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Abstract

The essence of this study is to clarify the position of the Islamic tradition with regard to refugees based on the main Islamic Sunnī sources and to examine the interface between this tradition and the 1951 Geneva Convention relating to the status of refugees. This study is the first that carries such examination since the endorsement of the 1951 Convention.

This study is composed of four chapters with an introduction and a conclusion. The first chapter explains the concept of *jiwār* (protection), which was a governing custom in the Arabs' life in the *jāhiliyya*, while the second chapter traces the concept of *jiwār* after the advent of Islam in Mecca. The purpose of the two chapters is to establish how the Prophet and his followers dealt with the *jiwār* custom when they were oppressed and sought *jiwār* of the non-Muslims and also when they were able to offer *jiwār* to fleeing non-Muslims in Medina.

The third chapter deals mainly with *amān* (safe conduct) in the Islamic tradition. It also defines several relevant terms, such as *dār al-ḥarb*, *dār al-Islam*, *mustajir*, *muhājir*, *musta'min* and *dhimmī*, in order to put the concept of *amān* in context. Due to its particular significance, the study undertakes an extensive examination of the different interpretations of the verse (9:6) which is considered the cornerstone in legalising, by analogy, the concept of refuge in the Qur'ān.

The fourth and final chapter comprises a comparison between the Islamic tradition relating to the laws of *amān* and the 1951 Geneva Convention relating to the status of refugees.

The conclusion however, highlights the close similarities between the Islamic tradition and the Geneva Convention and therefore recommends the Arab and Islamic governments to endorse the 1951 Geneva Convention relating to the status of refugees. And if necessary to make reservations concerning certain Articles taking account of the internal circumstances of each state.

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Introduction

By any measure, the issue of refugees occupies an important place on the contemporary international agenda. Millions of people around the world have become refugees as a result of wars, natural disasters and other circumstances.

The challenges facing international agencies such as the United Nations Refugees Agency (UNHCR) are many and include “the plight of tens of millions of internally displaced people; widespread confusion over migrants and refugees; tightened asylum policies and growing intolerance”¹.

A quick survey of elections, be they in the developed or developing world, shows just how sensitive the refugee question is. Parties of all political hues have a position on this issue. A considerable number of developed societies are witnessing “the re-emergence of racism, xenophobia and that brand of populism which always tries to generate confusion in the public opinion between refugees, migrants and even terrorists”². The governments of many developed countries are seeking to reinterpret articles of international law relating to refugees in an attempt to circumvent their duties and free themselves of the refugee burden.

Arab and the Muslim states are not exempt from this problem. On the contrary, according to António Guterres, the head of UNHCR, “the majority of refugees worldwide are Muslim”³. Notwithstanding, some UNHCR operations “in the Muslim world have been systematically underfunded ... [and] the generosity of host countries has not been matched by that of the international community”⁴. Moreover, “only a few of them possess domestic legislation which deals with refugees or migrants” (Elmadmad, 1991, p.462). In fact, only 35 out of 57 member states of the Organization of the Islamic Conference (OIC) have ratified the 1951 Geneva Convention and the 1967 Protocol⁵.

¹ (http://www.unhcr.se/en/News/State_World_Refugees_2006_publ.html)/ [cited August 2007]

² (<http://www.unhcr.org/admin/ADMIN/45ed1ea64.html>)/ [cited August 2007]

³ (<http://www.unhcr.org/admin/ADMIN/45ed1ea64.html>)/ [cited August 2007]

⁴ (<http://www.unhcr.org/admin/ADMIN/45ed1ea64.html>)/ [cited August 2007]

⁵ (<http://www.unhcr.org/cgi-bin/texis/vtx/home?id=search>)/ [cited August 2007]

The appeal that Guterres issued on the occasion of the 127th meeting of the League of Arab States (LAS) Council of Ministers of Foreign Affairs in Cairo in March 2007 is very telling. He appealed to “the Muslim world, and in particular the Arab world, to play a greater role in the discussion, formulation and implementation of international refugee policy”⁶.

Given this reality, and the ambiguity of the Islamic position on such issues, the study I have carried out is especially relevant. Broadly, this study aims to clarify the attitude of the Islamic tradition towards refugees and establish whether this tradition has any views, principles, rules or regulations on a range of issues including the definition of the term refugee and the rights and duties of refugees and host states. In this sense the study will hopefully underline the relevance of the Islamic tradition concerning the refugee status and will contribute to the international legislation regarding this issue.

This study also aims at collating relevant sources on refugees in Arab history in the *jāhilliya* (pre-Islamic period)⁷, such as the concept of *jiwār* (protection). The study will further examine concepts related to the refugee status in the Islamic tradition, for example the term *hijra* (migration) and *amān* (safe conduct). Together, these sources comprise a very useful store of information for future researchers seeking to examine Islamic parallels to contemporary regulations relating to refugees.

The significance of this study also derives from the fact that it is the first occasion since the endorsement of the 1951 Geneva Convention relating to refugees that a study has attempted to examine the interface between the Convention and the Islamic tradition, with a view to identifying the similarities and differences between the two.

The relevance of such a study is clear, especially given that no Arab or Islamic convention has been drawn up to parallel the refugee Convention, as is the case with international human rights conventions.

Remarkably little has been written on this topic from an Islamic perspective. In this sense, this study will I hope fill a gap in the Islamic library and provide experts and

⁶ (www.unhcr.org/admin/ADMIN/45ed1ea64.html)/ [cited August 2007]

⁷ According to Khalif (1959, p.11) and Dayf (1960, p.38) this period mainly is the last hundred and fifty years before the advent of Islam.

legislators in Islamic states with a guide to interpreting the law on refugee issues, since this study provides huge amount of scholarly opinions in different field relating to the status of refugee in the Islamic state.

Literature review of previous works on the topic

I have undertaken extensive research to survey the literature related to this topic, but there are hardly more than a handful of books and articles that touch upon it from different angles.

The book called “*The Rules Concerning Dhimmīs (non-Muslims) and Mustaʿmins (Seekers of Safe Conduct) in Realm of Islam (Dar al-Islam)*” أحكام الذميين والمستأمنين في دار الإسلام by °Abd al-Karīm Zaydān, 1982 is 700 pages long and is divided into two chapters, with an introduction and conclusion. This work succeeds to a great degree in clarifying many rules and jurisprudential judgments of non-Muslims in Islamic states.

In his introduction, Zaydān examines how Islamic law classifies the world and its people according to faith. People are either Muslims or non-Muslims and the world they inhabit is either *dār Islam* or *dār ḥarb*. The author goes on to define these terms as well as the terms *dhimmī* and *mustaʿmin*. He then defines the terms and conditions of *ʿaqd al-dhimma* and *ʿaqd al-amān*.

In chapter one, which he divides into two sections, Zaydān discusses the rules of the *dhimmī* and *mustaʿmin* in terms of their relationship to the Islamic state. In the first section he deals with their rights. These include their political rights, the right of occupying governmental positions, the right of personal and religious freedom, the freedom of movement and the freedom to work, the right of protection and the right to enjoy material care from the state. Additionally he speaks about their duties towards the Islamic state with reference to taxation including *jizya* (a per capita tax), *kharāj* (a tax on agricultural land), *ushr* (a tax on the commercial goods brought from non-Muslim countries) and so on.

In the second section, Zaydān deals with the crimes of *dhimmī* and *mustaʿmin* be they against the state, for example insurgence and spying, or against people like robbery, theft, homicide, adultery, and the false accusation of committing adultery. He discusses the punishment of such crimes and the opinions of scholars on the subject.

In chapter two, the author explores the rulings concerning personal status, such as the rulings regarding different kinds of marriage, the dowry, divorce, proving descent, alimony and so on. Additionally, Zaydān touches upon financial matters, including wills and inheritance between the *dhimmī* and the *musta'min* or between them and the Muslims. He ends this chapter by examining the relationship of the *dhimmī* and the *musta'min* to the judicial system in the Islamic state and by discussing whether they have to adhere to it or if they have the right to their own juridical system.

Although the book is a lengthy jurisprudential study of non-Muslims in the Islamic state, the author does not address the special case of asylum seekers and refugees. Although many of the topics, especially the rights and duties of the *musta'min*, are relevant in the current context, the author deals with them only briefly. The majority of this work is dedicated to questions such as the punishment of crimes committed by aliens in the Islamic state, the taxes imposed on them, their marriage, wills and inheritance. Moreover, Zaydān frequently compares the opinion of the early scholars with the legal situations in Iraq, Egypt and Saudi Arabia, but does not compare these rulings to any international Convention on refugees.

Asylum in the Arab-Islamic Tradition by Ghassan Arnaout (1987) is only 52 pages long, but nonetheless is an important book that covers many issues related to my topic. Arnaout begins with some historical background and touches briefly on the concept of asylum in the Arab tradition before Islam. In this chapter he deals with the religious origins of asylum among the Arabs and illustrates the central place of the Ka'ba in this context. In this chapter he also points to the social origins of asylum among the Arabs and their tribal humanism. He examines the hospitality and generosity that were deeply rooted in their traditions and which played a central role in maintaining this custom.

In chapter two, entitled *Nature and Sources of the Concept of Asylum in Islam*, the author relates the accounts of refuge in Abyssinia and exile in Medina. He then addresses the issue of asylum under Islamic law and the forming of the institutions of asylum: *amān* and *dhimma*. On the last point he tries to identify the meanings of these two concepts and how they were implemented in the Islamic history. He also touches upon the concept of *dār al-Islam* and its meaning in terms of refugees. He addresses the issue of *dhimma* or non-Muslim religious communities in the Muslim state in some

detail and concludes that the Islamic state was not against ethnic and religious minorities. On the contrary, he says, the Islamic state encourages and respects “difference” and the dignity of non-Muslims living on its soil. Finally, Arnaout discusses the foundations of the doctrine of asylum in Islam [the Qurʾān and the *Sunna* of the Prophet] and states that these foundations obligate Muslims individually and collectively to grant asylum to the seekers and to provide them with the protection they require.

In chapter three, Arnaout examines the implementation of previous principles in Islamic history. He comments on the Hispanic–Arab civilization and the Jewish–Islamic–Christian symbiosis. He discusses the Arab-Islamic civilization in Spain and how religious minorities enjoyed many rights there which were not available to minorities under the Christian emperors. Then he explains how these religious communities fled to the Arab countries after the fall of the Islamic civilization there and the start of the inquisition of all non-Christians. He also draws on the example of Islamic tolerance and the welcoming of non-Muslims in the Indo-Muslim civilization of south Asia.

In his final chapter the author summarizes the situation of asylum in the modern Arab-Islamic world. After stating the right of asylum in the constitutions and legislations of Arab and Islamic countries he points to the regional and international arrangements for the protection of and assistance to refugees. He also notes the attempt to formulate an Arab and Islamic convention related to refugees. Lastly Arnaout, in his conclusion, stresses that civilizations should be based on science and technology as well as on ideologies and calls upon the Arab-Islamic countries to succeed in constructing a material civilization while remaining faithful to their traditional values.

There are a number of comments to be made on Arnaout’s book:

- Although the author tackles topics very relevant to this thesis, for example asylum in Arab history before Islam and the construction of social life at the time, his treatment of them is very brief. He does not address the reasons, the types or the formalities of *jīwār*; how it was contracted and how it ended.

- Regarding the concept of *amān* in the Islamic tradition, Arnaout does not delve very deeply into the commentary books, the books of *sīra* and the jurisprudence schools. Nowhere in the book does he refer to any of the early Islamic sources in exegesis, history, *sīra*, or jurisprudence. Hence the treatment of these subjects did not reflect the full scope of this concept in the Islamic tradition. In general, his work lacks documentation.
- Despite his position as the director of the division of refugee law and doctrine in the office of the United Nations High Commissioner for Refugees (UNHCR), Arnaout does not make any comparison between the Islamic tradition and the 1951 Geneva Convention.
- Overall, the work is very good and gives a fair idea about asylum in the Arab-Islamic history, but it is frustratingly short and does not cover all the issues related to this topic.

Hasan Moinuddin (1987) in his book entitled: *The Charter of the Islamic Conference and Legal Framework of Economic Co-operation among its Member States*, touches upon the issue of *amān* in his discussion of the property of aliens in the Islamic state. After speaking briefly about the *musta'min*, the protected person in the Islamic state, he mentions the protection of the *musta'min* which includes his person and his property. However, this subject was not the focal point of the book and the treatment of this issue is limited.

In terms of articles, I found two pertinent articles by Khadija Elmadmad entitled *Asylum in International Law and Islamic Law* اللجوء في القانون الدولي والشريعة الإسلامية (1989) and *An Arab Convention on Forced Migration: Desirability and Possibilities* (1991). The first article is important. It gives a very brief historical background to the concept of asylum and types of asylum, a short review of the crucial elements of asylum in international law and a general review of asylum in Islamic law and its implementation by Arab and the Islamic countries. Unfortunately, the last point was only briefly discussed and the author only refers to a few verses of the Qur'ān to indicate the general principles which call upon Muslims to help the needy and provide protection to refugees.

The second article is more comprehensive. The author's main focus here is the notion of an Arab convention on refugees, a point I will come back to in my conclusion to examine whether the Arabs require a separate convention or if they simply need to sign the Geneva Convention. Elmadmad makes a brief summary of forced migration and human rights in the Arab world. She then elaborates on some of the Islamic principles which oblige the Muslim to give asylum with a review of the Arab custom of protection before the advent of Islam. After that she makes a half-page comparison between the concept of asylum in Islam and modern refugee law. Finally, she concludes her article with a call for an actual Arab convention on forced migration. This article's treatment of the concept of asylum in the Islamic tradition lacks depth and the comparison between the Islamic tradition and modern refugee law is confined to the concept only.

Important research on this issue has been carried out by a group of Islamic scholars commissioned by UNHCR who jointly published a paper entitled: *Human Rights, Migration and Asylum: the Three Traditions in Middle Eastern-Islamic Civilizations* (1990?). It sheds some light on historical events such as the early Muslim migrations to Abyssinia and Medina. It also touches briefly on the issue of *amān*. Following that, it mentions the migrations and refugee flows into the Arab-Islamic world especially during the inquisition in Spain. Finally, it elaborates on the Ottoman period and how the Caliphate dealt with the issue of *amān*. Unfortunately, this research is both general and brief and does not focus on the issue of *amān*.

An article by Saheer A. F. Muzaffar entitled: *Practicable Ideals? A Proposal for Revitalizing the Rights of Forced Migrants in Islam* (2003) is useful as it deals briefly with the principles of Islam that legalise the concept of asylum. The author discusses assistance to refugees from theory to reality and describes how Muslims in the past took care of the poor and the needy. Muzaffar also comments on policy and practice in the Muslim world and particularly the gap between theory and the practice with regard to refugees. The article does not tackle other aspects of refuge.

Structure and methodology

This study is composed of four chapters with an introduction and a conclusion. The first chapter is dedicated to the concept of *jiwār*, protection, which was a preponderant custom in the life of Arabs in the *jāhiliyya*, before the advent of Islam. In this chapter I study the custom of *jiwār* to understand the relationship between that custom and the Islamic principle of *amān* or safe conduct that emerged later. I point there to the process of contracting *jiwār*, the rights and duties of both the *mustajīr* (the seeker of protection) and the *mujīr* (the one who provides protection) and the termination of the *jiwār*. Most importantly, I try to illustrate the importance assumed by the custom of *jiwār* in that tribal society and its relationship to poetry.

The second chapter traces the concept of *jiwār* after the advent of Islam, from the Meccan period, through the migrations to Abyssinia, the journey to al-Ṭāʿf until the migration to Medina. The purpose of this chapter is to establish how the Prophet and his followers dealt with the custom of *jiwār* on both ends of the situation, i.e., when they were oppressed and sought *jiwār* of non-Muslims and when they established their state in Medina and were able to offer *jiwār* to non-Muslims.

The third chapter deals mainly with concept of *amān* in the Islamic tradition. However, it becomes relevant in this context to define some important terms as an introduction to the study of *amān*, including the terms *dār al-ḥarb*, *dār al-Islam*, *mustajīr*, *muhājir*, *mustaʿmin* and *dhimmi*. The study of these terms is very important in the sense that there is no direct equivalent to the term 'refugee' in the Islamic tradition. Those terms which are relevant and closest in the meaning to 'refugee' are '*mustajīr*' (who is usually non-Muslim), '*muhājir*' (who is Muslim in the Qurʾanic usage) and *mustaʿmin* (also non-Muslim). The last term, *mustaʿmin*, is the closest to the term 'refugee', though it refers to all aliens in the Islamic state whether or not they are refugees. As such, the argument in the thesis and the application of the term *mustaʿmin* to refugee are by analogy.

Equally crucial is to go extensively through the different interpretations of the verse (9:6) which is considered the cornerstone in legalisation concerning the concept of refugee status in the Qurʾān. Although the verse uses the term *mushrik* (non-Muslim) to

mean a refugee it still, by default, can be extended by analogy to include the Muslim. In other words if God obliges Muslims to give refuge to those who do not believe in Him, would not it be more appropriate and more obligatory on the Islamic state to give refuge to fellow Muslims who adhere to the same religion.

I have studied more than 60 commentaries chronologically to trace the differences between scholars in understanding this verse and to find out whether these interpretations have been affected by the passage of time.

The fourth and final chapter is dedicated to a comparison between the Islamic tradition relating to the laws of *amān* and the 1951 Geneva Convention relating to the status of refugees, in an endeavour to spot the similarities and differences, if any, between the two. Although *musta'min* is not the same as refugee, we can compare between them as they have exile in common. For the sake of convenience and ease, I set the articles of the Convention as a standard then referred to the jurisprudential Islamic sources to see how compatible such articles were from an Islamic perspective.

I have concentrated on 24 out of the 45 articles of the Convention because the other articles are administrative and do not affect the core of the Convention. I conclude with a summary of what I think are the right conclusions and recommendations relevant to researchers, scholars and the Arab and Islamic governments.

It is important to note that this study is not a conventional historical study, nor is it a legal or jurisprudential one. It is actually a literary study that draws on history, especially in regard to *jīwār* and its development between the *jāhiliyya* and Islam, to put the issue in its natural context. I do not delve into the detailed rulings on each aspect of the refugee issue, as this is not a comparative study between the different schools of Islamic jurisprudence. Rather it is a study that deals with *al-Siyāsa al-Shar'īyya*⁸ and the diplomatic matters concerning the issue of refugees.

⁸ *al-Siyāsa al-Shar'īyya* means governance in accordance with the the Sharī'a. It is a Sunnī constitutional and legal doctrine emerging in late mediaeval times and calling for harmonization between the law and the procedures of Islamic jurisprudence (*fiqh*) and the practical demands of governance (*siyāsa*). Most responsible for crystallizing the doctrine were the two Ḥanbalī scholars Ibn Taymiyya and his student Ibn Qayyim al-Jawziyya. This doctrine according to Khallāf, *al-Siyāsa al-Shar'īyya*, recognizes, in the state, authority to take legal acts as needed for the public good provided that the *Sharī'a* is not infringed thereby (or, in another formulation, as long as the *Sharī'a* has 'no text' on the matter). (Bosworth et al., 1997, vol.4, p.694).

Also, regarding the *hadiths* mentioned throughout the study I did not check the authenticity of them as this is beyond the scope of this study, however I was keen to use the main books of *hadith* where it was possible. The purpose of the study is basically to establish the principles of refugee status in the Islamic tradition and identify relevant sources that may help legal experts to devise laws of refugee status in conformity with the Islamic tradition.

Nevertheless, it is important to emphasize that the comparison here between the Islamic tradition and the Geneva Convention focuses on the principle on both sides without delving into the implementation of these principles in practice, whether in the past or in the present.

I should also point out that when I refer here to the 'Islamic state', I do not mean any particular modern Arab or Islamic country, or any historical Caliphate, as lots of dispute could arise against any country in the Arab and Islamic world in terms of its application of the Islamic rulings. Also regarding the Caliphate the same thing applies given that the Caliphate throughout history did not flow at the same level and we can find lots of variations between the Caliphates in different periods of the Islamic history like the Umayyad, Abbasid and Ottoman Caliphate. What is intended by the term is the Islamic state that is based on the Islamic tradition which is the teachings of the Qur^{ān} and the Prophet as formulated and implied by the Sunnī Muslims.

Methodology

The methodology I followed in this study was to collect relevant historical material in the different fields dealing with the issue of refugee status and then try to formulate my understanding of the stance of the Islamic tradition towards refugees.

In the *jāhiliyya* I tried to clarify the concept of *jiwār* and its implementation in the Arab life then. This required me to search not only the historical references but also references dealing with literature, poetry, language, biographies, and genealogy.

After the advent of Islam, my research was directed towards *Sunnī* references in the *sīra*, the Prophet's history, to find out how the Prophet and his companions dealt with the by then existing concept of *jīwār* in Mecca and Medina.

When it came to the concept of *amān*, it was essential to deal with the books of exegesis to see how scholars interpreted the verses of the Qur'ān that touch upon the issue of refugee status. Due to its central importance in the research, I gave the verse (9:6) extra attention. I studied all the available commentaries I could find, around sixty books, in chronological order to spot variations in understanding the verse over time. In this context only did I go beyond *Sunnī* references to the Shī'ite, Zaydī and Ibādī sources in order to observe any important additions from these schools of thought. In relation to the Qur'anic verses, the translation I have used is Asad's translation entitled: *The Message of the Qur'ān* (1980). After examining other translations I found Asad's translation more accurate and gives close interpretation and relevant meanings to the study.

In dealing with *amān*, it was necessary to examine the different books of *Sunnī* jurisprudence. As indicated above, since this study is not a comparative study between the different orthodox law schools I have dealt with the scholars without differentiation between them on the basis of their jurisprudential school.

In regard to the referencing system in this study I have followed the Harvard system with Arabic transliteration. For well-known geographical names, the common spellings have been preserved, like Mecca, Medina and so on.

Finally, I hope this study will provide a clear picture of the issue of refugee status in the Islamic tradition in the past. The comparison I have carried out between this tradition and the Geneva Convention will I hope provide legal experts and legislators in Arab and Muslim countries with an important instrument to deal with the problem of refugees according to the principles of Islam.

Chapter I
The *Jiwār* in the *Jāhiliyya*

The *Jiwār* in the *Jāhiliyya*

Introduction

When addressing the status of refugees in the Arab and Islamic tradition, writers often refer to the issue of *jiwār* among Arabs in the Peninsula before the advent of Islam. They consider *jiwār*, in essence, the equivalent of the modern concept of refuge as it meant granting protection and welfare to the needy and the fleeing person. The importance of this principle also derives from the fact that tribes in many modern Arab states still adhere to and preserve this customary practice.

Existing works on this subject, despite its significance, fail to convey the importance of *jiwār* to Arabs in the *jāhiliyya*. Those that have elaborated on *jiwār* do so only from a narrow perspective, where mention of it is limited to one particular context only.

Robertson Smith (1903) in his valuable book *Kinship and Marriage in Early Arabia* does tackle the subject of *jiwār*. He sheds some light on the factors that sometimes necessitated *jiwār*, and the relationship between the *mustajīr* and his *mujīr*. However, his treatment of *jiwār* is also limited since he addresses it only in the context of the Arab tribe and unity of blood, and the relationship of the tribe with strangers to it, whether *jār*, *ḥalīf* (ally), or *mawlā* (freeman).

In his book *al-Shu'arā' al-Ṣa'ālīk*⁹, which deals specifically with the phenomenon of the *ṣa'ālīk*, the outcasts, from a social perspective, Yūsuf Khalīf (1959) speaks about *jiwār* to show that the individual in the Arab tribe, where he was cast out, faced two options: either go into the desert as a *ṣu'lūk* or seek the *jiwār* of one of the tribes. He does address *jiwār*, but the treatment remained quite deficient.

This was also the case with *Makka wa al-Madīna fī al-Jāhiliyya wa 'Ahd al-Rasūl*, by Aḥmad Al-Sharīf (1965). The book deals with the state of the Arabs of Mecca and Medina in the period of the *jāhiliyya* and the following period, the period of the

⁹ for more details about al-Ṣa'ālīk and their famous poets see al-Marzūqī (1953, vol.2, p.487), al-Zamakhsharī (n.d, vol.2, p. 420), al-Baghdādī (1998, vol.3, p. 319) and Sarkīs (1979, pp.181-212)

Prophet's message. The author speaks about Arab customs, but touches only fleetingly on the subject of *jīwār*.

Also, Arnaout (1987) in his book *Asylum in the Arab-Islamic Tradition* discusses the custom as an introduction to refuge in the Islamic tradition. He does not explore the actual extent of this custom in that society, but does point to the social and religious factors in shaping this principle and how it was contracted.

Additionally, °Abd al-Ghanī Zaytūnī (2001) in his book *al-Insān fī al-Shi'ar al-Jāhili*, examines various aspects of life in the *jāhiliyya*, while mentioning *jīwār* in the context of social circumstances. Again, however, he does not present it comprehensively because this is a secondary rather than the primary topic of his study.

Thus, there is no thorough and unified study of this topic. For this reason, I begin this research with a study of the principle of *jīwār* in the *jāhiliyya* as an introduction to the main topic. It should be noted that the scale of this study is limited to the Arabs who lived in the Arabian Peninsula in the period before Islam, which is the period Muslims later called the period of the *jāhiliyya*, the age of ignorance.

The fact that so little has been written on this issue makes the task more difficult. Hence to form a complete and uniform picture of *jīwār* before Islam I have referred to a range of texts, including history, literature, poetry, language, biography and genealogy in an attempt to collate the scattered evidence and produce a more complete picture of *jīwār* as observed by Arabs in the period before Islam.

Method of the research

Due to the limited resources that tackle this topic in any depth, I have had recourse a broad range of texts from various disciplines, history, literature, poetry, genealogy and linguistics in order to gather as much information as possible directly or indirectly related to the issue. However, the reliability of these will be discussed shortly in "A note on Sources".

After collating and organising the material, general features began to emerge. I then analysed each story, until I had a comprehensive understanding of the core of the topic.

On the whole, the analyses and generalizations that appear in the body of this study are my own words, and are a reflection of what I understand to be the true state of that time. Other than that, are quotes taken from the various sources, where I have indicated these references.

It is important to note here that *jiwār* was enormously important to the Arabs during this period. It was linked inextricably with the issues of honour and shame that played such a pivotal role in the life of the Arab tribes.

In this society, where honour and status were so highly prized, praise, fame and good reputation among the tribes assumed enormous importance. Poetry played a prominent role in the transmission of reputation as it was the only news medium widespread amongst the Arabs at that time.

The significance of poetry emerges clearly from the sources. Ibn ʿAbbās used to say: “Poetry is the record of the Arabs” الشعر ديوان العرب (al-Ḥākim, 1990, vol.2, p.542). Poetry was the main medium of communication and spreading news all over the Arab Peninsula. If someone wanted to praise or ridicule another, he would arrange verses of poetry that could be transmitted to far reaching places. What deepened the impact of such poetry was the remarkable ability of the Arabs then to memorize, arrange and transmit it, so that the effect was more powerful and enduring. Ridiculing somebody and deriding him could actually mean tarnishing his honour for life.

In this chapter, I clarify the cases where the relationship of *jiwār* was initiated, the reasons an individual sought it from other tribes as well as the means by which *jiwār* was contracted, and the way in which *jiwār* was publicised. I then examine the rights and responsibilities of the *mustajīr* and *mujīr*, the way in which *jiwār* was ended and the reasons for terminating it.

I do not claim to have covered the whole topic in every detail. Rather I say that the main lines of enquiry concerning this topic, the general features and much of its details have

been included in this chapter and I hope that I have succeeded in painting a complete and homogeneous picture of *jīwār* as practiced by the Arabs in the *jāhiliyya*.

A note on the sources

None of the reference texts related to *jīwār* were written in the period of the *jāhiliyya*. The texts closest to that period were written two to three centuries later, which might call into question the accuracy of these sources. Even the pre-Islamic poetry, *al-shi'ar al-jāhili*, which we depend on to a large degree in narrating the history and the various aspects of life of the Arabs before Islam, this poetry was a subject of debate between the scholars of literature in terms of its authenticity. Some of them like Ṭāha Ḥusayn refutes its authenticity and declares that "he does not have doubts that it is fake"¹⁰ (Ḥusayn, 1927, p. 116). However, other scholars defended the authenticity of this poetry like Majd Ḥusayn who dedicated a book called "*Naqḍ Kitāb Fī al-Shi'ar al-Jāhili*" to refute what Ṭāha Ḥusayn said and Asad in his book '*Maṣādir al-Shi'ar al-Jāhili wa Qīmatuha al-matuha al-Tārīkhīyya*'¹¹.

Perhaps the most likely reason why there are no contemporary written references to *jīwār* in the sources is the fact that the Arabs then were largely illiterate and made little use of writing in their everyday lives. Rather, they relied on word of mouth and memorization to transmit news and poetry. The predominantly nomadic lifestyle of the tribes did not encourage the use of writing, which only spread after the appearance of Islam and the call to seek knowledge and learning, found in many Qur'anic verses and *ḥadīths*, Prophetic traditions. Because of their dependence on word of mouth rather than written text, then a degree, small or great, of change, loss or ambiguity may have entered into the sources.

Of greater concern is the fact that the Muslim scholars writing about and documenting the *jāhiliyya* period in the second and third centuries AH, did not commit themselves to the highest levels of authentication and verification in taking the narrations from narrators, and following the chain of narrators, as they had done for *ḥadīths*. This was because the *ḥadīths* dealt with the Islamic creed, which was not the case for the accounts of the affairs of the Arabs before Islam.

¹⁰ See also (Ḥusayn, 1926)

¹¹ For more discussion about this issue see also (Badawī, 1979) and (Khafājī, 1973)

And yet we have no alternative but to refer to these sources. To reduce the degree of error, and to arrive at the closest possible depiction of the truth, I have used sources from a range of disciplines and forms, including history, literature, poetry, biography, parable and genealogy.

In what follows, I will present a short description of the sources that I will use chronologically according to the death of the author, giving an indication of the content of the book, its author, date of writing and its relevance to the issue of *jīwār*.

I will start with the historical texts, which dedicated significant parts to the tribes in the Arabian Peninsula, and the events they passed in the time of *jāhiliyya*:

- *Al-Munammaq fī Akhbār Quraysh* and *al-Muḥabbar* both by Ibn Ḥabīb (245 AH). These two books contain accounts of the history of the Arabs in the *jāhiliyya* and after the advent of Islam. Among other issues, Ibn Ḥabīb mentions accounts of *jīwār*, how it was contracted and from whom it was asked.
- *Al-Kāmil fī al-Tārīkh* by Ibn al-Athīr (630 AH): a comprehensive historical work spanning from the beginning of time up to the year 628 AH, this naturally contains different accounts of *jīwār*.
- *Tārīkh Ibn Khaldūn* and *al-Muqaddima* by Ibn Khaldūn (808 AH). These works examine the historical and social aspects of Arab lives. Their importance to this research derives from the light they shed on the social aspects of the Arab tribe, the issue of blood ties and its relation to the issue of *jīwār*.
- *Mawsūʿat al-Tārīkh al-Islamī wa al-Ḥaḍāra al-Islamiyya* by Aḥmad Shalabī, published in 1974. This is an encyclopaedic work dedicated to Islamic history and civilisation from the appearance of Islam to the late Caliphate. It contains incidents of *jīwār* that demonstrate the duties of the *mustajīr* towards his *mujīr*.

Naturally, the researcher in this field cannot exclude works of literature and what they contain of poetry. As elaborated above, the poem was the recording medium of the Arabs and strongest and quickest way to spread the news of fame and ridicule which in turn have a strong impact on the issue of *jiwār*. Many incidents of *jiwār* are related in poems either as a praise or ridicule to the *mujiir*. Hence, these books are an important sources for this research. These are:

- *Al-Kāmil fī al-Lughā wa al-Adab wa al-Naḥw wa al-Tafsīr* by Muḥammad Ibn Yazīd al-Mubarrad (285 AH). As is apparent from the title, this work addresses the language, its construction, grammar, and many stories of literature, novels, comedy, poetry, Arab customs and traditions including *jiwār*.
- *Al-Aghānī* by Abu Faraj al-Aṣḥānī (356 AH). This book has been the fascination of scholars over the centuries. Its author not only collated the news of singers and biographies of many poets that none but he mentioned, but embraced the literary tradition, and gave a picture of the pulsing life in the various literary periods. For “*Al-Aghānī*” as its publisher said, is the storehouse of Arabian tradition, literary, social, political and civilisation encyclopaedia. It was written by Al-Iṣḥānī (born 284 Hijri), as he said, by command of one of his superiors, who directed him to collate all the singers, so he collected all that he could of poetry, old and new, referencing each to its creator and musical composer. He added to this, traditions, news, biographies, poetry related to the famous days of the Arabs, and of narrated news, stories of kings in *Jāhiliyya*, Caliphs in Islam, genealogy of poets, and all that concerned them. This book is one of the main texts of this study.
- *Al-‘Iqd al-Farīd* by Aḥmad Ibn ‘Abd Rabḥ al-Andalusī (356 AH). This work tackles politics and authority, wars and their causes, parables, advice, condolences, the sayings of the Arabs, their speeches, genealogy, sciences, literary affairs, days, accounts of famous Arabs such as Caliphs and commanders, as well as verses from the Qur’ān and *ḥadīths*, poetry and historical accounts. *Al-‘Iqd* contains no less than ten thousand verses of poetry from more than two hundred poets from the *jāhiliyya*, Umayyad, and

Abbasid times. Thus, this also is one of the important reference texts for this study.

- *Al-Amālī* by Abu °Alī al-Qālī (356 AH). This book is important in terms of the Arabic literary tradition. It contains news, poetry, parables, wisdoms, linguistics, explanations of the Qur°ān and *ḥadīth*. Its author wrote it in Cordoba of al-Andalus.
- *Muḥaḍarāt al-Udabā° wa Muḥawarāt al-Shu°arā° wa al-Bulaghā°* by al-Rāghib al-Aṣfahānī (502 AH). The author touches here upon almost everything. He speaks of good manners, wisdom, authority and governance, manners of food, drink and attire, treatment of servants, manners of companionship, types of animals, stars, the heavens, and such like. Its importance lies in its collection of verses of poetry, stories, customs and traditions of the Arabs and obviously *jīwār* is included in all of this.
- *Nihāyat al-Arab fī Funūn al-Adab* by Al-Nuwayrī (733 AH). This is a comprehensive book tackling many topics, including literature and poetry. The author details the genealogy of Quraysh and its constituent parts. He speaks about history and mentions many incidents of *jīwār*. It is a comprehensive book which leaves no topic untouched and thus is important in the area of this investigation.
- *Khizānat al-Adab wa Lub Lubāb Lisān al-°Arab* by °Abd al-Qādir al-Baghdādī (1093 AH). This book was an explanation of *al-Shawāhid al-Kāfiya li-Najm al-A°imma* by its author Muḥammad Ibn Ḥasan, famously known as Al-Raḍī Al-Astrabāzī. In his book, al-Baghdādī mentions Arabic grammar (*naḥw* and *ṣarf*) in all its forms, and uses evidence from poetry for everything he says and details. Regarding *jīwār* he touches upon many cases including examples of treachery towards the *mustajīr*.

In addition to these books I have referred to biographies and genealogies in order to understand the divisions of the tribal society in that period, the conditions in which they

lived and the notable classes within that society. This provides important background regarding the custom of *jiwār*.

The books of genealogy I consulted were:

- *Jumal min Ansāb al-Ashrāf* by al-Balādhurī (279 AH). This work discusses the genealogy of the Arab tribes from Ādam to the Umayyad Caliphate. The author goes into detail regarding the Prophetic biography and the events therein. During his presentation of tribal genealogy, he mentions stories and poetry, as well as events in the lives of the personalities he was discussing. This work deals with the period of the *jāhiliyya* and as such is an important reference text for this research.
- *Nihāyat al-Arab fī Ansāb al-‘Arab* by Aḥmad Ibn ‘Alī al-Qalqashandī (821 AH). This book focuses on the genealogy of the Arab tribes, their roots and origins. The author addresses the science of genealogy and its benefits, defining those who came under the term Arab, and mentioning the types. It also elaborates on the classes of lineage which is closely related to the issue of *jiwār* and the members of the tribe who are entitled to give *jiwār*.

The books of biography I have consulted are considered secondary sources. These are:

- *Mu‘jam al-Shu‘arā’* by Al-Marzubānī (384 AH) presents a brief biography of poets, birth, death and some of their poetry.
- *Al-Wāfī bī al-Wafayāt* by al-Ṣafadī (764 AH). The author starts with the biography of the Prophet followed by the biographies of the companions and scholars in alphabetical order. The book also contains a large amount of poetry and stories.
- *Mu‘jam al-Udabā’ - Irshād al-Arīb ilā Ma‘rifat al-Adīb* by Yāqūt Al-Ḥamawī (1229 AH). This work is dedicated to the biographies of poets, historians, and famous writers, and discusses origin, lineage, place of birth

and death and personal histories. It also mentions their standing among scholars and teachers, and includes some of their poetry and literature.

Secondary sources dealing with the Arabic language were also valuable. Their importance lay in what they contained of poetry and stories of *jiwār* from the *jāhiliyya*:

- *Al-Ishtiḳāq* by Ibn Durayd (321 AH). This contains poetry, stories, and parables related to the period of *jāhiliyya*.

- *Al-Khaṣā'is* by Ibn Jinnī (392 AH). This book is similar to the previous one. The author deals with the Arabic language from all angles, including grammar and punctuation. It contains much poetry that is related to *jiwār*.

- *Sharḥ Dīwān al-Ḥamāsa* by al-Marzūqī (421 AH). This book discusses *Dīwān al-Ḥamāsa* by Abu Tammām which contains a large and varied amount of poetry dealing with the warrior spirit, praise, ridicule, elegy, literary gems, women, guests, and biographies.

In addition to these books, I studied collections of Arab parables, such as *Jamharat al-Amthāl* by al-°Askarī (395 AH) and *Majma° al-Amthāl* by Al-Maydānī (518 AH), who worked to collate the parables of the Arabs as well as the reasons behind them. Some people were well-known for their protection of the *mustajir* and thus some parables were said to praise them, so studying the context of these parables sheds light on the issue of *jiwār*.

The Definition of *jiwār*

Looking up the three-letter root of the word, and that is *jawara* (Jīm-Wāw-Rā°), we find the following in the language dictionaries:

“*Jāwar Banī Fulān*” sought *jiwār* of Banī so-and-so: became sacred, i.e. protected due to their *jiwār* بحوارهم ثخرم بجوارهم. *Jār* and *mujīr*: “he is who protects and grants you *jiwār*” هو الذي يمنحك ويجبرك (Ibn Manẓūr, 1956, vol.4, p.154). Al-Farāhīdī (1980, vol.1, p.490) however, defines the *jār* as “your neighbour in dwelling, who has contracted your *jiwār* and protection”. So, the term *jār* could be used to mean the protector, the *mujīr*, or the protected, the *mustajīr*. For the sake of clarity, I will use the term *mujīr* to mean the protector and the term *mustajīr* to mean the protected.

Thus, *jiwār* could in essence be defined as a contract between two parties where one asks for protection and the other grants it to him or her.

In fact, the right to grant *jiwār* was reserved solely for the true-blooded members of the tribe (al-Jumaylī, 1972, p.198). It was their premier right and the most perilous, because as a result the tribe would take in foreigners and bear the consequences of their actions, even if that meant war or loss in wealth and lives. Granting *jiwār* was therefore a serious decision for anyone to take other than the freemen of the tribe.

Protection and welfare

Granting *jiwār* by definition meant providing protection and welfare to the *mustajīr*. The relationship between the two, however, “varied according to circumstances. Sometimes it was quite temporary, and other times it was permanent and even hereditary. At one time the protector only promised to aid his *mustajīr* against some particular enemy; at another time he undertook to protect him against all enemies” (Smith, 1903, p.51).

By and large, the protector would do his utmost to provide protection to his *mustajīr*. Some of them took pride in the fact that their *mustajīr* was in a safe and elevated position in the tribe so that no one could harm him. Marwān Ibn Abī Ḥafṣa praised Ma°n Ibn Zā°ida, and his tribe by saying (al-Andalusī, 1987, vol.1, p.122):

هم يمنعون الجار حتى كأنما

لجارهم بين السماكين منزل

They protect the *jār*, until it is as though
their *mustajīr* has a place among the Samākayn¹²

Others went even further in honouring the *mustajīr*, considering him equal to the *ṣihr*, the relative by marriage. Ibn al-°Arabī says: *Muṣhir* is said to one who is given sanctity by marriage, blood relation, or *jīwār*” (al-Zamakhsharī, 1979, p.268).

The extent of their generosity and honouring sometimes made the *mustajīr* feel that he was one of the tribe’s true members, such that his lineage would be dissolved into the lineage of the tribe to become one of them (Ibn Khaldūn, 1900, p.50). To praise Banī Shaybān the poet Yazīd Ibn Ḥamān al-Sakūnī described them (al-Marzūqī, 1953, vol.1, p.301)¹³:

ومن تكرمهم في المخل أنهم
لا يعلم الجار فيهم أنه الجار
حتى يكون عزيزاً من نفوسهم
أو أن يبين جميعاً وهو مختار

And of their honouring of the *mustajīr* during the hardships that
he does not know that he is a *mustajīr*
until he becomes a noble one of them
or goes away out of free choice

In addition to generosity, some tribes were also concerned with the psychological state of the *mustajīr*. They preserved his feelings and made him feel as if he were closest family, while disregarding his faults and mistakes and listening to him attentively, so that he would not feel a stranger far from home and family. The poet Qays Ibn °Āṣim al-Minqarī describes them (al-Marzubānī, 1935, p.324):

لا يفتنون لعيب جارهم
وهم لحسن حديثه فطن

They do not sense the fault of their *mustajīr*
and they are in observing his protection, alert¹⁴

¹² Samākayn: name of stars, see al-Tha°ālibī (1982, vol.1, p.65)

¹³ See also al-Qālī (1980, vol.1, p.41)

¹⁴ Al-Qālī (1980, vol.1, p.239)

Moreover, some tribes cared so much about the *mustajir* that they would continue to care about him even after he left them for other places. °Umayr Ibn al-Ayham al-Taghlibi praised his tribe saying (al-Qazwini, 1998, vol.1, p.340):

ونكرم جارنا ما دام فينا وتتبعه الكرامة حيث مالا

And we put up well our *mustajir* amongst us
and follow him, honouring him wherever he goes

In some cases, protecting the *mustajir* took extreme forms and the *mujir* had to pay a heavy price in order to keep his *mustajir* safe. One such example is the famous story of al-Samaw°al who kept the shields of Imru°u al-Qays with him. When al-Harith Ibn Zalim came to take them from him, al-Samaw°al took refuge in a fortified position. al-Harith took al-Samaw°al's son hostage in return of the shields. Despite that, al-Samaw°al refused to hand over the wealth of his *mustajir* and break his trust. Subsequently, al-Harith swung his sword and cut the boy in half, while al-Samaw°al looked on. On this occasion, he said his famous verses (al-Aṣfahānī, 1983, vol.12, p.116):

وفيت بأدرع الكندي إني إذا ما خان أقوام وفيت

I am true to my promise for [keeping] shields of the Kindi
if people betray, I fulfil

In other verses he depicts the moment of decision to protect the shields of his *mustajir*, and sacrifice his son (Ibn al-Athir, 1884, vol.1, p.235):

فشك غير طويل ثم قال له اقتل أسيرك إني مانع جاري

So he pondered little then said to him
kill your prisoner, I'll protect my *mustajir*

For this great sacrifice he became subject of the popular saying on observing trust: "More faithful [to his promises] than al-Samaw°al" (al-Maydānī, 1987, vol.2, p.441).

Protection was sometimes even extended to include beasts and roaming animals. Mudlaj Ibn Suwayd al-Ṭā°ī, for example, gave protected status to the locusts if they were in his vicinity, and prevented his people from collecting them, and thus was called: "Protector

of the locusts”¹⁵ مجير الجراد (al-Andalusī, 1987, vol.1, p.122). The illustration of these extremes is that they are considered a sign of power, chivalry and warrior spirit. If locusts could not be hunted on tribal lands, then what about persons taking refuge there, let alone anyone thinking of harming the tribe or any of its members.

To show their status, power and strength some tribes even went so far as to build a special dwelling for those who request their *jiwār*. The tribe of Banī Abd al-Mudān, for instance, “built a dome of adobe they called Ka°ba. If entered by a seeker of *jiwār* they would grant him their protection and if entered by a person with any need like food, water or money they would give him what he is asking for” (al-Aṣfahānī, 1983, vol.12, p.7).

Using the word Ka°ba to name that tent was probably to give a sense of sanctity to the place, as was the case of the Ka°ba in Mecca. For this reason, Arnaout says that *jiwār* was “essentially religious” (Arnaout, 1987, p.11). In fact, even the normal tents in which the Bedouin lived had a certain sanctity and inviolability, such that it was sufficient for the *mustajīr* simply to touch it or its ropes to be considered a legitimate request for *jiwār* (al-Aṣfahānī, 1983, vol.3, p.57).

The family of Muḥlam Ibn Dhuhāl, nobles in *al-jāhiliyya*, built a dome in the valley of °Awf and called it Dome of Mu°ādha. Whoever sought refuge in it would be protected (Ibn Durayd, 1958, p.358). By the same meaning, al-A°shā took pride saying (Ibn Jinnī, 1913, vol.1 p.389):

لنا هضبة لا ينزل الذل وسطها ويأوي إليها المستجير فيعصما

We have a mount, no humiliation comes to it
the *mustajīr* comes to it for refuge and he will be protected

The reasons for asking *jiwār*

One of the main factors in formulating *jiwār* was *khal°*, which means “abolishing all sorts of lawful responsibilities placed on the relatives or the tribe of the outcast person. If he commits a crime he should be solely responsible for that and nobody would protect

¹⁵ Al-Maydānī (1987, vol.1, p.285) states that he was subject to the parable: أحى من مجير الجراد “More protective than the protector of locusts”.

or defend him” (al-Ṭāhir, 1973, vol.4, p.410). The expelled person was left, in most cases, with no option but to seek *jīwār* from other tribes and prominent figures in the neighbourhood.

Still, there were other motives that drove people to seek *jīwār*, such as protection from drought and hunger. The harsh desert conditions were sometimes merciless and people sometimes struggled to find any kind of sustenance for their families or their animals. Such conditions forced some people to seek *jīwār* of other rich and powerful tribes. Al-Ḥuṭay³a, the well-known poet, sought refuge with Banī Muqallad Ibn Yarbū³ when he suffered hunger and poverty. They granted him *jīwār* fearing his ridicule in poetry if they were to refuse him. However, when the difficult times past, he left saying (al-Aṣfahānī, 1983, vol.2, p.150):

جاورت آل مقلد فحمدتهم إذ ليس كل أخي جوارٍ يحمد

I stayed with Banī Muqallad and am grateful
for not all those granting *jīwār* are worthy of gratitude

Some, however, would seek refuge during the winter months only, when the need was great, and leave for his own home and tribe when the season was over. The *mujīr* was obliged to treat him with honour, take care of his needs, protect his wealth, if he had any, and compensate him for any loss during his stay with them (al-Marzūqī, 1953, vol.1, p.302).

Some would seek *jīwār* for protection from certain harsh environmental conditions like the wind. Ibn al-Mujāwir (1954, p.165) reports that a group of people asked *jīwār* of Ḥijr Ibn al-Muhalhal from the wind. After accepting them, he built them a wall from stone and mortar and stopped the wind blowing on them.

Such examples demonstrate the impact of the harsh environment on the custom of *jīwār*. They also indicate that asking *jīwār* was not a complicated process, nor was it shameful. If someone needed help, he would not hesitate to seek it from the wealthier and more powerful members of that society.

Exacting vengeance was another reason which forced some people to seek *jīwār*, especially when that person was weak and unable to achieve his goal. He would seek

protection of someone until he could exact his revenge, like what Imru^u al-Qays tried to do when Banī Asad killed his father Ḥijr al-Kindī (al-Aṣfahānī, 1983, vol.9, pp.87-91).

This type of *jīwār* is an example of a very politically motivated request for *jīwār* since Ḥijr al-Kindī was a king when he was killed. Revenge by his son was a way of regaining honour after taking his father's place. Nevertheless, *jīwār* in general always had a political dimension, either to highlight honour and prestige or to show the power of the tribe to protect the weak and needy in addition to members of the tribe itself.

Protecting the trade caravans was another valid reason for seeking *jīwār*. This type of *jīwār* covered wealth rather than its owner. Even if the owner was safe, if his goods were passing through insecure territory he might be forced to request the protection of a tribe to safeguard it. After al-Nu[°]mān Ibn al-Mundhir killed the brother of Bal[°]ā[°] Ibn Qays, the latter attacked his caravans in Tihāma and robbed them twice, so al-Nu[°]mān had no choice but to "ask protection for his caravans from the Arab tribes there" (Ibn Ḥabīb, 1985, p.45)

More interestingly, some people went further to ask *jīwār* from death knowing that nobody could ever stop death. However, the idea behind that is illustrated in the incident of al-A[°]shā with [°]Āmir Ibn Ṭufayl. Al-A[°]shā came to him asking *jīwār* from jinni, men and death. When Ibn Ṭufayl accepted, al-A[°]shā astonishingly asked how would you protect me from death? He said: "If you die while in my *jīwār*, I will send to your family your blood-money¹⁶. He said: Now I know that you have protected me from death. So, he complimented [°]Āmir and insulted [°]Alqama in his poetry [for refusing to protect him from death]" (al-Aṣfahānī, 1983, vol.9, p.117)

Some people would even seek *jīwār* of poets so as not to become the subject of their contempt and derisive poetry. When "al-Farazdaq composed poetry maligning Banī Ja[°]far Ibn Kilāb, a woman feared he would mention her name and insult her. To escape this severe threat she sought refuge at the grave of his father, Ghālib Ibn Ṣa[°]ṣa[°]a. As al-Farazdaq knew this, he accepted her *jīwār* and did not mention her name or lineage" (al-Mubarrad, 1956, vol.2, p.87).

¹⁶ See also (Smith, 1903, p.50).

The examples above demonstrate the general relationship between *jīwār* and poetry. The incident involving al-Farazdaq and the woman is significant in the sense that it exposes the direct relation between *jīwār* and poetry. The influence of poetry in the life of the Arabs at the time is clear. This gives justification to the unhesitating nature of the decisions to grant *jīwār* to whoever sought it, despite the heavy price they might pay as a result.

In the above examples, some tribes not only gave protection to the *mustajīr* but were exceedingly proud of their actions and extended their hospitality to the extent that the *mustajīr* became one of them. In all previous examples, the *mustajīr* used his ability to arrange poems to praise the *mujīr* in the best form possible. This praise was extremely important to the *mujīr* as it would spread all over the Peninsula and would be transmitted for generations.

Granting *jīwār* necessarily entailed the ability to provide protection and welfare. As a demonstration of power and strength, spreading news of *jīwār* could be very beneficial to the tribe. This was particularly so in that environment, where power could mean survival and freedom from slavery.

Thus, *jīwār* was basically an exchange of bounty between the *mustajīr* and *mujīr*. While the *mustajīr* got the material help and protection needed, the *mujīr* received praise, fame and high status among the tribes. This status would certainly mean an increase in power and would reduce the likelihood of raids and attacks: Tribe that was ready to defend foreigners would definitely fight fiercely to protect its own members and property.

Other factors that made the custom of *jīwār* so entrenched in the lives of the Arabs were the nature of their personalities and the structure of the tribe. The *ṣurahā*² of the tribe were usually distinguished by the character of bravery, generosity and protectors of the weak. "They considered nothing worse than subjugation and oppression" (Dayf, 1964, vol.1, p.69). Therefore, defending and protecting the *mustajīr* was the cause of much pride and praise amongst them.

Based on this understanding it was a matter of pride and honour to protect the *jār*. One of the strongest phrases of praise was to depict somebody as follows: “He is protective of the *mustajīr* and defender of morals” منيع الجار حامي الذمار (al-Andalusī, 1984, vol.1, p.86).

It seems that the Arabs generally took pride in this issue among other nations. According to al-Andalusī (1987, vol.1, p.278), when al-Nu°mān Ibn al-Mundhir came to Khosru, king of the Persians, while many emissaries from Rome, India, and China were praising their kings and lands, al-Nu°mān showed great pride in the Arabs and held them above all other nations for their protection of their *jār*: Part of what he said was: “One of them [the Arabs] may hear news that a person who had sought his protection had been harmed, perhaps far away from his land. Then he would not be content until he annihilate the tribe which had harmed the seeker of his protection or his own tribe be wiped out”.

On the other hand, mistreatment of the *mustajīr* or refusing his *jiwār* was very shameful and such persons or tribes would be subject to costly ridicule and derision in poetry. When al-Ḥuṭay³a wanted to insult his stepfather, the worst that he said of him was that he was from a tribe that did not protect their *mustajīr* (al-Aṣfahānī, 1983, vol.2, p.135):

قتح الإله قبيلة لم يمنعوا يوم المجير جازهم من فقّس.

May God cast ugliness on a tribe who did not protect
their *mustajīr* from Faq°as on the day of Mujaymir

Abu Wāsi° from Banī Asad Ibn Khuzayma derided Ibn Ḥassān in poetry, saying; not only do they not protect their *mustajīr*; but he lived in fear of their treachery (al-Aṣfahānī, 1983, vol.15, p.91):

وما للجار حين يحل فيكم لديكم يا بني النجار حام
يظل الجار مفترشا يديه مخافتكم لدى ملئت الظلام

When the *mustajīr* comes to you
Banī al-Najjār, he finds no protector
The *mustajīr* sleeps on his hands
in fear of you, when night falls

The poet al-Burj Ibn Muṣhir insulted Banī Kalb after he left their *jiwār* saying sarcastically (al-Marzūqī, 1953, vol.1, p.359):

فنعلم الحي كلب غير أنا رأينا في جوارهم هنات
فإن الغدر قد أمسى وأضحى مقيماً بين خبت إلى المسات

The best of neighbourhoods is [the tribe of] Kalb, except that
we saw in their *jiwār*, problems
Treachery has resided night and day
between Khabt [name of place] and al-Masāt [name of place]

How *jiwār* was contracted

If we can use the term “contract” to describe this customary relationship, then *jiwār* was contracted by a clear request and answer, or by acting in a manner by which it was understood that this relationship now existed. However, the most prominent actions undertaken to request *jiwār* were tying the camel to the tent pole¹⁷, lowering the spears in front of the *mujīr* until he gets his *jiwār*¹⁸, tying the end of one’s clothes to the tent¹⁹, mentioning the name of the *mujīr* even if that person was not present²⁰ and seeking refuge by the grave of a famous person²¹. The entanglement of a bucket with that of the others in the well²², or using the rope of the others²³ sometimes obliged *jiwār*:

Sometimes, to affirm this contract, the *mustajīr* would eat the food of his protector as Mu‘āwiya Ibn al-Ḥārith did when he ate some dates from al-Bajlī after the latter granted him protection (Ibn Ḥabīb, 1942, p.208).

The contract of *jiwār* required little in way of ceremony. The process was simple, like their lives in general. As soon as the *mustajīr* asked *jiwār* of a person, and the other was able to bear the consequences, he was quick to take it on, stimulated by chivalry and

¹⁷ See an example of this in al-Qālī (1980, vol.2, p.57)

¹⁸ See al-Balādhurī (1996, vol.1, p.49)

¹⁹ See al-Aṣfahānī (1983, vol.3, p.57). The tent meant a *ḥaram* i.e. the sacred place for them where their women (*ḥarīm*) are dwelling and enjoy the maximum security and safety. This custom is still respected in the contemporary Arab tribes in many parts of the Arab world like in Yemen, Egypt Jordan, etc.

²⁰ See al-Aṣfahānī (1983, vol.10, p.18)

²¹ See Mubarrad (1956, p.131).

²² See al-Sharīf (1965, p.44)

²³ See al-Maydānī (1987, vol.2, p.444) and Ibn Ḥabīb (1942, p.194)

noble manners, and fearing ridicule and contempt if he were to refuse (Ḍayf,1960, p.69).

Announcing *jiwār*

As when they were disowning a member of their tribe, the Arabs would also announce their protection of individuals. The protector would announce this in the presence of an assembly, so that everyone was clear on the matter. Henceforth, that individual was in his custody and protection, equal to his blood relatives and afforded the protection of family or tribe. The tribe would ratify this in line with the individual's right to grant *jiwār*, so the *mustajir* was now deserving of their collective protection. People would avoid harming him in any way, out of respect for the force of his protection. The announcement would usually be made in the markets and places of assembly of people (Ibn Abī Ḥadīd, 1959, vol.15, p.231).

In Yathrib, if a person asked their protection, they would give him an arrow and say to him: “*Qawqil*”²⁴, cavort with this where you will, you are safe. They may say to him *qawqil* to the top of the mountain, so this group were called the *Qawāqil*”²⁵ (Ibn Hishām, 1991, vol.2, p.280)

Rights and Duties of the *mustajir*

The contract of *jiwār* comprised a number of rights for the *mustajir* guaranteed by his benefactor. Even though these rights were not written, the Arabs were very observant of their discharge in the best manner possible. The rights of the *mustajir* as a result of this *jiwār* were various and included:

- Protection: This included protection of his person, family and wealth. Hāni° Ibn Mas°ūd, head of Banī Shaybān summarised them when he granted *jiwār* to al-Nu°mān Ibn al-Mundhir: “I am obliged to protect your honour, and I shall protect you from that which I protect myself, my family, my children, so long as there is a man left in my tribe” (al-Aṣfahānī, 1983, vol.2, p.104). In other words,

²⁴ Walk like bobwhite الحجل يمشي مثل الحجل (al-Fayrūzabādī, no.d, vol.1, p.1356)

²⁵ See also al-Wāqidi (1966, p.167)

he was taking it upon himself to protect him, even if that meant his family and tribe were wiped out, that wars flared and souls were killed. The Arabs witnessed horrific wars caused by aggression against the *mustajir*, like the war of al-Basūs which lasted forty years²⁶.

For such serious consequences some tribes used to apologise from being able to grant protection, when they knew that they were not able to afford it (Ibn al-Athīr, 1884, vol.1, p.257). Even the *mustajir* may apologise, if he found that this was beyond the resources of his benefactors (al-Aṣfahānī, 1983, vol.2, p.104)

- Blood vengeance for the *mustajir* if killed: The Arabs used to seek retribution for the killing of the *mustajir* as they would do if he was one of the true-blooded members. The tribe would seek redress from the killer even if he were one of its own *ṣurahā*²⁷. When Qays, the brother of °Awf Ibn Maṭar al-Māzinī killed the *mustajir* of °Awf treacherously to get his wife, °Awf killed him in revenge for his *mustajir* saying (Ibn Ḥabīb, 1942, p.348):

إني، إِبْنَتُ العَمْرِي لا ثوب فاجر لبست، ولا من غدرة أتقنع
سعت على قيس بذمة جاره لأمنع عرضي إن عرضي ممنع

I, O daughter of al-°Amrī, not clothes of the corrupt have I
put on, nor from treachery turned blind eye
I went against Qays with the revenge of his *mustajir*
to defend my honour, my honour is well-guarded

- Seeking *diyya* [blood money] and paying it to the family of the *mustajir*, if he was killed: *Diyya* is an amount of money paid by the killer as a fine, in punishment for his crime. This is payable if capital punishment is waived by the family of the victim. The *diyya* for the *mustajir* was asked by the tribe in the same way as it would ask for one of its own (al-Balādhurī (1996, vol.1, p.81).

²⁶ See al-Nuwayrī (1988, p.1700) and al-Andalusī (1987, vol.6, p.70).

²⁷ *Ṣurahā*° is the plural of *Ṣarīḥ* and it means the true-blooded member of the tribe. See Ibn Ḥazm (1948, p.198) and al-Aṣfahānī (1983, vol.3, p.57-59).

- Preserving their wealth and recovering what had been stolen: If the *mustajir* was wealthy and his possessions were stolen or harmed the *mujiir* would bear responsibility and compensate him for all his loss²⁸.

In return for the protection and welfare the *mustajir* received from his benefactors while among them, he had to respect the limits of good conduct in his actions, so as not to bring the tribe that protected him into disrepute. Generally, the *mustajir*'s personality was subsumed in that of the tribe and become one of the tribe: "He rises when it rises, without asking why" (Shalabī, 1974, vol.1, p.150), he even sometimes was attributed to his new tribe, especially if his stay was long. He had to carry out all the tasks that fell on him as an individual member of the tribe so long as he was their *mustajir*. In other words, the *mustajir* observed the laws of the tribe that protected him, and submitted to it so long as he was with it.

Persons from whom *jiwār* may be requested

As we have seen, *jiwār* was requested from the strong who were able to provide the protection and welfare needed by the *mustajir*. Those who were not able did not take that obligation upon themselves. However, as al-Nuwayrī (1988, p.1812) and al-Aṣfahānī (1983, vol.22, p.47) report, we do find some cases where *jiwār* was requested from women, especially if they belonged to powerful tribes. This matter was considered part of the tribe's status and power, that a woman was able to provide protection of *jiwār*.

On rare occasions, we even find cases where people asked for the protection of boys, due to the sheer power and status of their tribe, like the incident of al-Ḥārith Ibn Zālim with the son of Abjar al-ʿIjlī (al-Aṣfahānī, 1983, p.1216). Such stories show the strength of this tribe and its status, where a young boy can make such a grave decision of granting protection; his tribe bearing the consequences of this decision, whatever they may be.

²⁸ See al-Aṣfahānī (1983, vol.16, p.172).

There are also interesting stories where a conquered tribe seeks the protection of the victorious tribe to save them from further harm and vanquish. Muḥammad Ibn Naṣr Ibn °Uyayna describes such a situation saying (al-Ṣafadī, 1931, vol.5, p.127):

فما برحت سمر الرماح تنوشهم بأطرافها حتى استجاروا بنا منا

Points of dark spears continued to eat them
until they sought our protection, from us

In this, the poet points out that there was no tribe more powerful than his tribe, and so the conquered tribe was forced to ask their *jiwār*, even though they were enemies. In other words this meant the complete surrender of that tribe to the victorious one.

Some people even went so far as to ask *jiwār* of jinn, especially when travelling in an unknown place. Al-Aṣfahānī (1961, vol.4, p.630) reports that when one of them “feared the jinn, he would say in a loud voice: I seek the protection of the master of this valley and this would be for him protection”

It seems that this case of *jiwār* was more psychological than practical, for this *jiwār* of the jinn would not prevent a highwayman from attacking him, killing him and taking his money. It does demonstrate, however, just how deep the principle of *jiwār* was embedded. Wherever there was danger, it was natural to seek protection from the party able to provide it. Some even went further: When one’s beast of burden moved away from him and he was left alone on the way, in the darkness of the night, he sang out (al-Baghdādī, 1998, vol.5, p.20):

تجاوزت في ليلةٍ مدلهمةٍ ينادي صداها ناقتي يستجيرُها

She moved past him in the dark night
he calls to her echo, my she-camel, seeking its protection

He sought the protection of his she-camel from the night closing in on him; he needed its company to feel safe, as if he was asking her *jiwār*. This emphasises the psychological aspect of the matter, and the ease of asking *jiwār* from those with the power and ability to give it.

The termination of *jīwār*

The tie of *jīwār* was on the whole temporary and not permanent. It would be dissolved for various reasons, like for example, when the *mustajīr* left the tribal territory, or when he gave back the protection and absolved his patron from it in public or if he did something shameful to the tribe's honour or trespassed on one of its prohibitions. Henceforth, the protector no longer carried the responsibility for him, in case of aggression against the former *mustajīr* (al-Andalusī, 1987, vol.6, p.19).

When they wished to end the *jīwār*, the tribes would give the *mustajīr* three days notice to prepare himself to leave the tribal territory. The Arabs would say, he gave his *mustajīr* three days i.e. he allowed him three days before the end of *jīwār* (al-Andalusī, 1987, vol.6, p.19).

However, despite the chivalry and nobility demonstrated by the Arab tribes in supporting the *mustajīr* and the particular care and concern for him, his family and wealth, there are nonetheless examples of various tribes betraying the *mustajīr*, for example by robbing the money of the *mustajīr*²⁹ (al-Baghdādī, 1998, vol.11, p.186) or taking revenge on him (al-Aṣfahānī, 1983, vol.21, pp.247-249).

Examples of such betrayal are rare compared to the vast number of examples of fulfilment, nobility, and sacrifice for the sake of the *mustajīr* and his rights. Whoever broke the contract of *jīwār* faced the worst possible criticism and ridicule in poetry, scorn, and contempt from a society that held good reputation and history in such high regard.

The continuity of the *jīwār* to the modern age

The custom of *jīwār* is still preserved and respected to some extent among Arab tribes in many parts of the Arab countries. In his valuable book, Dresch (1993, p.108) deals with this issue and reports incidents in Yemeni society which are very similar in essence to the stories detailed here. Peristiany (1966, p.254-255) also elaborates on the issue of

²⁹ See also al-Aṣfahānī (1983, vol.9, p.93)

honour and shame and its impact on *jiwār* in the life of the Arab tribes of Western Egypt. Through his treatment to the subject, the similarity becomes very clear between how the Arabs of the *jāhiliyya* and the contemporary Arab tribes deal with the issue of *jiwār*.

Conclusion

It is apparent then that the custom of *jiwār* was a comprehensive and recognised law practiced by all people, even though no written text existed detailing this law with respect to the party seeking *jiwār*, or the party granting it. Each party knew their rights and responsibilities and abided by them. If they violated them, they understood the consequences.

It could also be said that *jiwār* in essence was a contract of mutual benefits for both the giver, the *mujīr*, and the taker, the *mustajīr*. Although the giver provided protection, care and welfare for the taker, and that may sometimes be costly, the giver received fame, praise and high status in the tribal society.

The reasons forcing a person to seek *jiwār* in the *jāhiliyya* were various and included fear of revenge, fear of solitary living, discontent with one's tribe, or harsh environmental conditions. In general, asking *jiwār* was not a complicated process. It was natural and deeply rooted in the society such that one would not hesitate to seek *jiwār* for any reason he believed appropriate to preserve his life, property or honour.

The issue of *jiwār* assumed grand dimensions in the customs of the Arabs before Islam, to the extent that a person would sacrifice himself, his family and property to defend his *jār*. Protection of *mustajīr* was strongly related to the preservation of honour and respect. Additionally, granting protection was also very much connected to the status of the tribe in that harsh environment. The level of protection a tribe was capable of offering was an indicator of its ability to protect itself and its members. Moreover, there were religious reasons for granting *jiwār* as was apparent in their observance of the sacredness of the Ka'ba and the refugees who come to seek asylum there. When they want to announce their *jiwār* they would go to the Ka'ba and declare that publicly (Ibn Abī Ḥadīd, 1959, vol.15, p.231). Also, this was obvious in their building tents and

naming them Ka°ba to imitate the sacred status of the Ka°ba and make it available for the *mustajir*. The tribe of Bani Abd al-Mudān, “built a dome of adobe they called the Ka°ba. If entered by a seeker of *jiwār* they would grant him *jiwār*; or entered by a person in fear they would afford him security, and if entered by a person with any need like food, water or money they would give him what he is asking for” (al-Aṣfahānī, 1983, vol.11, p.382).

In this regard, poetry played a significant role in strengthening and maintaining this custom, as it was the strongest medium of communication and spreading news among the Arab tribes. Both praise and ridicule could be rapidly transmitted all over the Peninsula through verses of poetry.

Finally, *jiwār* in the *jāhiliyya* was a common customary practice. It was entrenched in the lives of the Arab tribes well before the advent of Islam. This practice continued afterwards. But how did the Prophet and his companions deal with this custom? Did they fight against it? Or adopted as an Islamic tradition? The next chapter is dedicated to answering these and other questions.

Chapter II
***Jiwār* in the Islamic Tradition in the
Meccan period**

Introduction

As evident in the previous chapter, the essence of *jiwār* in the *jāhiliyya* was the provision of protection. Indeed, were we to undertake an examination of asylum throughout history, the provision of protection would surely emerge as a core issue and common factor in all such cases. Based on this, it is logical for me to start searching the Islamic tradition for cases of protection, whether the Muslims were providing or receiving it.

I begin with the Prophet who was born as an orphan and badly needed protection throughout his thorny mission. In the first section I seek to clarify how God provided His Prophet with His protection from birth, through the people who surrounded him in his different stages of his life. I then study attempts by the Prophet after the revelation to get protection from the Arab tribes, namely his migration to al-Ṭāʿf, the migration of his companions to Abyssinia and the collective migration of the Muslims to Medina.

Heaven's protection of the Prophet

Prophecy by its very nature requires a comprehensive revolution in peoples' beliefs, visions and fundamental principles. Such revolutions are usually met with varying degrees of rejection depending on the society and the ideological, economic, political and social conditions.

Very often this rejection was translated into different forms of insult, abuse, offence, torture and, in some extreme circumstances, death, as the Qurʾān (3:21) tells. Therefore, it was essential for those who would undertake this tremendously thorny mission to be psychologically, spiritually and physically qualified to cope with the potentially harmful consequences.

For His part, God, the divine source of the prophecy, would prepare the conditions and qualify His prophets for the mission they were to undertake. God not only protected and took care of His prophets during their mission, but also during their childhood. For example, God protected the prophet Moses from the Pharaoh who would kill the

newborn children of the Israelites by making the Pharaoh himself the guardian and protector of Moses (al-Ṭabarī, n.d, vol.1, pp. 231-236).

In the case of the Prophet Muḥammad, God began His protection of him by preparing the conditions for his mission long before his actual birth. Choosing him to be from among the noblest families in Mecca and a descendant of the prophet Ibrāhīm was the beginning.

The genealogical tree of the prophet Muḥammad stretches back to the prophet Ismāʿīl, the son of Ibrāhīm. This was emphasized in the *ḥadīth* narrated by al-Ḥākim (1990, vol.2, p.602): “I am the son of the two slaughtered” أنا ابن الذبيحين. The two slaughtered to whom he refers are his father ʿAbdullah and the prophet Ismāʿīl, as al-Ḥākim (1990 vol.2 p.609) states.

The issue of genealogy played a significant role in Mecca’s hierarchal society in the time of the Prophet. Some of the masters in Mecca rejected Islam on the grounds that it equalised between the masters and their slaves. As the Qur’an records (26:111): “They answered: “Shall we place our faith in thee, even though [only] the most abject [of people] follow thee?” قالوا أنؤمن لك واتبعك الأرذلون؟

This hierarchal system, at many stages, played an important role in protecting the Prophet from the polytheists of Mecca.

The story of the Prophet’s father, ʿAbdullah, and his father, ʿAbd al-Muṭṭalib, was not far removed from the preparations God had arranged for his Prophet. ʿAbd al-Muṭṭalib made a commitment to slaughter the tenth child should God give him ten children. When God gave him what he wanted, he was obliged to fulfil his promise. The tenth was ʿAbdullah, the father of the Prophet, the most beloved one of his children. The elite of Quraysh rescued the situation by advising him to slaughter a hundred camels instead. After this incident the love of ʿAbdullah increased not only in the heart of ʿAbd al-Muṭṭalib, but in the hearts of all people in Mecca. Therefore, when ʿAbdullah died in Medina at the age of twenty five, ʿAbd al-Muṭṭalib was “saddened very much” as Ibn Saʿd (n.d, vol.1, p.99) narrates. When the Prophet was born months later, he was already an orphan and all the love of his father was later transmitted to him and

eventually played a significant role in his life, especially in protecting him after the revelation.

Even before the Prophet was born, heaven was caring for him and his mother. As his mother told, she felt no tiredness during her pregnancy. “All she noticed, and by which she knew she was pregnant, was that her period interrupted and somebody came to her while she was half asleep and asked her whether she was a pregnant and she said I do not know, then he told her that you are a pregnant with the master and the Prophet of this nation” (Ibn Sa’d, n.d, vol.1, p.98). When she gave birth to the Prophet, a flood of light came out with him and lit between east and west (Ibn Sa’d, n.d, vol.1, p.102).

God’s blessings continued to surround the Prophet after his birth and into the foster period. The Arabs in Mecca at that time would send their newborn baby boys to women fosterers in the desert, believing that the children would grow up stronger, sharper in their intelligence and more eloquent. It was also said they did that because they considered it shameful that the mother only should foster the child (al-Ḥalabī, n.d, vol.1, p.146).

Some of the Arab tribes in the desert were well-known for their eloquence. Banī Sa’d, the tribe that the Prophet was raised amongst, was one of those renowned for their eloquence. The Prophet later expressed his pride to his companions that he had been fostered in Banī Sa’d and would say: “I am the most eloquent of you, I am from Quraysh and I was fostered in Banī Sa’d” (Ibn Kathīr, n.d, vol.2, p.277).

Thus, the choice of Ḥalīma from Banī Sa’d to foster and raise him was a very important qualification for the Prophet and one he would very much need in a society that valued eloquence, articulacy, fluency and poetry so highly.

As an orphan with no father to offer generous rewards, Ḥalīma was initially hesitant to foster the Prophet and wondered: “What good rewards would his mother give her?” (Ibn Ishāq, n.d, vol.1 p.26). Finally though, not wanting to return to her tribe without a baby, Ḥalīma agreed to take him and it seems she began to feel the blessings of fostering the Prophet from the first moment. Her breasts filled with milk such that this baby and her own child drank till they were sated. Their goat’s dug was full and even their lazy

donkey became very strong and exceeded the others for the first time in his life (Ibn Ishāq, n.d, vol.1 p.26).

When Ḥalīma's husband saw this he realized that all these blessings were because of the child they took and said to her: "O Ḥalīma, by God you have taken a very blessing soul" (Ibn Ishāq vol.1 p.26). The continuous blessings that shadowed Ḥalīma's house in particular after they returned to their tribe increased her love and care to the Prophet.

The incident which happened to the Prophet when he was two years old was decisive for Ḥalīma to return the Prophet to his mother. The incident as narrated by Ibn Ishāq (n.d, vol.1 p.27) was strange by any standard. While the Prophet was playing with other children, two angels in a shape of men came and took him away. They opened his heart and took out a small black clot, then washed his heart and returned it to his body (Ibn Ishāq, n.d, vol.1 p.27).

Ḥalīma was frightened when her son told her what had occurred and she decided that she must return the Prophet to his mother. At the same time, however, she was reluctant to do so because of the blessing she had enjoyed while he was in her care. When Ḥalīma told the Prophet's mother, Āmina, what had happened, Āmina said: "Ney, by God, the devil has nothing to do with him; my son will have a great status" (Ibn Ishāq, n.d, vol.1, p.27).

The act of opening the Prophet's heart and removing the black clot, symbolising evil, is evidence of heaven's nurturing of the Prophet and a means of preparing him for his mission. As a result, Satan the first enemy of the Prophet has nothing to do with him, and has no power to seduce or cause him to deviate from the right path. This is obviously one of the central means of protecting the Prophet. It was narrated that the Prophet said to his companions: "None of you but has accompanying Satan. They said: and you O Prophet? He said: and me but God helped me, so I am saved" ولكن الله أعانني (Ibn Kathīr, n.d, vol.1, p.67) and in another narration there is an extra paragraph which says: "And he does not whisper to me but good things" فلا يأمروني إلا بخير (Muslim, n.d., vol.4, p. 2167). In the latter narration the word فأسلم does not mean to be saved but that his Satan has become a Muslim so he whispers to him the good things.



This matter was obvious in the life of the Prophet and particularly in his youth before the mission in Mecca. God save-guarded him not only from the doing but also from the intention to do what the youth in Mecca did at that time. Al-Ṭabarī narrates a *ḥadīth* on the authority of the Prophet which confirms this fact: “I never intended to do something of what the ignorant people used to do except two times, in which God prevented me from doing what I was intending to do” (al-Ṭabarī, 1986, vol.1 p.520). He mentions the two cases³⁰, and after that he never had the intention of doing anything wrong until he was honoured by God’s mission.

The protection of Abd al-Muṭṭalib

After Ḥalīma al-Sa^ʿdiyya returned the Prophet to his mother, he lived with her until her death when he was six years old. It was natural that ʿAbd al-Muṭṭalib would take care of him. Ibn Sa^ʿd narrates that: “ʿAbd al-Muṭṭalib loved him more than his sons, he used to get him close to him. The Prophet was the only person who could enter to ʿAbd al-Muṭṭalib when he sits alone. Moreover, ʿAbd al-Muṭṭalib used not to eat until the Prophet joins him” (Ibn Sa^ʿd, n.d, vol.1, p.118).

What increased his love of the Prophet was what a group of Banī Mudlaj said to ʿAbd al-Muṭṭalib. They told him to take very good care of the Prophet as: “We have never seen a foot similar to the foot in *al-Maqām*³¹ like Muḥammad’s” (Ibn Sa^ʿd, vol.1 p. 118). ʿAbd al-Muṭṭalib also heard that the Jews said Muḥammad was the prophet of this nation and so he ordered his nurse Um Ayman not to be distracted from the Prophet.

When death approached, ʿAbd al-Muṭṭalib entrusted the Prophet’s care to Abu Ṭālib. The Prophet was eight years old when his grandfather passed away.

³⁰ “One night I asked a youngster from Quraysh to look after my sheep so I can get to Mecca and party there like the other people. Once I got to the first house in Mecca I heard music, then I asked: what is that? They said: somebody is getting married, so I sat to watch them, then God made me sleep and I slept and nothing woke up except the heat of the sun next day. He tried to do the same in another day the same happened to him” (al-Ṭabarī, 1986, vol.1 p.520).

³¹ It is a place in the Ka^ʿba. The foot in *al-Maqām* was the print foot of the prophet Ibrāhīm.

The protection of Abu Ṭālib

Following the death of ʿAbd al-Muṭṭalib, the Prophet joined his uncle's family. Abu Ṭālib acted precisely according to his father's instructions and took very good care of the Prophet. He loved him more than his sons and used not to sleep unless the Prophet was beside him. When Abu Ṭālib went out the Prophet would usually accompany him. "Abu Ṭālib as well used to particularize him with food and special care" (Ibn Sa'd n.d, vol.1, p.119).

When the Prophet was twelve years old, he accompanied Abu Ṭālib on his trading journey to Syria. On their way they met Baḥīra, the saint. When Baḥīra saw the Prophet he recognized the marks of prophecy, which Baḥīra knew very well through his readings of the Old Testament. When Baḥīra was sure that this was the expected prophet, he told Abu Ṭālib to "take the Prophet back to Mecca and to be careful of the Jews. By God, should they see him and recognize what I recognized they would harm him" (al-Ṭabarī, 1986, vol.1 p.519). This incident made Abu Ṭālib more careful and vigilant than ever towards the Prophet and his protection of him continued until his death.

Even after God commissioned his Prophet with his mission, Abu Ṭālib stood by him shielding, defending and protecting him by all the means at his disposal. When a delegate of Quryash came to Abu Ṭālib complaining about the Prophet and his preaching, Abu Ṭālib said to the Prophet: "O my brother's son, do say whatever you like, by God I will never disappoint you" (al-Ṭabarī, 1986, vol. 1 p.545). When Quraysh intensified their pressure on the Muslims, Abu Ṭālib called on his tribe, Banī Hāshim, to protect the Prophet.

The Prophet understood the full benefit of Abu Ṭālib's protection soon after he died. One day, while the Prophet was travelling home, a thug threw sand on him. His daughter started to cry while she cleaned it, and the Prophet said: "O my daughter, do not cry. God will protect your father. Quraysh could not reach me by something I hate until Abu Ṭālib died" (Ibn Hishām, 1991, vol.2 p.264).

This is perhaps the first time the Prophet mentions that God will protect him, meaning God will prevent Quraysh from killing him, but not from harming him. The offence and insult of Quraysh escalated so dramatically after Abu Ṭālib's death such that the Prophet said: "O uncle, how quickly I missed you" (al-Ḥalabī, n.d, v.2, p.50).

These words reached Abu Lahab, the Prophet's uncle, who decided to protect him and said: "O Muḥammad, do whatever you want as you used to do when Abu Ṭālib was alive. By Allāt and ʿUzzā no one would harm you until I die." (Ibn Saʿd, n.d, vol.1, p.210) and he protected him for several days.

Nevertheless, Quraysh started to goad Abu Lahab, claiming that the Prophet had said his father was in hellfire. When he asked the Prophet about this and the Prophet replied positively, Abu Lahab said: "I will be your enemy as long as you say ʿAbd Al-Muṭṭlib is in the hellfire" (Ibn Saʿd, n.d, vol.1, p.211) and he ended his protection.

Under enormous pressure from Quraysh, the Prophet decided to go to al-Ṭāʿif in attempt to find shelter and a protector should the people there follow him.

Conclusion:

The Heavenly protection of the Prophet was wide-ranging and began well before his birth. This protection materialized at different stages through people, not through miracles.

The vulnerability of the Prophet, his status as orphan and his need of protection at different stages of his life ensured that the values of mercy and protection were deeply entrenched in him. Certainly, the difficult experiences he endured helped him to understand the needs of the destitute, the weak and those requiring protection. Finally, if we were to call the seeker of protection an asylum seeker then Prophet Muḥammad was the first asylum seeker in Islam.

The Journey of the Prophet to al-Ṭāʿif

The Sources:

The story of the Prophet's journey to al-Ṭāʿif is depicted in more than one source. It is narrated by Ibn Ishāq (150 AH), Ibn Saʿd (230 AH), Mūsā Ibn ʿUqba (141 AH) and al-Umawī (249 AH), although the later two reached us incomplete.

The narration of Ibn Ishāq does not exist in the text we have today entitled *Sīrat Ibn Ishāq*. The original book survived in incomplete form. Thankfully, many writers after Ibn Ishāq depended on his book to narrate the *sīra* of the Prophet, preserving most of his book. Ibn Hishām (213H) relied wholly on Ibn Ishāq's book and copied most of it. Ibn ʿAbd al-Barr (463 AH) in his book "*al-Durar fī Ikhtisār al-Maghāzī wa al-Siyar*" transmitted many parts of that book. In addition, Ibn Kathīr (774 AH) in his book "*al-Bidāya wa al-Nihāya*", al-Ḥalabī (1044 AH) in his *sīra* and nearly all others who wrote about the *sīra* of the Prophet, relied on the transitions of Ibn Ishāq.

In his book *Maṣādir al-Sīra al-Nabawiyya wa Taqwīmuḥā*, Fārūq Ḥamāda (1980, p.71) says: "Ibn Ishāq was the master of this art to all those who came after him, without any argument. His book was the thorough source and the basic material for anyone who wants to write or talk about the *sīra* of the Prophet"³².

The story of the Prophet's journey to al-Ṭāʿif is also mentioned in Ṭabaqāt of Ibn Saʿd (230 AH) who depends basically on the narrations of Muḥammad Ibn ʿUmar al-Wāqidī (207 AH).

This account is also narrated by Mūsā Ibn ʿUqba (141 AH), one of the three students of al-Zuhrī (124 AH), the sheikh of Ibn Ishāq. However he reported this account partially as Ibn Kathīr recounts in *al-Bidāya wa al-Nihāya* (n.d, vol. 3 p.136).

These different narrations agree on the general course of the account, and disagree on some specific points. Generally, they agree on the reasons that drove the Prophet from Mecca to al-Ṭāʿif, the dialogue that took place between the elite of Thaḳīf and the

³² for more details about this issue see (Guillaume, 2006)

Prophet, the ordeal of the Prophet after that, the conversion of the group of spirits and finally the return of the Prophet to Mecca. They differ in their accounts of the Prophet asking the *jiwār* of Muṭ°im Ibn °Adyy. Ibn Ishāq and Mūsā Ibn °Uqba do not mention this incident at all, while Ibn Sa°d mentions it only briefly in his Ṭabaqāt and Ibn Kathīr transmits its details from the “Maghāzī” of Sa°id Ibn Yaḥyā al-Umawī (249H), the contemporary of Ibn Sa°d. Al-Ṭabarī also narrates this account, but without specifying his source as he says: “Some of them said” (al-Ṭabarī, 1986, vol.1, p.555).

Another difference between the narrations of Ibn Ishāq and Ibn Sa°d is the story of the Christian slave °Addās. While Ibn Ishāq goes into the details of this account (Ibn Kathīr, n.d, vol.3, p.136), Ibn Sa°d mentions nothing about it.

Regarding the narration of Ibn Ishāq, Ibn Hishām, al-Ṭabarī and Ibn Kathīr transmit the same story with the same phrases, whereas, Ibn °Abd Al-Barr (1982, vol.1, pp.59-64) reports the same account sometimes using his own phrases.

Ibn Sa°d (n.d, vol.1, pp. 212-213) reports it briefly without going into depth. He does not detail the dialogue between the Prophet and the elite of Thaḳīf, nor does he explain what happened to the Prophet while returning to Mecca and the Du°ā° he made at that time. However, he does mention the *jiwār* that Abu Lahab granted to the Prophet before his departure to al-Ṭāif.

After this general overview of the different narrations and books, I will choose the narration of Ibn Ishāq transmitted by Ibn Kathīr, despite the fact that he is not the earliest to narrate the account. This is because his narration has more details than Ibn Sa°d’s. Moreover, Ibn Kathīr reports the narration of al-Umawī regarding the *jiwār* of al-Muṭ°im, which is important in this context, in addition to transmitting Ibn Ishāq’s narration. I will use other sources, where the need arises.

The reasons that drove the Prophet to depart to al-Ṭāif

With the death of Abu Ṭālib and Khadija, the Prophet’s wife, within a month of each other, “two disasters have gathered on the Prophet. He stayed at his home and got out rarely” (Ibn Sa°d, n.d, vol.1, p.211). Quraysh could harm him in such way that they

could not have hoped for in the life of Abu Ṭālib. The Prophet lost the security and the economic security provided by Abu Ṭālib and Khadija respectively. He became vulnerable and subject to torture and harassment by the non-believers in Mecca, especially when Abu Lahab ended the protection he had offered the Prophet for a few days after Abu Ṭālib's death. The suffering of the Prophet and of the Muslims was unprecedented and the Prophet named it "the year of sadness", as al-Ḥalabī transmits (1979, vol.3 p.498).

Despite the torment and anguish faced by the Prophet in Mecca, he continued to speak out to the tribes about his new religion. None of them, however, was convinced and they would say: "His people know him better, and how would he straighten us who distorted his people?" (Ibn °Abd al-Barr, n.d, vol.1, p.62). The Prophet then decided to go out to al-Ṭā'if seeking protection and support.

He set out to al-Ṭā'if in search of the support and protection of the tribe of Thaqīf and hoping that they would accept what God had sent him with. He set out by himself according to the narration of Ibn Ishāq, while Ibn Sa'd says he went out "with Zayd Ibn Hāritha in the tenth year of his mission" (Ibn Sa'd, n.d, vol.1, p.211).

After meeting and preaching to the three masters of Thaqīf, the Prophet asked them to convert to Islam and support him in delivering his message (al-Ṭabarī, 1986, vol.1, p.554). In seeking the *jīwār* of Thaqīf, the Prophet was not looking for his personal protection and welfare only. He was asking them to follow his religion and to fight with him against those who opposed and oppressed him.

The elite of Thaqīf understood what the Prophet asked and what the consequences of their acceptance would be, particularly the price of supporting him against Quraysh, the most powerful tribe in Mecca. Eventually, they refused to follow his religion and gave him a harsh reply (al-Ṭabarī, 1986, vol.1, p.554).

When the Prophet heard their answer he asked them to "keep what happened a secret" (Ibn Kathīr, n.d, vol. 3 p. 235). He did not want Quraysh to hear about it because he feared that this would encourage them to increase their attacks on him.

However, the three masters of Thaqīf not only revealed the secret, but ordered the Prophet to “get out of our country and go to a land where you can be saved” أخرج من بلدنا (al-Ḥalabī, n.d, vol.2 p.52). “They feared that he would spoil their youth” والحق بمنجاتك من الأرض had he stayed there, as Ibn Saʿd (n.d, vol.1, p.212) says. They feared that some of their younger members might convert to Muḥammad’s religion and eventually offer him *jiwār*. The right of granting *jiwār* was guaranteed for all the freemen in the tribe, and if given, the whole tribe would be obliged to defend Muḥammad and protect him.

Moreover, they urged their thugs and slaves to abuse and harass him. “They stoned him until they blooded his feet. Meanwhile, Zayd kept trying to shield him by his body until he was injured in his head” (Ibn Saʿd, n.d, vol.1, p.212).

Finally, the Prophet managed to get away to a field of grapes belonging to ʿUtba and Shayba Ibn Rabīʿa. When he settled there and felt safe, he made an impressive, powerful prayer asking God to help him. The prayer was extremely telling and explained much about the painful and traumatic situation the Prophet found himself in (Ibn Kathīr, n.d, vol.3, p.136). “No man or a woman of Thaqīf believed him”, as Ibn Saʿd says (n.d, vol.1 p.212) and there was no glimpse of human support, especially after his relatives became his enemy and Thaqīf refused to give him *jiwār*. There was no one left to seek *jiwār*; refuge and mercy from, except God.

This was the most difficult day the Prophet ever faced, as he himself revealed to ʿĀʾisha when she asked him whether if he had ever faced a day more terrible than the day of Uḥud (al-Bukhārī, 1986, vol.3, p.1180).

However, when Rabīʿa and Shayba saw him they sympathized with him, as they were relatives from the same tribe. They sent their Christian slave called ʿAddās with grapes to the Prophet.

After that the Prophet moved to a place called Nakhla, close to Mecca, and “stayed there for some days” (Ibn Saʿd, n.d, vol.1, p.212). One night, while he was praying a group of spirits came across him and listened to the Qurʾān. The group of spirits believed in the Prophet and went to their people as warners as the Qurʾān states (46:29).

Moreover, God sent the angel of the mountains to the Prophet ordering him to follow the instructions of the Prophet even if it was to collapse the two mountains of Mecca on the heads of its people. But the Prophet said: “I hope that God will bring out of them who worship God and make no partner with Him” (al-Bukhārī, 1986, vol.3, p.1180).

Through these incidents it could be that God wanted to tell the Prophet that He and His angels were with him and supported him. The message was that if the elite of Thaqīf did not believe in you, the poor people and the spirits believe in you, and your mission is not failure. It also could be said that God might wanted to raise the morale of the Prophet at this stage particularly, where he was in a desperate situation after the humans let him down.

However, on their way back to Mecca, Zayd asked the Prophet: “How would you enter Mecca after they had expelled you? كيف تدخل عليهم وهم أخرجوك (Ibn Sa°d, n.d, vol.1, p.212). Although, Quraysh did not force him to leave and accordingly he still has the right to return, Zayd meant as al-Ḥalabī comments “their aggravation and harassment were the reason behind your departure” (al-Ḥalabī, 1979, vol.2 p.62). The Prophet replied: “God will ease things and make a way out of it. God will elevate his religion and support his Prophet” (Ibn Sa°d, n.d, vol.1, p.213).

Zayd’s question emphasizes that the Prophet’s journey to al-Ṭā’if was considered by Quraysh as an apparent rebellion, a kind of declaration of war by seeking support from another tribe to fight his own. The Prophet knew this well, and knew that he could not re-enter Mecca without *jiwār*:

Thus, he sent a messenger called Urayqit̄ to al-Akhnas Ibn Shurayq with a clear message: “Muḥammad asks you: Would you be my *mujīr* until I deliver the message of my Lord?” يقول لك محمد هل أنت مجيري حتى أبلغ رسالة ربي (al-Ṭabarī, 1986, vol.1 p.555). The message was brief but it contained two important elements. The first was that the Prophet had not lost hope of convincing Quraysh of his message. He was trying to return to Mecca in such a way as to preach to them again. The second point was that the Prophet was not concerned about his personal safety as much as he wanted to deliver his message. This explains his condition that the *mujīr* ought to protect him until

entered the Ka'ba and told the Prophet to make his *ṭawāf*, circumambulations. Hurriedly, Abu Sufyān³⁵ came to al-Muṭ'īm and asked him: "Are a *mujīr* or a follower?" أمجیر أم متابع (Ibn Kathīr, n.d, vol.3, p.137) Al-Muṭ'īm said: I am a *mujīr*. Then Abu Sufyān said: "Then your [*jiwār*] will not be disrespected" إذا لا تخفر (Ibn Kathīr, n.d, vol.3 p.137)

This question and answer reflect the deep and significant changes that took place in Meccan society in regard to the principle of *jiwār* after the advent of Islam. By asking al-Muṭ'īm that question, Abu Sufyān wanted to say: If you are a follower of Muḥammad then your *jiwār* is void, but if you are not, then your *jiwār* is respected and your *mustajīr* is protected.

This means that those who became Muslims would lose most of, if not all, their tribal rights and especially, the right to grant *jiwār*. The Muslims were treated as if they were *ṣa'ālīk* or rebels against society. They did not worship the idols of Mecca and hence they were out of society and had no rights at all.

The other point worthy of note is the central place the principle of *jiwār* occupied at that society. Despite the bitter enmity of the Prophet, especially after his trip to al-Ṭā'if looking for support against them, Quraysh could not do anything to the Prophet when he got the *jiwār* of al-Muṭ'īm.

The *jiwār* of al-Muṭ'īm did not include the protection against the physical harm only, but also against the verbal abuse. When they were at the Ka'ba, al-Muṭ'īm rose on his horse and shouted: "O the people of Quraysh, I have granted my *jiwār* to Muḥammad, so nobody deride him" يا معشر قريش إني قد أجزت محمدا فلا يهجه أحد منكم (Ibn Sa'd, n.d, vol. 1 p.213)

Al-Muṭ'īm's noble stance was remembered by the Prophet and the Muslims in general. When the Muslims captured some prisoners of Quraysh after the war of Badr, the Prophet said in an indication of his thankfulness to al-Muṭ'īm: "Had al-Muṭ'īm been alive and asked me to release them I would have done so" (al-Bukhārī, 1986, vol.2, p.305).

³⁵ In the narration of al-Ṭabarī (n.d, vol. 1 p.555) it was Abu Jahl who asked that question (are you a *mujīr* or a follower) and when al-Muṭ'īm replied Abu Jahl said: "We grant *jiwār* to whom you grant".

Conclusion:

The journey of the Prophet to al-Ṭāʾif was a clear example of seeking protection through *jīwār*. It was also considered by the Prophet and Quraysh an apparent rebellion against them, and a kind of declaring war by seeking support from another tribe to fight his own. Therefore the Prophet could not enter Mecca without *jīwār*.

The Prophet's seeking protection of non-Muslims shows that Islam does not reject the well-established principle of *jīwār*. On the contrary, this affirms that the custom of *jīwār* has been legalised by the Prophet, on the condition that this *jīwār* should not contradict with the principles of Islam.

Moreover, the attempts of the Prophet to seek *jīwār* of al-Akhnas Ibn Shurayq and Suhayl Ibn ʿAmr and their refusal to grant him *jīwār* indicate the structure of the Arab tribes and the rules governing relations between them in regard to the custom of *jīwār*. However, the acceptance of al-Muṭʿim to grant the Prophet his *jīwār* and the acceptance by Quraysh despite their enmity towards the Prophet, emphasise the central place the custom occupied in that society.

Abu Sufyān's question to al-Muṭʿim reflects that those who converted to Islam were not considered *ṣuraḥā* of the tribe and therefore did not have the full rights of others and certainly had lost the right to be protected by the tribe, let alone grant protection to others.

Nonetheless, after the advent of Islam some significant changes altered the custom of *jīwār*. The apparent shape of the process remained intact, but the essence of *jīwār* and the deal done between the *mujīr* and the *mustajīr* was altered. Previously, the *mujīr* would give protection, relief and care. In return he got fame and good reputation. After the advent of Islam, the *mujīr* was offered something extra in return for his *jīwār*: In addition to fame, he was promised to enter Paradise, should he accept Islam, in exchange for his *jīwār*. This new deal was revolutionary to the tribesmen who used to receive the bounty of their *jīwār* immediately, through verses of poetry that spread rapidly throughout the tribes.

The migration to Abyssinia

A quick overview of the *sīra* books gives us a sense of the important role of the two migrations to Abyssinia in the life of the Muslims in Mecca. After five years of harassment, torture and abuse the Prophet permitted his companions to search for safety, security and protection in Abyssinia. It was only when they migrated to Abyssinia those Muslims could worship openly, without fear or intimidation.

In this regard it is appropriate to examine the factors that drove Muslims to migrate to Abyssinia in the first wave, the reasons for choosing Abyssinia as their destination, and the number of Muslims who migrated. It is also relevant here to touch upon the second wave of migration to Abyssinia and the reasons behind that, in addition to the accounts in which returnees sought the *jiwār* of Quraysh.

For the sake of consistency, I will adhere to my methodology in this section by choosing six of the main and earliest books of *sīra*. We can classify them into two categories according to their chains of narration. The first is the chain of Ibn Ishāq (150 AH) who transmits from his Sheikh, al-Zuhrī (124 AH). His book is called *Sīrat Ibn Ishāq*. The second chain is Ibn Sa'd (230 AH) who transmits from his sheikh, al-Wāqidi (207 AH). His book is called *al-Ṭabaqāt*.

The main writers of *sīra*, for different reasons³⁶, depended on the narration of Ibn Ishāq, like Ibn Hishām (218 AH), the student of Ibn Ishāq, in *al-Sīra al-Nabawiyya*, al-Ṭabarī (310 AH) in *Tārīkh al-Ṭabarī*, Ibn °Abd al-Barr (463 AH) in *al-Durar* and Ibn Kathīr (774H) in *al-Bidāya wa al-Nihāya*.

In the coming pages, I will give a general sense of how these books dealt with this story, and will then select one account from which to narrate the story.

Starting with *Sīrat Ibn Ishāq*, Ibn Ishāq (150 AH) begins his narration with the terrible circumstances the Muslim faced in Mecca, and then the Prophet's permission to his companions to migrate to Abyssinia. He also narrates the names of the Muslims who migrated and the disagreement between the scholars on who was the first to migrate.

³⁶ For further details on this see (Ḥamāda, 1980, p.71)

Then, he summarizes the story of *al-Gharānīq*³⁷ and the return of the Muslims according to that. Finally, he details accounts in which some of the returning Muslims sought the *jiwār* of Quraysh to enter Mecca. However, he mentions nothing about the second migration to Abyssinia.

Ibn Hishām (218H), the student of Ibn Ishāq, offers more details in his book *al-Sīra al-Nabawiyya*, which is a summary of *Sīrat Ibn Ishāq*. This work is particularly significant because *Sīrat Ibn Ishāq* has not survived in its entirety. Ibn Hishām had transmitted most of *Sīrat Ibn Ishāq*, as he himself claims in the introduction of his book.

The common accounts in *Sīrat Ibn Ishāq* and *Sīrat Ibn Hishām* were the circumstances of and the reasons for the migration, the main events in the first migration and the story of °Uthmān Ibn Maz°ūn in seeking *jiwār* of al-Walīd Ibn al-Mughīra.

However, Ibn Hishām reports other accounts in his *sīra* on the authority of Ibn Ishāq which were not mentioned in the book called *Sīrat Ibn Ishāq*. These accounts were the delegation of Quraysh to al-Najāshī and the dialogue that took place between them, the conversion of al-Najāshī to Islam, and the account of Abu Bakr in seeking *jiwār* of Ibn al-Dighna. Interestingly, Ibn Hishām does not report the details of *al-Gharānīq* despite the fact that his sheikh, Ibn Ishāq, mentions it in his *sīra*. He only refers to it briefly when he speaks about the returning migrants to Mecca. This is probably due to his methodology. In his introduction, Ibn Hishām stipulates that he will not mention things that Ibn Ishāq narrated in his book, because “it was ugly to mention it, or mentioning it will irritate some people or al-Bakkā’ī³⁸ did not approve it” أشياء يشنع الحديث به وأشياء يسوء بعض الناس ذكره وأشياء لم يقر لنا البكائي بروايته (Ibn Hishām vol.1 p.12).

On the other hand, this phrase of Ibn Hishām means that he was committed to transmit the whole *sīra* of Ibn Ishāq, but there was a process of filtering and this is why he did not mention the story of *al-Gharānīq*. Nevertheless, another student of Ibn Ishāq also

³⁷ In brief, the story of *al-Gharānīq* was about the two “verses” which praised the idols that Satan put in the mouth of the Prophet. When the Prophet said them the non-Muslims prostrated with the Muslims. Once they heard this, Muslims who had migrated to Abyssinia thought that Quraysh had converted to Islam, so they returned to Mecca only to find that this was not true. The full details of the story will be presented in the following pages.

³⁸ Ziyād Ibn °Abdullah al-Bakkā’ī (183H) was the student of Ibn Ishāq and at the same time the sheikh of Ibn Hishām, who transmitted the *sīra* of Ibn Ishāq to him.

transmitted his *sīra*, though this has not survived in its complete form. His name was Ibrāhīm Ibn Sa°d (157H). All that survived of his work were odd bits of his narration within other books, like *al-Rawḍ al-Anif* authored by al-Suhaylī (581H) and others.

As for al-Ṭabarī, he does not narrate the story from one source, as is usual for him. His methodology is based on gathering the material from different sources regardless of whether its chain, *sanad*, is strong enough or not. He narrates different parts of the story from different sources and chains. First he reports on the authority of Abān al-°Aṭṭār (160 H), and Hishām Ibn °Urwa (146 H) on the authority of °Urwa, the circumstances the Muslim faced in Mecca and the Prophet’s permission for them to migrate to Abyssinia. However, he reports the number of the Muslims who migrated, their names, and how they migrated quoting Ibn Sa°d, i.e. on the authority of al-Wāqidi. Then on other occasions, he narrates on the authority of Ibn Ishāq.

He also narrates in detail the account of *al-Gharānīq* and its impact on the Muslims in Abyssinia and its role in making them return to Mecca, on the authority of Yazīd Ibn Ziyād on the authority of Muḥammad al-Qurazī. He then reinforces this account from a chain other than Ibn Ishāq. He narrates it from the chain of Ḥajjāj on the authority of Abu Ma°shar on the authority of Muḥammad al-Qurazī, with some differences in the details. Al-Ṭabarī does not mention the second migration to Abyssinia.

Ibn °Abd al-Barr (463H) relies wholly on the narration of Ma°mar Ibn Rāshid (154H), one of the three students of al-Zuhrī³⁹, on the authority of al-Zuhrī. This narration offers an excellent opportunity to compare the narrations of the two pupils of al-Zuhrī, Ibn Ishāq and Ma°mar.

The narration of Ibn °Abd al-Barr includes the circumstances before the migration, the Prophet’s permission for the Muslims to migrate, the first migrant and the names of all migrants. He also discusses the stay in Abyssinia, and finally he names the migrants who returned to Mecca after they heard that Quraysh had converted to Islam.

In comparing this narration and the narration of Ibn Ishāq, we find that Ibn °Abd al-Barr does not mention the delegation of Quraysh to al-Najāshī, the incident of *al-Gharānīq*,

³⁹ The other two students are Mūsa Ibn °Uqba (141H) and Muḥammad Ibn Ishāq (150H).

the second migration, or any incident when the returning Muslims sought the *jiwār* of Quraysh.

Notable in the account of Ibn ʿAbd al-Barr is the fact that he recounts the long list of those who migrated and those who returned to Mecca without indulging too much in the details and dimensions of the story.

As for Ibn Kathīr (774H), he follows in the footsteps of al-Ṭabarī in narrating the different parts of the story from different sources. For instance, he narrates on the authority of al-Wāqidī the reasons behind the first migration of the Muslim and their names. Then he emphasizes this by mentioning Ibn Ishāq’s narration. He also makes comparisons between the narration of Ibn Ishāq and the narration of his counterpart Mūsā Ibn ʿUqba (141H) and states his opinion on which is most accurate. He states the date of the first migration and quotes Mūsā Ibn ʿUqba saying it was when Quraysh imposed the boycott on Banī Hāshim, the tribe of the Prophet. He then says of this: “It is doubtful” وفي هذا نظر (Ibn Kathīr, n.d, vol.3, p.67)

Moreover, he ponders the opinion of Ibn Ishāq about Jaʿfar Ibn Abu Ṭālib and whether he migrated in the first wave or the second. Mūsā Ibn ʿUqba says that he was in the second migration while Ibn Ishāq says he was in the first. Then Ibn Kathīr said: “What Ibn Ishāq mentioned about his migration in the first wave is stronger” ما ذكره ابن اسحاق من خروجه في الرعي الأول أظهر (Ibn Kathīr, n.d, vol.3, p.67).

He goes on making comparisons and agrees with Ibn ʿUqba on the delegation of Quraysh. Ibn Ishāq said it consisted of ʿAmr Ibn al-ʿĀṣ and ʿAbdullah Ibn Abī Rabīʿa, while Mūsā Ibn ʿUqba said it consisted of ʿAmr Ibn al-ʿĀṣ and ʿAmāra Ibn al-Walīd. Then Ibn Kathīr said that “What (Mūsā Ibn ʿUqba) said was mentioned in the *ḥadīth* narrated by Ibn Masʿūd and Abu Mūsā al-Ashʿarī”. (Ibn Kathīr, n.d, vol.3, p.75)

Ibn Kathīr supports his ideas with reference to the relevant *ḥadīths* from al-Bukhārī, as in the account of Abu Mūsā al-Ashʿarī and whether he migrated from Mecca with the Muslims or joined them from Yemen, and as in the Prophet’s prayer for al-Najāshī after his death.

In addition to that, he narrates on the authority of al-Umawī the delegation of Quraysh to al-Najāshī and what happened to them afterwards.

Overall, Ibn Kathīr depends essentially on the narration of Ibn Ishāq. His account is comprehensive and covers all the main topics of the story. He starts with the circumstances that drove the Muslims to migrate to Abyssinia and then narrates their names and numbers. After that he recounts what happened to them in Abyssinia. He then focuses on the delegation of Quraysh that came to Abyssinia to demand the return of the Muslims to Mecca and how al-Najāshī responded to them. Moreover, he names the Muslims who decided to go back to Mecca after they heard the story of *al-Gharānīq*, which he does not detail “lest it be heard by he who does not put it in its place [not appreciate it]” لئلا يسمعها من لا يضعها مواضعها (Ibn Kathīr, n.d, vol.3, p.90). Finally, he recounts some of the stories in which some Muslims sought *jiwār* of the non believers, like the story of Uthmān Ibn Maz°ūn who sought the *jiwār* of al-Walīd Ibn al-Mughīra and the story of Abu Bakr who accepted the *jiwār* of Ibn al-Dighna.

With reference to the second chain, we find that Ibn Sa°d’s narration is very brief. He reported the difficult circumstances that drove the Muslims to migrate to Abyssinia and named those who migrated. He also talked about the story of *al-Gharānīq* and its role in making the Muslims, who migrated to Abyssinia, return to Mecca.

An interesting point in Ibn Sa°d’s narration is that the sheikh of Ibn Sa°d, al-Wāqidī (207H), in one of the very rare occasions, narrates on the authority of al-Zuhrī (124H), the sheikh of Ibn Ishāq, in some parts. That was when he mentions the circumstances the Muslims faced in Mecca before the migration to Abyssinia, the news of Quraysh’s conversion to Islam and its impact on the decision the Muslims who had migrated made to return to Mecca. After that, he narrates the rest of the story from his own chain, i.e. from al-Wāqidī and his teachers.

In the following account, I will refer to the narration of Ibn Hishām simply because it covers all the main topics of the story and it is considered one of the earliest narrations. I will use other sources where appropriate either to support and explain an idea or to clarify important points. In these cases I will put the references in accordance to the Harvard system.

The circumstances that drove Muslims to migrate to Abyssinia

Despite the fact the Prophet was safe and protected by his uncle Abu Ṭālib, he did not feel comfortable. His followers were harassed and tortured day and night and he was incapable of protecting them. Thus he gave them permission to migrate to Abyssinia saying: “If you were to go to Abyssinia you will find a king with whom nobody is oppressed, and it is a land of truth, [stay there] until God grants an ease for you” لو خرجتم إلى أرض الحبشة فإن بها ملكا لا يظلم عنده أحد وهي أرض صدق، حتى يجعل الله لكم فرجا (Ibn Hishām, 1990, vol2. p.164).

The Muslims escaped to Abyssinia individually and in groups, to escape the torment they faced in Mecca. Some of them took their wives, while others migrated alone. In total, 11 men and four women formed the first migration in Islam.

Regarding the very first migrant, there is some dispute among the scholars although most of them agree that °Uthmān Ibn °Affān and his wife Ruqayya, the daughter of the Prophet, were the first to migrate⁴⁰.

Ibn Sa’d (n.d, vol.1, p.204) says that they set out to Abyssinia in the fifth year of Prophet’s mission, in the month of Rajab⁴¹. Once they got to the shore they found two trading ships travelling towards Abyssinia. The captains agreed to take them across the sea for half a Dīnār. Upon hearing about their flee, Quraysh followed them to the sea, but could not catch up with them.

When the Muslims reached Abyssinia, al-Najāshī gave them his *jiwār*. For the first time, they felt secure and could worship without fear. They showed their appreciation to al-Najāshī, and wished their fellow Muslims in Mecca could be with them.

The delegation of Quraysh to al-Najāshī

The news that Muslims were living in safety and security in Abyssinia were not good for the elite of Quraysh. They wanted to bring them back to Mecca and to force them to

⁴⁰ See Ibn Hishām (1990, vol.2, p.164), Ibn °Abd al-Barr (1982, vol.1, p.48), Ibn Kathīr (n.d., vol.3, p.66)

⁴¹ The seventh month in the Hijrī Date.

abandon Islam. After discussing this matter among themselves, they decided to send a delegation to al-Najāshī consisting of °Abdullah Ibn Abī Rabī°a and °Amr Ibn al-°Āṣ. The aim of this delegation was to convince al-Najāshī to hand the Muslims over to Quraysh. The delegation took valuable presents not only to al-Najāshī but to all the cardinals surrounding al-Najāshī.

As soon as the delegation arrived in Abyssinia, they gave the cardinals their presents and revealed their intentions. The cardinals agreed to help them. When they met al-Najāshī and gave him their gifts, they started to explain their mission. They told him that the Muslims were scurrilous people who had rejected their religion and mocked their Gods, and at the same time did not follow his religion.

Attentively, the king listened till they finished. He then told them that he would not hand over those who had asked for his *jīwār* and preferred his country to any other country, until he had questioned them about the delegation's claims. If they were as the delegation alleged, then he would return the Muslims to Mecca. Otherwise he would protect them and grant them *jīwār* as long as they were in his country.

When the Muslims were told they were to meet al-Najāshī for this reason, they gathered to discuss what they should say to him. Finally, they decided to tell him "what the Prophet, peace be upon him, taught and ordered us regardless of whatever may happen"
ما علمنا وما أمرنا به نبينا صلى الله عليه وسلم كائنا في ذلك ما هو كائن

This decision is significant. It shows how the principle of *jīwār* is affected by the new religion. It shows the insistence and resolve of the Muslims to say what they believed in regardless of whether this belief would impinge on the *jīwār* or not. Their faith came first for them, and whether this would offend al-Najāshī, the *mustajīr*, or not, was another issue. They understood the consequences very well. They knew that al-Najāshī would send them back to Mecca if he was not happy with their answer, but they resolved to say what they believed in.

When the Muslims stand before al-Najāshī, he quizzes them about this new religion that made them abandon the worship of the idols and at the same time prevented them from converting to his religion. Ja°far Ibn Abu Ṭālib is the spokesman of the Muslims. He

replies that they had been ignorant people who used to worship stones, eat dead animals (without proper slaughter), commit adultery and the powerful eat the weak. God then sent a Messenger from among them; they knew his lineage, his truthfulness, honesty and sincerity. He called upon them to worship God only and leave behind the worship of the idols. He also ordered them to be truthful in their sayings, fulfil their promises, visit their relatives and be friendly with their neighbours. He also prohibited them from killing each other. Moreover, he enjoined them to pray, give *zakāt*⁴² and fast. So, they believed in him and followed him. Their people, Quraysh, were unhappy with that and started to harass them and torture every believer to force him to return to the worship of the idols. The Muslims could not bear this torment, so they migrated to his country and preferred his *jiwār* to any other *jiwār* hoping that they would not be oppressed in his land.

Al-Najashī is deeply affected, especially after he listened to some verses of the Qur^{ān}. When Ja^{far} finished reciting al-Najāshī said: “This and what Jesus came with, come from one lantern. Go free, by God, I will not hand them over to you (the Meccan delegation)” إن هذا والذي جاء به عيسى ليخرج من مشكاة واحدة، انطلقا فلا والله لا أسلمهم إليكما (Ibn Hishām, 1990, vol.2 p.180).

Next day, the delegation comes back to al-Najāshī in a second attempt to turn him against the Muslims. They tell him that the Muslims believed Jesus to be a slave of God and not a son of God, as al-Najāshī believed.

Once again al-Najāshī calls upon the Muslims to explain these claims. Though mindful of the potentially disastrous consequences, the Muslims decide to tell al-Najāshī what they believed in regardless of whether or not this would displease him.

With all his cardinals surrounding him, al-Najāshī asks the Muslims about Jesus. Without hesitation, Ja^{far} replies: “He is a slave of God, His messenger and His word that He cast into the virgin and worshipper Maryam” هو عبد الله ورسوله وروحه وكلمته ألقاها إلى مريم العذراء البتول (Ibn Hishām 1990, vol.2, p.180)

⁴² *Zakāt* is the obligatory payment by Muslims of a determinate portion of specified category of their lawful property for the benefit of the poor and other enumerated classes (Bosworth, et al, 2002, vol.6, p.406-407).

Yet again, the Muslims emphasized that belief had priority over anything else and *jiwār* should not compromise the faith. Otherwise it should be ended whatever the price to be paid.

The Muslims stay in Abyssinia in safety and security in the *jiwār* of al-Najāshī until they heard the story of *al-Gharānīq* and the conversion of the Quraysh to Islam. They took the decision to return to Mecca three months after their migration to Abyssinia.

The story of *al-Gharānīq*⁴³ in brief as Ibn Sa°d (n.d, vol.1 p.204) and Ibn Ishāq (n.d, vol.2 p.158) report is that:

Hoping for the conversion of Quraysh, the Prophet wished that nothing of the revelation would descend to him that puts his people away from him. He began to get closer to them. One day he joined them in their club around the Ka°ba and started to recite the verses of *sūrat* al-Najm. In the middle of his recitation Satan put in his mouth two “verses”: “Those elevated *Gharānīq* will have promising concession” تلك الغرائيق العلى وإن شفاعتهن لترتجى (Ibn Sa°d n.d, vol.1 p.205). The Prophet said these two “verses” and continued the rest of the *sūra*. When he recited the verse where he should prostrate, he and the non-Muslims of Mecca prostrated including the elite of Quraysh like al-Walīd Ibn al-Mughīra who took some earth and put it on his forehead, as he could not prostrate because he was too elderly.

After that, the non-believers say to the Prophet that they would be with him as far as he made their idols welcome in the Hereafter. The Prophet is very upset at this and when Jibrīl, the Angel, descended to him, he denies that he had taught the Prophet these two “verses”, which saddened the Prophet even more.

To counsel him, God later reveals to his Prophet the verse (22:52): “Yet whenever We sent forth any apostle or prophet before thee, and he was hoping [that his warnings would be heeded], Satan would cast an aspersion on his innermost aims but God renders null and void whatever aspersion Satan may cast; and God makes His messages clear in

⁴³ *Al-Gharānīq* is the idols. Some scholars refuted this story and rejected it and spoke about the weakness of it in regard to the *sanad* (chain) and the *matn* (text). Others accepted it. See al-°Aynī (n.d, vol.7, p.100), al-Mubārakfūrī (n.d, vol.3,p.136), Ibn al-Jawzī (1997, vol.1, p.274) and al-Ḥalabī (1979, vol.2 p.9).

وَمَا أَرْسَلْنَا مِنْ قَبْلِكَ مِنْ رَسُولٍ وَلَا نَبِيٍّ إِلَّا إِذَا تَمَنَّىٰ «and by themselves for God is all-knowing, wise» أَلْفَى الشَّيْطَانُ فِي أَمْنَيْتِهِ فَيَنْسَخُ اللَّهُ مَا يُلْقِي الشَّيْطَانُ ثُمَّ يُحْكِمُ اللَّهُ آيَاتِهِ وَاللَّهُ عَلِيمٌ حَكِيمٌ

The news of the prostration spread amongst the Arabs, and reached the Muslims in Abyssinia. They thought that Quraysh had become Muslims, so most of them decided to return to Mecca.

When they got closer to Mecca they found out the truth. After discussions as to whether to go back to Abyssinia or enter Mecca, they chose the latter option. However, they could not do that without *jiwār* from the people of Mecca, as they were still wanted by Quraysh.

Most of them sought *jiwār* and entered Mecca. °Uthmān Ibn Maz°ūn was granted the *jiwār* of al-Walīd Ibn al-Mughīra. Nevertheless, when he felt that he could come and go securely and without fear, while his fellow Muslims were tortured and harassed, he felt ashamed and he decided to give back *jiwār* to al-Walīd.

Al-Walīd was amazed and asked if anybody had harmed him. °Uthmān said: “No, but I am satisfied with the *jiwār* of God and I do not want *jiwār* from anybody else” ولكني أرضى بجوار الله ولا أريد أن أستجير بغيره (Ibn Hishām 1990, vol.2, p.214). Then al-Walīd asked him to do that publicly, as he had granted him his *jiwār* publicly. When they got to the Ka°ba, al-Walīd said that °Uthmān wanted to give me back my *jiwār*. °Uthmān said: “He is right, I have found him sincere and generous to his *mustajīr*, but I liked not to ask *jiwār* except from God, so I give him back his *jiwār*” وقد صدق فقد وجدته وقيًا كريم الجوار، ولكني أحببت أن لا أستجير بغير الله فرددت عليه جواره (Ibn Hishām 1990, vol. 2, p.214).

Some days later, °Uthmān quarrelled with some people of Quraysh over a matter of faith and was injured in his eye. Al-Walīd was in the area and saw what happened to °Uthmān. Indirectly, he blamed him. He told °Uthmān that this need not have happened to his eye and that he had been in a secure *jiwār*. °Uthmān replied that his second eye was in sore need of what had happened to the first eye, and that he was in the *jiwār* of the One, More Powerful and More Glorified. Al-Walīd once again offered his *jiwār* to °Uthmān, but he refused.

Clearly, °Uthmān did not reject the *jīwār* of al-Walīd because a new Islamic legislation had emerged. He refused it because he wanted to feel like his fellow Muslims who were being tortured in Mecca. This in itself indicates the strong bonds Islam had created among its followers. These emotional bonds were stronger than the tribal ties and blood lineage. This was the real revolution that the society was experiencing.

Another important aspect of this account is the fact that the Muslims kept on dealing with the mechanism and formalities of *jīwār* in the same way the Arabs had. °Uthmān accepted *jīwār* and later went to the Ka°ba and publicly released al-Walīd from the responsibility of *jīwār*. In other words, the changes Islam had applied to *jīwār* were not in the form, or the rights and duties, but in the sense that the principle itself should not contradict the Islamic faith.

Abu Bakr accepts the *jīwār* of Ibn al-Dighna

Another example of a high profile Muslim accepting the *jīwār* of a non-Muslim is Abu Bakr. The second person after the Prophet to lead the Muslims, his faith according to °Umar Ibn al-Khattāb (al-Dhahabī, 1992, vol.8 p.405) was heavier than that of the whole nation if it were to be weighed.

Like the Prophet and other Muslims, Abu Bakr is harassed and persecuted by Quraysh because of his conversion. He asks the Prophet's permission to migrate and Prophet gave it. Abu Bakr leaves Mecca and after two days of travel, he meets Ibn al-Dighna who asks him where he was going. Abu Bakr explains that his people had harmed him and that he is leaving Mecca. With enthusiasm, Ibn al-Dighna tells Abu Bakr that he is a noble man and that he used to help the needy and do well to everyone. Eventually, he offers him his *jīwār*. Abu Bakr accepts and they return to Mecca together.

Upon their arrival to Mecca, Ibn al-Dighna announces that he had granted his *jīwār* to Abu Bakr and that nobody should do him any harm. Accordingly, Quraysh stopped harming him.

The days after that went peacefully until the elite of Quraysh complained to Ibn al-Dighna that Abu Bakr had harmed them by his prayers. They told him that the prayer

room Abu Bakr had established outside his home had become a focal point for their children, women and slaves, and that they were afraid Abu Bakr would spoil them. Ibn al-Dighna went to Abu Bakr to discuss the complaint. He asked him either to pray inside his home or to give back his *jiwār*. Without hesitation, Abu Bakr renounced his *jiwār* and told him that he would be satisfied with God's *jiwār*. Instantly, Ibn al-Dighna announced that he was no longer the *mujīr* of Abu Bakr.

Again this example underlines the acceptance of *jiwār* by different Muslims. Moreover, the Muslims adhered to the conditions of the *mujīr* and in case of dispute they were more than willing to give back the *jiwār*.

Conclusion:

The migration to Abyssinia was the first collective migration in Islam. The Prophet's permission to the Muslims to migrate was an Islamic legislation of immigration to seek protection in non-Muslim countries when oppression and injustice occur. However, this migration should not compromise the faith and if there is a contradiction between them, the faith should take priority.

On the other hand, Muslims should fulfil their promises and adhere to the conditions of the protection contract as far as these conditions were acceptable in Islam.

Another important aspect of this story is the migration of women alongside their men. Ibn 'Abd al-Barr (1982, vol.1 p.49) narrates that Ḥudhayfa Ibn 'Utba Ibn Rabī'a fled from his father fearing for his religion with his wife, Sahla Bint Suhayl Ibn 'Amr "challenging her father and fleeing with her religion" مراغمة لأبيها فارة عنه بدينها.

This indicates that women were not migrating simply because their husbands were. On the contrary, they were fully aware of what they were doing. Sahla challenged her father when she converted to Islam and challenged him again when she migrated to find a place where she could worship without fear.

This shift in attitudes to women in the *jāhili* society, which according to some sources⁴⁴, considered women a property to be inherited after the death of her husband, could be attributed to the moral and intellectual revolution Islam had brought about among its followers in a very short period of time.

This was the first time the Arabs witnessed women migrate in search of justice. The thorough search of the sources I have conducted has not revealed an example in Arab life before Islam of a woman migrating in search of *jiwār* from another tribe.

Ibn Kathīr makes reference to another case that emphasizes this understanding, that of Um °Abdullah Bint Ḥarmala. She and her husband decide to migrate to Abyssinia. One day, as she is preparing to set out and her husband, °Āmir, goes to get some things, and °Umar Ibn al-Khaṭṭāb comes. Noticing that they are preparing to travel, he asks her about what was going on. Without hesitation, she replies: “Yes, by God we will go out to a place in God’s earth until God grants us a way out of this. You have harmed and oppressed us” (Ibn Kathīr, 1964, vol.3, p.78).

Clearly, she was fully aware of the implications of her acts. She was migrating for God’s sake to find a place where she could worship without fear. This was something the Arabs had not witnessed in the *jāhiliyya*.

It can safely be concluded that the Islamic tradition rejects oppression and tyranny and calls for freedom and protection. If this protection is not available in a particular place, the oppressed should migrate to a safer place. The Prophet’s order to his companions to migrate to Abyssinia formed a clear Islamic legislation of migration to non-Muslim countries. It is true that the Arabs of the Peninsula would move from one place to another due to the nature of Bedouin life, and in some cases to seek *jiwār*: But this collective migration was the first in Islam and it is the precedent that made the *jāhili* custom an Islamic one. The Prophet, in giving permission to his followers to migrate, was legalizing the migration of oppressed people to any place where there was justice.

⁴⁴ After the death of her husband, his son from another woman, or one of his close relatives once he put his cloak on her, had the right to do anything with the woman. He could marry her, make her marry someone else or even keep her without marriage for ever. God forbade this in the Qur’anic verse (4:19). See on this al-Qurṭubī (1952, vol.5 p. 94), al-Bukhārī (1987, vol.4 p.1670) and Ibn Kathīr (1980, vol.1 p.466).

Moreover, this legislation was not only for the Muslims at that time, but for all Muslims until the Day of Judgment.

In another sense, this legislation imposes heavy duties on the Islamic state. The early Muslims tasted torment and knew what oppression was. Their state should not only be free of any kind of oppression, suppression and tyranny, but should be ready to do whatever it could to protect the weak and the oppressed and be a safe haven for those seeking protection. Many verses and *ḥadīths* stress that God does not like oppressors: “God does not love oppressors” *والله لا يحب الظالمين* (Q. 3:57). In the *ḥadīth Qudsī* God says: “O My slaves, I have forbidden oppression for Myself and have made it forbidden amongst you, so do not oppress one another” *يا عبادي إني حرمت الظلم على نفسي وجعلته بينكم محرما فلا تظالموا* (Muslim, n.d, vol.4 p.1994).

The Migration to Medina

When °Umar Ibn al-Khaṭṭāb convened a meeting of the elite of the companions to decide upon a system of dating, according to one account⁴⁵, some of the companions suggested the day of revelation to be the start point while others proposed the year of the Prophet's death. Then °Umar said, as al-Ṭabarī reports (n.d, vol.2 p.3): "Verily, we shall start dating from the [year] of the Prophet's *hijra*, as his *hijra* was a severance between the truth and the falsehood" بل نؤرخ لمهاجر رسول الله فإن مهاجره فرق بين الحق والباطل. These words from the second Caliph sum up the absolute importance of the *hijra* and its significant impact on the course of history.

The *hijra* to Medina was not the first of its kind, as the *hijra* to Abyssinia preceded it by eight years. However, it was unique in the sense that it symbolized the start of the coming era, where Muslims established their own state for the first time in history, practiced their religion without fear of persecution and spread Islam outwards.

The sources and analogy of this topic

Adhering to my methodology, I will study the six compilations of *sīra* that I have already used, and then choose one of them to trace and analyze the course of events that occurred before, during and after the *hijra* to Medina.

Ibn Ishāq (151 AH), *Sīrat Ibn Ishāq*

Unfortunately, what the surviving sections of this book make no reference to the *hijra* to Medina, other than short sketches about the Prophet's preaching to the Arab tribes who came for pilgrimage.

⁴⁵ There are various accounts of this occurrence. Some of the accounts state that °Alī Ibn Abī Ṭālib was the person who suggested the *hijra* to be the start point of dating, other accounts cite that it was the Prophet himself who pointed out to calculate dates from his arrival in Medina, and used this date when he sent letters to the Christians of Najrān inviting them to convert to Islam. For full details about these accounts see; al-Ṭabarī, (n.d, vol.2 pp.3-6) also, al-Suyūṭī, (1978, vol.1 p.19-23), Ibn al-Jawzī, (1939, vol.4. p.228), Ibn Sa°d, (n.d, vol.3 p.281 and Ibn Kathīr (n.d, vol.3 p.206).

Ibn Hishām (213 AH), *Sīrat Ibn Hishām*

Ibn Hishām who narrates on the authority of Ibn Ishāq, reports the whole course of events concerning the *hijra* to Medina. He starts with the attempts of the Prophet to convert the Arab tribes and details the names of tribes and how they replied to the Prophet. He then reports the account of the group of Banī al-Najjār who met the Prophet in Mecca and converted to Islam (Ibn Hishām, 1990, vol.2, p.277)

After that he describes the first allegiance, *bay'at al- 'Aqaba al- 'ūlā* including the names of the *Anṣār* who swore the allegiance and the wording of the allegiance itself. He then relates the account of Muṣ'ab Ibn 'Umayr in Medina and his successful efforts to spread Islam, including the conversion of the elite of the tribesmen there, such as Usayd Ibn Huḍayr and Sa'd Ibn Mu'adh (Ibn Hishām, 1990, vol.2, pp.279-282).

After that Ibn Hishām goes on to detail the second allegiance, *bya'at al- 'Aqaba al- thāniya*. He names the 71 men and two women who attended that night. He also relates what the Prophet and his uncle al-'Abbās asked for and the reply of the *Anṣār*: He affirms the incident of the devil *al-Shayṭān* when he shouted loudly to warn Quraysh of *al- 'Aqaba* meeting, and the incident of the capture of Sa'd Ibn 'Ubāda and his release (Ibn Hishām, 1990, vol.2, p.287).

Additionally, Ibn Hishām cites the Prophet's permission for the Muslims to migrate, but he exclusively details many accounts of Muslims migrating to Medina and the suffering they experienced from Quraysh upon that (Ibn Hishām, 1990, vol.2, p.314).

He then reports the conspiracy of Quraysh to get rid of the Prophet and his miraculous escape from them. In addition, he narrates the pursuit of the Prophet by Quraysh, including the story of Surāqa Ibn Mālik, the Thawr grotto, the way and the places the Prophet and his companion passed through to Medina (Ibn Hishām, 1990, vol.2, p.320).

Finally, Ibn Hishām states the warm welcome of the *Anṣār* to the Prophet, the building of the mosque, the brotherhood bond between the *Anṣār* and the *Muhājirūn* and the details of the new constitution, which arranged relations among Medinan society including the Jewish tribes (Ibn Hishām, 1990, vol.2, p.324).

Ibn Sa°d (230 AH), *Ṭabaqāt Ibn Sa°d*

Ibn Sa°d reports the *hijra* to Medina from the beginning. He describes the circumstances before *hijra*, the Prophet's attempts to convert one of the pilgrim Arab tribes to Islam and his eventual success in converting the six people of Banī al-Najjār in the season of pilgrimage. He relates a superficial account of the first allegiance *bay°at al-°Aqaba al-°ūlā* and the dispatch of Muṣ°ab Ibn °Umayr to Yathrib, but a more detailed account of the second allegiance *bya°at al-°Aqaba al-thāniya*, the terms and conditions of the Prophet and his uncle al-°Abbās and the acceptance of the *Anṣār* (Ibn Sa°d, n.d, vol.1, pp.216-218)

After that Ibn Sa°d reports the permission of the Prophet to the Muslims to migrate to Medina, the conspiracy of Quraysh against the Prophet and his miraculous escape from them. He then reports the migration of the Prophet and his companion Abu Bakr including their refuge in the cave of Thawr during the failed chase of Quraysh. He also mentions in this context the account of Um Ma°bad and the account of Surāqa (Ibn Sa°d, n.d, vol.1, pp.225-229).

Finally, Ibn Sa°d ends his narration by reporting the very warm welcome of the *Anṣār* to the Prophet and his companion and touches briefly upon the brotherhood between the *Anṣār* and the *Muhājirūn* (Ibn Sa°d, n.d, vol.1, p.238).

Al-Ṭabarī (310 AH), *Tārīkh al-Ṭabarī*

Al-Ṭabarī adopts the narration of Ibn Ishāq fully with almost no variation on what Ibn Hishām narrates on the authority of Ibn Ishāq (al-Ṭabarī, 1984, vol.1, p.558).

Ibn Kathīr (774 AH), *al-Bidāya wa al-Nihāya*

Ibn Kathīr also relies generally on the narration of Ibn Ishāq, but also makes some comparisons in certain places between the narration of Mūsā Ibn °Uqba, the counterpart of Ibn Ishāq, and the narration of Ibn Ishāq. In addition, Ibn Kathīr includes more detail from other traditions and narrations, like the spinning of the spider's web over the

entrance of the cave and the pigeons that laid their eggs there (Ibn Kathīr, n.d, vol.3, p.228).

Al-Ḥalabī (1044 AH), *al-Sīra al-Ḥalabiyya*

Al-Ḥalabī depends on the narration of Ibn Ishāq, but adds significant detail from other traditions and sometimes even from the narration of al-Wāqidī, the sheikh of Ibn Saʿd. He also comments on the course of events and supports his claims with quotations from the jurists and history scholars.

Regarding the compilation, I will rely on *Sīrat Ibn Hishām* to trace and analyse events because Ibn Hishām covers the migration to Medina in most detail, in particular the condition of the Muslims in Medina, the brotherhood, the constitution and other elements pertinent to this research. Also the narration of Ibn Ishāq (150 AH) is considered one of the earliest narrations and many scholars depended on it to report the events of *Sīra*. In his book *Maṣādir al-Sīra al-Nabawiyya wa Taqwīmuhā*, Fārūq Ḥamāda (1980, p.71) says: “Ibn Ishāq was the master of this art to all those who came after him, without any argument. His book was the thorough source and the basic material for anyone who wants to write or talk about the *sīra* of the Prophet”.

The atmosphere in Mecca before *hijra* to Medina

In this period, the torture and oppression of Muslims by the Quraysh continued, making the need for a safe haven a priority. Some Muslims sought refuge in Abyssinia, while others stayed in Mecca, for various reasons, despite the dreadful conditions there.

The Prophet’s efforts to convert people to Islam, especially the elite of the Arab tribes, does not stop after the experience in al-Ṭāʿf. He exposes himself to various troubles in preaching to the tribes who come to perform pilgrimage in Mecca. These tribes, in most cases, not only reject his message but also harass and mock him. As Ḥamīdullah (1974, p.54) says: “The fifteen tribes he had approached without any result represented the

whole of the Arabian Peninsula; tribes from the North, the South, the East, the West and the Centre of the desert continent". However, this bitter and harsh rejection does not deter him. He remains confident that the day would come when all the Arabs would convert to Islam. This was particularly the case after his miraculous journey *al-Isrā' wa al-Mi'rāj* to heaven, where he saw the world of the unseen, Paradise, Hellfire, the previous prophets, the angels and much more.

A spark of hope comes from Yathrib

The meeting between the Prophet and the pilgrims from Khazraj who eventually convert to Islam gives hope to the Prophet that the achievement of his mission is drawing closer.

A year after this crucial meeting, a group of twelve people, nine from al-Khazraj⁴⁶ and three from al-Aws, come to meet the Prophet in Mecca. They meet in Mina valley in a place called al-°Aqaba, after which the allegiance was named *al-°Aqaba* allegiance.

The members of the delegation stand out. The three men from al-Aws in this delegation are a powerful indication of the absolute sincerity and earnestness of the Khazrajite group who promised the Prophet to spread the word in Medina. They did not spread it only amongst their tribe, al-Khazraj, but also triumphed over their enmity and approached al-Aws with the new religion. Watt (1994, p.146) describes the situation in Medina at the time: "No formal peace was made after Bu°āth⁴⁷, but the combatants were too exhausted to continue the struggle actively. For the most part, the enemy groups avoided one another, but there was a state of hostility, and, if a man was careless and gave his opponents an opportunity, he was liable to be murdered".

⁴⁶ From these nine, there were two men from Banī °Awf who were known by al-Qawāqil. They were called by this name because they used to give *jiwār* to whoever asked for it, and when they did so they used to give the *mustaiir* an arrow and tell him *قول* i.e. walk proudly in Madina (Ibn Kathīr, n.d, vol.2 p.280).

⁴⁷ It is the last famous battle between al-Aws and al-Khazraj, and the victory was to al-Awas and its allies over al-Khazraj and its allies. See al-Shaybānī (1994, vol.1 p.538)

This could mean that the Khazrajite Muslims took some risk in approaching al-Aws with this religion. Once again, this demonstrates that their enthusiasm for the new religion was not a matter of political interest, as Watt says (1994, p.I) but an intellectual convention and an emotional belonging. Otherwise, they might have restricted their preaching of Islam to their own tribe, al-Khazraj, and not spread it to all the tribes in Medina as Hamīdullāh says (1974, p.55).

The essence of the allegiance, which the delegation came to swear before the Prophet, was adherence to monotheism and the rites of Islam. The literal text of this oath, as Ibn Hishām (1990, vol.2 p.280) states, was: “Not to ascribe anything as a partner to God and nor to steal or to commit illegal sexual intercourse, nor kill our children, nor fabricate any calumny either by hands [or to walk into it] by feet, nor disobey him in any good” أن لا نشرك بالله شيئا ولا نسرق ولا نزني ولا نقتل أولادنا ولا نأتي ببهتان نفتريه من بين أيدينا ” وأرجلنا ولا نعصيه في معروف

Should they stick to these commands and fulfil their promises, the reward would be Paradise. Otherwise, “their fate was up to God Exalted is He, either He forgives or punishes them”, as the Prophet said (Ibn Hishām, 1990, vol.2 p.280).

This oath of allegiance was called the allegiance of women, *bay‘at al-nisā’*, because fighting was not obligatory on them. However, by this allegiance a new base for the oppressed Muslims in Mecca was in the making. To strengthen this base, the Prophet sent one of his intimate companions, Muṣ‘ab Ibn ‘Umayr, to teach the Medinan Muslims the Qur’ān and spread Islam among the tribes.

Muṣ‘ab’s mission was a great success. After only a year, there was no house in Medina that had not heard about Islam. In addition, seventy three high profile Medinan Muslims came to the Prophet to swear allegiance to him, in what is known as the second allegiance, *bya‘at al-‘Aqaba al-thāniya*.

The second allegiance, *bya'at al-°Aqaba al-thāniya*⁴⁸

Accompanying five hundred non-Muslim pilgrims from among their people, the seventy three Medinan Muslims, including two women, went to Mecca to meet the Prophet. The meeting was arranged at the same place, *al-°Aqaba*. Discreetly, the Medinan Muslims went along without their non-Muslim relatives suspecting anything.

The Prophet is there, accompanied by his non-Muslim uncle al-°Abbās who comes to ensure the quality of the deal they would strike with the Prophet. Being the first one to speak, al-°Abbās, as narrated by Ibn Hishām (1990, vol.2, p.290) says: “O people of Khazraj⁴⁹, verily Mohammad is in [a unique] position within his tribe, as you know. We have protected him from our own people who do not believe in him like me⁵⁰. He is respected within his people and protected in his country. However, he refused but to align and depart to you. Should you think that you can fulfil what you have promised him and protect him from his opponents, then it is up to you to face what you have borne. But, if you think that you may surrender him and let him down after he departs with you, then leave him now, as he is respected and protected in his country and amongst his people”

يا معشر الخزرج إن محمدا منا حيث قد علمتم وقد منعنا من قومنا ممن هو على مثل رأينا فيه فهو في عز من قومه ومنعة في بلده وإنه قد أبى إلا الانحياز إليكم واللحوق بكم فإن كنتم ترون أنكم وافون له بما دعوتموه إليه ومانعوه ممن خالفه فأنتم وما تحملتم من ذلك وإن كنتم ترون أنكم مسلموه وخاذلوه بعد الخروج به إليكم فمن الآن فدعوه فإنه في عز ومنعة من قومه وبلده

Respectfully, the delegation answers that they had listened and then asked the Prophet to speak and set whatever conditions he likes. After preaching and reciting some verses of the Qur°ān, the Prophet puts before them his condition to migrate, as Ibn Hishām (1990, vol.2 p.291) states: “I accept your allegiance [on the condition that] you protect me from what you protect your women and children”

أبايعكم على أن تمنوعوني مما تمنعون منه نساءكم وأبناءكم

⁴⁸ Ibn Sa°d call it *Bya'at al-°Aqaba al-°Ākhira*

⁴⁹ He called upon al-Khazraj only although al-Aws were there because the Arabs used to call both of al-Awas and al-Khazraj al-Khazraj, either because al-Khazraj was the majority or because they were the powerful tribe.

⁵⁰ In the narration of Ibn Sa°d he added: “By God we all protect him, irrespective whether we follow him or not. Those who do not follow him protect him out of lineage and honour”

لم يكن منا من كان على قوله ومن يمنعه والله منا من كان على قوله ومن يمنعه للحسب والشرف

Obviously this was the condition for the Prophet's migration to Medina. He wanted a protection, a safe haven and a base for him to set out preaching and spreading his message.

To demonstrate their sincerity and acknowledgement of the serious implications, al-Barā' Ibn Ma'rūr stands full with pride, takes the Prophet's hand and says, according to Ibn Hishām (1990, vol.2 p.291): "Yes, by He Who has sent you with the truth, we will protect you from what we protect our women, so accept our allegiance O the Messenger of God. By God we are the sons of wars and the people of battle, we have inherited it from noble grandfathers" قال نعم والذي بعثك بالحق لنمنعك مما نمنع منه أزرننا فبايعنا يا رسول الله فنحن والله أبناء الحروب وأهل الحلقة ورثناها كإبراهيم عن كابر

By this reply the *jīwār* is struck between the Prophet and the Muslims of Medina. It is a clear manifestation that the Islamic tradition accepts the contract of *jīwār* and endorses it. They promised to protect him as they protected their women and children, which meant they were ready to die, if need be, to defend him. Nonetheless, their reasons for accepting such a risky and dangerous deal were different from the motivations of ordinary tribesmen who gave *jīwār*: Their motives were not mainly fame and reputation but reward in Paradise. This kind of reward was unfamiliar to the Arab tribes. From then on, the factor of religion was present when making the *jīwār* contract.

The start of migration to Medina

Unconfirmed news of the allegiance reached Quraysh who intensified their torture, harassment and persecution of the Muslims in Mecca. If the news turned out to be true, then their trade would be threatened and Yathrib would provide a military base for the Muslims to launch attacks against them.

According to Ibn Sa'd (n.d, vol.1 p.224), God reveals to His Prophet through a vision the permission for Muslims to migrate to Medina. The Prophet then tells his companions that: "God, Exalted is He, has made for you brothers and a home where you should be safe" إن الله عز وجل قد جعل لكم إخوانا ودارا تأمنون بها (Ibn Hishām, 1990, vol.2 p.314). Hastily, the distressed Muslims start to migrate individually and in groups. No Muslim remains in Mecca, except for the Prophet, Abu Bakr, and 'Alī as well as those

who are compulsorily detained and locked up, or too sick or weak to travel (Ibn Sa°d, n.d, vol.2 p.224).

With the mass migration of the Muslims, Quraysh realizes that their worst fears were materializing. The Prophet would join his followers sooner rather than later and consequently fight them with his zealous followers. Hence, they convened an urgent assembly in *Dār al-Nadwa*⁵¹, to decide how to deal with the Prophet. After lengthy discussion they agree upon killing the Prophet by a group of men selected from different divisions of Quraysh, so that the Prophet's tribe, Banī °Abd Manāf could not seek revenge after his killing.

This plot and the alternatives discussed in dealing with the Prophet were swiftly revealed to the Prophet by Jibrīl, the Angel (8:30): "And when those who disbelieve plot against you to pin you down, or to kill you or to exile you; they plot and plan, and Allah too plans; but the best of planners is Allah" وَإِذْ يَمْكُرُ بِكَ الَّذِينَ كَفَرُوا لِيُثْبِتُوكَ أَوْ يَقْتُلُوكَ أَوْ يُخْرِجُوكَ وَيَمْكُرُونَ وَاللَّهُ خَيْرُ الْمَاكِرِينَ

This was the awaited permission for the Prophet to migrate as al-Rāzī says (2000, vol.16, p.51). Divine Providence intervened to protect the Prophet. God aborted the plot of Quraysh and saved his Prophet from the fighters who surrounded his home. The Prophet then went to Abu Bakr to accompany him on his journey to Medina.

The details of the Prophet's journey to Medina and the precautions he took reveal the deep sense of insecurity he felt. His order to °Alī Ibn Abī Ṭālib to sleep in his place, the choice of an unconventional route to Medina, the use of the goats that °Abdullah Ibn Abu Bakr used to graze to wipe out their footsteps and the refuge of the Prophet and his companion at the Thawr Grotto during the pursuit of Quraysh, all demonstrate the Prophet's reliance on God and the employment of every possible human measure to achieve his goal. These measures also indicate the fear experienced by the Prophet and his companion in fleeing from Mecca and escaping the assassination attempt.

⁵¹ A place Quraysh used to convene meetings in, to take crucial decisions, as Ibn Ishāq says, see (Ibn Hishām, 1990, vol.3, p.5).

Whether this departure was flight or expulsion is something of a philosophical debate, as discussed by Rubin, (2003, p.44), and is of less relevance here. It was Quraysh who created the harsh conditions and made the atmosphere intolerable for the Prophet to live there any longer, hence he had to flee, as al-Rāzī says (2000, vol.16, p.51). They also pursued him to kill him while he was fleeing, and in this sense he was expelled forcibly. In any case, the outcome of both flight and expulsion was the same, as both drove the Prophet to Medina, where he established the first Islamic state.

Establishing the Islamic state in Medina

Upon the arrival of the Prophet in Medina, acceptance of Islam was spreading and the Muslims there waited eagerly for the Prophet to be among them. The welcome was very warm, as Ibn Hishām (1990, vol.3 p.20) states. However, there were a few tribes, specifically Khaṭma, Wā'il, Wāqif and Umayya, who were called "Aws Allah" that did not convert according to Ibn Hishām (1990, vol.3 p.29). The reasons for their refusal are not evident. However, Watt (1994, p.178) tried to explain it by the fact that "these clans were closely linked with the Jews. Their lands were apparently not in a solid block, but mixed among Jewish lands. Their position was thus weak, and it is understandable that they were not ready, without further observation at close quarters, to commit themselves irrevocably to a movement that was looked on with disfavour by their Jewish neighbours."

Some members of these clans converted to Islam covertly, but after the killing of 'Aṣmā' Bint Marwān al-Khaṭmī, who had arranged poems abusing the Prophet and his religion and inciting the men of her tribe to kill him, they openly declared their conversion without any fear⁵².

Opposition to the Prophet was not exclusive to these clans and the Jewish tribes also kept aloof from Islam. Given that the Prophet was not from among them, as they were expecting (Ibn Hishām, 1990, vol.2 p.276) they were disappointed. As Watt, (1994, p.198) says: "The great majority of the Jews did not merely accept Muḥammad, but

⁵² These tribes eventually converted to Islam and were the last in Medina to convert. For details see Ibn Kathīr (n.d, vol.5 p.221) and Ibn Hibbān (1975, vol.1, p.136).

became increasingly hostile. Very soon after the *hijra* it must have become clear that few Jews were likely to accept the Gentile Prophet”.

Opposition of the Prophet in Medina also included the *munāfiqūn*, the hypocrites, who overtly adopted Islam as their religion but clandestinely devised plots against the Prophet and his followers.

Having been about to be crowned as the king of Yathrib, °Abdullah Ibn Ubayy, the head of the hypocrites, considered the Prophet his enemy. The Prophet dealt with him gently and tried to win his heart but with no success. On the contrary, °Abdullah Ibn Ubayy kept trying to hurt the Prophet by inciting the Muslims against him, as occurred during the expedition of Banī al-Muṣṭaliq. When the Prophet heard about this he got angry but °Usayd Ibn Ḥudayr intervened and asked the Prophet to forgive him as narrated by Ibn Kathīr, (vol.4, p.157): “O the messenger of God, be kind [to him]. Verily, God has sent you to us and his people were arranging the pearls to crown him and he sees that you have taken his kingship” يا رسول الله ارفق لقد جاءنا الله بك وان قومه لينظمون له الخرز ليتوجوه فانه ليرى انك قد استلبته ملكا.

The role of the *munāfiqūn*, and especially this incident involving °Abdullah Ibn Ubayy in the expedition of Banī al-Muṣṭaliq, is important to understand the nature of Medinan society at that time.

The bond of brotherhood between the Muslims

The first step in his venture to establish the first Islamic state was the Prophet’s construction of the Mosque and his dwelling within it. This mosque functioned as a place for worship, for learning the teachings of Islam and for receiving the revelations. In addition, it was the government headquarters, where policy, social affairs, foreign affairs, economy, peace, war and anything else of importance to the Muslims, individually or collectively was decided upon. In brief, Islam for Medinan Muslims as Watt (1994, p.146) says: “Provided an economic, social, and political system. Of this system, religion was an integral part; it may be called the ideological aspect of the system”. There is little wonder then that the mosque played such a central part in the life of the Muslims.

To strengthen the internal front, the Prophet set an unprecedented course in the life of the Arabs then. He diminished their tribal relations and founded a new relationship called *al-mu'ākhā* brotherhood between the emigrants the *muhājirūn* and the people of Yathrib the *Anṣār*. According to Ibn Sa'd (n.d, vol.1, p.238) the Prophet: "Made them brothers on [the basis of] truth and equality and to inherit each other after death excluding their [non-Muslim] blood relatives" أخى بينهم على الحق والمؤاساة ويتوارثون بعد الممات دون ذوي الأرحام.

This relationship the *mu'ākhā* was new to them, but they embraced its implementation. One interesting account of this *mu'ākhā* was that between 'Abd al-Raḥmān Ibn 'Awf, (*muhājir*) and Sa'd Ibn al-Rabī' (from the *Anṣār*). According to the narration of Ibn Sa'd (n.d, vol.3, p.126) and Ibn Kathīr (n.d, vol.3, p.228) Sa'd told Ibn 'Awf: "I am the wealthiest man in Medina, so look at half of my riches and take it. I also have two wives, have a look at them and see who you fancy more, so that I divorce her [so you can then marry her]" أنا أكثر أهل المدينة مالا فانظر شطر مالي فخذته وتحتي امرأتان فانظر أيتهما أعجب إليك حتى أطلقها لك.

This portrait of generosity exceeded the familiar boundaries and customs of the Arab tribes before the advent of Islam. Generosity was one of the elevated characteristics the Arabs were proud of. The poets frequently arranged poems praising the generous and this praise played a crucial role in motivating people to help the needy either by providing them with food and shelter or by granting them protection and *jiwār*. However, the motivation here was not the poets' praise but the Prophet's praise and reward in the hereafter. This again shows that a new society based on new relations was emerging in Medina.

It is worth noticing that the *mu'ākhā* was not merely between the *Muhājirūn* on one side and the *Anṣār* on the other. It was actually between all sectors of society regardless of their position in the hierarchy at that time. The *Muhājirūn* themselves were bonded together as brothers by the *mu'ākhā*. The Prophet and 'Alī Ibn Abī Ṭālib became brothers and Ḥamza Ibn 'Abd al-Muṭṭalib, the Prophet's uncle and Zayd Ibn Ḥāritha, the servant of the Prophet, also became brothers in the light of this *mu'ākhā*. Hence, the ultimate aim of the *mu'ākhā* was not just to help the destitute and needy immigrants, but

to demolish the tribal ties and relations and build new allegiances based on religion alone. This new bond aimed at strengthening the internal front and constructing a harmonized society.

The *mu'ākhā* also shows the power of Islam and its innovation to establish strong relationships between its followers which could be needed badly in the Arab and Islamic world these days.

It is perhaps one of the rare occasions, if any, in history that we see such harmony between the immigrants and the indigenous people of a country. This success was due to the Islamic ideology on which the whole system was based. The *Anṣār* gave limitlessly because they wanted rewards in the hereafter, as they had been promised by the Prophet on the first day they met in al-^oAqaba and swore the allegiance to him. Without such unity and harmony, the newborn state probably could not have withstood the challenges inside and outside Medina.

For this unique hospitality and warm welcome from the *Anṣār* towards the *Muhājirūn*, they deserved eternal praise from God. In the *jāhiliyya*, the poem was the most effective way to praise and honour. Now it was the Qur^oān and the Prophet's sayings that took this position, although poetry continued to play a reduced role. An example of this praise was in the Qur^oanic verse (59:9): "And [it shall be offered, too, unto the poor from among] those who, before them had their abode in this realm and in faith - [those] who love all that come to them in search of refuge, and who harbour in their hearts no grudge for whatever the others may have been given, but rather give them preference over themselves, even though poverty be their own lot for, such as from their own covetousness are saved - it is they, they that shall attain to a happy state!" وَالَّذِينَ تَبَوَّأُوا الدَّارَ وَالْإِيمَانَ مِنْ قَبْلِهِمْ يُحِبُّونَ مَنْ هَاجَرَ إِلَيْهِمْ وَلَا يَجِدُونَ فِي صُدُورِهِمْ حَاجَةً مِّمَّا أُوتُوا وَيُؤْتُونَ عَلَى أَنْفُسِهِمْ وَلَوْ كَانَ بِهِمْ خَصَاصَةٌ وَمَنْ يُوقِ شَحْنًا نَفْسِهِ فَأُولَئِكَ هُمُ الْمُفْلِحُونَ

Regarding the *Muhājirūn* they were also praised in the Qur^oān (59:8) for their sacrifices: "[Thus, part of such war-gains shall be given] to the poor among those who have forsaken the domain of evil those who have been driven from their homelands and their possessions, seeking favour with God and [His] goodly acceptance, and who aid [the cause of] God and His Apostle: It is they, they who are true to their word!" لِلْفُقَرَاءِ

المُهَاجِرِينَ الَّذِينَ أُخْرِجُوا مِنْ دِيَارِهِمْ وَأَمْوَالِهِمْ يَبْتَغُونَ فَضْلًا مِّنَ اللَّهِ وَرِضْوَانًا وَيَنْصُرُونَ اللَّهَ وَرَسُولَهُ أُولَئِكَ هُمُ الصَّادِقُونَ

Despite the spirit of generosity, unity and brotherhood that spread across Medina, there were some isolated incidents which hint at the difficulty felt by some in relinquishing the blood-feud and *jāhily* tribal attitude. These incidents were fuelled by those representing the opposition in Medina, i.e. the *munāfiqūn* and the Jewish tribes there.

One of these incidents, narrated by Ibn Hishām (1990, vol.4, pp.254-256) occurred during the expedition of Banī al-Muṣṭaliq. It started when Jahjāh, the servant of °Umar Ibn al-Khaṭṭāb, scrambled with Sinān Ibn Wabar, an ally of al-Khazraj, then Sinān shouted: “O the people of the *Anṣār*”⁵³ and Jahjāh shouted: “O the people of *Muhājirūn*”. Hurriedly, two groups of the two sides gathered and carried their weapons, as a sign of readiness to fight. When °Abdullah Ibn Ubayy heard this, he became angry and started to abuse the *Muhājirūn* and blame his people for their hospitality towards them. He said: “They have become more than us and confronted us in our country. By God, we and those of the low class of Quraysh have become like what the predecessors said: Feed your dog and he will bite you. By God, if we return to Medina, the honourable will expel the meaner. Then he turned to those who attended his gathering of his people and said: This is what you have done to yourselves; you opened your country to them and shared your possessions with them. By God, if you had not given them what you have, they would have turned to anywhere other than your country”⁵⁴ قد نافرنا وكاثرونا في بلادنا والله ما أعدنا وجلابيب قريش هذه إلا كما قال الأول سمن كلبك يأكلك أما والله لئن رجعنا إلى المدينة ليخرجن الأعرز منها الأذل. ثم أقبل على من حضره من قومه فقال: هذا ما فعلتم بانفسكم احللتموهم بلادكم وقاسمتموهم أموالكم أما والله لو أمسكتهم عنهم ما بأيديكم لتحولوا إلى غير داركم. Part of this occurrence was recorded in the Qur^{ān} (63:7-8).

⁵³ These shouts are for calling help from the tribe when one is in danger and obviously the tribesmen must answer this call according to the blood-feud that they sacred and considered as a means of survival in that environment. See Watt (1994, p.261)

⁵⁴ It is remarkable how closely the words of Ibn Ubayy resemble the addresses of many extreme right-wing parties in the developed countries these days regarding immigrants. The logic and even the wording are similar. These parties speak about the immigrants who come to their countries to take over their jobs and share with them the benefits and the wealth of their countries. Thus they express the necessity to reduce their numbers, if not prevent them totally from entering their countries. Moreover, one can detect a kind of racist attitude within many of these extreme right-wing parties as they consider themselves superior to any other foreigners living with them in their countries, exactly as Ibn Ubayy thought. He believed that he was superior and honourable, and the migrating Muslims meaner and inferior.

The *munāfiqūn* were a kind of fifth column in the Medinan society. Despite that the Prophet did not take any direct action towards them, especially Ibn Ubayy. This could be due to the Prophet's intention to concentrate on building and nourishing the positive side of the society, hoping that the *munāfiqūn* would die away in the course of time. Also it could be that the Prophet did not want to send a wrong message to the other tribes by killing ʿAbdullah Ibn Ubayy. This was clear in the Prophet's response to ʿUmar Ibn al-Khaṭṭāb who asked the Prophet to kill him: "How would it be O ʿUmar if people propagate that Muḥammad kills his companions?" فكيف يا عمر إذا تحدث الناس أن محمدا يقتل أصحابه. It was then for political reasons that the Prophet did not kill him. The Prophet was proved right, when the closest circle of Ibn Ubayy started to blame and stop him from saying, let alone doing, anything to harm the Prophet (Ibn Hishām, 1990, vol.4, p.256).

Another powerful indication of the changes taking place in the society's tribal relations was the offer by the son of ʿAbdullah Ibn Ubayy after hearing what his father had said. He went to the Prophet and expressed his readiness to bring the head of his father to the Prophet, should he order him. The Prophet refused, however, and told him to be gentle with him as long as he was alive⁵⁵ (al-Ṭabarī, 1984, vol.28, p.116).

After this incident and what followed for Ibn Ubayy, the influence of the *munāfiqūn* started to fade while the Muslims continued to gather strength and might in establishing the new Islamic state, which became a safe haven for any Muslim seeking refuge.

The integration of the migrants into Medinan society perhaps has no historical precedent. The migrants did not only integrate fully into that society, but also became the governors of the country, not with occupation and oppression but with the cooperation of the indigenous people.

Giving *jīwār* to non-Muslims

Until the oppressed Muslims in Mecca started to migrate and build their state in Medina, they only knew one side of *jīwār*, that is to ask for it and be *mustajīr* rather than

⁵⁵ See also Ibn Ḥajar (n.d, vol.8, p.650)

mujir. However, as the first Islamic state in Medina grew capable of defending itself, Muslims began to experience the other side of *jiwār*; that is to be *mujir*, the one who gives *jiwār*.

Interestingly, we find in this period, examples of women giving *jiwār* to non-Muslims and the Prophet himself endorsing this *jiwār*: The account of the Prophet's daughter Zaynab giving *jiwār* to her non-Muslim husband al-°Āṣ is well known. As narrated⁵⁶ by Ibn Kathīr (n.d, vol.3 p.332) al-°Āṣ Ibn al-Rabī° refused to convert and stayed in Mecca, while his wife Zaynab migrated to Medina to join her father. One day al-°Āṣ went out on a trade journey to Syria as he used to do. On his way back a group of armed Muslims faced him and took all his trade, money and belongings, while he managed to escape. Secretly, he went to his wife Zaynab in Medina who gave him *jiwār*: To declare it to all Muslims Zaynab shouted from the back lines, while the Prophet was leading the morning prayers: "O people I have given *jiwār* to al-°Āṣ Ibn al-Rabī°" أيها الناس إني قد أجرت أبا العاص بن الربيع. When the Prophet finished his prayers he turned to people asking whether they had heard what he heard, they said yes. To assure people this was not made up before hand, the Prophet swore that he knew nothing about this until he heard it with them. Then he said: "The weakest of the Muslims gives *jiwār*" يجير على المسلمين أدناهم

Another well-known example of women giving protection to non-Muslims is the *jiwār* of Um Hāni° to two of her brothers-in-law of Banī Makhzūm, as narrated⁵⁷ by Ibn Hishām (1991, vol.5 p.72). When the Prophet entered Mecca triumphantly, some from Quraysh tried to save themselves in different ways. Al-Ḥārith Ibn Hishām and Zuhayr Ibn Umayya (al-Ḥalabī, n.d, vol.3 p.41) sought *jiwār* of Um Hāni° who granted it. Her brother °Alī Ibn Abī Ṭālib came across and saw the two men. Astonished as to how his sister could give *jiwār* to non-Muslims, he decided to kill them, but she confronted him and refused to hand them to him. Hurriedly, she then went to the Prophet and told him what had happened, the Prophet said: "We give *jiwār* to whom you have given *jiwār* to, and we secure whom you have secured. He [°Alī] should not kill them" أجرنا من أجزت وأمنا من أمنت فلا يقتلها

⁵⁶ See al-Andalusī (1997, vol.2 p.45), Ibn Sa°d (n.d, vol.2 p.87) and al-Shayybānī (1991, vol.5 p.372)

⁵⁷ See also al-Ḥalabī (1979, vol.3 p.41), Ibn Kathīr (n.d, vol.4 p.281) and Ibn Sa°d (n.d, vol.2 p.144)

In these two examples we see that women could give *jiwār* to non-Muslims and that all the Muslims had to keep this *jiwār* intact and respect it.

Conclusion:

The *hijra* of the Prophet and his companions to Medina was a major event the impact of which changed the course of history thereafter. It was the clearest shape of seeking protection through *jiwār*; where the Prophet and his companions migrated en masse from Mecca to Medina seeking protection and care from the People of Medina. The latter accepted that because of mainly the great reward they would get in the hereafter.

It was the first time in history that Muslims had a state where they could practice their religion without fear, oppression or persecution. The Prophet managed to demolish many of the tribal customs, tradition and relations, and form instead a very strong and coherent society which later was capable of vanquishing huge empires.

The hospitality of the people of Yathrib towards the Meccan migrants was a rare incident in history, notwithstanding the opposition of some factions there, like the *munāfiqūn*, the Jewish tribes and the non-believers.

The integration of the migrants in the Medinan society was also uniquely smooth. It was unprecedented that migrants could take power in the host society without oppression or tyranny. It was due to the Islamic faith that dissolved *jāhili* relations and shaped new bonds that did not differentiate between the migrant and the indigenous people and made them one nation.

This new society, due to its history and components, was able to feel the pain of the oppressed and the refugees. It was natural then to see the endorsement of the Prophet of the principle of *jiwār* and even more for it to become a Heavenly obligation on Muslims through the Prophetic practice and verses of Qur^oān.

Chapter III:
***Amān* [Safe Conduct] in the**
Islamic Tradition

Introduction

After elaborating extensively on how the Muslims in the Meccan period and the early days in Medina dealt with the issue of protection, I will, in this chapter, examine how the Muslims dealt with those who came to them after establishing their state in Medina seeking their protection.

Research across the various sources of exegesis, *sīra*, *ḥadīth*, literature, history, poetry and linguistics suggests that there were three terms used to identify the person who sought protection with the Muslims. These terms were *mustajīr*, *muhājir* and *mustaʿmin*. This issue also led me to identify other people living in the Islamic state and enjoying protection, called the *dhimmi*s. Studying the issue of dhimma in this context is crucial in order to differentiate between them and those who came from outside the Islamic state seeking temporary protection, such as the *mustajīr* and *mustaʿmin*.

Before delving into the definition of each term, its usage and the similarities and differences between them, it is essential to define other terms relating to these such as those relating to the land the *mustajīr*, *muhājir* and *mustaʿmin* may have come from. Some scholars, as we shall see, divided the world into two main categories: *dār al-ḥarb* and *dār al-Islam*. The importance of studying these *dārs* lies in the fact that each has its own rulings and the movement of a person from one *dār* to another could have an important impact. It is also significant to study these *dārs* as this study is concerned with the movement of the *mustajīr*, *muhājir* and *mustaʿmin* from *dār al-ḥarb* to *dār al-Islam* and not vice versa, so as to examine how the Islamic tradition dealt with them in the Islamic state (*dār al-Islam*).

After identifying all of these terms I undertake extensive research of the Qurʾanic commentary books to see how scholars, throughout the course of Islamic history, understood and interpreted the verse (9:6) which is considered the cornerstone in legalising the protection of the non-Muslims when they seek it in the Islamic state.

Dār al-Harb and Dār al-Islam

Muslim scholars in general divided the world into two and sometimes into three categories⁵⁸, as Zaydān states (1982, p.18). The first category is *dār al-Islam*, the second is *dār al-ḥarb* and the third is *dār al-‘ahd*⁵⁹. While this categorization seems not to have any supporting evidence in the Qur’ān, the early scholars might have relied on the account narrated by al-Bukhārī (1986, vol.5, p.2024) on the authority of Ibn ‘Abbās which states: “The disbelievers were two categories in the eyes of the Prophet and the Muslims. [The first category] was disbelievers of war who used to fight the Prophet, and the Prophet used to fight them. The [second] was the disbelievers of ‘ahd, covenant, who did not fight the Prophet and the Prophet did not fight them” كان المشركون على منزلتين من النبي والمؤمنين، كانوا مشركي أهل حرب يقاتلهم ويقاثلونه ومشركي أهل عهد لا يقاتلهم ولا يقاثلونه

Dār al-Harb

*Dār al-ḥarb*⁶⁰ is also sometimes referred to as *dār al-kufr*, *arḍ al-kufī*⁶¹, *dār al-shirk*⁶² or *arḍ al-shirk*⁶³. (*Dār al-Islam* is also sometimes known as *arḍ al-Islam*). Ibn Taymiyya (ḥanbalī- 728 AH) (n.d, vol.27, p.47), is the only scholar who called it once *arḍ al-Īmān*.

The ḥanafites, who are renowned for their fondness of thorough debates, have discussed this matter in more detail than other scholars. Al-Sarakhsī (ḥanafī- 490 AH) had a

⁵⁸ That is also obvious from the coming discussions of the scholars and their definition to *dār al-ḥarb* and *dār al-Islam*. See the sources below.

⁵⁹ Some scholars consider *dār al-‘ahd* part of *dār al-Islam*, as we shall see later.

⁶⁰ See for example, al-Ṭabarī (n.d, vol.5, p.207), Ibn al-‘Arabī (n.d, vol.2, p.441), al-Shawkānī (n.d, vol.1, p.218), Ibn Qudāma (1984, vol.1, p.208), al-Buhūti (1996, vol.2, p.389), Ibn Taymiyya (n.d, vol.19, p.217) and al-Shāfi‘ī (1973, vol.4, p.193).

⁶¹ See al-Ṭabarī (n.d, vol.6, p.213), al-Qurtubī (n.d, vol.13, p.339), al-Shawkānī (n.d, vol.3, p.410), al-Buhūti (n.d, 1981, vol.3, p.43), Ibn Ḥazm (n.d, vol.7, p.284), al-Mubārḳfūrī (n.d, vol.8, p.304), al-Tilmisānī (1986, vol.1, p.25), al-Suyūṭī (1961, vol.2, p.511) and Ibn Qudāma (1984, vol.1, p.211).

⁶² Al-Shāfi‘ī (1979, vol.2, p.13), al-Ṭabarī (n.d, vol.6, p.217), Ibn Kathīr (n.d, 1980, vol.1, p.442), Ibn al-Jawzī (1983, vol.6, p.281), al-Mirdāwī (n.d, vol.6, p.358), Ibn Muflīḥ (1979, vol.6, p.156), al-Shāfi‘ī (1973, vol.4, p.160), al-Nawawī (1997, vol.2, p.82), al-Shīrāzī (n.d, vol.1, p.25), al-Shaybānī (1975, vol.1, p.237), Ibn ‘Abdīn (2000, vol.8, p.387), al-Sīwāsī (n.d, vol.6, p.109), al-Sa‘dī (1984, vol.1, p.309), al-‘Abdarī (1977, vol.3, p.375), Ibn ‘Abd al-Barr (2000, vol.8, p.224), al-Qurtubī (n.d, vol.1, p.291), al-Dāraquṭnī (1966, vol.4, p.112), Ibn Ḥibbān (1993, vol.1, p.343), Ibn Ḥajar (n.d, vol.1, p.52), Abu al-Faraj (1979, vol.4, p.419) and al-Ṭahḥāwī (1978, vol.3, p.245).

⁶³ Al-Jaṣṣās (1984, vol.3, p.228), al-Ṭabarī (n.d, vol.5, p.223), al-Shawkānī (n.d, vol.1, p.506), al-Shāfi‘ī (1973, vol.7, p.333), al-Sa‘dī (1984, vol.2, p.726), al-‘Abdarī (1977, vol.4, p.160), al-Dusūqī (n.d, vol.2, p.482), al-Maghribī (1977, vol.3, p.382), al-Nasā‘ī (1991, vol.2, p.297), Ibn Ḥazm (n.d, vol.9, p.302), al-Ḥākim (1990, vol.3, p.15), Ibn Ḥibbān (1993, vol.15, p.471), Ibn Abī Shayba (1988, vol.6, p.505) ‘Abd al-Razzāq (1982, vol.5, p.196) al-Zurā‘ī (n.d, vol.1, p.270) and al-Fayrūzabādī (n.d, vol.1, p.1276).

criteria for defining a land as *dār Islam* or *dār kufr*. For him, the implementation of Islamic rules in the new land was a precondition for its classification as *dār Islam*: “Conquering (the land) only without implementing the rules of Islam does not make it *dār Islam*” وبمجرد الفتح قبل إجراء أحكام الإسلام لا تصير دار إسلام (al-Sarakhsī, n.d, vol.10 p.23).

Al-Kāsānī (ḥanafī- 580 AH) summarized the opinion of the ḥanafite school on this issue saying: “There is no dispute between our *aṣḥāb*⁶⁴ that *dār al-kufr* turns into *dār Islam* by the prevalence of the Islamic rules there” لا خلاف بين أصحابنا في أن دار الكفر تصير دار إسلام (al-Kāsānī, 1982, vol.7, p.130). However, there was disagreement on what factors turned *dār al-Islam* into *dār kufr*. Abu Ḥanīfa said (al-Kāsānī, 1982, vol.7, p.130) that: “It [*dār al-Islam*] does not become *dār kufr* unless three conditions are available; the first is the prevalence of the disbelief rulings, the second is the very closeness to *dār al-kufr* and the third is that no Muslim or *dhimmī* could be safe by the first security convention, i.e. the security convention of the Muslims⁶⁵” إنها لا تصير دار الكفر إلا بثلاث شرائط أحدها ظهور أحكام الكفر فيها والثاني أن تكون متاخمة لدار الكفر والثالث أن لا يبقى فيها مسلم ولا ذمي أمان بالأمان الأول وهو أمان المسلمين. Abu Yūsuf and Muḥammad, the companions of Abu Ḥanīfa, however, were at variance with Abu Ḥanīfa and adopted the first condition only to turn *dār al-Islam* to *dār kufr* (al-Kāsānī, 1982, vol.7, p.130).

Al-Kāsānī comments on Abu Ḥanīfa's opinion as follows: “If the Muslims were absolutely secure in that land and the non-believers were fearful all the time, then it is *dār Islam* and if the non-believers were absolutely secure and the Muslims were fearful all the time then it is *dār kufr*. The judgments are based on the security and fear, and not on Islam and disbelief” الأمان إن كان للمسلمين فيها على الإطلاق والخوف للكفرة على الإطلاق فهي دار الإسلام وإن كان الأمان فيها للكفرة على الإطلاق والخوف للمسلمين على الإطلاق فهي دار الكفر. والأحكام مبنية على الأمان والخوف لا على الإسلام والكفر (al-Kāsānī, 1982, vol.7, p.130).

Al-Kāsānī here stressed the issue of security, which should be available at all times to Muslims, *dhimmīs* and those tied to the Muslims by other conventions such as *jiwār*, *ḥilf* or other contracts. This was apparent in the saying of Abu Ḥanīfa أمان بالأمان الأول and the first *amān* is the *amān* that springs from the soul of Islam and guaranteed by the

⁶⁴ *Aṣḥāb* means members of the same school (Bosworth, et al., 1995, vol.8, p.830)

⁶⁵ The first *amān* is the *amān* the Muslims give to all the residents in the Islamic state including the *dhimmīs* who live there.

head of the state to the Muslims, *dhimmi*s and other covenant people alike. The non-believers, al-Kāsānī mentioned are those who are at war with the Muslims and not all non-believers.

The issue of security emerges here as another condition that defines *dār Islam* or *dār kufr*. Al-Sīwāsī (ḥanafī- 681 AH) asserts this, saying: “*Dār al-ḥarb* becomes *dār Islam* by implementing the [Islamic] rules and by guaranteeing security to the Muslims living there” دار الحرب تصير دار إسلام بإجراء الأحكام وبثبوت الأمن للمقيم من المسلمين فيها (al-Sīwāsī, n.d, vol.5, p.480).

Al-Asbījānī (ḥanafī-700 AH) goes further in defining *dār Islam* and its features. Speaking about the Muslims countries invaded by Mongols in the eighth AH century, he states that the observance of worship rituals like *adhān*, congregational prayers, Friday prayers, etc. keeps the country *dār Islam* (Zaydān, 1982, p.21). Al-Asbījānī is clearly keen to retain the attribute of *dār Islam* for the Muslim countries despite the fact they were invaded by Tatars, the rulings of Islam were not implemented and the Muslims had no sovereignty over the land. Thus, the Islamic doctrine is reduced to the very basic principles such as prayer.

The insistence on continuing to classify the land *dār Islam* despite all that had taken place could be explained by his hope that this invasion and occupation was only temporary. Another factor in al-Asbījānī’s approach might be that to define these countries as *dār kufr* would mean there no land on Earth could any longer be considered *dār Islam*. The Tatars had invaded the symbol and the capital of the Muslim world, Baghdad, and the other countries.

In accordance with the Hanbalites strict approach regarding the implementation of the Islamic rules, Ibn Qayyim al-Jawziyya (ḥanbalī- 751 AH) defined *dār al-Islam*: “It is the land that the Muslims conquered and the rules of Islam have been applied to it. If the rules of Islam have not been implemented, then it is not *dār Islam*” هي التي نزلها المسلمون وجرت عليها أحكام الإسلام وما لم تجر عليها أحكام الإسلام لم يكن دار إسلام (Ibn Qayyim, 1997, vol.2, p.728). Therefore, the decisive factor became the rule of Islam and the implementation of its commands there. Ibn Qayyim al-Jawziyya does not accept the implementation of the rituals only, but requires the implementation of the main Islamic rules.

Al-Asbjānī and Ibn Qayyim al-Jawziyya differed significantly in their views on this issue despite living in the same period. This demonstrates the enormous impact the nature of the *madhhab* has on scholars and their views.

Although Ibn Taymiyya (ḥanbalī-728 AH) does not clearly state the implementation of the Islamic rules as a condition, it is certainly implied. He states that: “A place could be *dār kufr* if its people are non-believers then it becomes *dār Islam* should its people convert to Islam” (Ibn Taymiyya, n.d, vol.27, p.143). By the nature of things, converting to Islam means the adherence to its commands and implementing its rules.

An interesting opinion was expressed by al-Ḥaṣkafī (ḥanafī-1088 AH) in the eleventh AH century. When commenting on the three conditions of Abu Ḥanīfa regarding *dār al-Islam* and *dār al-kufr*, he says: “*Dār al-ḥarb* becomes *dār Islam* by implementing the rules of Islam like the Friday and *‘īd* prayers although some disbelievers may stay there and despite the fact that it is not connected to *dār Islam*” (al-Ḥaṣkafī, 1966, vol.4, p.176). This opinion is interesting in the sense that al-Ḥaṣkafī, like al-Asbjānī, was satisfied with prayers as evidence of the implementation of Islamic rules, despite the fact that the implementation of Islamic rules goes beyond the apparent rituals. In this context, most lands would today be considered *dār Islam* in the sense that even western secular states respect individual religious needs including the congregational prayers like Friday and *‘īd* prayers, and many other rituals in addition to political, religious, economic and social freedoms.

To add strength to this understanding, we find some scholars in the Shāfi‘ī school⁶⁶ like al-Bujayramī (shāfi‘ī-1155 AH) in the twelfth AH century, supporting this approach: “If the non-believers conquered a county where Muslims live, like Ṭarsūs it would not become *dār ḥarb*” (al-Bujayramī, n.d, vol.3, p.189). He says these countries are originally Muslim countries, either built by Muslims like Baghdad and Basra, or converted to Islam like Medina and

⁶⁶ See al-Shirwānī (n.d, vol.6, p.204) and al-Shirbīnī (n.d, vol.2, p.362).

Yemen, or conquered by force like Egypt and Iraq. In all these cases, these countries remain Islamic regardless of whatever happens afterwards.

Al-Dusūqī (Mālikī- 1230 AH) affirms this in the thirteenth AH century: “The Muslim countries do not become *dār kufr* by conquering of disbelievers, as long as the rituals of Islam are still performed” بلاد الإسلام لا تصير دار حرب بأخذ الكفار لها بالتهر ما دامت شعائر الإسلام قائمة فيها (Al-Dusūqī, n.d, vol.2, p.188). Again we find more scholars from different schools at different times lay emphasis on the rituals as a sign of the implementation of Islam.

Ibn °Ābdīn (ḥanafī-1307 AH) goes further and quotes from some late scholars who said that if the three conditions Abu Ḥanīfa set up for turning *dār Islam* to *dār ḥarb*, were evident and a Muslim Judge was appointed to implement the Islamic ruling, then *dār al-ḥarb* becomes *dār Islam* (Ibn °Ābdīn, 2000, vol.4, p.175). Apparently, the Islamic ruling in the environment of an occupied country does not mean rulings concerning governing, political affairs, home or foreign affairs, but rulings on personal affairs like marriage, death, inheritance and so on.

Perhaps the most extreme opinion was that of al-Shaybānī (ḥanafī- 189 AH). He exceeds all the boundaries when he says: “The fact that one of us Muslims remains in a country whose people have become apostates prevents it from turning into *dār ḥarb*” بقاء بقاء (al-Shaybānī, n.d, vol.8, p.168). This opinion implies that a single Muslim performing Islamic rituals such as prayers, fasting, etc would ensure that the title of *dār Islam* was retained in that place.

To sum up, it is apparent that while many scholars make the implementation of Islamic rules a pre-requisite for *dār Islam* or *dār kufr*, there are different opinions as to the meaning and signs of implementation. It is also significant that scholars such as al-Shaybānī, Ibn °Ābdīn, Al-Dusūqī, al-Bujayramī and others who were keen to retain the attribute of *dār al-Islam* for lands once considered Muslim, all defined a land as Muslim regardless or whether it was originally for the Muslims or its people converted to Islam. In other words, they were quick to define a land as *dār Islam* but reluctant to withdraw this characteristic despite the apostasy and occupation that may occur, as long as the basic Islamic rituals such as Friday and °Īd prayers were performed.

Dār al-‘Ahd

Al-Shāfi‘ī (204 AH) was perhaps the only scholar to refer to *dār al-‘ahd* as *dār al-amān*. He (1973, vol.7, p.350) says that this *dār* should be protected like *dār al-Islam*: “It is prohibited to launch an attack on [a place] if it is *dār Islam* or *dār amān* [which becomes so] by a covenant that is struck by the Muslims, and nobody should be allowed to attack it” وتمنع الدار من الغارة إذا كانت دار إسلام أو دار أمان بعقد يعقد عقده المسلمون لا يكون لأحد أن يغير عليها”. So, it is not only that Muslims are not allowed to attack, but also they have a duty to protect it since they made the deal with its people. He also mentions *dār al-‘ahd* in the context of what the Muslims are allowed to do in each land they conquer, (al-Shāfi‘ī, 1973, vol.4, p.257)

Literally, ‘*ahd* means *amān*, security, as al-Rāzī (1995, vol.1, p.192) says. Conventionally, it means the land Muslims conquer without force and with whose people they agree that the land remains theirs, provided they pay the tax, *kharāj*, as al-Mirdāwī (Ḥanbalī- 450 AH) states. While explaining the status of lands conquered by pacification, he defines *dār al-‘ahd*: “The second [choice] is to reach an agreement with them that the land is theirs and a duty, *kharāj*, to be paid. This *kharāj* is equivalent to *jizya* and when they convert to Islam it will be abolished. Their land does not become *dār Islam* but *dār ‘ahd*. They also have the right to sell or mortgage it” الثاني أن يصلحوا على أن الأرضين لهم ويضرب عليها خراج يؤدونه عنها وهذا الخراج في حكم الجزية متى أسلموا سقط عنهم ولا التصير أن يصلحوا أن يبيعها ورهنها (al-Mirdāwī, n.d, vol.1, p.157).

This meaning was reaffirmed by Ibn Muflīḥ (Ḥanbalī-884) in the ninth AH century⁶⁷. Al-Buhūṭī (ḥanbalī-1051 AH) supports Ibn Muflīḥ in this opinion and adds that this “land is theirs and they are free to do anything with it” (al-Buhūṭī, 1996, vol.1, p.648). They can even build a church on it or any other worship places⁶⁸. With the exact wording al-Suyūṭī (Ḥanbalī- 1243 AH) asserted the same meaning regarding *dār al-‘ahd*⁶⁹.

⁶⁷ See Ibn Muflīḥ (1979, vol.3, p.379).

⁶⁸ Al-Buhūṭī reaffirmed this in another book (1981, vol.3, p.96).

⁶⁹ See al-Suyūṭī (1961, vol.2, p.566).

Conclusion

Throughout Islamic history, scholars have differed in their definitions of *dār al-Islam* and *dār al-ḥarb*. Some made the full implementation of Islamic rules an essential characteristic of *dār-Islam*, while others were satisfied with the practice of the congregational prayers to consider that place *dār-Islam*. The scholars were generally influenced by the environment they lived in, and shaped their definition accordingly. It could be concluded that the definition of *dār al-Islam* in modern times should be based on implementation of the main Islamic principles and on the rights Muslims enjoy concerning their freedom to practice their religion and express their beliefs and opinions.

Nonetheless, categorizing the world into two or three *dārs* requires further scholarly discussion, especially given that the Prophet did not categorize the world as such, nor did the Qur^{ān}. Additionally, the world at the time of the Prophet differs significantly from the world today. Today, the world is dominated by national states with recognized borders, with international laws and universal conventions, which, theoretically at least, govern the relation between states.

The definition of the term *mustajir*

The term *mustajir*, as explained in chapter one, was used by Arabs in the *jāhiliyya* to describe the person who flees his land seeking protection and welfare, regardless of the reasons that might drive him to do so. After the establishment of the Islamic state in Medina the custom of *jiwār* continued to exist, depicting the non-Muslim who seeks protection with the Muslims, like for example, when Um Hāni^o gave protection to two brothers-in-law and Zaynab, daughter of the Prophet, gave *jiwār* to her husband al-^cĀṣ Ibn al-Rabi^{c70}.

However, it should be noted that Muslims might also seek *jiwār* from other Muslims to protect them, particularly when they had committed a crime and fled fearing punishment⁷¹. As such, it could be concluded that the term *mustajir* was used for Muslims and non-Muslims.

⁷⁰ See for more details see (ch.2 pp.86-87) of this thesis.

⁷¹ See examples of this in Ibn Kathir (n.d, vol.7, p.247), al-Shaybānī (1994, vol.3, p.365), Ibn Khaldūn (1984, vol.4, p.675) and al-Ṭabarī (n.d, vol.3, p.375).

The definition of the term *muhājir*

The word *hijra* in Arabic is derived from the verb *hājara* which, according to al-Fayrūzabādī (n.d, vol.1, p. 637) originally meant: “To leave a land to [another] land” الخروج من أرض إلى أرض. Ibn Manzūr (1956, vol.5, p.251) defines it as: “The nomad or the civil who departs his country to live in another country” كل من فارق بلده من بدوي أو حضري like the Arab tribes who migrated from Yemen to Mecca, Medina and Syria following the destruction of the Ma³rib Dam (Ibn Kathīr, n.d, vol.2, p.159).

In the Islamic tradition, the term *hijra* has been used to describe the emigration of Muslims from Mecca to different places like Abyssinia and other areas, however, they used it “most commonly to refer to emigration from Mecca to Medina in the time of the Prophet” (Crone, 1994, p.352). Later on, and particularly in the post-conquest period, a non-classical usage was developed according to Welhausen: “*Hijra* no longer meant flight, but emigration (with wife and children) to a military and political centre in order to serve there” (Crone, 1994, p.352).

Yet the term *hijra* has other subtle and important meanings associated with it. It means as Ibn Manzūr (1956, vol.5, p.251) states: “To abandon something completely and neglect it” هجرت الشيء هجرا إذا تركته وأغفلته. This meaning of the term is supported by some traditions as al-Nasā³i reports (1991, vol.5 p.214) that the Prophet said: “The *muhājir* is the one who abandons what God has forbidden” المهاجر من هجر ما نهى الله عنه.

So, *hijra* is at once physical and psychological. It is physical by moving from one place to another, and psychological in the sense that the *muhājir* leaves not only his tribe, relatives and kinsmen but also their customs, tenets and rites.

It could also be said that *hijra* from a metaphoric perspective means the opposite of *hijra* in a literal sense. *Hijra* literally means leaving one’s own place to a foreign place, while metaphorically, is leaving a foreign place to one’s own place. It is leaving disbelief, which is against the instinct, according to the tradition narrated by Muslim (al-Nawawī, 1972, vol.16, p.207) on the authority of Abu Hurayra that the Prophet said: “Every child is born with innate character [faith of Islam] but his parents convert him to Judaism, Christianity or Magianism, as the animal delivers a perfect animal, do you find it

mutilated?” Then Abu Hurayra said: Read if you like (Allah’s nature with which He has created human beings. No change let be in the creation of Allah) (Q. 30:30) ما من مولود إلا ويولد على الفطرة فأبواه يهودانه وينصرانه ويمجسانه كما تنتج البهيمة بهيمة جمعاء هل تحسون فيما من جدعاء؟ ثم يقول أبو هريرة أقرؤوا إن شئتم (فطرة الله التي فطر الناس عليها لا تبديل لخلق الله)

Thus, disbelief according to the Islamic understanding is something foreign to man, and migrating to the absolute truth, the Creator who gives life, sustenance, satisfaction and security, is the original and right place for man to be in.

Regarding the Qur’anic usage of this term, the search of the Qur’ān revealed that the term *hijra* and all its derivatives have been mentioned 31 times in 27 verses in 17 *suras*. The verses are; (2:218), (3:195), (4:34/89/97/100), (8:72/74/75), (9:20/100/117), (16:41/110), (19:46), (22:58), (23:67), (24:22), (25:30), (29:26), (33:6/50), (59:8/9), (60:10), (73:10), (74:5). Interestingly, in all these verses the term *hijra* or its derivatives came in a context where Muslims are the main focus, except in two verses (23:67), (25:30) which spoke about disbelievers.

On the whole, it is difficult to divide these verses into completely separate topics without repetition, since many verses speak about multiple issues at the same time. However, in terms of the subject and the context in which they are mentioned, it seems the vast majority of these verses speak positively about those who emigrated for the cause of God and his Prophet. The emigration from Mecca to Medina was a focal point in many of these verses in terms of praising, honouring and promising rewards to the *Muhājirūn* and the *Anṣār* and also calling upon those who had not yet emigrated to do so. The verses that could fall in this category are: (2:218), (3:195), (9:20/100/117), (16:41/110), (22:58), (24:22), (33: 50), (59:8).

In these verses God’s generosity to those emigrants and the rewards awaiting them in this life and the next are apparent. The rewards of this life included victory over their enemies (16:41), (9:20), entitlement of the public money (24:22) and assuring them of God’s satisfaction and gratification (9:100). In the hereafter, the rewards would be greater by forgiving their sins (9:117), having mercy upon them (2:218), (16:110), providing them with sustenance in Paradise (22:58), putting them in a higher hierarchy

over the rest of people (9:20), rewarding them for their good deeds however small (3:195) and granting them a permanent living in the eternal pleasure of Paradise (9:21).

In addition, the Qur^{ān} urges Muslims to migrate and imposes an obligation on them to do so. In this category, the Qur^{ān} motivates Muslims to emigrate in order to find comfort and affluence (4:100). Moreover, the Qur^{ān} goes further, making the emigration a condition for the loyalty *muwālā* of Muslims and the membership in their society (4:89), (8:72) (8:75), (33:6). More importantly, not migrating and accepting oppression as an excuse would be a cause for punishment (4:97).

Regarding the third category it is the praise and extolling of those who welcomed and gave hospitality to the emigrants. In the verse (59:9) God describes the *Anṣār* in a very positive way because they did not welcome the *Muhājirūn* as a duty, but out of affection, warmth and love for those who emigrated. Furthermore, in the verse (8: 74) God gives the *Anṣār* a great honour by stipulating that they are the true believers, thus they deserve forgiveness and great sustenance in the hereafter. In addition, God urges the Muslims to be generous towards the *Muhājirūn* and sets rights for them (60:10).

The fourth category in this respect is the use of the term *hijra* to give the metaphorical and physical meaning of abandonment and rejection, like the verses; (4:34), (19:46), (73:10), (74:5). In the verse (4:34) we find the word *اهجروهن في المضاجع* means abandon the disobedient wives in bed as a kind of punishment. Then we find a similar meaning in the verse (19:46) where the father of the prophet Ibrāhim orders his son angrily to leave him and go away if he does not follow his faith. In the verse (73:10) God orders his Prophet Muḥammad to keep psychologically away from the disbelievers but at the same time to be kind in this *hijra*. Casewit (1998, vol. 88, no. ii, p. 109) comments on this verse as follows: “The Prophet is enjoined to patiently endure the abusive language of his oppressors and to dissociate himself from them in a dignified manner *واهجروهم هجرا جميلا* (Q.73:10). Here we find the imperative form of the verb *hajara* with its accompanying verbal noun *hijr* used with the conventional social implications of a deliberate, though not necessarily permanent, abjuration of social interaction and verbal

communication with a particular person or party.”⁷² In the same sense the verses (23:67) and (25:30) speak about the psychological and physical abandonment of the disbelievers to the Qur’ān as a sign of rejection of the message of Islam. In the last verse (73:10) in this category God orders his Prophet to keep physically away from the dirt and filth.

Conclusion

The term *hijra* goes beyond the apparent legal text to a much wider and more complicated context. It holds a philosophy that deals with the emigration from a new perspective which combines the heavenly and the earthly needs. It does not overlook the suffering and the hardship of the emigrants, caused by the departure and desertion of families, tribes, properties, businesses and homeland, but at the same time it does not stop there and considers it the end of the world. Even more, Islam portrays the human life in this planet through many verses⁷³ and *ḥadīths*⁷⁴ as a journey or emigration from Paradise, where Adam and Ḥawwā’ were created and lived, to earth as a temporary station. Then, the journey continues from earth to the hereafter. In other word, all humans on earth are just migrants waiting to return to their homes in the hereafter.

The Islamic tradition deals with the obstacles to emigration and tries to ease them in two ways. First, it tries to make the emigration a kind of worship and sacrifice in the cause of God. In return great rewards, in this life or in the hereafter, await those who emigrate. Secondly, God makes it obligatory on Muslims on the other side to welcome the emigrants and be generous in their hospitality towards them. This is what the *Anṣār* did in Medina, for which they deserved the praise and honour of God in this life and on Judgment Day.

With appreciation of the torment, this philosophy considers emigration as part of the religion and the sacrifice that should be made by its followers. It puts it bluntly that this was the way of the prophets and their followers in the past, and it is the way of Prophet Muḥammad and his followers as well.

⁷² Casewit in his paper titles “*Hijra* as history and metaphor: a survey of Qur’anic and *ḥadīth* sources” brings more examples to support this meaning and draws comparison in an articulate way, between the *hijra* of the Prophet and the *hijra* of other prophets like Noah and Abraham.

⁷³ See the story of Ādam in *sūrat al-Baqara* (2:30-39)

⁷⁴ See the *ḥadīth* narrated by al-Bukhārī (1987, vol.5, p.2358) on the authority of Ibn ‘Umar that the Prophet put his hand on his shoulder and said: “Be in this life as a foreigner or a passer-by”.

Within this philosophy there is no holiness to the place just because it is a place of birth. It gives the first priority to the religion and the freedom to practice it. It even makes the rejection of emigration a cause for blame and punishment in the hereafter.

Finally, it should be noted here that the term *muhājir* is used in the Qurʾān exclusively to describe the Muslim emigrants and in most cases it was connoted with positive merits, while the term *mustajir* was used for both the Muslims and non-Muslims alike.

The definition of the term *musta'min*

The term *amān* literally means “the opposite of fear” الأمان ضد الخوف (Ibn Manzūr, 1956, vol.13, p.26). The Islamic encyclopaedia defines it as “safety, protection, safe conduct [and] *musta'min* [is] the person who has received an *amān*” (Bearman, et al., 2000, p.429).

In the sixth century, al-Kāsānī made the earliest attempt I could find to define this term: “The *musta'min* is one of the people of *dār al-ḥarb*, he enters *dār al-Islam* not to stay there permanently, but [enters] for a temporary need which he satisfies and then goes back to his country” المستامن من أهل دار الحرب دخل دار الإسلام لا لقصد الإقامة بل لعارض حاجة يدفعها ثم يعود إلى وطنه الأصلي (al-Kāsānī, 1982, vol.7, p.236). In this definition, al-Kāsānī considers the *musta'min* a disbeliever and does not determine the reason for his asking *amān*.

In the seventh century al-Nawawī (shāfi'i, 676 AH) explains little in his definition. He states that: “The *musta'min* is the fighting disbeliever who enters *dār al-Islam* with *amān* (contract)” المستامن هو الحربي الذي دخل دار الإسلام بأمان (al-Nawawī, 1987, vol.1, p.325). Al-Sīwāsī, (ḥanafī 681 AH), the contemporary of al-Nawawī also gives very little detail in his definition. He states that: “The *musta'min* is the one who leaves *dār al-ḥarb* and enters *dār al-Islam*” المستامن من يدخل دار الإسلام تاركاً للحرب (al-Nawawī, n.d, vol.6, p.109). However, both consider the *musta'min* a disbeliever and do not verify the reason for entering *dār al-Islam*.

In the eighth century Ibn Kathīr (774 AH) counts the cases where the non-believer should be considered a *musta'min*. He says: “Whoever comes from *dār al-ḥarb* to *dār al-Islam* for delivering a message, trading, asking peaceful settlement or truce, carrying *jizya* or something like that, and asked the *Imām* or his deputy *amān* he should be given it” من قدم من دار الحرب إلى دار الإسلام في إداء رسالة أو تجارة أو طلب صلح أو مهادنة أو حمل جزية أو نحو ذلك من الأسباب وطلب من الإمام أو نائبه أماناً أعطى أماناً (Ibn Kathīr, 1980, vol.2, p.338). Thus the term *musta'min* applies to several people according to their circumstances and not is confined to those who come to *dār al-Islam* to learn about Islam as the verse (9:6) stipulates.

Moving to the ninth century we find Mulla Khusru (ḥanafī, 885 AH) gives a general definition of the *musta'min* and applies this term to Muslim and non-Muslim alike. He says: “The *musta'min* is the one who enters another country with a (contract) of *amān* whether he was a Muslim or a disbeliever fighter” الْمُسْتَأْمَنُ هُوَ مَنْ يَدْخُلُ غَيْرَ دَارِهِ بِأَمَانٍ مُسْلِمًا كَانَ أَوْ حَرْبِيًّا. By this definition Mulla Khusru becomes the first scholar to consider the *musta'min* to be probably a Muslim.

Nonetheless, in the tenth century al-Qawnawī (ḥanafī, 987 AH) follows Mulla Khusru in this consideration. He defines the *musta'min* in general terms saying: “The *musta'min* is [derived] from asking *amān* and it is asking *amān* from the enemy whether he is a Muslim or a non-Muslim fighter” الْمُسْتَأْمَنُ مِنَ الْإِسْتِيْمَانِ وَهُوَ طَلَبُ الْأَمَانِ مِنَ الْعَدُوِّ حَرْبِيًّا كَانَ أَوْ مُسْلِمًا (al-Qawnawī, 1985, vol.1, p.185). In this century also we find al-Shirbīnī (shāfi'ī - 977 AH) defining *‘aqd al-amān* as “a contract of safety between the Muslims and the non-Muslims to stop the killing and fighting” (n.d, vol.4, p.236). Al-Shirbīnī adds a new communal dimension to this contract. In his understanding it is not an individual contract but rather a contact between the Muslims and the non-Muslims as a whole.

This meaning was also affirmed by another ḥanafite scholar in the eleventh century, Shaykhizāda (1078 AH), who states: “The *musta'min* is the one who enters another country with a (contract) of *amān*, and this includes the Muslim when he enters their country with *amān* and the disbeliever who enters our country with *amān*” الْمُسْتَأْمَنُ هُوَ مَنْ يَدْخُلُ دَارَ غَيْرِهِ بِأَمَانٍ فَتَسْمِعُ مُسْلِمًا دَخَلَ دَارَهُمْ بِأَمَانٍ وَكَافِرًا دَخَلَ دَارَنَا بِأَمَانٍ (Shaykhizāda, n.d, vol.4, p.333).

However, it should be noted that this term is generally applied to the non-Muslims who enter *dār al-Islam* for a short period, as the Muslim by the virtue of being Muslim or the disbeliever by conversion to Islam enjoys *amān*. This is well founded in the *ḥadīth* narrated by al-Bukhārī (1986, vol.2, p.507): “I was ordered to fight people until they say no deity worthy of worship except Allah, and whoever says it then he will protect his money and soul save the rightful reasons and God will hold him accountable” أَمَرْتُ أَنْ أَقَاتِلَ النَّاسَ حَتَّى يَقُولُوا لَا إِلَهَ إِلَّا اللَّهُ، فَمَنْ قَالَهَا فَقَدْ غَصَمَ مِنِّي مَالَهُ وَنَفْسَهُ إِلَّا بِحَقِّهِ وَحِسَابُهُ عَلَى اللَّهِ.

Other *ḥadīths* show that the Muslim's soul, money and honour should always be saved and secure. Al-Bayhaqī (1994, vol.8, p.249) reports on the authority of Abu Hurayra

that the Prophet said: “The Muslim is forbidden to harm the other Muslim in anything; his blood, money and honour” كل المسلم على المسلم حرام دمه وماله وعرضه.

Additionally, the *sīra* of the Prophet holds for us a number of incidents where the Prophet offered *amān* to certain tribes should they accept Islam.

One of the relevant examples of this is the account of Mālik Ibn Aḥmar who came to the Prophet and after converting and asked him to write a letter to his people to invite them to Islam. The Prophet agreed and the letter read according to al-Ṭabarānī (1994, vol.7, p.50): “In the name of God the most Gracious the most Merciful. This is a letter from Muḥammad the messenger of God to Mālik Ibn Aḥmar and whoever follows him from the Muslims. This is *amān* to them as long as they perform the prayers, give *zakāt*, follow the Muslims, avoid the disbelievers and give the one fifth of the war gains, the share of *al-Ghānimīn*, etc. [Should they do that] they will be secure by the *amān* of God and the *amān* of his Prophet” هذا كتاب من محمد رسول الله لمالك بن أحمـر ولمن اتبعه من المسلمين أمانا لهم ما أقاموا الصلاة وآتوا الزكاة واتبـعوا المسلمين وجانبوا المشركين وأدوا الخمس من المغنم وسهم الغارمين وسهم كذا وسهم كذا فهم آمنون بأمان الله وأمان محمد رسول الله.

Al-ʿUqaylī (1983, vol.3, p.201) reports another account on the authority of ʿUthmān Ibn Abu Rāshid al-Azdī that he went with his brother to the Prophet and converted. Then the Prophet sent a letter with him to his people, Banī Azd. It reads as follows: “From Muḥammad the messenger of God to whoever listens to my message; Whoever bear the witness that no God but Allah and Muḥammad is his messenger and perform the prayers then he will have the *amān* of God and the *amān* of his messenger” من محمد رسول الله إلى من يقرأ عليه كتابي هذا من شهد أن لا إله إلا الله وأن محمدا رسول الله وأقام الصلاة فله أمان الله وأمان رسوله.

With the same spirit the Prophet sent letters to other tribes. Ibn Saʿd (n.d, vol.1, pp.258-291) reviewed most of these letters and mentioned the *amān* contracts the Prophet made with Arab Christian tribes. In these letters the Prophet offers his *amān* in exchange of *jizya*. An example of this is the case of Dawma, Ayla and Taymāʾ tribes, who came to the Prophet headed by Yaḥna Ibn Rawba, the king of Ayla accompanied by the people of Syria, the people of Yemen and the people of Bahrain. The Prophet wrote them a letter saying: “This is *amān* from God and Muḥammad, the Prophet and the messenger of God to Yaḥna Ibn Rawba and the people of Ayla and their ships and caravans in the

land and sea. They and the people of Syria, Yemen and Bahrain will have the custody of God and Muhammad His Prophet” هذا أمانة من الله ومحمد النبي رسول الله ليحفظه بن روية وأهل أيلة لسفنتهم وسياراتهم في البر والبحر لهم ذمة الله وذمة محمد رسول الله ولمن كان معهم من أهل الشام وأهل اليمن وأهل البحر (Ibn Sa°d, n.d, vol.1, p.289). The letter goes on to state the terms and the conditions of this contract.

Conclusion

The term *musta'min* refers to the non-believer who comes to *dār al-Islam* seeking protection regardless of the reasons that might drive him to do so. He could be a trader needing to enter *dār al-Islam* to sell his products or a messenger or a person fleeing *dār al-ḥarb* out of fear or any unfortunate circumstances to *dār al-Islam* seeking protection. Thus, the term *musta'min* encompasses all the aliens in *dār al-Islam* including refugees and asylum seekers. If he comes to *dār al-Islam* he should be protected but his stay is temporary to fulfil his need.

The contract of *amān* could be for individuals and groups also. It could be obtained by converting to Islam or paying *jizya*.

Dhimmīs in the Islamic tradition

The issue of *dhimma* is one of the central issues concerning modern writers, scholars and researchers, be they Muslims or non-Muslims. Its significance has varied according to the motives and intentions of each writer. Some have used this subject to defend the Islamic position, as a theory and a historical practice like, Al-Qaradāwī in his book entitled: غير المسلمين في المجتمع الإسلامي “*Non-Muslims In The Islamic Society*” (1977). In this he seeks to clarify “the legal position, the rights and duties of the *dhimmīs* in the Islamic society as well as to refute the accusations of the others who falsified the historical events and intentionally misinterpreted the legal texts in order to distort the unprecedented tolerance of Islam” (Qaradāwī, 1977, p.4). Also, Mawdūdī, who was “under the influence of the events that led to divide India between the Muslims and the Hindus” (Zakī 2006, p.115) wrote a lengthy article about the subject entitled “*Rights of Non-Muslims in Islamic State*” (1982) to clarify the positions of minorities in Pakistan, from an Islamic point of view, after its independence⁷⁵.

Other writers who have focused on this issue have done so in order to criticise the Islamic tradition and its treatment of the *dhimmīs*, like Bat Ye’or who wrote a number of books on this topic: “*Dhimmī Peoples, Oppressed Nations*” (1984) and “*Islam And Dhimmitude: Where Civilizations Collide*” (2002) and “*The Dhimmī: Jews And Christianity Under Islam*” in which she states: “A truly scholarly, ‘objectivity’ study becomes extremely difficult (though personally I don not believe in objectivity in the humanities... and yet, precisely, as has been said, passion is involved” (Ye’or, 1985, p.31). Also in this regard we find a book called “*The Myth of Islamic Tolerance: How Islamic Law Treats Non-Muslims*” (2005) by Robert Spencer.

Other scholars have dealt with this topic from an academic perspective without any obvious agenda to defend or attack the Islamic tradition, like for instance the book edited by Hoyland named “*Muslims and others in early Islamic society*” (2004).

In discussing the term *dhimmī* in greater detail I will begin with the early scholars to see how they defined the *dhimmī* and what rights and duties they allocated to them. It will then be appropriate to see how contemporary scholars viewed this issue and whether

⁷⁵ See also (Siddiqī, 1969), (Chaudhry, 1995), (Amāra, 2003) and (Doi, 1981).

there is a difference between the early and modern Muslim scholars in dealing with this matter.

The definition of the term *dhimmī*

Starting with the lexical definition, Ibn Manzūr (1956, vol.5, p.251) says: *Al-dhimma* is *al-‘ahd* الذمة العهد and “the *dhimmī* is a man who has ‘*ahd* i.e., agreement” رجل له الذمي: له and “the people of *dhimma* are people of covenant” أهل الذمة قوم معاهدون . Also, al-Rāzī (1994, vol.1, p.94) defines *al-dhimma* to be *al-amān*.

Conventionally, al-Ghazālī (1996, vol.7, p.55) and ‘Ulaysh (1988, vol.3, p.213) define the contract of *dhimma* as: “Granting them [the non-Muslims] a permission to stay in our *dār*, protecting and securing them [on condition that] they pay *jizya*⁷⁶ and submit [to Muslims]” التزام تقريرهم في ديارنا وحمايتهم والذب عنهم ببذل الجزية والإستسلام من جهتهم.

Ibn Mufliḥ (1979, vol.3, p.404) and al-Ba‘lī (2002, vol.1, p.351) also define it to be: “Permitting some disbelievers to remain in their disbelief provided they pay *jizya* and adhere to the rulings of the nation [the Muslims]” إقرار بعض الكفار على كفره بشرط بذل الجزية “والتزام أحكام الملة.

Agreeing with this definition, al-Buhūtī (1970, vol.2, p.15) states that *dhimma* literally means: “Promise, protection and security” العهد والضمان والأمان and the legal evidence is the verse (9:29): “Till they [agree to] pay the exemption tax with a willing hand, after having been humbled [in war]” حتى يعطوا الجزية عن يد وهم صاغرون.

It is hence a contract between the Muslims and non-Muslims to allow the latter to stay in *dār al-Islam* keeping their faith and enjoying the protection of the Muslims providing they commit themselves to pay *jizya* and accept the general rulings of Muslims. More importantly, it is a contract that cannot be concluded without consent from both sides. Ibn Qudāma (n.d, vol.9, p.252) and Ibn Mufliḥ (1979, vol.3, p.404) describe it as “a

⁷⁶ Regarding the amount of *jizya*, the scholars differed as there is no fixed amount mentioned in the verse (9:29) which obligated *jizya*. Some of them said it is *dinār* annually on the adult, others said it is 48 *dirhams*, while others said the amount should be mutually agreed between the *Imām* and the *dhimmīs* (al-Jaṣṣāṣ, 1984, vol.4, p.290). However, women, children, the monastic, the elderly and the poor *dhimmīs* are not subject to *jizya* (al-Buhūtī, 1981, vol.3, p.120) and (Ibn Mufliḥ, 1979, vol.3, p.407).

عقد معاوضة فلا "reciprocity contract that cannot be affirmed without mutual agreement" يثبت إلا بالتراضي.

The term "non-Muslims" in this context is also defined by scholars. Ibn Qudāma (n.d, vol.4, p.346) states that those who are eligible to have the contract of *dhimma* are "the people of the book and the magians" أهل الكتاب والمجوس. al-Mirdāwī (n.d, vol.4, p.217) illustrates the meaning of the people of the book by saying that they are: "Jews, Christians and those who agree with them in believing in the Torah and the Gospel like the Samirites and Romans" الْيَهُودُ وَالنَّصَارَى وَمَنْ وافقهم في التَّدِينِ بِالتَّوْرَةِ وَالْإِنْجِيلِ كَالسَّامِرَةِ وَالْفَرَنْجِ. However, al-Fayrūzabādī (1982, vol.1, p.236) clearly affirms that this contract cannot be concluded with: "Those who do not have a [heavenly] book or what could be a book, like the pagans" ولا يعقد الذمة لمن لا كتاب له ولا شبهة كتاب كعبدة الأوثان. Yet, al-°Abdarī (1977, vol.3, p.380) reports that Mālik [Ibn Anas] ruled that *jizya* "could be taken from those who worship the idols and fire" تؤخذ من عبدة الأوثان والنيران. Paying *jizya* means that they have the right to agree a *dhimma* contract with the Muslims.

Regarding the period of this contract there is apparent consensus between the scholars that this contract is perpetual and not temporary. Ibn Qudāma (1984, vol.9, p.240) and al-Suyūṭī (1961, vol.2, p.590) assert that it is "a lifelong contract" عقد مؤبد. To leave no doubt about its permanent nature, al-Nawawī (1984, vol.10, p.297) stipulates that "it is not permissible to conclude the contract of *dhimma* temporarily" ولا يصح عقد الذمة مؤقتا. Additionally Ibn Mufliḥ (1997, vol.6, p.244) states that even "the *Imām* has no right to change this contract" ليس للإمام تغييره or to cancel it, as al-Mirdāwī (n.d, vol.4, p.220) stresses.

Due to this everlasting nature on one hand and "its impact on the public interests of the Muslims" (Ibn Qudāma, n.d, vol.4, p.346) on the other, nobody is allowed to conclude this contract with the *dhimmīs* except the *Imām* or his deputy, as al-Ba°lī (2002, vol.1, p.351) affirms. Al-Fayrūzabādī (1982, vol.1, p.236) agrees with this opinion but allows the *Imām* to delegate this right to anybody he deems suitable. Moreover, al-Mirdāwī (n.d, vol.4, p.217) states that there are other opinions about this issue within the *ḥanbalī* school, yet the majority opinion is that it is the *Imām* and his deputy only who are entitled to conclude this contract. However, Ibn °Abd al-Wahhāb (1985, vol.1, p.401), who is also from the *ḥanbalī* school stresses that: "It is not permissible [to conclude the

contract] except by the *Imām* or his deputy [and] we do not know any disagreement about it” لا تجوز إلا من الإمام أو نائبه، لا نعلم فيه خلافاً”.

Owing to the sensitive nature of this issue and its relationship to the public interest, the scholars tended to stipulate certain conditions on *dhimīs* to ensure their contract would not have detrimental effects on Muslim society as a whole.

Al-Fayrūzabādī (1982, vol.1, p.237) emphasises that “the contract of *dhimma* cannot be struck without two conditions; adhering to the rulings of the nation and paying *jizyā*’. Ibn Qudāma (n.d, vol.4, p.357) is in line with these conditions but elaborates on the rulings which they have to adhere to, such as the rulings regarding the rights of other people in contracts and [financial] dealings. After reiterating these two conditions, al-Ḥusaynī (1994, vol.1, p.511) details that the contract of *dhimma* includes four obligations on the *dhimīs*: “To pay *jizya*, to apply the rulings of Islam on them, only to speak well about Islam and not to do anything that harms the Muslims” أن يؤدوا الجزية وأن تجري عليهم أحكام الإسلام، وأن لا يذكروا دين الإسلام إلا بخير وأن لا يفعلوا ما فيه ضرر على المسلمين. These very same obligations are repeated by al-Shirbīnī (1994, vol. 2, p.573) and Ibn Yūsuf (1969, vol.1, p.104).

Conversely, the Islamic state has certain obligations towards these people according to the *dhimma* contract. The first obligation is protection and security. Al-Shīrāzī (n.d, vol.2, p.257) affirms that “the sole purpose of the *dhimma* contract is the security from both sides” مقتضى عقد الذمة الأمان من الجانبين. This means the *dhimīmī* has the right to be safe and secure in the Islamic state while the Muslims have to be confident that the *dhimīmī* will not act as spies for their enemies.

Al-Nawawī (1984, vol.10, p.303), however, asserts that “the *dhimma* contract gives the disbeliever the security for his person, his possessions and his slaves” عقد الذمة يفيد الأمان للكافر نفسه وماله وعبيده. Speaking about the conquered land Ibn Sālim (n.d, vol.1, p.100) stresses that “once they pay what is obligatory on them it is compulsory [on the Muslims] to accept it and it is [then] forbidden to fight them” ومتى بذلوا الواجب عليهم وجب قبوله وحرّم قتالهم.

Nonetheless, al-Ḥusaynī (1994, vol.1, p.511) elaborates further on these rights: “What we are obliged to are two things; the first is to stop harming them either in their persons or their possessions and anyone who does so, has to compensate them, because they paid *jizya* to protect their blood and money. The second thing is that the *Imām* has to defend them against anyone who intends [to harm them] from the people of *dār al-ḥarb*” ما يلزمنا فأمران أحدهما الكف عنهم بأن لا نتعرض لهم نفساً ولا مالا ويضمنهما المتلف لأنهم إنما بذلوا الجزية لعصمة الدماء والأموال، الأمر الثاني أنه يلزم الإمام دفع من قصدهم من أهل الحرب. The same opinion is also adopted by Ibn Yūsuf (1969, vol.1, p.104) who says: “It is prohibited to kill the people of *dhimma* or take their moneys and it is obligatory on the *Imām* to protect them and stop anyone from harming them” ويحرم قتل أهل الذمة وأخذ مالهم ويجب على الإمام حفظهم ومنع من يؤذيهم.

Hence, the *dhimma* contract in essence is a safety contract where the *dhimmi*s reside in the Islamic state securely, provided that they keep the general order and pay *jizya*.

Concerning their rights in their daily life in terms of work, finance and welfare, for example, the scholars stipulated a general rule. This rule was deduced from a *ḥadīth* in which the Prophet said: “If they accept the contract of *dhimma*, then let them know that they have the same rights of the Muslims and they are committed to the same obligations”⁷⁷ إذا قبلوا عَقْدَ الذِّمَّةِ فَأَعْلَمُهُمْ أَنَّ لَهُمْ مَا لِلْمُسْلِمِينَ وَعَلَيْهِمْ مَا عَلَى الْمُسْلِمِينَ (al-Kāsānī, 1982, vol.2, p.37).

Affirming their liberty in matters related to their beliefs, al-Zayla^ʿī (1895, vol.2, p.159) and al-Mirghinānī (n.d, vol.1, p.214) lay down another rule that says: “We are ordered to leave them with what they believe in” أمرنا بأن نتركهم وما يدينون. However, he exempts the issue of committing adultery and usury from the things that they are allowed to do, as the first matter is “prohibited in all religions” حرام في الأديان كلها and usury is prohibited by the *ḥadīth*: “Except [who deals with] usury, there is no covenant between us”⁷⁸ إلا من عهد (al-Zayla^ʿī, 1938, vol.3,p.203)

⁷⁷ This *ḥadīth* was narrated in different formats by many scholars like al-Nasā^ʿī (1990, vol.2, p.279), Abu Dāwūd (n.d, vol.3, p.44), Ibn Ḥanbal (n.d, vol.3, p.224) and Ibn Jārūd (1987, vol.1, p.260).

⁷⁸ Regarding the detailed rulings of the *dhimmi*s in *dār al-Islam*, the Muslim scholars debated these rulings in depth and naturally they differed in many of these details. Such debates are scattered through out the books of jurisprudence, like the one I mentioned above.

Yet behaviour that was inconsistent with these rulings did not necessarily involve the abolition of their contract. The scholars generally were very reluctant to expand on the circumstances in which the *dhimma* contract could be cancelled, because of its everlasting nature, as mentioned above. Al-Ghamrāwī (n.d, vol.1, p.555), al-Ramlī (1983, vol.8, p.109) and al-Nawawī (1984, vol.10, p.338) state clearly that “the *dhimma* contract cannot be terminated by [mere] accusation” لا يَبْذَى عَقْدُ الذِّمَّةِ بِالتَّهْمَةِ. Moreover, Ibn Nujaym (n.d, vol.5, p.125) affirms that “the *dhimma* contract is cancelled by action not by words” عَقْدُ الذِّمَّةِ يُنْتَقَضُ بِالْفِعْلِ وَلَا يُنْتَقَضُ بِالْقَوْلِ. So, there must be an action and irrefutable evidence against the *dhimmi* for the *Imām* to be able to terminate his contract. Al-Shīrāzī (n.d, vol.2, p.257) rules that “if he fights against the Muslims, his contract is nullified, whether this condition [not fighting the Muslims] was stipulated in the contract or not, as the requisite of the *dhimma* contract is security from both sides, and fighting [against the Muslims] negates that, so it nullifies the contract” وإن قاتل المسلمين وإنقضى عهده سواء شرط عليه تركه في العقد أو لم يشرط لأن مقتضى عقد الذمة الأمان من الجانبين والقتال ينافي الأمان فانقضى به العهد.

In addition, close to this case is returning to *dār al-ḥarb* “to live there permanently without returning to *dār al-Islam*” (Ibn ʿĀbdīn, 2000, vol.4, p.171). Al-Rāzī (1996, vol.1, p.191) asserts that “the contract cannot be terminated unless the *dhimmi* joins *dār al-ḥarb* or they take control over a place and fight us” ولا ينتقض عقد الذمة إلا بأن يلحق بدار الحرب أو يغلبوا على موضع ويحاربونا. Al-Mirghinānī (n.d, vol.2, p.163) mentions the same scenario of joining *dār al-ḥarb* and justifies the termination by the fact that “they become our enemies and that strips the contract off any advantage, i.e. preventing the evils of war” لأنهم صاروا حربا علينا فيعزى عقد الذمة عن الفائدة وهو دفع شر الحراب.

The other valid reason for terminating the contract is refusing to pay *jizya* and the disobedience to the rulings of the Muslims, as al-Fayrūzabādī (1982, vol.1, p.239) rules. Al-Shīrāzī (n.d, vol.2, p.257) provides an explanation of this ruling: “The *dhimma* contract is not concluded without them [paying *jizya* and adhering to the Muslim rulings], so it will not stay still without them” عقد الذمة لا ينعقد إلا بهما فلم يبق دونهما. Al-Ramlī (1983, vol.8, p.104), still puts a reservation on terminating the contract in this case. He states that the refusal to pay *jizya* should be without a valid reason to do so; otherwise, it should not be terminated.

However, if the *dhimmī* commits crimes other than those mentioned above, like committing adultery with a Muslim woman, helping a spy of the disbelievers, showing the weak points of the Muslims, making a Muslim convert to another religion, or killing a Muslim, al-Fayrūzabādī (1982, vol.1, p.239) states that if these crimes were stipulated in the contract not to be committed, then his contract will be terminated otherwise it will not.

Committing these crimes will obviously be met with punishment, but it will not invalidate his contract. Practically, this means that the *dhimmī* enjoys the right of a permanent stay in the Islamic state and he is not dealt with as an alien, but as a member of society who could be punished for the crimes and the wrong deeds he commits.

Lastly, during particular periods in Islamic history we find some scholars stipulating other conditions on the *dhimmīs* in relation to their behaviour, worship, outward appearance, dress code, what to ride, where to reside, the height of their buildings and so on⁷⁹ (al-Fayrūzabādī, 1982, vol.1, pp.236-238). These conditions were later known as *al-shurūṭ al-ʿUmariyya*, ʿUmar ordinances (Ibn al-Jawzī, 1961, vol.1, p.735). Furthermore, some scholars added that even paying *jizya* should be done in a certain humiliating form, thinking that this is what was required according to the verse (9:29). Ibn Sālīm (n.d, vol.1, p.100) for instance says: “They should be humiliated when paying [*jizya*] and they should be made to wait for a long time and be dragged from their hands” ويمتهنون عند أخذها ويطال وقوفهم وتجر أيديهم. Al-Ḥusaynī (1994, vol.1, p.511) mentions other forms of humiliation that should accompany the process of taking *jizya*, like making the *dhimmī* stand while the Muslim [the taxman] sitting and to order him to take his hands out of his pocket, bend his back and bow his head whilst pouring what he has in the balance” يكون الذمي قائما والمسلم جالسا ويأمره أن يخرج يده من جيبه ويحنى ظهره ويطأطئ رأسه ويصب ما معه في كفة الميزان. Yet, after mentioning these forms al-Ḥusaynī concludes that these forms are rejected and false. The claim that these conditions are recommended or obligatory is more false أشد بطلانا as nobody transmitted these forms from the Prophet or anyone of his successors⁸⁰.

⁷⁹ For details of these condition see Hoyland (2004, pp.104-106), al-Zarkashī (2002, vol.3, p.229), Ibn Sālīm (n.d, vol.1, p.100) and (Ibn Yūsuf, 1969, vol.1, p.104).

⁸⁰ Al-Shirbīnī (1994, vol.2, p.572) says the same thing.

Noth (Hoyland, 2004, p.104) comments on these conditions saying that they “mainly deal with the sensitivities of the Muslims, not the victimization of religious minorities. These sensitivities only exist because the Muslims, as the victorious adherents of a different religion, had not demanded the conversion of the vanquished, but permitted them the concrete cultic manifestation of their faith”.

Despite agreeing to the above conditions, however, Ibn al-Jawzī (1961, p.30) states that: “They were not ordered to have a dress code, *al-ghayār*, in the Prophet’s era, but it was following ‘Umar’s ordinance” لم يلزموا بالغيار في عهد النبي وإنما اتبع فيه أمر عمر. So, there is no sound *ḥadīth* or verse of the Qur’ān that legalize these regulations.

The Modern Muslim scholars and the issue of *dhimma*

After establishing the national states and the advent of the new Islamic movements that aim at reviving the Islamic tradition and advancing better understanding of Islam, the issue of *dhimma* in the Islamic society was revisited by many Muslim writers, researchers and thinkers.

In their different studies they tried to identify the meaning of the term ‘citizen’ and develop it to include all non-Muslims in the Muslim countries. El-Affendī (Nafi^c, 2001, pp.61-73) summarizes the position of many of the modern scholars, like Faṭḥī ‘Uthmān, Fahmī Huwaydī, Ṭāriq al-Bishrī, Salīm al-‘Awwā, Aḥmad Kamāl, Rāshid al-Ghannūshī and other, towards this issue. In doing so he makes the following observations:

- a) ‘Uthmān discusses this issue and calls upon the Muslim to go beyond the old classifications and categorizations and to accept the non-Muslims as full citizens who have as full rights as the others.
- b) Huwaydī, after defending the old styles of dealing with the non-Muslims by saying that they fit the old times, indicates that the new developments and the rise of the concept of equal citizenship have superseded the old styles. He also points out that the old styles were customary treatment and not necessarily based on the Qur’ān and the *Sunna*.

- c) Al-°Awwā developed a new theory based on what he calls ‘the legality of conquest’ شرعية الفتح and ‘the legality of liberation’ شرعية التحرير. He says that the traditional Islamic authorities dealt with non-Muslims as a conquered people, while the new Muslim states came into reality following a liberation struggle that involved Muslims and non-Muslims alike. Thus, the latter deserve the rights of full citizenship and the old styles are not applicable these days.
- d) Al-Ghanūshī, however, argues that citizenship in Islamic political life depends on two things; religious affiliation and residence. The non-resident Muslims and the non-Muslim residents are not full citizens and they do not have the right to occupy sensitive positions in the state, such as the head of the state and the leader of the army.
- e) Based on the position of al-Māwardī who differentiates between ‘the minister of authorization’ وزير تفويض and ‘the minister of execution’ وزير تنفيذ and allows the non-Muslims to occupy the latter position, al-Bishrī comments that ministerial positions in democratic states, including the position of head of state, are executive and there is no absolute authority. Hence all positions should be open to all citizens including the non-Muslims.

El-Affendī lastly concludes that Islamic attempts to redefine the faith to encompass the modern demands of equal citizenship are going in the right direction; however, they do not go far enough.

Conclusion

From this discussion it is clear that the contract of *dhimma* is a security contract in essence, but it is a permanent contract. The scholars gave it more strength when they stressed its perpetuity and did not authorize the head of state to terminate it unless there was irrefutable evidence against the *dhimmī* invalidating his contract.

The general rules the scholars stipulate to govern the non-Muslims rights and duties in the Islamic society show that to a large extent the *dhimmī* is considered a member of the Muslim society and not an alien.

The *jizya* was a tax paid by the *dhimmī* to enjoy, in return, the protection of the Islamic state without participating in the battles or serving in the Muslim army (°Amāra, 2003, p.15). Once these non-Muslims participate in the army they do not have to pay *jizya* as al-Qaraḍāwī (1977, p.57) states.

There is a clear gap between the early Islamic tradition and the contemporary Muslim scholars regarding the issue of *dhimma*. While some early scholars in certain periods deal with the *dhimmīs* as ‘second class citizens’, deprived of occupying sensitive positions in the state due to the fact that they are conquered people, modern scholars have tried to identify a concept of citizenship in order to give non-Muslims equal rights with Muslims in the Islamic states.

The vagueness and sometimes confusion of some modern scholars around the issue of *dhimma* in terms of equalizing them with the Muslim citizens is due to their attempt to accommodate and apply the concepts of the Caliphate rulings regarding the *dhimmīs* to the non-Muslims residents in the national states. Although Mawdūdī makes the same mistake by implementing the ruling of the Caliphate to the national state, he (Mawdūdī, 1961, I) says: “It should be clearly borne in mind that an Islamic State is essentially an Ideological state, and is thus radically different from a national state. This difference in the very nature of these two types of states has important bearing on the problem under discussion”.

It is important to note that many of the historical circumstances and concepts have changed and modern scholars should revisit the concept of *dhimma* to be understood in the light of the new developments regarding the principle of equal citizenship in the modern national states.

The Interpretation of the verse (9:6) and its relation to *amān*

The revelation of the verse was in the ninth year of the *hijra* in Medina, as al-Rāzī (2000, vol.15, p.176) says. Most scholars from different schools when writing about *‘aqd al-amān* make it the basis of its legalisation. They started their arguments with this phrase: “The basis of the *amān* is the verse (And if any of those who ascribe divinity to aught beside God seeks thy protection, grant him protection, so that he might [be able to] hear the word of God)” والأصل في الأمان آية (وإن أحد من المشركين استجارك فأجره حتى يسمع كلام الله)⁸¹.

Thus, due to its great importance in this regard I have examined 54 books of exegesis⁸² written by different scholars from the Sunnī, the Shī‘ites, Ibādī⁸³ and Zaydī⁸⁴ schools.

My approach in studying this verse will be chronological and by topic. I will try to analyze the commentaries of scholars regarding each topic in different periods to spot any changes in their interpretations of this verse. I will also try to establish whether contemporary scholars differ from earlier scholars in looking at this verse and how the passage of time has added to the meaning of the verse, if at all. In addition, I will try to analyse the impact of the environment and the *madhhab* of the scholars in terms of their understanding of this verse and its implications.

However, in order to understand the full significance of the verse it is necessary to be acquainted with the context, the historical background and the environment this verse was revealed in.

⁸¹ See for example; al-Shaybānī (189 AH) (n.d, vol.9, p.56), al-Shāfi‘ī (204 AH) (1979, vol.2, p.64), al-Bukhārī (256 AH) (1987, vol.6, p.2733), al-Ṭabarī (310 AH) (1984, vol.10, p.80), al-Jaṣṣās (370 AH) (1984, vol.4, p.273), al-Bayhaqī (458 AH) (1994, vol.8, p.31), al-Qurṭubī (1986, vol.1, p.209), Ibn Muflīḥ (1979, vol.3, p.389), al-Anṣārī (1997, vol.2, p.306), al-Shirbīnī (n.d, vol.4, p.236), al-Buhūṭī (1982, vol.3, p.104), al-Suyūṭī (1961, vol.2, p.577) al-Shawkānī (1973, vol.7, p.155).

⁸² All the books I could find in libraries and online.

⁸³ *Ibādīyya* is one of the main branches of the kharijites. The sect takes its name from that of one of those said to have found it, °Abd Allāh Ibn Ibād al-Tamīmī. This sect is spread nowadays in Oman, East Africa and southern Algeria (Lewis, 1971, vol.3, p.648).

⁸⁴ *Zaydiyya* is a branch of Shī‘ites, arising out of the abortive revolt of Zayd Ibn °Ali al-Ḥusayn in Kūfa, in 122 AH. During the preparations for the revolt, a part of the Kūfan Shī‘ite withdrew their support from Zayd in protest against his refusal to condemn unconditionally the early caliphs preceding °Ali and backed Zayd’s nephew Ja°far al-Šādiq. The *Zaydiyya*, as moderates, did not classify the Sunnī Muslims generally as infidels. In political terms, however, they were in contrast to the radical but quietest Imāmiyya, militant, espousing revolt against the illegitimate Sunnī rulers as a religious duty (Bearman et al, 2002, vol.6, p.478)

In short, the first five verses of this *sūra* are ordering the Muslims to cut relations and declare war against the disbelievers who continuously fight the Muslims and violate treaties with them⁸⁵. However, the verses exempt those who respected their treaties with the Muslims (al-Ṭabarī, 1984, vol.10, p.62). Hence, none of the disbelievers is allowed to enter the holy mosque in Mecca, *al-Bayt al-Ḥarām*, in particular or Muslim land in general. Should anyone of them do so he will be putting himself at risk and could be killed. Then verse six comes to exclude those who come to the Muslims asking for *amān*.

Taking into consideration this historical and ideological background, the majority of scholars tend to interpret the reason for *amān* as the hearing of God's word.

However, in the first two AH centuries we find three commentaries, the first is *Tafsīr Ibn ʿAbbās*⁸⁶ (68 AH), the second is *Tafsīr Mujāhid* (104) and the third is *Tafsīr Muqātil* (150 AH).

The three of them interpret the verse only briefly saying that if a *mushrik* comes to the Muslims asking for *amān*, they should give him *amān* until he hears the word of God. Then he should be safe to return to his land. Yet, there is a slight difference in their interpretations regarding the "word of God". Ibn ʿAbbās interprets it as: "Your recitation of the Qurʾān" قراءتك لكلام الله while Mujāhid (1976, vol.1, p.273) interprets it "to hear what you say and what has been revealed upon you" يسمع ما تقول ويسمع ما أنزل عليك and Muqātil interprets it to be the Qurʾān.

This could be interpreted to mean that Ibn ʿAbbās would like to shorten the period *al-mushrik* could stay in the Muslim land, as he deems the recitation itself would be enough for the disbeliever to convert, while the other two scholars want it to be longer so as the disbeliever could hear and contemplate upon the whole Qurʾān and the Prophet's *ḥadīths*.

⁸⁵ See also al-Zamakhsharī (n.d, vol.2, p.230), al-Ṭabarī (1984, vol.10, p.70), al-Rāzī (2000, vol.15, p.176) and al-Qurṭubī (n.d, vol.8, p.70)

⁸⁶ Some scholars shed doubts on the authenticity of this book and its reference to Ibn ʿAbbās. See for example Abu Shuhba (1971, p.69) and al-Dhahabī (2000, vol.1, p.56)

In the third century AH I could find three commentaries, the first is *Aḥkām al-Qurʿān* by al-Shāfiʿī (204 AH), the second is *Tafsīr al-Kitāb al-ʿAzīz* by al-Hawwārī (third AH century, Ibādī) who is from the Ibādī school, and the third is *Tafsīr Furāt al-Kūfī* by Furāt al-Kūfī, who is from the Zaydī school. The general understanding of the verse remains close to that of previous scholars. However, al-Shāfiʿī affirms this meaning and stresses “the word of God” by saying that: “Whoever comes from the disbelievers wanting [to know] about Islam, then it is obligatory upon the *Imām* to protect him until he [the *Imām*] recites before him the Book of God and preaches to him in a way that he hopes God will make him accept Islam” من جاء من المشركين يريد الإسلام فحق على الإمام أن يؤمنه حتى يتلو عليه كتاب الله عز وجل ويدعوه إلى الإسلام بالمعنى الذي يرجو أن يدخل الله به عليه الإسلام (1979, vol.2, p.64). So it is not simply a matter of making him hear the Qurʿān, but taking every possible means to convince him.

Al-Hawwārī, like al-Kūfī, affirms the general meaning and quotes al-Ḥasan saying that this verse is decisive and not abrogated. However, he reports a significant story about the implementation of *ʿaqd al-amān* in the period of the Prophet. He narrates on the authority of al-Kalbī that a group of disbelievers, who did not have any treaty with the Prophet and did not attend the pilgrimage season, heard that the Prophet had ordered to fight the disbelievers who had no treaty with him after the month of *Muḥarram*, and so came to him in Medina to make a treaty. The Prophet refused that and invited them instead to convert, but they declined. So the Prophet let them go until they reached their place of safety فخلى سبيلهم حتى بلغوا مأمَنهم. The story goes on to tell us something noteworthy: “They were Christians from Banī Qays Ibn Thaʿlaba. They went to Yamāma until the people converted. Some of them converted and some of them adhered to their Christianity” وكانوا نصارى من بني قيس بن ثعلبة، فلحقوا باليمامة حتى أسلم الناس، فمنهم من أسلم، وكانوا نصارى من بني قيس بن ثعلبة، فلحقوا باليمامة حتى أسلم الناس، فمنهم من أسلم، ومنهم من أقام على نصرانيته. This account may lend itself to prove that the term disbeliever mentioned in the verse is not confined to pagans and atheists only but includes Christians and all non-Muslims. This is quite important in this context, since it widens the range of people who are entitled to ask for *amān* in Muslim lands.

The scholars in the fourth century AH, I could find, generally do not go far beyond the general meaning of the verse, except in small details, such as the period that the *mustaʿmin* could stay and his legal status after he enters *dār al-Islam*. In this period we find five commentaries, the first is *Jāmiʿ al-Bayān fī Tafsīr al-Qurʿān* by al-Ṭabarī (310

AH), *Ma'ānī al-Qur'ān* by al-Naḥḥās (338 AH), *Aḥkām al-Qur'ān* by al-Jaṣṣāṣ (370 AH) Tafsīr *Baḥr al-'Ulūm* by al-Samarqandī (373 AH) and the first Shi'ite *tafsīr* known as *Tafsīr al-Qur'ān* by al-Qummī (the fourth century).

Al-Ṭabarī reports an account narrated on the authority of Sa'īd that in one battle the Muslims caught a disbeliever and were about to kill him when he said: Take your weapons off me and let me hear the word of God. After telling him the main principles of Islam he converted (al-Ṭabarī, 1984, vol.10, p.80).

Significantly, this account emphasises the practical side of *al-amān* and shows that it was not simply a theoretical and intellectual concept but also a practical one.

This meaning is also reaffirmed by al-Naḥḥās (338 AH), who says: "If he [the disbeliever] asked to save him from killing to hear the word of God, then [you have to] give him *amān*" إن استجار من القتل حتى يسمع كلام الله فأجره (al-Naḥḥās, 1984, vol.3, p.185).

In his commentary, al-Jaṣṣāṣ also concentrates on this issue. He elaborates on the duty of the Muslims to spread the message of Islam in a way that makes the non-Muslims understand it clearly, by providing all the necessary proofs and logic. He also states that the period the *mustajir* is allowed to stay in the Muslim land is subject to fulfilling his needs, and then the *Imām* should order him to leave. "Should he exceed a year, after the *Imām* ordered him to leave, he becomes a *dhimmī* and *kharāj* will be imposed upon him فإن أقام بعد التقدم إليه سنة في دار الإسلام صار ذميا ووضع عليه الخراج (al-Jaṣṣāṣ, 1984, vol.4, p.273). This opinion is obviously important as it is related to the legal status of the *mustamin* and how he gets the permanent stay in *dār al-Islam* by becoming a *dhimmī*.

Al-Samarqandī and al-Qummī do not add any new meaning to the verse but repeat briefly the general meaning.

Moving to the fifth AH century we find six commentaries without any significant addition to the meaning of the verse, but with different approaches to its interpretation. The first is concerned with the abrogation and is contained in *al-Nāsikh wa al-Mansūkh* by al-Muqṛī (410 AH). The second is *al-Nukat wa al-'Uyūn* by al-Māwardī (450 AH). The third is Shi'ite *tafsīr* called *Tafsīr al-Tibyān al-Jāmi' li-'Ulūm al-Qur'ān* by al-Ṭūsī

(460 AH, Shi'ite) who concentrates mainly on the linguistics and the grammar in the verse. The fourth is completely different from the others we've seen so far as it takes the *sūfi*, mystic approach. It is named *Laṭā'f al-Ishārāt* by al-Qushayrī (465 AH). Then we find *Tafsīr al-Wajīz* by al-Wāḥidī (468 AH) which is really *wajīz*, brief. The last one is *Tafsīr al-Sam'ānī* by al-Sam'ānī (489 AH) who takes the conventional approach and is concise.

Due to the fact that al-Muqṛī is mainly concerned with the abrogation side of the verse I will defer it to the last section specified for abrogation. Al-Māwardī comments on the “word of God” by saying that this could mean either the whole Qur'ān or *Sūrat Barā'a*⁸⁷ only. Being the first scholar to specify this *sūra* as an obligation on the *musta'min* to learn in order to “know what it contains of the rulings regarding the *mu'āhid*, [the *musta'min*], the rulings concerning those who breach their covenant, besides the fate of the disbelievers and the difference between them and the hypocrites”⁸⁸ *ليعلم ما فيها من حكم المقيم على العهد، وحكم الناقض له والسيره في المشركين والفرق بينهم وبين المنافقين*

After elaborating thoroughly on the linguistics and grammar in the verse, al-Ṭūsī (1960, vol.5, p.205) explains the meaning of the phrase *أبلغه مأمنه* “make him attain his place of safety” and says that “attaining [literally] is making [something] proceed to the ultimate end” *الإبلاغ التصيير إلى منتهى الحد*. In other words he wants to say that the Muslims should do their best to protect the *musta'min* till he reaches his safe place regardless of whatever it may cost.

Al-Qushayrī, the *sufi*, brilliantly articulates his argument that God orders us to give *amān* to the disbeliever who does not know anything about Him. God also obliges us not to turn him away without letting him listen to His word. All this is out of His Compassion and Mercy. Al-Qushayrī continues to wonder how then would His treatment be of those who asked Him the *amān* considering that they worshipped Him during their entire lives and knew how great and exalted is He. Al-Qushayrī⁸⁹ supports his view by the verse of poetry:

⁸⁷ Another name of *Surāt al-Tawba*.

⁸⁸ (<http://www.altafsir.com/Tafasir.asp?tMadhNo=0&tTafsirNo=12&tSoraNo=9&tAyahNo=6&tDisplay=yes&UserProfile=0/>) [cited April 2007]

⁸⁹ (<http://www.altafsir.com/Tafasir.asp?tMadhNo=3&tTafsirNo=31&tSoraNo=9&tAyahNo=6&tDisplay=yes&UserProfile=0/>) [cited April 2007]

It is noticeable that al-Zamakhsharī in this phrase interprets the listening to a lengthy process of discovering the truth. This means, by default, an extended period to finish this process and not confined to any restriction rather than knowing the truth.

Another interesting matter al-Zamakhsharī adds in this context is the account of °Alī Ibn Abī Ṭālib with the disbeliever who asked: “If a man of us [the disbelievers] wants to come to Muḥammad, after the end of this date, [the *Ḥarām* months]⁹⁰ to listen to the word of God or for a need, would he be killed? °Alī said: No, because God exalted is He says: “If one of the disbelievers sought your *ḥiwār* grant it to him” إن أراد الرجل منا أن يأتي محمداً بعد انقضاء هذا الأجل لسماع كلام الله تعالى أو لحاجة قتل؟ قال: لا لأن الله تعالى يقول: (وإن أخذ من المشركين أسئجارك فأجزه).

The importance of this account in this context is that it states clearly that a disbeliever may come to *dār al-Islam* to ask for something other than listening to the word of God, and °Alī whose position is known in Islam affirms this and supports it by quoting the verse.

However, Ibn °Aṭiyya (542 AH) interprets this verse by saying that the *mustaʿmin* comes to *dār al-Islam* “to listen to the Qurʾān and see the state of Islam”⁹¹ يسمع القرآن ويرى حال الإسلام. Hence, it is more than listening. It is listening and wandering about in the Muslim land to see the social, economical, political aspects of Muslim daily life. By virtue of things he needs lots of time to do that and the liberty to move around in the Islamic state⁹².

Al-Ṭabarsī (548 AH, Shiʿite) does not go far beyond this meaning. He (al-Ṭabarsī, 1980, vol.3, p.17) affirms that: “If the *mustaʿmin* comes to listen to your preaching and argument from the Qurʾān, give him *amān*, explain to him what he wants and give him enough time to listen and ponder upon the word of God”⁹³ لسمع دعوتك واحتجاجك عليه بالقرآن فأمنه وبين له ما يريد وأمهله حتى يسمع كلام الله ويتدبره.

⁹⁰ These months were the period that God gave to disbelievers before declaring the state of war against them in the verses prior to this verse (9:1-5).

⁹¹ (<http://www.altafsir.com/Tafasir.asp?tMadhNo=0&tTafsirNo=14&tSoraNo=9&tAyahNo=6&tDisplay=yes&UserProfile=0/>) [cited April 2006]

⁹² The issue of ‘freedom of movement’ for the *mustaʿmin* will be discussed in ch.4 when comparing the Geneva Convention 1951 to the Islamic tradition.

⁹³ (<http://www.altafsir.com/Tafasir.asp?tMadhNo=4&tTafsirNo=3&tSoraNo=9&tAyahNo=6&tDisplay=yes&UserProfile=0/>) [cited April 2006]

answer, but a process where the *musta'min* needs unrestricted time to listen, contemplate and reflect upon Islam.

Although Ibn al-Jawzī (597 AH) is brief in interpreting this verse, nonetheless he makes clear that “if [the *musta'min*] asked for your *amān* to listen to the Qur'ān and look into what he is commanded to do and prohibited from doing, give him *amān*” استأمنك يبتغي أن (Ibn al-Jawzī, 1983, vol.3, p. 399) يسمع القرآن وينظر فيما أمر به ونهي عنه فأجره

The scholars of this period generally affirm the *musta'min*'s right to be given the full opportunity to learn about Islam, without making time an obstacle.

Moving to the seventh century we find four commentaries; the first is *al-Tafsīr al-Kabīr* by al-Rāzī (604 AH), the second is *al-Jāmi' li-Aḥkām al-Qur'ān* by al-Qurṭubī (642AH), the third is *Tafsīr al-Qur'ān* by Ibn 'Abd al-Salām (660 AH) and the fourth is *Tafsīr Anwār al-Tanzīl wa Asrār al-Ta'wīl* by al-Bayḍāwī (685 AH). The scholars in this period vary in regard to the length of their comments on the verse. At the time where we find al-Rāzī and al-Qurṭubī elaborate extensively on the verse and the rules it sets, we find Ibn 'Abd al-Salām and al-Bayḍāwī comment in a few words about the direct meaning of the verse.

After stating the aforementioned account of 'Alī Ibn Abī Ṭālib with the disbeliever, al-Rāzī takes the historical approach to put the verse in its context. He directly links it to the previous verses to show that the flow of events leads to the legislation of this verse which exempts the *musta'min* from killing, as the previous verses stipulate. He then stresses several points in this verse.

One of them is the arrangement of wording in the verse, especially the phrase “if one of the disbelievers asked your protection” وإن أحد من المشركين استجارك. Grammatically, he says, the verb “asked your protection” استجارك should be mentioned before “one of the disbelievers” أحد من المشركين and repeated after it. So the verse would be وإن استجارك أحد من المشركين استجارك فأجره. However, the Qur'ān did not repeat the verb and put it before the subject, the disbeliever, because God wanted to focus attention on the *musta'min* himself. Al-Rāzī supports this opinion by quoting Sibawayh, the famous linguist, who says: “They [the Arabs] bring forward the most important thing which they want to

for reasons other than learning about Islam is principally acceptable if it does not harm the Muslims and may bring them benefits.

It is al-Qurṭubī who is the first of the exegetes to widen the reason for granting *amān*. This could be due to the fact that he was living in Cordoba, a powerful, civilised and settled city in the golden era of the Muslims in Spain. So, he was not worried by the foreigners entering *dār al-Islam* or the state of Muslims, which was great enough to convince many people to convert, or at least to be impressed.

In regard to the other two commentaries, Ibn ʿAbd al-Salām (660 AH) and al-Bayḍāwī (685 AH) interpret the verse in brief and do not go beyond the general meaning. Nevertheless, al-Bayḍāwī stresses on listening and reflecting and the importance of acquainting the *mustaʿmin* with the truth of Islam (al-Bayḍāwī, n.d, vol.3, p.130).

The eighth century AH witnessed the highest number of exegetes, so far. I found seven commentaries. They are chronologically; *Tafsīr Madārik al-Tanzīl wa Ḥaqāʾiq al-Taʾwīl* by al-Nasafī (710 AH), *Nāsīḥ al-Qurʾān wa Mansūkhīh* by Ibn al-Bāzārī (738 AH), *al-Tashīl li-ʿUlūm al-Tanzīl* by al-Kalbī (741 AH), *Tafsīr Lubāb al-Taʾwīl fī Maʿānī al-Tanzīl* by al-Khāzin (741 AH), *Tafsīr al-Baḥr al-Muḥīṭ* by Abu Ḥayyān (745 AH), *Tafsīr al-Qurʾān al-Karīm* by Ibn Kathīr (774 AH) and *al-Burhān fī ʿUlūm al-Qurʾān* by al-Zarkashī (794 AH).

None of these books except *Tafsīr al-Baḥr al-Muḥīṭ* by Abu Ḥayyān (745 AH) and *Tafsīr al-Qurʾān al-Karīm* by Ibn Kathīr, add any new or significant meaning to the verse. However, I will consider Ibn al-Bāzārī, who is mainly concerned with the abrogation issue, to the next part of this section.

Abu Ḥayyān (745 AH) approaches his interpretation of this verse from different perspectives. He mentions the issue of abrogation and argues against the opponents who say it is abrogated. He also takes the jurisprudential approach and discusses some details in this regard, like the *amān* of the *Imām*, the slave, the woman and the boy and mentions the variations between the scholars about these issues.

The interesting thing in Abu Ḥayyān's interpretation is his use of the same wording of al-Rāzī in regard to the lessons formulated from this verse, especially the issue of reflection upon monotheism and considering it the highest hierarchy in Islam, without referring to al-Rāzī.

However, Abu Ḥayyān's comments on the word 'until' *ḥatta* حتى are significant here. He says: "*Ḥatta* could mean the time, i.e. until he hears [the word of God], or it could be for justification [the reason for giving *amān*]. In both cases it is linked with [the verb] حتى يصح أن تكون للغاية أي: إلى أن يسمع ويصح أن تكون للتعليل، وهي متعلقة في 'amān' أجره الحالين بأجره (Abu Ḥayyān, 1983, vol.5, p.11). So, in the first interpretation the period of *amān* should be restricted to the limit and the time of listening. Once the listening is done his *amān* should be terminated. Yet in the second interpretation the word *ḥatta* gives the meaning of purpose, i.e. give him *amān* so that he may hear the word of God, and thus he will be given the opportunity to learn about Islam. In these two scenarios the verse has nothing to do with the purpose of asking *amān* by the *musta'min*, since it deals only with the duration of *amān* in the first scenario or the purpose of granting *amān* in the second one.

Nonetheless, Abu Ḥayyān also mentions that some linguistic scholars could accept that 'until' *ḥatta* is linked with the verb 'sought your protection' استجارك. In this case the verse would be: 'If one of the disbelievers sought your *amān* to listen to the word of God give it to him' وإن أحد من المشركين استجارك حتى يسمع كلام الله فأجره. So, the verse would mean that the disbeliever comes to *dār al-Islam* for the purpose of listening to the word of God, and thus the Muslims should grant him *amān* for that reason.

However, the majority of scholars, as Abu Ḥayyān (1983, vol.5, p.11) says, reject the association of the word 'until' *ḥatta* with the verb 'sought your protection' استجارك because in this case we should repeat the phrase 'until he hears the word of God' حتى يسمع كلام الله twice. The first phrase should be put after the verb 'sought your protection' استجارك since it is associated with it, according to this understanding, while the second one should be put after the verb 'give him *amān*' أجره. So, the verse would be read: "If one of the disbelievers sought your protection 'to hear the word of God' grant him protection 'until he hears the word of God'" وإن أحد من المشركين استجارك حتى يسمع كلام الله فأجره حتى يسمع كلام الله

In this scenario, however, the first phrase ‘to hear the word of God’ حتى يسمع كلام الله is used here to show the purpose of asking *amān*, and that is to listen to the word of God only, whereas the second phrase ‘until he hears the word of God’ حتى يسمع كلام الله is used to show the time and the limit, i.e. grant him *amān* until he hears the word of God, and once that is done the *amān* will be terminated. Nonetheless, there is a problem with this scenario, according to the Abu Ḥayyān (1983, vol.5, p.11). The repetition of phrase ‘until he hears the word of God’ حتى يسمع كلام الله is not acceptable grammatically, therefore the second repeated phrase should be replaced with a pronoun attached to the word *ḥatta*, instead. Hence the verse should be: “If one of the disbelievers sought your protection to hear the word of God grant it to him until he hears it” وإن أحد من المشركين استجارك حتى يسمع كلام الله فأجره حتاه *ḥatta*. Although in English it sounds right grammatically, in terms of Arabic grammar, there is a problem since the pronoun هـ cannot be attached to the word *ḥatta* حتى as it is the case here حتاه.

Having said that, the word *ḥatta* cannot grammatically refer to the verb ‘sought your protection’ حتى استجارك i.e. ‘sought your protection to hear the word of God’. The significance of this approach is that the verse does not state the reasons for seeking protection, whether it is hearing the word of God or anything else. The verse practically lifts any restrictions on the disbeliever to ask for protection, so whenever he feels that there is a need to ask for protection in *dār al-Islam* he should be able to do so. This would also mean that scholars who confine the reason for asking protection to the listening to the word of God are wrong, simply because it is against the Arabic grammatical and linguistic rules.

According to this conclusion the word *ḥatta* should not be interpreted to mean the limitation and duration of the *amān*, as many classical scholars claimed. That is because this interpretation was based on the assumption that the disbeliever seeks *amān* in *dār al-Islam* to hear the word of God and thus once he hears it his *amān* should be terminated. However, since we have proved that this assumption is in contradiction with the grammar of the Arabic language, the meaning of the word *ḥatta* should be changed to mean ‘so that’ instead of ‘until’.

Briefly, in light of this discussion the verse should be interpreted as follows: “If one of the disbelievers, [regardless of his purposes], sought your protection, grant it to him [without limitation of time] so that he may hear the word of God”.

Adhering to his own method, Ibn Kathīr (774 AH) tries to bring in everything related to the topic from different perspectives. He interprets the verse in general and quotes from various sources to support his opinion. Yet, most of what he says here is not new. The significance of his comments becomes apparent when he mentions part of the account of *sulḥ al-Ḥudaybiya* related to the subject here, and the account of the messenger of Musaylama al-Kadhḥāb to the Prophet. He does so to conclude that: “Whoever comes from *dār al-ḥarb* to *dār al-Islam* for delivering a message, trading, asking peaceful settlement or truce, carrying *jizya* or something similar to that and asked for *amān* from the *Imām* or his deputy, he should be given the *amān* as far as he stays in *dār al-Islam* until he returns to his safe place and his homeland” من قدم من دار الحرب إلى دار الإسلام في إداء رسالة أو تجارة أو طلب صلح أو مهادنة أو حمل جزية أو نحو ذلك من الأسباب وطلب من الإمام أو نائبه أمانا أعطى أمانا مادام مترددا في دار الإسلام وحتى يرجع إلى مأمنه ووطنه (Ibn Kathīr, 1980, vol.2, p.338).

What is noteworthy in this quotation is that Ibn Kathīr does not restrict the *amān* for these categories only but makes it open to similar cases, which could include cases of refuge of modern times.

In the ninth century I could find four commentaries; the first is *Tafsīr Gharāʾib al-Qurʾān wa Raghāʾib al-Furqān* by al-Qummī (850 AH), the second is *Tafsīr al-Lubāb fī ʿUlūm al-Kitāb* by Ibn ʿĀdil (880 AH), and the third is *Tafsīr Nazm al-Durar fī Tanāsub al-ʿĀyāt wa al-Suwar* by al-Biqāʿī (885 AH) and the fourth is *Tafsīr al-Aʿqam* by al-Aʿqam (ninth AH, Zaydī).

As he states in his introduction, al-Qummī gathers material from his predecessors like al-Zamakhsharī, al-Rāzī and others. So it is no wonder that we find in some cases the same wording of al-Rāzī, especially when he mentions the hierarchy of contemplation in Islam and that the verse does not have any specific limitation to the stay of the *mustaʿmin*, and so on. However, al-Qummī reaffirms the last point by saying: “As for the time of stay for contemplation, there is nothing in the verse that shows it. [Deciding

the limit] could be up to the judgment of the *Imām*⁹⁴ أما زمان مهلة النظر فليس في الآية ما يدل على ذلك ولعله مفوض إلى اجتهاد الإمام.

Nevertheless, al-Qummī also discusses the juristic side of the verse in regard to who is entitled to give *amān* and so on. In addition, he supports his ideas by mentioning the account of Um Hāni^o with the two disbelievers she gave *jiwār* to. After that he argues about the abrogation of the verse.

Like al-Qummī, Ibn ʿĀdil (880 AH) quotes from the predecessors, yet without stating that. He almost copies what Abu Ḥayyan said about the word *ḥatta* and its relationship to the verb ‘grant him protection’ أجره and the grammatical and linguistic justification for that. However, he adds more examples to support his position. In addition, he touches upon the abrogation argument between the scholars concerning this verse.

The other two scholars, al-Biqāʿī and al-Aʿqam, who is from the Zaydī school, do not bring forward any important addition to the meaning of the verse. They reiterate the general meaning and al-Aʿqam affirms that ʿAlī Ibn Abī Ṭālib said that the verse in abrogated.

Moving to the tenth AH century we find three commentaries; the first is called *al-Durr al-Manthūr fī al-Tafsīr bi al-Maʿthūr* by al-Suyūṭī (911 AH), the second is *al-Jawāhīr al-Ḥisān fī Tafsīr al-Qurʾān* by al-Thaʿālibī (928 AH) and the last one is *Irshād al-ʿAql al-Salīm ilā Mazāyā al-Kitāb al-Karīm* by Abu al-Suʿūd (951 AH).

In addition to the general meaning of the verse, al-Suyūṭī discusses the issue of abrogation of the verse. However, he narrates on the authority of al-Ḍaḥḥāk that the Muslims were not only ordered to protect the disbeliever who wants to listen to the word of God but also “were ordered to take care of them financially as long as they are there” وأمر أن ينفق عليهم على حالهم ذلك.

This account adds a new dimension to the issue of *amān* in which responsibility for the disbelievers lies on Muslims shoulders. They have to take care of them in terms of

⁹⁴(<http://www.altafsir.com/Tafasir.asp?tMadhNo=4&tTafsirNo=38&tSoraNo=9&tAyahNo=6&tDisplay=yes&UserProfile=0/>) [cited April 2006]

welfare, protection and everything else they may need as long as they stay in the *dār al-Islam*.

With regard to al-Tha°alibī, he comments on the verse briefly and stays within the general meaning the other scholars cited.

Like the others, Abu al-Su°ūd repeats the general meaning of the verse, but he also affirms what Abu Ḥayyān and al-Qummī said about the word *ḥatta* and its reference to the verb ‘grant him protection’ أجره rather than the verb استجارك. He justifies that by saying: “*Ḥatta*, whether it is to show limitation or rationalization, is referred to what is after it [the verb ‘grant him protection’] and not to the verb ‘sought your protection’. [If it refers to ‘sought your protection’] this will lead to the use of *ḥatta* with the pronoun and that is what should not happen except by poetic license” حتى سواء كانت للغاية أو للتعليل (Abu al-Su°ūd, n.d, vol.4, p.44).

Moreover, he goes on to comment on ‘the need’ mentioned in the account of °Alī Ibn Abī Ṭālib with the disbeliever. He then interprets ‘the need’ by saying: “It is the need related to religion and not the general need or the earthly needs” الحاجة المتعلقة بالدين لا ما الحاجة المتعلقة بالدين لا ما (Abu al-Su°ūd, n.d, vol.4, p.44). In this comment, Abu al-Su°ūd becomes the first scholar to explicitly restrict the reason for requesting *amān* to the religious needs and exclude bluntly any other need. While other scholars mentioned the religious need, they did not exclude other needs so categorically.

In the eleventh century, I could find one commentary called *al-Ṣāfi fī Tafsīr Kalām Allah al-Wāfi* by al-Fayḍ al-Kāshānī (1090 AH, Shī°ite). The author of this work does not add any different meaning and sticks to the general meaning stated by earlier scholars (al-Kāshānī, 1985, vol.8, p.921).

Like the century before it, the twelfth century I could find one book called *Rūḥ al-Bayān fī Tafsīr al-Qur°ān* by Ḥaqqī (1127 AH). This does add new meaning rather than

simply affirming the previous understandings, especially in relation to the word *ḥatta* which could mean ‘until’ or ‘so that’⁹⁵.

The thirteenth AH century witnessed the production of three commentaries. The first is *Faṭḥ al-Qadīr* by al-Shawkānī (1259 AH), the second is *al-Baḥr al-Madīd fī Tafsīr al-Qurʾān al-Mjīd* by Ibn ʿAjība (1266 AH) and the third is *Rūḥ al-Maʿānī fī Tafsīr al-Qurʾān al-Aẓīm wa al-Sabʿ al-Mathānī* by al-Alūsī (1270 AH). After examining these books, we find that the first two authors remain in the same area with the majority of scholars. However, al-Shawkānī adds a new meaning to the word ‘his place of safety’ مأمنه and says: “It is the place he is safe in” (al-Shawkānī, n.d, vol.2, p. 338). In other words, when returning the disbeliever it is not necessarily to be to his country of origin if it is not safe. Instead, the Muslims are obliged to send him to a safe place regardless whether it is his home country or somewhere else. This point is quite important as we shall see when discussing the concept of *non-refoulement*.

However, Ibn ʿAjība aligns himself with those who interpret the word *ḥatta* to mean ‘so that’. He says: “It is obligatory to give them *jīwār* so that they may listen and contemplate and that becomes a reason for their conversion”⁹⁶ فلا بد من إيجارهم، لعلمهم يسمعون ويتدبرون؛ فيكون ذلك سبب إيمانهم. Then he applies this verse to hierarchical system of Sufism. He makes it obligatory on the higher Sufis to give *jīwār* to the beginners in Sufism should they ask for it especially when the latter enter ‘the land of truths’ بلاد الحقائق.

Nonetheless, Al-Alūsī (n.d, vol.10, p.53) concentrates primarily on interpreting the word *ḥatta* and its implications. He argues strongly that *ḥatta* is for justification and thus related to the verb ‘grant him protection’. He quotes al-Fāḍil Ibn ʿĀdil saying that the majority of scholars refuse to consider *ḥatta* to be related to the verb ‘sought your protection’. He then continues to refute his opponents’ evidence. Lastly, he counters what Abu al-Suʿūd said about the account of ʿAlī and the word ‘need’ mentioned there.

⁹⁵(<http://www.altafsir.com/Tafasir.asp?tMadhNo=0&tTafsirNo=36&tSoraNo=9&tAyahNo=6&tDisplay=yes&UserProfile=0/>) [cited April 2006]

⁹⁶(<http://www.altafsir.com/Tafasir.asp?tMadhNo=0&tTafsirNo=37&tSoraNo=9&tAyahNo=6&tDisplay=yes&UserProfile=0/>) [cited April 2006]

In fourteenth AH century we find four commentaries; *Hamyān al-Zād ilā Dār al-Ma'ād* and *Taysīr al-Tafsīr* both by Muḥammad Aṭfiyyash (1332 AH, Ibādī), *Tafsīr al-Taḥrīr wa al-Tanwīr* by Ibn °Āshūr (1393 AH) and *Bayān al-Sa'āda fī Maqāmāt al-°Ibāda* by al-Janābadhī (14th century, Shī°ite). All these works agree that the disbeliever could come to the Muslim land and ask for *amān* not only for religious reason but also for an earthly need.

Aṭfiyyash interprets the verse in his second *tafsīr* at greater length than the first one, but the meaning, remains relatively unchanged. In *Taysīr al-Tafsīr* he asserts that the disbeliever could ask for *amān* from the Muslims either for hearing the Qur°ān or for an earthly matter. He also emphasizes the word *ḥatta* and says that it is for justification and relates to the verb 'grant him protection'. He reaffirms that clearly saying: "He asked for *amān* generally, without the restriction of hearing"⁹⁷ استجارك مطلقا، لا بقيد السماع. He also comments on the phrase 'make him attain his place of safety' ثم أبلغه مأمنه and states that his safe place could be his homeland or anywhere else, where he feels he will be safe.

Ibn °Āshūr (2000, vol.10, p.26) states bluntly that the verse does not explain the reason behind asking for *jiwār*, because the reasons for that are different and nobody asks for *amān* without a valid reason. He also draws attention to the word 'then' ثم and says that it gives the meaning of slow motion. This means here that Muslims should not hurry the disbeliever to his safe place, but should allow him to stay there whatever it takes.

Lastly in this century al-Janābadhī, the Shī°ite, confirms that the disbeliever could come to Muslim lands for an earthly need rather than religious needs⁹⁸.

Arriving to the modern commentaries we find several books; *Fī Zilāl al-Qur°ān* by Sayyid Quṭb (1387 AH), *al-Mīzān fī Tafsīr al-Qur°ān* by al-Ṭabāṭabā°ī (1402 AH, Shī°ite), *al-Wasīṭ fī Tafsīr al-Qur°ān* by Ṭanṭāwī, *Taysīr al-Tafsīr* by al-Qaṭān and *Aysar al-Tafāsīr* by As°ad Ḥawmid.

⁹⁷(<http://www.alfasir.com/Tafasir.asp?tMadhNo=0&tTafsirNo=50&tSoraNo=9&tAyahNo=6&tDisplay=yes&UserProfile=0/>) [cited April 2006]

⁹⁸(<http://www.alfasir.com/Tafasir.asp?tMadhNo=0&tTafsirNo=42&tSoraNo=9&tAyahNo=6&tDisplay=yes&UserProfile=0/>) [cited April 2006]

Generally speaking the above mentioned scholars do not go far beyond what the classical scholars stated, and in some cases they depend on their work. However, they sometimes add new meanings or put more emphasis on particular issues.

The controversial *Fī Zilāl al-Qurʿān*, whose author was hanged in Egypt in 1966 for his controversial and revolutionary views, comments comprehensively on this verse and the previous verses, and approaches them from a different perspective. He first goes through the historical background to put this verse in context. After piecing the verses together he concludes that this particular verse is a landmark of the greatness of Islam since it allows the disbelievers to enter *dār al-Islām* with guaranteed security so that they listen to and understand the core meaning of the religion (Quṭb, 1967, vol.4, p.142).

As for al-Ṭabāṭbāʿī, he also gives a lengthy interpretation of the verse and touches upon different matters, which lie within the main topics of the earlier scholars. Yet there are some variations, like in relation to the word *hatta*. He says that it is “the purpose of asking for *jiwār* and giving *jiwār*”⁹⁹ غاية للاستجارة والاجارة. Later on he restricts giving *amān* to those who ask for it to learn about Islam and not for anything else. He (al-Ṭabāṭbāʿī, 1971 vol.9, p. 154) says: “Then asking for *amān* was only for listening to the word of God and to querying of what the Prophet has of the matters related to his message” فالاستئمان إنما كان لسماع كلام الله واستفسار ما عند الرسول من مواد الرسالة. Moreover, he emphasizes this in another place (al-Ṭabāṭbāʿī, 1971 vol.9, p. 155) by saying: “The verse only obligates giving *jiwār* to the *mustajir* if he asked for it for a religious matter that is likely to be of good benefit to the religion. But the general *istijāra* [asking for *amān*] for non-religious reason and with no good of it to religion is not originally supported by this verse” أن الآية إنما توجب أجارة المستجير إذا استجار لأمر ديني يرجى فيه خير الدين، وأما مطلق الاستجارة لا لغرض ديني ولا نفع عائد إليه فلا دلالة لها عليه أصلاً. By saying this al-Ṭabāṭbāʿī becomes the second scholar after Abu al-Suʿūd to restrict *asking for jiwār* to the religious need to the exclusion of all other needs.

After commenting on the verse extensively from different perspectives and reiterating what earlier scholars had said about it, Ṭanṭāwī affirms an important issue concerning

⁹⁹(<http://www.altafsir.com/Tafasir.asp?tMadhNo=0&tTafsirNo=56&tSoraNo=9&tAyahNo=6&tDisplay=yes&UserProfile=0/>) [cited April 2006]

the length of stay for the *mustajir*. He says: “It is obligatory on the *Imām* or whoever replaces him to give the *mustamin* the period he deems would be enough for him to understand the truths of Islam” على الإمام أو من يقوم مقامه أن يعطى المستأمن المهلة التي يراها كافية “ لفهمه حقائق الاسلام. He then quotes al-Rāzī to support his opinion.

Finally, he praises Islam for giving this opportunity to disbelievers and quotes Quṭb, without mentioning him, saying that the *amān* is the pinnacle of Islam and an indication that Islam is “a system of guidance not a system of annihilation” since it not only gives them the opportunity to stay in his land, but also protects them and accompanies them until they reach their safe place should they refuse to convert.

Regarding al-Qaṭṭān and Ḥawmid, they interpret the verse briefly and stay within the general framework of earlier scholars.

The issue of abrogation

Twenty out of the 54 scholars address the issue of abrogation. After examining these commentaries it is apparent that the main debate concerning this issue is based upon two opinions. The first is that “the verse is decisive” الآية محكمة and that is al-Ḥasan’s opinion. The second is that the verse is abrogated by the verse (9:5) or the verse (9:36) and that is what al-Ḍaḥḥāk, al-Siddī and Sa’id Ibn Abu ‘Urūba claim.

However, the majority, 17 out of 20 scholars¹⁰⁰, state in different phrases that the verse is decisive. Some of them even go further to say that “the verse is not applicable for abrogation till the Judgment Day”¹⁰¹ الآية غير قابلة للنسخ إلى يوم القيامة. However, others mention the two opinions on the verse without clarifying their views, like al-Ṭabarī (310 AH), Ibn ‘Aṭīyya (542 AH) and al-Kalbī (741 AH),

¹⁰⁰ al-Hawwārī (3 AH), Al-Baghawī (510 AH), al-Zamakhsharī (538 AH), Al-Qurṭubī (642 AH), Ibn al-Bāzārī (738 AH), al-Khāzin (741 AH), Abu Ḥayyān (745 AH), al-A‘qam (Zaydī, 9 AH), Al-Qummī, Ibn ‘Adil (880 AH), al-Biqā‘ī (885), Al-Tha‘ālibī (928 AH), al-Shawkānī (1250 AH), al-Alūsī (1270 AH), Itfayyish (1332 AH), al-Ṭabāṭbā‘ī (14 AH) and Quṭb (14 AH).

¹⁰¹(<http://www.altafsir.com/Tafasir.asp?tMadhNo=0&tTafsirNo=56&tSoraNo=9&tAyahNo=6&tDisplay=yes&UserProfile=0/>) [cited April 2006]

Conclusions

After this thorough research it is apparent that the verse (9:6) forms the clearest Qur^oanic evidence for legalizing *amān*. Interpretation of the verse was subject to change over the course of time and the understanding of scholars. Some scholars were satisfied with the apparent meaning in their interpretation whereas others were more open and went deeper in defining the *musta'min*.

From the meticulous discussions between the scholars about this verse, it is possible to conclude that the interpretation of the verse (9:6) should be that if a non-Muslim, whether he is a follower of another religion or even without a religion, seeks the protection of the Muslims they should grant him their protection. The reasons that may drive such a person to seek protection in *dār al-Islam* are of no relevance in this context, since the verse itself does not specify any reason for that.

Based on the above discussion I can say that the majority of scholars who based their interpretation on the assumption that the disbeliever comes to *dār al-Islam* to hear the word of God are not accurate as this interpretation is in contradiction with the grammatical and linguistic rule of the Arabic language. The apparent meaning of the verse and the Arabic grammar supports my opinion.

The verse puts an obligation upon the Muslims to give *amān* to anyone who asks for it. On the other hand, Islamic society has a duty and a message of mercy towards other peoples, as stated in many verses of the Qur^oān, and the greatest manifestation of this mercy is giving shelter and protection to those fleeing oppression and persecution.

More notably, the verse itself linguistically and grammatically supports this meaning. I agree with the scholars, including Abu Ḥayyān, Abu al-Su^oūd and al-Qummī, who say the word *ḥatta* is referred to the verb 'grant him protection' فآجره and not the verb 'sought your protection' استجارك. However I disagree with them that the word *ḥatta* is for timing or to limit the duration of stay. I believe that it is for rationalisation of the whole process. In other words, Muslims are obliged by this verse to grant their protection to whoever requests it so that he will have the opportunity to hear, learn and contemplate the Islamic principles. Thus, regardless of any reason, be it oppression,

persecution, poverty, natural disaster or any other unfortunate circumstances, the Muslims should grant this *musta'min* the *amān* he asks for.

This understanding was also adopted by Ibn Kathīr who counted some cases from his time in which Muslims should grant *amān* to certain categories, and eventually he left it open to accept similar cases in other times. Clearly, modern cases of refuge could be included.

We also have to bear in mind the examples mentioned above and especially the examples of al-Ṭabarī and Abu al-Su'ūd to assert that this matter was not theoretical but rather real and practical. In addition, the contemporary scholars like, Aṭfiyyash, °Āshūr, al-Janābidhī and Sayyid Quṭb made it clear that the *musta'min* should be granted *amān* quite separate from the reasons that drove him to seek it.

Another small, yet important comment in the structure of the verse is the use of the letter ف in the word فأجره and letter ثم after the word أبلغه. According to the general Islamic belief every word and even every letter in the Qur'ān is mentioned intentionally and there is no randomness in the Qur'ān whatsoever. Even the apparent repetition in the Qur'ān is meant to give extra meanings¹⁰². Therefore, the two letters should be understood in this context. The Qur'ān uses the letter ف which is usually employed for coupling with the sense of speed associated with the verb 'grant him protection' أجره to tell the Muslim that they have to be hasty and swift in giving *amān* to those who seek it. This sense of speed in granting protection is crucially important in the case of the destitute, distressed and fearful asylum seekers who flee their homes looking for a safe place to protect their souls.

When it comes to terminating the contract the Qur'ān uses the letter 'then' ثم which gives the sense of slow motion associated with the verb 'make him attain his place of safety' أبلغه مأمنه to order the Muslims to be slow in ending the contract of *amān* and give more time for the *musta'min* before returning him to his place of safety.

¹⁰² See al-Bāqillānī (n.d, p.17) and al-Kirmānī (1976, vol.1 p.1)

This understanding of the verse harmonises with the mercy the Prophet was sent to deliver to the worlds as in the Qur'anic verse (21:107): "And we have not sent you but as a mercy to the worlds" وما أرسلناك إلا رحمة للعالمين.

Moreover, while the *musta'min* stays in the Islamic state the Muslims should take care of him in terms of protection, welfare and finance as al-Suyūṭī highlighted. Thus, it is a comprehensive responsibility ordered by God to all Muslims.

In addition, the phrase "make him attain his place of safety" is vital in our discussion, especially when comparing the Islamic concept of refuge with the concept of *non-refoulement* stated in the Geneva Convention 1954 relating to refugees. This phrase puts an obligation on the shoulders of Muslims to protect the refugee until he reaches a safe place, without defining it or restricting it to the country of origin or the country where refugee came from. The refugee's safety should not be jeopardized or compromised under any circumstances. If the refugee were to be expelled from a certain place, his or her safety should be secured by all means.

To sum up, in the Islamic tradition we find three terms used to identify the person who comes to the Islamic state seeking protection. They are the *mustajir* which applies to the Muslim and non-Muslim alike, the *muhājir* that is used solely by the Qur'an to describe Muslims, and the *musta'min* which is a loose term that includes all the foreigners who enter the Islamic state looking for protection, whether they are refugees or not, without specifying the reason for that. After entering *dār al-Islam* the status of each one would differ. The *muhājir*, who is a Muslim, would enjoy permanent protection like the other citizens, while the *mustajir* would enjoy temporary protection. In regard to the *musta'min*, he would also enjoy temporary protection unless he became a *dhimmī*, in which case he would enjoy permanent protection like the Muslim. Diagram (1) explains the situation:

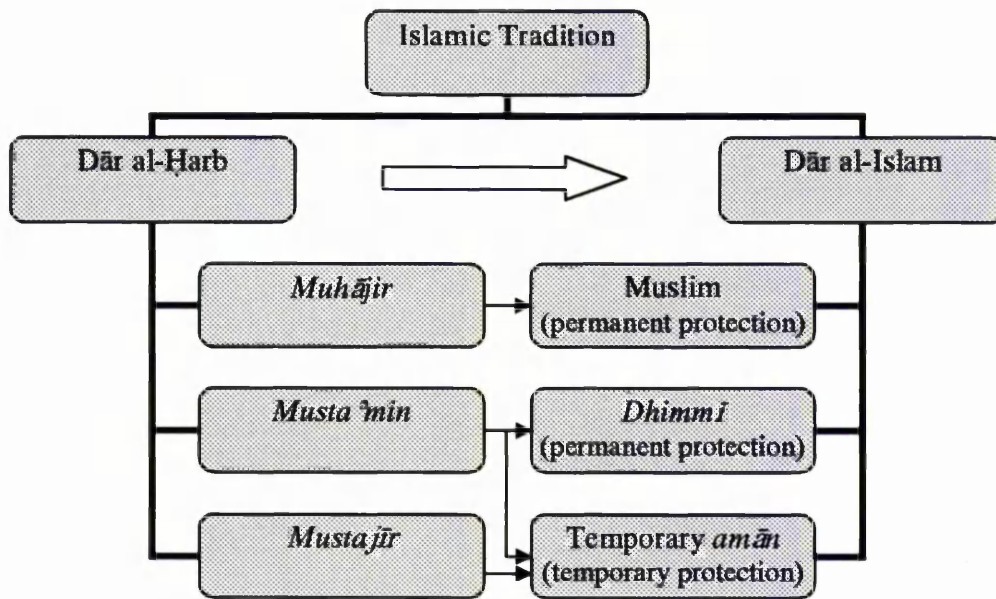


Diagram (1)

However, in recent times and after the advent of national states, the situation changed somewhat. All those who come seeking protection are called refugees and their status is determined based on the laws of the national state. Theoretically at least they enjoy temporary protection and if they stay longer then they are entitled to enjoy the nationality of the state. Diagram (2) explains the situation:

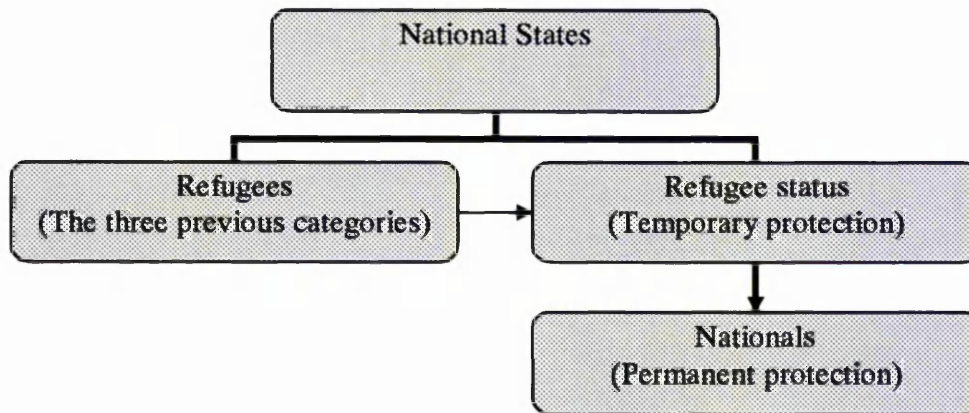


Diagram (2)

However, after examining the three terms it might be said that the closest term which could apply to the term 'refugee' is the term *musta'min*, although the latter term encompasses other kinds of people. Hence from now on I will use it to mean a refugee.

Thus, based on the above discussion, the definition of the refugee in the Islamic tradition is “the non-Muslim who enters the Islamic state looking for refuge, regardless of the reasons that drove him to do that, be it oppression, fear, natural disaster or any other unfortunate circumstances”. However, the authorities in the Islamic state have the right to organize the process according to the needs and the interests of Muslims without violating the right of the others to seek refuge in the Islamic state.

The crucial point here is that the verse makes it obligatory on Muslims to give refuge to the seeker as an Islamic duty, while “according to the modern refugee law, asylum is a right of the State and not of the individual” (Elmadmad, 1991, p.473).

Finally, it could be rightly said here that the Islamic tradition provides a different system of protection than the modern system but the basic value of protection is embedded in both and the traditional system could be implemented in a modern context. This justifies looking more closely at the type of protection granted by modern refugee status in comparison to the protection granted by *amān* and that is what I will be examining in the following chapter.

Chapter Four:
The 1951 Geneva Convention
Relating to the Status of Refugees in
light of the Islamic Tradition

Introduction

This chapter studies the articles of the Geneva Convention from an Islamic perspective and examines the interface between the Convention and the Islamic tradition, with a view to identify similarities and differences between the two. More importantly it examines international refugee protection and protection granted by *amān* in the Islamic tradition.

With regard to my methodology in this chapter, I will state the text of the Article and the comments of legal experts where it is necessary to clarify it. I will then move to the Islamic tradition to establish the evidence (if any) of endorsement, or otherwise.

I will follow the order of the Articles in the UN Geneva Convention relating to the Status of Refugees adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950. The Articles I will discuss are the following:

- Article 1. Definition
- Article 2. General obligations
- Article 3. Non-Discrimination
- Article 4. Religion
- Article 12. Personal status
- Article 13. Movable and immovable property
- Article 15. Right of association
- Article 16. Access to courts
- Article 17, 18 & 19. Gainful employment
- Article 20, 21, 22, 23 & 24. Welfare
- Article 26, 27, 28 & 29. Freedom of movement
- Article 31. Refugees unlawfully in the country of refuge
- Article 32. Expulsion
- Article 33. Prohibition of expulsion or return "*refoulement*"
- Article 34. Naturalization

I will exclude some Articles due to their administrative content which is not relevant to the core of this study. Also, due to its particular importance, I will bring forward Article 33. Prohibition of expulsion or return '*refoulement*' and discuss it after the definition. I will follow this up with a discussion of the 'safety of the refugee' which is not an Article in the Convention. This is due to its importance in the context of protection on one hand and to clarify the debate that took place between the Muslim scholars on this issue on the other. Lastly, I assume that if the Islamic tradition does not disagree with the main Articles of the Convention, then by default it will endorse them.

Definition of the term 'refugee' (Article 1)

The definition of the term 'refugee' is of critical importance "for it can mean the difference between life and death for an individual seeking asylum" (Chimni, 2000, p.1).

It is evident that there are many definitions to the term "refugee". There is the definition of the 1951 Convention with the 1967 Protocol, the definition of the Organisation of the African Unity (OAU) and the Cartagena Declaration as well as the Asian-African Legal Consultative Committee definition.

Broadly speaking, these different definitions were to some extent influenced by the circumstances at the time of the legislation. This is evident from the 1951 Convention which names the categories of the people who are entitled to seek refuge, all of which relate to that particular period. Hathaway points out that "there is no avoiding the Cold War origins of the 1951 Convention definition and its Eurocentric focus" (Chimni, 2000, p.2). He adds that "in addition to their desire for the refugee definition to serve strategic political objectives, the majority of states that drafted the Convention sought to create a rights regime conducive to the redistribution of the post-war refugee burden from European shoulders" (Hathaway, 1991, p.8).

Moreover, the OAU definition, as Chimni (2000, p.62) indicates, reflects more closely "the realities of Africa during a period of violent struggle for self-determination and national development". The Cartagena Declaration, Arboleda explains, "broadened the definition still further recognising the special attention deserved by the Central American situation" (Chimni, 2000, p.62).

The Islamic definition was also influenced by the environment in which it was formed. Earlier pages demonstrate the diversity of Muslim scholarly opinion over the course of time regarding the definition of the term 'refugee'.

The Significance of the 1951 Convention and the 1967 Protocol

This Convention with the Protocol, as Goodwin-Gill (1996, p.20) says: “Remain the principal international instrument benefiting refugees and their definition has been expressly adopted in a variety of regional arrangements aimed at further improving the situation of recognized refugees. It forms the basis for article I of the 1969 OAU Convention on refugee Problems in Africa.” Even the Cartagena Declaration is based on the elements of the 1951 Convention and the Protocol that broadened it. (Goodwin-Gill, 1996, p.20)

However, it is appropriate to touch on these different definitions, before expanding on the 1951 Convention and the 1967 Protocol.

The OAU Convention and the Cartagena Declaration

The Convention and the Declaration came about because the definition of the refugee in the 1951 Convention, as Arboleda puts it, “did not adequately respond to the variety of situations in the sixties and seventies; for the drafters of the early definitions neither considered nor anticipated the problems of the less developed world” (Chimni, 2000, p.62).

The OAU Convention defines the term ‘refugee’ as: “[E]very person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality”.

The important addition of this Convention was, as Arboleda (Chimni, 2000, p.63) states that “for the first time, the legal term ‘refugee’, albeit at regional level, was extended to individuals forced to leave their countries owing to aggression by another State and /or as a result of an invasion”. Arboleda goes on to say that the OAU Convention marked the beginning of a refugee protection system that directly addressed the causes of mass refugee influxes, by emphasising conditions in the country of origin.

Although the Cartagena Declaration did not grow out of a regional organisation, and is not a formally binding treaty, it “represents endorsement by the States concerned of appropriate and applicable standards of protection and assistance” (Goodwin-Gill, 1996, p.21).

The addition, the definition of this Declaration, according to Goodwin-Gill (1996, p.21) includes “persons who have fled their country, because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances seriously disturbing public order.”

In regard to the Cartagena Declaration, Arboleda (Chimni, 2000, p.63) maintains that it “was the first document in the Latin American context to establish guidelines for states faced with mass inflows of refugees. It was also the first instrumental declaration recognising that the victims of generalised violence, internal conflicts and massive human rights violations deserved refugee status”.

The 1951 Convention and the 1967 Protocol

The main object of this Convention is “to endeavour to assure refugees the widest possible exercise of the fundamental rights and freedoms enshrined in the Charter of the United Nations and the Universal Declaration of Human Rights” (Nicholson et. al., 2003, p.100).

This Convention and its Protocol are so important “it is unlikely that the Convention drafters envisaged the extent to which it would become a standard feature of courtroom dispute or generate so prolific a body of work amongst legal academics” (Twomey, 1999, p.4). Notwithstanding this, the Convention has limitations and falls short of other conventions in terms of the definition of ‘refugee’. Nonetheless, it still forms the most important convention relating to the status of refugees. That, according to Hathaway (1991, p.V) is owing to the fact that “it has been subscribed to by more than one hundred nations in the only refugee accords of global scope. Many nations have also imported this standard into their domestic immigration legislation as the basis upon which asylum and other protection decisions are made”.

The 1951 Convention, according to Nicholson (Nicholson et al. 2003,p.100), defined the term 'refugee' to apply, first, to any person who had been considered a refugee under the earlier arrangements or under the IRO Constitution, and, secondly to any person who:

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In regard to the 1967 Protocol it states that;

.... For the purpose of the present Protocol, the term 'refugee' shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article I of the Convention as if the words "As a result of events occurring before 1 January 1951 and..." and the words "...as a result of such events", in article 1 A (2) were omitted.

The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article I B (I) (a) of the Convention, shall, unless extended under article I B (2) thereof, apply also under the present Protocol.

The key feature of that Protocol was that it "removed the temporal and geographical limitations in the 1951 Convention" (Chimni, 2000, p.7). It achieved the formal, but not the substantive, universalisation of the Convention definition of refugee status.

Overall, the Convention as Hathaway (Chimni, 2000, pp.14-15) explains:

"May be viewed as comprising five essential elements, each of which must be established before status is appropriately recognised....

The first is persons who have left their country of nationality, or in the case of stateless persons, their country of habitual residence...

Second, the refugee claimant must be *genuinely at risk*. It is not enough that she truly believe herself to be in jeopardy. Rather, there must be objective facts to provide a concrete foundation for the concern which induces her to seek protection in another state....

Third, the claimant's flight must be motivated by prospect of 'persecution', that is *risk of serious harm* against which the state of origin is *unwilling or unable to offer protection*....

Fourth, the risk faced by the refugee claimant must have some nexus to her race, religion, nationality, membership in a particular social group, or political opinion. The critical question is whether but for her *civil or political status* she could reasonably be said to be at risk of serious harm...

Fifth and finally, there must be a genuine need for and legitimate claim to protection".

The Arab and Islamic Declarations and the issue of refugee

Regrettably, Muslim scholars in modern times paid little attention to the issue of refuge, as far as their studies and debates are concerned. However, the Cairo Declaration on Human Rights in Islam, which was adopted by the 19th Islamic Conference of Foreign Ministers 1990, made mention of this topic in Article 12:

"Every man (sic) shall have the right, within the framework of the *Sharī'ah*, to free movement and to select his place of residence whether within or outside his country and if persecuted, is entitled to seek asylum in another country. The country of refuge shall be obliged to provide protection to the asylum-seeker until his safety has been attained, unless asylum is motivated by committing an act regarded by the *Sharī'ah* as a crime"¹⁰³. لكل إنسان الحق في إطار الشريعة في حرية التنقل، واختيار محل إقامته داخل بلاده أو خارجها وله إذا اضطهد حق اللجوء إلى بلد آخر وعلى البلد الذي لجأ إليه أن يجيره حتى يبلغه مأمنه ما لم يكن سبب اللجوء اقتراف جريمة في نظر الشرع

¹⁰³ (<http://www1.umn.edu/humanrts/instree/cairodeclaration.html>)/ [cited February 2005]

The Arab Charter on Human Rights, adopted by the League of Arab States in 1997, also touches on the issue of refugee in Article 22:

“Every citizen shall have the right to seek political asylum in other countries in order to escape persecution. This right shall not be enjoyed by persons facing prosecution for an offence under the ordinary law. Political refugees shall not be extraditable”¹⁰⁴. لكل مواطن الحق في طلب اللجوء السياسي إلى بلاد أخرى هرباً من الاضطهاد ولا ينتفع بهذا الحق من سبق تتبعه من أجل جريمة عادية تهم الحق العام ولا يجوز تسليم اللاجئين السياسيين

In terms of the motives it appears the same, stating that the reason for seeking asylum should be persecution, without extending it to other reasons.

Lastly, agreeing with the Cairo Declaration it cites clearly that political refugee should not be extradited.

The definition of ‘refugee’ in the Islamic tradition and the Geneva Convention

As explained above, in the Islamic tradition there are three terms that come close to the meaning of the modern term ‘refugee’. These are *mustajir*, *muhajir* and *musta’min*. The usage and context of these three terms varied over time. Yet, the closest of them to the modern term ‘refugee’ is *musta’min*, as indicated earlier¹⁰⁵.

For the purposes of comparison, however, I will consider the five elements employed by Hathaway as standards to see how far the Islamic definition I have reached of the term ‘refugee’ agrees or disagrees with the 1951 Convention.

With regard to the first point about leaving one’s country, it seems that although the Muslim scholars did not state this formally, the fact of departure was implicit. When interpreting the Qur’anic verse (9:6) or discussing *‘aqd al-amān* all scholars supposed that the disbeliever comes to the Islamic country asking for refuge. However, it should be noted here that the terms “borders” and “nationality” were not identified at the time of the early Islamic state as we identify them today.

¹⁰⁴ (<http://www.law.wits.ac.za/humanrts/instree/arabhrcharter.html##1>) [cited February 2006]

¹⁰⁵ See section entitled: “The definition of the *musta’min*” of the thesis p.104.

Such terminology is relatively modern. Instead, the early Muslim scholars flatly divided the world into three categories; *dār al-Islam*, *dār al-ḥarb* and *dār al-‘ahd*, with some variations between them, as demonstrated in chapter two. Yet they agreed that the conversion of the *ḥarbī* to Islam allows him to enjoy all rights of Muslims in *dār al-Islam*.

The issue of nationality in the Muslim state will be discussed at a later stage. However, at this point it is important to note that religion played a significant role in determining geographical limitations and borders in the early days of Islam.

The second element, about genuine risk, is quite specific in the Convention, but not so detailed in the Islamic tradition. Even though the Qur’an did not stipulate it nor did the Prophet, we still find some scholars interpret the verse (9:6) to permit the disbelievers to come to *dār al-Islam* for reasons other than listening to the word of God. Moreover, as mentioned in the previous chapter about the interpretation of the verse, I proved that the verse does not specify any particular reason for asking *amān* in *dār al-Islam*, thus the feel of genuine risk should be one of the valid reasons for asking protection in the Islamic state.

Based on this, it could be said that the Islamic concept on this point is wider than the Convention. This might be due to the nature of Islam as a universal religion with a message of mercy that tries to spread far and wide, by allowing the vulnerable to seek protection in its land and to learn about Islam. This could explain why neither the Qur’an nor the Prophet specified the reason for seeking refuge. Nevertheless, Muslim scholars did give some control over access to refugees by saying it should not contradict with the interests of Muslims as a whole. In theory, the borders of the Muslim state should be open to refugees regardless of why they seek refuge there. However, in practical terms, this should not be in conflict with State’s general interests, public security or even its capacity. Obviously, this matter is left to the authorities in the Islamic state to decide on.

The third, fourth and the fifth elements are related to the previous element. From an Islamic perspective, they are important despite the fact that Islamic jurisprudence did not detail such cases formally. All cases of refuge that Muslims experienced resulted

from oppression and persecution. The Islamic tradition opened the door wide to refugees, but that is not to say that the Islamic state should not have certain regulations for controlling this process. On the contrary, as the scholars said, the head of state should ensure the regulations exist to manage the process effectively and to ensure a balance between the accessibility of the Muslim state for refugees and the national interest of the Muslims.

In brief, the differences between the Islamic definition I arrived at and the UN Convention definition is that in theory at least the Islamic tradition is wider than the UN's definition and does not specify particular reasons for seeking refuge. Actually the Islamic tradition leaves this matter to the authorities in the Islamic state to decide who deserves to be a refugee.

Exclusion Clauses

Regarding the definition of the term “refugee”, international conventions specify particular criteria for those who are entitled to the right of asylum. Nevertheless, “they also establish criteria by which individuals may be excluded from international protection” (Chimni, 2000, p.57).

Over the years “awareness of the background and past of certain asylum seekers has increased, *inter alia* as a result of the atrocities committed during the Yugoslav wars. Paying increased attention to the issue of the application of the exclusion clause was apt and timely” (Van Krieken (1999, p.1).

Even, before the UN Convention saw the light of day, the drafters of the Universal Declaration of Human Rights (UDHR) in 1948, as Van Krieken (1999, p.1) states, “ not only laid down the right to seek and enjoy asylum from persecution (Article 14.1) but they also added that certain categories of persons were excluded from seeking, not to mention enjoying, asylum”.

The exclusion clauses were stipulated in the Geneva Convention in Article 1. F. After defining the term at length the 1951 Convention excludes certain people from this definition:

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

The crimes listed above have been subject to debate and analysis by legal experts, like for example Goodwin-Gill (1996, p.95-114) and Van Krieken (1999).

Obviously, “the primary purposes of these exclusion clauses are to deprive the perpetrators of heinous acts and serious common crimes of such protection, and to safeguard the receiving country from criminals who present a danger to the country’s security. If the protection provided by refugee law were permitted to afford protection to perpetrators of grave offence, the practice of international protection would be in direct conflict with national and international law, and would contradict the humanitarian and peaceful nature of the concept of asylum. From this perspective, exclusion clauses help to preserve the integrity of the asylum concept” (Chimni, 2000, p.57).

Having said that, it will be applicable to look at the Islamic heritage to see how much the Islamic tradition agrees or disagrees with this principle.

But before that I’d like to indicate that the Arabs in the *jāhiliyya* also exempted some people from enjoying their *jiwār*:

Jiwār in the *jāhiliyya*, as explained thoroughly in chapter one of this thesis, was extensively applied, and occupied a significant place in their social life, due to different factors. Yet we could observe some examples where a number of people were exempted from getting *jiwār*. The main reason for that could be the weakness to defend the *mustajir* against the powerful people who are targeting him.

One of the examples of this exemption is the incident of al-Hārith Ibn Zālim al-Mirrī who killed the son of al-Nu°mān Ibn al-Mundhir and fled asking many tribes to give him *jiwār*. They refused saying *من يجيرك على هوازن والنعمان وقد قتلت ولده* “who will give you *jiwār* against Hawāzin, the tribe, and al-Nu°mān after you killed his son” (al-Shaybānī, 1994, vol.1, p.447). They replied with a question whose answer is self-evident and that is nobody will ever give him *jiwār* after committing such a crime. They refused to give him *jiwār*, apparently, because of their inability to fight Hawāzin, the tribe who were very powerful people and nobody could fight them.

This excuse of weakness or moral responsibility, in some cases, continued in the Islamic state, where the custom of *jīwār* was maintained, apart from *‘aqd al-amān*. We can spot a number of examples where some of the elite and powerful personalities in the Islamic community refused to grant *jīwār* to various people due to the nature of their crimes. As recorded in Ibn al-Jawzī’s History of Baghdad, (1939, vol.12, p.22)¹⁰⁶ in 249 AH al-Musta’in Billāh, the caliph, refused to grant *jīwār* to his minister Atāmish, when the public revolted against him as a consequence of his crimes against them.

We also can find examples where the high personalities refused to give *jīwār* to some people in order not to anger the ruler or the chief of that province they lived in. When Yūsuf Ibn Abī ‘Ayyād was defeated in Morocco by the Sultan’s forces he sought *jīwār* of Makhlūf Ibn ‘Abbū, but the latter refused to do that lest he upset the Sultan (Ibn Khaldūn, 1984, vol.7, p.311)¹⁰⁷. In addition when Yazid Ibn Rabī‘a reprehended ‘Ubayd Allah Ibn Ziyād, the ruler of al-Basra during the Umayyad period, and fled to Syria, al-Aḥnaf Ibn Qays and Khālīd Ibn Usayd refused to give him *jīwār* so as not to anger the ruler (al-Ḥamawī, 1990, vol.5, p.639).

Concerning the issue of exclusion in the Islamic tradition, there is no concrete evidence or a direct ruling in the Qur’ān that stipulates a judgment on this issue. However, the concept of exclusion is mentioned in the Qur’ān in reference to heavenly measurements on the Day of Judgment. Some Qur’anic verses stipulate clearly that particular sins will not be forgiven and their doers will be excluded from God’s forgiveness and mercy and will not enter Paradise. The greatest sin of all is the apostasy and association with God. The Qur’ān (4:48) stipulates: “Verily, God does not forgive the ascribing of divinity to aught beside Him, although He forgives any lesser sin unto whomever He wills: for he who ascribes divinity to aught beside God has indeed contrived an awesome sin” **إِنَّ اللَّهَ لَا يَغْفِرُ أَنْ يُشْرَكَ بِهِ وَيَغْفِرُ مَا دُونَ ذَلِكَ لِمَنْ يَشَاءُ وَمَنْ يُشْرِكْ بِاللَّهِ فَقَدْ افْتَرَىٰ إِثْمًا عَظِيمًا**. This means all sinners may be forgiven except those who do not believe in God or associate others with Him in worshipping. So, the association of others with God is the biggest sin in the Islamic creed and in the hereafter God will exclude those who associate others with him from his forgiveness and Paradise.

¹⁰⁶ See also (Ibn Khaldūn, 1984, vol.3, p.356), (al-Ṭabarī, n.d vol.5, p.358) and (al-Ṣafadī, 2000, vol.9, p.249).

¹⁰⁷ See also (al-Nāṣirī, 1997, vol.3, p.93).

This exclusion is also stressed clearly in the Qur'anic verse (5:72) where God forbids Paradise for the disbelievers.

Islam is a monotheistic faith and requires belief in God as the sole Creator and the only one worthy of worship. Disbelief or association in this context contradicts with the very foundations of the Islamic faith and this may explain why it cannot be forgiven and its doer will be excluded from mercy in the hereafter, while other sins could be forgiven.

In regard to the exclusion in this life concerning the refugees the *sīra* holds some relevant examples. One account is narrated by al-Ṣuyūṭī (1993, vol.4 p.351) on the authority of Sa'ad Ibn Abī Waqqāṣ: "On the day of Mecca conquest, the Prophet, peace be upon him, gave *amān* to all people except four men and two women, and said: Kill them even if you find them hanging to the cloths of the Ka'ba. [They are]: 'Ikrima Ibn Abī Jahl, 'Abdullah Ibn Khaṭal, Maqīs Ibn Ḍabāba¹⁰⁸ and 'Abdullah Ibn Abī Sarḥ" لما كان يوم فتح مكة آمن رسول الله صلى الله عليه وسلم الناس إلا أربعة نفر وإمرأتين، وقال اقتلوهم وإن وجدتموهم متعلقين بأستار الكعبة: عكرمة بن أبي جهل وعبد الله بن خطل ومقيس بن ضبابة وعبد الله بن سعد بن أبي سرح¹⁰⁹.

From the strong wording of this *ḥadīth* we can guess at the nature of the crimes. The Ka'ba is the most sacred place and it gives security to anyone around it. The Qur'ān states that clearly in the verse (3:97): "Whoever enters it attains security". Hanging to its cloth was the most extreme case of impunity one could get. Despite that, some would not benefit from the sacredness of this place and nothing on earth could save them from the punishment.

Regarding the two women, the narrations vary in identifying them. Some suggest that they were the slaves of Ibn Khaṭal who used to satirise the Prophet (al-Bayhaqī, 1989, vol.8, p.205). Other narrations identify them as Um Sārah who was: "A slave singer of Banī Hāshim used to curse the Prophet every day and night" قينة لبني هاشم كانت تدعو على النبي حين يصبح وحين يمسي (al-Fākihī, 1993, vol.5, p.220) and the other one was Bunāna, who was mentioned in the narration of Abī Barza that he heard the Prophet saying: "All

¹⁰⁸ Some narrations name him as Maqīs Ibn Ṣubabah. See (al-Nasā'ī, 1994, vol.7, p.106), (al-Tahhāwī, 1978, vol.3, p.330), (Ibn Abī Shayba, 1988, vol.7, p.404), (al-Hīndī, 1998, vol.10, p.233).

¹⁰⁹ In the narration of Ibn Ḥajar (n.d, vol.4, p.61) he states that the Prophet did not give *amān* to ten people, six men and four women. However, the majority of the accounts cite that they were four men and two women.

الناس آمنون كلهم غير °Abdullah Ibn Khaṭal and the immoral Bunāna” (Ibn Sa°d, n.d, vol.4, p.299).

Studying the different narrations carefully informs our understanding of the grounds on which the Prophet excluded these six people from the general *amān* extended to the people of Mecca, and facilitates the extraction of general rules and regulations in regard to exclusion.

Starting with the first man named in the previous *ḥadīth*, °Ikrima Ibn Abī Jahl, I could count 294 accounts of him, scattered throughout the *sīra*, *ḥadīth*, *fiqh* and *tafsīr*. Unfortunately, none of these state clearly why the Prophet excluded him from the *amān*. Many do describe him positively after his conversion to Islam while others give an indication of his enmity to the Muslims before converting.

When he came to the Prophet repentant and willing to convert, he admitted, according to the account narrated by al-Naysābūrī (1990, vol.3, p270) that he was very active in his enmity towards the Prophet and had been plotting aggressively against the Muslims.

Yet, another account highlights some of the terrible acts that may have driven the Prophet to exclude him from the *amān*. Al-Ṣuyūṭī (1993, vol. 1, p.571) reports on the authority of Abu Ishāq that °Ikrima was one of those who enticed and encouraged the people of Quraysh to kill Khubayb Ibn °Adyy.

The story of Khubayb as narrated by Ibn Ḥibbān (1993, vol.15, p.512) was that the Prophet sent a group of Muslims to bring him news of Quraysh¹¹⁰. On their way to Mecca they were intercepted by the tribe of Banī Lahyān. After a fierce fight they were all killed, with the exception of Khubayb Ibn °Adyy and Zayd Ibn al-Dithna who were sold as slaves to Quraysh. Eventually, Quraysh killed the captives, encouraged by °Ikrima.

¹¹⁰ In the narration of Ibn Ḥajar (1992, vol.2, p.604), the Prophet sent the men to teach the tribe of °Aḍal and Qārah the principles of Islam.

The role of ʿIkrima in Khubayb’s death might be, in addition to his heinous acts, the reasons behind his exclusion from the general *amān* enjoyed by the people of Mecca at the time.

Despite this exclusion, the Muslims did not kill ʿIkrima. According to the account narrated by al-Bazzār (1984, vol.3, p.350) ʿIkrima tried to flee by sea. When the storm was about to tear his boat he promised himself to return to the Prophet and become a Muslim¹¹¹. The Prophet accepted his repentance and forgave him¹¹².

Concerning ʿAbdullah Ibn Khaṭal, I could count a hundred and twelve narrations that provide reports about him. Most of these accounts concentrate on the manner in which he was killed, but few explain why he was excluded.

The way he was killed is narrated by many scholars including Ibn Saʿd (n.d, vol.4, p. 299), Ibn Abī Shayba (1988, vol.7, p.404), al-Bazzār (1984, vol.3, p.350) and al-Nasāʿī (1991, vol.2, p.302). The narrations all agree that: “As for ʿAbdullah Ibn Khaṭal [he] was caught hanging onto the cloths of the Kaʿba. [When they saw him] Saʿīd Ibn Ḥurayth and ʿAmmār Ibn Yāsir competed to get him. Saʿīd outran ʿAmmār as he was the younger of the two and killed him [i.e. Ibn Khaṭal]” فأما عبد الله بن خطل فادرك وهو متعلق (Abu Yaʿlā, 1984, vol.2, p.100).

Several reasons are offered for his exclusion from the general *amān*. Ibn ʿAbd al-Barr (1967, vol.6, p.170) and Ibn Ḥajar state that: “He ordered the killing of Ibn Khaṭal because he was a Muslim and the Prophet sent him as a messenger (to some people). The Prophet sent with him a man from the *Anṣār* and a slave to serve him, and he was a Muslim. In their way they stopped over, and Ibn Khaṭal ordered the slave to slaughter a goat and make food for him. The slave slept and woke up without making anything for him. So he [Ibn Khaṭal] attacked him and killed him. Then he reverted to disbelief. He

¹¹¹ This account was also narrated by Abu Yaʿlā (1984, vol.2,p.101), Ibn al-Ḥasan (1995, vol.41, p.59), al-Maqdisī (1989, vol.3, p.249) and al-Haythamī (1986, vol.6,p.169).

¹¹² In the account narrated by al-Suyūṭī (1993, vol. 1, p.571), his wife came to the Prophet and asked him to give ʿIkrima *amān*, then he came to the Prophet and converted to Islam.

إنما أمر بقتل بن خطل لأنه كان¹¹³”
مسلمًا فبعثه رسول الله مصدقًا، وبعث معه رجلا من الأنصار وكان معه مولى يخدمه وكان مسلمًا، فنزل منزلا فأمر المولى أن يذبح له تيسا ويصنع له طعاما فنام واستيقظ ولم يصنع له شيئا فعدا عليه فقتله ثم ارتد مشركا، وكان (Ibn Ḥajar, n.d, vol.4, p.61).

Not only then did he kill a Muslim without a valid reason, but also he reverted to disbelief and allowed his slaves to vilify the Prophet. His crimes were an explicit challenge to the Prophet that clearly could not be tolerated or forgiven.

Nevertheless, al-Suyūṭī (1993, vol.8, p.517) gives a different reason for the exclusion. He reports on the authority of Sa‘īd Ibn Jubayr that ‘Abdullah Ibn Khaṭal [after his conversion] came to the Prophet and asked to be one of those who wrote down the Qur’ān. The Prophet accepted and started to tell him what to write. Ibn Khaṭal purposely changed the order of the wording. Instead of writing ‘the most Knowledgeable, the Wise’ عليما حكيمًا, as told by the Prophet, Ibn Khaṭal would change the order, putting forward ‘the Wise, the most Knowledgeable’ حكيمًا عليما. He then read back to the Prophet what he had written in an attempt to confuse him. Eventually, Ibn Khaṭal went to Quraysh and told them that “his message is nonsense” ليس أمره بشيء. Thus Ibn Jubayr concludes: “So he became one of the four whom the Prophet did not give *amān* to” فكان أحد الأربعة الذين لم يؤمنهم النبي (al-Suyūṭī, 1993, vol.8, p.517).

Concerning the third person, Maqīs Ibn Ḍabāba, I could count eighty reports about him in different books¹¹⁴. The majority concentrate on how he was killed, but some do make mention of why he was killed.

Al-‘Aynī (n.d, vol.18, p.182) reports the story at length: When Maqīs discovered that his brother Hishām was killed by Banī al-Najjār, he told the Prophet. The Prophet sent with him a messenger to Banī al-Najjār and ordered them to hand over the killer, should they know him. Banī al-Najjār swore that they did not know the killer and showed their willingness to pay the blood money. After they paid Maqīs a hundred camels, he killed

¹¹³ In the narration of al-Bayhaqī (1989, vol.2, p.205) about the same incident he adds that the two slave singers used to sing songs to ridicule the Prophet so the Prophet ordered to kill them with him (Ibn Khaṭal).

¹¹⁴ See for example, al-Nasā‘ī (1991, vol.2, p.302), al-Ṭaḥḥāwī (1978, vol.3, p.330), al-Hindī (1998, vol.10, p.233), al-Bazzār (1988, vol.3, p.350), al-Shāshī (1989, vol.1, p.153) and Ibn ‘Abd al-Barr (1991, vol.4, p.1539).

the messenger of the Prophet who was with him. Then he reverted to disbelief and returned to Mecca. When the Muslims conquered Mecca, they killed him in the market¹¹⁵.

A-Haythamī (1987, vol.6, p.168) offers a more graphic account. When al-Fahrī [the Muslim from the tribe of Banī Fahr] slept Maqīs got up, took a big stone and smashed his head. Then he said these verses:

يُضْرَجُ ثُوبِيهِ دِمَاءُ الْإِجَادِعِ	شَفَى النَّفْسَ مِنْ قَدْ مَاتَ بِالْقَاعِ مَسْنَدًا
تَهَيَّجَ قَتْنَسِينِي وَطَاةَ الْمُضَاجِعِ	وَكَانَتْ هُمُومَ النَّفْسِ مِنْ قَبْلِ قَتْلِهِ
وَكَنتَ إِلَى الْإِوْثَانِ أَوَّلَ رَاجِعِ	حَلَلْتَ بِهِ ثَأْرِي وَأَدْرَكْتَ ثَوْرَتِي

He has cured the soul the one who has died and stretched in the Qā¹¹⁶

With the blood [of his nose and head] covering his cloths

The stress, before getting him killed used to attack

me to the extent I that I could not sleep

I have taken revenge and attained my desire

And I am the first to revert to the idols

His crimes were unforgivable. Acceptance of the blood money meant the negation of the right to revenge. But Maqīs, after taking the blood money, deceived the innocent messenger who accompanied him and killed him. He then reverted to *kufir* and went back to Mecca.

With regard to °Abdullah Ibn Abī Sarḥ, al-Ṭabarī and al-Suyūṭī agree that he was the person mentioned in the Qur'anic verse (6:93) "And who could be more wicked than he who invents a lie about God,' or says, "This has been revealed unto me," while nothing has been revealed to him? - or he who says, "I, too, can bestow from on high the like of what God has bestowed?" If thou couldst but see [how it will be] when these evildoers find themselves in the agonies of death, and the angels stretch forth their hands [and call]: "Give up your souls! Today you shall be requited with the suffering of humiliation for having attributed to God something that is not true, and for having persistently scorned His messages in your arrogance!" " وَمَنْ أَظْلَمُ مِمَّنْ افْتَرَى عَلَى اللَّهِ كَذِبًا أَوْ قَالَ أُوحِيَ إِلَيَّ وَلَمْ

¹¹⁵ In the narration of Ibn Abī Shayba (1988, vol.7, p.399), his cousin Numayla killed him between al-Safā and al-Marwā near the Ka'ba.

¹¹⁶ The name of the place.

يُوحِ إِلَيْهِ شَيْءٌ وَمَنْ قَالَ سَأُنزِلَ مِثْلَ مَا أَنْزَلَ اللَّهُ وَلَوْ تَرَى إِذِ الظَّالِمُونَ فِي غَمْرَاتِ الْمَوْتِ وَالْمَلَائِكَةُ بَاسِطُوا أَيْدِيهِمْ
أَخْرَجُوا أَنْفُسَكُمْ الْيَوْمَ تُجْزَوْنَ عَذَابَ الْهُونِ بِمَا كُنْتُمْ تَقُولُونَ عَلَى اللَّهِ غَيْرَ الْحَقِّ وَكُنْتُمْ عَنْ آيَاتِهِ تَسْتَكْبِرُونَ

Al-Ṭabarī (1984, vol.7, p.272) explains that he used to write down the Qurʾān as recited by the Prophet. He started to change the ends of verses and doubt crept into his heart. He reverted to disbelief and went back to Quraysh. Afterwards he would say: “If Muḥammad is the recipient of revelations, then so am I. And if God brings down the Qurʾān, well I have brought down the same. Muḥammad says: The All-Hearing, the All-knowing and I say: the All-knowing, the Wise” إن كان محمد يوحى إليه فقد أوحى إلي وإن كان الله ينزله فقد أنزلت مثل ما أنزل الله قال محمد سميعا عليما فقلت أنا عليما حكيما

Moreover, he committed another crime by revealing the secret about the conversion of ʿAmmār and Jubayr to Banī ʿAbd al-Dār who took them, cut the ear of ʿAmmār and tortured them till they reverted to disbelief (al-Ṭabarī, 1984, vol.7, p.272)

It could be that for these crimes the Prophet ordered his death. However, after the conquest of Mecca ʿUthmān Ibn ʿAffān pledged to the Prophet to give him *amān*. The Prophet, as al-Nasāʿī (1991, vol.2, p.302) reports, refused to give him *amān* three times but then agreed to do so unhappily. The Prophet’s comment after giving him the pardon is self-explanatory. He turned to his companions and said: “Was not there a reasonable man amongst you who is ready to go to this man and kill him when he saw that I withheld my hand so as not to accept his allegiance” أما كان فيكم رجل رشيد يقوم إلى هذا حيث withheld my hand so as not to accept his allegiance” (al-Suyūṭī, 1993, vol.4, p.351).

Regarding the two women, one of them was a slave singer who used to deride the Prophet while the other was Um Sārah, who was involved in spying against the Muslims, as al-Ṭabarānī (1994, vol.6,p.343), al-Suyūṭī (1993 vol.8, p.127), al-Hindī (1998, vol.10,p.234) report.

According to these reports Um Sārah was the messenger who carried a letter to Quraysh telling them that the Prophet was preparing to attack them. When the angel Jibrīl revealed this to the Prophet, he sent ʿUmar and ʿAlī to capture her. At first she refused to give them the letter, but under threat of death she untied her hair and surrendered it (al-Ṭabarānī, 1994, vol.6, p.343).

This type of crime could be classified by the Muslims or indeed by any nation nowadays, as one of the most dangerous crimes, since it threatens the security of the whole country and makes it vulnerable to enemies.

To sum up, after studying these incidents in details a common factor emerges. As Ibn Taymiyya (1984, vol.3, p.773) concludes: “In the year of conquest, the Prophet gave *amān* to all fighters except those who had committed a special crime that necessitated his killing” النبي أمن عام الفتح المقاتلة كلهم إلا من له جرم خاص يوجب قتله.

In all cases the crimes were serious and in many resulted in killing innocent people. As for Ibn Khaṭal he killed the Muslim who was accompanying him. Moving to Maqīs, he killed the man from Banī Fahr after taking blood-money from his tribe.

Killing a Muslim, from the Islamic perspective, is greater than the destruction of the whole world, as the Prophet said in the *ḥadīth* reported by al-Jirāhī (1984, vol.2, p.119): “Surely, the demolishing of the earthly life, in the eyes of God, is lesser than killing a believer without a rightful reason” لزوال الدنيا أهون عند الله من قتل مؤمن بغير حق. In the Qurʾān God gives killing one human a universal dimension. The verse (5:32) reads: “Because of this did We ordain unto the children of Israel that if anyone slays a human being unless it be [in punishment] for murder or for spreading corruption on earth-it shall be as though he had slain all mankind; whereas, if anyone saves a life, it shall be as though he had saved the lives of all mankind. And, indeed, there came unto them Our apostles with all evidence of the truth: yet, behold, notwithstanding all this, many of them go on committing all manner of excesses on earth” من أجل ذلك كتبنا على بني إسرائيل أنه من قتل نفسًا بغير نفسٍ أو فسادٍ في الأرض فكأنما قتل الناس جميعًا ومن أحياها فكأنما أحيا الناس جميعًا ولقد جاءتهم رُسُلنا بالبينات ثم إن كثيرًا منهُمْ بعد ذلك في الأرض لمُسرفون

Regarding Ibn Abī Sarḥ, the reason of his killing, according the accounts mentioned earlier, it could be that he cheated the Prophet, reverted to disbelief and started to mock the Prophet after the Prophet trusted him and made him one of those who write the Qurʾān.

Lastly, the crimes of the two women could be explained. Um Sārah was involved in spying against the Muslims and was caught carrying a message to enemies of the Prophet revealing the secrets of the Muslims, while the other woman was involved in cursing the Prophet and vilifying the message of Islam according to the previous accounts.

What is more, the arguments of the scholars in regard to the punishment of those who commit severe crimes offer more evidence to strengthen the previous opinions.

They argued about the interpretation of the verses (5:33/34): “It is but a just recompense for those who make war on God and His apostle, and endeavour to spread corruption on earth, that they are being slain, or crucified, or have their hands and feet cut off from opposite sides, or are being [entirely] banished from [the face of] the earth: such is their ignominy in this world. But in the life to come [yet more] awesome suffering awaits them (34) save for such [of them] as repent ere you [O believers] become more powerful than they: for you must know that God is much-forgiving, a dispenser of grace”
 إِنَّمَا جَزَاءُ الَّذِينَ يُحَارِبُونَ اللَّهَ وَرَسُولَهُ وَيَسْعَوْنَ فِي الْأَرْضِ فَسَادًا أَنْ يُقَتَّلُوا أَوْ يُصَلَّبُوا أَوْ تُقَطَّعَ أَيْدِيهِمْ وَأَرْجُلُهُمْ مِّنْ خِلَافٍ أَوْ يُنْفَوْا مِنَ الْأَرْضِ ذَلِكَ لَهُمْ جِزْيٌ فِي الدُّنْيَا وَلَهُمْ فِي الْآخِرَةِ عَذَابٌ عَظِيمٌ. إِلَّا الَّذِينَ تَابُوا مِن قَبْلِ أَنْ تَقْرَأُوا عَلَيْهِمْ فَاعْلَمُوا أَنَّ اللَّهَ غَفُورٌ رَّحِيمٌ

Al-Ṭabarī mentions the disagreements between scholars about the interpretation of these verses and quotes those who said that even if the *Imām* gave the criminal *amān* this does not mean the people he harmed would lose their right to retribution or compensation. He must return what he had taken (al-Ṭabarī, 1984, vol.6, p.221). Al-Ṭabarī then reinforces his argument by quoting Mālik who affirms that the rights of other people will not be abolished by the *amān* that he might get from the *Imām*.

Furthermore, al-Ṭabarī cites scholars who made granting *amān* conditional on the size of the crime, concluding that “his crime should not be big” (al-Ṭabarī, 1984, vol.6, p.223). He goes on to narrate on the authority of Sa‘īd Ibn Jubayr that he said: “If he [the one who committed a crime] came repentant and did not commit a robbery nor killed anybody then he will be left [given *amān*]. This is what God said: ‘Except for those who repent before they fall into your power’. He means those who did

إن جاء تائباً لم يقتطع مالا ولم يسفك دماً ترك، فذلك الذي قال الله: إلا "not kill nor commit any robbery" الذين تابوا من قبل أن تقدرُوا عليهم. يعني بذلك أنه لم يسفك دماً ولم يقتطع مالا.

In addition, al-Ṭabarī continues to narrate on the authority of °Urwa Ibn al-Zubayr that: "He [the one who committed a crime and fled and then came back asking *amān*] should be punished for the crimes he committed and nobody is allowed to give him *amān*" يقام عليه حد ما فر منه ولا يجوز لأحد فيه أمان. In the end, al-Ṭabarī quotes a scholar, Abu °Amr, saying that: If he [the criminal] fled in *dār al-Islam* and the *Imām* gave him *amān*, then this *amān* is not valid" إن فر من حدته في دار الإسلام فأعطاه الإمام أماناً لم يجز أمانه.

Al-Qārrī (2001, vol.5, p.616) states straightforwardly that even Mecca will not give Sanctuary to the criminals like those who rebel against the Caliph.

From all these narrations it is apparent that certain crimes could not be tolerated or forgiven and that the criminal was not entitled to refuge or asylum in the Islamic state.

These examples illustrated the types of crime that demanded the withdrawal of the right to seek asylum in the Islamic state. The nature of the crime may vary from time to time and there is no clear text from the Prophet to determine these crimes. However, these examples from the Prophetic custom and the opinion of scholars give a clear signal to contemporary scholars of the kinds of crimes that demanded such a punishment.

Comparison

After examining the Islamic tradition in regard to the exclusion clause we can now compare the Convention exclusion clause to the Islamic tradition.

There is in fact a great deal of agreement between the two. Both agree in principle that some people should be excluded from asylum on account of their crimes. They also agree that these crimes are so serious that they cannot be tolerated under any circumstances.

Regarding the definition of these crimes, the Convention has defined the categories, while in Islam there is no such clear classification. That could be due to universal nature

of Islam and its validity in different places and times, as the Muslim scholars claim. In other words, Islam provides the general principles, while the scholars in every generation must shape the rulings in accordance with these general principles to suit their time and place.

Nonetheless, the Islamic tradition can and should adopt the categories outlined in the Convention. The Prophet considered the killing of one person grounds for exclusion from the right to seek refuge so it goes without saying that crimes of a larger scale, such as crimes against peace, a war crime, or a crime against humanity, should be included. Some examples mentioned above could fall under the category of war crimes, as defined by Goodwin-Gill (1996, p.98) which included killing of hostages. Moreover, the attacks against the Prophet and the attempts to destroy the core of his message could be of a universal nature from the Islamic point of view, especially when the Qur^{ān} states clearly that the Prophet was sent a mercy to all mankind and his message is the final message that all humans should adhere to.

In regard to the second category in Article 1 F (c), “a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee”, also applies in the Islamic tradition. Most of the previous examples fall under this category, like the incident of Maqīs Ibn Ḍabāba who killed a Muslim and the others who committed different crimes prior to conquering Mecca.

Even the third category in Article 1 F (c) “acts contrary to the purposes and principles of the United Nations” is generally endorsed by the Islamic tradition. The objective of these principles as stated by Goodwin-Gill (1996, p.109) are “to prevent war, to reaffirm faith in fundamental human rights, to establish the condition under which justice and respect for obligations can be maintained, and to promote social progression and better standards of life in larger freedom.” These humane principles do not, on the whole, contradict the Islamic principles. On the contrary, these principles broadly coincide with the Islamic teachings.

In terms of preventing war, we find in the *ḥadīth* narrated by al-Bukhārī (1986, vol.6, p.2644) that the Prophet tells his followers: “Do not wish to fight the enemies and ask

God the safety” *لا تَتَمَنَّوْا لِقَاءَ الْعَدُوِّ وَسَلُّوا اللَّهَ الْعَاقِبَةَ*. In other words the Prophet tells them that if you can stop war from happening do that and pray to God not to have a war.

Concerning human rights, generally speaking many *hadiths* and verses of the Qurʾān made people equal in their humanity. The Prophet likened them: “People are like the teeth of the comb” (al-Qadāʾī, 1986, vol.1, p.145) *الناس كأسنان المشط*. The Prophet also said (Ibn al-Mubārak, 1986, vol.1, p.147) “O people, your God is one and your father is one. Surely, no superiority for the Arabs over the non-Arabs, nor for the non-Arabs over the Arabs, nor for the black over the red and nor the red over the black save the piety of God” *يا أيها الناس إن ربكم واحد وإن أباكم واحد إلا لا فضل لعربي على أعجمي ولا لعجمي على عربي ولا أسود على أحمر ولا أحمر على أسود إلا بتقوى الله*.

Furthermore, justice and mercy to all human kind are repeated throughout the Qurʾān, for example (21:107): *وَمَا أَرْسَلْنَاكَ إِلَّا رَحْمَةً لِّلْعَالَمِينَ*: “And [thus, O Prophet,] We have sent thee as [an evidence of Our] grace towards all the worlds”. We find lots of material in the Islamic tradition to support social justice, freedom from all kinds of oppression and noble morals. The *hadith* narrated by al-Bayhaqī (1989, vol.10, p.191) on the authority of Abu Hurayra that the Prophet said: “I was only sent to make the moral qualities perfect” *إنما بعثت لأتمم مكارم الأخلاق* fits in this context. Moreover, al-Haythamī (1986, vol.8, p.167) reports on the authority of Anas Ibn Mālik that the Prophet said: “He is not a believer in me who sleeps with full stomach while his neighbour next to him sleeps hungry, and he knows about him” *ما آمن بي من بات شبعان وجاره جائع إلى جنبه وهو يعلم به*. In addition, Ibn Ḥibbān (1993, vol.11, p.571) narrates that the Prophet said: “Support your brother if he was the oppressed or the oppressor. The companions said; O the Prophet [we] support him if he was oppressed, but how can we support him if he was an oppressor? The Prophet said: Prevent him from oppression” *انصر أخاك ظالما أو مظلوما فقالوا يا رسول الله هذا ننصره مظلوما فكيف أنصره ظالما قال تكفه عن الظلم*.

These narrations show that the Islamic tradition in principle does not contradict the UN principles, but supports them for the good of all mankind.

In brief, the Islamic tradition has legislated the exclusion clauses in practice but not in clearly stated principles. Moreover, the Islamic tradition leaves the door open for

scholars to construct judgments that suit their time with regard to the crimes that exempt the criminal from the right to seek asylum in the Islamic state.

Prohibition of expulsion or return '*refoulement*' (Article 33)

The term "*non-refoulement* derives from the French *refouler*, which means to drive back or to repel, as in an enemy who fails to breach one's defences" (Goodwin-Gill, 1996, p.117). To summarise the concept of *non-refoulement* in relation to refugees, it is "a concept which prohibits States from returning a refugee or asylum seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion" (Nicholson et al. 2003, p.89). This principle is "distinguished from expulsion or deportation, the more formal process whereby a lawfully resident alien may be required to leave a State, or be forcibly removed" (Goodwin-Gill, 1996, p.117).

This concept is enshrined in Article 33 of the 1951 Convention relating to refugees. It stipulates that;

1. No Contracting State shall expel or return '*refouler*' a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

The principle also appeared in various instrument according to Nicholson (2003, p.91) like;

- (a) The 1966 Principle Concerning Treatment of Refugees, adopted by the Asian-African Legal Consultative Committee, Article III(3).
- (b) The 1967 Declaration on Territorial Asylum adopted unanimously by the United Nations General Assembly (UNGA) as Resolution 2132 (XXII), 14 December 1967, Article 3.

- (c) The 1969 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, Article II(3)
- (d) The 1969 American Convention on Human Rights, Article 22(8).
- (e) The 1984 Cartagena Declaration, section III, paragraph 5.

This principle has been adopted by many countries. "State practice, individuals and within international organisations, has contributed to further progressive development of the law. By and large, States in their practice and in their record views, have recognized that *non-refoulement* applies to the moment at which asylum seekers present themselves for entry... the concept now encompasses both non-return and non-rejection" (Goodwin-Gill, 1996, p.124).

Nevertheless, this issue was mentioned in the Cairo Declaration on Human Rights in Islam in the Nineteenth Islamic Conference of Foreign Ministers, in 1993. In Article 12 it indicates that: "The country of refuge shall be obliged to provide protection to the asylum-seeker until his safety has been attained". Moreover, the Arab Charter on Human Rights, adopted by the League of Arab States in 1997 stated in Article 23 that "Political refugees shall not be extraditable".

Non-refoulement in the Islamic tradition

Searching the various books of the Islamic tradition for incidents in the Prophet's life that indicate to the modern principle of *non-refoulement*, few relevant passages were found in the account of *ṣulḥ*, the truce agreement of *al-Ḥudaybiya*, and other accounts.

Ṣulḥ al-Ḥudaybiya is the agreement signed between the Prophet and the delegate of Quraysh in 6 AH. This agreement is reported in detail throughout the histories and *sīra*. The details are not relevant here, but some incidents are worthy of mentioning.

The first is about a group of slaves who fled Mecca to the Muslims. Most scholars¹¹⁷ report this incident with almost identical wording: "On the day of *al-ḥudaybiya* prior [to

¹¹⁷ They are: al-Tabrīzī (1985, vol.2, p.1163), al-Sajistānī (n.d, vol.3, p.65), al-Bayhaqī (n.d, vol.7, p.159), al-Maqdisī (1989, vol.2, p.69), al-Zayla'ī (1938, vol.3, p.280), Ibn Ḥajar (n.d, vol.2, p.85), al-Qārī (2001, vol.7, p. 485), al-Naysābūrī (1990, vol.2, p.136), Ibn Ḥusām al-Dīn (1998, vol.10, p.214) and al-Shawkānī (1973, vol.8, p.175).

signing] the agreement, some slaves fled to the Prophet. Their masters wrote to the Prophet and said: O Muḥammad, by God they did not flee to you out of love for your religion, but they ran away fleeing slavery. Some people [of the companions] said: O the messenger of God they are right, hand them [the slave] back to them [Quraysh]. The Prophet got angry and said: I do not see you will stop, O the people of Quraysh, until God sends you who cut your necks for this¹¹⁸. He refused to hand them back and said they are God's freed men" خَرَجَ عَبْدَانُ إِلَى رَسُولِ اللَّهِ يَوْمَ الْحُدَيْبِيَّةِ قَبْلَ الصُّلْحِ فَكَتَبَ إِلَيْهِ مَوَالِيَهُمْ، قَالُوا يَا مُحَمَّدُ وَاللَّهِ مَا خَرَجُوا إِلَيْكَ رَغْبَةً فِي دِينِكَ وَإِنَّمَا خَرَجُوا هَرَبًا مِّنَ الرِّقِّ فَقَالَ نَاسٌ صَدَقُوا يَا رَسُولَ اللَّهِ رُدُّهُمْ إِلَيْهِمْ فغَضِبَ رَسُولُ اللَّهِ وَقَالَ مَا أَرَاكُمْ تَنْتَهُونَ يَا مَعْشَرَ قُرَيْشٍ حَتَّى يَبِيعَ اللَّهُ عَلَيْكُمْ مَن يَضْرِبُ رِقَابَكُمْ عَلَى هَذَا، وَأَبَى أَنْ يَرُدَّهُمْ وَقَالَ: هُمْ عُنُقَاءُ اللَّهِ.

The other three narrations¹¹⁹ cite the account with almost the same wording but add that these slaves converted to Islam.

This account is significant here as it appears to be a typical form of seeking refuge, like we witness in modern times. All the factors appropriate to the principle of *non-refoulement* are apparent. This group fled their place of residence because of the treatment they faced at the hands of Quraysh. They sought refuge with other people, the Muslims. When their masters asked for their return, the Prophet refused to allow it, despite the fact that they did not migrate to Muslims out of fondness of their religion, as some of the companions affirmed, but in search of safety.

What is important here is that this incident occurred before signing the agreement that included a condition that "anyone comes to you, even if he follows your religion, has to be sent back to us or you let us free to take him" لَا بَأْسَ بِكَ مِمَّا أَحَدٌ وَإِنْ كَانَ عَلَى دِينِكَ إِلَّا رَدُّنَاهُ إِلَيْنَا وَخَلَيْتَ بَيْنَنَا وَبَيْنَهُ (al-Bukhārī, 1986, vol.2, p.967). On the other hand if a Muslim comes back to Quraysh, they are not obliged to send him back to Medina as stated in this agreement: "And whoever comes to you from us, [you have] to hand him back to us" وَمَنْ جَاءَكُمْ مِنَّا رَدُّنَاهُ عَلَيْنَا (Muslim, n.d, vol.3, p.1409).

When the bewildered Muslims asked the Prophet about these conditions he said: "Whoever from us go to them, then God has distanced him from us, and who comes

¹¹⁸ Al-Qārī (2001, vol.7, p. 485) interprets this by saying it is the fanaticism or the refusal of the truth.

¹¹⁹ Ibn Jārūd (1988, vol.1, p.275), al-Ṭabarānī (1994, vol.4, p.316) and al-Fākihī (1414h, vol.5, p.72).

من ذهب منا إليهم فأبعده الله، ومن جاءنا منهم” من ذهب منا إليهم فأبعده الله، ومن جاءنا منهم” (Ibn Abī Shayba, 1988, vol.7, p.385).

Immediately after signing the *ṣulḥ* the Prophet was tested on his adherence to the last condition in particular. Abu Jandal, the son of Suhayl Ibn ʿAmr, the Qurayshi negotiator, fled to the Muslims asking for refuge. He as al-Ṭabarī (1984, vol.26, p.100) reports “threw himself amongst the Muslim” رمى بنفسه بين أظهر المسلمين. When Suhayl saw that, he said: “O Muḥammad, this is the first I will judge you with. [You have] to return him to us” هذا يا محمد أول من أقاضيك عليه أن ترده إلينا. The Prophet asked Suhayl twice to give Abu Jandal *jiwār*, but he refused. Then his companion named Mukriz told the Prophet that he will give him *jiwār*. Eventually, the Prophet returned Abu Jandal to Quraysh. At that moment the shocked Abu Jandal shouted amongst the astounded Muslims: “O Muslims, [are you going] to return me to the disbelievers while I came to you as a Muslim? Do not you see what I have been through?” أي معاشر المسلمين أورد إلى المشركين وقد جئت مسلما إلا ترون ما قد لقيت. None of the Muslims, however, was able to do anything after the Prophet decided to return him to Quraysh, adhering to and fulfilling his promise.

To assert his adherence to the contract, the Prophet also returned Abu Basīr when he fled to Medina from Mecca. Al-Bukhārī (1986, vol.2, p.979) reports the incident and says that when Quraysh learned about his escape they sent two men to the Prophet to get him back. They came to the Prophet and said: “[we ask you to fulfil] the Promise you made to us” العهد الذي جعلت لنا. The Prophet then handed Abu Basīr to them. On their way back to Mecca the men stopped at a place called dhu al-Ḥulayfa to eat dates. While there, Abu Basīr started to praise the sharpness of one of the men’s sword and asked to see it. Unwisely, that man gave the sword to Abu Basīr who killed him. The narration goes on to tell that the other man escaped to tell the Prophet what had happened. When Abu Basīr returned to Medina he told the Prophet what had happened. Fearing that the Prophet would hand him over again to Quraysh he went out of Medina and started to form a militia from others who had fled Mecca but could not go to Medina¹²⁰. Eventually, after the trade caravans of Quraysh started to suffer from attacks carried out by this group, Quraysh pledged to the Prophet to abolish this condition from the *ṣulḥ*, which the Prophet gladly did.

¹²⁰ For the full details of this account see Ibn Hishām (1990, vol.4 p.290-293), al-Ṭabarī, (n.d, vol.2 p.125), Ibn Kathīr (n.d, vol. 4 p.176) and al-Ḥalabī (n.d, vol.2 p.719).

Others came to the Prophet seeking refuge but the Prophet returned them all to Mecca as al-Bayhaqī (1989, vol.9, p.229) says: “All the men who came to him in that period were returned even though they were Muslims” ولم يأته أحد من الرجال إلا رده في تلك المدة وإن كان مسلماً.

In these incidents it is quite apparent that the Prophet gave the *ṣulḥ* priority, and did not allow anything, even the maltreatment and the torture of his followers, to justify breaking his agreement.

Nevertheless, when it came to women the case was different. The exemption of women from this agreement was made by God. The first woman who migrated from Mecca to Medina after *ṣulḥ al-Ḥudaybiya* was Um Kulthūm Bint °Uqba, as Ibn Sa°d (n.d, vol.8 p.230) states: “We do not know any woman from Quraysh who converted to Islam and left her parents migrating to God and His messenger, except Um Kulthūm Bint °Uqba. She left Mecca on her own and then accompanied a man from Khuzā°a until she arrived to Medina” ولم نعلم قرشية خرجت من بين أبيها مسلمة مهاجرة إلى الله ورسوله إلا أم كلثوم بنت عقبة خرجت من مكة وحدها وصاحبت رجلاً من خزاعة حتى قدمت المدينة.

Upon her arrival to Medīna her two brothers, al-Walīd and °Amāra, according to the narration of Ibn Sa°d (n.d, vol.8 p.230) followed her. They went to the Prophet asking him to hand her over to them, providing that this was one of the terms of *ṣulḥ al-Ḥudaybiya*. Um Kulthūm then said to the Prophet: “I am a woman and status of women is weak as you know. If you return me back to the disbelievers they will examine my faith, and I do not have patience” أنا امرأة وحال النساء إلى الضعفاء ما قد علمت فتردني إلى الكفار يفتنونني في ديني ولا صبر لي.

Just then, the Qur°anic verse (60:10) was revealed to the Prophet¹²¹: “O you who have attained to faith! Whenever believing women come unto you, forsaking the domain of evil, examine them, [although only] God is fully aware of their faith; and if you have thus ascertained that they are believers, do not send them back to the deniers of the truth, [since] they are [no longer] lawful to their erstwhile husbands, and these are [no

¹²¹ The majority of the scholars say the woman was Um Kulthūm, however, others say she was Subay°a Bint al-Ḥārith. See al-Rāzī (2000, vol.29 p.265) and Abu al-Su°ūd (n.d, vol.8 p.239),

longer] lawful to them. Nonetheless, you shall return to them whatever they have spent [on their wives by way of dower]; and [then, O believers,] you will be committing no sin if you marry them after giving them their dowers. On the other hand, hold not to the marriage-tie with women who [continue to] deny the truth, and ask but for [the return of] whatever you have spent [by way of dower] - just as they [whose wives have gone over to you] have the right to demand [the return of] whatever they have spent. Such is God's judgment: He judges between you [in equity] - for God is all-knowing, wise” يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا جَاءَكُمُ الْمُؤْمِنَاتُ مِهَاجِرَاتٍ فَامْتَحِنُوهُنَّ اللَّهُ أَعْلَمُ بِإِيمَانِهِنَّ فَإِنْ عَلِمْتُمُوهُنَّ مُؤْمِنَاتٍ فَلَا تَرْجِعُوهُنَّ إِلَى الْكُفَّارِ لَا هُنَّ حِلٌّ لَّهُمْ وَلَا هُمْ يَحِلُّونَ لَهُنَّ وَآثَرُهُنَّ مَا أَنْفَقُوا وَلَا جُنَاحَ عَلَيْكُمْ أَنْ تَنْكِحُوهُنَّ إِذَا آتَيْتُمُوهُنَّ أَجْرَهُنَّ وَلَا تُمْسِكُوا بِعِصَمِ الْكَوَافِرِ وَأَسْأَلُوا مَا أَنْفَقْتُمْ وَلَيْسَ أَلْوَا مَا أَنْفَقُوا ذَلِكَمُ حُكْمُ اللَّهِ يَحْكُمُ بَيْنَكُمْ وَاللَّهُ عَلِيمٌ حَكِيمٌ.

Obviously, after this revelation the Prophet refused to return her to Mecca. Then the Prophet examined her and all women after her by swearing that: “By God, nothing has driven you to migrate except the love of God, His Prophet and Islam and you have not migrated for the sake of husband or money” والله ما أخرجكن إلا حب الله ورسوله والإسلام وما خرجتن لزوج ولا مال. She instantly replied positively, and the Prophet kept her in Medina.

The response of the Prophet towards this woman was totally different to his response to Abu Baṣīr. The difference could be due to the fact that the fleeing person in the first case was a woman who could not stand the persecution and examination. In the second case, the returned Muslim was not only a man, but also a defiant fighter, who could defend and take care of himself. What supports this analysis is the Prophet’s comment when he heard that Abu Baṣīr had killed his captor and escaped. The Prophet said: “He is capable of fuelling a war, if he had men” مسعر حرب لو كان معه رجال. This comment shows that Abu Baṣīr was not a weak person, who could be oppressed and maltreated easily and the Prophet was not worried for him.

The Prophet’s expectations turned out to be true, when Abu Baṣīr formed a sort of militia and started to attack the trade caravans of Quraysh. Eventually, Quraysh sent a delegation to the Prophet requesting him to remove this term from *ṣulḥ al-Ḥudaybiya*, which the Prophet promptly did and Abu Baṣīr and his group returned to Medina.

The Qur’anic verse specified women in this case, for non-return, because of their absolute need for protection and also for the certain danger and persecution they would

face were they to be returned. However, in case of men the level of risk was not comparable, especially when it came to “honour and shame” in that tribal society.

Nevertheless, the examination of migrating women mentioned in the verse (60:10) was meant to make sure that any migrating woman was genuinely migrating for the sake of Islam and not for anything else, therefore, the responsibility of protecting her life lay on the Muslims, particularly after the Qurʾān (60:10) cut the ties between these women and their non-believer relatives: “Neither are these [women] lawful for them, nor are those [men] lawful for them” لَا هُنَّ حِلٌّ لَهُمْ وَلَا هُمْ يَحِلُّونَ لَهُنَّ.

Also, it could be said that this verse sets a principle of inspection and legislates for the examination of the migrant to make sure he is genuine in his claims. In the case of the migrant woman the examination was to make sure she was truly a believer. Thus, the verse could be extended these days to include all migrants to the Islamic state to see whether they are genuine migrants or not. This is not to say it restricts access for refugees, since that contradicts with the verse (9:6), but allows for making sure that they are genuinely in need of refuge¹²².

However, the exclusion of men from this term continued for some period. Quraysh requested the abolishment of this exclusion after what Abu Baṣīr and his brothers did and the rule was applied to everybody, men and women, that no immigrant would be returned to his country.

Another account of *non-refoulement* is narrated by Ibn Saʿd (n.d, vol.7, p.15). In the year 8 AH during the conquest of al-Ṭāʾif, Abu Bakra, a slave of Thaḳīf, fled to the Prophet during the siege imposed on them by the Muslims. When Thaḳīf asked the Prophet to return him, the Prophet refused saying: “He is the freeman of God and his Messenger” هو طليق الله و طليق رسوله. However, in the account of al-Bayhaqī he reports that they were a group of slaves who fled to the Prophet and converted to Islam. When

¹²² Some scholars like al-Bayhaqī (1989, vol.9, p.229) argue that the women were not included in the *ṣulḥ* in the first place. He reports the account with the following wording: “So Suhayl said: on the condition that any man from us comes to you, although he is following your religion, you have to return him to us” فقال سهيل على أن لا يأتيك منا رجل وإن كان على دينك إلا رددته إلينا وفي ذلك دلالة على أن النساء لم يدخلن في هذا الشرط. Then al-Bayhaqī commented that this is evidence that women were not included in this condition.

Thaqif came to the Prophet asking him to return the slaves he refused and said: “They are the freemen of God” هم عتقاء الله (al-Bayhaqī, 1989, vol.9, p.229)

This incident, which occurred after *ṣulḥ al-Ḥudaybiya*, shows that the general rule in such circumstances is to accept those who flee to Muslims and not to return them to where they were oppressed, while the condition of *ṣulḥ al-Ḥudaybiya* that stated otherwise for a short period of time, was an exception and should not be understood as the standard.

Another imperative issue in this verse is the phrase “make him attain his place of safety” ثم أبلغه مأمنه. This states that after providing him with protection and care, Muslims should not put the life of the refuge-seeker at risk when ending his *amān*. On the contrary, they must ensure he reaches a safe place.

The verse does not specify where the refugee is to be returned to, whether it is his home or anywhere else. The Qurʾān leaves it general, simply because the destination itself is not central in this context. The most crucial point here is safety and wherever safety is available the refugee should be able to get there. The verse also obliges Muslims to protect the refugee and get him to where he feels safe. In other words, the refugee’s safety should not be jeopardised or compromised and if he was expelled from a place, his safety must be assured.

Remarkably, this understanding of the verse fits perfectly with what contemporary legal experts think about the place of return. As Nicholson states:

“The word ‘*territories*’ mentioned in the Article holds two important points, “the first point is that this expression does not refer only to refugee or asylum seeker’s country of origin (whether of nationality or former habitual residence), even though the fear of persecution in such territories may well be at the root of that person’s claim to protection. The reference is to the frontiers of ‘*territories*’, in plural. The evident import of this is that *refoulement* is prohibited to the frontiers of *any* territory in which the person concerned will be at risk- regardless of whether those territories are the country of origin of the person concerned”.

The second point is “the word used is ‘territories’ as opposed to ‘countries’ or ‘States’. The implication of this is that the legal status of the place to which the individual may be sent is not material. The relevant issue will be whether it is a place where the person concerned will be at risk”.

Thirdly, they state clearly that Article 33(1) of the 1951 Convention cannot be read as precluding removal to a ‘safe’ third country”, nevertheless, it should be interpreted to preclude “removal to a place from which the refugee would be in danger of subsequent removal to a territory of risk” (Nicholson, et al. 2003, p.122-123).

Conclusion

The Islamic tradition has stipulated that the refugee should not be returned to his country or to any other place where his safety is threatened. When ending refugee status, the verse (9:6) places responsibility on Muslims to ensure that the refugee reaches his place of safety. This means that the Islamic state should bear all the costs and take all necessary measures to secure his journey to the safe place. The Prophet also demonstrated in practice that this principle is Islamic and must be respected.

In light of this discussion, it could be concluded that the Islamic tradition matches the spirit and the letter of Article 33 of the Geneva Convention about the principle of *non-refoulement*.

The *ḥadīth*, narrated in several books with different phrasing, was clear on this point. In the account of Ibn Abī Shayba (1988, vol.2, p.356) and al-Qazwīnī (n.d, vol.2, p.896) the Prophet says: “Whoever gives *amān* to a person and kills him, will be given the flag of treason in the hereafter” من أمن رجلا على دمه فقتله أعطي لواء غدر يوم القيامة. In another narration the Prophet says: “Whoever gives *amān* to a man and kills him, then I am disassociated from the killer even if the killed [person] was a disbeliever” من أمن رجلا على دمه فقتله فأنا من القاتل بريء وإن كان المقتول كافرا¹²⁴ (al-Tabrīzī, 1985, vol.2, p.1146)

The point in this *ḥadīth*, “and even if the killed person is a disbeliever”, is significant in this context. It demonstrates that being a disbeliever does not diminish his value or humanity. More importantly being a disbeliever does not excuse the treason or the act of killing. The significance of this *ḥadīth* will be more apparent in relation to the scholarly discussion regarding the punishment of a Muslim who kills a *mustaʿmin*.

Ibn Qayyim al-Jawziyyah states clearly: “The *mustaʿmin* is protected and his blood-money is guaranteed” المستامن يحرم قتله وتضمن نفسه. However, if he was killed by a Muslim the scholars of Islamic jurisprudence differed over the punishment for that crime. Some maintained that the Muslim should only pay blood-money since the *mustaʿmin* was a *ḥarbī* a fighter and his life was not equal to that of a Muslim. Others claimed that their lives were of equal value and that the killer should be treated as if he had killed a Muslim.

Remarkably, scholars of the first opinion were in a majority. Al-Shāfiʿī even claims that: “There is no dispute [between all the scholars] that [the Muslim] should not be killed [for killing] the fighter *mustaʿmin*” لا خلاف أنه لا يُقتل بالحربي المستامن (al-Jaṣṣāṣ, 1984, vol.1, pp.173-178). This opinion should be considered in light of the perception of the *mustaʿmin*. The *mustaʿmin* as was defined as an enemy in the first place who decided for some reason to come from *dār al-ḥarb* to *dār al-Islam* for a short period of time. His immunity from killing is therefore temporary. After this appointed time he would return behind the enemy lines and may later fight the Muslims. Al-Sarakhsī (n.d, vol.26, p.133) puts it bluntly: “The dubiousity that allows the shedding of his blood is

¹²⁴ Also narrated by Ibn Qānī (1997, vol.2, p.202), al-Aṣbahānī (1984, vol.9, p.24), al-Qaḍāʿī (1986, vol.1, p.130), al-Hindī (1998, vol.4, p.156) and al-Manāwī (1937, vol.6, p.19).

that of being a fighter and the ability to go back to *dār al-ḥarb*’ الشبهة المبيحة في دمه وهو *dār al-ḥarb*’ كونه حربيا لأنه ممكن من الرجوع إلى دار الحرب. Moreover, Ibn ‘Abdīn (2000, vol.4, p.169) declares: “No penalisation of the Muslim or the *dhimmī* for killing a *musta‘min*” لا قصاص على مسلم أو ذمي بقتل مستأمن. Ibn Nujaym (n.d, vol.5, p.154) concludes that all the killer has to do is give the blood-money. Moreover, al-Shāfi‘ī (1973, vol.7, p.4) states that even if the killing of the *musta‘min* was deliberate, a Muslim should not be killed for that.

As mentioned above, the scholars’ outlook was underpinned by their division of the world into two categories; *dār al-ḥarb* and *dār al-Islam*, and the state of war between them. Thus, the killing of the disbeliever from *dār al-ḥarb* is allowed, simply because their attempts to kill Muslims are ongoing. According to this understanding, the general rule is to kill the disbelieving fighters and the exception is to save them as long as they have *amān*. So, the *amān* is temporary and limited to an appointed time and that is the end of the contract.

On the other hand, scholars who held the second opinion like Abu Yūsuf (al-Sarakhsī, n.d, vol.26, p.133) justified it, claiming that: “The dubiousity that allows the shedding of his blood is negated by the contract of *amān*” الشبهة المبيحة عن الدم تنفى بعقد الأمان. Thus, he adds: “There is no doubt that the penalisation of killing must be applied upon the *musta‘min*¹²⁵ and the Muslim alike” فلا جرم يجب القصاص بقتله على المستأمن والمسلم جميعا.

In fact, this opinion more closely matches the spirit of the Islamic principles and the aims behind legislation regarding the *amān* contract. Refuge is provided to save those who fleeing death, oppression or humiliation in another place. Keeping him alive and safe is an obligation from God on Muslims through the verse (9:6) as we saw before.

However, this issue is related to a wider debate between the scholars regarding the equality of Muslims and *dhimmīs* in the Islamic state. This is relevant in view of the general rule in dealing with the *musta‘min* as stated by many scholars¹²⁶ that: “The *musta‘min* in our *dār*; before becoming a *dhimmī* is treated like a *dhimmī*” المستأمن في *dār*; قبل أن يصير ذميا حكمه حكم الذمي (Ibn ‘Abdīn, 2000, vol.4, p.169).

¹²⁵ He means if the *musta‘min* was killed by another *musta‘min*.

¹²⁶ See al-Shirbīnī (1994, vol.2, p.410), al-Nawawī (1984, vol.5, p.279) and al-Ramlī (1983, vol.6, p.239)

The scholars¹²⁷ who claim the superiority of the Muslim over the *dhimmī* rely primarily on narrations combined with their understanding of belief and disbelief in general. The *ḥadīth* they draw on was narrated by al-Bukhārī (1986, vol.3, p.1110) and others¹²⁸, on the authority of °Alī Ibn Abī Ṭālib that the Prophet said: “A Muslim should not be killed [for killing] a disbeliever” لا يقتل مسلم بكافر.

Others, according to al-Jaṣṣāṣ (1984, vol.1, p.177), support their opinion by the *ḥadīth* “The Muslims are equal in their blood” والمُسْلِمُونَ تَكَافَأَ دِمَاؤُهُمْ and conclude that “this makes the blood of the disbeliever unequal [to the Muslim]” وَهَذَا يَمْنَعُ كَوْنَ دِمِّ الْكَافِرِ مَكَافَا.

In addition, Ibn Taymiyya (n.d, vol.14, p.85) justifies this opinion by saying that there is nothing in our religion that makes the blood of the Muslim equal to the blood of the disbeliever, since belief is the basis for hierarchy.

Those who say the Muslim and the *dhimmī* are equal in terms of the punishment strengthen their position with reference to other proofs. Regarding the first *ḥadīth* “a Muslim should not be killed [for killing] a disbeliever” لا يقتل مسلم بكافر, al-Jaṣṣāṣ (1984, vol.1, p.175) rejects their interpretation, explaining that this *ḥadīth* belongs to certain circumstances and should not be generalised. He says that the Prophet mentioned this in his speech on the day of the Mecca conquest. A man from Khuzā°a tribe had killed a man from Hudhayl tribe in the *jāhiliyya* and it seems he wanted revenge for that killing. The Prophet said that *ḥadīth* to stop the killing of a Muslim because he killed a man in the days of the *jāhiliyya*. In other words, the Prophet wanted to open a new chapter and to draw a line under the all killings and demands for vengeance between tribes before the advent of Islam. The Prophet acted as a leader who wanted to spread peace and harmony among his people.

To support this view, al-Jaṣṣāṣ (1984, vol.1, p.176) also cites the *ḥadīth* of the Prophet during the same speech: “Every blood spilt in the *jāhiliyya* is placed under my feet” كُلُّ دِمٍّ كَانَ فِي الْجَاهِلِيَّةِ فَهُوَ مَوْضُوعٌ تَحْتِ قَدَمِي. Thus, there is no revenge any more and a Muslim should not be killed for something he did in the *jāhiliyya*.

¹²⁷ Like Ibn Shibrīma, al-Thawrī, al-Awzā°ī and al-Shāfi°ī.

¹²⁸ See also Ibn Jārūd (1988, vol.1, p.200), al-Nasā°ī (1991, vol.4, p.220), al-Bayhaqī (1991, vol.8, p.29), al-Dāraquṭnī (1966, vol.3, p.98) and al-Tirmidhī (n.d, vol.4, p.25)

Concerning the second *ḥadīth* “The Muslims are equal in their blood” *المسلمون تكافأ دماؤهم* al-Jaṣṣāṣ (1984, vol.1, p.177) maintains that this does not negate the equality of the blood of Muslims and non-Muslims. The benefit of this *ḥadīth*, he says, is to affirm the equality between Muslims themselves. In other words, the Prophet wants to confirm that all Muslims are equal, whether they are young, old, pious, non-pious, white or black and so on. But the *ḥadīth* did not state that non-Muslims are not equal to Muslims.

Responding to those who claim that disbelief is what made their blood susceptible, al-Kāsānī (1982, vol.7, p.237) says: “The equality in religion is not a condition [for revenge from the killer]. Do not you see that if a *dhimmi* killed a *dhimmi* and then the killer converted to Islam, he will be killed for that [his previous crime before converting]” *المساواة في الدين ليس بشرط ألا ترضى أن الدمى إذا قتل ذمياً ثم أسلم القاتل يُقتل به*. He continues to say: “It is not acceptable to say that disbelief makes killing him permissible. What could make it permissible is the disbelief that motivates war and the disbelief of the *dhimmi* is not [motivating him to fight the Muslims], so he is immune” *الكفر مبيح على الإطلاق ممنوع بن المبيح هو الكفر الباعث على الجراب وكفره ليس بباعث على الجراب فلا يكون مبيحاً*.

Furthermore, al-Kāsānī (1982, vol.7, p.237) supports his opinion by verses from the Qur^{ān}, such as the verse (2:178): “O you who have attained to faith! Just retribution is ordained for you in cases of killing: the free for the free, and the slave for the slave, and the woman for the woman. And if something [of his guilt] is remitted to a guilty person by his brother, this [remission] shall be adhered to with fairness, and restitution to his fellow-man shall be made in a goodly manner. This is alleviation from your Sustainer, and an act of His grace. And for him who, nonetheless, wilfully transgresses the bounds of what is right, there is grievous suffering in store” *يا أيها الذين آمنوا كتب عليكم القصاص في القتلى الحر بالحر والعبد بالعبد والأنثى بالأنثى فمن عفي له من أخيه شيء فاتباع بالمعروف وأداء إليه بإحسان ذلك تخفيف من ربكم ورحمة فمن اعتدى بعد ذلك فله عذاب أليم*.

He also cited the Qur^{ān}ic verse (5:45): “And We ordained for them in that [Torah]: A life for a life, and an eye for an eye, and a nose for a nose, and an ear for an ear, and a tooth for a tooth, and a [similar] retribution for wounds;” but he who shall forgo it out of charity will atone thereby for some of his past sins.” And they who do not judge in

accordance with what God has revealed, they are the evildoers! وَكُنْتُمْ عَلَيْهِمْ فِيهَا أَنْ النَّفْسِ بِالنَّفْسِ وَالْعَيْنِ بِالْعَيْنِ وَالْأَنْفِ بِالْأَنْفِ وَالْأُذُنِ بِالْأُذُنِ وَالسِّنَّ بِالسِّنِّ وَالْجُرُوحَ قِصَاصًا فَمَنْ تَصَدَّقَ بِهِ فَهُوَ كَفَّارَةٌ لَهُ وَمَنْ لَمْ يَحْكَمْ بِمَا أَنْزَلَ اللَّهُ فَأُولَئِكَ هُمُ الظَّالِمُونَ

Also he employed the verse (17:33): “And do not take any human being's life -[the life] which God has willed to be, sacred-otherwise than in [the pursuit of] justice.” Hence, if anyone has been slain wrongfully, We have empowered the defender of his rights [to exact a just retribution] but even so, let him not exceed the bounds of equity in [retributive] killing. [And as for him who has been slain wrongfully] behold, he is indeed succoured [by God]” وَلَا تَقْتُلُوا النَّفْسَ الَّتِي حَرَّمَ اللَّهُ إِلَّا بِالْحَقِّ وَمَنْ قُتِلَ مَظْلُومًا فَقَدْ جَعَلْنَا لَوْلِيَّهِ” سُلْطَانًا فَلَا يُسْرِفُ فِي الْقَتْلِ إِنَّهُ كَانَ مَنْصُورًا

These verses, he claims, are general and “do not differentiate between a killed [person] and another, or between a soul and another, or between an oppressed person and another. Whoever says that this is restricted to Muslims has to bring the evidence [for such restriction]” من غير فصلٍ بين قَتِيلٍ وَقَتِيلٍ وَنَفْسٍ وَنَفْسٍ وَمَظْلُومٍ وَمَظْلُومٍ فَمَنْ ادَّعَى التَّخْصِيبَ وَالتَّقْيِيدَ فَعَلَيْهِ الدَّلِيلُ

Finally he cites the verse (2:179): “For, in [the law of] just retribution, O you who are endowed with insight, there is life for you, so that you might remain conscious of God!” وَأَكْمَرُ فِي التَّصَانُفِ حَيَاةٌ يَا أُولِي الْأَلْبَابِ لَعَلَّكُمْ تَتَّقُونَ and comments that: “What is really meant by life [in this Qur’anic verse] is more evident in relation to killing a Muslim for killing a *dhimmi* rather than killing a Muslim for killing a Muslim, because religious enmity drives him to kill especially when angry, so a deterrent is even more necessary” وَتَحْقِيقُ” مَعْنَى الْحَيَاةِ فِي قَتْلِ الْمُسْلِمِ بِالذَّمِّ أُنْبَغُ مِنْهُ فِي قَتْلِ الْمُسْلِمِ بِالْمُسْلِمِ لِأَنَّ الْعَدَاوَةَ الدِّينِيَّةَ تَحْمِلُهُ عَلَى الْقَتْلِ خُصُوصًا عِنْدَ الْعُصَبِ فَكَانَتْ الْحَاجَةُ إِلَى الرَّاجِرِ أَمْسَ (al-Kāsānī, 1982, vol.7, p.237).

In addition, those scholars who equalise between Muslim and *dhimmi* like Abu Ḥanīfa, Abu Yūsuf, Muḥammad, Zufar, Ibn Abu Layla, ‘Uthmān al-Battī and al-Jaṣṣāṣ used other *ḥadīths* to support their stance. Al-Jaṣṣāṣ states that the Prophet “killed a Muslim because he killed a *dhimmi* and said: I am the first to fulfil my obligation [to grant protection]” أَقَادَ مُسْلِمًا بِذِمِّيٍّ وَقَالَ أَنَا أَحَقُّ مِنْ وَفَى بِذِمَّتِهِ”

This *ḥadīth* was narrated by some scholars with different wording in regard to the person who was killed initially. Al-Zaylaʿī (1895, vol.6, p.103) and Abu Dāwūd (n.d, vol.1, p.207) narrate that the killed person was *dhimmī*, while Ibn Ḥajar (n.d, vol.12, p.262) adds significant detail. He says: “The Prophet killed a Muslim for killing a disbeliever and said I am the first to fulfil his obligation” *قتل رسول الله مسلما بكافر وقال أنا أولى من وفى بدمته*. This description is particularly significant since it shows clearly that the killed person was a non-Muslim without defining what his status was, which means he could be *mustaʿmin* or *dhimmī*. Lastly, al-Ṣanʿānī (1959, vol.3, p.242) narrates this *ḥadīth* saying that: “The Prophet killed a Muslim for killing a *muʿāhid*¹²⁹ and said I am the first to fulfil his obligation” *أن النبي قتل مسلما بمعاهد وقال أنا أولى من وفى بدمته*.

Additionally, al-Jaṣṣāṣ (1984, vol.1, p.175) states that it was narrated upon ʿUmar, ʿAlī and ʿAbdullah that they killed a Muslim for killing a *dhimmī*. After allowing the relatives of the killed *dhimmī* the opportunity to apply the law of retaliation, ʿAlī Ibn Abu Ṭālib commented: “We gave them what we gave them to make their blood like ours and our blood-money like theirs” *أعطيناهم الذي أعطيناهم لئكون دماؤنا كدمائهم ودياننا كديانهم*. This comment is relevant to this discussion. Although ʿAlī was talking about the *dhimmī* it certainly applies to the *mustaʿmin* in the sense that both the *dhimmī* and the *mustaʿmin* had a covenant with the Muslims with a common factor between them, namely the *amān*. In essence the *amān* the Muslims gave to both of them was identical in regard to safety but different in terms of length: the *dhimmī* contract is permanent while the *mustaʿmin* contract is temporary. Therefore, there must be equality between the *dhimmī* and the *mustaʿmin* in terms of the value of their lives, at least during the period of *amān*.

Conclusion

Muslim scholars in general affirm the need to give the *mustaʿmin* protection. The debate between scholars regarding the equality between the Muslim and the *mustaʿmin* does not mean that the *mustaʿmin* was vulnerable and subject to harassment and attack by Muslims. On the contrary, even those who supported the inequality between the Muslim and the *mustaʿmin*, such as Abu Ḥanīfa and Ibn ʿAbdīn, state categorically that

¹²⁹ *Muʿāhid* is the person who has a covenant with the Muslims. It applies for both the *dhimmī* and *mustaʿmin*.

Muslims should treat the *musta'min* well in order to show him the value of Islam and induce him to convert. They also place a duty on the *Imām* to support the *musta'min* (Shaykhī Zāda, 1998, vol.2, p.452)¹³⁰. Effectively, therefore the discussion was theoretical rather than practical. Nevertheless, this research contends that the *musta'min* is equal to the *dhimmī* and both of them are equal to the Muslim, as Abu Yusūf said. Once the Muslims give him the *amān* he was eligible for their full protection and care. The essence of the *amān* contract is safety and anything that diminishes this safety must be rejected.

Additionally, the Qur'ān does not differentiate between humans when it comes to killing, particularly the verse (5:32). So, a soul is a soul whether it is the soul of a Muslim, a *dhimmī* or a *musta'min* and it should not be slain without rightful reason.

One of these rightful reasons, according to the *ḥadīth* narrated by Ibn Kathīr (1980, vol.1, p.535), was “a soul for soul” النفس بالنفس, again, without differentiation between the souls.

Commenting on this verse, al-Buhūtī (1996, vol.3, p.328) and al-Ṣuyūṭī (1961, vol.6, p.146) say that it is the same whether the killed person was a *musta'min* or a Muslim because both are humans.

This opinion is perfectly in tune with the message of mercy in Islam and the core aims of granting refuge. This message, as we've seen, welcomes the refugee and obliges the Muslim to take good care of him. Diminishing the value of their lives does not fit with this message.

¹³⁰ See also what the scholars said about the interpreting of the verse (9:6) in the previous chapter.

General obligations (Article 2.)

In Article 2 under the title 'General obligations' the Geneva Convention states that: "Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order."

When drafting this Article, "a number of governments felt that such a provision was superfluous in view of the general duty of foreigners to obey the law of their country of residence" (Hathaway, 2005, p.98). However, some governments argued that the obligation of the refugees should be stated clearly. "Largely out of respect for the significant refugee protection contributions made by France, it was decided to include a specific reference in the Convention to the duties of the refugees" (Hathaway, 2005, p.99).

If it goes without saying that refugees should comply with the laws of the country they are in, a problem arises in how to apply these laws without conflict with the basic human rights of the refugee in terms of freedom of expression. Refugees as Johnson (Chimni, 2000, p.208) explains, are "persons whose fundamental rights have been violated. They seek refuge abroad precisely in order to be able to continue to enjoy their basic human rights, including the right to freedom of opinion and expression... The repeated call by States that refugees have a duty not to engage in subversive activities, should not prohibit them from enjoying such rights. The only permissible limit would be when, for example, in the exercise of the right to freedom of opinion and expression, refugees incite violence or the use of force".

Another relevant question here is that if the refugee committed a crime or did not adhere to the law of the country he was seeking refuge in, would he be expelled or his rights forfeited?

According to Hathaway, after a lengthy discussion between the contracting states "the legal position is that Art. 2 does not authorise the withdrawal of refugee rights for even the most serious breaches of a refugee's duty to the host state. Because there is no reciprocity of rights and obligations under the refugee Convention, refugees must be

dealt with in the same ways as any other person who violate a generally applicable law, regulations, or public order measure” (Hathaway, 2000, pp.104-106).

The duties of the refugee from an Islamic perspective

Like the drafters of the Geneva Convention, the Muslim scholars dealt with this issue briefly and in general terms. Zaydān sums up the duties of the *musta'min* by saying that he should refrain from “what is demerit to the Muslims or disrespect to their religion” عما فيه غضاضة على المسلمين وانتقاص لدينهم (Zaydān, 1982, p.208)

Among the works of jurisprudence, al-Sarakhsī (n.d, vol.9, p.56) affirms this point and denies that *amān* may allow disrespect of the Muslim faith: “We did not give him *amān* to deride the Muslims” وما أعطيناه الأمان ليستخف بالمسلمين. In practical terms that means he has to respect the Muslims, their faith, way of life and certainly the general order.

To be clear on this point, Ibn Taymiyya states clearly that: “His [the *musta'min*] deride of the Prophet and his harm to God the Almighty and his messenger will not make it possible to grant him *amān* and covenant” ان هجاءه للنبي واذاه الله تعالى ورسوله لا ينعقد معه أمان ولا عهد (Ibn Taymiyya, 1983, vol.3, p.768). In this context, he also relates the case of two slave singers whom the Prophet allowed the shedding of their blood in Mecca Conquest for abusing him, as a proof that the *amān* contradicts with the abuse of the Muslim faith.

This particular point is important and will be dealt with at length when discussing the terms and conditions of cancelling the *amān* and expelling the *musta'min*. However, it is clear that Ibn Taymiyya requires respect for the Islam as a precondition of *amān* to the *musta'min*. Respecting the faith necessarily involved respecting the way of life and rulings.

In regard to punishment for crimes committed and the question of nullification of the *amān*, it is interesting to note that the Muslim scholars engaged in a discussion very similar to that which took place among the drafters of the Geneva Convention over this Article¹³¹. Some of them, such as Ibn Taymiyya, held that certain crimes, like abusing the Muslim faith, invalidated the *amān*. Others went to the extreme and made any crime a valid reason for cancelling the *amān*. Among them was Ibn Mufliḥ (1979, vol.3,

¹³¹ See Hathaway (2005, pp.98-107)

p.394) who judged that: “If [the *ḥarbī*] came to us with *amān* and then treated [someone] unfairly his *amān* will be nullified” إذا دخل إلينا بأمان فجار انتقض أمانه

Others still argued that committing a crime did not abolish the contract although the perpetrator should be held to account for it. Abu Yūsuf and al-Shāfi‘ī declare: “He is subject to punishments like the *dhimmī*, and as long as he stays in our *dār* he should adhere to our rulings” (al-Sarakhsī, n.d, vol.9, p.56). They justify their opinion with reference to the fact that these rulings are applied in *dār al-Islām* to protect it. In this case, anyone comes to it must adhere to the general order of that *dār*:

Elsewhere, al-Shāfi‘ī is more specific about the *musta‘min* who kills a Muslim. He (al-Shāfi‘ī, 1973, vol.6, p.46) says: “If a *musta‘min* committed a crime the law of retaliation should be applied upon him” يحكم على الحربي المستأمن إذا جنى يقتص منه

By making these general judgements, Abu Yūsuf and al-Shāfi‘ī do not differentiate between the rulings that relate to crimes against God or rulings relating to crimes against people. They make it obligatory on the *musta‘min* to adhere to them. Abu Yūsuf validates his opinion as follows: “When he [the *musta‘min*] enters *dār al-Islām*, he then commits himself to the rulings of Islam as long as he stays there, so he becomes like the *dhimmī*” (al-Kāsānī, 1982, vol.7, p.34). Nevertheless, Abu Yūsuf excludes the punishment of drinking alcohol, because it is not applicable to the *dhimmī* and should not therefore be applicable to the *musta‘min* (Ibn Nujaym, n.d, vol.5, p.19).

Other scholars do not agree with this trend. They, like al-Sarakhsī for instance, differentiate between the crimes for which the *musta‘min* might be punished. They make a distinction between crimes committed against people and those committed against God. Al-Sarakhsī concludes: “The *musta‘min* is liable to be punished for [the crimes] concerning the rights of other people” يواخذ المستأمن بما هو من حقوق العباد (al-Sarakhsī, n.d, vol.9, p.109). This means that because he is a non-Muslim he is forgiven for other crimes concerning the faith, for which a Muslim would be punished. Abu Ḥanīfa and his student Muḥammad state clearly: “The punishments which relate to crimes against God the Almighty do not apply to the *musta‘min*, even if it was proven evidently or by observation or by his confession” الحدود التي هي لله تعالى لا تقام على المستأمن

Al-°Adawī (1991, vol.2, p.426) declares that: “There is no *ḥadd*¹³² applicable to the *ḥarbi*” لا حدّ على الحرّبيّ. (al-Sarakhsī, n.d, vol.18, p.170). إن ثبت سببها بالبينة أو بالمعينة وكذلك إذا أقر به الحرّبيّ.

Furthermore, Abu Ḥanīfa believes that “there is no punishment applicable to the *mustaʿmin* or *mustaʿmina*¹³³ except the punishment for *qadhī*^{134,135} لا يُقام على المُستأمن إلا حدّ القذف. He excludes this crime because it involves the right of other people and when the *mustaʿmin* accepts *ʿaqda al-amān* it means he commits himself not to harm Muslims (al-Kāsānī, 1982, vol.7, p.34). Abu Ḥanīfa defends his position: “The application [of the punishments] is built on loyalty, and loyalty is built on adherence [willingly]. If we were to force him to adhere [to our rulings] without his commitment, this will drive him away from our *dār*; and God has ordered us to treat him in a way that leads him to enter our *dār* to see the beauties of Islam and convert” الإقامة تُبنى على الولاية والولاية تُبنى على الالتزام. إذ لو الزمناه حكمنا بدون التزامه أدى إلى تنفيره من دارنا وقد ندبنا إلى معاملة تُدْمِلُ على الدخول في دارنا ليزي محاسن الإسلام فيسلم (al-Zayla°ī, 1895, vol.3, p.182).

It seems that Abu Ḥanīfa is affirming here that so long as the *mustaʿmin* is not a Muslim, he should not adhere to the same rulings and punishments applicable as those who converted to and embraced the rulings of Islam. Yet, when it comes to the public order and the rights of other people, the *mustaʿmin* should adhere to public rulings. Abu Ḥanīfa states plainly: “He by accepting *amān* had committed [himself to respect] peoples’ rights... and to treat them justly as he is treated justly and do not harm them as he is not harmed, so he is committed to these things by his acceptance [the *amān*]. As to God’s rights they are not applicable to him because he did not commit himself to [them by conversion]” وهو بالأمان التزم حقوق العباد... وأن يُنصفهم كما يُنصف وأن لا يؤذي أحدًا كما لا يؤذى (al-Zayla°ī, 1895, vol.3, p.182). “فيلزمه بالالتزام. وأما حقوق الله تعالى فلا تلزمه لأنه لم يلتزمها

Abu Ḥanīfa gives an example of the crimes that are not applicable to the *mustaʿmin*: “If the *mustaʿmin* committed adultery with a female Muslim or female *dhimmī* or female *mustaʿmin*, there is no punishment for him or her [female *mustaʿmin*]” الحرّبيّ المُستأمن إذا زنا بمسلمة أو ذمّية أو ذمّية زنا بحرّبية مُستأمنة لا حدّ على الحرّبيّ والحرّبية

¹³² *Ḥadd* is the technical term for the punishments of certain acts which have been forbidden or sanctioned by punishments in the Qurʾān and have thereby become crimes against religion (Lewis, et al. 1971, p.20).

¹³³ The female of *mustaʿmin*

¹³⁴ *Qadhī*: false accusation of unlawful intercourse (Lewis, et al. 1971, p.20).

¹³⁵ See also (Nizam et. al, 1990, vol.2, p.149)

p.34). Furthermore, if the *musta'min* stole from a Muslim, the punishment of cutting his hand should not apply to him as it is *ḥadd*. This example appears confusing, because it involves the rights of others and, as we have seen above, the *musta'min* is punished for the crimes he commits against other people. However, Abu Ḥanīfa says this *ḥadd* i.e. cutting off his hand, is not applicable here because the *ḥudūd* are applicable only to Muslims. This *musta'min*, however, could be punished with other penalties called *ta'zīr*¹³⁶ which could be decided by the judge.

With regard to financial dealings with the *musta'min*, the scholars imposed a tax called the *ushr*¹³⁷ on those engaged in trading. Al-Ghazālī (1996, vol.7, p.76) reports that: “Umar Ibn al-Khaṭṭāb imposed the *ushr* on every *ḥarbī* trades in our country” كل حربي يتجر في بلادنا ضرب عمر رضي الله عنه عليهم العشر. Al-Ghazālī (1996, vol.7, p.76) and Ibn ʿAbdīn (2000, vol.4, p.169) affirms this.

Al-Shāfiʿī, however, maintains that this condition should be imposed while granting the *amān* (Ibn ʿAbd al-Barr, 2000, vol.3, p.165). Ibn ʿAbd al-Barr gives a new dimension to this tax and makes it subject to the customary law between states. He (Ibn ʿAbd al-Barr, 2000, vol.3, p.165) says: “The *ushr* should be taken from the *ḥarbī* unless his people take less from us,¹³⁸ if so, it should be taken from them like what they take from us. If they do not take from us we should not take anything from them” يؤخذ من الحربي العشر إلا أن يكون أهل الحرب يأخذون منا أقل فيؤخذ منهم مثل ما أخذوا منا وإن لم يأخذوا منا لم نأخذ منهم شيئاً.

Conclusion

The similarities between the Geneva Convention and the rulings of Muslim scholars in regard to the duties of the refugee/ *musta'min* towards the host state are quite remarkable. Both assert the need to adhere to the general laws of the host state and the measures taken to ensure public safety.

In addition, the Muslim scholars stressed that refugees must respect the faith of the majority in the Islamic state and behave respectfully. At the same time, they exempt the non-Muslim refugee from certain rules due to his disbelief, particularly the rules

¹³⁶ *Ta'zīr*: a term of Islamic law meaning discretionary punishment, e.g. by the *qāḍī* [the judge] for the offences for which no *ḥadd* punishment is laid down (Bearman, et al. 2000, p.406)

¹³⁷ *Ushr* is a tax on the land owned by Muslims, or a tax on the commercial goods to be paid by Muslim, *dhimmi*, or *ḥarbī* merchants from non-Muslim countries (*dār al-ḥarb*). (Bearman, et al. 2000, p.917)

¹³⁸ He means when the Muslims go to *dār al-ḥarb*.

relating to the Islamic faith and its obligations. So, he may retain his identity, customs, dress and even unashamed behaviours, such as drinking alcohol or eating pork, as far as this does not harm Muslims or disturb public order. This particular issue contrasts with the requirements of some modern democratic states such as France which require even their own Muslim citizens, for example, to remove their headscarves in order to attend school.

In terms of the punishment, the Convention does not give any exemptions in this regard. Yet it states that the crimes committed by the refugee should not invalidate his status. Muslim scholars, as we have seen, differentiate in regard to punishment and take into account the faith of the refugee. Generally speaking, they respect his faith and allow him to act accordingly despite the fact that, in some cases, it contradicts with the social and religious rules of Muslim society.

Finally, regarding taxation and other financial dealings, it is left to scholars to decide on according to the circumstances of the time. There is nothing permanent in this regard. It is, as Ibn ʿAbd al-Barr said, subject to the international law and what states can agree on.

Non-discrimination (Article 3)

The issue of non-discrimination in dealing with refugees is vital. The legislators and experts who framed the Geneva Convention gave it precedence, making it the first right to be granted to the refugee. Article 3 in the Convention states: “The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin”.

In the Islamic tradition, there is no text which stipulates this right with equal clarity. However, there are general principles in Islam which serve the same purpose of this Article.

The issue of race was addressed by the Qur^{ān} in different verses. It is clear that the Qur^{ān} and *hadīth* opposed those pre-Islamic Arab customs which discriminated against people on the basis of race. First, the Qur^{ān} declares all human beings are equal by virtue of the fact that all emanate from the same origin. The Qur^{ānic} verse (25:54) states: “And He it is who out of this [very] water has created man and has endowed him with [the consciousness of] descent and marriage-tie thy Sustainer is ever infinite in His power”¹³⁹. Al-Ṣan^{ānī} (1959, vol. 3, p.128) comments on the verse: “It is deduced from this verse the equality between the sons of Ādam”¹³⁹. In another verse (4:1) the Qur^{ān} reasserts this fact and clarifies that all peoples were created from one soul: “O mankind! Be conscious of your Sustainer, who has created you out of one living entity, and out of it created its mate, and out of the two spread abroad a multitude of men and women. And remain conscious of God, in whose name you demand [your rights] from one another, and of these ties of kinship. Verily, God is ever watchful over you!”¹³⁹ يَا أَيُّهَا النَّاسُ اتَّقُوا رَبَّكُمُ الَّذِي خَلَقَكُمْ مِنْ نَفْسٍ وَاحِدَةٍ وَخَلَقَ مِنْهَا زَوْجَهَا وَبَثَّ مِنْهُمَا رِجَالًا كَثِيرًا وَنِسَاءً وَاتَّقُوا اللَّهَ الَّذِي تَسَاءَلُونَ بِهِ وَالْأَرْحَامَ إِنَّ اللَّهَ كَانَ عَلَيْكُمْ رَقِيبًا. The Prophet affirmed this meaning: “All people are the sons of Ādam and Ādam was created from soil”¹³⁹ (al-Suyūṭī, 1993, vol.7, p.580)

Furthermore, God states that He has honoured humans, all humans, and made them superior to many of His creatures in the verse (17:70): “Now indeed, We have conferred

¹³⁹ See also al-Tirmidhī (n.d, vol.5, p.734).

dignity on the children of Ādam, and borne them over land and sea, and provided for them sustenance out of the good things of life, and favoured them far above most of Our creation” وَقَدْ كَرَّمْنَا بَنِي آدَمَ وَحَمَلْنَاهُمْ فِي الْبَرِّ وَالْبَحْرِ وَرَزَقْنَاهُمْ مِّنَ الطَّيِّبَاتِ وَفَضَّلْنَاهُمْ عَلَى كَثِيرٍ مِّمَّنْ خَلَقْنَا تَفْضِيلًا.

Yet, the Islamic principles establish a standard for superiority among humans, the criterion for which is piety and good conduct. In verse (49:13) God directs His speech to all humans, Muslims and non-Muslims, regardless of colour, telling them: “O men! Behold, We have created you all out of a male and a female and have made you into nations and tribes, so that you might come to know one another Verily, the noblest of you in the sight of God is the one who is most deeply conscious of Him. Behold, God is all-knowing, all-aware” يَا أَيُّهَا النَّاسُ إِنَّا خَلَقْنَاكُمْ مِّن ذَكَرٍ وَأُنثَىٰ وَجَعَلْنَاكُمْ شُعُوبًا وَقَبَائِلَ لِتَعَارَفُوا إِنَّ أَكْرَمَكُمْ عِنْدَ اللَّهِ أَتْقَاهُمْ إِنَّ اللَّهَ عَلِيمٌ خَبِيرٌ. Al-Aṣṣfahānī (n.d, vol.1, p.429) comments on the nobleness mentioned here and says: “It is the praised actions” الأفعال المحمودة.

This standard was repeated and rephrased by the Prophet in many *ḥadīths*, like that reported by Muslim (n.d, vol.4, p. 1987) on the authority of Abu Hurayra: “Verily, God does not look at your appearances and monies, but He looks at your hearts and deeds” إِنَّ اللَّهَ لَا يَنْظُرُ إِلَىٰ صُورِكُمْ وَأَمْوَالِكُمْ وَلَكِنْ يَنْظُرُ إِلَىٰ قُلُوبِكُمْ وَأَعْمَالِكُمْ¹⁴⁰. The Prophet emphasised the significance of this principle, in his last pilgrimage: “O people, verily your God is one. Verily, your father is one. Verily, no favour for the Arab over the non-Arab, there is no favour for the non-Arab over the Arab, there is no favour for the black over the red and there is no favour for the red over the black except by piety” يَا أَيُّهَا النَّاسُ أَلَا إِنَّ رَبَّكُمْ وَاحِدٌ أَلَا إِنَّ أَبِيهَا النَّاسُ أَلَا لَا فَضْلَ لِعَرَبِيٍّ عَلَىٰ أَعْجَمِيٍّ وَلَا لِعَجَمِيٍّ عَلَىٰ عَرَبِيٍّ وَلَا لِأَسْوَدٍ عَلَىٰ أَحْمَرَ وَلَا لِأَحْمَرَ عَلَىٰ أَسْوَدٍ إِلَّا بِالتَّقْوَىٰ (al-Suyūṭī, 1993, vol.7, p.579).

This piety, however, is not just a claim devoid of substance. On the contrary, it should be practical and people should feel its good effect. The Prophet was asked about the best Muslim and said: “[The best Muslim] is who people are safe from his hand and tongue” من سلم الناس من لسانه ويده¹⁴¹ (Ibn Ḥibbān, 1993, vol.2, p.76). In the narration of al-Nasā’ī (1991, vol.6, p.530) the Prophet added: “And the true believer is the one to

¹⁴⁰ See also, Ibn Ḥibbān (1993, vol.2, p.119), Ibn Rāḥawayh (1991, vol.1, p.369) and Ibn Ḥanbal (n.d, vol.2, p.284).

¹⁴¹ See also, al-Haythamī (n.d, vol.1, p.37) and Ibn al-Mubārak (1986, vol.1, p.16).

whom people entrust their blood and money” وأموالهم على دمانهم والناس من أمنه الناس . So, it is the practice and the action that makes some people excel over others.

This question of who is the best was asked directly to the Prophet who replied: “[The best] is the one who lives longer and makes his deeds better” من طال عمره وحسن عمله¹⁴² (al-Naysābūrī, 1990, vol.1, p.489).

To enshrine this principle in the minds of Muslim’s required far more than one *ḥadīth*. It was a long process that was particularly difficult for those Arabs who could recall the *jāhiliyya* and its customs. Pride in race and tribe was engrained in that society¹⁴³ and it was not easy to relinquish. Despite their sincere adherence to the teachings of the Prophet, some Muslims on occasion failed the test and longed for the days of the *jāhiliyya* unconsciously. In an incident reported by al-Ṭabarī (1984, vol.4, p.23), two men of al-Aws and al-Khazraj recalled the days of the *jāhiliyya* and recited its poems when the two tribes met each other in the famous battle of Bu^ʿāth. Then, each one of them started to call on his people to fight in his line. When the Prophet heard about this he immediately went to them and started to blame them for this *jāhiliyyī* act. His speech is well known: “[Do you fight each other] in the name of the *jāhiliyya* whilst I am still alive amongst you?” أبعدوى الجاهلية وأنا بين أظهركم (al-Ṭabarī, 1984, vol.4, p.23).

In such cases, the Prophet would frequently deter Muslims from taking pride in their tribal lineage, making it a sign of the *jāhiliyya*. On the authority of Salmān the Prophet said: “Three things are from the *jāhiliyya*; the pride of the tribal line, the tarnishing of ancestry and lamentation [over the dead]” ثلاثة من الجاهلية الفخر بالأحساب والطعن في الأنساب والنياحة¹⁴⁴ (al-Ṭabarānī, 1983, vol.6, p.239)

On other occasions the Prophet thanked God publicly for stripping his companions of this negative trait. Ibn Ḥumayd (1988, vol.1, p.253) reports that the Prophet would say: “All praise due to God who removed from you the stain of the *jāhiliyya* and its pride in the forefathers” الحمد لله الذي أذهب عنكم عيبة الجاهلية وتكبرها بأبائها¹⁴⁵.

¹⁴² See also al-Naḥḥās (n.d, vol.4, p.215), Ibn ʿAbd al-Wāḥid (1989, vol.9, p.43) and Ibn Abī Shayba (1988, vol.7, p.89).

¹⁴³ See ch.1 of this thesis.

¹⁴⁴ See also Ibn Ḥusām al-Dīn (1998, vol.16, p.13)

¹⁴⁵ See also al-Zaylaʿī (1993, vol.3, p.349) and al-Suyūṭī (1993, vol.7, p.579)

When the Prophet felt that his leniency was not having the desired impact, he threatened those who still exhibited *jāhiliyya* behaviour: “If those who take pride in their forefathers do not stop, then God will make them lower than the *ju‘lān*¹⁴⁶ ليتهين قوم ليكنون أهون على الله من الجعلان (al-Suyūṭī, 1993, vol.7, p.582).

Discrimination based on colour was also reprimanded and associated with the *jāhiliyya*. Individuals who made such mistakes were admonished by the Prophet. Abu Dharr, one day called a companion while quarrelling “O the son of the black mother” يا ابن السوداء when the Prophet heard about it he summoned him and told him: “You are a man with remains of the *jāhiliyya*” إنك امرؤ فيك جاهلية (al-Bukhārī, 1986, vol.1, p.20). Abu Dharr was regretful and asked the forgiveness of that companion¹⁴⁷.

With regard to the issue of religion, the Qur’anic verse (9:6) is considered the cornerstone in legislating the refuge principle in the Islamic tradition and does not differentiate between refugees on the basis of colour or country of origin. The term used to describe the refugee is “one of the disbelievers” أحد من المشركين without any specifications, descriptions or limitations. So, it is general and could encompass all non-Muslim refugees.

However, when it comes to Muslim refugees we find that the Islamic tradition dealt with them differently as the *sīra* shows. When the Prophet and his companions fled Mecca to Medina they were treated no less favourably than the residents of Medina itself. The brethren contract the Prophet struck between the people of Medina made the *Muhājirūn* and the *Anṣār* equal in duties and responsibilities from the day the Meccan migrants arrived in Medina¹⁴⁸. They not only became residents, but also rulers and occupied high positions in Medinan society. The non-Muslim *musta‘min*, meanwhile, had to secure an *amān* contract to stay in the Islamic state for a short period which could be extended to a year, according to the most tolerant opinions of the early scholars¹⁴⁹.

¹⁴⁶ The *ju‘lān* is plural of *ju‘l* which is a small animal with a bad smell (Ibn Manẓūr, 1956, vol.11, p.112)

¹⁴⁷ See also al-Ṣan‘ānī (1982, vol.9, p.447) and Abu ‘Uwāna (n.d, vol.4, p.73).

¹⁴⁸ See the section entitled ‘The migration to Medina’ in this thesis p.72.

¹⁴⁹ This issue also will be discussed at the section concerning ‘Naturalization’ p.265.

This is due to the fact that *amān* at the time was obtained also by converting to Islam. So, once the disbeliever converted, he had the full right to be protected in the Islamic state which was built on the basis of religion and not geography, borders or lineage.

The religious relationship was stronger and superior to any other relation. The relationship of blood lineage, geography, marriage and any other relation were inferior. The concept of loyalty (to God, his Prophet and the fellow Muslims) and dissociation (from the disbelievers, even if they were relatives) was manifest. On this relation Islamic society was built.

However, after migration to Medina and the establishment of the Islamic state there, the issue of migration emerged as another condition for participation in the Islamic state. Nonetheless, there was still some relationship between those who did not migrate and the Islamic state. This relationship was illustrated by the verse (8:72): "Behold, as for those who have attained to faith, and who have forsaken the domain of evil' and are striving hard, with their possessions and their lives, in God's cause, as well as those who shelter and succour [them] - these are [truly] the friends and protectors of one another. But as for those who have come to believe without having migrated [to your country]" - you are in no wise responsible for their protection until such a time as they migrate [to you]. Yet, if they ask you for succour against religious persecution,' it is your duty to give [them] this succour-except against a people between whom and yourselves there is a covenant' for God sees all that you do" إِنَّ الَّذِينَ آمَنُوا وَهَاجَرُوا وَجَاهَدُوا بِأَمْوَالِهِمْ وَأَنْفُسِهِمْ فِي سَبِيلِ اللَّهِ وَالَّذِينَ آمَنُوا وَلَمْ يُهَاجِرُوا مَا لَكُمْ مِّنْ وَلَايَتِهِمْ مِّنْ شَيْءٍ حَتَّىٰ يُهَاجِرُوا وَإِنِ اسْتَنْصَرُوكُمْ فِي الدِّينِ فَعَلَيْكُمُ النَّصْرُ إِلَّا عَلَىٰ قَوْمٍ بَيْنَكُمْ وَبَيْنَهُمْ مِّيثَاقٌ وَاللَّهُ بِمَا تَعْمَلُونَ بَصِيرٌ

So, non-resident Muslims could expect some rights from the Islamic state subject to its own capacity, like the right of support, as al-Ghanūshī (1993, p.46) states.

This means that Muslim migrants had more rights than the others in terms of obtaining permanent stay and being part of that Islamic society.

Such rules applied to the Caliphate state at the time. It is significant, however, that in the modern age of national states, the rules should be different, as al-Mawdūdī states. During a discussion on the status of *dhimmi*s in the Islamic state he claims: "It should be clearly borne in mind that an Islamic State is essentially an Ideological state, and is

thus radically different from a national state. This difference in the very nature of these two types of states has an important bearing on the problem under discussion” (Mawdūdī, 1961, I). Thus, this issue should be readdressed by Muslim scholars who must also detail the rulings and judgements concerning refugees to the modern national state away from the rulings that governed the Caliphate state.

Conclusion

The Islamic tradition in principle rejects any sort of discrimination based on race or colour and makes such discrimination a sign of backwardness and of reverting to the *jāhiliyya*. One of the main principles in Islam is the equality of humanity. There is no superiority for one race over another. The measurement for superiority is the excellence in serving the good and acting positively, regardless of race, lineage or colour. From these principles, which came without restriction or limitation, we can generalise for application to all refugees.

In regard to religion, the Islamic tradition afforded Muslim migrants priority over non-Muslims in terms of the speed of assimilation into and membership of Muslim society. This was due to the nature of the Caliphate state that was established on religion and had different duties and responsibilities towards Muslims. However, the favourable treatment of Muslim migrants did not entail a rejection of non-Muslims refugees. Practically it meant that Muslim refugees did not fall into the same category because of their faith and their theoretical relationship to the Caliphate state.

Nevertheless, with the disappearance of the central Caliphate state and after the advent of the modern national states, the whole concept of support and loyalty had to be revised according to current realities.

Thus, in regard to Article 3 of the Convention, it could be concluded that the Islamic tradition provides sufficient grounds to match this Article, particularly in terms of non-discrimination based on colour or country of origin. Concerning religion, the Islamic tradition was not in full tune with this Article, based on the nature of the Caliphate state. Yet, in the modern national state, the favourable treatment of Muslim migrants should be dropped and there must be equality in the treatment of refugees since all refugees

generally share a common experience of suffering and a need of protection. It could be said that the Islamic tradition provides the basis for contemporary Muslim scholars to revise, think and detail the appropriate judgement from the tradition in light of current realities.

Religion (Article 4)

In its fourth Article entitled “Religion” the Geneva Convention states: “The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children”.

The need for such an article was not initially felt according to Hathaway (2005, p.570). However, at the conference of Plenipotentiaries there was overwhelming support for codification of this right to impose a contractual obligation on states to respect the religious liberties of refugees. This vast support was partially due to the fact that lack of religious freedom was a frequent cause of refugee flight. Thus “it would clearly be unacceptable if refugees forced to flee religious persecution were to be required to accept as “protection” conditions of life which denied them the very freedom which forced them abroad” (Hathaway, 2005, p.572).

The place this Article occupied in the Convention demonstrates the importance the drafters attached to it. “It is the only article in the Convention which comprises a principled obligation on states to take steps for the benefit of refugees beyond even what is done for their own citizens” (Hathaway, 2005, p.572).

In regard to educating children, the Article “ensures that refugee parents are free (if they have resources) to enrol their children in schools which provide their preferred form of religious instructions; and if they are not able to fund education of that kind, they enjoy the liberty to withdraw their children from any non-preferred form of religious instructions provided within the public school system” (Hathaway, 2005, p.583).

The view of the Islamic tradition in regard to Article 4

In their extensive debate about the rights and duties of the *musta'min*, Muslim scholars discussed the religious freedom of non-Muslims who seek *amān* in *dār al-Islam*. They

also debated the religious freedom of the *dhimmī* whose state was similar to the *musta'min*¹⁵⁰.

According to Ibn Qudāma there was consensus among the scholars that forcing the *dhimmī* and *musta'min* to convert to Islam was prohibited. He states: “The people of knowledge agree that so long as the *dhimmī* and the *musta'min* keep their contract, it is prohibited to abolish it or force them to do something that was not agreed on, ... like professing [that no God but Allah and Muḥammad is his Prophet]” أجمع أهل العلم على أن (Ibn Qudāma, 1982, vol.9, p.29).

The scholars based their judgement on the Qur'anic verses that prohibit Muslims from coercing non-Muslims to convert, for example verse (2:256): “There shall be no coercion in matters of faith. Distinct has now become the right way from [the way of] error: hence, he who rejects the powers of evil and believes in God has indeed taken hold of a support most unfailing, which shall never give way: for God is all-hearing, all-knowing” لا إكراه في الدين قد تبين الرشد من الغي فمن يكفر بالطاغوت ويؤمن بالله فقد استمسك بالعروة الوثقى لا انفصام لها والله سميع عليم.

Al-Nasafī (n.d, vol.1, p.125) comments: “There is no compulsion to follow the true religion, and that is the religion of Islam” لا إجمار على الدين الحق وهو دين الإسلام. Ibn Kathīr (1980, vol.1, p.311), al-Sa'dī (2000, vol.1, p.111) and al-Samarqandī (n.d, vol.1, p.195) affirm this meaning: “Do not force anyone to convert to this religion because it is clear, obvious, its proves are apparent and it does not need anyone to be forced to follow it” لا تكرهوا أحدا على الدخول في دين الإسلام فإنه بين واضح جلي دلائله وبراهينه لا يحتاج إلى أن يكره أحد على الدخول فيه.

The contemporary commentator Sayyid Quṭb, who was imprisoned, tortured and eventually hanged for his beliefs, glorified this freedom and widened it to include the freedom to preach the faith. He said: “The religious freedom is the first right to the human with which he is rightly described ‘a human’. He who dispossesses a human of his religious freedom actually dispossesses his humanity. Religious freedom should be

¹⁵⁰ See Ibn 'Abdīn (2000, vol.4, p.169), al-Shirbīnī (1994, vol.2, p.410), al-Nawawī (1984, vol.5, p.279) and al-Ramlī (1983, vol.6, p.239).

accompanied by the freedom to preach the faith securely from any harm or inquisition. Otherwise, it is a freedom by the name only, without any meaning in real life” إن حرية الاعتقاد هي أول حقوق "الإنسان" التي يثبت له بها وصف الإنسان. فالذي يسلب إنسان حرية الاعتقاد إنما يسلبه إنسانيته ابتداء. ومع حرية الاعتقاد حرية الدعوة للعقيدة والأمن من الأذى والفتنة. وإلا فإنها حرية بالإسم لا مدلول لها في واقع الحياة (Quṭb, 1967, vol.1, p.30).

These scholarly interpretations are strengthened by the actual reasons for the revelation of this verse. These reasons are immensely important in this perspective as they give practical examples of how Muslims dealt with the issue of freedom to religion.

The scholars mentioned two reasons for the revelation. The first account was reported by al-Nasāʿī (1991, vol.6, p.304), Abū Dāwūd (n.d, vol.3, p.58) and Ibn Ḥibbān (1993, vol.1, p.352) on the authority of Ibn ʿAbbās: “If a woman happens to be barren she vows that if her baby lives she will convert him to Judaism. When Banū al-Naḍīr were evacuated from Medina, some of the *Anṣār*’s sons were with them. They [the *Anṣār*] said we will not let our children [go away with the evacuated tribe], so God the Almighty revealed “There shall be no coercion in matters of faith”, truly the right way has become clearly distinct from error” كانت المرأة تكون مثلاً فتجعل على نفسها إن عاش لها ولد أن تهوّد فلما أجليت بنو النضير كان فيهم من أبناء الأنصار فقالوا لا ندع أبناءنا فأنزل الله عز وجل لا إكراه في الدين خيروا أصحابكم فإن اختاروكم فهم خير وإن اختاروهم فهم منهم (al-Ṭabarī, 1984 vol.3, p.15).

The other reason for revelation, however, is similar to this and also was narrated on the authority of Ibn ʿAbbās who said: “This verse was revealed because of a man from the tribe of Banī Sālim Ibn ʿAwf from the *Anṣār* called al-Ḥuṣayn. He had two Christian sons and he was a Muslim. He asked the Prophet [permission] to force them to convert after they refused [to convert willingly] and stayed Christians, so God revealed this verse” نزلت في رجل من الأنصار من بني سالم بن عوف يقال له الحصين كان له ابنان نصرانيان وكان هو رجلاً مسلماً فقال للنبي ألا أستكردهما فإنهما قد أبيا إلا النصرانية فأنزل الله فيه ذلك (al-Qurṭubī, n.d, vol.3, p.280).

¹⁵¹ See also al-Ṭabarī (1984, vol.3, p.14) and al-Nasafī (n.d, vol.1, p.125).

These two incidents are the true embodiment of this principle. The Muslims could easily have forced their sons to convert to Islam, especially since at that time they were victorious, very close to the Prophet and had strong belief in him and his message. However, their enthusiasm for their religion did not make them exceed the limits established by God. God revealed this verse to establish a universal principle spelling out that freedom of religion should be protected in the Islamic state even though it may allow the existence of faiths and creeds that contradict with the fundamentals of the Islamic faith.

Another explanation for the peaceful reaction of those Muslims could be the fact that they themselves had been subject to harassment and torture at the hands of the disbelievers when they chose a different religion and way of life. So, they did not want to do the same with their sons and become their oppressors.

The religious freedom enshrined in this verse is general and should be valid for all ages and generations. It should not be restricted to any time or specific incident, since the general jurisprudential rule is: “The point is in the general phrasing and not in the specific cause”¹⁵² العبرة بعموم اللفظ لا بخصوص السبب (al-Ghazālī, 1992, vol.1, p.236)

The other verse the scholars depended on in their verdict is the verse (10:99) “And if thy Lord willed, all who are in the earth would have believed together. Wouldst thou (Muḥammad) compel men until they are believers?” وَلَوْ شَاءَ رَبُّكَ لَأَمَنَّ مِنَ فِي الْأَرْضِ كُلَّهُمْ جَمِيعًا أَفَأَنْتَ تُكْرِهُ النَّاسَ حَتَّىٰ يَكُونُوا مُؤْمِنِينَ

Al-Kalbī (1983, vol.2, p.99) comments on this verse, maintaining that the question here is for negation and the meaning of the verse is: you, the Prophet cannot put faith in peoples’ hearts to make them convert. Yet, al-Zamakhsharī (n.d, vol.1, p.331) explains more: “God could have forced people to convert if He wished, but He did not do that and made conversion the subject of a personal choice” لو شاء لقسرهم على الإيمان ولكنه لم يفعل وبني الأمر على الاختيار

Al-Alūsī (n.d, vol.11, p.195) in turn asserts that the verse orders the Prophet “not to force people to convert but to point them towards that which may bring them to it” لا

¹⁵² See also (al-Rāzī, 1979, vol.4, p.77).

تكره الناس على الإيمان ولكن أوامرهم بما يتوصل به إليه. With no uncertainty, Ibn al-Jawzī (1994, vol.1, p.39) concludes that “faith is not proper by compulsion” الإكره لا يصح مع الإكراه.

These verses, however, were interpreted practically in the life of the early Muslims. The trend of religious tolerance and freedom continued to the following generations. Al-Aṣbahānī (1984, vol.9, p.34) reports that °Umar the caliph, had a servant called Wasaq. °Umar used to invite him to convert by making him offers: “If you convert I will use you to help me in carrying my duties, as I am not allowed to use, in ruling the Muslims, someone who is not from them” إن أسلمت استعنت بك على أمانة المسلمين فإنه لا ينبغي لي أن أستعين على أمانتهم بمن ليس منهم. But Wasaq refused and then °Umar said: “There shall be no coercion in matters of faith”. When °Umar was dying he freed that servant and told him to go wherever he wished¹⁵³.

Although °Umar was surely able to force his servant to convert, he did not do so because conversion should be based only on absolute conviction and persuasion. °Umar believed that conversion is not just a matter of a few words to be uttered, but it is belief in the heart and no one can make that happen by force, as al-Nasafī (n.d, vol.2, p.143) said.

As a result, this tolerance and religious freedom was asserted by the scholars when they judged that forced conversion is not acceptable and no ruling may be built on that. Ibn Qudāma (n.d, vol.4, p.164) stresses: “He who was forced wrongly to convert like the *dhimmī* and the *musta'min*, his conversion is not acceptable and no Islamic ruling should apply to him” من أكره على الإسلام بغير حق كالذمي والمستامن لم يصح إسلامه ولم يثبت له أحكامه. In another book he repeats this opinion and adds that this conversion will not be accepted until there is a proof after the removal of force that he still adheres to Islam, otherwise if he died he will not be considered a Muslim (Ibn Qudāma, 1984, vol.9, p.29).

Al-Nawawī (1997, vol.9, p.151) agrees, stating that if enforcement happened then it was wrong since the basic term of the contract was to leave him free with his religion.

¹⁵³ See also Ibn Abī Shayba (1988, vol.3, p.108).

Besides, many scholars in their debates concerning the rights of the *dhimmī* and the *musta'min* repeatedly used the phrase: “We gave them *amān* subject to the condition that we leave them with what they believe in”¹⁵⁴ (al-Sarakhsī, n.d, vol.9, p.56). Al-Kāsānī (1982, vol.2, p.311) affirms this rule and adds: “They should not be harmed in their worshipping other than God, although it is forbidden [for the Muslims]”¹⁵⁵ لا يتعرض لهم في عبادة غير الله تعالى وإن كانت محرمة .

To fortify this principle and demonstrate sincerity in its application, the Muslim scholars granted the *musta'min* rights supplementary to the right of religious freedom. The scholars gave him the freedom in personal affairs such as marriage, wills, food, dress etc. according to his belief, with the exception of only a small number of areas which impacted on wider community like dealing in usury, for example¹⁵⁵.

Moreover, al-Zayla'ī reports that Abu Ḥanīfa also said they are allowed to drink and sell alcohol and pork in *dār al-Islam*, as “we are ordered to leave them with what they believe in”¹⁵⁶. Not only that but if a Muslim, out of anger or enthusiasm, decided to destroy his forbidden goods, like alcohol, he will be forced to compensate him (Shaykhī Zāda, 1998, vol.4, p.94).

Furthermore, the scholars argued about the right to places for worship. Some of them refused, stating that the Islamic state should be a place for worshipping God in the Islamic way only and thus no churches should be built there. Al-Subkī (n.d, vol.2, p.373) claims that: “It is a consensus [between all the Muslims scholars] that building a church is prohibited” بناء الكنيسة حرام بالإجماع. To support his claim he mentions a few *ḥadīths* like: “There is no church building in Islam and no refurbishment to the old ones” لا تبنى كنيسة في الإسلام ولا يجدد ما خرب منها and “There is no emasculation in Islam and there is no church building” لا خصاء في الإسلام ولا بنيان كنيسة and “Demolish the churches and the abbeys” اهدموا الصوامع واهدموا البيع .

The irony in al-Subkī's position is that he himself judges that these *ḥadīths* are weak (al-Subkī n.d, vol.2, p.373). Therefore, we cannot consider them, let alone deduce a valid

¹⁵⁴ See for example, Ibn Nujaym (n.d, vol.5, p.81), al-Mirghinānī (n.d, vol.1, p.214) and al-Kāsānī (1982, vol.2, p.311).

¹⁵⁵ See section ‘Personal Status’ in this thesis p.206.

¹⁵⁶ See also al-Kāsānī, (1982, vol.7, p.147) and Ibn Nujaym (n.d, vol.8, p.519).

judgment from them on such an important issue. Moreover, the Qur^{ān} and the *ḥadīth* clearly show that non-Muslims could live in the Islamic state despite the fact that they are disbelievers. This by default means that they may practise their religion and certainly they would need a place to practice it.

Above all, the *sīra* of the Prophet and his companions show that they did not demolish any church or place of worship. On the contrary, we find the Prophet and his caliphs ordering their armies to avoid worshippers and the places where they worship. Ibn Ḥusām al-Dīn (1998, vol.4, p.203) reports an account that Abu Bakr ordered Yazīd Ibn Abu Sufyān, °Amr Ibn al-°Āṣ and Shuraḥbīl Ibn Ḥasana, the leaders of his army: “Do not demolish an abbey” لا تهدموا بيعة. In the narration of al-Bayhaqī (1989, vol.9, p.90) he told them: “You will find people who have locked themselves in these abbeys [for worship], leave them with what they locked themselves for” ستجدون أقواما قد حبسوا أنفسهم في هذه الصوامع فاتركوهم وما حبسوا له أنفسهم¹⁵⁷.

However, another opinion is that they are allowed to build and rebuild the demolished churches. This was the opinion of Abu Ḥanīfa (Shaykhī Zāda, 1998, vol.4, p.452) and some Shāfi°ī scholars according to (al-Shīrāzī, n.d, vol.2, p.255). Contemporary scholars such as al-Ghanūshī (1993, p.47) and Zaydān (1982, p.99) also support this opinion.

This opinion seems the most logical and agrees with the spirit of the Qur^{ān} and the Prophetic teachings. It goes hand in hand with the fact that Islam not only allowed the disbelievers to live among Muslims, but also left the door open for non-resident disbelievers to come in and see the beauty of its principles, as we have seen in the interpretation of the verse (9:6). This obviously places certain responsibilities upon the Islamic state, such as allowing those non-Muslims to worship and a place to worship in.

Conclusion

Freedom of religion in the Islamic tradition is ingrained in the Qur^{ān} and the teachings of the Prophet. This freedom was not just theoretical but also practical. It was the right of non-Muslims and particularly of those who sought refuge in the Islamic state. The

¹⁵⁷ Also narrated by Ibn Sa°īd al-Umawī (n.d, vol1, p.72) and Ibn Hibāt Allah (1995, vol.2, p.50)

verse (9:6) justifies granting *amān* to them, as some scholars said, by the probability that they may listen to the word of God and convert. In other words, Islam allowed them to enter so they had the opportunity to learn about Islam and forcing them to relinquish their beliefs did not fit this aim.

By this verse too the *Imām*, as al-Jaṣṣāṣ (1984, vol.4, p.273) concludes, is obliged to “protect the *mustaʿmin*, take care of him and prevent people from harming him” جَفِظَ هَذَا “الْحَرْبِيُّ الْمُسْتَجِيرَ وَجِيَاظَتُهُ وَمَنَعَ النَّاسَ مِنْ تَنَاوُلِهِ بِشَرِّ”. Without doubt, the worst harm would be in forcing him to change his faith or preventing him from practicing what he believes in.

Moreover, the *mustaʿmin* in the Islamic state is not only free to believe in the religion he prefers, but enjoys the right to practise it the way he wants. This obviously requires a place to practise it in and the right to build places of worship if need be.

Additionally, they have the right to live according to their beliefs with respect to most areas, including marriage, food, dress and any other personal affairs, but excluding those few areas that affect the wider Muslim community, such as dealing in usury, as some scholars¹⁵⁸ said.

Finally, based on the above discussion it can be concluded that the Islamic tradition agrees with Article 4 of the Geneva Convention. Religious freedom is a firmly-fixed principle in Islam and certainly applies to refugees in the Islamic state.

¹⁵⁸ See al-Siwāsī (n.d, vol.3, p.386).

Personal status (Article 12)

In its 12th Article the Geneva Convention tackles the personal status of the refugee and formulates:

1. The personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.
2. Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee.

Despite lengthy discussions about the definition of the term domicile, the contracting states failed to agree a definition and left it to “the courts of the reception country to determine the domicile” (Hathaway, 2005, p.216).

Still, the adoption of this Article is important in that it enables “persons to move between countries without thereby jeopardizing basic entitlements” (Hathaway, 2005, p.210)

Personal status in the Islamic tradition

The debate which took place between drafters during the coding of the Convention¹⁵⁹ is remarkably similar to the discussion that occurred between Muslim scholars concerning the *musta'min* and his personal affairs, including the status of his marriage and will before entering *dār al-Islam*. Such discussions and especially those relating to the marriage issue are of relevance in the current context, since the Convention gives special attention to it.

¹⁵⁹ See Hathaway (2005, pp.210-223).

As is well known in Islamic jurisprudence, the groom has to give a dowry to his bride. In terms of the *ḥarbī* who is a non-Muslim, the Ḥanafites, as reported by al-Kāsānī (1982, vol.2, p.312) agree that: “If a *ḥarbī* married a *ḥarbiyya*¹⁶⁰ in *dār al-ḥarb* without dowry, it would be accepted” *ولو تزوج حربى حربيّة في دار الحرب على أن لا مهر لها جاز ذلك*. Obviously that is in contradiction with the Islamic tradition, but it is nonetheless acceptable and Muslims do not have the right to compel the *mustaʿmin* to do otherwise. The Ḥanafites agreed on the basis of this ruling and expressed it in different wording. Muḥammad and Zufar¹⁶¹ justify it on the grounds that “they are not obliged to adhere to our rulings” *لأنهما ما التزما أحكامنا*, while Abu Ḥanīfa validates this on the basis that “we are ordered to leave them with what they believe in”¹⁶².

This opinion is stressed again by al-Mirghinānī (n.d, vol.1, p.214) but more explicitly. He says that if a *mustaʿmin* got married and the dowry was a dead animal, it would be accepted. Obviously, this is a hypothetical case to demonstrate that whatever they agree on, it will not be rejected by the Muslims, notwithstanding the fact that it might contradict their rulings. In this particular example it is clear that such a marriage is not allowed for the Muslims, since firstly the dowry is a condition for the correctness of the marriage and secondly the dowry should not be something prohibited for the Muslims to eat or to deal with. What the scholars agreed was that in practical terms the personal status of the refugee prior entering the Islamic state is respected regardless whether it agrees with the Islamic rulings or not.

This opinion was straightforwardly endorsed by al-Jaṣṣāṣ (1984, vol.5, p.330): “If the *ḥarbī* entered to us with *amān*, the divorce between him and his wife should not occur” *لو دخل حربى إلينا بأمان لم تقع الفرقة بينه وبين زوجته*. This is further confirmation from a well-known scholar to respect the personal status of the *mustaʿmin* when he is in the Islamic state.

Another issue of particular importance to the personal status of the *mustaʿmin* was not addressed by the Convention but was discussed in detail by the Muslim scholars. That is the issue of religion and conversion to Islam after entering *dār al-Islām*. The Muslim scholars placed certain rulings on the *mustaʿmin* when he converted. Al-Shaybānī (n.d,

¹⁶⁰ The female of *ḥarbī*.

¹⁶¹ The famous students of Abu Ḥanīfa (al-Sīwāsī, n.d, vol.3, p.386).

¹⁶² See also al-Zaylaʿī (1895, vol.2, p.159) and Ibn Nujaym (n.d, vol.8, p.519).

vol.1, p.189) presents ten different scenarios of the *musta'min*'s marriage and the rulings after his conversion. Obviously, discussing these cases is beyond the terms of this research, but the point here is that conversion, by necessity, changed the rulings relating to the *musta'min* and could affect his personal status.

Nonetheless, some of these rulings could be very serious in relation to the marital status of the *musta'min* and might nullify it completely according to some scholars. Mālik, al-Ūzā'ī, al-Layth, al-Shāfi'ī and Abu Ḥanīfa say: "If one of them converted while they were in *dār al-ḥarb* and then entered *dār al-Islam* their marriage will be void" *إن أسلم أحدهما وهما في دار الحرب ودخل دار الإسلام انفسخ النكاح* (Ibn Qudāma, 1984, vol.7, p.120). On the other hand, al-Buhūtī argues that this is not necessarily the case, since Um Ḥakīm converted in Mecca while her husband °Ikrima fled to Yemen and later converted and their marriage remained valid despite "the difference in the homestead and religion" *اختلاف الدار والدين* (al-Buhūtī, 1996, vol.2, p.686).

Religion, therefore, plays a clear role in determining the personal status of the refugee in the Islamic tradition. Obviously, the focus of this research is not to show how it could be affected, but rather to demonstrate in principle that the conversion to Islam by the *musta'min* might have some impact on his personal status.

Another issue concerning the personal status of the refugee discussed by the Muslim scholars was the will of the *musta'min* in *dār al-Islam*. They argued over its validity and whether to execute it in the way he determined or in conformity with Islamic rulings.

Abu Ḥanīfa rules that the *musta'min*'s will should be treated like the *dhimmi*'s: "If a *dhimmi* bequeathed his house to be a church for unnamed people it will be correct like the will of the *musta'min*" *لو أوصى بداره كنيسة لقوم غير مسلمين صححت كوصية حزبي مستأمن* (Ibn Nujaym, n.d, vol.8, p.519). He defends his position by saying: "This is a good deed in their belief and we are ordered to leave them with what they believe in, so it is allowed [to do that] according to their belief" *هذه قرينة في معتقدهم ونحن أمرنا أن نتركهم وما يديون فيجوز*. However, Muḥammad and Zufar disagree: "The will is invalid because it is actual sin although it is a good deed in their belief. To determine a sin by a will is null and its execution is affirming the sin" *الوصية باطلة لأنها معصية حقیقة وإن كان في معتقدهم قرينة* (Ibn Nujaym, n.d, vol.8, p.519). *والوصية بالمعصية باطلة لأن تنفيذها تقرير للمعصية*

Al-Shāfi'ī in turn affirms the opinion of the latter and gives a clear example of the void will: "If he determined by his will to use his money to buy alcohol and pigs and then donate them to the needy ... we will invalidate his will" لو أوصى ذمي أن يشتري به خمرا أو خنازير فيصدق بها ... أبطلنا الوصية (al-Shāfi'ī, 1973, vol.4, p.213).

The Islamic law of inheritance is too detailed for a full discussion here. However, concerning the point above, while is allowed to determine a sin by his will, the Muslim is not, otherwise his will is nullified, according to al-Kāsānī (1982, vol.7, p.341). This shows that the Islamic tradition gives the *musta'min* some rights which the Muslim is not entitled to, simply because the the *musta'min* has a different religion which should be considered in the Islamic state.

Conclusion

From this discussion we may conclude that the Islamic tradition respects the personal status of the *musta'min* as governed by the laws of his domicile including rights previously acquired. In regard to status of marriage particularly the non-Muslim refugees have the right to adhere to their beliefs and Muslims must respect that.

Although the Islamic tradition provides the refugee with much liberty to pursue his personal matters, some rights in certain cases have to be in agreement with Islamic principles, otherwise they could be rejected. This understanding conforms to the condition put by the Convention on the nature of the personal issue and its legality in the host country. A clear and relevant example of this could be the issue of the same sex marriages. This right in some countries has been legalised, while in others it is rejected and is still considered an issue for debate. In the Islamic tradition this right is not recognised since it is prohibited by the Qur'ān and the Prophetic custom. Thus, the refugee may not enjoy this right as it is at odds with one of the fundamental principles of Islam concerning the family in Islamic society. This is simply an example and the scholars could impose other conditions to preserve the identity of the Islamic state, keep the public order and secure the national interests.

To sum up, the Islamic tradition of jurisprudence provides sufficient grounds to argue that the principles of Article 12 can be accepted subject to certain conditions. These conditions could be verified by the scholars of law according to their circumstances.

Movable and immovable property (Article 13)

Article 13 of the Geneva Convention states: “The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.”

This Article according to Hathaway (2005, p.524) “not only protects the right to acquire all forms of property, but also guarantees non-discrimination in regard to “other rights pertaining thereto,” specifically including related contractual interests.” However, Hathaway maintains that the article does not establish “an absolute guarantee of property rights for refugees” (Hathaway, 2005, p.524) because “the drafters rejected pleas fully to enfranchise refugees in order to promote their speedy assimilation. Some states took the view that there was no good reason to privilege refugees relative to other non-citizens. Others simply wanted to be able to reserve some property rights for either their own citizens, or for citizens of states with which they were allied in an economic or political association.” (Hathaway, 2005, p.525-526)

However, Hathaway (2005, p. 527) concludes that “the benefits of Art. 13 can now be invoked by any refugee under a state’s authority, including those not yet formally recognized as refugees.”

The stance of the Islamic tradition on this issue

The amount of time and space devoted to this issue by scholars is quite remarkable. So too is their neutral and unbiased approach to the rights of the *musta'min* in possessing property in *dār al-Islām*. They simply did not allow ‘religious passion’, as Zaydān (1982, p.133) states, to restrict the rights the *musta'min* was entitled to.

However, it is worth noting that the scholars generally thought of the *musta'min* as a trader *musta'min*. This is quite clear from the justification they give for their judgement.

Ibn Nujaym, for example, asserts that Muslims should permit the *musta'min* to stay for a short period of time, because if we did not allow him to stay it “will cause the cessation of importing provisions and closing the door for trading” لأنَّ في مَنعِهَا قَطْعَ المِيرَةِ وَالْجَلْبِ وَسَدَّ بَابِ التَّجَارَةِ. This opinion was also affirmed by al-Mirghinānī (n.d, vol.2, p.154), al-Zayla'ī (1895, vol.3, p.268) and al-Sīwāsī (n.d, vol.6, p.22).

The protection of the *musta'min*'s properties

The Muslim scholars expressed the inviolability of the *musta'min*'s possessions in different ways and stressed that his money was protected as much as himself. Ibn Qudāma (1984, vol.9, p.198) judged that: “By his entrance to *dār al-Islam* with *amān*, the *amān* of his money is confirmed” بدخوله دار الإسلام بأمان ثبت الأمان لماله الذي معه. Al-Buhūtī (1996, vol.1, p.653) and al-Suyūfī (1961, vol.2, p.579) extend his personal *amān* to include his relatives and his money: “The *amān* fulminates into the *musta'min*'s accompanying relatives and money unless it [the *amān*] is restricted to him only” ويسرى الأمان إلى من معه أي المستأمن من أهل ومال تبعاً له إلا أن يخصص به.

Al-Sīwāsī (n.d, vol.7, p.39) in his turn affirms that: “His money has become protected by the *amān*” ماله صار محظوراً بالأمان. Ibn 'Abd al-Barr (2000, vol.3, p.166) phrases it differently: “The *amān* saves the blood and the money” الأمان يحقن الدم والمال. Al-Sarakhsī (n.d, vol.7, p.200) agrees with the other scholars: “The property of the *musta'min* is respected by the *amān*” ملك المستأمن محترم بالأمان. He reaffirms this elsewhere (n.d, vol.10, p.52): “It is prohibited to possess the money of the *musta'min* by force” لا يملك مال المستأمن بالقهر.

Any money taken from the *musta'min* without his consent is not allowed as Ibn Ḍuwayyān (1984, vol.1, p.277) states: “What is taken from the disbeliever by oppression like the money of the *musta'min* is not a spoil” ما أخذ من كافر ظلماً كمال المستأمن فليس بفيء. His money according to al-Kāsānī (1982, vol.7, p.132) “is protected against any damage” معصومة على الإتلاف.

Moreover, in order to emphasise the inviolability of the *musta'min*'s money, the Muslim scholars consider the *amān* of his money absolute and separate from his personal *amān*. This means that if his personal *amān* is nullified for one reason or

another, the *amān* of his money could remain unharmed. Ibn Qudāma (1984, vol.9, p.198) refutes the saying that: “The *amān* of the money is secured by attachment [to the *mustaʿmin*] and once it is invalidated in the followed [the *mustaʿmin*] it is nullified in the follower” يثبت الأمان لماله تبعاً فإذا بطل في المتبوع بطل في التابع. He asserts that: “The *amān* of the money is attained for itself since it got into [*dār al-Islam*] with him” يثبت له الأمان لمعنى. He adds: “This requires the affirmation of the *amān* to the money even if it is not affirmed to the person”. He then supports his argument by saying: “If the *mustaʿmin* sends his money with a trader or an agent, the *amān* is affirmed to his money, while it is not affirmed to his person” لو بعثه مع مضارب له أو وكيل فإنه يثبت الأمان ولم. (Ibn Qudāma, 1984, vol.9, p.198). Al-Shīrāzī (n.d, vol.2, p.264) supports this opinion using very similar wording: “The *amān* is confirmed by originality as if he sent it with a trader or an agent” الأمان ثابت فيه على وجه الأصالة كما لو بعثه مع وكيل أو مضارب.

Establishing such protection for the possessions of the *ḥarbī* who comes from *dār al-ḥarb*, is remarkable, especially given the state of war between *dār al-Islam* and *dār al-ḥarb*.

In addition to this protection, the scholars gave the *mustaʿmin* the absolute right to do whatever he chose with his money. Apart from harming the citizens or disturbing public order, as we shall see, only the *mustaʿmin* himself could decide how to spend or invest his money. Ibn Qudāma (1984, vol.9, p.198) states clearly: “If he conducted actions like selling, granting or anything else, his conduct is correct” وإن تصرف فيه ببيع أو هبة أو غيرهما صح تصرفه. Al-Suyūṭī (1961, vol.2, p.582) justifies that on the basis of “His continuity of ownership” لبقاء ملكه.

Based on that, it was natural for the *mustaʿmin* to buy any land¹⁶³ in the Islamic state without restrictions. Therefore we find the scholars debating the consequences of purchasing land in terms of its affect on the *mustaʿmin*'s status and whether the purchase itself entitles him to become *dhimmī* or paying *kharāj*¹⁶⁴.

¹⁶³ The land in the Islamic state was divided into categories, like *al-arāḍī al-ʿUshriyya*, *arāḍī al-kharāj* and each one has subcategories. See al-Smarqandī (1984, vol.1, p.320) and Ibn ʿAbdīn (2000, vol.2, p.334).

¹⁶⁴ *Kharāj* is the tax imposed on the person and the outcome of the land. See al-Sīwāsī (n.d, vol.6, p.31).

Al-Kāsānī (1982, vol.7, p.110) stipulates that: “If the *mustaʿmin* purchased land subject to *kharāj* and he committed to pay the *kharāj* he would become a *dhimmī*” وَلَوْ اشْتَرَى الْمُسْتَأْمِنُ أَرْضًا خَرَجِيَّةً فَإِذَا وَضَعَ عَلَيْهِ الْخَرَاجَ صَارَ ذِمِّيًّا. Shaykhī Zāda looks at a different scenario but even then the *mustaʿmin* is the one who purchases the land. He (Shaykhī Zāda et al., 1990, vol.2, p.235) says: “If the *mustaʿmin* purchased land on the contract of *muqāsama*¹⁶⁵ and rented it to a Muslim, then the *Imām* took the *kharāj* from the tenant providing that [this *kharāj*] is for the outcome, the *mustaʿmin* will not become a *dhimmī*” إن اشترى المستأمن أرضاً المُقاسمة فأجرها من مسلم فآخذ الإمام الخراج من المستأجر ورأى أن ذلك *dhimmī*”¹⁶⁶ على الزرع لم يصير المستأمن ذمياً. What Shaykhī Zāda is saying here is that as far as the *mustaʿmin* did not pay his personal tax he would not become a *dhimmī*¹⁶⁷.

Elsewhere the scholars debated the fate of the land subject to *ʿushr* after purchase by the *mustaʿmin* and whether it remained land subject to *ʿushr* or became land subject to *kharāj*. Al-Sīwāsī (n.d, vol.6, p.23) reports that according to Muḥammad it remained a land subject to *ʿushr* while for Abu Ḥanīfa it became a land subject to *kharāj*.

Al-Sarakhsī examines a case wherein the *mustaʿmin* purchases land and hires a Muslim to plant it: “If the *mustaʿmin* purchased land subject to *ʿushr* or subject to *kharāj* and gave it to a Muslim on *muzāraʿa* contract, that would be correct and the outcome [of the land] is divided between them as they agreed” ولو اشترى العربي المستأمن أرضاً عشرية أو خراجية أو خراجية فدفعها إلى مسلم مزارعة جاز والخارج بينهما على ما اشترطا (al-Sarakhsī, n.d, vol.23, p.121).

Additionally, the scholars gave the *mustaʿmin* the right to sell the land as well as lease it out without restriction or limitation. Again, while debating the legal status of the *mustaʿmin* in *dār al-Islām* we find them saying: “If he sold it before the due date for its *kharāj* he would not become a *dhimmī* by its purchase” فَإِنْ بَاعَهَا قَبْلَ أَنْ يَجِبَ خَرَجُهَا لَمْ يَكُنْ *dhimmī* by its purchase” (Shaykhī Zāda et al., 1990, vol.2, p.235). On the issue of renting, al-Kāsānī (1982, vol.7, p.110) asserts: “And if he rented land subject to *kharāj* and planted it, he will not become *dhimmī* by planting”¹⁶⁸ لَوْ اسْتَأْجَرَ أَرْضًا خَرَجِيَّةً فَرَزَعَهَا لَمْ يَصِرْ ذِمِّيًّا.

¹⁶⁵ It is a kind of contract between the landlord and the tenant. See al-Sarkhasī (n.d, vol.23, p.34).

¹⁶⁶ See also al-Kāsānī (1982, vol.7, 110).

¹⁶⁷ I will discuss this point in more details when I come to the issue of nationality.

¹⁶⁸ See also Shaykhī Zāda et al. (1990, vol.2, p.235).

Clearly, the *musta'min* has the right to purchase, sell, lease out and rent land in the Islamic state without restrictions. Moreover, the scholars gave the *musta'min* the right to execute all these dealings by himself or appoint a procurator on his behalf. This agent could be from *dār al-Islam* or *dār al-kufr* (al-Sarakhsī, n.d, vol.19, p.138).

From such arguments, it is apparent that the scholars gave full rights to the *musta'min* to engage in various financial activities with nearly no limitation except public security.

When it comes to security and the public interest we find that the scholars do tend to impose restrictions and conditions on the *musta'min*. Al-Shawkānī (1984, vol.4, p.563), for instance, bars the *musta'min* completely from purchasing any kind of weaponry: “The *musta'min* should not be able to purchase the war machine” لا يمكن المستامن من شراء آلة الحرب. He defends that on security grounds: “The reason for that is he goes back to *dār al-ḥarb* and this weaponry would strength the disbelievers over the Muslims” فوجه ذلك أنه يعود بها إلى دار الحرب فتكون قوة للكافرين على المسلمين Al-Shirwānī (n.d, vol.4, p.231) shares this view: “It is prohibited for the *musta'min* to purchase weaponry” تملك الحربي الحديد فيحرم.

Al-Qalyūbī (1998, vol.2, p.196) gives examples of the weaponry prohibited for the *musta'min*: “The war machine is like the sword, shield, horse and boat, either he possessed all or one or some of them” آلة حرب كسيف وترس ورمح وفرس وسفينة سواء تملك جميع ذلك أو كل واحد من ذلك أو بعضه.

However, Ibn Nujaym eases the ban and imposes conditions to guarantee the security of Muslims: “If the *ḥarbī* came to [*dār al-Islam*] with a sword and exchanged it with an arrow, spear or a horse, he would not be allowed to get out of [*dār al-Islam*] with it. And so if he exchanged his sword with a better sword, but if the sword was equal to it or worse than it, he would not be barred” فَإِنْ كَانَ الْحَرْبِيُّ جَاءَ بِسَيْفٍ فَاشْتَرَى مَكَاةً قَوْسًا أَوْ رُمْحًا أَوْ فَرَسًا لَمْ يَتْرَكَ أَنْ يَخْرُجَ بِهِ مَكَانَ سَيْفِهِ وَكَذَا إِذَا اسْتَبَدَّلَ بِسَيْفِهِ سَيْفًا خَيْرًا مِنْهُ وَإِنْ كَانَ مِثْلَهُ أَوْ شَرًّا مِنْهُ لَمْ يُمْنَعْ. (Ibn Nujaym, n.d, vol.5, p.87)

The purpose of these restrictions and conditions was not to harm the *musta'min* or to strip him off of his possessions, but rather to protect the national interest and public safety. This is clear from the example offered by Shaykhī Zāda: “If a *ḥarbī* from the

Romans entered to us by *amān* [possessing] horses, weapons or slaves, then he wanted to enter the land of the Turks, the Daylam or any other land of the enemies to sell it to them he would not be allowed to” ولو أن حربيًا من الروم دخل إلينا بأمانٍ بكراعٍ أو سلاحٍ أو رقيقٍ فأراد أن يدخل ذلك أرض التُّرك أو الدَّيلم أو غيره من أعداء المسلمين ليبيعه منهم مُنع من ذلك (Shaykhī Zāda, 1990, vol.2, p.234). The danger here is obvious and no state would allow such a threat.

In the following example Shaykhī Zāda makes clear that the ban was not pointless or to harm the *musta'min*: “If two *musta'mins* of the Romans entered our *dār* by *amān* and one of them has slaves and the other has weapons, then they exchanged their goods or each one of them sold his goods to the other for a certain price, none of them would be banned from getting into *dār al-ḥarb* with the prices they got” (Shaykhī Zāda et al., 1990, vol.2, p.234) So, their possessions would be safe and rather than taking weaponry that may strengthen the enemy, they can cash it and take the money with them wherever they wish to go.

The *amān* of money remains after the expiry of the personal *amān*

To demonstrate their care for the property of the *musta'min*, many scholars agreed that if he returned to *dār al-ḥarb* his property would be secure and would still have the right to get it back. Ibn Taymiyya (1983, vol.2, p.181) gives his verdict: “If a *musta'min* gives his money to a Muslim as a trust or lends him some money or leaves his money and goes back to settle in *dār al-ḥarb* ... the *amān* of his money remains” إن أودع أو أقرض¹⁶⁹ مستأمن مسلمًا مالا أو تركه وعاد لإقامته بدار حرب... يبقى أمان ماله. This *amān* remains despite the fact that his personal *amān* is nullified as al-Buhūti explains: “Because when he entered *dār al-Islam* the *amān* of his money was affirmed, so if his personal *amān* was cancelled by his entering [*dār al-ḥarb*] the *amān* of his money remains valid as it did not enter [*dār al-ḥarb*]” لأنه لما دخل دار الإسلام بأمان ثبت لماله فإذا بطل في نفسه بدخوله إليها وبقي في ماله الذي لم يدخل [*dār al-ḥarb*]” (al-Buhūti, 1981, vol.3, p.108). This means that the Muslim has to pay back the money to *al-ḥārbī* in *dār al-ḥarb* who theoretically has returned to being his enemy.

On the other hand, if the *musta'min* was indebted to a Muslim or *dhimmī* in *dār al-Islam* and went back to *dār al-ḥarb* without paying off his debt, they have the right to take their money from his remaining possessions (Ibn °Abdīn, 2000, vol.4, p.173)

¹⁶⁹ See also Ibn Mufliḥ (1997, vol.6, p.229).

In case of death either in *dār al-Islām* or *dār al-ḥarb* there is no difference according to Ibn Qudāma (1984, vol.9, p.198): his money should go to his heirs and it is prohibited for the Muslims to take any of it¹⁷⁰.

Furthermore, Ibn Qudāma disputes al-Shāfi‘ī and Abu Ḥanīfa who say the *amān* of the money expires after it is transferred to the inheritors. He defends his position by saying that: “The *amān* is an indispensable right attached to the money” إن الأمان حق له لازم متعلق بالمال and if money is transferred to the inheritors it transfers with it. He also claims that al-Muznī supports his opinion (Ibn Qudāma, 1984, vol.9, p.198).

By default, if the *musta‘min* does not have inheritors his inheritance goes to the treasury of the Islamic state according to ‘Ulaysh (1988, vol.3, p.175) and others¹⁷¹.

The issue of keeping the money of the *musta‘min* even after going back to *dār al-ḥarb* and becoming an enemy is worth pondering. One may hastily jump to the conclusion that this money is permissible to loot as the *musta‘min* has become a disbeliever in *dār al-ḥarb*.

The Muslim scholars even stressed the duty of Muslims to send the *musta‘min*’s money to the *ḥarbī* in *dār al-ḥarb*. Ibn ‘Abdīn (2000, vol.6, p.768) claims: “Getting the money to his inheritors is his right as it is in the majority of the books, so it is prohibited to send it to the Muslim treasury” إيصال ماله لورثته من حقه كما في عامة الكتب فيمنع ذلك صرفه لبيت المال. Al-Dardīr (n.d, vol.3, p.125) also affirms that his money should be sent to his inheritors.

However, al-Suyūṭī (1961, vol.2, p.582) and al-Shīrāzī (n.d, vol.2, p.264) go further, emphasising that the money of the *musta‘min* should be respected at all times even if this *musta‘min* returned to *dār al-ḥarb* as a fighter. Al-Qurāfi (1994, vol.3, p.446) judged that: “If the *musta‘min* left some money as a trust with us, then he went back to his country and died or was killed in fighting us, his money should be returned to his

¹⁷⁰ See also Ibn Taymiyya (1983, vol.2, p.181), al-Buhūti (1996, vol.1, p.654), al-Sīwāsī (n.d, vol.6, p.23), Ibn ‘Abdīn (2000, vol.6, p.768), Shaykhī Zāda (1990, vol.2, p.235) and al-Shaybānī (1975, vol1, p.174).

¹⁷¹ Like Ibn Qudāma (1984, vol.9, p.198), Ibn Taymiyya (1983, vol.2,p.181) and al-Buhūti (1996, vol.1, p.654).

inheritors” ولو أودع المستامن عندنا مالا ثم رجع إلى بلده فمات أو قتل في محاربتنا رد ماله لورثته. The duty of the Muslims according to al-Qurāfī is not only to allow him to keep his money but also to get it to him in *dār al-ḥarb* even after he was killed while fighting the Muslims.

This view was reaffirmed by al-°Abdarī (1977, vol.3, p.363): “If he was killed while he was fighting the Muslims we should send his money which is still with us” لو قتل في محاربتنا للمسلمين فإننا نبعث بماله الذي له عندنا.

Moreover, the spoils which the *musta’min* may gain from fighting the Muslims should be respected also when he enters *dār al-Islam* as a *musta’min*, according to al-Dardīr (n.d, vol.3, p.126). Nonetheless, Abu al-Ḥasan disliked the idea of Muslims purchasing it from him so as not to encourage him to do that again. Moreover, its purchase by another Muslim meant that the original owner [the Muslim who owned it before he lost it in the war] would miss the opportunity to get it back, since purchasing it would be the only way to regain it. He explains his position: “The *ḥarbī* has owned the goods through *amān*, i.e. *amān* has maintained his possession on those goods” الحربي ملك السلع بالأمان يعني أن الأمان يحقق له الملك على تلك السلع (al-Dardīr, n.d, vol.3, p.126).

Such great protection and the liberty to transfer the possession anywhere the refugee liked is in tune with Article 30 of the Geneva Convention entitled Transfer of Assets.

Nevertheless, to give more protection and security to the possessions of the *musta’min*, the scholars ruled that he who destroys the properties of the *musta’min* has to compensate him and pay back what he damaged because his property is protected by the *amān*¹⁷² (al-Kāsānī, 1982, vol.7, p.71).

What is more, the state of war that could exist between *dār al-Islam* and *dār al-ḥarb* does not allow the Muslim to loot or to take the money of the disbelievers unlawfully. Al-Zarkashī (1981, vol.1, p.354) gives an example of that: “If a *ḥarbī* borrowed some money from another *ḥarbī* and got to us by *amān* and then converted, he has to

¹⁷² Ibn °Abdīn (2000, vol.4, p.113)

إن اقترض حربي من حربي "reimburse the money, because he took it as a way of reciprocity"¹⁷³. ما لا ثم دخل إلينا فأسلم فعليه رد البذل لأنه أخذه على سبيل المعاوضة

Supposedly, if a Muslim steals from the *musta'min*, al-Sīwāsī (n.d, vol.5, p.462) gives the verdict that it is "Prohibited to buy the stolen properties because the moneys of the *musta'min* cannot be possessed by theft" لا يحل شراؤه منه لأن مال المستامن لا يملك بالسرقة

The punishment of the Muslims in this case however, was a point for debate between the scholars. Some of them said the punishment should be cutting off his hand as it is the Islamic punishment for theft, according the verse (5:38) "Now as for the man who steals and the woman who steals, cut off the hand of either of them in requital for what they have wrought, as a deterrent ordained by God: for God is almighty, wise" وَالسَّارِقِ وَالسَّارِقَةُ فَاقْطَعُوا أَيْدِيَهُمَا جِزَاءً بِمَا كَسَبَا نَكَالاً مِّنَ اللَّهِ وَاللَّهُ عَزِيزٌ حَكِيمٌ. Others said the thief should not be punished by cutting off his hands because the property of the *musta'min* is not permanently inviolable, since he is allowed to go back to *dār al-ḥarb*. The scholars of the latter opinion base their judgement on the same argument concerning the killing of the *musta'min* and whether the Muslim should be killed if he was convicted¹⁷⁴.

Zufar, the student of Abu Ḥanīfa affirms that the thief should be punished by cutting off his hands because "His [the *musta'min*'s] properties in our *dār* are inviolable like the *dhimmī*" ماله محرز بدارنا فإنه معصوم كمال الذمي (al-Sarakhsī, n.d, vol.9, p.181). In another part of his book al-Sarakhsī gives a brilliant explanation of this judgement and replies to those scholars who say the punishment should not be cutting of the hands: "Cutting off the hands for theft is a right for God the Almighty. Its implementation depends on the crime" القَطْعُ فِي السَّرِقَةِ حَقُّ اللَّهِ تَعَالَى فَوْجُوهُ بِعَتَمَدِ الْجَنَايَةِ. He continues: "The meaning of the crime is present in stealing the money of the *dhimmī* as well as the *musta'min*" ومعنى (al-Sarakhsī, n.d, vol.26, p.132). In other words, the crime is a crime whether it is against a Muslim, *dhimmī* or *musta'min* and the punishment is for committing the crime in itself regardless of the victim.

After mentioning these two opinions, al-Kāsānī (1982, vol.7, p.71) comments: "His hands should be cut off because he stole a protected money, since the *ḥarbī* has got the

¹⁷³ See also Ibn Qudāma (n.d, vol. 4, p.336), al-Shīrāzī (n.d, vol.2, p.264) and Ibn al-Sayyid (n.d, vol.4, p.204).

¹⁷⁴ See the previous section entitled 'The safety of the *musta'min*' p. 177

protection by *amān* so he is like the *dhimmī*'. In his discussion about the punishment of gangsters who attack the caravans, kill and loot, Shaykhī Zāda (1998, vol.2, p.402) states that if the people in the caravans were *musta'mins*, the attackers should be punished by the *ḥadd* and must reimburse the money, because the *musta'min*'s moneys are protected.

On the other hand, Ibn ʿĀbdīn (2000, vol.4, p.84) believes that: "The thief who steals from the *musta'min* [his hands] should not be cut off". Al-Zaylaʿī (1895, vol.6, p.104) defends this opinion: "The money is attaching to the soul, and the money is less important than the soul. So, once [his hands] are cut off for his theft, it would be more adequate to kill the killer [of the *musta'min*], because the soul is greater than the money" *المال تبع للنفس وأمر المال أهون من النفس فلما قطع بسرقة كان أولى أن يُقتل بقتله لأن أمر النفس أعظم من المال*. Obviously, he differentiates between the *musta'min* and the *dhimmī* in terms of the value of their lives and possessions, so he believes that the punishment of stealing the money of the *musta'min* should not be cutting off the hands of the thief.

This opinion, however, has less reasoning and logic than the first. The first opinion accords with the general principles of Islam that call for equality in humanity and more particularly agrees with the aims of legislating the *amān*. Making the punishment for stealing his money less than other citizens will make the *musta'min* vulnerable and less protected. Undoubtedly that contradicts with the verse (9:6) which obliges the Muslims to take good care of the *musta'min*. It also disagrees with the unprecedented attention and respect the scholars gave to the possessions of the *musta'min*. Finally, the issue of differentiation in rulings between the *dhimmī* and the *musta'min* on the basis that the *dhimmī*'s contract is permanent while the *musta'min*'s is temporal does not stand up to scrutiny. As Zaydān (1982, p.235) says the *dhimmī* could cancel his contract and leave to *dār al-ḥarb* like the *musta'min*. Even the Muslim could do that. So, the rulings should not be based on what might happen in future but rather should be based on the current situation. In the current situation the *musta'min* has *amān* and any violation of it should be met with the proper sentence.

Conclusion

This profound care for the properties of the *musta'min* is amazing. The reasons for that might owed to the Islamic principles mentioned in many verses and *ḥadīths* which order Muslims to fulfil their promises and render back the trusts to their owners, such as the verse (4:58) "Behold, God bids you to deliver all that you have been entrusted with unto those who are entitled thereto, and whenever you judge between people, to judge with justice. Verily, most excellent is what God exhorts you to do: verily, God is all-hearing, all-seeing!" إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ إِنَّ اللَّهَ نِعِمَّا بِاللهِ عَلِيمٌ يَعِظُكُمْ بِهِ إِنَّ اللَّهَ كَانَ سَمِيعًا بَصِيرًا

Al-Dāraquṭnī (1966, vol.3, p.35) also reports on the authority of Abu Hurayra that the Prophet said: "Restore deposits to their owners and do not deceive who deceived you" ¹⁷⁵ أد الأمانة إلى من أئتمنتك ولا تخن من خانك. Besides, Ibn Khuzayma (1970, vol.4, p.51) reports a narration on the authority of Anas that the Prophet said: "There is no faith for he who does not keep the trust" لا إيمان لمن لا أمانة له. In the account of al-Haythamī (n.d, vol.1, p.41) and Abu Ya'la (1984, vol.5, p.247) the Prophet adds: "And there is no religion for who he does not keep his covenant" ولا دين لمن لا عهد له.

From the above discussion the properties of the *musta'min* whether movable or immovable is protected and should always be inviolable.

In regard to his right to possess properties in the Islamic state it is clear that his right is almost absolute with very limited exceptions relating to security and the public interest. Such limitations could be determined by the authorities in the Islamic state according to its situation.

It was also clear that the *musta'min* has the same rights in regard to the protection of his possessions even after returning to his country. Not only that, but he still has the right to manage his properties in *dār al-Islam* through an agent. This precisely coincides with what Hathaway (2005, p. 527) concludes, that "Non-resident refugees are entitled to the same protection of property rights as is afforded comparably situated non-resident aliens".

¹⁷⁵ See also al-Ḥākim al-Naysābūrī (1990, vol.2, p.53) and al-Qūdā'ī (1986, vol.1, p.432).

Lastly, after thorough research, it may safely be concluded that the Islamic tradition endorses Article 13 of the Geneva Convention in principle and actually goes further in detailing the rights of the refugee in this regard.

Right of association (Article 15)

Article 15 of the Geneva Convention states that: “As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances.”

After examining the history and discussions between the Contracting States of the Convention, Hathaway (2005, p.891) concludes: “Overall, the best that can be said for Art. 15 is that it is an important affirmation of the right of refugees - at least once they are lawfully staying, and to the same extent as most-favoured foreigners – to undertake quite a broad range of associational activities, including not only the right to join trade unions, but also to participate in the activities of a diverse array of associations, including those with cultural, sporting, social, or philanthropic aims”.

Obviously any activities of a political nature are not expressed clearly by this Article. The rationale for that was “to avoid interstate tension” as well as “to deny refugees the right to participate in domestic political association” as Hathaway (2005, p.884) states.

In regard to the Islamic position on this Article it is difficult to find a straightforward opinion from the classical scholars simply because the association is a modern mode of expressing opinions, gaining or defending rights for a given group. However, we still find general principles in the Islamic tradition that could relate to this Article.

Freedom of expression was and remains an issue of debate between modern Muslim scholars. In his book “The general freedoms in the Islamic state” الحريات العامة في الدولة الإسلامية al-Ghanūshī discusses the freedoms of Muslims, *dhimmīs* and even atheists. He defends the right of *dhimmīs* and all disbelievers to express their beliefs free from fear of oppression or torture. He justifies that based on the verse (2:256) “There shall be no coercion in matters of faith” لا إكراه في الدين, as well as historical accounts in which non-believers or the digressed groups such as the *khawārij* held public debates with Muslims scholars to dispute the very origins of the Islamic faith, in an atmosphere of religious and intellectual tolerance. Al-Ghanūshī also supports his ideas with reference to many contemporary scholars.

Additionally, when interpreting the verse (9:6) many scholars stated that the *musta'min* should stay in *dār al-Islam* as long as it takes for him to understand the Islamic principles¹⁷⁶. They also gave him the full right to ask and argue with them about the Qur'ān, the *ḥadīth* and the fundamentals of Islam without restricting his freedom in this regard. Obviously the result of such discussions was not necessarily the conversion, but the *musta'min* could adhere to his beliefs and still enjoy the right to stay in *dār al-Islam*.

Therefore, guaranteeing the expressive freedom for the refugees in *dār al-Islam* by default entails them to join or even establish associations, since they are a means of expression.

Furthermore, we can look at freedom of association from another angle to understand its legitimacy from the Islamic perspective. Tentatively, joining an association could also be to protect one's legitimate rights through collective efforts. In this sense freedom of association is not only permissible but also recommended by the Qur'ān and the *ḥadīth*.

God orders people through the Qur'anic verse (5:2) to: "Help one another in furthering virtue and God-consciousness, and do not help one another in furthering evil and enmity; and remain conscious of God: for, behold, God is severe in retribution" **وَتَعَاوَنُوا عَلَى الْبِرِّ وَالتَّقْوَىٰ وَلَا تَعَاوَنُوا عَلَى الْإِثْمِ وَالْعُدْوَانِ وَاتَّقُوا اللَّهَ إِنَّ اللَّهَ شَدِيدُ الْعِقَابِ**.

In order not to think that this verse is exclusive to Muslims only, al-Akhfash says it is "an order to all humans to cooperate in goodness and piety" **أمر لجميع الخلق بالتعاون على البر والتقوى** (al-Qurṭubī, n.d, vol.6, p.46). Al-Samarqandī (n.d, vol.1, p.391) affirms this: "The verse is general for all people" **الآية عامة في جميع الناس**. Al-Kalbī (1983, vol.1, p.167) also endorses this meaning, claiming that the verse is "a general obligation" **وصية عامة**.

These interpretations mean that the Muslim, the *dhimmī* and the *musta'min* are all included in its order and are urged to cooperate in everything that is considered a good cause.

¹⁷⁶ See section entitled "The interpretation of the verse (9:6) and its relation to *amān*" p. 118

Al-Sa^cdī (1984, vol.1, p.219) comments on the good cause by defining the meaning of *al-birr*: He says it is “a general term that includes everything that God loves and is satisfied with [like] all the apparent and covert deeds that relate to God’s rights and humans” اسم جامع لكل من يحبه الله ويرضاه من الأعمال الظاهرة والباطنة من حقوق الله وحقوق الأدميين. So, the good deed here relates not only to the deeds of the hereafter, but also to any well-intentioned endeavour by a human being. The doer of any earthly action that could be considered beneficial to people will also be rewarded on the Judgement Day because the term *al-birr* encompasses it, as al-Rāzī (2000, vol.5, p.32) states.

In regard to the Prophetic custom on the issue of cooperation, the Prophet used to urge Muslims to extend their hands to help the needy. Al-Hindī (1998, vol.15, p.381) reports on the authority of Ibn ‘Abbās that the Prophet said: “God will keep helping the man as long as he helps his fellow human” والله في عون العبد ما دام العبد في عون أخيه.

In another account the Prophet tells his companions about the great reward for those who help the disadvantaged. He says on the account narrated by al-Mundhirī (1996, vol.3, p.263) on the authority of Ibn ‘Abbās that: “Whoever gets involved in his brother’s need to attain it, [then that] will be better for him than ten years of *I’tikāf*¹⁷⁷” من مشى في حاجة أخيه وبلغ فيها كان خيرا من اعتكاف عشر سنين.

At the same time the Prophet tries to deter Muslims from supporting each other in doing evil. Ibn Kathīr (1980, vol.2, p.7) reports an account of the Prophet saying: “Whoever walks with an oppressor to help him, knowing that he is an oppressor, then he has gone out of Islam” من مشى مع ظالم ليعينه وهو يعلم أنه ظالم فقد خرج من الإسلام. This punishment is severe from an Islamic perspective, but indicates the seriousness of the Islamic teachings on resisting oppression and oppressors.

This meaning is precisely repeated in another *ḥadīth* narrated by al-Bukhārī (1986, vol.6, p.2550) on the authority of Anas in which the Prophet says: “Help your brother

¹⁷⁷ *I’tikāf* is a particularly commended pious practice consisting of a period of retreat in a mosque, the vow for which stipulates a certain number of days in accordance with the believers own wish. He must not leave it, save for the performance of his natural functions and his ablutions. He will there practice fasting, ritual prayer and recitation of the Qur’ān (Lewis, et al., 1978, vol.4, p.280). The reward for that is great in Islam as the Prophet says: “Who make one day of *i’tikāf* God will distance him from the hellfire by three trenches [each one of them] is further than the two ends of the world” من اعتكف يوما ابتغاء وجه الله جعل الله بينه وبين النار ثلاث خنادق أبعد مما بين الخافقين (al-Suyūṭī, 1993, vol.1, p.486).

whether he is oppressed or an oppressor. A man said O the messenger of God, I help him when he is oppressed but how can I help him if he is an oppressor, [the Prophet] said: stopping him from oppressing is your help” *انصُرْ أَهْلَكَ ظَالِمًا أَوْ مَظْلُومًا فَقَالَ رَجُلٌ يَا رَسُولَ اللَّهِ أَنْصُرْ مَنْ ظَلَمَ أَوْ تَمْنَعُهُ مِنَ الظَّالِمِ فَإِنَّ ذَلِكَ نَصْرُهُ*¹⁷⁸.

Such general statements from the Qur³ān, the Prophet and the scholars enable us to generalise that such cooperation is not exclusive to Muslims. Rather, all people are urged to cooperate in good causes and unite in the fight against evil.

In light of this discussion, there is no apparent reason not to extend this verdict to include refugees. On the contrary, in the case of refugees the need is more urgent to cooperate in removing the barriers which obstruct their normal lives. This could be through establishing their own associations or by joining existing ones. There is no difference as long as legitimate aims are served.

Regarding political activities, the previous principles do not differentiate between the nature of the association and whether it is economical, social, cultural or political. Thus, freedom is still guaranteed for the refugee to express his political opinion through the legal channels provided. Indeed, since political opinion could be the reason behind his flight, it is illogical to deprive him from the right that he fled in search of. Also, according to the above mentioned principles, cooperation in fighting aggression, oppression and tyranny could be more important than cooperation to improve and perfect living conditions for refugees. That is not to say that improving the living conditions of refugees is not important, but that struggle against tyranny in certain circumstances might have priority.

However, would that mean allowing refugees to join a political association? According to the general principles of cooperation mentioned above, the only condition the scholars put on this issue is that the cooperation may not to be based on or advocate “sin and aggression” *الإثم والعدوان*. So, in theory the refugee has the right to join or establish a political party that does not contradict with the fundamentals of Islam or threaten national security or the public safety.

¹⁷⁸ Also narrated by Ibn Ḥibbān (1993, vol.11, p.571) and al-Bayhaqī (1989, vol.6, p.94).

Nevertheless, occupying an official political position in the Islamic state is another thing. That is because the refugee was considered by the scholars a foreigner who could stay temporarily in *dār al-Islam* to meet a particular need then go back to his country. According to Zaydān (1982, p.85) Muslim scholars did not allow the refugee to occupy public positions in the Islamic state. Remarkably, this is exactly what the Civil and Political Covenant states: "Freedom of association is not tantamount to a right to self-govern, because only citizens of a state have the right to take part in the conduct of public affairs, to vote, and to hold elected offices" (Hathaway, 2005, 896).

Conclusion

As a matter of principle the Islamic tradition urges cooperation in doing good deeds, individually and collectively. The form or the shape of the means is not as important as serving the good cause. So, it could be through establishing an association or by any other means.

Refugees are not excluded from this general principle; hence there is no objection to them establishing new associations to protect their rights in the field of work, sport, culture, or to preserve their identity or for any other reason. They also have the right to join existing associations for the same purpose.

In regard to political activities and joining political parties, it could be said that the Islamic principles do not object here either. The door is left open to scholars and the state to define the framework for organizing such participation. Theoretically, there is no objection to establishing or to joining any political association as long as it respects the fundamentals of Islam.

Finally, in light of the above discussion it could be concluded that the Islamic tradition agrees with Article 13 of the Geneva Convention in terms of the right of the refugee to join associations. Regarding the nature of the association, be it political or non-political, the Convention does not state the right of the refugee to join or form a political association. However, from the debate above it could be concluded that the Islamic tradition does not object to the refugee joining a political association to serve the struggle against tyranny and oppression.

Access to courts (Article 16)

According to Hathaway (2005, p.626), the significance of this Article lies in identifying the refugee and granting him the protection and other rights he is entitled to. This right enables him to go to court in order to obtain refugee status under the law. The drafters of the Refugee Convention put primary responsibility for assisting refugees to enforce their rights on the state parties themselves (Hathaway, 2005, p.628). After much discussion they agreed to codify Article 16 under the title 'Access to courts':

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.
2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*.
3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

The stance of the Islamic tradition on this issue

In principle Muslims are obliged by God in various Qur^ʿanic verses to be just in judging between people. For example, the verse (4:58): “Behold, God bids you to deliver all that you have been entrusted with unto those who are entitled thereto, and whenever you judge between people, to judge with justice. Verily, most excellent is what God exhorts you to do: verily, God is all-hearing, all-seeing!” إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ إِنَّ اللَّهَ نِعِمَّا يَعِظُكُمْ بِهِ إِنَّ اللَّهَ كَانَ سَمِيعًا بَصِيرًا.

In another verse (16:90) God commands fairness and forbids injustice: “Behold, God enjoins justice, and the doing of good, and generosity towards [one's] fellow-men and He forbids all that is shameful and all that runs counter to reason, as well as envy; [and] He exhorts you [repeatedly] so that you might bear [all this] in mind” إِنَّ اللَّهَ يَأْمُرُ بِالْعَدْلِ وَالْإِحْسَانِ وَإِيتَاءِ ذِي الْقُرْبَىٰ وَيَنْهَىٰ عَنِ الْفَحْشَاءِ وَالْمُنْكَرِ وَالْبَغْيِ يَعِظُكُمْ لَعَلَّكُمْ تَذَكَّرُونَ.

Moreover, even if a Muslim were to judge people he does not like, he still has to be fair with them, according to the verse (5:8): “O you who have attained to faith! Be ever steadfast in your devotion to God, bearing witness to the truth in all equity; and never let hatred of anyone lead you into the sin of deviating from justice. Be just: this is closest to being God-conscious. And remain conscious of God: verily, God is aware of all that you do” يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ بِالْقِسْطِ وَلَا يَجْرِمَنَّكُمْ شَنَاٰنُ قَوْمٍ عَلَىٰ أَلَّا تَعْدِلُوا اَعْدِلُوا يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ بِالْقِسْطِ وَلَا يَجْرِمَنَّكُمْ شَنَاٰنُ قَوْمٍ عَلَىٰ أَلَّا تَعْدِلُوا اَعْدِلُوا. Al-Zamakhsharī (n.d, vol.1, p.647) maintains that this verse obliges Muslims to act justly even towards disbelievers who are the enemies of God. Ibn Kathīr (1980, vol.2, p.6), however, states a general rule: “Acting equitably is obligatory on everybody towards anybody in any situation” العدل واجب على كل أحد في كل حال. Al-Saʿdī (2000, vol.1, p.224) endorses this opinion and makes acting justly part of the religion.

In order to motivate Muslims to act justly the Prophet in various *ḥadīths* mentions that they can expect a great reward for doing so. Al-Bayhaqī (1993, vol.10, p.87) reports a *ḥadīth* in which the Prophet states: “The fair people at the Judgment Day will be on rostrum made of light on the right hand side of God and both His hands are right” المقسطون عند الله يوم القيامة على منابر من نور على يمين الرحمن، وكلتا يديه يمين. In another account reported by al-Bayhaqī (1991, vol.10, p.88) the Prophet states: “The most loved and the closest to God in the hereafter is the just *Imām*, and the most hated and the most severely punished is the unjust *Imām*” إن أحب الناس إلى الله يوم القيامة وأقربهم منه مجلسا إمام عادل وإن أبغض الناس إلى الله يوم القيامة وأشدهم عذابا إمام جائر¹⁷⁹.

Such strong statements in affirming justice and equity in Islamic society are of great relevance to refugees and their right to access courts as stated in Article 14 of the Convention. The fairness and justice Muslims are commanded to abide by do not exclude refugees, even though they might follow another religion.

The importance of such principles in dealing with refugees in particular is clear in regard to the modern tendency to regard refugees as a burden and to try to circumvent the state’s legal obligations. The examples of such attempts cited by Hathaway (2005, p.630) support this opinion.

¹⁷⁹ Narrated also by Ibn Ḥanbal (n.d, vol.3, p.22) and Ibn Jaʿd (1990, vol.1, p.295).

However, the Muslim scholars touched upon the issue of access to courts for non-Muslims when they discussed the Qur'anic verse (5:42) and its commands regarding the *dhimmīs* and their right to access Islamic courts in *dār al-Islam*.

The verse (5:42) reads: "Those who eagerly listen to any falsehood, greedily swallowing all that is evil!" Hence, if they come to thee [for judgment]," thou mayest either judge between them or leave them alone: for, if thou leave them alone, they cannot harm thee in any way. But if thou dost judge, judge between them with equity, verily, God knows those who act equitably" سَمَاعُونَ لِلْكَذِبِ أَكْأَلُونَ لِلسُّخْتِ فَإِنْ جَاؤُوكَ فَاحْكُم بَيْنَهُمْ أَوْ أَعْرِضْ عَنْهُمْ وَإِنْ تُعْرِضْ عَنْهُمْ فَلَنْ يَضُرُّوكَ شَيْئًا وَإِنْ حَكَمْتَ فَاحْكُم بَيْنَهُمْ بِالْقِسْطِ إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ

This verse and the verse before it (5:41) speak clearly about the *dhimmīs*. However, the meaning of this verse is apparent in giving the Prophet and any judge after him the choice to judge or not between the *dhimmīs* when they come to him in a dispute (al-Kalbī, 1983, vol.1, p.177).

Yet, scholars were at odds in terms of the abrogation of this verse. According to al-Rāzī (2000, vol.11, p.186) some of them, like, Ibn ʿAbbās, al-Ḥasan, Mujāhid, ʿIkrima and the school of al-Shāfiʿī said it is abrogated by the verse (5:49) "Hence, judge [between the followers of earlier revelation] in accordance with what God has bestowed from on high, and do not follow their errant views; and beware of them, lest they tempt thee away from aught that God has bestowed from on high upon thee. And if they turn away [from His commandments], then know that it is but God's will [thus] to afflict them for some of their sins". وَأَنْ أَحْكُم بَيْنَهُمْ بِمَا أَنْزَلَ اللَّهُ وَلَا تَتَّبِعْ أَهْوَاءَهُمْ وَاحْذَرْهُمْ أَنْ يَفْتِنُوكَ عَنْ بَعْضِ مَا أَنْزَلَ اللَّهُ إِلَيْكَ فَإِنْ تَوَلَّوْا فَاعْلَمْ أَنَّمَا يُرِيدُ اللَّهُ أَنْ يُصِيبَهُمْ بِبَعْضِ ذُنُوبِهِمْ وَإِنَّ كَثِيرًا مِّنَ النَّاسِ لَفَاسِقُونَ. Thus, the free choice is not valid any more, and the *dhimmīs* in *dār al-Islam* should adhere to the Islamic rulings, in their disputes.

Nevertheless, others, like, al-Nakhaʿī, al-Shaʿbī, Qutāda, ʿAṭāʾ, Abu Bakr and Abu Muslim (al-Rāzī, 2000, vol.11, p.186) assert that the verse is not abrogated and the choice in judging between them remains.

After examining all the evidence carefully, Zaydān (1982, p.573) concludes that the overriding opinion is that a Muslim judge has to give a verdict if non-Muslims, whether *dhimmīs* or *mustaʿmins*, decide to go to court.

The relevance of this discussion to Article 14 is that it gives the *mustaʿmin* the right to go to court in *dār al-Islam* and obliges the judge to look at his case and give a suitable verdict. So, he can go to court as a claimant to defend his rights against anybody, or he goes there accused by someone else.

Concrete evidence that the Muslim scholars gave *mustaʿmin* the right to access the courts appears in the scholarly discussion about the illegal *mustaʿmin* in *dār al-Islam*. Throughout their debate it is apparent that any final verdict had to be thoroughly considered. Claimants, proofs, witnesses, judges and deliberations between them were all necessary before considering the verdict. So, it is a legal process that may lead to endorsing the stay of the *mustaʿmin* in *dār al-Islam* or invalidate it completely requiring his transfer to his original place.

Ibn Qudāma (1984, vol.9, p.281) for instance, goes through the scenario of having a *mustaʿmin* in *dār al-Islam* without *amān* and rules that this *mustaʿmin* should be asked about his *amān*, and if he claims he is a messenger to the Muslims, he should be believed, because “it is impossible to prove otherwise as the messengers usually come without a previous *amān*” تتعذر إقامة البينة على ذلك ولم تزل الرسل تأتي من غير تقدم أمان. However, Ibn Nujaym (n.d, vol.5, p.109) disagrees with him on this point and says that if he claims to be a messenger, it is necessary to look and see whether he has a letter or not. If he has a letter, then he gets *amān*, if not he will be captured. Nonetheless, al-Nawawī (1984, vol.10, p.299) and al-Shirbīnī (n.d, vol.4, p.243) propose that if he does not carry a message, he has to swear to prove that¹⁸⁰.

Al-Ṣawī (1994, vol.2, p.186) however, requires further efforts to verify the conditions surrounding the *mustaʿmin* and suggests looking for any link that may support him, such as the wind which might have forced him to come to *dār al-Islam*. Or, the link

¹⁸⁰ This debate shows the care the Muslim scholars gave to keep the diplomatic customs between the nations.

could be against him like finding weaponry on him, which might mean he was a fighter and not a *musta'min*.

If the *musta'min* claimed that a Muslim had given him *amān*, the scholars were at variance. Al-Shirbīnī (n.d, vol.4, p.243) and al-Ramlī (1983, vol.8, p.86) say “he should not be believed without a proof, because [proving it] is feasible” لا يصدق بغير بيينة لسهولتها. Yet, al-Ghazālī (1996, vol.7, p.58) mentions the two options without weighing any one against the other, and al-Nawawī (1984, vol.10, p.299) after mentioning the two possibilities, suggests believing him without proof.

Furthermore, if a Muslim claimed that he had given him *amān*, Ibn °Ābdīn (2000, vol.4, p.168) and Shaykhī Zāda (1998, vol.2, p.452) judge that this Muslim should not be believed until he brings two witnesses with him.

The significant point here is that the scholars do not hastily reach a verdict. It is a thorough process involving a judge, defendant, prosecutor, witnesses and proofs, which means practically that a legal process should take place in a court. All the elements of the court are available and at the end there must be a verdict that should be respected by all parties, either to the benefit of the refugee or against him, and that is the essence of Article 14 of the Convention.

The other element to take into account here is that engaging in legal process costs money. Thus having the right to be heard before the judge to defend himself and table his evidences, the *musta'min* by default should also have the right to be assisted and given legal aid by the state to pursue the process and be able to cover the expenses including any necessary fees. Otherwise, if we say that he should not be assisted then his right to sue or to be sued becomes meaningless and virtually unattainable. Indeed refugees in most cases are “unable to enforce their rights without assistance from state or international authorities” (Hathaway, 2005, p.626). This would then be in contradiction with the principles of justice established in the Islamic legacy.

Conclusion

Following the above discussion it is evident that the Islamic tradition clearly affirms the principles of justice through the verses of the Qur^ʿān and the different *ḥadīths*. That justice should encompass the Muslim and the non-Muslim alike. By virtue of this principle allowing the *mustaʿmin* to access to court to determine his refugee status and claim his rights or to defend himself becomes a duty of the Islamic state to guarantee the principles of justice and equity.

Also, the *mustaʿmin* in the Islamic state should adhere to the legal system implemented there in regard to his rights and duties.

The historical discussion of the scholars shows clearly that issues relating to the circumstances of the *mustaʿmin*'s entrance should be solved by the court. In other words, the essence of Article 14 was practically implemented although phrasing that in a legal format was not as plain as the practise itself. In modern terms, the *mustaʿmin* has the right to go to the relevant Islamic court to establish his legal status. By default the Islamic state should fund the legal process and undertake all the expenses evolving from it.

In light of this it can be safely concluded that Article 14 is in conformity with the Islamic tradition and its principles of justice.

Gainful Employment (Article 17, 18 & 19)

The refugee's right to work was and remains a sensitive issue in all countries whether they are developed or less developed. That is because it affects the local economy and workers in the host state. The sensitivity of this issue is particularly apparent at election time when the impact of migrants on job opportunities for nationals often surfaces.

With regard to 'Wage-earning employment' Article 17 of the Geneva Convention states:

"1. The Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment".

The drafting of this Article, according to Hathaway (2005, p.742) was not conceived in naivety. Governments were keenly aware of the domestic political and other risks of allowing refugees to compete with their own citizens for employment opportunities. These governments, just recovering from the Second World War, were anxious not to jeopardise their plans for economic recovery by allowing the free entry of refugees into the workforce. Nonetheless, it seems there was "a clear awareness among the drafters that there are few rights more central to refugee self-sufficiency than the right to work... it was therefore decided that it made more sense to set the right to work at a meaningful high level" (Hathaway, 2005, p.745).

The drafters of the Convention "were determined to provide refugees with better than the lowest common denominator of state practice, under which non-citizens are often excluded from the labour market. The drafters clearly recognized, and intended, that Article 17 would require states to grant refugees a preferential access to work opportunities, even though this has not been the case under earlier refugee treaties" (Hathaway, 2005, p.742).

Gainful Employment from an Islamic perspective

Due to the different circumstances, as well as the limited importance of the issue in their times, the early Muslim scholars did not feel the need to formulate or codify the right to

work for the *musta'min* in a clear legal text. However, while there was no overall legal ruling, they dealt with a number of related matters separately. For example, they detailed the *musta'min's* right to trade in *dār al-Islam* with all the surrounding issues relating to it. They also discussed the issue of purchase, selling, letting and renting of land by the *musta'min*. So, generally speaking, they allowed the *musta'min* freely to engage in various activities in the work field, except in a small number of fields not deemed to be in the public interest. Gathering all these scattered issues will shape the stance of the Islamic tradition on the *musta'min's* right to work and eventually enable us to compare it with Article 17 of the Geneva Convention.

The right to trade

The sheer volume of texts and discussions by scholars about the *musta'min's* rights and duties in the field of commerce affirms the conclusion reached in the previous section,¹⁸¹ that commerce was the practical and tangible purpose of *amān* in the early days¹⁸² of the Islamic state.

Concerning this issue, we do not find the scholars stipulating the right of the *musta'min* to trade. Instead they usually discuss trade-related matters such as the tax imposed on him and the kind of goods he can trade with and so on. This means the *musta'min's* right to trade was accepted as a matter of fact and a judgement was not required.

The phrase used by many scholars¹⁸³ to impose the amount of tax on the *musta'min* is: "وإن أتجرَ خزبيُّ إلينا أخذَ منه العُشْرُ" *'ushr'* (Ibn Mufīḥ, 1979, vol.3, p.427). However, this tax was subject to debate between the scholars. Al-Nafrāwī (1994, vol.1, p.339) states that even this tax could be altered and reduced if the *Imām* saw fit, or if another percentage of tax was agreed with the *musta'min* before he entered *dār al-Islam*.

To encourage and facilitate the entrance of the *musta'min* to *dār al-Islam* al-Shāfi'ī and other scholars went further to abolish the *'ushr* tax imposed on the *musta'min* provided he brings needed provisions to Muslims. They said: "If they entered to provide rations

¹⁸¹ See section "Movable and Immovable Property" p.211

¹⁸² The clearest manifestation of this could in the Mamlūk period. See Wansbrough (1971, pp.20-35).

¹⁸³ See for example al-Mirdāwī (n.d, vol.4, p.243), al-Buhūti (1970, vol.2, p.19), Ibn Qudāma (n.d, vol.1, p.157), Ibn Mufliḥ (1997, vol.6, p.253), al-Buhūti (1981, vol.3, p.100) and al-Khiraqī (1982, vol.1, p.133).

needed by people, they are allowed to enter without *‘ushr*’. Al-Shāfi‘ī substantiates his decision on the ground that “their entrance is of benefit to the Muslims” دخولهم نفع للمسلمين (Ibn Qudāma, 1984, vol.9, p.281).

So, the *musta‘min* according to these opinions is not only allowed to trade in *dār al-Islam*, but also encouraged to do so. All in all, the *musta‘mins* had considerable liberty in their commercial activities and the kinds of good they were permitted to trade with in *dār al-Islam*.

The scholars, by and large, widen the scale of trade for the *musta‘min*. We find them giving a clear verdict to allow the Muslim and the *musta‘min* to be partners in business. Al-Kāsānī (1982, vol.6, p.81) states: “If a *ḥarbī* enters *dār al-Islam* with *amān* and then he gives his money to a Muslim to trade for him on a *muḍāraba*¹⁸⁴ contract, or the Muslim gives his money to him on a *muḍāraba* contract, that will be permissible” لو دخل حربيّ دار الإسلام بأمانٍ فَدَفَعَ مَالَهُ إِلَى مُسْلِمٍ مُضَارَبَةً أَوْ دَفَعَ إِلَيْهِ مُسْلِمٌ مَالَهُ مُضَارَبَةً فَهُوَ جَائِزٌ.

Other scholars, however, envisaged different scenarios for this partnership and gave solutions for each one. Ibn ‘Ābdīn (2000, vol.8, p.327), for instance, rules that: “If a *ḥarbī* gives his money to a Muslim on *muḍāraba* and the Muslim then enters *dār al-ḥarb* with a permission from the owner of the money, the contract will be intact” ولو دفع حربيّ إلى مسلم مال المضاربة ثم دخل المسلم دار الحرب بإذن رب المال فهو على المضاربة.

Shaykhī Zāda (1990, vol.4, p.334) adds that if two *musta‘mins* entered *dār al-Islam* with *amān* and one of them gave money to the other on *muḍāraba* contract and the latter then went to *dār al-ḥarb*, Shaykhī Zāda affirms that the contract is unbroken.

Al-Sarakhsī (n.d, vol.22, p.129) endorsed the commercial contract between the Muslim and the *musta‘min* even if the agreement was to share the profits equally.

Nevertheless, on the agricultural side, the scholars allowed the *musta‘min* to engage in all sorts of dealings, including purchase, selling, hiring and renting the agricultural land. Al-Sarakhsī devotes a section in his book called: “The *muzāra‘a*¹⁸⁵ contract with the

¹⁸⁴ A *muḍāraba* contract is a contract between two people whereby one provides the funds and the other provides the labour and the revenue will be shared on an agreed percentage. See al-Mirdāwī (n.d, vol.5, p.427) and Ibn Nujaym (n.d, vol.7, p.263).

¹⁸⁵ *Al-muzāra‘a* is an agricultural contract between the owner of the land and the worker to share the harvest on a certain percentage. See al-Kāsānī (1982, vol.6, p.175)

ḥarbī” specifically to matters relating to this contract. He says: “If a *ḥarbī* entered *dār al-islam* with *amān* and a [Muslim] man gave him his land and seeds on *muzāraʿa*, [then the contract] is permissible and the harvest at the end of the year should be shared as agreed” وإذا دخل الحربي دار الإسلام بأمان فدفع إليه رجل أرضا له وبذرا مزارعة هذه السنة “بالنصف فهو جائز والخارج بينهما على ما اشترطا (al-Sarakhsī, n.d, vol.23, p.121).

Concerning another type of contract al-Dardīr (n.d, vol.6, p.235) asserts: “The Muslim is approved to give his grape trellis to a *dhimmī* or a *muʿāhid* or *ḥarbī* on a *musāqā*¹⁸⁶ contract providing that he [the Muslim] makes sure that [the *mustaʿmin*, *muʿāhid* or the *dhimmī*] does not make the grapes alcohol” المسلم له أن يدفع حائطه لذمي أو معاهد أو حربي مساقاة بشرط أن يأمن منه أن يعصر ما ينوبه خمرا.

What’s more, the scholars gave the *mustaʿmin* great liberty in the field of work to the extent that they allowed the Muslim to appoint the *mustaʿmin* to act on his behalf on variety of dealings, like trading, attaining his legal rights and so on (Shaykhī Zāda, 1990, vol.3, p.563). This basically means allowing him to work as a solicitor to defend the rights of his clients before the court if need be.

Additionally, the scholars allowed the *mustaʿmin* to work in financial matters and to be involved in borrowing, lending and depositing money with the Muslims and vice versa (al-Suyūfī, 1961, vol.2, p.582)¹⁸⁷. In practical terms this could be interpreted today as permission to work in the financial markets as an advisor, banker, and so on.

The *mustaʿmin* also has the right to work as an employee in various fields. Al-Sarakhsī (n.d, vol.16, p.56) confirms that: “If a Muslim hired a *dhimmī* or *mustaʿmin* to serve him that would be permissible” إن استأجر المسلم ذميا أو مستأمنا لخدمته كان جائزا. Also al-Shirbīnī (n.d, vol.2, p.362) permits the *mustaʿmin* to work in the field of “cutting trees, collecting grass and hunting” الاحتطاب والاحتشاش والاصطياد.

In practical terms, these different permissions might today mean that the *mustaʿmin* is permitted to work in diverse sectors of the market place. To be a trader would by default

¹⁸⁶ *Al-musāqā* is a contract between the owner of the field and another person on the condition that latter takes care of all the needs of the field including irrigation and the harvest to be shared on an agreed percentage. See al-Ḥusaynī (1994, vol.1, p.291) and Ḥaydar (n.d, vol.3, p.504)

¹⁸⁷ See also Ibn Muflīḥ (1997, vol.6, p.229) and al-Buhūtī (1996, vol.1, p.654)

mean to employ other people, such as accountants, workers, drivers, solicitors, bankers and any other needed staff. The same applies to allowing the *musta'amin* to be a farmer. In other words he has the right to employ people or to be employed as well as the right to be self-employed.

Restrictions on the *musta'amin* concerning some kinds of work

Yet, with this extended freedom granted to the *musta'amin* to work in *dār al-Islam*, some scholars introduced restrictions and reservations on particular types of work that could be detrimental to the national interest or in conflict with the identity of the Islamic state.

The scholars, for instance, do not allow the *musta'amin* to trade in certain goods with the Muslims because they are forbidden for Muslims, such as pork and alcohol (al-Nafrāwī, 1994, vol.1, p.339). However, if there are *dhimmīs* in that area of *dār al-Islam* the *musta'amin* can still sell them these goods, according to al-Nafrāwī (1994, vol.1, p.339).

Other scholars, such as al-Shawkānī (1984, vol.4, p.563), al-Qalyūbī (1998, vol.2, p.196) and Ibn Nujaym, (n.d, vol.5, p.87) imposed other restrictions on the *musta'amin* in regard to his trade in weaponry especially with the non-Muslims in *dār al-ḥarb*.

Also, some scholars imposed restriction on work in excavating treasures especially gold and silver, unless there was permission from the *Imām* (Shaykhī Zāda, 1990, vol.1, p.184). Otherwise, anything he finds should be taken from him, because these treasures belong to the people of *dār al-Islam* (al-Samarqandī, 1984, vol.1, p.328). In the case that the *Imām* allows him to excavate treasures, he has to pay one fifth of what he finds to the Muslims (al-Qaffāl, 1980, vol.3, p.95). However, if he worked there as an employee with a permission, that would be acceptable, according to Shaykhī Zāda (1990, vol.1, p.185).

The significance of these opinions is in their lead to contemporary scholars who face different challenges and circumstances. It could be rightfully said that the *musta'amin* is prohibited from working in certain fields due to their sensitive nature. Nonetheless, these limitations and restrictions are the exception, not the rule, and should not be used as an excuse to deprive the refugee of his right to engage in a gainful employment.

Conclusion

The Islamic tradition in principle and practice allows the refugee a wide range of freedoms to engage in work in the Islamic state. As noted, he has the right to work in merchandise, financial activities and agriculture and can be an employee or an employer or even be self-employed.

Naturally, the *musta'min* in his work in the Islamic state has to adhere to the general rules governing work there. There are, however, a small number of fields the *musta'min* cannot work in, which relate to national security or the public interest.

Based on that, it is clear that there is a large measure of agreement between Article 17 and the Islamic position concerning the same issue. Moreover, in light of these findings, the Islamic tradition could also be in agreement with Articles 18 and 19 of the Convention, because of the very close nature of these two Article with the Article discussed above. Article 18 entitles 'Self-employment' states:

“The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies”.

Remarkably, some of these fields were mentioned by name by Muslims scholars, for example agriculture, and stated that the refugee has the right to engage in it. Also we saw that the scholars stipulated the right of the *musta'min* to establish partnerships and be involved in various contracts either with Muslims, *dhimmīs* or even with *musta'mins* like him.

Article 19 entitled 'Liberal professions' reads:

“1. Each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognised by the competent authorities of that State, and who are desirous of practising a liberal profession, treatment as

favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.”

Based on the discussion above, in principle this Article is in line with the Islamic rules and teachings that urge the Muslims to put the best qualified man in the right position according to the Qur^ānic verse (28:26): “Said one of the two [daughters]: “O my father! Hire him: for, behold, the best that thou couldst hire is one who is [as] strong and worthy of trust” *قَالَتْ إِحْدَاهُمَا يَا أَبَتِ اسْتَأْجِرْهُ إِنَّ خَيْرَ مَنِ اسْتَأْجَرْتَ الْقَوِيُّ الْأَمِينُ*. The qualifications are the capability to do the job and honesty as well. Capability by default means the knowledge, experience, and the physical ability too.

The Prophet also recommends that Muslims do their work to perfection. On the account narrated by Abu Ya[°]lā (1984, vol.7, p.349) on the authority of [°]Ā[°]isha the Prophet said: “If one of you does a job, God loves him to do it just right” *إن الله يحب إذا عمل أحدكم عملاً أن يتقنه*¹⁸⁸.

Thus, it could be said that Article 19 matches to a great extent the principles of the Islamic tradition and could be endorsed by contemporary Muslim scholars.

¹⁸⁸ Also narrated by al-Bayhaqī (1989, vol.4, p.334), al-Jirāhī (1984, vol.1, p.513) and al-Numayrī (1996, vol.1, p.67).

Welfare (Article 20, 21, 22, 23 & 24)

To guarantee one of the very basic human rights of refugees the Convention dedicates articles, 20, 21, 22, 23 and 24 of chapter 4 entitled 'Welfare' to the rights of the refugee that will help him benefit from public assistance and ensure he will not be left alone struggling to secure basic needs in his new domicile.

Article 20 speaks about the rationing system and the refugee's right to be treated like nationals where this system exists. Article 21 states the refugee's right to housing and the treatment should be as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

Article 22, however, grants the refugee the right to education, access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships. Moreover, Article 23 obliges the contracting states to give the refugee the right to public relief on the same level of their own nationals.

Lastly, Article 24 regulates the labour legislation and social security.

In regard to the Islamic position towards these Articles we find well-established principles in the Islamic tradition that oblige Muslims collectively and individually to help the needy and the distressed.

There are numerous *ḥadīths* in which the Prophet urges his followers to be generous and help the deprived, the destitute, the distressed and anybody needs help.

Al-Bukhārī (1986, vol.1, p.13) narrates an account on the authority of Ibn °Umar that a man asked the Prophet about the best thing in Islam. The Prophet said: "Feeding, saying the greeting of peace to anybody, whether you know him or not" *تَطْعِمُ الطَّعَامَ وَتُقْرِأُ السَّلَامَ عَلَى مَنْ لَمْ تَعْرِفْ وَمَنْ لَمْ تَعْرِفْ وَمَنْ لَمْ تَعْرِفْ*. In another *ḥadīth* narrated by al-Hindī (1998, vol.3, p.168) the Prophet says: "God loves helping the afflicted" *إِنَّ اللَّهَ يُحِبُّ إِغَاثَةَ الْمَلْهُوفِ*. Ābādī (1995, vol.14, p.9) comments on this account that: "Helping the afflicted is obligatory" *إِغَاثَةُ الْمَلْهُوفِ فَرِيضَةٌ*. Al-Munāwī (1937, vol.4, p.268), however, explains the meaning of *al-malhūf* to include "the oppressed who ask for help or the grievously distressed" *المظلوم المستغيث أو المضطر المتحسر*. To support this interpretation he cites a *ḥadīth* that states:

“People are the dependents of God and the most loved ones those who are of help to his dependents” الخلق كلهم عيال الله وأحبهم إليه أنفعهم لعياله especially when the need is dire, as he comments.

To encourage Muslims to extend their help to whosoever needs it, the Prophet tells his followers about a man¹⁸⁹ who deserved to get into Paradise for going down a well to bring water to a thirsty dog (al-Bukhārī, 1986, vol.2, p.833). The amazed companions asked the Prophet: “وإن لنا في البهائم أجراً?” and the Prophet said: “There is a reward [in showing kindness to any creature that has] a fresh [live] liver” في كل كبدٍ رطبةٍ أجرٌ.

The Prophet also warns Muslims of the wrong-doing of denying help to the needy; even if the needy were an animal. Ibn Ḥibbān (1993, vol.2, p.305) reports on the authority of Ibn ‘Umar that the Prophet said: “A woman was punished [in hellfire] for a cat she tied. She neither fed her, nor did she allow her to look for food outside” عذبت امرأة في هرة ربطتها فلم تطعمها ولم تدعها تأكل من خشاش الأرض¹⁹⁰.

Also, al-Bukhārī (1989, vol.1, p.137) narrates on the authority of Jarīṭ that the Prophet said: “God will not show mercy to those who do not show mercy to people” من لا يرحم من الناس لا يرحمه الله.

As we can see therefore, these are very general principles that encompass not only humankind, but other creatures as well. Thus the *musta‘min* is, by default, included in these principles. Al-Suyūṭī (1993, vol.4, p.133) in his interpretation of the verse (9:6) narrates on the authority of al-Ḍaḥḥāk that Muslims were not only ordered to protect the disbeliever who wants to listen to the word of God [i.e. the *musta‘min*] but also to take care of them financially as long as they are there” وأمر أن ينفق عليهم على حالهم ذلك. Hence, it is the responsibility of the Muslims as individuals and the *Imām* as the head of the state to take financial care of the *musta‘min* and provide him with the material he needs.

In addition to the above principles, the Qur’anic verse (2:271) may lend itself to support this attitude. It reads: “If you do deeds of charity openly, it is well; but if you bestow it

¹⁸⁹ In the narration reported by Muslim (n.d, vol.4, p.1761) it was a prostitute of Banī Israel who gave water to the dog, and God forgave all her sins for that good deed.

¹⁹⁰ It was narrated also by Muslim, (n.d, vol.4, p.1760)

upon the needy in secret, it will be even better for you, and it will atone for some of your bad deeds. And God is aware of all that you do” *إِنْ تُبْدُوا الصَّدَقَاتِ فَنِعِمَّا هِيَ وَإِنْ تُخْفُوهَا*” *وَتُؤْتُوهُهَا الْفُقَرَاءَ فَهُوَ خَيْرٌ لَكُمْ وَيُكَفِّرُ عَنْكُمْ مِّنْ سَيِّئَاتِكُمْ وَاللَّهُ بِمَا تَعْمَلُونَ خَبِيرٌ*. The verse does not differentiate between the needy on the basis of religion. The general terms employed in the verse ensure the poor *dhimmī* is included in its verdict as Al-Kāsānī (1982, vol.2, p.49) maintains. Other scholars like Ibn Rushd (n.d, vol.1, p.297) say that: “The rulings of the *ḥarbī*, when he gets *amān*, are the same like the *dhimmī*” *حكم الحربي إذا دخل بأمان حكم* *الذمي*. This means that the poor *mustaʿmin* is also included.

They also refer to the verse (60:8) to support their opinion: “As for such [of the unbelievers] as do not fight against you on account of [your] faith, and neither drive you forth from your homelands, God does not forbid you to show them kindness and to behave towards them with full equity: for, verily, God loves those who act equitably” *لَا يَنْهَاكُمُ اللَّهُ عَنِ الَّذِينَ لَمْ يُقَاتِلُوكُمْ فِي الدِّينِ وَلَمْ يُخْرِجُوكُمْ مِّنْ دِيَارِكُمْ أَنْ تَبَرُّوهُمْ وَتُقْسِطُوا إِلَيْهِمْ إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ*

Abu Ḥanīfa and Muḥammad conclude that spending money of *ṣadaqa*¹⁹¹ on the *dhimmīs* is a way of showing kindness and we are commanded to do that. They go further to say that had it not been for the *ḥadīth* of Muʿādh¹⁹², it would have been permissible to give them *zakāt*¹⁹³ as well (al-Kāsānī, 1982, vol.2, p.49).

To reinforce his argument in permitting spending money of *ṣadaqa* on the *dhimmīs*, al-Sīwāsī (n.d, vol.2, p.267) mentions an account on the authority of Saʿīd Ibn al-Musayyib that the Prophet gave money of *ṣadaqa* to a Jewish family. He also cites the account of the Prophet who says: “Give alms to the people of religions” *تصدقوا على أهل* *الأديان* (al-Sīwāsī, n.d, vol.2, p.267).

Despite these great principles we still find some scholars who argue that the *mustaʿmin* is not entitled to financial help from the state. Their rationale is that the *mustaʿmin* in essence is an enemy and only temporarily allowed to stay in the Islamic state. When the

¹⁹¹ *Sadaqa* means voluntary alms (Bosworth et al, 1995, vol.8, p.708).

¹⁹² On the authority of Muʿādh, he said when the Prophet sent him to Yemen, he ordered him to take the money from their rich Muslims and return it to their poor people *خُذْهَا مِنْ أَغْنِيَاءِهِمْ وَرُدِّهَا لِي تُفَرِّقَهُمْ* (al-Shaybānī, 1985, vol.1, p.123) see also (al-Ṭahḥāwī, 1987, vol.4, p.372), (Ibn Hajar, 1964, vol.3, p.112) and (al-Zaylaʿī, 1938, vol.2, p.398). From this *ḥadīth* the scholars concluded that *zakāt* should only be taken from Muslims and returned to the poor Muslims only, i.e., all non-Muslims are not allowed to take from the money of *zakāt*.

¹⁹³ *Zakāt* is the obligatory payment by Muslims of a determinate portion of specified category of their lawful property for the benefit of the poor and other enumerated classes (Bosworth, et al, 2002, vol.6, p.406-407).

period of his stay expires he goes behind enemy lines. So, eventually helping him will strengthen the enemy camp and this is not acceptable.

Ibn Nujaym (n.d, vol.2, p.261) claims that: “It is a consensus that all the kinds of *ṣadaqa*, whether it is obligatory, mandatory or voluntary are prohibited to the *ḥarbi*” جميع الصدقات فرضا كانت أو واجبة أو تطوعا لا تجوز للحربي اتفاقا. He justifies that with reference to the verse (60:9): “God only forbids you to turn in friendship towards those who fight against you because of [your] faith, and drive you forth from your homelands, or aid [others] in driving you forth: and as for those [from among you] who turn towards them in friendship; it is they who are truly wrongdoers!” إِنَّمَا يَنْهَاكُمْ اللَّهُ عَنِ الَّذِينَ قَاتَلُوكُمْ فِي الدِّينِ وَأَخْرَجُوكُمْ مِّن دِيَارِكُمْ وَظَاهَرُوا عَلَىٰ إِخْرَاجِكُمْ أَن تُوَلُّوهُمْ وَمَن يُتَوَلَّهُمْ فَأُولَٰئِكَ هُمُ الظَّالِمُونَ. He then comments that the verse is general and it includes the *mustaʿmin*.

Additionally, al-Kāsānī (1982, vol.2, p.49), asserts that the *ṣadaqa* is not permitted to be spent on the *ḥarbi* while it is permitted for the *dhimmi*, because spending it on the *ḥarbi* will help them in fighting us and this is not permissible, while this probability is not available in the case of the *dhimmi* لأنَّ في ذلك إغائة لهم على قتالنا وهذا لا يجوز وهذا المعنى لم يوجد في الدمي.

Al-Zaylaʿī (1895, vol.1, p.300) also endorses this opinion depending on the verse (60:9). He comments that all the needy of *dār al-ḥarb* are excluded from the poor people in general and the *ḥarbi* in *dār al-Islam* is excluded from it as well.

Moreover, al-Sarakhsī (n.d, vol.3, p.111) excludes the *mustaʿmin* from the eligible people of *ṣadaqa* because the *mustaʿmin* is a fighter and we were ordered not to show kindness to those who fight us as God commands in the verse (60:9) المستامن فإنه مقاتل وقد نهينا عن المبرة مع من يقاتلنا

Therefore, the apparent reason that opponents would deny the *mustaʿmin ṣadaqa* is that he is an enemy and helping him will reinforce the enemy camp and encourage them to fight the Muslims. This assumption, however, is clearly not valid in the case of refugees today, who are usually forced to flee their homes either because of oppression, war, a natural disaster, or other unfortunate circumstances. These people cannot be the enemies of the Islamic state and feeding and sheltering them do not threaten national security, nor will it strengthen the enemy as the scholars feared.

A debate on the sources of money

In addition to the above discussion the scholars also debated the sources from which the *musta'min* is eligible for money. Generally speaking the main sources of money in the Islamic state were: the *fay*¹⁹⁴, *khums al-ghanīma*¹⁹⁵, *al-'ushūr*¹⁹⁶, *al-jizya*¹⁹⁷, *al-ṣadaqāt*¹⁹⁸, *al-kharāj*¹⁹⁹, the left money with no inheritor and the natural resources

The main two sources the scholars debated were the *zakāt* and *ṣadaqa*. The vast majority of scholars do not allow the state to spend the money of *zakāt* on the *dhimmi* or the *musta'min*, while regarding the money of *ṣadaqa* some of them allow it and others do not.

It seems there is a consensus between the scholars that the *dhimmi* is not eligible to receive the money of *zakāt* according to al-Kāsānī (1982, vol.2, p.49): “It is a consensus that spending money of *zakāt* on the disbeliever is not permitted” فلا يجوزُ صرفُ الزَّكَاةِ إلى الكافرِ بلا خلافٍ. The basis of this verdict is the *ḥadīth*²⁰⁰ narrated on the authority of Mu'ādh that when the Prophet sent him to Yemen, he ordered him to take the money from their rich people and return it to their poor people خُذْهَا مِنْ أَغْنِيَانِهِمْ وَرُدَّهَا فِي فُقَرَائِهِمْ Al-Kāsānī concludes that the *zakāt* is taken from the rich Muslims and should be returned only to the poor Muslims and not to anybody else, as stated by this *ḥadīth*.

Ibn Nujaym (n.d, vol.2, p.261) puts it rather bluntly: “It is not paid to the *dhimmi* because of Mu'ādh's *ḥadīth*” لا تُدْفَعُ إِلَى ذِمِّيٍّ لِحَدِيثِ مُعَاذٍ. Al-Shaybānī (1985, vol.1, p.123) and Shaykhī Zāda (1998, vol.1, p.329) as well affirm the same meaning.

Moreover, al-Sarakhsī (n.d, vol.2, p.202) generalises that any disbeliever, [whether a *dhimmi* or a *ḥarbī*], should not take from the money of *zakāt* ولا يعطى من الزكاة كافر. Al-

¹⁹⁴ *Al-fay* is the possessions of the disbelievers which they left to Muslims without war (Ibn Qudāma, 1984, vol.6, p.312).

¹⁹⁵ The fifth of the war spoils (Ibid).

¹⁹⁶ The tax that is paid by the non-Muslim traders who enter *dār al-Islam* (Ibid)

¹⁹⁷ *Al-jizya* is the poll-tax which in the traditional Muslim law, was levied on non-Muslims in Muslim state (Lewis, et al., 1965, p.559).

¹⁹⁸ *Al-ṣadaqāt* is the monies that the Muslim gives out seeking the reward of God. They are two kinds, the first is obligatory and that is called *zakāt* and the other one is voluntary and called *ṣadaqa*

¹⁹⁹ *Kharaj* is the tax imposed on the person and the outcome of the land (al-Sīwāsī, n.d, vol.6, p.31).

²⁰⁰ This *ḥadīth* was also narrated by al-Shaybānī (1985, vol.1, p.123), al-Taḥḥāwī (1978, vol.4, p.372), Ibn Ḥajar (1964, vol.3, p.112), Ibn Ḥajar (n.d, vol.1, p.266) and al-Zayla'ī (1938, vol.2, p.398).

Mirghinānī (n.d, vol.1, p.113) and al-Ṭaḥḥāwī (1900, vol.1, p.473) emphasize that *zakāt* should not be paid to *dhimmī* ولا تدفع لذي.

However, the only scholar who permitted *zakāt* to be paid to the *dhimmī* is Zufar according to al-Sarakhsī (n.d, vol.2, p.202). His rationale for this is that: “The purpose of the *zakāt* is to satisfy the needs of the poor by seeking God’s satisfaction, and that has happened” لأن المقصود إغناء الفقير المحتاج على طريق التقرب وقد حصل. Yet, Zufar did not explain how to refute the other opinion or how to interpret the straightforward *ḥadīth* of the Prophet narrated by Mu‘ādh, which states clearly that *zakāt* should be taken from the rich Muslims and returned to the poor Muslims.

In regard the voluntary *ṣadaqa*, al-Sarakhsī (n.d, vol.3, p.111) affirms that it is permitted to give the voluntary *ṣadaqa* to the *dhimmī* and says that if we were to use *qiyās*²⁰¹ then giving *zakāt* would be allowed, but, we dropped *qiyās* here because of Mu‘ādh’s *ḥadīth*. Nonetheless, it is allowed to give *ṣadaqa* and other alms to them.

Moreover, al-Sīwāsī claims that there is an agreement between the scholars about permitting spending of alms on them الإتيان على جواز الصدقة النافلة عليه (al-Sīwāsī, n.d, vol.2, p.267). Al-Sarakhsī and al-Sīwāsī speak about the *dhimmī* and since the rulings of the *musta‘min* are the same as the *dhimmī* once the *musta‘min* gets into *dār al-Islam*. So, these ruling apply to him.

Explaining the rationale behind this permission al-Kāsānī (1982, vol.5, p.104) states: “It is permissible to give them *ṣadaqa* as it is permissible to give it to the Muslim. It is, rather, better to give *ṣadaqa* to them because this will attract them to Islam and lead them to convert” يَجُوزُ صَرْفُ الصَّدَقَةِ إِلَيْهِمْ كَمَا يَجُوزُ صَرْفُهَا إِلَى الْمُسْلِمِ بِنِ أَوْلَى لِأَنَّ التَّصَدُّقَ عَلَيْهِمْ بَعْضُ مَا يُرْعَبُهُمْ إِلَى الْإِسْلَامِ وَيَحْمِلُهُمْ عَلَيْهِ.

Al-Shirbīnī (n.d, vol.3, p.121) goes further to say that the *ṣadaqa* is allowed to a non-Muslim كافر وتحل لشخص كافر and supports his view by the *ḥadīth* “There is a reward [in showing kindness to any creature that has] a fresh [live] liver”. He also reports a scholar called al-Ṣayramī that there is no difference between the *ḥarbī* and the other

²⁰¹ *Qiyās* is reasoning by analogy, it is the fourth source of Muslim law (Bosworth et al, 1986, vol.5, p.238).

disbelievers. Al-Ramlī (1983, vol.6, p.173) as well reports the same thing on al-Ṣayramī.

In regard to the opponents, al-Kāsānī (1982, vol.2, p.49) reports that they base their judgment on two things; the first is that they considered *zakāt* like *ṣadaqa* and since they are forbidden from receiving *zakāt* they should also be forbidden from receiving *ṣadaqa*. The second thing is that it is not permitted to give *ṣadaqa* to the *ḥarbī* and so it should not be permitted to give it to the *dhimmī*.

From the above presentation it is clear that the scholars do not allow spending *zakāt* on the *dhimmī* and by default to the *musta'min*. Concerning the *ṣadaqa*, the position of the proponents of spending *ṣadaqa* money on the *dhimmī* is much stronger than the opponents. However, when it comes to the *musta'min* the case is different.

The interpretation of the two verses (60: 8-9)

Due to their important place in this discussion, an examination of some of the interpretations of these verses will shed more light on the topic.

The reasons for the revelations were disputed by the scholars according to al-Tha'ālibī (n.d, vol.4, p.292). Some said that those we are commanded to show kindness to, are those who have a covenant with the Prophet. Others said they are those who converted in Mecca but did not migrate. Others also said they are the women and children. However, 'Abdullah Ibn al-Zubayr said the reason for revelation is the incident that took place between Asmā' Bint Abī Bakr and her mother who came to visit her. Asmā' Bint Abu Bakr refused to welcome her mother because she was a disbeliever. So, the Prophet ordered her to accept the gifts from her mother, take good care of her, be generous and show kindness to her²⁰². Nonetheless, Ibn 'Abbās says the disbelievers mentioned in the verse were a tribe of Banī al-'Abbās who were driven forcibly to fight in Badr expedition (al-Rāzī, 2000, vol.29, p.263).

However, al-Shāfi'ī (n.d, vol.2, p.192) adds another reason for the revelation. He says that some Muslims felt bad when God ordered them to fight against the disbelievers and to cut relations with them, so they feared that their financial help to their non-Muslim

²⁰² Abu al-Su'ūd (n.d, vol.8, p.238), al-Suyūṭī (1993, vol.8, p.130) and al-Zamakhsharī (n.d, vol.4, p.515) support this account.

relatives in Mecca would be illegal. Therefore God revealed this verse to allow them to continue sending the money.

This actually means that helping the *ḥarbī* even in *dār al-ḥarb* let alone *dār al-Islam* is allowed providing that: “It is not to support the disbelievers to fight or there is harm that may befall Islam” لم يكن فيه تقوية على الحرب أو دلالة على الإسلام as Ibn al-Jawzī (1994, vol.1, p.56) states.

Al-Qurṭubī (n.d, vol.3, p.338) emphasises this meaning by saying that: “The apparent meaning of the verses obligates the permission to spend money of all kind of *ṣadaqa* on them, but the Prophet excluded the money of *zakāt*” by the *ḥadīth* of Mu^oādh”.

Al-Naḥḥās (1987, vol.1, p.713) also confirms that assisting non-Muslim relatives in *dār al-ḥarb* is not prohibited as long as it does not strengthen the fighters by weapons or horses and does not expose the Muslims to danger.

Al-Ṭabarī agrees with these conditions and states that a Muslim may assist a needy *ḥarbī* in *dār al-ḥarb* even if they are not related by kinship (Ibn al-Jawzī, 1984, vol.1, p.239).

Lastly, Ibn ^oĀbdīn (2000, vol.2, p.352) reports that al-Zayla^oī confirmed that it is permissible to give *ṣadaqa* to the *musta^omin*. He also narrates an account of the Prophet to underline this view. The account explains that when there was a drought in Mecca, the Prophet sent 500 *dīnārs* to Abu Sufyān and Ṣafwān Ibn Umayya to distribute them among the poor there.

Though the people of Mecca were obviously enemies in *dār al-ḥarb*, the Prophet sent them money to help the needy at that difficult time. Thus, if it is allowed to help the needy in *dār al-ḥarb*, it would be possible to help those needy when they come into *dār al-Islam*.

Therefore, the practical way of showing mercy to a *musta^omin* is by providing him with food, shelter, medical care and all the necessary means of life.

Conclusion

The principle of helping the needy is enshrined in Islamic teaching in the Qurʾān and the *ḥadīth*. The help mentioned in these sources is not restricted to a particular field. Hence, it could include any kind of help, like social security, housing or any other thing to guarantee a decent life, free from humiliation and disrespect.

The scholars who opposed helping the *mustaʿmin* did not mean the needy and vulnerable refugees, but the fighters who temporarily stay in the Islamic state for a short period of time, then go back to *dār al-ḥarb*. The reason for this prohibition is that the scholars feared this help may strengthen the enemy camp and encourage them to continue fighting the Muslims. This scenario is not relevant in the modern context and does not apply to present refugees.

Despite this understanding some scholars allowed help to the *ḥarbī* in *dār al-ḥarb*, providing that it will not harm the Muslims. So, by default helping them in *dār al-Islam* is more appropriate.

In his interpretation of the verse (9:6) al-Suyūṭī (1993, vol.4, p.133) narrates on the authority of al-Ḍaḥḥāk that the Muslims were not only ordered to protect the disbeliever who wanted to listen to the word of God but were also ordered to take care of them financially as long as they were there. In practical terms this means an entitlement to social security benefits, housing, rations when the rationing system exists, public education and any other needs.

Another point here is that the Islamic state has certain peculiarities regarding its financial system owing to its nature and identity. *Zakāt* should be collected from Muslims and spent on Muslims according to the above mentioned *ḥadīth*. Other non-Muslim residents in the Islamic state could enjoy financial help from other sources, such as *ṣadaqa*. This issue is minor as long as the help is available for the needy. As Henkin of the United States commented during the discussion to draft Article 23 of the Convention: “The principle of article (23) was clear: the refugees should be accorded the same treatment with respect to public relief and assistance as was accorded to nationals, and it did not matter how the treatment was accorded, provided the results were the same” (Hathaway, 2005, p.812)

To sum up, it could be concluded that the Islamic tradition provides strong principles that obligate Muslims individually and collectively to help the needy. These principles

are sufficient to rely on in granting the modern refugee the care and material assistance he needs. So there is enough evidence to conclude that the Islamic tradition is in keeping with Articles 20, 21, 22, 23, 24 of the Geneva Convention.

It is significant that there is also a responsibility on the Islamic state to look after and take care of the refugees financially. Despite the fact that the modern state is dramatically different to the traditional Islamic state in regard to financial resources, the responsibility remains the same and the Islamic state is still obliged by these principles to take care of the refugee financially.

Freedom of movement (Article 26, 27, 28 &29)

The issue of movement was dealt with by the Geneva Convention in Art. 26 which states “Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances.”

Despite that, states still have the right to limit freedom of movement “in two circumstances: during a mass influx, or while investigating the identity of and possible security threat posed by an individual seeking recognition of refugee status” (Hathaway, 2005, p.705). Otherwise, “once lawfully in the territory of a state party, refugees should be subject only to whatever restrictions govern the freedom of internal movement and residence of other non-citizens” (Hathaway, 2005, p.705)

The Islamic tradition and freedom of movement

Like many other issues relating to the *musta'min* the Muslim jurists touched upon the issue of movement, not only within the Islamic state but also outside it, as well as the *musta'min*'s residence in *dār al-Islam*. Interestingly, they dealt with the *musta'min*'s right to move outside the state more than they did with his movement inside it, as if it was by default to the *musta'min* to move within the state freely.

Before elaborating on the issue of movement it is appropriate to mention the issue of residence first, as both issues are very much connected. The issue of nationality is also relevant and will be discussed below, but this debate will shed more light on the relationship between freedom of residence and movement.

To start with, the vast majority of scholars dealt with the *musta'min*'s stay as a temporary period which in any case should not exceed a year. Nevertheless, referring to the Qur'anic verse (9:6) which deals with the issue of refuge, and the interpretations of the scholars we find that the verse itself associates the length of the stay with attaining the safety of the *musta'min*. So, it is not a matter of months and years as much as a matter of safety, protection and shelter.

Al-Qummī affirms that: “[Regarding the time of stay], there is nothing in the verse that shows it. It could be left to the judgment of the *Imām*” فليس في الآية ما يدل على ذلك ولعله مفوض إلى اجتهاد الإمام²⁰³

Ṭanṭāwī, who assumes that the *mustaʿmin* comes to learn about Islam, also stresses that the length of stay is left to the *Imām*, and that this period of time should be long enough for the *mustaʿmin* to understand the truths of Islam²⁰⁴.

It is clear then that the *mustaʿmin* whether he comes to *dār al-Islam* for trading, learning about Islam or looking for protection has the right to stay there as long as it takes to meet his needs. The other important note is that length of the stay is left to the *Imām* to judge according to his assessment of the need.

However, in terms of his movement outside the state we find the majority of scholars agree that the *mustaʿmin* has the right to travel outside the Islamic state and come back to it without violating his *amān*. The primary condition for endorsing this action is that his travel to *dār al-ḥarb* should not be for the purpose of settling there permanently or for fighting the Muslims.

Ibn Qudāma (1984, vol.9, p.198) affirms that: “If he enters [*dār al-ḥarb*] to settle, his personal *amān* will be nullified” وإن دخل مستوطننا بطل الأمان في نفسه. Ibn Mufliḥ (1979, vol.3, p.395) looks at a scenario where a *mustaʿmin* deposits or lends his money to a Muslim or to a *dhimmi* and then travels to *dār al-ḥarb*, to settle there. Ibn Mufliḥ differentiates between the personal *amān* and the *amān* of his money. While his personal *amān* is nullified, according to him, the *amān* of his money remains intact. Ibn Taymiyya (1983, vol.2, p.181) however, agrees with Ibn Mufliḥ on the personal *amān* and goes further to say even the *amān* of his money will be cancelled²⁰⁵.

Without doubt, if he goes back to *dār al-ḥarb* to fight the Muslims his personal *amān* will be void إن عاد محاربا بطل أمانه as Ibn Qudāma (n.d, vol.4, p.335) states.

²⁰³<http://www.altafsir.com/Tafasir.asp?tMadhNo=4&tTafsirNo=38&tSoraNo=9&tAyahNo=6&tDisplay=yes&UserProfile=0/> [cited April 2006].

²⁰⁴<http://www.altafsir.com/Tafasir.asp?tMadhNo=7&tTafsirNo=57&tSoraNo=9&tAyahNo=6&tDisplay=yes&UserProfile=0/> [cited April 2006].

²⁰⁵ Regarding the *amān* of money see section ‘Movable and immovable properties’ in this thesis. p.211.

Apart from these two cases the *musta'min* has the right to travel outside *dār al-Islam* for different reasons providing that his intention is to return to *dār al-Islam*. Al-Buhūtī (1981, vol.3, p.108) asserts that if the *musta'min* goes back to *dār al-ḥarb* for trading or to fulfil a need, as long as his intention is to go back [to *dār al-Islam*] his *amān* is still valid إذا عاد المستأمن إلى دار الحرب لتجارة أو حاجة على عزم عودته إلينا فهو على أمانه. Moreover, if he goes back to *dār al-ḥarb* as a messenger his *amān* will be intact, according to al-Suyūfī (1961, vol.2, p.582).

Even more, Ibn Qudāma (1984, vol.9, p.198) says that if the *musta'min* goes back to *dār al-ḥarb* on an excursion, his *amān* will still be valid because this is not considered to be in conflict with his intention to stay in *dār al-Islam* لأنه لم يخرج بذلك عن نية الإقامة بدار الإسلام.

What is worth noting here is that the Muslim scholars gave the *musta'min* this right of freedom of movement outside the Islamic state after he was lawfully considered a *musta'min*. The Geneva Convention, however, did nearly the same but did not allow the refugee to enter the original country from which he had fled from because of fear or other difficult circumstances. The Islamic tradition did not make any exception in this regard and the reason for that could be the fact that the scholars when debating this issue thought of the *musta'min* as a trader, not as a conventional refugee.

Regarding internal movement, the general attitude of the scholars was not to speak about it, as if it were a matter of fact, especially when they discussed the trader *musta'min*, who by the nature of his *amān* needs to travel in the state. Some of them went even further, allowing him to enter Mecca, which is prohibited to disbelievers.

The issue of entering Mecca and settling there was the only issue concerning internal movement that was widely debated between the scholars. This might owe to the fact that it was a real and practical issue at that time.

Although the majority of scholars prohibit the *musta'min* from entering Mecca, we find scholars who object to that ruling. In his interpretation of the Qur'anic verse (9:28): "O you who have attained to faith! Those who ascribe divinity to aught beside God are nothing but impure: and so they shall not approach the Inviolable House of Worship from this year onwards And should you fear poverty, then [know that] in time God will enrich you out of His bounty, if He so wills: for, verily, God is all-knowing, wise!" يَا أَيُّهَا الَّذِينَ آمَنُوا إِنَّمَا الْمُشْرِكُونَ نَجَسٌ فَلَا يَقْرَبُوا الْمَسْجِدَ الْحَرَامَ بَعْدَ عَامِهِمْ هَذَا وَإِنْ خِفْتُمْ عَيْلَةً فَسَوْفَ يُغْنِيكُمُ اللَّهُ مِنَ

فَضْلِهِ إِنْ شَاءَ إِنْ أَلَّهِ عَلَيْهِ حَكِيمٍ al-Jaṣṣāṣ (1984, vol.4, p.280) goes through the evidences of his opponents and refutes them, and then he concludes that the *dhimmīs* are allowed to enter Mecca. Al-Sīwāsī (n.d, vol.2, p.350) also reports that it was narrated that Abu Ḥanīfa allowed them to enter Mecca.

On the other hand we find scholars strictly prohibiting that, such as Ibn Taymiyya (1983, vol.2, p.186) who states: “As for the *ḥaram* it is strictly prohibited for them to enter it” وأما الحرم فيمنعون دخوله مطلقا. The same opinion with slightly different wording is given by al-Nawawī (1997, vol.7, p.104) and al-Ramlī (1983, vol.7, p.316) who affirm that “the *dhimmī* is not enabled to enter the *ḥaram*” والذمي غير ممكن من دخول الحرم.

Other scholars, however, put it straightforwardly that the *ḥarbī* is not permitted to enter *Ḥijāz*²⁰⁶ for trading الحربي لا يمكن من دخول الحجاز للتجارة (al-Shirwānī, n.d, vol.9, p.282). Al-Ramlī (n.d, vol.4, p.214) also reports on a scholar called al-Balqīnī that he said the same and reports a saying of al-Shāfi‘ī in support of this opinion.

Nevertheless, al-Shirbīnī (n.d, vol.4, p.246) makes some exceptions to this verdict. He states that if the *ḥarbī* asks for permission from the *Imām* to enter Mecca, the latter has the right to do so should there be a benefit to the Muslims, like delivering a message, striking a contract of *dhimma* or *‘ahd* or if this disbeliever brings immensely needed provisions. Otherwise he should not be allowed.

Even in these cases, al-Shirbīnī (n.d, vol.4, p.247) asserts that the *ḥarbī* should not stay more than three days there.

Conclusion

Following the above discussion it could be safely concluded that the *musta‘min* has the right to stay in the Islamic state until the need that drove him to flee has been removed.

After being lawfully recognized as a *musta‘min* by the state he has the right to travel inside and outside the state, providing that he still wants to come back. In certain cases where the *musta‘min* goes back to his homeland to live there permanently or to fight or to harm the Islamic state he loses his contract of *amān*.

²⁰⁶ *Ḥijāz* is the area that encompasses Mecca, Medina, Yamāma, Khaybar, Yanbu° and Fadak (Ibn Taymiyya, 1983, vol.2, p.186).

In regard to the restrictions on his movement the scholars gave the *musta'min* a great deal of liberty to move outside and inside the state except within Mecca, as the majority of scholars rule. Therefore, it could be also said that the Islamic tradition in regard to the freedom of movement granted to refugees is in keeping with Article 26 of the Geneva Convention.

Finally, this freedom of movement granted by the Muslim scholars may have repercussions for the Islamic state trying to make this right a practicable reality. This may mean that the Islamic state should deal with issuing travel documents for refugees to enable them to travel, or else this freedom is hypothetical. In this vein it could be concluded that the Islamic tradition is in conformity with Article 27 and 28 of the Convention that regulates the issue of travel documents for the refugee to facilitate his travel outside the host country.

Refugees unlawfully in the country of refuge (Article 31)

Dealing with the illegal entry of refugees to the country of refuge, Article 31 of the Convention states “The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”. Refugees as Goodwin-Gill (1998, p.152) rightly says “have no time for immigration formalities”, especially when there is a threat or any unfortunate circumstances that drive them to flee their homes. In this perspective, the significance of this Article becomes more evident.

The view of the Islamic tradition concerning this Article

Unlike other issues concerning the *musta'min*, illegal entry to *dār al-Islam* did not occupy much space in the scholars' discussions. This could be due to the norm that the *ḥarbī* does not enter *dār al-Islam* without getting *amān*, as al-Shirbīnī (n.d, vol.4, p.243) states: “The norm is that the *ḥarbī* does not enter our *dār* without *amān*” الظاهر من حال الحربي أنه لا يدخل دارنا بغير أمان. This meant it was not a major issue then and the scholars did not feel the need to give it much attention.

The general rule the scholars adopted in this situation is that the people of *dār al-ḥarb* were not allowed to enter *dār al-Islam* without *amān*, according to Ibn Qudāma (1984, vol.9, p.281) ليس لأهل الحرب دخول دار الإسلام بغير أمان. The rationale behind this rule is the high probability that the *ḥarbī* could be a spy, as expressed by Ibn ʿĀbdīn (2000, vol.4, p.168), especially when we know that the relation between *dār al-ḥarb* and *dār al-Islam* is enmity and war²⁰⁷.

However, the opinions of the jurists about the *ḥarbī* who enters *dār al-Islam* without getting *amān* and claims that he is a *musta'min* varied. While some scholars took the extreme view and invalidated his allegation from the outset, others were at ease with this claim and accepted it to protect his “blood from spilling” as al-Ramlī (1983,

²⁰⁷ See section “Definition of *dār al-ḥarb* and *dār al-Islam*” p.91

vol.8, p.86) explains. A third group, who are the majority, were in the middle and called for examining him to prove his truthfulness and sincerity.

Starting with the first group we find Ibn Nujaym (n.d, vol.5, p.109), Shaykhī Zāda (1998, vol.2, p.452) and al-Shaybānī (1975, vol.1, p.178) affirm that: “If he [the *ḥarbī*] enters our *dār* without *amān* then he and what he possesses are *fay*”²⁰⁸ لو دخل دارنا بلا أمان فهو وما معه فيء. This meant that he would be enslaved and stripped of his possessions. Whether his possessions went to the Muslim who captured him or to the state treasury is another debate²⁰⁹.

Nonetheless, other scholars took a much more tolerant approach, tending to accept the slightest evidence which the *ḥarbī* may give, or even if he did not produce any evidence they were satisfied with his mere claim.

Al-Nawawī (1984, vol.10, p.299) presumes that if the *ḥarbī* alleges that he entered *dār al-Islam* to listen to the word of God or to deliver a message he ought to be believed and he should not be exposed to any harm regardless whether he has the letter or not. However, if this *ḥarbī* purports that a Muslim had given him *amān*, al-Shirbīnī (n.d, vol.4, p.243) gives a verdict that his *amān* is correct and he should not be harmed because it is probable that his claim is right. To save his blood from spilling, all that al-Ramlī (1983, vol.8, p.86) asks from the *ḥarbī*, in case of suspicion, is to swear, if he does, then he should be left to stay.

Concerning the third group of scholars, their position was to examine the claimant and judge accordingly. Ibn Qudāma (1984, vol.9, p.281) argues that if the *ḥarbī* purports that he is a messenger he has to show the message he is carrying. If he claims he is a trader he has to show his goods. If he claims that a Muslim gave him the *amān* that Muslim must be asked to check whether this is true.

Taking the same approach, al-Ghazālī (1996, vol.7, p.58) affirms that if the *ḥarbī* claims that he entered *dār al-Islam* to listen to the word of God he has to be believed. In addition if he claims that he is a messenger his claim should be accepted. But if he

²⁰⁸ *Fay* is the spoils which the Muslims get from the disbelievers without war (Ibn Taymiyya, n.d, vol.28, p.276).

²⁰⁹ See Ibn ʿĀbdīn (2000, vol.4, p.135), Ibn Nujaym (n.d, vol.5, p.109) and al-Sīwāsī (n.d, vol.6, p.23).

claims that a Muslim gave him *amān* there are two options, either to trust him or to reject his allegation. Ibn ʿĀbdīn (2000, vol.4, p.168) elaborates more on this and states a condition to accept this claim. He states that if the *ḥarbī* alleges that a Muslim gave him *amān* that Muslim has to bring with him two witnesses to prove that he did indeed give the *ḥarbī* his *amān*.

Al-Sīwāsī (n.d, vol.6, p.23), however, concentrates on another issue during the test of the *ḥarbī* who claims to be a messenger. He demands verification of the letter which the *ḥarbī* carries to see if it was authentic. If it was, then he should be granted *amān*, otherwise he will be *fayʿ*.

So, the third group of scholars principally shows some kind of tolerance towards the *ḥarbī* but want to verify that he is truthful in his allegations.

Conclusion

It is significant that the milieu in which the Muslim scholars made their judgments is vastly different from the present day. Despite the state of war between *dār al-Islam* and *dār al-ḥarb*, and the dangerous probability of the *ḥarbī* being a spy against the Muslims, we still find that the majority of scholars granted the illegal *mustaʿmin* the right to stay in *dār al-Islam*. In the modern period, this could actually mean that if refugees fleeing life threatening dangers seek safety in the Islamic state, they have to be granted the right to stay there.

The principle of examining the genuineness of the refugee's claim does not contradict with the above Article. From the examples shown here it is clear that the examination is a lengthy process. This by default entails the right of the refugee to stay in the Islamic state until this process ends either to the benefit of the refugee, if he succeeds in producing the necessary evidences, or it leads to the rejection of his case.

In regard to the extreme opinions of some scholars concerning the fate of the *ḥarbī* who fails to defend his case, they must be put in the relevant context and be viewed in light of the state of war between the *dār al-Islam* and *dār al-ḥarb*. Moreover the concepts and

the international relations that governed the situation then should be borne in mind when discussing such opinions.

Briefly, it can therefore be concluded that the Islamic tradition shares much common ground with Article 31 of the Geneva Convention.

Expulsion (Article 32)

The issue of expulsion is a sensitive one both for refugees and for host states. The Geneva Convention deals with it in Article 32:

1. The Contracting States shall not expel a refugee lawfully in their territory, save on grounds of national security or public order.
2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before a competent authority or a person or persons specially designated by the competent authority.

Although the Article gives flexibility to the state to defend its interests and protect its public from the danger posed by a refugee, it still guarantees the refugee the basic right of fair trial. As Goodwin-Gill concludes “Article 32 may yet have both advantages and disadvantages for the refugee”.

The Islamic tradition and the issue of expulsion

One of the most fundamental conditions the Muslim scholars stipulated for the correctness of the *amān* contract is that it should not harm Muslims’ interests. Ibn Mufliḥ (1997, vol.6, p.228) and al-Mirdāwī (n.d, vol.4, p.203) state clearly: “[For the correctness] of the *amān* it must not bring harm to us” وَيُشْتَرَطُ لِأَمَانٍ غَدَمَ الضَّرَرِ عَلَيْنَا.

Brief but straight to the point, al-Dardīr puts a rule that should govern the *amān* contract. He says (n.d, vol.3, p.124) “[Bringing] benefit is not the condition, but [what is compulsory] is not bringing harm” لَا تَشْتَرِطُ الْمَصْلَحَةُ بَلْ عَدَمُ الضَّرَرِ.

If harm was expected the *Imām* has the right to terminate the *amān*. al-Zayla‘ī (1895, vol.3, p.247) states that the *Imām* is entitled to end the *amān* given by a Muslim if there was harm, in order to keep the interests of the Muslims: نَبَذَ الْإِمَامُ أَمَانَ:

الأوحد إذا كان شراً رعائياً لمصالح المسلمين. This opinion is also affirmed by al-Buhūti (1981, vol.3, p.105) who says the *Imām* is not to cancel the *amān* given by a Muslim unless he fears the treason of the one who has been given it إلا أن يخاف خيانة من أعطيته من أخطائه.

Al-Qalqashandī (1981, vol.13, p.323) also asserts that: “It is prohibited to terminate [the *amān*] unless harm is expected from the *mustaʿmin*, if this was expected then it is permitted to cancel his *amān*” فلا يجوز النبد إلا أن يتوقع من المستأمن الشر، فإذا توقع منه ذلك، فإنه يجوز نبد العهد إليه.

Based on this principle many scholars reached the conclusion that if the *mustaʿmin* posed a threat to Muslims interests or showed enmity towards the Muslims, or fought against them, then his *amān* should be cancelled.

Al-Buhūti (1981, vol.3, p.108) explains that the scale of the harm that allows the Muslims to terminate his *amān* is treason. Al-Shiḥrāzī (n.d, vol.2, p.220), however, is satisfied with the fear of treason to terminate it. He states that “The temporary²¹⁰ *amān* is invalidated when treason may be suspected” الأمان المؤقت ينتقض بالخوف من الخيانة. Also, al-Qalqashandī gives the example of the *mustaʿmin* being a spy to cancel his *amān*. He says: “As to its condition that no harm should accrue to Muslims from the *mustaʿmin*, like his being a vanguard or a spy” (al-Qalqashandī, 1981, vol.13, p.322) وأما شرطه فإن لا يكون على المسلمين ضرر في المستأمن بأن يكون طليعة أو جاسوساً. This example is also used by al-Qurāfī (1994, vol.3, p.446) to show the case where the Muslims could invalidate the *amān* of the *mustaʿmin*.

Fighting against the Muslims is obviously a valid reason for terminating the *amān*, as stated twice by Ibn Qudāma. He (n.d, vol.4, p.151) says: “The condition of the *amān* is not to fight against the Muslims” من شرط الأمان ألا يقاتلوا المسلمين. Affirming the same point in another book he says (1984, vol.9, p.14): “One of the conditions for its correctness is to stop fighting the Muslims” من شرط صحته إلزام كفه عن المسلمين. Therefore if the *mustaʿmin* was involved in fighting against the Muslims or collaborating to do so, his *amān* will certainly be nullified.

²¹⁰ The word temporary is used here to distinguish this *amān* from the *dhimmi* contract which is permanent.

Nonetheless, if the Muslims decided to terminate the *amān* of the *musta'min* they have to send him to his place of safety²¹¹. Al-Nawawī (1984, vol.10, p.290) puts emphasis on this point by saying that: “Without dispute, if the *amān* of the *musat'min* had been terminated he ought to be sent to his place of safety and his belongings should not be exposed to any harm” وإذا نبذ المستأمن العهد وجب تبليغه المأمن ولا يتعرض لما معه بلا خلاف. Al-Qalqashandī (1981, vol.13, p.323) also asserts that in case the *amān* is cancelled the *musta'min* should be sent to his safe place”.

Conclusion

From the above discussion it is clear that there are similarities between the Islamic tradition and Article 32 of the Geneva Convention. Both agree that the refugee can be expelled only on the grounds of being a threat to national security and the public interest.

Both also agree that even in these rare cases the refugee should not be sent to a place where he might be subject to persecution. Instead he must be sent to a place where he feels safe.

Although there are no citations in the Islamic tradition about the fact that refugees should be granted access to a court hearing in the event that their *amān* is terminated, it still can be said that the general Islamic principles of justice and equity will serve the refugee in providing him with a fair hearing as this is a basic norm of fairness which the Islamic legal system should give to the refugee. Moreover, in the previous section it was proved that the *musta'min* has the right to access courts in the Islamic state to prove his legal status, thus that right can be applied here to defend his stay in the Islamic state.

Lastly, determining what is a threat to national security and the public interest must be left to governmental authorities and courts of law, as these matters vary from one time to another.

²¹¹ For more details about the place of safety and what the scholars said about it see the section entitled 'non-refoulement' in this thesis. p.169

To sum up, it could be rightly concluded that the Islamic tradition is in keeping with Article 32 of the Geneva Convention.

Naturalisation (Article 34)

The Geneva Convention addressed this issue in Article 34 that states: “The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.”

This provision according to Hathaway (2005, p.981) is “without precedent in international refugee law”. It “sets a duty only to “facilitate” assimilation and naturalization, not an obligation of result... however, “despite the minimalist nature of the duties it sets, Art. 34 is breached where a state party simply does not allow refugees to secure its citizenship, and refuses to provide a cogent explanation for inaccessibility (Hathaway, 2005, P. 987).

The Islamic tradition and the issue of naturalization

The concepts of ‘nationality’, ‘citizenship’, ‘naturalisation’ and their relation and implementation in the traditional Islamic state is quite a major issue, and the debates about it continue between modern scholars²¹². This debate is not my specific focus, but it is necessary to discuss it briefly in order to contextualize the opinions of the early scholars.

In the book ‘Citizenship and democracy in the Arab countries’ المواطنة والديمقراطية في البلاد العربية a group of historians, legal experts and Muslim scholars debate the issue of citizenship in the Islamic state and other related issues. One of the papers presented by El-Afendī deals with the concept of citizenship and its base whether it is religion or race. After explaining the historical context of the issue and comparing it to modern times he concludes that the equivalent of the term ‘citizen’, the term ‘Muslim’ was used in the Islamic tradition to indicate to the same meaning (Nāfi^c, et al., 2001, p.56). The reason for that, according to the author, is that the religious and political identity which shaped the Islamic society at the beginning was an essential requirement to guarantee the full rights of a given person in that society. However, the status of the non-members [non-Muslims] depended on their contractual relationship with the original group [the

²¹² See (Nāfi^c et al., 2001) to find an example of such debate.

Muslims] تعتمد مكانة غير الأعضاء على صلتهم التعاقدية مع المجموعة الأصلية (Nāfi[°], et al., 2001, p.57). In other word, due to the religious nature of the Islamic state citizenship was granted automatically to Muslims while the other non-Muslims living there have to prove their commitment to the Islamic state by paying *jizya*. In return their protection is guaranteed by the Muslim army.

Nonetheless, this concept has changed through the course of time as El-Afendī claims (Nāfi[°], et al., 2001, p.61) and the modern scholars like Fathī °Uthmān, Fahmī Huwaydī, Ṭāriq al-Bishrī, Salīm al-°Awwā, Kamāl Abu al-Majd and others have developed new ideas about giving equal citizenship to all citizens of the Islamic state regardless of religion.

Going back to the early Muslim scholars, then, it goes without saying that the term ‘naturalisation’ was not used, since this is a modern term that came into use after the advent of the national state. However, the core of the issue of naturalisation was discussed by the Muslims scholars in the legal tradition. In their debates we find that they clearly differentiate in their rulings between foreigners who come to *dār al-Islam*, like the *musta°min*, and the residents there such as Muslims and *dhimmīs*. As evident above, Muslim scholars placed duties and allocated rights to the *musta°min* which were different than the rights and duties of the *dhimmī* and the Muslim. Additionally, the scholars also debated the circumstances under which the *musta°min* could be treated like a *dhimmī*, i.e. a member of the society.

In principle the scholars did not allow the *musta°min* to stay long in *dār al-Islam*, as stated bluntly by al-Kāsānī (1982, vol.4, p.37): “[The *Imām*] should not enable [the *musta°min*] to stay long in *dār al-Islam*” وَلَا يُمَكِّنُهُ مِنْ إِطَالَةِ الْإِقَامَةِ فِي دَارِ الْإِسْلَامِ. Shaykhī Zāda (1998, vol.2, p.45) and al-Ḥaṣkafī (1966, vol.4, p.168) clarify the length by saying: “The *musta°min* should not be allowed to stay for a year in our *dār*” لَا يُمْكِنُ مَسْتَأْمِنٌ حَرْبِيٌّ أَنْ يَبْقَى فِي دَارِنَا سَنَةً.

The reason for this limitation as explained by the these scholars (Shaykhī Zāda, 1998, vol.2, p.45), (al-Ḥaṣkafī, 1966, vol.4, p.168) and al-Zayla°ī (1895, vol.3, p.268) is the suspicion of the *musta°min* harming the Muslims by being a spy of the disbelievers. الخوف من أن يكون يَبْقَى ضَرَرًا عَلَى الْمُسْلِمِينَ لِكَوْنِهِ عَيْنًا لَهُمْ.

Nonetheless, other scholars argued the year limitation and left it to the *Imām* to decide upon it as he deems fit to the interests of the Muslims. Al-Shaybānī (1985, vol.1, p.321) states that: “The *Imām* should approach [the *mustaʿmin*] once he enters [*dār al-Islam*] and give him a certain period of time to stay, depending on his opinion” ينبغي للإمام ان يتقدم إليه في اول ما دخل ويضرب له مدة معلومة على قدر ما يقتضي رأيه. Going even further, al-Shawkānī (1984, vol.4, p.567) refutes the whole idea of limiting the period to a year and says: “There is no justification for restricting the period to a year. It is permissible for the *Imām* to give the period to [the *mustaʿmin*] which he thinks is right even though it might be long” فلا وجه للتوقيف بالسنة بل يجوز للإمام أن يصالحه على ما يرى فيه صلاحا وإن طالت المدة. Al-Jaṣṣāṣ (1984, vol.4, p.273), however, does not agree with the idea of limiting the period to a year, but at the same time refuses to allow the *Imām* to let the *mustaʿmin* stay in *dār al-Islam* without an excuse or a valid reason which requires his stay. He affirms that: “[The *mustaʿmin*] should not be left to stay more than he requires for fulfilling his need” لا يُترك فيها إلا بمقدار قضاء حاجته.

The circumstances that entitle the *mustaʿmin* to become a *dhimmī*

The *dhimmī* as we have seen in the previous section is a citizen in the Islamic state. So, when the scholars spoke about the *mustaʿmin* becoming a *dhimmī* that practically meant he became a citizen, if we were are to use modern terms.

The circumstances that enable the *mustaʿmin* to become a *dhimmī* in *dār al-Islam* vary. Some scholars make the length of stay a valid reason to be treated like a *dhimmī*. So, if he stays more than a year he becomes a *dhimmī*, provided that there is an agreement between the *mustaʿmin* and the *Imām* on this, from the first day of his stay. Al-Rāzī (1996, vol.1, p.187) asserts that when the *mustaʿmin* enters *dār al-Islam* he should be told that if he stays a year he becomes *dhimmī*. However, if he deliberately stays a year then he becomes automatically a *dhimmī*, [even without telling him that at the beginning]. Affirming this opinion, Shaykhī Zāda (1990, vol.2, p.234) and al-Zaylaʿī (1895, vol.3, p.268) add that the period should be considered from the day of agreement between the *mustaʿmin* and the *Imām* and not from the day of entrance وتعتبر المدة من وقت التقدّم إليه لا من وقت دخوله دار الإسلام. Thus, the agreement and its date it comes into force are essential pre-conditions for becoming a *dhimmī*. Al-Ḥaṣkafī (1966, vol.4, p.168) asserts

that if the *musta'min* stays a year or two before the *Imām* tells him the condition he will not become a *dhimmi*. Emphasizing the same point al-Shaybānī (1985, vol.1, p.321) says that if the *musta'min* stays years without the *Imām* approaching him, then he will not be a *dhimmi*.

Relating to the period of time also we find some commentators stating that the verse [9:6] does not have any kind of limitation on the time that the *musta'min* who comes to learn about Islam, can stay. Al-Rāzi [2000, vol.2, p.182] states: "There is no evidence in the verse that shows the limits of the period [*al-musta'min* could stay], however, it may only be known by customary practice. Once there are remarks from him that he is a seeker for the truth and researcher for the decisive evidence he should be permitted to stay. And when it appears that he rejects the truth and wants to gain time by lies, then no account should be taken of him [and his *amān* be ended]".

Al-Qummī also reaffirms this: "As regarding the time of reflection, there is nothing in the verse that shows it. It might be left to the discretion of the *Imām*"²¹³ أما زمان مهلة النظر فليس في الآية ما يدل على ذلك ولعله مَفْوَض إلى اجتهاد الإمام.

Hence, it means that the process is not automatic nor is it compulsory. It is a two-way process where the *Imām* has to make the offer including the period of stay to the *musta'min*, and on the other hand the *musta'min* has the full right to agree or not on becoming a *dhimmi*. If not, he still has to adhere to the agreed period of stay.

Other scholars however, made paying *kharāj*²¹⁴ a valid reason for the *musta'min* to become a *dhimmi*. Ibn Nujaym (n.d, vol.5, p.110) clearly states: "He becomes a *dhimmi* by the adherence to pay *kharāj*' يَصِيرُ ذِمِّيًّا بِلُزُومِ الْخَرَاجِ". Even if the *kharāj* of the land, which the *musta'min* had purchased, becomes due in less than a year of its purchase the *musta'min* becomes a *dhimmi*, according to al-Kāsānī (1982, vol.7, p.110) وَلَوْ وَجِبَ عَلَى الْمُسْتَأْمِنِ أَنْ يَدْفَعَ الْخَرَاجَ فِي أَقَلِّ مِنْ سَنَةٍ مُنْذُ يَوْمِ مَلَكَهَا صَارَ ذِمِّيًّا. Al-Sīwāsī (n.d, vol.6, p.23) moreover, rules that his commitment to pay the *kharāj* of the purchase land will be enough to make him eligible to become a *dhimmi* وَإِنْ دَخَلَ الْحَرْبِي دَارَنَا بِأَمَانٍ وَاشْتَرَى أَرْضَ خَرَاجٍ فَإِذَا وَضَعَ عَلَيْهِ ذِمَّتَهُ

²¹³(<http://www.altafsir.com/Tafasir.asp?tMadhNo=4&tTafsirNo=38&tSoraNo=9&tAyahNo=6&tDisplay=yes&UserProfile=0/>) [cited April 2006]

²¹⁴ *Kharāj* is the tax imposed on the person and the outcome of the land. See al-Sīwāsī (n.d, vol.6, p.31).

الخراج صار ذميا. Thus purchasing a land subject to *kharāj* and committing to pay it is a valid reason for becoming a *dhimmī*.

Nonetheless, some of the scholars went even further to say that the mere purchase of a land subject to *kharāj* is a valid reason to become a *dhimmī*, according to al-Zayla^ī (1895, vol.3, p.268) وَمِنْ الْمُتَشَايِخِ مَنْ قَالَ يَصِيرُ ذِمِّيًّا بِنَفْسِ الشُّرَاءِ. Others²¹⁵ still believe that the mere purchase is not enough until the *kharāj* is imposed on it لَا يَصِيرُ ذِمِّيًّا بِشُرَاءِ أَرْضِ الْخَرَاجِ حَتَّى يُوَضَعَ عَلَيْهِ الْخَرَاجُ (al-Zayla^ī, 1895, vol.3, p.268).

Another possible reason for becoming a *dhimmī* is the marriage of a *musta^ʿmina*²¹⁶ to a *dhimmī*. Al-Kāsānī (1982, vol.7, p.110) and (al-Zayla^ī, 1895, vol.7, p.110) state that: “If a *ḥarbiyya*²¹⁷ got married to a *dhimmī* she becomes a *dhimmiyya*²¹⁸ due to her commitment to stay with him” إِذَا تَزَوَّجَتْ الْحَرْبِيَّةُ ذِمِّيًّا تُصِيرُ بِذَلِكَ ذِمِّيَّةً لِأَتِزَامِهَا الْمَقَامَ مَعَهُ. They justify that on the ground that: “A woman is attached to the man in his residence” لِأَنَّ الْمَرْأَةَ تَائِبِعَةٌ لِلرَّجُلِ فِي السُّكْنَى. If she got married to a Muslim, by default she will become a *dhimmiyya* as Shaykhī Zāda states (1998, vol.2, p.453). While if a *musta^ʿmin* got married to *dhimmiyya* he will not become a *dhimmī* because this is not a commitment from his side to stay with her, as she is attached to him in his residence and not vice versa, according to al-Shaybānī (1985, vol.1, p.321) and al-Kāsānī (1982, vol.7, p.110).

This justification is quite interesting as it symbolises the whole issue of naturalisation. If we look carefully at all previous cases where the *musta^ʿmin* is eligible to become a *dhimmī* we find that there is a common factor between them, namely loyalty and adherence to the Islamic state. In the first case we find that if the *musta^ʿmin* stays in *dār al-Islam* according to the conditions set by the *Imām* he then is allowed to become a *dhimmī*, even if he stays there a month or so as stated by Shaykhī Zāda (1998, vol.2, p.453). So, the point is not the length of stay as much as showing the willingness to adhere to the Islamic principles and rules.

We can say the same regarding the second case which is purchasing land subject to *kharāj*. The discussions evidently show that the scholars were looking for any sign from

²¹⁵ Shaykhī Zāda (1998, vol.2, p.451) and al-Shaybānī (1985, vol.1, p.321) also agree with this condition.

²¹⁶ *Musta^ʿmina* means the female of *musta^ʿmin*.

²¹⁷ The female of *ḥarbī*.

²¹⁸ The female of *dhimmī*.

the *musta'min* that reflected his willingness to adhere to Islamic regulations, such as purchasing land or commitment to pay *kharāj*.

Concerning the third case, the justification the scholars gave to excluding the *musta'min* who gets married to a *dhimmiyya* from becoming a *dhimmī* is significant and illustrates that the lack of his commitment to stay in *dār al-Islam* is the reason behind that exclusion. Al-Kāsānī (1982, vol.7, p.110) states clearly that “the husband is not a follower to the woman, so his marriage to her is not evidence of his satisfaction to stay in our *dār*; hence, he will not become a *dhimmī*” الزَّوْجُ فَلَيْسَ بِتَابِعٍ لِلْمَرْأَةِ فَلَا يَكُونُ تَزْوُجُهُ إِيَّاهَا دَلِيلًا الرِّضَا بِالْمَقَامِ فِي دَارِنَا فَلَا يَصِيرُ ذِمِّيًّا. This very meaning is reaffirmed by al-Sarakhsī (n.d, vol.10, p.84) who says: “He [the *musta'min*] by this marriage [the *dhimmiyya*] did not [show his] satisfaction to stay in our *dār* perpetually” فهو بالنكاح لم يصير راضيا بالمقام في دارنا على التأييد. Moreover, al-Mirghinānī (n.d, vol.2, p.154) gives the same explanation in different wording: “The *musta'min* can divorce her [the *dhimmiyya*] and go back to his country, thus he is not committed to stay [in *dār al-Islam*]” لأنه يمكنه أن يطلقها فيرجع إلى بلده فلم يكن ملتزما بالمقام.

Conclusion

Following the above discussion it is quite apparent that the Muslim scholars in principle give the *musta'min* the right to reside permanently in the Islamic state. Although the term ‘naturalisation’ was not used by those scholars, the essence of the principle was addressed in practical terms.

The other important issue evident from this discussion is that the Muslim scholars were very keen to give the *musta'min* the right to become a *dhimmī*, i.e. a citizen. They were satisfied with any sort of evidence that indicates the sincerity of the *musta'min* to assimilate to Islamic society and become a citizen, either by purchasing land, agreeing to stay a period of time in the Islamic state or getting married of a *dhimmī* or a Muslim.

This keenness and flexibility of the Islamic legal scholars to grant the *musta'min* the right to stay permanently and become a *dhimmī* coincides with the spirit of Article 34 which calls upon the contracting state to facilitate the assimilation and naturalization of refugees.

V. Final Conclusions

The purpose of this study is to clarify the position of the Islamic tradition with regard to refugees and to establish whether this tradition has any views, principles, rules or regulations concerning refugee status.

The study is composed of four chapters. The first three deal primarily with the Islamic tradition in terms of the protection it offers to those who seek it. The first chapter explains the concept of *jīwār* (protection) in the Arabs' life in the *jāhiliyya*, before the advent of Islam. The second chapter traces the concept of *jīwār* after the advent of Islam in Mecca, then examines the migrations to Abyssinia, the journey to al-Ṭā'f and the migration to Medina. The third chapter deals mainly with *amān* (safe conduct) in the Islamic tradition. It also defines several relevant terms, such as *dār al-ḥarb*, *dār al-Islam*, *mustajir*, *muhājir*, *musta'min* and *dhimmī*, in order to put the concept of *amān* in context. Finally, the fourth chapter comprises a comparison between the Islamic tradition relating to the laws of *amān* and the 1951 Geneva Convention relating to the status of refugees, in an attempt to identify the similarities and differences, if any, between the two.

The conclusion of this study is divided into two main parts. The first relates to the first three chapters concerning the Islamic tradition and the principle of protection. The second discusses the comparison carried out between the Islamic tradition relating to the laws of *amān* and the 1951 Geneva Convention relating to the status of refugees.

Main conclusions of the first three chapters: The Islamic tradition and the principle of protection

It is now apparent that the custom of *jīwār* was in effect the recognised customary law of refugee status for the Arabs in the *jāhiliyya*. With it were associated clear rights and duties both for the person or tribe who grants *jīwār* and for the person who receives it. While no written text detailed this law, it is clear that each party knew their rights and responsibilities and, on the whole, abided by them.

The reasons requiring a person to seek *jīwār* in the *jāhiliyya* were various. In general, requesting *jīwār* was not a complicated process. It was so natural and deeply rooted in

society and custom that few would hesitate to seek *jiwār* for any reason deemed appropriate in order to preserve life, property, honour and so on.

The issue of *jiwār* held an important and far reaching position in the customs of the Arabs before Islam. This was no doubt partially due to the direct correlation between protecting the *mustajīr* and preserving one's honour, maintaining one's fame and elevating one's status in the tribal society. In addition, granting protection was directly relevant to the status of the tribe in a very unforgiving environment. It was a demonstration of power and a flexing of muscles before other tribes. The level of protection a tribe could provide for the vulnerable was an indication of its ability to protect itself and its members. Moreover, the religious reasons for granting *jiwār* were manifest in the practice. These were evident not only in the preservation of the sacredness of the Ka'ba and the refugees who come to seek asylum there, but in the building of tents and naming them Ka'ba in order to emulate that sacred status and to make it available to the *mustajīr*.

In this context, poetry played a tremendous role in strengthening and maintaining this custom. It was the strongest medium of communication and for spreading news among the tribes. Through poetry praise for granting *jiwār* and ridicule for infringing its rules rapidly transmitted all over the Peninsula. Desire for such public praise and fear of public humiliation were thus amongst the strongest motivations for granting *jiwār*:

However, after the advent of Islam in Mecca the custom of *jiwār* not only continued to exist but was maintained and affirmed by the Muslims through the acts of the Prophet and his companions.

Owing to the grave threats and challenges experienced by the new religion and its followers at the hands of the disbelievers, Muslims were in desperate need of protection. Heavenly protection surrounded the Prophet from his childhood until he became the messenger of God. In Mecca, the Muslims were persecuted for their beliefs and invoked the custom of *jiwār* to assure themselves of temporary protection. The Prophet himself and the elite of his companions drew on it sometimes to enjoy a degree of protection.

The vulnerability of the Prophet, the fact that he was an orphan and his constant need of protection at different stages in his life ensured that the values of mercy, protection and assistance for the needy were deeply entrenched in him. Having said that, it could be rightly concluded that the Prophet was the first asylum seeker in Islam²¹⁹. Certainly, the difficult experiences and the persecution he and other Muslims endured helped them to understand the needs of the destitute, the weak and those in need of protection.

Moreover, the Prophet's permission to the Muslims to migrate to Abyssinia was the first Islamic legislation of immigration to non-Muslim countries when oppression and injustice occurred. However, it was clear that migration should not compromise the faith and if a contradiction did exist between them, then faith took priority. On the other hand, Muslims should respect their obligations and adhere to the conditions of refuge; otherwise they should end the contract of refuge without treason.

The migration to Abyssinia was also the first example of a woman migrating in search of justice and a place to worship God without fear of oppression. This research has not revealed a single example in the life of Arabs before Islam in which a woman migrated to seek *jiwār* from another tribe.

In terms of the migration of the Prophet and his companions to Medina, this was an event of major significance that altered the course of history. It was the clearest example of refuge, with the Prophet and his companions migrating en masse from Mecca to Medina in search of the protection and care of its inhabitants.

This was also the first time in history that Muslims would have a state in which they could practice their religion without fear, oppression or persecution. The Prophet was able to demolish many of the tribal customs, tradition and relations, and form instead a very strong and coherent society which was later capable of vanquishing empires.

The hospitality of the people of Medina towards the Meccan migrants was a rare historical occurrence, notwithstanding the opposition of some factions there. Additionally, the integration of the migrants into Medinan society was remarkably

²¹⁹ A quick survey of the stories of the prophets reveals that most of them had to experience exile at a certain stage of their lives. They were forced to migrate looking for protection and asylum, including, for example, the Prophets Ibrāhīm, Mūsa, Yūnus and others.

smooth and the fact that the migrants assumed power and leadership of the host society without oppression or tyranny was also unprecedented. This was made possible by the fact that the Islamic faith dissolved *jāhili* relations and shaped new relationships that did not differentiate between the migrants and the indigenous peoples.

Due to its history and its constituents, this new society felt the pain of the oppressed and the weak. It was natural then that the Prophet should endorse the principle of *jīwār* and even more for it to become a Heavenly obligation on Muslims through the Prophetic practice and verses of Qur^{ān}.

Briefly, from such migrations it could be concluded that the Islamic tradition rejects oppression and tyranny and calls for freedom. If this freedom was not available in a particular place, then the oppressed should migrate to a safer place. In another respect, this legislation also imposes certain obligations upon the Islamic state. The Muslims tasted torment and understood what oppression meant. As such, their state should not only be free of oppression, suppression and tyranny, but should also be ready to do whatever was in its power to protect the weak and oppressed and provide a safe haven for those seeking justice.

Furthermore, the term *hijra*, migration, in the Islamic tradition goes beyond the apparent legal circumstances to a much wider and more complicated context. It contains a philosophy that deals with emigration from a new perspective, combining heavenly and earthly needs. The Islamic tradition portrays human life in this world through many verses and *hadīths* as a journey or emigration from Paradise to earth and then to the hereafter. In other words, all humans on earth are in this sense migrants waiting to return to their homes.

Besides, the Islamic tradition deals with the trials of exile and attempts to ease them in two ways, firstly by considering exile a kind of worship and sacrifice in the cause of God and secondly by making it an obligation upon Muslims to welcome emigrants and be generous in their hospitality towards them.

Within this philosophy there is no holiness attached to a place simply because it is the place of one's birth. It gives first priority to religion and the freedom to practice it. It

even makes the rejection of emigration a cause for blame and punishment in the hereafter.

Nonetheless, the term *muhājir*, emigrant, is used in the Qur^{ān} exclusively to describe Muslim emigrants usually with positive connotations, while the term *mustajir* was used for both Muslims and non-Muslims alike.

In relation to the definitions of *dār al-Islam* and *dār al-kufr*, scholars throughout Islamic history have differed. Generally, they were influenced by the environment in which they lived and shaped their definition accordingly. The categorisation of the world into two or three *dārs* in fact requires further scholarly attention. This is particularly the case since neither the Prophet nor the Qur^{ān} categorize the world as such. Moreover, the world at the time of the Prophet differed significantly from the contemporary world. Modern times have witnessed the rise of national states within recognised borders, international law and universal conventions as well as the disappearance of the Islamic Caliphate. Yet it can be concluded that the definition of *dār al-Islam* in modern times should be based on the implementation of the main Islamic principles and on the rights that Muslims enjoy like freedom to practice their religion and express their beliefs and opinions.

Regarding *dhimma*, there is a clear break between the early Islamic tradition and contemporary Muslim scholars. While some early scholars occasionally dealt with the *dhimmīs* as 'second class citizens', denying them sensitive positions in the state because they were a conquered people, modern scholars have made serious attempts to identify the concept of citizenship in the light of national states that gives the non-Muslim equal rights with Muslims in Islamic states.

However, the vagueness and confusion of some modern scholars on this issue is due to their attempts to accommodate and apply the concepts of Caliphate rulings regarding the *dhimmīs* to non-Muslim residents in national states today. In fact, many of the historical circumstances and concepts have changed and modern scholars should revisit the concept of *dhimma* to reinterpret it in light of the principles of equal citizenship in modern national states.

The verse (9:6) forms the clearest Qur^ānic evidence for legalising *amān*, the principle of safe conduct. Interpretation of the verse was subject to change over time. Some scholars were exceptionally restrictive and rigid in their interpretation while others were flexible in defining the *mustajir* and by extension the *musta'min*.

From the painstaking discussions between scholars about this verse, it can be concluded that the interpretation of verse (9:6) should be as follows: If a non-Muslim, whether he is a follower of another religion or without religion at all, seeks the protection of the Muslims they should grant him or her protection. The reasons that may drive such a person to seek protection in *dār al-Islam* are of no relevance in this context, since the verse itself does not specify any reason for that.

Based on that, the majority of scholars who founded their interpretation on the assumption that the disbeliever comes to *dār al-Islam* to hear the word of God are not accurate as this interpretation is in contradiction with the grammatical and linguistic rules of the Arabic language.

Also, the verse obliges Muslims to give refuge to the non-Muslim who asks for it, while the Islamic society has a duty and a message of mercy towards other peoples, as stated in many verses of the Qur^ān. The greatest manifestation of this mercy is the offering of shelter and protection to those fleeing oppression and persecution.

More notably, the structure of the verse obliges Muslims to be hasty in granting refuge to the asylum seekers and at the same time to be slow and careful in ending this contract of refugee status determination. This sense of speed in granting protection is crucially important in the case of destitute, distressed and fearful asylum seekers who flee their homes in search of safety.

Obviously the state has the right to organize the refuge process without harming public interests or violating the right of others to look for a refuge in the Islamic state.

The final crucial point here is that the verse makes it obligatory on individual Muslims to give refuge to the seeker as an Islamic duty, while according to the modern refugee law asylum is a right of the State and not of the individual.

Conclusion of the fourth chapter: A comparison between the Islamic tradition relating to the laws of *amān* and the 1951 Geneva Convention

The comparison here between the Islamic tradition and the Geneva Convention was based on the fact that the Islamic tradition offered a system of protection to those who came into its land seeking protection, through the laws of *amān* (safe conduct) which covers numerous aspects of the 1951 Convention. Although the term refugee had not been used to describe the protection seeker, the spirit of the term, its connotations and implications were present in dealing with them.

Definition (Article 1)

Based on this study no exact definition of the term 'refugee' exists in the Islamic tradition. However, the Islamic tradition has several terms related to the term 'refugee' at different levels. They are *muhājir*, *mustajir* and *musta'min*. The common factor between the three terms is need for protection. However, the closest of them to the modern term 'refugee' is the term '*musta'min*' which is a loose term that includes all foreigners who enter the Islamic state looking for protection, whether they are refugees or not, without specifying the reason for that. However, after entering *dār al-Islam* the status of each one would differ. The *muhājir* who is a Muslim would enjoy permanent protection like other citizens, while the *mustajir* would enjoy temporary protection. In regard to the *musta'min*, he would also enjoy temporary protection unless he becomes a *dhimmī* in which case he would enjoy permanent protection like the Muslim.

Nonetheless, in our times and after the advent of the national states the situation has become different. All those who come seeking protection are called refugees and their status is determined based on the laws of the national state. Theoretically at least they enjoy temporary protection and if they stay longer they are entitled to enjoy the nationality of the state.

Also, it should be said that the term *musta'min*, which was applied to non-Muslims in the Islamic tradition, could be applied by analogy to Muslims nowadays. So, it could be concluded that the term refugee in the Islamic tradition is "any person (Muslim or non-Muslim) who enters the Islamic state looking for refuge, regardless of the reasons that

drove him to do that, be it oppression, fear, natural disaster or any other unfortunate circumstances". In this sense this definition is wider than the definition of the Geneva Convention, as the earlier does not put any restriction or limitation on the reasons that may drive someone to seek asylum.

Demonstrating that Muslims and non-Muslims have equal status in terms of refuge, Muslim scholars in general affirm the need to provide the *musta'min* with protection. As also stated also by Zaydān (1982, p.) my opinion here is that the life of *musta'min* is equal to the life of the *dhimmi* and both of them are equal to the Muslim's. The essence of the *amān* is safety and anything that diminishes this safety should be rejected. Additionally, the verses of the Qur'ān do not differentiate between humans when it comes to homicide. Thus, the value of life is the same whether it is that of a Muslim, a *dhimmi* or a *musta'min* and that life should not be taken without just cause.

General obligations (Article 2)

The correspondence between the Geneva Convention and the opinion of Muslim scholars in relation to the duties of the refugee/*musta'min* towards the host state is quite remarkable. Both assert the need to adhere to the general laws applied in the host state and the measures taken to secure public safety. However, the Muslim scholars stress the need for refugees/*musta'min* to respect the faith of the majority in the Islamic state and to act in a way that shows respect. Unlike the Geneva Convention, Muslim scholars allow the non-Muslim refugee to be exempted from certain rules due to his disbelief, especially the rules which relate to the Islamic faith and its obligations. So, he has the right to keep his identity, customs, mode of dress and even non-Islamic behaviours, such as drinking alcohol or eating pork, as long as he does not harm the Muslims or disturb public order.

In terms of the punishment, the Convention gives no exemptions, yet it states that the crimes committed by the refugee should not invalidate his status. Muslim scholars also differentiate between punishments and take into consideration the faith of the *musta'min*. Regarding taxation and financial dealings, these are left for scholars to decide on according to contemporary circumstances, as there is nothing permanent in this regard. It is, as Ibn 'Abd al-Barr said, subject to the international law and what the states can agree on.

Non-Discrimination (Article 3)

The Islamic tradition in principle rejects any sort of discrimination based on race or colour and makes such discrimination a sign of backwardness and reversal to the *jāhiliyya*. A fundamental principle in Islam is the equality of humanity. There is no superiority for one race over another. The measurement for superiority is excellence in serving the good and acting positively, regardless of race, lineage or colour. From these principles, which are without restriction or limitation, we can generalise and extend them to all refugees. In regard to religion, the Islamic tradition gave Muslim migrants some sort of advanced status over non-Muslims in terms of assimilation into Muslim society and membership of it. This was due to the nature of the Caliphate state, established as it was on religion with different duties and responsibilities towards Muslims. However, the favourable treatment of Muslim migrants did not mean rejecting non-Muslims refugees. Practically it meant that Muslim refugees did not fall into the same category because of their faith and their theoretical relation with the Caliphate state.

Nevertheless, with the disappearance of the central Caliphate state and the advent of modern national states, the whole concept of support and loyalty should be revised. In this context, the Islamic tradition provides grounds to meet Article 3 of the Convention in terms of colour and country of origin. I believe it should be extended to include no discrimination based on religion, country of origin or colour.

Religion (Article 4)

Freedom of religion in the Islamic tradition is ingrained in the Qur^{ān} and the teachings of the Prophet. This freedom was not just theoretical but practical. This principle is a right for non-Muslims whether they are residents there or came as refugees to the Islamic state. Without doubt, the worst harm one could do would be to force them to change their faith or to prevent them from practicing what they believe in. Moreover, the refugee/*musta^ʿmin* in the Islamic state is not only free to believe in the religion he prefers, but also has the right to practise it in the way he wants. This obviously requires a place to practise the faith, so they have the right to build their own places of worship. Also, they have the right to live according to their beliefs with respect to marriage, food,

dress and any other personal affairs, except a small number of very minor things that affect the wider Muslim society. Based on this, it could safely be said that the Islamic tradition agrees with Article 4 of the Geneva Convention.

Personal status (Article 12)

The Islamic tradition respects the personal status of the *musta'min* as governed by the laws of his domicile, including rights previously acquired. With regard to the status of marriage in particular, non-Muslim refugees have the right to adhere to their beliefs and Muslims are required to respect that.

Although the Islamic tradition provides the refugee with a great deal of liberty to pursue his personal affairs, particular rights in certain cases must be in agreement with Islamic principles, otherwise they could be rejected. This understanding conforms to the condition put by the Convention on the nature of personal issues and their legality in the host country. A clear and relevant example of this could be same sex marriages. This right in some countries has been legalised, while in others it is rejected and remains the subject of debate. In the Islamic tradition this right is not recognised, since it is prohibited by the Qur^{ān} and the Prophetic custom. Thus, the refugee may not enjoy this right as it is at odds with one of the fundamental principles of Islam concerning the construction of the family in the Islamic society. This is simply an example and scholars may identify other rules and conditions refugees have to meet to preserve the identity of the Islamic state, keep the public order and secure the national interests. Briefly, the Islamic tradition of jurisprudence provides sufficient grounds to argue that the principles of Article 12 can be accepted subject to certain conditions. These conditions could be verified by the scholars of law according to their circumstances.

Movable and immovable property (Article 13)

The Islamic tradition has shown profound care for the properties of the *musta'min*. The reason for that might be owed to the Islamic principles of fulfilling promises and justice, on one hand. And on the other hand it could be to encourage the traders to trade in *dār al-Islam*. Also, the commercial dealings with the *musta'min* in the past left its print on

the judgement of the scholars regarding the protection of the refugee's properties. The Islamic tradition agrees fully with Article 13 and 14 of the Geneva Convention.

Right of association (Article 15)

As a matter of principle the Islamic tradition urges people to collaborate in doing good deeds, both individually and collectively. The form or the shape of the means is not as important as serving a good cause. So, it could be through establishing an association or by any other means. Refugees are not excluded from this general principle; hence there is no objection to them establishing new associations to protect their rights in the field of work, sport, culture, or to preserve their identity or for any other reason. They also have the right to join existing associations for the same purposes.

In regard to political activities and the joining of political parties, it might be concluded that the Islamic principles do not object to this either. The door is left open for legal experts to set up the frame for organizing such participation. Theoretically, there is no objection to establish or join any political association as long as it respects the general Islamic fundamentals.

Therefore, it could be said that the Islamic tradition agrees with Article 13 of the Geneva Convention in terms of the right of the refugee to join associations. Regarding the nature of the association and whether it is political or non-political the Convention does not state the right of the refugee to join or form political associations, which is the same in the Islamic tradition.

Access to courts (Article 16)

The Islamic tradition affirms the principles of justice in the clearest and most robust way, through the verses of the Qur^{ān} and the *ḥadīths* of the Prophet. Justice should encompass Muslims and non-Muslims alike. By virtue of this principle, it allows the *musta'min* access to court to determine his refugee status and claim his rights. In addition, the historical discussions of scholars about this point show clearly that the issues relating to the circumstances of the *musta'min*'s entrance should be solved by the court. In other words, the essence of Article 14 was practically implemented although

phrasing that in a legal format was not put as straightforwardly as the practise itself. In modern terms, we can say that the *musta'min* has the right to go to the relevant court in the Islamic state to establish his legal status. By default, the Islamic state should fund the legal process and undertake all the expenses arising from it. In light of this it can be safely concluded that Article 14 is in conformity with the Islamic tradition and its principles of justice.

Gainful employment (Articles 17, 18 & 19)

The Islamic tradition in principle and practice has given the refugee a wide range of freedoms to engage in work in the Islamic state. He has the right to work in merchandise, financial activities, agriculture, to be an employee or an employer or even self-employed. Naturally, the *musta'min* in his work in the Islamic state has to adhere to the general rules governing work there. There are, however, very few fields the *musta'min* cannot work in. These restrictions should be limited to the venues that are sensitive and relate to the national security, the strategic interest of the public or any other field that the Islamic state genuinely deems to be of a special nature that may affect the Muslims public interest.

Based on that, it is clear that there is a large measure of agreement between Article 17 and the Islamic position on the same issue. Moreover, in light of these findings, the tradition of Islamic jurisprudence could also be in agreement with Articles 18 and 19 of the Convention, because of the very close nature of these two Articles with the Article discussed above.

Also, the *musta'min* has the right to establish partnerships and be involved in various contracts either with Muslims, *dhimmi's* or even with other *musta'mins*.

Regarding Article 19, the Islamic tradition also agrees with it since it is a well-established principle in Islam to employ the best qualified and most honest person in the right position.

Welfare (Articles 20, 21, 22, 23 & 24)

The principle of helping the needy is enshrined in Islamic teaching in the Qur^oan and the *hadith*. The help mentioned in these sources is not constrained or restricted to a

certain field. Hence, it could include any kind of help, like social security, housing or any other factor to guarantee a decent life, free from humiliation and disrespect.

Scholars who opposed helping the *musta'min* did not mean the needy and vulnerable refugees; rather they meant the fighters who temporarily reside in the Islamic state, then return to *dār al-ḥarb*. The reason for this prohibition is that the scholars feared this help may strengthen the enemy camp and encourage them to continue fighting the Muslims. This scenario has not materialized and does not apply to present day refugees. Despite this understanding, we found scholars allowing the help to the *ḥarbī* in *dār al-ḥarb*, providing that it will not harm the Muslims. So, by default, helping them in *dār al-Islam* is more appropriate.

The other issue to be highlighted here is that owing to its nature and identity the Islamic state has certain peculiarities regarding its financial system. *Zakāt* should be collected from Muslims and spent on Muslims. The non-Muslim residents of the Islamic state could enjoy financial help from other sources, like *ṣadaqa*. The modern Islamic states have changed dramatically from the traditional Caliphate with regard to the financial resources, but the responsibility remains the same and Islamic states are still obliged by these principles to take care of the refugee financially. So, in principle, there is sufficient evidence to suggest that the tradition of Islamic jurisprudence is in keeping with Articles 20, 21, 22, 23, 24 of the Geneva Convention.

Freedom of movement (Articles 26, 27, 28 & 29)

The *musta'min* in principle has the right to stay in the Islamic state until the need that caused him to flee has been removed. After being lawfully recognized as a *musta'min* by the state he has the right to travel inside and outside the state, providing that he still wants to come back. In certain cases, where the *musta'min* goes back to his homeland to live permanently or to fight or to harm the Islamic state, he loses his contract of *amān*.

In regard to restrictions on his movement the scholars have given the *musta'min* a great deal of liberty to move outside and inside the state except Mecca, as the majority of scholars rule. Therefore, it could be said that the Islamic tradition in regard to the freedom of movement granted to refugees within the state's territories is largely in

keeping with Article 26 of the Geneva Convention, except in regard to Mecca and Medina.

Finally, this freedom of movement granted by the Muslim scholars might have certain implications for the Islamic state in order to realise this right and to make it practicable, for example issuing travel documents for refugees to enable them to travel. Otherwise, this freedom would be hypothetical. In this vein, it could be concluded that the Islamic tradition is in conformity with Article 27, 28 and 29 of the Convention.

Refugees unlawfully in the country of refuge (Article 31)

It is of significance here that the environment and circumstances on which the Muslim scholars based their judgments are different than the actual situation today. Despite the state of war between *dār al-Islam* and *dār al-ḥarb*, and the dangerous probability of the *ḥarbī* being a spy against the Muslims, we still find that the majority of the scholars tended to grant the illegal *musta'min* the right to stay in *dār al-Islam*. In modern times this could mean that if refugees flee their homes looking for safety in the Islamic state, they have to be granted the right to stay there even if they enter illegally.

The principle of examining the genuineness of the refugee's claim does not contradict the above principle. Briefly, it could be concluded that the Islamic tradition provides common grounds with Article 31 of the Geneva Convention.

Expulsion (Article 32)

There are similarities between the Islamic tradition and Article 32 of the Geneva Convention. Firstly, both agree that the refugee is expelled only on the grounds of being a threat to the national security and the public interest. Secondly, both agree that even in these rare cases the refugee should not be sent to a place where he might be subject to persecution. Instead he must be sent to a place where he feels he is safe.

Although there are no citations in the Islamic tradition about the fact that *musta'min* should be granted access to a court hearing in case his *amān* is terminated, it still

can be said that the general Islamic principles of justice and equity will serve the refugee in providing him with a fair hearing as this is a basic norm of fairness which the Islamic legal system should give to the refugee. Moreover, it was proved that the *musta'min* has the right to access courts in the Islamic state to prove his legal status, thus that right can be applied here to defend his stay in the Islamic state.

Lastly, determining what is to be considered a threat to national security and public interest must be left to governmental authorities and courts of law, as these matters vary from one time to another.

Prohibition of expulsion or return "*refoulement*" (Article 33)

The Islamic state is obliged by the verse (9:6) to grant their protection to the non-Muslims if they ask for it. When ending the refugee status, his safety should not be jeopardised or compromised in any way, according to the verse. Making him attain his place of safety means that the Islamic state should bear the costs and take all necessary measures to secure his journey to the safe place, whether it is his original country or anywhere else. The verse did not specify the place but described it as a place of safety. The Prophetic custom also shows that the refugee should not be sent back to where he might be harmed. Regarding the terms of the *hdaybiya* agreement it was temporary and was only in special circumstances. The general rule after that is that the refugee should not be returned to where he might be harmed. This tradition matches the spirit and the text of Article 33 of the Geneva Convention about the principle of *non-refoulement*.

Naturalization (Article 34)

The Muslim scholars in principle give the *musta'min* the right to reside permanently in the Islamic state. Although the term 'naturalisation' was not used by those scholars, the essence of the principle was dealt with in practical terms.

The other important matter is that the Muslim scholars were very keen to give the *musta'min* the right to become a *dhimmi*, i.e. a citizen. They were satisfied with any sort of evidence that indicated the sincere wish of the *musta'min* to assimilate to Islamic

society and become a citizen, either by purchasing land, agreeing to stay for a period in the Islamic state or marrying a *dhimmi* or Muslim.

The eagerness and flexibility of the Islamic legal scholars to grant the *musta'min* the right to remain permanently and become a *dhimmi* corresponds to the spirit of Article 34 which calls upon the contracting state to facilitate the assimilation and naturalization of refugees.

Recommendations

Based on the findings of the study it could be said safely that the Islamic tradition concerning the *musta'min* provides very strong grounds to claim that the Muslims in their history welcomed the non-Muslim aliens in their countries and provided them with the needed protection. By analogy this tradition could be interpreted into contemporary laws to apply to the refugee status in our modern times. However, when deducing such laws the difference between the Caliphate and the national states should be noted and present in minds of the scholars and the legal experts, since the rulings, the circumstances and the nature of the two are different. Because of this difference the issue of *dhimma* should be revisited by the scholars in order to give them full citizenship in terms of rights and duties like their Muslim fellows in the modern national Islamic states.

Most importantly, the Islamic tradition and the Geneva Convention have very close similarities. The suggestion made by Bognetti and quoted in Wansbrough (1971, p.34) that "European medieval safe conduct must have owed a good deal to Islamic law" raises a very interesting point here. If it were to be proven that the European medieval safe conduct was the ancestor of the 1951 Geneva Convention then it might be claimed that the Islamic tradition exerted strong influence over the present international law concerning refugees and that the 1951 Geneva Convention owes a great deal to the Islamic tradition. Obviously this requires further study, which I recommend, to examine the relationship between medieval safe conduct and international law concerning refugees, especially the 1951 Geneva Convention, to establish to what degree the Islamic tradition influenced both.

Armed with these findings my recommendation to Arab and Islamic governments is to endorse the 1951 Geneva Convention relating to the status of refugees and if necessary make reservations concerning certain Articles taking account of the internal circumstances of each state. I know that many of Muslim states do have the judiciaries and the right institutions to adopt this judgement; however, this should not be an excuse, since these states have to undergo a serious reform in many areas, and certainly signing the Convention and dealing with the issue of refugees in the right way is one of the main and important issues.

Thus, I disagree with those who call for drafting an Arab or Islamic Convention relating to refugees, like Elmadmad. I believe the Geneva Convention is fully in tune with the Islamic tradition and the Arab and Islamic states should sign it.

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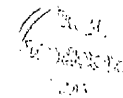
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