THE MUSLIM CONCEPTION OF INTERNATIONAL LAW
AND THE WESTERN APPROACH

by

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A B S T R A C T

This thesis deals with the general outlook of Islam on international law compared with the Western approach, as formerly represented in Christian doctrines and then in modern international law. The study falls into three parts. Part I tackles a historical background in which we outline the international status of Arabia on the advent of Islam, as a groundwork for better understanding of the Islamic theory. Then we briefly trace the expansion of Islam to elucidate the fact that, historically, the intellectual conquest of Islam was not inseparably the offshot of its military conquest. In a third chapter we try to review the development of the Islamic theory, both in practice and in dogmas, a review which points out the dynamic character of Islamic conceptions to answer the needs of the time. Part I, in fact, clarifies that Islamic theory is rather tolerant and comprehensive as compared with corresponding Christian doctrines.

Part II analyses the basis of obligation in Muslim international law, which to us, is a sui generis idea of natural law. It also treats the sources and

methods of interpretation, in which respect the differences between Islam and Western theory are due to the religious background which colours the Islamic theory.

Part III reviews, in the first chapter, the Muslim classical doctrine. In the second chapter we consider the said doctrine with a view to explaining that it was the product of particular circumstances which are no more valid. The third chapter presents our view about a new interpretation in which we repudiate the classical division of the world into dar al-Islam and dar al-harb together with its main consequences. In fact, our view does not differ basically from the modern standards except in some respects that could contribute to the furtherance of the law of peace in particular and to international law in general.

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P R E F A C E

Rigidity of classical doctrine

"Muslim International Law" is an expression which may sound unfamiliar to Western thought since some of the European authoratitive writers disregard the very existence of this subject.¹ This is not surprising because the contribution of modern writers to the interpretation of Muslim international law is still remarkably deficient. Even the modern writers who embraced the subject at some length accepted Muslim classical doctrine as the standard orthodox explanation for the teaching of Islam--a rigid position--which is due to a general tendency to believe that the right of ijtihad, i.e. independent reasoning or judicial speculation² has been closed to the Sunnite community.³ That tendency

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1. Henry Wheaton, Charles G. Fenwick and Oppenheim could be given as examples in this respect. The three writers, in their dealing with the history of international law, did not refer at all to Muslim international law.
Arthur Nussbaum maintains that "the Islamic law on international relations is scanty and vague, except for some aspects of war". Nussbaum, Arthur - A Concise History of the Law of Nations, New York, 1963, p.4.
 2. The term means literally "exertion". See Hughes, Thomas Patrick - A Dictionary of Islam, London 1935, p.197.
 3. The Shi'ites still have their learned men, who act the altar ego of the hidden imam and have the right to reflect his views. We will briefly explain, in the following chapters, what is meant by the Sunnis and the Shi'ites.

has prompted a belief that radical differences exist between Muslim international law and the modern law of nations.

In fact the earliest Muslim jurist-theologians, broadly speaking, refused to recognize peaceful co-existence between Muslim and non-Muslim states and looked upon jihad¹ as the Islamic instrument to get dar al-harb² (non-Muslim territory) into the orbit of dar al-Islam (Muslim territory). This theory, inevitably, reduces Muslim international law to an exclusive system since international law, if it is to have any claim to universal acceptance, must adopt the principle of mutual independence and legal equality among nations. If Muslim and modern international law failed to coalesce in that respect, then, since Muslim civilization - under which Muslim international law had thrived - is now lagging behind, either Muslim international law will perish or else it will act as a barrier dividing Islamic from all other states. This conclusion, we believe, betrays one

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1. Jihad literally means "Perseverance" but some writers debatably, as we shall see, confine the term to "holy war".
 2. Dar al-harb literally means the countries with which Muslims are at war. This definition will be dealt with later.

of the fundamental features of Islam, that is to say its universality and permanent validity. Furthermore, it is incompatible with the present intimate integration of Muslim countries in the modern community of nations as shown by their membership of the United Nations and its agencies. Such a paradoxical conjecture, undoubtedly, prompts a genuine and constructive effort to reconsider the classical interpretation of Muslim international law as regards its capacity to cope with international life as it is nowadays,¹ a speculation which modern writers fail to make. To fill in a gap relating to one of the most outstanding legal systems in the history of human thought is the purpose of this study.

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1. "La religion est la vie. Si la vie est progressive, comment la religion ne le serait-elle pas. Pour être conséquents, les défenseurs d'une orthodoxie immuable devraient nier même le progrès intellectuel et physique. Les plus aveugles et les plus obstinés poussant la logique jusqu'à ce point, ils ne s'aperçoivent pas que la logique porte malheur aux mauvaises causes; ils ne voient pas que le jour où l'humanité aura à choisir entre une Eglise qui prétend immobiliser la société avec tous ses abus et toutes ses misères, et une doctrine qui enseigne que la vie implique le mouvement, le progrès, et l'amélioration continue de la destinée humaine, son choix ne sera pas douteux. De fait, ce choix est déjà fait."

Quoted from Laurent, F.-Etudes sur l'Histoire de l'Humanité, (Histoire du Droit des Gens). 2nd ed., Bruxelles 1861, Vol. p.ix.

Adaptability of Islam.

It is natural that one's attitude towards Muslim international law should reflect one's wider attitude towards Islam as a whole. Islam is said by some to be a stagnant narrow religion and adverse to progressive development. For Watt,¹ such an allegation could be explained by the fact that "for centuries Islam was the great enemy of Christendom, since Christendom was not in direct contact with any other organised states comparable in power to the Muslims. The Byzantine Empire, after losing some of its best provinces to the Arabs, was being attacked in Asia Minor while Western Europe was threatened through Spain and Sicily. Before the Crusades focused attention on the expulsion of the Saracens from the Holy Land, medieval Europe was building up a conception of (the great enemy). At one point Muhammad was transferred into Mahound, the prince of darkness. By the twelfth century the ideas about Islam and Muslims current in the crusading armies were such travesties that they had a bad

1. Watt, Montgomery W - Muhammad, Prophet and Statesman, Oxford paperbacks 1961, p. 231.

effect on morale." This denigration of Islam¹ by some writers has often been opposed by a romantic idealization of Islam by others. Both these approaches suffer from being guided by propagandist rather than by objective considerations. We trust that a true scholarly study would avoid prejudice if it were to produce accurate information. On that ground the foregoing charge seems very questionable since it is sharply in conflict with the judgement of history which demonstrates the flexibility

1. Many modern writers qualify Muslim law as Muhammadan Law. This objectionable definition, which connects Islam with Muhammad and not with God discloses either a misinformed or a preconceived idea about Islam. "The religion of Jesus bears the name of Christianity, derived from the designation of Christ, that of Moses and of Budha are known by the respective names of their teachers. The Religion of Mohammad alone has a distinctive appellation. It is Islam. In order to form a just appreciation of the religion of Mohammad it is necessary to understand aright the true significance of the word Islam. Salam (salama), in its primary sense, to be tranquil, at rest, to have done one's duty, to have paid up, to be at perfect peace; in its secondary sense, to surrender oneself to Him with whom peace is made. The noun derived from it means peace, safety, salvation. The word does not imply, as is commonly supposed, absolute submission to God's will, but means on the contrary, striving after righteousness". Ameer Ali, Syed - The Spirit of Islam, London, 1946, pp.137-8. Ockley, for one, in the very beginning of his "History of the Saracens" qualified Muhammad as a great imposter, a definition adopted by Prideaux in his "Vie de Mahomet", and also by many other writers, though they may differ in phraseology.

and adaptability of Islam, both as a religion and as a State, throughout the ages. Accommodating itself to the needs of the time, Islam could never come into conflict with civilization, if by civilization we mean spiritual development, intellectual growth and material progress.¹ It is in line with this attitude that the present study is oriented, as it advocates the suitability of the Islamic institutions of international law for the permanent conduct of inter-State relations.

Objectives of Muslim international law²

Needless to say the task of law in a society is mainly to meet its needs and remedy its deficiencies.³ Especially is that so when law is revealed by divine power, we presume that it should mostly be predestined to redress society. To perform its function appropriately, the revealed law must select a society where certain

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1. Sukhash, Khuda S. - Contribution to the History of Islamic Civilization, 1st ed. Calcutta, 1930, vol. II, p. 41.
 2. The theological background of Muslim law will be discussed hereinafter.
 3. For Lauterpacht "the function of law is to regulate the conduct of men by reference to rules whose formal - as distinct from the historical - source of validity lies in the last resort in a precept imposed from outside." See Lauterpacht, H. - The Function of Law in the International Society, Oxford, 1933, p.33.

deficiencies exist in regard to which the application of the divine process may convincingly illustrate the reformative role of the legal system. Based on that assumption and taking into consideration that Muslim law is originally a divine law, we have to consider Arabia, where Islam initially emerged, as an ideal testing ground for trying out the Islamic technique of adjusting society.¹ Thus, the state of Arab society, at the time when Islam was revealed by God to the prophet Muhammad, should be construed as intuitively symbolising the intolerable failure of human society; and the methods that Islam adopted are to be perceived as the heavenly rationalization for those very defects.² Therefore, the way of life that prevailed in pre-Islamic Arabia should be regarded as a preliminary background against which we may come to understand the objectives of Islam in so far as our earthly life is concerned. Since the present study is exclusively interested in Muslim international law, we deem it

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1. "In Islamic legal theory the law preceded the society and is considered to be as eternal as God. Tradition has it that God revealed himself through a divine law, communicated to man by His Prophets"... Quoted from Shafi'is Risala, translated with an introduction by Majid Khadduri - The John Hopkins Press, Baltimore 1961 p. vii. This idea will be argued henceforth.
 2. We do not intend to say that the rule of Islam was uniquely reformative. In fact Islam approved the continuation of some of the pre-Islamic Arab customs.

expedient to confine ourselves to the international aspects of Arab life just before Islam came into being. To the best of the writer's knowledge the worst manifestations of the Arab life¹, at the time, were mainly:

(i) the widespread disintegration among the Arabs with every clan or tribe, as the case may be, claiming complete independence and fully independent status vis-à-vis the other clans or tribes, and

(ii) war as the ultimate resort for settling disputes. In other words, the clannish spirit was overwhelming international relations among the Arabs, if we may use the term international in this context. From this point of view we could say that the chief purpose of Muslim international law was to mitigate, if not to banish, egoistical feelings and preach - as a substitute - fraternity, peace and security. This inference might suggest that both Muslim and Western international law have common ends.²

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1. The term Arabs here is used in its broad sense including all the inhabitants of the peninsula without regard to geographical location. Some writers maintain a distinction between Arabians, inhabitants of the peninsula and Arabs, Arabic-speaking people. Hitti, Phillip K. - History of the Arabs, London, 1951, p. 43.
 2. 'O mankind! Lo! We have created you male and female, and have made you nations and tribes, that you may know one another. Lo! the noblest of you, in the sight of Allah, is the best in conduct. Lo! Allah is Knower, Aware.' Qur'an, 49:13. This verse was revealed in the ninth year of Hejira (year of deputation) in Medina.

The conception of fraternity, peace and security should be conceived as fundamental for the understanding of the orthodox norms of the Muslim international law and as the pattern within which we interpret the injunction of the Qur'an and the traditions as well. Hence, this notion will generally form the framework of our attempt to trace both the history and concepts of Muslim international law. But we would like to point out, from the very outset, that Muslim history and thought were not always or necessarily identical with Arab history and thought, because when the Arabs, through their conquests, came into direct contact with the Greeks and the Persians they were influenced by both the Greek and Persian culture, and Islamic civilization reflected that influence.

Synopsis of research

The form of our research will be appreciated the more as we pursue the analysis of the subject-matter. Our treatise will fall into three parts. The first will survey the history of Muslim international law. This part will begin with a study of conditions in pre-Islamic Arabia, and from that we shall go on to explain the main historical facts as regards the expansion of Islam. In the second part we will outline the nature of the Muslim legacy in law and legal matters. The third part, which is meant to

be the most significant, will tackle the approach of Islam to international law. Whenever it is relevant, due regard will be paid to a comparative study of the Islamic views and the corresponding Western concepts.

We would like to invite attention to the fact that a study on Islam in English is always faced with the crucial problem of the lack of a precise translation of the Qur'an, the primary source for such a study. Actually, the translations at hand are but attempts to present the meaning of the Qur'an. Technically, they can never take the place of the Arabic version of the Qur'an. Consequently, the translations often show subtle differences which might lead to different conclusions. The Jihad is a significant example in that context. To illustrate this we quote, for comparison, the translation given by various European authorities for the original word "Yujahidoon". George Sale's translation is "Employing their substance and their persons for the advancement of God's true religion". Rev. Rodwell's translation is "Contending with your substance and your person". Henry Palmer's is "Fighting strenuously". Arberry's is "May struggle with their possessions and their selves". Dawood's is "Fighting with their wealth and their persons". Moreover, it is deplorable that some

translations, poor though they are, are relied upon scholars who are unaware of the misleading nature of those translations because of their being short of adequate means to check them. This fact is apt to lead scholars to adopt an altogether wrong attitude towards the teachings of Islam.¹

The present writer is quite aware of the incompleteness of his attempt to deal in a comprehensive manner with a subject which goes beyond the scope of an individual effort and hopes that this will pave the way for further comprehensive and profound studies. Nevertheless he sincerely hopes that this contribution will help to a better international understanding in our modern era where contacts between Muslim and non Muslim states are far closer than ever before. In fact the blossoming into independence of numerous Muslim states "emphasizes the growing political importance of the Islamic world, and, as a result, the desirability of extending and deepening the understanding and appreciation of this great segment of mankind."²

It is noteworthy here to mention that Islamic civilization has been already represented by a judge among

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1. See Arberry, Arthur J. - The Koran Interpreted, vol.I London, 1955. pp.7-28.
 2. Coulson, N.J. - A History of Islamic Law, Edinburgh, 1964, (The Foreward) p.V.

the fifteen judges of the International Court of Justice. Thereby, it is laudable to dedicate to the Islamic world one seat of the eleven seats on the Security Council in the United Nations.¹

It might be of convenience, before we proceed to our study, to explain that by the Western approach we mean the non-Islamic approach which is mainly represented nowadays in the Western thought. Modern international law, in our study, will be regarded as a Western product since it still carries clear European features. Hence, the Western references will be our interest in the first place, particularly, when we lend ourselves to a comparative study.

*

1. At present the Muslim judge is Judge Badawi (of U.A.R.). In fact Article 9 of the Statute of the International Court of Justice insists that the body of judges as a whole should represent the various forms of civilization and the principal legal systems of the world. Whereas Article 23 of the Charter of the United Nations provides that, in electing the six non permanent members of the Security Council, due regard is to be paid "to equitable geographical distribution". In the London Gentlemen Agreement of 1946, concerning the distribution of the non permanent seats, the "geographical distribution" was conceived on the basis of the existence of common interests peculiar to every division to be represented. To us, Islam could provide an adequate basis, in this respect, as to consider the Islamic world a unity worthy of being represented by, at least, a seat on the Security Council.

* During the time which has elapsed between the completion of this thesis and its presentation, Judge Badawi has died.

PART ONE

HISTORICAL BACKGROUND

CHAPTER ONE

PRE-ISLAMIC ARABIA

1. The rivalry of the Great Powers

"It is not as a mere matter of historical research that the student is led to begin his inquiry into the nature of international law by a survey of the political environment in which the conception of a community of states has developed through the centuries. For international law, far more than the law of any individual state, is in a sense an entailed inheritance. It not only reflects to-day the legal principles and the political, economic and social conditions of past generations, but it is in large part determined by them".¹ So, it might be of interest at the beginning of our study to sketch briefly the international status of Arabia in the latter part of the Jahiliyah² which covered the decades immediately preceding the rise of Islam. It may be argued that a study

1. Fenwick, Charles G., - International Law, 3rd ed. 1948, p.3.

2. The term "Jahiliyah" occurred several times in the Qur'an (3:148, 5:55, 33:33, 48:26) meaning the period in which Arabia had no inspired prophet and no revealed book. Jahiliyah literally means ignorance or barbarism, a definition which could hardly apply to the civilization developed by South Arabia, particularly Yemen.

of pre-Islamic Arabia is irrelevant to the subject matter of our study on the ground that Islamic law is a revelation of the divine will preceding and not preceded by the state. Hence, as an historical phenomenon, Islam was presumably loosely tied to the progress of the pre-Islamic Arab society. Granting that it is a general tenor of the Qur'an that the status quo, in pre-Islamic Arabia, is tacitly ratified unless it is explicitly amended, we are confident that a study of the international situation of pre-Islamic Arabia is indispensable to grasp the core of Muslim international law.

The main factor that conditioned the situation during the period in question was the geographical position of Arabia. Arabia, then, was hedged from the east and west by the great powers of the day; Byzantium and Persia, masters of the world. These flourishing states needed to bring Arabian frankincense, Indian spices and silks and other luxuries via the trade routes of Arabia. The rivalry between these two giants had its repercussions in Arabia. In fact, Arabia became enmeshed in their politics which were vigorously manifested in a long

continued series of wars.¹ The availability of arms and the means of communication at that time made it beyond the power even of a great empire to control the nomads directly,² so both empires contented themselves with establishing spheres of influence within areas bordering their frontiers through which they hoped to have their dominance infiltrate into the rest of the peninsula.³ Further, those areas under influence could assist in barring the expansion of the bedouins onto the settled land and at the same time act as buffer state between these

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1. In fact the history of those protectorates was occupied, for one reason or another, with several wars among them. The two protectorates of the north, though of the same tribal descent, were engaged in wars that took place between their protecting powers. Moreover with Kindah added, there was a third protagonist for supremacy over the Northern Arabs.
 2. In 24 B.C. the Romans sent an expedition to capture the trade routes monopolized by the South Arabs and to restore the resources of the al-Yaman for Rome but the expedition proved to be a failure, indeed a disaster.
 3. In 590, 'Uthman ibn-alHuwayrith negotiated with Byzantians to bring Makkah into its sphere of influence with the view to become, he himself, a prince or a phylarch but he was denounced by his own clan.

Quraysh, the dominating tribe in Makkah, is said to have acquired the art of writing and the system of false belief from al-Hirah. This was held as a proof that the Lakhmids were the bridge over which the Persian influence found its way into Central Arabia. Ibn Rustah-Al-Alaq al-Nafisah, ed. de Geeje (Leyden, 1892), p.192, ll. 2-3, and p.217, ll. 9-10.

two contending powers. The Persians thus supported the Lakhmids near the Euphrates and later were able to extend their influence to al-Yaman (Yemen) in the South. In like manner the Byzantines supported the Ghassanids who had settled to the east of Damascus. Both empires were naturally keen to strengthen their protectorates so as to achieve the purposes for which these protectorates were designed.

2. The Arab Protectorates

We could say that Arabia was politically divided into two sections:¹ protectorates, or the dynastic principalities; and independent Arabia, or mostly the bedouins. The protectorates comprised the

1. Classical writers adopted a tripartite division for Arabia; namely:

- (i) Arabia Deserta (the Badiyah), including the Syro-Mesopotamian desert and controlled partly by Parthia (Persia).
- (ii) Arabia Petraea, centring on Sinai and the Nabataen kingdom, subject to Rome.
- (iii) Arabia Felix, comprising the rest of the Arab peninsula, being independent.

This division corresponds to Arabia in the first Christian century.

See Hitti - op.cit., p.44.

Ghassanids¹ and the Lakhmids² in the north, Kindah³ in Central Arabia and al-Yaman in the South. Independent Arabia encompassed the rest of the peninsula.

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1. The Ghassanids of Yamanite origin, immigrated to the North of Arabia under the chieftainship of 'Amr Myzaygiya' ibn-Amr Ma'al-Sama' at the destruction of Ma'rib dam towards the third Christian century. They displaced the Salih, who founded the first Arab kingdom in Syria, and established their capital in a nomad camp. Abul Fida' - Tarikh (Al Mukhtasar fi Akhbar al-Bashar) Constantinople, 1286 A.H., vol.1, pp.76-7.
Ibn Qutaybah-Kitab al Ma'arif, ed. F. Wustenfeld, Gutingen, 1850, pp.314-316.
 2. The Lakhmids were a confederation of Tanukh and Azd tribes who came originally from al-Yaman (era A.D.226). The dynasty is named after its founder Amr ibn-'Adi ibn Nasr ibn-Rai'ah ibn Lakhm. Their capital, al Hirah, began as a temporary camp (from Syriac Herta, camp).
 3. In A.B. 480, Hujr, surnamed Akil al Murar, founded the strong tribe or Kindah in a region to the west of Hadramawt and was the first within the peninsula to receive the title of Malik (King), usually given by the Arabs to foreign potentates. We included Kindah in the protectorates because the Kindite kings stood in relevance to the Tobba's of al-Yaman.
Kindah should be regarded as the first attempt in Central Arabia to unite the nomad tribes under a central authority, a precedent to the Muslim State.
Olinder, Gunnar-- The Kings of Kindah, Lund 1927, pp. 38-9 and 117-118.

The Lakhmids put an end to the kingdom of Kindah¹ but in their turn were overthrown by the Ghassanids.² Despite becoming urbanised to some extent the Arab princes still retained bedouin blood in their veins and this affected behaviour and outlook.³

Al-Yaman was busily indulging in a religious and economic rivalry with al-Hijaz⁴ until 628 when Badhau,

1. Al-Harith, the Kindite king, took advantage of the death of the Persian emperor Qubadh and declared himself master of al-Hirah. In revenge, the Lakhmid king al-Mundhir III fought him and Al-Harith, together with fifty of his princes, were killed, (about 529).
2. One of the famous battles between the Ghassanids and the Lakhmids was that which had taken place in the district of Qinnasun in 554, known as the "Day of Halimah".
3. That aggressive attitude which the Arab principalities maintained towards each other is assimilative to the animosity which characterised the relations among the Greek cities.
4. Of Central Arabia, al-Hijaz was the birthplace of Islam. The three settlements in al-Hijaz were Medina, Makkah and al-Ta'if, the first two of which are of particular interest to our study as we will see later. Makkah lies in southern al-Hijaz. It originally came into existence as a surrounding to the famous sanctuary al-Ka'bah, which lately became the Palladium of Islam. Hitti - op.cit., p.103.
Medina, originally Yahtrib, is some 250 miles north of Makkah. Hitti maintains that the name had come from Aramaic Medinta and that the explanation of the name as the "town" (of the prophet) was comparatively a late one. Hitti - op.cit., p.104. As a matter of fact, Makkah distinguished itself from Medina in two respects:
 - (i) It established al-Ahabish, a national army composed of foreign elements under an Arab commandant--analagous to the French "Legions Etrangères"--but rather for police purposes.

Continued on Page 19.....

the Persian satrap of al-Yaman, adopted Islam.¹ An alliance known as Hilf al Fudul, the league of the Virtuous,² was formed in the early manhood of the Prophet Muhammad, being inspired mainly by economic motives. Watt maintains that the League "aimed at

4. Continued from previous page.

(i) Cont....

Watt describes the Ahabish as "a collection of small tribes or clans including al Mustaliq (of Khuza'ah) and al Hun (Khuzaymah with its subdivisions 'Adal and al-Qarah); the leading group was al-Harith's 'Abd Manat's, Kinanah. They were closely attached to Quraysh".

Watt, Montgomery W. - Muhammad at Medina, Oxford, 1962, p.81.

Of the same idea is Hamudullah - Hamudullah, Muhammad - Le Prophète de l'Islam, Paris, 1959, vol.I, pp.183-86.

- (ii) The Meccans cultivated a sort of republican organization based on the principle of the distribution of powers, with a parliament, dar al-nadwah, where they used to debate their common affairs and render executive decisions. Sa'id, Amin--Tarikh al Islam al Siyâsi, Cairo, pp.2-4.

1. During the period 525-575 the Abyssians were in control of al-Yaman, where they tried to shift the centre of pilgrimage from Makkah to al-Yaman, hoping to destroy the economy of al-Hijaz since the ownership or the custody of a sanctuary could be a source of great profit. For this purpose they built a magnificent cathedral - al-Qalis (from Gr. ekklêsië, church). Two pagan arabs polluted it on the eve of a festival. To revenge, Abrahah, the Abyssinian viceroy, sent an expedition (in 570 or 571) against Makkah, but his army perished by small-pox (or sijil according to the Qur'anic term). Al Tabari: - Tafsir al Qur'an, Bulaq, 1329, vol.XXX, p.193.
2. Al Husayn ibn Ali invoked this league against the Umayyad governor al-Hajjaj.

upholding commercial integrity, but beyond this it was probably interested in preventing the exclusion of Yemenite merchants from the Meccan market, and the clans which formed it seem to have been those which were themselves incapable of sending caravans to the Yemen or which had specialized in trade between Mecca and Syria".¹

Independent Arabia

Geographically, independent Arabia - with the exception of some mountains and highlands - was mainly desert and steppes. That two-fold nature of the peninsula resulted in a bipartite division of the populace, the desertfolk (nomads) and the townsfolk.² This division should not be conceived as a clear cut partition as the one was always admixing with the other.

Admittedly, the political organization of a society represents the adaptation of the social life

1. Watt - op.cit., p.9.

2. Hitti - op.cit., p.27.

to the environmental conditions. Hence, the nomadic life¹ of the Arabs determined their political organization. To meet the prerequisites of the *bahitat* the basic unit of the Arab political organization was the clan 'ashirah or qawm, which was a federation of kin families gathered in one encampment, havy. Although blood was the normal attachment among the members of one clan, yet the Arabs recognized some other artificial adhesive links - such as sharing a member's food or sucking a few drops of his blood² - to privileged individuals. Besides, Arab customary law adopted three institutions in this respect:

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1. Nomadism is an acknowledged method of living which demands a nomad to wander after verdant land and water to keep his animals, the sole fortune which nature has given him. It is an unwarranted mistake to take the nomad, *badw*, for an aimless roamer.
 2. Tradition maintains that originally the Arabs are of two ancestors: Qahtan in the west and Adnan in the centre and in the north. Every group constituted Sha'b. Writers are not in agreement on the ordinal subdivisions of the Arab society. The classification we adopt is the simplest.

(i) the dakhil (protégé), a stranger who gains the protection of a clan. The system of dakhil had almost an equivalent in the Greek custom; namely, the Isotele. Traditions are not very clear about the exact legal position of the Isoteles. They may have been aliens legally admitted to the full rights of citizenship with the exception of those of a pure political nature or perhaps they were made citizens from the practical point of view.¹ None the less, in both cases the affinity between the Arab and the Greek custom is conspicuous.

The Greek custom knew a lessprivileged class of foreigners by the name of metoecs. A metoec was an alien residing in a Greek city (factum) intending to settle there (animus manendi), in which case he had to find a citizen to be his patron. With these requirements satisfied he was to be granted the right of domicile with limited privileges and rights.

1. Phillipson, Coleman - The International Law and Custom of Ancient Greece and Rome, London, 1911, vol. I, p.173.

(i) Continued...

The Greek practice offers some examples where this right of domicile was accorded to groups en masse.¹

(ii) the Mawla, confederate, a slave who has been freed but prefers to attach himself to his master's clan. The Mawla was a halif-walā' Hilful-walā' generally takes the consequences of legal equality and tends to integrate the mawla into the group of his contractant. Under social and political circumstances this term was used by the Muslims in a different way which referred to the status of the vanquished populations.

(iii) the Mujawir, client, a stranger who adheres to the service of a sanctuary.

The members of one clan were surnamed under one unified title introduced by banu (children of), and had their common war cry.

The complex form of the clan was a confederation known by the name of qabilah (tribe). Such confederation

1. Phillipson - op.cit., pp.159-161.

could be achieved by one of two ways, or by both:

- (i) on a basis of kinship, when some related clans unite together.
- (ii) an affiliation as a further stage in the system of protection when a weak clan claims the protection of a stronger clan. This relation frequently would end by the protector absorbing the protected.¹

Self interest and self preservation were the motives that over-shadowed the relations between the wandering and the sedentary Arabs. On the one hand, the wealthy tribes of the cities were reluctant to share equal brotherhood with the poor men of the desert and, on the other hand, the nomads would not tolerate being deprived of the rich resources which were available to the townsfolk. This developed into a system of increasing hostilities and violence and was manifested in the endless wars that independent

1. The tribes of Tayyi', Taghlib and Ghatafan are prominent examples of such confederations.

Arabia had known throughout its pre-Islamic history.¹

It is of interest to mention that there was, too, a certain amount of connection between religion and politics in Arabia. Generally speaking, the Orthodox and Monophysite Christians were pro-Byzantine since Orthodoxy was the form of Christianity adopted by the Byzantine emperor and Monophysitism was that of the Ghassanids and Abyssinians. As regards the Jewish and pagan Arabs, they were pro-Persian. The former because of their hostility to Christianity due to the persecution, and the latter because of their common

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1. To put ourselves in the picture, it might be helpful to cite but a few examples of these combats, namely,
 - (i) the battle of Bu'ath in 618 in which the tribes of Medina were involved. For details see: Al-Isbahani, Abu Faraj-Kitab Al-Aghani, vol. II, p.162.
 - (ii) the four subsequent battles known as the Wicked War, or al-Fijar, (transgression) in the early youth of the prophet. For details see: Yaqut, ibn Abdullah al Hanawi-Mu'jam al Buldan, ed. G. Wusterfeld, Leipzig, 1866-73, vol. III, p.579.
 - (iii) the Dahis war between the 'Abs and its relative tribe Dhubyan. For details see: Al-Isbahani-Aghani, vol. IX, p.150, vol. VII, p.150.

interests with pagan Persia.¹ This religious split tended to aggravate other causes of conflict between the Arabs.

3. The Arab "Jus Gentium"²

In a world like that of the Arabs we could not expect to come across an elaborate institution of

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1. Judaism spread in Arabia after the destruction of Jerusalem by the Romans in A.D.70. As for Christianity, it began to trickle in from Syria to Arabia at an early date. Judaism thrived in al-Yaman and in various oasis northern al-Hijaz particularly in Madinah, whilst Christianity had a strong centre in Najran. But Christians in Arabia were less numerous than the Jews and less powerful.
 2. The Romans noticed that certain legal principles had been common to all nations--irrespective of any mutual relations--which they identified as "jus naturale" since it should have originated from the rational notion of justice and injustice innate in men. These norms had been the bulwark which the praetor peregrines developed into what was called "jus gentium" - Law of Nations - applicable to non-Roman citizens. "Jus gentium" was later extended to regulate the relations among subject states which referred to Rome as arbitrator. The association of "jus gentium" with "jus naturale" and the lack of organization by which the law might be given practical application to the relations of states made "jus gentium" inter-municipal rather than international law whence we borrow the term to designate the aggregate rules that governed the inter-tribal relations in Arabia.

international law in the sense in which we interpret the term to-day. Obsessed by 'asabiyah (chauvinism) and clannish individualism, the Arabs failed to develop the principles of regional community within their circle.¹ The clan strongly cherished patriotism within itself as an ultimate end and regarded other clans as its justifiable victims. The Arab who is not attached to a tribe is considered an outlaw. "If you see your kinsman in danger you went to his help without asking whether he was right or wrong",² and when a vendetta has been established any member of the clan is liable to pay for it by his own life; (lex talionis). In this situation, violence and land piracy,³ nowadays considered as vices, were the code of dignity and honour of the Arab. This attitude manifests itself in the more than one thousand

1. Al Mubbarrad - Al-Kamil, ed. W. Wright, Leipzig, 1864, p. 29, l. 3.

2. Watt - op. cit., p. 49.

3. The characteristics which the desert share with the sea induced us to call the desert brigandage "land piracy".

synonyms the Arabic language is said to have contained for the sword, and, equally in the chronicles called "Ayyam al-'Arab", days of the Arabs, which narrate their diplomatic history through their wars. Even conferences, such as Suq 'Ukaz,¹ were occasions for boasting and showing off, and nothing of importance to the cause of peace was achieved through such general gatherings.² This deplorable disintegration and individuality³ had accumulated certain principles which constituted the main structure of the intertribal Arab law of jus gentium. The fundamental principles of the

1. Suq 'Ukaz was a literary fair used to be held annually in the north where men of literature gather in some sort of contest. The fair, according to Hitti, "stood in pre-Islamic days for a kind of Académie Française of Arabia".
Hitti - op. cit., p. 94.
 2. The "Sacrilegious Wars" - the Ghazwat al-Fijar - broke out at 'Ukaz, named sacrilegious from the violation of the sanctity of the sacred months as we mentioned before. In fact, the actors used to go to the fair disguised, from the avengers of blood, in masks or veils.
Ameer Ali, Syed - op. cit., pp.10-11.
 3. Watt maintains that "in Mecca this tribal solidarity was being replaced by individualism. There may have been some beginnings of individualism among the nomads, but at Mecca the trend to individualism was mainly due
- Continued on Page 29.

3. Continued....

to the growth of commerce. The great merchants put business interests before everything else and would join with business associates against their fellow clansmen. In a sense a new type of unit was being found by common business interests."

Watt - op. cit., p.4.

jus gentium could be classified into two items; forcible measures and peaceful relations.

The rules for warlike relations consisted of:

- (1) Ghazw: The khazw or razzia was an economic measure to secure supplies for the clan or the tribe. According to the principles of the game, the raiders would descend on a pasture ground where camels of an unfriendly tribe were grazing and while the main body of the tribe was far away, taking advantage of surprise or of temporary overwhelming power.

The freebooters should try to get back to their clan before the members of the attacked tribe caught up with them.¹ Both should avoid bloodshed because, to the Arab, blood always calls for blood, although sometimes a blood wit of camels was accepted when killing was accidental or incidental. A measure unfavourably regarded as acceptable was milk (camels) instead of blood (revenge)². Hence, razzia was rather some sort of national sport than war which was far more serious. Actually, it was a normal feature of a poor society starving from the ever increasing numbers of

1. According to the Arab tradition the chieftain of the clan received a quarter of the booty so that he could look after the poorer members of the clan.

2. Watt - op. cit., pp.105, 106.

the population. It is no wonder, therefore, if the social and economic conditions of the Arab desert life raised razzia to the level of a sport and looked upon raiding as a manly occupation, whereby we find expression of that principle even in the behaviour of Christian Arab tribes such as the banu Taghlib. Hitti¹, to prove the deep roots of this concept in the Arab conduct, translated a quotation from Ash'ār al-Hamasah (poetry of fortitude and enthusiasm), in which the Arab poet boasts that "Our business is to make raids on the enemy, on our neighbour and on our brother in case we find none to raid but a brother". This situation is not unlike that of Greek society as described by Homer in his epics. Laurent, paraphrasing the Greek poet on that point, provided that "La force brutale régnait partout. L'enlèvement des femmes était une chose habituelle:² les nombreux prétendants d'Helène s'obligèrent par un pacte solennel, confirmé par des imprécations terribles.....Les actes de violence étaient journaliers: les voisins se volaient leurs troupeaux, seule richesse de cet âge. C'est là le sujet habituel des exploits que les héros d'Homère aiment à rencontrer. Les brigandages n'étaient pas

1. Hitti. - op. cit., p.25.

2. Although not frequent, the Arab raids were sometimes directed against the woman folk of the attacked tribe when things were more serious.

déprouvés par la conscience publique, le vol n'avait rien de déshonorant; le voleur ne s'en faisait scrupule que lorsqu'il était pris sur le fait".¹

- (2) War: Misunderstandings between tribes as regards cattle, water or pasturage were often settled by war. "The course of events on each of these "days", as reported to us, follows somewhat the same pattern. At first only a few men came to blows with one another in consequence of some border dispute or personal insult. The quarrel of the few then became the business of the whole. Peace is finally restored by the intervention of some neutral party. The tribe with the fewer casualties pays its adversary blood money for the surplus of dead. Popular memory keeps the recollection of the heroes alive for centuries to come".²

This theory, which regarded war as just since it was in the interest of the group, was also adopted by the Oriental church of Byzantium.³ Nevertheless, the Arab concept was more equitable as it tolerated more humane commitments, namely, the obligation of the victorious to compensate the defeated.

1. Laurent - op. cit., vol. II, p.30.

2. Quoted from Hitti - op. cit., p.89.

3. Taub, Baron Michel - Étude sur le Développement Historique du Droit International dans l'Europe Orientale, Recueil des Cours de l'Académie de la Haye, 1926, I, vol. III, p. 367.

The practice of resorting to war was tamed for religious reasons in order to enable the Arabs to go safely on pilgrimages. For this purpose war was prohibited during the months of truce, sacred months which were near the date of pilgrimage and in the holy abode of Ka'bah which included Makkah and a suburban area. The Arabs used to profit from the occasion to exchange their products and goods. The truce of God, advocated in the Middle Ages by the Church, was a Christian institution having the same purpose.¹

The rules relevant to peaceful conduct concerned:

- (1) Diyafah: Diyafah (hospitality) was considered one of the illustrious virtues of the Arab race. The miserable conditions of desert life, where no lodgings were available to a stranger, made it imperative for the Arabs to contemplate some sort of courtesy towards a guest who, in danger, asks for hospitality; that was to accommodate and protect him, even if he would have been an enemy in normal times. We could hardly say that both Arab hospitality and Greek hospitality (*proxenie*) were affinitive, since each institution satisfied different requirements.

1. See Laurent- op. cit., p. 117-21 and vol.V, pp.456-59. The truce of God was "days during which feuds were prohibited. In 1041 truces were expanded by assemblies of French prelates to last from sunset on Wednesday in each week to sunrise on Monday. The rule spread from France to

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other countries and was made general ecclesiastical law by church councils, particularly by the third Lantern Council in 1179".

Nussbaum, Arthur - A concise History of Law of Nations, New York, 1963, pp.17-18.

The Greeks knew two kinds of proxenie; public and private. The public proxenie was the magistrate charged with entertaining foreigners who came to visit the city on national occasions such as fairs and feasts. The private proxenie was the host who individually looked after the interests of a foreigner and represented him in legal matters.

- (ii) Tahkim: The traditional practice of the Arabs shows that they knew tahkim (arbitration) as an institution of a conciliatory nature to settle inter-tribal wars and disputes. To this mission highly reputed persons like chieftains and kuhhan (sooth-sayers) were normally nominated.¹ Beside the choice of arbiter, the litigant parties had to agree on the subject of their dispute and the questions to be submitted to the arbiters. To test his merits, the parties, usually, used to ask the arbiter to make a guess about a secret matter they had agreed upon before - such as a hidden object and the place where it could be found. The arbiter was free to accept or to refuse the mission. If he accepted it each party had to provide a guarantee, whether real

1. Khadduri - War and Peace in The Law of Islam, p.231.

or personal, to secure his submission to the decision which was definitive. Normally, the decision settles a legal point, pertaining to the contentious issue according to the customary law (sunnah).¹ The Dahis war between 'Abs and Dhubyan, (to which we alluded before) had been settled through the successful mediation of Al-Harith ibn'Awf and Kharija. The prophet, "Al Amin"² was referred to as an arbiter to decide the conflict that had arisen among the tribes as to the lifting up of the blackstone to its place in the Ka'bah. His wise decision was to the satisfaction of the tribes and ended a very menacing controversy.

(iii) The Wufud: The Wufud, or delegations, is an ancient Arab usage usually practiced on the occasion of important events. Tribes were in the habit of sending a deputation to each other to that effect. Quraysh sent a delegation to Sayf ibn Dhi-Yazan to congratulate him on his victory over the Abyssinians. This Sifarrah stands for what we call now diplomatic envoys.

(iv) Treaty relations: The treaties known in pre-Islamic

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1. Schact, Joseph - Esquisse d'une Histoire du Droit Musulman, translated by Jeanne et Felix Arin, Paris, p.11.
 2. The prophet Muhammad was called by his tribesmen al-Amin (trustworthy), an honorific title, in recognition of his infallible behaviour before the call to prophethood.

Arab history were mainly: hilf, musanadah and muwada'ah¹. The hilf² was a treaty concluded between two equal and independent groups comprising all aspects of life.³ This institution is said to have influenced the social and political structure of Arab society since it entitles the members of the two groups to move freely in the domain of each other with the inevitable result of complete fusion and

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1. The Arabs knew other sorts of collective agreements but they were concluded among the different sections of the same group, such as the League of the Virtuous to which we alluded before. In fact the treaty as a mode of conducting the inter-tribal relations was not a predominant feature of the Arab life.
 2. This sort of hilf should not be confused with hilf al-wala since it does not tend to breach the autonomy of the parties.
 3. According to tradition, Quraysh concluded several hilfs with Persia, Abyssinia and Byzantium to regulate the commerce between Makkah and these countries. The conclusion of the hilf was usually done in a ceremonial way such as lighting fire before which both parties swear loyalty to their engagements. Rome, under the Republic, adopted similar tenets. It believed that a treaty is not obligatory except in sacramental terms. When Rome desired to enter into treaty relations, the facial engages in long ceremonial procedures asking king Tullus to empower him to interpret the royal will as well as that of the roman people and to grant him the sacred herb for that purpose. When these rituals are over, a sacrifice should be offered; then the facial signs the treaty and keeps it in the temple of Jupiter Capitolin.

definitive union. An example of this was the Humaysites and the Sahmites.¹ The musandah² is a hilf confined to military actions according to which both parties fight against a common enemy, but under separate commanders, and share the booty. The mawada'ah is a hilf of peace under which the contracting parties refrain from any act of aggression against each other as well as verbal provocation.³

4. Conclusion:

It is a tragedy that the conjunctive bonds of common religion, race, language and customs, which might have been expected to develop some sort of Arab union, failed to do so.² "The antiquated paganism of the peninsula seems to

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1. The institutions of the Arab hilf seems to us quite analagous to the community treaties of our time such as the European Common Market.
 2. The musanadah recalls the present military pacts such as Nato.
 3. For further details on the subject see Tyan, Emile - Institutions du Droit Publique Musulman, Recueil Sirey, 1954, vol. I. pp.33-43.
 4. It seems that everywhere by these ancient times humanity lived in its heroic age where force and physical strength were the potential factors in inter-group relations. That general trend manifested itself in the early societies of Greece and Arabia and resulted in bitter individualism checking all efforts for regional unity.
The words between the quotation marks are quoted from Hitti - op. cit., p. 108.

have reached a point where it failed any longer to meet the spiritual demands of the people and was outgrown by a dissatisfied group who developed vague monotheistic ideas, and went by the name of Hanifs...On the political side the organized national life developed in early South Arabia was utterly disrupted. And anarchy prevailed in the political realm as it did in the religious. The stage was set, the moment was psychological, for the rise of a great religious and national leader."¹

1. Hitti - op. cit., p.108.

The federations that intermittently existed, in a vague way, in the history of pre-Islamic Arabia were of no valuable significance so far as the true Arab unity is concerned. To cite an example, we mention "Hilf al-Fuzul", or the federation of the Fuzul, in memory of an ancient society instituted with a similar object among the Jurhum and composed of four personages named Fazl, Fazāl, Mufazzal, and Fuzail, collectively Fuzul. This league was founded about 595 A.C. and continued to exist in full force for the first half century of Islam in which the descendants of Hashim and of Muttalib and the principal members of the family of Zuhra and Tayye' bound themselves by a solemn oath to defend every individual, whether Meccan or stranger, free or slave, from any wrong or injustice to which he might be subjected in Meccan territories, and to obtain redress for him from the oppressor--paraphrased from Ameer Ali- op. cit., p.13.

CHAPTER TWO

A. A BRIEF ACCOUNT OF THE HISTORICAL EXPANSION OF ISLAM

Introduction

Islam began in Mecca as a religion, became a state in Medina and then spread as a culture.

To judge Islamic expansion fairly it is vital to look at it from the right angle. Islam, in our view, is a reformative revolution to be counted among the great revolutions in the history of humanity. Islam, like both the French and the Russian revolutions, is a revolution based on particular dogmas and theories addressed to humanity as a whole and claiming universality. Such revolutions tend to prevail by their very nature and have a predestined role to enforce their philosophy upon the opponents of the new ideas, otherwise they betray their aim and "raison d'être". Hence a war of propaganda is an indispensable corollary to this sort of revolution with a view to enlightening humanity and forcing it forward to a better intellectual and social life. This is not fanatical because fanaticism implies abnormality which is far removed from what we have in mind. In support of our view we quote here what one of the acknowledged defenders of democracy, Proudhon, said about the

propagandist wars of the French Revolution: "Non, ceux qui en 1791 firent décréter la guerre à la contre révolution, représentée par l'étranger, au contraire, plus que Robespierre et ses amis, le vrai sentiment de la révolution. Qu'eut-elle donc été cette Révolution, sans la sanction du sang et de la victoire? La guerre est divine, la guerre est justicière, la guerre est regeneratrice des moeurs".¹

This apologia for the French Revolution applies too, and for stronger reasons, to the Islamic revolution. The cry for fraternity, liberty, and equality echoed in the different corners of Arabia more than twelve centuries before the French Revolution² and Islam launched the principles of an affluent society in a way far more acceptable than contemporary economic doctrines. We could not say then that by using force to spread these dogmas beyond the political boundaries of Arabia, Islam proved to be a warlike creed; otherwise we overlook the hostile attitude which the exponents of past political and religious ideas outside Arabia took towards Islam and ignore as well

1. Proudhon - La Guerre et la Paix, F.I. p. 110.

2. Arabia knew these principles before Islam but they were of rather tribal scope.

the universal claims of Islam. Thereby the early Islamic conquests should be regarded as wars of propaganda and not of imperialism; in other words those conquests were directed towards the propagation of the Islamic philosophy and not Arab domination.¹ They were a necessity for the furtherance of civilization, even a providential blessing. The Arab conquerors were often received by the vanquished peoples as saviours.² Our view may be better illustrated if we take into consideration the fact that the early Islamic conquests were directed against the then seats of world civilization in Syria and Persia and Egypt where the intellectual struggle must be settled one way or another.

It is true that war is not always the proper medium to propagate ideas but we can say the same about revolutions which are usually achieved by some measure of violence. But revolution is a glorious initiative generally praised in history and considered as a providential means of

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1. This idea will be treated fully in the third part of this thesis.
 2. To mention but a few examples: "The people of Shazzar (Laissa) went out to meet him (Khalid ibn al Walid) accompanied by players on the tambourines and singers and bowed before him". "A statement attributed to the people of Hims is representative of the sentiment cherished by the native Syrians towards the new conquerors: We like your rule and justice far better than the state of oppression and tyranny under which we have been living."--Hitti--op. cit., pp.152-3.

regenerating society, particularly during ages when humanity had not yet achieved its era of peaceful development.

In line with what we have said we refute the theory that explains the Islamic expansion mainly on economic grounds. Of course we cannot entirely ignore the economic aspect of the Islamic conquests but we reject its being the main factor. It is true that the Muslim caliphs used to stimulate the enthusiasm of the warriors by referring to the booty they could gain and that the conquests enabled the Muslims to amass a considerable fortune, but these were not the essential objectives of the Islamic conquests which, as we mentioned before, were for dogmatic propaganda in an era which knew only war as an effective means for such a purpose. Referring to booty was a way to secure the zeal of some soldiers who were newly converted to Islam or were not sincerely involved in it, a measure compared to granting medals of honour or financial privileges in our times, but this should not be confused with the ultimate aim of the state as such. It is utterly inconceivable that the orthodox caliphs and their assistants, the companions of the Prophet, who were administering the state and who gave up their

possessions for the cause of Islam, would consider such an aim of substantial importance in planning Islamic foreign policy.

We, too, repudiate the widespread view that the astounding victory of Islam over the two great powers of the day was due to the weakness of these powers. Undoubtedly, nascent Islam was far less equipped than they were in numbers and war instruments, and had to concern itself with supplying its conquering forces. In fact, Islam as a belief was the driving factor and the essential element that cemented the Arab masses never united before. We shall see that the Muslims, at one time, fought against both Byzantium and Persia simultaneously when the Arab troops were engaged in wars in Persia and Egypt as well.¹ It is beyond all logic to ascertain that the Muslims who, thus, had to fight in two fronts at the same time against the two powers of the day were, by any means, in a stronger position vis-à-vis Persia and Byzantium however weak the two empires might have been.

To us, it is common error that writers try to find out an explanation, beyond propagation of the Faith, for

1. For instance, in 640 the Arab troops were facing the 20,000 men Byzantian garrison at Babylon in the West, whilst other troops were forcing their way to the province of Pars (Persia proper) in the East.

the Islamic conquests in the seventh century. There is nothing surprising about religion being the background of a military expedition. What is really worthy of investigation is the magic expansion of Islam and its decisive victories over the two great empires of the day. To this effect we are inclined to accept the interpretation given by Pirenne and Vasiliev, a suggestion as to what might have facilitated a quick victory. First the Byzantine Empire had never regarded its frontiers with the Arabs "as one of its vulnerable points, nor had it ever massed there any large proportion of its military forces. It was a frontier of inspection which was crossed by the caravans that brought perfume and spices. The Persian Empire, another of Arabia's neighbours, had taken the same precaution. After all, there was nothing to fear from the nomadic Bedouins of the Peninsula¹, whose civilization was still in the tribal stage, whose religious beliefs were hardly better than fetichism, and who spent their time in making war upon one another, or pillaging the caravans that travelled from the South to the North, from Yemen to Palestine, Syria and the Peninsula

1. Of course there were precautions against expected Bedouin raids, but those precautions could not be understood as defensive measures against prospective invasion.

of Sinai, passing through Mecca and Yathrib. Pre-occupied by their secular conflict, neither Romans nor the Persian Empire seems to have any suspicion of the propaganda by which Muhammad, amidst the confused conflicts of tribes, was on the point of giving his own people a religion which it would presently cast upon the world, while imposing its own domination.....the Arab onslaught took them by surprise."¹

"There is no doubt that one of the essential causes of the amazing military successes of the Arabs was the discontent of the population of Syria and Egypt. This discontent was religious in character, for the Monophysite doctrine adopted by the great majority of the population of these provinces had been outlawed by the Byzantine Government."²

Generally speaking the Islamic conquest can be divided into two stages. The first was achieved under the Orthodox caliphs,³ and the second during the Umayyad period⁴. During the Abassid era⁵ the Islamic world split

1. Pirenne- op. cit., pp. 147-9.

2. Vasiliev, A.A. - Byzantium and Islam, an article in "Byzantium - An introduction to the East Roman Civilization", Oxford paperbacks, 1961.

3. A.D. 632-61 = 11 - 40 A.H.

4. A.D. 661 - 750 = 41 - 132 A.H.

5. A.D. 750 - 1258 = 132 - 656 A.H.

and it was the job of the Turkish 'Uthmanlis to bring it back to unity. With the downfall of the 'Uthmanlis the Islamic world disintegrated again and developed into its present state.

The first stage of the Islamic conquests

By the death of Abu Bakr, the first caliph, in A.D. 634, all the Arabs of the peninsula were brought into the orbit of the Medina government and subjected to its authority. When 'Umar ibn al Khattab succeeded to the caliphate, the Islamic state, so consolidated, felt able to carry out its missionary task. Due to the international conditions of that time, 'Umar had no alternative but to resort to war to put into effect the Islamic reformatory philosophy.

Al Hirah,¹ in A.D. 634, was the first territory outside the Islamic State to capitulate to the Muslim army, thus opening the door afterwards to the conquest of Iraq and Persia.

But of course the place of first concern to the Arabs was Syria with which they had early commercial and social relations. Therefore, 'Umar conducted the first main campaign against Syria whose destiny was sealed in

1. See page 17.

August 20th 636 after the decisive victory of the Arabs at the Battle of Yarmuk. The conclusive conquests of Syria was achieved in October 640 after the fall of Caesarea.

In the meantime Persia succeeded in almost destroying the Arab troops that were stationed at al-Hirah and began preparing for aggression on the Arab state. This called for a counter attack by the Arabs who were able to make a triumphal entry, in June 637, into Ctesiphon, the Persian royal capital. In Persia the Arabs were met by a stubborn resistance but eventually they succeeded in completing their initial conquest of the country in 643 when they stood on the borders of India.

While some Arab troops were operating eastwards, other Arab armies were heading westwards to Egypt and North Africa. In September, 642 the Emperor Constantine of Byzantium ratified a treaty ceding Egypt to the Arabs.

With their conquest of Syria, Persia and Egypt the Muslims became the heirs of ancient civilizations and the champions of the advancement of culture for centuries to come. Within a generation from the death of the Prophet the Muslim state extended from the Oxus to Syrtis Minor in North Africa. This expansion came to a stand still under 'Ali ibn Abi Talib, the fourth caliph, whose caliphate

was disturbed by the civil war that broke out between him and Mu'awiyah, the then governor of Syria whom 'Ali wished to depose. To justify his opposition, Mu'awiyah claimed to be seeking revenge for the martyred 'Uthman, the third caliph. In fact this allegation disguised the real cause of the conflict, namely, the rivalry between Syria and Iraq for supremacy over the Muslim world, since 'Ali had transferred his capital from Medina to al-Kufah in al-Iraq.

The two opposing armies met at Siffin and victory was about to swing to Ali when the army of Mu'awiyah waved in the air copies of the Qur'an fastened to their lances symbolizing an appeal from the decision of the sword to the decision of the Qur'an. Reluctantly 'Ali accepted the proposal and a committee of arbitrators was appointed. In 650 the committee passed a decision depriving 'Ali of his right to the caliphate. The acceptance of arbitration by 'Ali, moreover, resulted in a large number of his followers seceding from their loyalty to him. Henceforth these were called Kharijites (seceders). These Kharijites, who were the first political faction to appear in Islamic history, adopted a motto "La hukma illa li-llah" (Arbitration belongs to God alone). Those who continued

to be loyal to 'Ali were called the Shi'tes or the 'Alidites. In 661, 'Ali was murdered, thus bringing to an end a period conventionally known as the period of the orthodox caliphate. After 'Ali's death, Mu'awiyah declared himself caliph and founded the Umayyad dynasty, thus introducing to the caliphate a principle quite alien to Arab traditions, ie., the hereditary principle.

The second stage of Islamic conquest

Actually this stage corresponds to the Umayyad period and was, as before, directed both eastward and westward.

In the east the Arabs reduced lower Turkhistan in 705, Samarqand and Khawriz in 706-9 and Sind in 711/712. In 713-715 a nominal Muslim rule was established in the central Asian Khanates. This expansion went as far as Mulatàn in Southern Punjab.

On the western front the Muslims captured Carthage in 608 and proceeded to other coastal territories until they came to the Atlantic, a strategic base which enabled the Arabs to launch their last major campaign, in Spain, in 711. Within twenty years the Iberian peninsula was brought into the possession of the Islamic state.¹

1. The Muslim advance was checked in 732 between Tour and Poitiers by Charles Martel, mayor of the Palace at the Merovingian Court. This defeat, known to the Muslims as Balatul-shuhadâ', pavement of Martyrs, was in fact a

turning point in the Arab conquests. "Gibbon, and after him other historians, would see in Paris and London mosques where cathedrals now stand, and would hear the Koran instead of the Bible expounded in Oxford and other seats of learning, had the Arabs won the day".

Hitti--op, cit., p. 501.

But no more than one century from the rise of the Umayyad Dynasty some factors occurred to hasten its downfall. The Shi'ites, who were bitter enemies of the Umayyads, entered into alliance with the Abassids, a faction named after the prophet's uncle Al-Abbas and claiming the caliphate. The alliance, which was headed by the Abassid Abdul-'Abbas, succeeded, through the support of the Persians, on April 26, 750 in capturing Damascus and putting an end to the Umayyad era. In 762 the foundations of Baghdad, the capital-to-be of the Abassids, were laid.

Split of the Islamic state:

When the Abassids virtually annihilated the entire Umayyad dynasty an Umayyad prince named "Abdel Rahman" escaped and fled to Spain where he was able, in 776, to establish a brilliant dynasty with Cordoba as his capital, thus separating Spain from the domains of the Abassid caliph.¹ This was followed, in 778, by the foundation of the Idrisi kingdom in Morocco with its

1. The Umayyad dynasty of Cordova lasted from A.D. 756 (138 A.H.) until A.D. 1027 (418 A.H.). By the end of the ninth century disturbances overwhelmed Spain and the Umayyad power collapsed, among which featured, in particular, the Jahwarids, the Abassids of Seville, the Murabids and the Muwahids.

capital in Fas (Fez). Another part of North Africa, Tunisia, split off from the rule of Baghdad under the Sunnite Aghlabids (827-868) who successfully added Sicily and some other parts of Italy to their influence (827-905)¹. In 868 Ahmed ibn Tulun wrested Egypt from the Abassid power. Thus the west wing of the Islamic state split off from Abassid control. This disintegration in the west was paralleled by a similar one in the east where the Turks² and the Persians succeeded in establishing some petty states.

With this devastation the Islamic state was to face the crusades that sprang up as a response to the speech delivered on November 26, 1095 by Pope Urban at Claremont and lasted for about three centuries. It is true that these crusaders were annihilated in 1291 in Syria, but other crusaders continued, as late as 1396, against Rhodes, Smyrna, Alexandria and Turkey.

The Christian reconquest of Spain, which actually began as early as the downfall of the Umayyads, attained

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1. These European possessions were recaptured by the Normans (1060-1091).
 2. The first of the Turks to appear in the history of Islam were the Saljuqs, named after Saljuq the chieftain of the Turkoman tribe Ghuzz from the Kirghis Steppes of Turkestan. The power of the Saljuqs came to its zenith in 1091 when they moved to Baghdad where they held the real authority leaving the caliph as puppet. These Turks are not to be confused with the Ottoman Turks who were kinsmen of the Mongols.

its climax in the thirteenth century, leading eventually to the christianization and unification of Spain under Ferdinand and Isabella towards the end of the fifteenth century.

Re-integration of the Islamic state:

The reintegration of the Islamic state was accomplished under the Turkish Empire when the 'Uthmanli sultans¹ undertook to unify the world of Islam under their rule. Sultan Selim, in June 1516, destroyed the Mamluks army in north Syria, imprisoned the last puppet Abassid caliph al-Mutawakil, and then proceeded to Egypt which surrendered to him in 1517. After that 'Uthmanli conquests were launched in different parts of the Islamic world and ultimately resulted in bringing almost all the former Islamic Empire, with the exception of Spain, Sicily, Persia and India, into Turkish possession.²

In the beginning the Turkish sultans³ did not show

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1. Mahmud of Ghannah (999-1030), of the Turkish Ghaznawid dynasty, was the first in Islam to be designated sultan.
 2. Under Sulayman (1520-66) the Turkish empire extended from Baghdad to Budapest and from Aswan to the strait of Gibraltar.
 3. Sultan is "a title which first appears in the fourth (xith) century in the sense of a powerful, an independent sovereign of a certain territory.....The word and its meaning was undoubtedly borrowed from the Syriac sultānā which has the meaning of power, and although rarely, also that of the wielder of power..... The transition in meaning from an impersonal

representative of political power to a personal title in a development the stages of which are difficult to follow.....very probably that the Seldjuks were the first for whom Sultan had become a regular title for a ruler. Sultan immediately became the highest title that a Muslim prince could obtain.....In Turkey sultan had been an elevated title. In addition to rulers, it was borne by princes." The Encyclopaedia of Islam, vol. IV, Leyden & London, 1934, edited by M. Th. Houtsma and H. J. Wensinck.

much zeal for the title of caliph and the first international document to add this title to the sultan recognizing, thus, for him some sort of spiritual authority over Muslims outside his empire was the treaty of Kuchuk Kay-narji signed in 1774 with Russia. Finally the caliphate was abolished in 1924 by the Kemalist government of Turkey. Since then some Muslim conferences have been held to discuss the restoration of the caliphate and the subject is still of a highly controversial character.

The present state of the Islamic world

When Turkey was defeated in World War I, Great Britain and France managed to get its Arab possessions into their sphere of influence either as protectorates or League of Nations mandates. These possessions were subsequently divided into distinctive states with more or less defined borders. Most of these states soon developed a feeling of nationalism and were able to attain their independence as separate political entities after World War II. But at the moment a new trend is growing up among these states tending to pan-arabism based on their common origin, language and history rather than religion. Recent years have witnessed some attempts in

that respect aimed at some sort or another of unity but, on the whole, the Islamic world is still politically divided into separate independent states which, on the international level, act as distinctive entities.

Islam is distributed among the politically independent entities as follows:¹

- (i) The Arab World: Algeria (11m.), Iraq (6m.), Jordan (1.5m.) Lybia (3.5m.) Kuwait (0.25m.), Lebanon (2M),² Morocco (10m.), Mauritania (1.25m), Syria (4.5,)³ Saudi Arabia (5.m), Sudan (12m.)⁴ Tunisia (3.5m) United Arab Republic (29.M) and Yemen (5.m). Aden (.5m) the Protectorates (1.25m) and Spanish Morocco (1.25m).
- (ii) Africa: Somalia (2 m.), Zanzibar (.25 m.); 75% of the whole population are Muslim in Senegal and Niger, 72% in Tehad, 64% in Rio de Oro and Nigeria, 18% in Madagascar, 37% in Ethiopia. There are also strong Muslim minorities on the Western Coast⁵ and in the middle of Africa.

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1. The information above mentioned is based on Sourdcl, Dominique - L'Islam, Paris, 1954, pp.116-7.
 2. Actually Lebanon is a country of mixed population. We can say that the Muslims are roughly about 50% of the whole population.
 3. 70% are Muslims.
 4. 65% are Muslims.
 5. Particularly in Sierra Leone, Liberia, Gold Coast and Cameroons.

(iii) Asia: Afghanistan (15 m.) Iran (24 m.) Indonesia (80 m) Malaysia (5 m.)¹, Pakistan (80 m.)², and Turkey (28 m) 25 m are in Russia; (Tartars, Uzbekistan, Kazakhstan, Backies, Turkeminstan, Tajihistan, Khirghizie and Transcaucasian federation). In China there are 5m. in Turkestan, and 20 m. in Kan-son and Yunnan. 37% of the whole population in Cyprus are Muslims and a considerable minority in India and Israel.

Europe: Apart from the minorities scattered in different places particularly Belgium and France there are 68% in Albania, 18% in Bulgaria and 12% in Yugoslavia.

America: There is a considerable minority in both the United States of America and Brazil.

Actually Muslims total now more than 400,000,000; that is to say about 1/6 of the world population.

1. Only 40% are Muslims.

2. Not to mention Kashmir which enshrines 4 m. Muslims.

B THE HISTORICAL DEVELOPMENT OF MUSLIM INTERNATIONAL LAW

1. Introduction

Western writers vary considerably in the definition they adopt for international law owing to divergences in the sources from which they maintain that this law is derived. Earlier writers, virtually jurist-theologians, laid the foundations of modern international law, and stressed reason and justice as the basis of that law--while later writers, equipped with rich precedents and practice arising from the political and diplomatic intercourse of states, emphasised the facts of international relations. In view of the difference of approach between the "naturalists" and the "positivists" an agreed definition of international law was not easy to arrive at. According to Fenwick, international law is the group of principles and rules which are binding upon the members of the international community.¹ This definition suggests that for international law to exist there must be a combination of three elements, namely,

- (i) numerous political entities,
- (ii) mutual relations between those entities,
- (iii) rules or principles to control these relations.

1. Fenwick - op. cit., p. 27.
See infra part II, Ch.2.

Obviously the environment in which the external Muslim law developed included, from the very start, the required elements. The nascent Muslim state emerged in a society which knew independent states such as Persia, Abyssinia and Byzantium. This society had its particular system of international law but some writers refrain from recognizing it. To this end we quote Phillipson,¹ "Now all this criticism is largely untenable. It is extreme and one sided. It fails to take due account of the difference in ancient conditions of the circumstances surrounding earlier stages of evolution in general and of legal development in particular. It sees imperfections and deficiencies in a system of things and forthwith condemns the entire system. It sees arbitrary or cruel acts in this or that quarter, at this or that epoch, and the conclusions it jumps at are immediately applied to all times and places in the ancient world. It regards the speculative constructions of the philosophers proceeding in their tentative argument in accordance with a given ideal and from certain postulated premises, and lays hold of sundry implications and conclusions thereof, which, -- failing to exercise any rational discrimination, -- it immediately

1. Phillipson - op. cit., pp. 49-50.

takes to represent the real facts and conditions of the time. Besides adverse critics for the most part speak as though modern international law is a perfect science, comprising a fully systematized body of universally accepted doctrines. But, in spite of our boasted advance of twenty centuries beyond the Greeks and the Romans there are those who deny that there exist even to-day any international law at all, at least in the strict sense of law."

It is noteworthy here to add Maine's significant remark that "peace is a modern invention."¹

The tendency for domination attributed by some to the Islamic state, even if admitted, does not affect our argument in this respect. Over the ages, the principles of international law were the creation of powerful states, a fact that justified qualifying international law as the legalized aspect of power politics, if by power we mean "the production of intended effects".² The Muslim state entered into relations, whether peaceful or hostile, with the said states and later on with other states in Europe, Asia and Africa. It might be argued that the law of

1. Maine, Sir Henry - International Law, London, 1888, p.8.
 2. Russell, Bertrand - Power, 3rd edit., 1963, p. 25
 (Unwin Books).

nations is, on the one hand, inconsistent with the notion of a "chosen race"¹ based on the ground of religion, and, on the other, with the notion of universal dominion. "The answer to this contention" if we refer again to Phillipson, "has already been suggested in general terms. It has already been pointed out that the absence of a complete and scientifically systemized body of law does not, in itself, render juridically inapplicable the elements that do exist, and that the denial of equality was based on a speculative theory, which was more of the nature of a phantasm than of an effective guide to practice."²

There were also principles and rules which the Muslim state considered as binding on it in its relation with other alien states.³

Besides, theology is not in contradiction with international law. The fathers of the international law of our time, as well as those of Muslim law, were

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1. The idea of "chosen race" still survives in the present international practice under the formula of "big powers" who claim legal exclusive rights and, consequently enjoy a favoured position as regards other states. A significant example is the legal status which the Charter of the United Nations accord to the world five big powers.
 2. Phillipson - op.cit., pp.61-2.
 3. See infra Part III.

theologians. Moreover, the science of international law aims at the integration of humanity. In that sense, religion is in closer accord with international law. The term "religion", says Fenelon, is derived from "regulare" because the divine cult gathers and unifies¹ men.

Bentwich, paraphrasing Laurent on that point, says that "One of the classics on the subject, Laurent's 'Histoire du Droit des Gens' published in 1861, has an alternative title, 'L'Étude sur l'histoire de l'Humanité',² and a large part of it deals with the teaching of the religions of the world. The author's professed aim was to follow the progress of mankind towards unity, which was the object of International Law. He justified his theme against German scholars who attacked him for introducing theology in a work of international law. Leibnitz, he says, shall answer for him, the philosopher who declared "Theologia species quaedam est juris-prudentias peternim sumptae" and who included the decrees of the councils of the Pope in his Corpus of International Law. Religion, as soon as it forms a church, is itself a concern of the law of nations and there is no stronger tie than religion."³

1. Laurent - op. cit., vol. I, p. X.

2. Bentwich, Norman, - The Religious Foundations of Internationalism, 2nd ed., 1959, p.7.

3. Khadduri maintains that the "The Muslim law of Nations , in contrast to almost all other systems, was designed to be a temporary institution until all people, except perhaps those of the tolerated religions, would become Muslims". Khadduri -- op. cit., p. 44.

On the same issue Phillipson¹ relates that, "and as to the argument that because a certain code of conduct in international relations draws its sanction from religion, it cannot therefore be described as possessing the character of international law, the answer is that it is of no consequence at all where the sanction lies, since the fundamental question is whether there is a generally admitted rule regulating certain international relations, and whether there exists any potent sanction whatever similarly recognized as enforcing the observance of that rule. The religious sanction did not impair but added force to the legal and political sanction. Religion in antiquity was co-extensive with the whole of life.....it was at the bottom of law, because it was at the bottom of life, and the admitted insistence and protection of the law by gods, in view of its general acceptance by men, does not necessarily deprive it of its character as law".

It is not our intention now to exhaust the discussion on this particular topic since we will tackle this issue whenever it is relevant to our study.

Thus the principles and rules, inspired by Islamic precepts, which governed international relations during

1. Phillipson -- op. cit., p. 51.

the period of Pax Islamica, make up the Muslim International Law.¹ On that understanding, we are going to trace the history of Muslim international law. A point of objection has been raised against a historical study of Islamic law on the ground that Islam is a divinely ordained system controlling and not controlled by Muslim society and, therefore, Muslim legal science is alien to the notion of historical development in law after the death of the prophet. This view has been completely refuted by the facts relating to legal evolution which occurred in the Muslim world throughout its legal and political history.²

Our inquiry into this field will deal mainly with the historical development of the significant legal concepts which have been applied in state practice, apart from diplomatic or political history, both of which have a great bearing on international law and are closely linked to it, and so will be tackled separately.³

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1. For more details on the definition of Muslim international law see Chapter II, Part II of this thesis.
 2. cf. p. 14 of this thesis.
 3. Nussbaum -- op. cit., p.44.
We will see that classical Muslim international law of peace was the intra-Muslim group law.

2. Emergence of Muslim International Law

It could be argued, with good reason, that the call to prophethood was the germ on which Muslim international law grew, on the ground that the Apostle was endowed with international personality. Muhammad the Apostle, in so far as international law is concerned, occupies a unique position which warrants exceptional treatment.¹

The Apostle was the spiritual leader and the supreme head of the Islamic community and, through divine revelation, he was the lawgiver of the communitas islamica. Even before the establishment of the Islamic city-state of Medina, the Apostle, as such, concluded, in 622, a treaty known as the Second Pledge of al-Aqaba,² with a

1. In Western international law, the unique position of the Pope in the Christian community induced Western writers to recognize him as an international person. Compare Kunz, Joseph L. - The Status of the Holy See in International Law, A.I.I.L., vol. 46, 1952, pp.308-14.

2. In that pledge the Medenans gave Muhammad their allegiance on the basis that they would protect him as they would their own women and children. The pledge should not be construed in the traditional sense as a procedure for electing a chief since the Apostle had been chosen by God. It only meant submission to the authority of God and his messenger. Its significance here lies in the fact that Muhammad individually was the one party and the independent tribes were the other in a politico-religious agreement.

delegation representing the Medenan tribes. Besides, he enjoyed the passive and active right of legation - that is to say, to send and receive ambassadors. He, as apostle, received the said deputation of Medina. In 621, after the First Pledge of al-'Aqaba, Muhammad sent Mus'ab to Medina as his representative to teach the people Islam.¹ The emigrants whom the Apostle sent to Abyssinia, in 615, should be regarded as his deputation if we judge by the circumstances and the wording of the message the emigrants carried to the Negus calling on him to embrace Islam and follow the prophet.²

In fact Mecca was in indirect relations with Abyssinia, particularly since 467 when 'Abd Chams, upon a suggestion from his brother Hashim, succeeded in getting from the Negus authorization for the Meccans to trade with their caravans in Abyssinia. On the other hand, Mecca used to import goods from Abyssinia by sea through Jeddah.³ Balladhuri reports that the two cousins, Abdel Muttalib and Harb, had a personal conflict which they

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1. Guillaume, A. - The Life of Muhammad, a translation of Ishàc's Sirat Rasūl Allah, 1955, p. 199.
 2. Hamid Allah, Muhammad - Majmu'at al-Watha'iq al-Siyassiyah Li'l 'Ahd al Nabawi wal Khilafah al-Rashidah, 2nd ed., Cairo, 1956, pp. 42-5. Hamid Allah introduces the second pledge of al-'Aqaba as the third pledge (p.7.).
 3. Nizamuddin al-Qummi - Tafsir. Ghara'ib al Qur'an, Cairo, XXX.

referred to the Negus as arbiter. From this we are rather inclined to infer that the emigrants must have had an extra mission relevant to the Meccan trade in the hope of inducing the Negus to boycott it as a measure of retaliation to the Meccan hostility towards the Muslims. This may, perhaps, be substantiated by these facts, i.e. (i) the wording of the message implies that the Prophet must have been, prior to the migration, on friendly terms with the Negus¹; (ii) It is true that the question of the safety of the Muslims was involved but among the emigrants were individuals, such as the well trained merchant 'Uthman, who could hardly be believed to have left Mecca because they were subjected to torture since they were denied their tribe protection. (iii) the Meccans were very much worried about migration, for they sent a delegation to persuade the Negus to extradite the Muslims to them. In this case the emigrants were actually a delegation representing Muhammad in his individual capacity as Prophet, and the

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1. The Negus was Ashamah who had been sold to a Damrite Arab and served for him as a shepherd in the valley of Badr. That may be the reason why the Prophet sent to him a Damrite ambassador, 'Amr ibn Umaiyah in about the year 624 to marry the prophet in absentia with the Muslim widow, Umm Habibah.

friendly reply of the Negus should be considered as a legal recognition of that right. Throughout his lifetime, Muhammad assumed only the title of Prophet and Apostle and introduced international documents by that title.¹ After the formation of the Muslim state the Apostle constituted in his person a union of two different persons of international law.² The relation between his prophet-hood and his political leadership could be assimilated, constitutionally, to the relation between the crown and the king in British constitutional law, in so far as the idea of separation of powers is concerned.

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1. A recueil of those documents was compiled by Hamid Allah, Majmu'at al Watha'iq, op. cit., pp. 15-283 and 365-399. It is true that the pagan Meccans refused to accord the title of prophet or apostle when concluding the truce of Hudaybiyah, but this individual incident does not involve any absolute denial of the existence of the right since, at least implicitly, other political entities such as Abyssinia, Egypt and Byzantium recognized it through the friendly attitude with which they apparently received the message of the Prophet.
 2. Al-Gahiz classified the imams, heads of state, into three categories, apostle, prophet and imam. The apostle is both prophet and imam, the prophet is imam but not apostle, the imam is neither apostle nor prophet. He may have in mind, in this classification, the pre-Islamic prophets.
See al-Gahiz - Letters, 247 seq.
Ibn Khaldun in his Muqaddima, Prolegomena, on analyzing the notion of sovereignty (Mulk), cites, as one of its forms, the sovereignty instituted by divine revelation in Islam which had for its subject the government of the community spiritually as well as temporally. He called this "al-Siyasa al-shar'evva".

More effective, however, is the argument that, even under the general principles of present international law, an international personality coheres in Muhammad as Apostle because these principles stipulate that legal personality is acquired by the person who is qualified and who is obligated by the rules of international law.¹

"Comme sujet de droit nous considérons celui qui encourt la responsabilité pour une conduite incompatible avec la norme, et celui qui a qualité de porter plainte contre toute violation de la norme. Le plus souvent, ces deux qualités sont réunies dans la même personne ou entité; il paraît utile, cependant, de considérer celui qui possède une des qualités seulement comme ayant également la personnalité juridique".² "In conformity with this we shall consider as a subject of international law a person who is a subject of rights and proceedings or a subject of duties and responsibility under international law".³ As a matter of fact when international law was binding mainly on Christian princes, as such, the international personality of the individual was beyond

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1. Spiropoulos, Jena A. - *L'Individu en Droit International*, Paris, 1928, p. 32.
 2. Sorensen, Max - *Principes de Droit International Public - R.C.A.D.I.* col. 101, (1960 III), p.127.
 3. Norgaard, Carl Aage - *The Position of The Individual in International Law*, Copenhagen, 1962, p.32.

discussion. It was only when the personality and sovereignty of the princes gave way to the personality and sovereignty of the state that the view emerged that states only are the subjects of international law, on the ground that the relations of states, since then, proceeded on the basis of their corporate personality whereby the rights of the individual ceased to be a determining factor in law-making. It is self-evident from the foregoing analysis, that these considerations are not valid in our case. The Apostle was the law-giver, the sublime arbiter of the Muslim state, which was but the agent through which he acted.

This view may be easier to grasp when we take into account that the Muslim theory, as we will explain, adheres to the concept of monism in the relationship between national and international law. It is noteworthy to add that the early classical interpretation of the notion of state recognizes the individual as an international person.

In fact, when Muslim international law first came into being, it was an incoherent system of rules scattered among the verses of the Qur'an and traditions, the public utterances of the righteous caliphs, the

treaties and franchises between Muslims and non-Muslims and the occasional interpretations of some jurist-theologians, who took an interest in grouping these rules under special headings such as "Jihad", "The Booty of War", and the "Aman", safety and protection. It was under the 'Abbassid dynasty, when the science of law became more elaborate, that Muslim publicists began to discuss the principles governing the conduct of state in a more scientific way under the technical term of "Al-Siyar wal Magahzi". These cumulative treatises became references for the classical doctrine of Muslim international law.

It might be of interest to cite here the prominent classical commentators on Muslim international law: namely,

(i) Abu Hanifa (699-767 = 80-150), the founder of the Hanafite rite for school, one of the four orthodox schools. His opinions survived through the compilations achieved by his disciples as well as his grandson Ismail b. Hammad which are the main reference for his lectures on international. He was

pro 'Alid, a sympathy that led to persecution and prison.

(ii) Al-Awza'i, Abu 'umar b. Abdel Rahman B. 'Umar - 704-774 = 87-157, the founder of the Syrian school named after him, madhab al-Awza'i. An original version of his criticism of the opinions of Abu-Hanifa on international law was still in existence in the 17th century (11th H.). We can still refer to this criticism in the extensive quotations mentioned by abu-Yusuf in his al-Radd'Ala Sirat al-Awza'i (Cairo, 1357 H.) and equally by al-Shafi'i in his Kitab al-Umm (Bulaq, 1325 H.) where both writers analyse and refute al-Awza'i's comments.

(iii) Abu-Yusuf, Ya'qub b. Ibrahim al-Ansari al-Kufi (729-798 = 113-182), a great Hanafi jurist who showed deep interest in legal theory though he did not engage himself in a special treatise on the subject. The main works in which he expressed his opinions on international law are his Kitab al Kharaj, a volume on public finance, taxation,

criminal justice and kindred subjects (Bulaq, 1302 H.) and his al-Radd Ala Siyar al-Awza'i, already mentioned.

(iv) Al-Shaybani, Abu 'Abdallah Muhammad b. al-Hasan b. Farqad (749/750-805 = 312-189), an imminent Hanafi lawyer. His remarkable treatise, al-Siyar al-Kabir dictated by al-Sarakhsee from his prison to his disciples (Haidarabad 1335-6 H.) is a work of great scholarly value entitling him to be duly considered the Father of Muslim international law. In fact the Haidarabad edition lacks accuracy so the Arab League sponsored a revised edition of which the first three volumes have been printed. Another edition with more helpful annotations was fostered by the University of Cairo but up to now only one volume has been issued.

(v) Al-Shafi'i, Abu 'Abdallah Muhammad b. Idris (767-820 = 150-204), one of the most illustrious Muslim jurists, the founder of the Shafi'i madhab, another school of the recognised orthodox schools. His views on international law

are referred to in his Kitab al-Umm (above mentioned), on which glosses of varying length have been written.

(vi) Ibn Taymiyah, Taqy el Dīn abul-'Abbās Aḥmad b. Abdel Halīm b. Abdel Salam al-Harānī al-Hanbalī (1263-1328 = 661-728), a jurist-theologian on whose orthodoxy Muslim scholars are not agreed, perhaps because of his bitter animosity to all Muslim sects and to the reputation of men, like 'Umar ibn al Khattab, whose authority is recognized in Islam. Among his published works are his Iʿtidā' al-Tariq al-Mustaqīm fi Mu'amalat Ahl al Jahim, and al-Siyasah al Shar'iyah in which ibn Taymiyah deals with topics of international law.

Obviously, we did not intend by the foregoing review to exhaust the issue relevant to the life and works of Muslim internationalists. This is, of course, a task

that goes beyond the scope of the present study. We only wished to give a brief account of the earliest founders of the science of Muslim international law. A thorough survey convinces us that the Hanafi school can claim the chief credit in this domain since the Hanafi jurists are the pioneers in this field, and the weight of their contribution is strongly felt. We appended ibn Taymiyah to them as a free representative of the Hanbali school whose opinions greatly influenced the Wahabbis in Saudi Arabia and the Egyptian reform party of Muhammad 'Abdu.

In view of the method which those classical writers treated the subject matter of international law, we believe it commendable to review the history of Muslim international law in a rather comprehensive way, i.e. to deal with it in two parts: the first, the practice, which comprises the main documents and events of significance to our study; the second, the theory to be essentially inferred from the said practice together with the relevant verses of the Qur'an. We do not pretend that this treatment will be a detailed one since we mean it to be a preliminary study to the last part of the present thesis.

3. The Practice:

Actually, the foundations of the first Islamic

state in Medina were laid in the Second pledge of Al-'aqaba which was the result of a conference, held one night early in July 622, between some seventy delegates of Medina on the one hand and Muhammad, accompanied by his pagan uncle 'Abbas, on the other. The Medinan delegates invited the Prophet to their city and pledged themselves not only to allegiance and to the moral precepts of Islam, but also "to war, in complete obedience to the Apostle, in weal and woe, in ease and hardship and evil circumstances".¹ On hearing the news of this pledge, the Meccans became furious and started an unbounded persecution of Muhammad and his followers, for which reason Muhammad advised the believers to seek security in Medina. In September of the same year Muhammad, himself, migrated to Medina, whereupon he put the principles, sworn under the second pledge of al-'aqaba, in a more detailed document named the Covenant of Medina.² This Covenant - which was of a constitutional nature -

1. Guillaume - op. cit., p. 208.

2. This document was drafted in a conference, presided over by the Prophet which took place at the house of Anas. It is noteworthy that this document represents the first written constitution that history has ever preserved for us. Some doubt the authenticity of this document but according to the prevailing idea, it is an authentic one although there is uncertainty about its date; so we accept it as a basis for discussing the political and legal situation in Medina.
See Watt, M.W. - Muhammad at Medina, Oxford, 1962, pp. 225-6.

commences "In the name of God the Compassionate the Merciful. This is a document from Muhammad the Prophet governing the relations between the believers and Muslims of Quraysh and Yathrib and those who follow them and are attached to them and those who crusade (jāhadū) along with them....". and was composed of forty seven articles¹ nine of which enumerate the Arab clans or groups of the Emigrants and the Helpers, about fifteen deal with the rights and duties of the Jews, and the remainder regulate different aspects of the relations of believers.

The main provisions of the Covenant that come into our study are:

(i) "The believers and Muslims of Quraysh and Yathrib, and those who followed them and joined them and laboured with them.....are one community (umma) to the exclusion of all men."

(ii) "The Jews...are one community with the believers,"²

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1. This division was done by Welhausen who was the first to translate the document into an European language. Hamidullah believes that it comprises fifty two articles. Hamidullah - Le Prophète de l'Islam, Paris, 1959 vol.1.p.124.
 2. It is noteworthy that the Covenant did not include expressly the names of the three main Jewish clans, an Nadir, Qurayzah and Qaynūqa'. As the last of these clans was liquidated in 627, some hold that the Covenant was drafted after that date, otherwise it would have referred to the said clans. It sounds more likely that it was drafted at the beginning of the Medinan period because this is its natural place, but it might have taken its definite shape by stages. This view will be further illustrated when we talk about the Jewish problem.

the Jews have their religion and the Muslims have theirs, their freedom and their persons except those who behave unjustly and sinfully for they harm but themselves and their families."

(iii) Every clan according to their present custom¹ shall pay the bloodwit within their number and shall redeem their prisoners with the kindness and justice common among believers."

(iv) "The peace of the believers is indivisible. No separate peace shall be made when believers are fighting in the way of God".

(v) "The Jews shall contribute to the cost of war so long as they are fighting alongside the believers".

(vi) "No polytheist shall take the property of Quraysh under his protection nor shall he intervene against a believer".

(vii) "The close friends of the Jews are as themselves. None of them shall go out to war save with permission of Muhammad, but he shall not be prevented from taking revenge for a wound".

(viii) "If any dispute or controversy likely to cause trouble should arise it must be referred to God and to Muhammad the apostle of God".

1. This quotation seems to be a bit vague. ~~and~~ It means actually "each clan according to their former condition".

(ix) "Yathrib shall be a sanctuary for the people of this document."

The nascent state of Medina faced, from the very beginning, two crucial problems that threatened to shake it to its foundations - namely, the Jewish opposition within the city-state and the Meccan hostility outside it. These problems were solved by stages.

(i) The Jewish opposition: The first stage came after the battle of Badr, in 624, when some of the Jews of Qaynuqā' and some Muslims who were doing business in the market engaged in a petty quarrel¹ after which the Banu Qaynuqā' retired to their strongholds. That act on the part of the Jews meant, according to their customs, that they were preparing for war, a casus belli. Only drastic measures in that situation could save the state from crumbling away. Muhammad, as responsible for the security of the state, had no alternative but to besiege the Jews and treat them as traitors to the state. After fifteen days of seige, the Banu Qaynuqā' surrendered and were deported from Medina and their property was confiscated.

1. Glubb, Sir J.B. - The Great Arab Conquests, London 1963, p.68. A group of Jews continued to scandalize a Muslim woman and, in her defence, a Muslim killed the Jewish aggressor and the Muslim himself was killed.

The second stage took place in August 635, a few months after the battle of Uhud, and, while the Muslim state was still licking the wounds it endured in the said battle. The Prophet went, in person, to Beni-an-Nadīr to request them to contribute to the blood money which he had to pay to Bani 'Amir for the two victims of the man who escaped from the well of Ma'unah.¹ Pretending to be ready to co-operate, the Banu an-Nadīr were conspiring to kill the Prophet who became aware of the plot in due time and was able to escape. Guilty of preparing an assault against the head of state, and being responsible for it, the Banu an-Nadīr were sentenced to banishment and they had to leave Medina within ten days. Their behaviour was inconsistent with the honour of citizenship so the decision was, to our mind, a deprivation of nationality with expulsion as a consequence. The Banu an-Nadīr refused to reconcile themselves peacefully to the ultimatum, so the state had to carry out the decree

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1. The tribe of 'Amir had been divided into sections, one of which was in alliance with the Muslims. In June, 625, at the well of Ma'unah, some of the hostile section attacked a group of Muslims and killed all except two who managed to flee. One of the two who escaped met two men of 'Amir and killed them in revenge, not knowing that they were from the allied section. So the Muslims had to pay a blood wit for the two murdered at Ma'unah.

by force and Muhammad set about beseiging them. After fifteen days they gave in and were expelled from Medina.

The third stage was performed in April 627, after the failure of the Meccan expedition of the Khandaq (Trench) against the Jewish clan of Qurayzah who were intriguing with the enemies during the seige of Medina and at one time were on the point of attacking the Muslims in their rear. Relying on the loyalty of the Jews and their duty in respect of the defence of Medina, the Prophet had posted no forces for the purpose of guarding the Muslim quarters of the town, and had left only a handful of watchmen to supervise the security of the women and children. When it became known to the Prophet that the Confederates had won over the Jews to their side, he assigned two bodies of men, three hundred and two hundred strong respectively, to the Muslim quarters of the town to take measures for their defence against the Jews should they attempt an attack. This reduced the forces at his disposal at the trench facing the Confederate army to seven hundred and fifty men. Again, the disparity in numbers and in every other respect between the opposing forces was not only striking but pitiful.

"The Prophet sent his cousin 'Ali to demand from the Jews an explanation. Far from furnishing any

explanation or offering any excuse the Jews behaved most arrogantly towards 'Ali, repudiated their covenant, and uttered vile abuse of the Prophet and his family. Manning their fortified strongholds they dared the Muslims to do their most."¹

The Muslim state of Medina measured arms with the Jews on other occasions but these events are of little interest to our study which does not pretend to exhaust the subject.²

(ii) Meccan hostility:

When the Meccans knew that the Prophet had settled in Medina they addressed a letter to 'Abdullah ibn Ubayy asking him to deport Muhammad from the city, failing which they would come with a mighty force and slaughter the males and enslave the females. This threat of invasion from the Meccans made it necessary for the Prophet to be on his guard, "The Prophet, therefore, sent out small parties from time to time to reconnoitre along

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1. Khan, Muhammad Zafrulla - Islam: Its Meaning for Modern Man, London, 1962, pp.50-51.
 2. It is noteworthy that, before Islam, the Medinan Leader 'Amr ibn Annu'man seriously thought of deporting an-Nadir and Qurayzah because of their hostility to the other Arabs of Medina. As for the assessment of the conduct of the Islamic state towards the Jews of Medina, on the whole, see pp. 120-130.

the routes to and from Mecca and the surrounding area..... one of the devices of the Meccans was to use their trade caravans plying between Mecca and Syria to incite the tribes on their route against the Muslims. They even diverted these caravans from this regular route so that their activities could be spread as widely as possible"¹

"Accordingly we find mention of several reconnoitring parties that went out in small numbers to watch the movement of the Quraysh. None of these expeditions, with the one exception, resulted in bloodshed and the hostile parties separated after a mutual interchange of abuse and self-laudation, in accordance with the old Arab custom. But on one occasion (A.H.2) the Prophet had sent 'Abdu-llāh ibn Jahsh and a party of eight men, with instructions to bring news of the movements of the Quraysh. His written orders were, "when you read this letter, march on and halt at Nakhlah between Mecca and Ta'if, there lie in wait for the Quraysh and bring us news of them." Ibn Jahsh interpreted his orders in accordance with the impetuous impulses of his own warrior spirit and returned to Medina with two prisoners. In so doing he had not only acted without authority but had violated the sacred truce which Arabs observed throughout the month of pilgrimage.

1. Khan - op. cit., p. 41.

Muhammad received him coldly with the words, "I gave thee no command to fight in the sacred month", dismissed the prisoners, and from his own purse paid the blood-money for a Meccan, who had lost his life in the fray.

The facts of the case clearly show that Muhammad had great difficulty in checking the impetuosity of his Arab followers, with their inborn love of fighting and plunder".¹ Besides they advance an argument against those who maintain the conduct of Muhammad in this respect as an aggression and try to prove that it was Muhammad who started hostilities with Mecca.

In fact the hostilities between Medina and Mecca were settled in four battles and an agreement.

The first regular engagement in the Annals of Islam was the Battle of Badr which took place in March 624 in which the Muslims achieved a notable victory over the Meccan troops.

A year later in March 625 an army of some 3,000 men composed of Meccans and their allies set out for Medina where they were engaged with the Medinans in a battle named the Battle of Uhud. A victory was almost in the grasp of the Muslims when a sudden reverse of fortune

1. Arnold, T.W. - The Preaching of Islam, pp. 30-31.

occured due to some disorder in the Muslim advance; a movement of the archers away from their position to join the advance and thus the day ended by a rather indecisive victory for the Meccans.

In March 627 a third battle known as the Battle of Khandaq, or the Trench, took place between a confederate army of 10,000 Meccans and some of their confederate nomadic tribes and the Muslims at Medina. To oppose this enormous force with only 3,000 men Muhammad set them on digging a trench, wherever Medina lay open to cavalry attack. The Confederates beseiged Medina for about a fortnight but this eventually resulted in complete failure for the Meccans. This supreme effort of the Meccans to destroy Muhammad's power, coming to that disastrous effect, put an end to the Meccan serious attempts in this respect and paved the way for a treaty of peace between the two parties.

In March, 629 Muhammad, accompanied by almost 2,000 men, decided to go to Mecca on 'Umrah', or the little pilgrimage, but the Meccans would not allow the Muslims to perform the pilgrimage and even used force to prevent it. After long negotiations carried out by messengers between the Meccans and the Muslims a treaty was agreed on named the Treaty of Hudaibiyah. The terms of the treaty are as follows:

"In Thy name, O God. This is the treaty which Muhammad b. 'Abdullah made with Suhayl b. 'Amr. They agreed to remove war from the people for ten years. During this time the people are to be in security and no one is to lay hands on another. Whoever of Quraysh comes to Muhammad without permissions of his protector (or guardian), Muhammad is to send back to them; whoever of those with Muhammad comes to Quraysh is not to be sent back to him. Between us evil is to be abstained from, and there is to be no raiding or spoilation. Who ever wants to enter into a covenant and alliance with Muhammad is to do so, and whoever wants to enter into a covenant and alliance with Quraysh is to do so.... You are to withdraw from us this year and not to enter Mecca against us; and when next year comes we shall go out in front of you and you shall enter it (Mecca) with your companions and remain in it three days; you shall have the arms of rider, swords in scabbards; you shall not enter it bearing anything else".¹ Shortly after the conclusion of the treaty, a refugee by the name of abu Basir gained Medina seeking asylum. Quraysh sent two deputies claiming his extradition which Muhammad effected out of respect for the

1. Watt - Muhammad at Medina, op. cit., pp. 47-48.

provisions of the treaty. On his way back to Mecca, abu Basīr succeeded in killing one of his escorts and fleeing from the other. He managed to live in a place far from both Mecca and Medina where he was joined by other poor Muslims. The group set on earning their living by raiding the Meccan caravans¹. Obviously the conduct of abu-Basīr and his group could not constitute a breach of the treaty since the men were not members of the Medinan community. Mecca even did not interpret it in that way, but eventually found no alternative to avoid such an embarrassing situation except by denouncing its right to extradition. Thus the treaty was revised in that respect.

In fact the rupture of the treaty came from the Meccans themselves when their ally Bakr ibn-'Abd Manāt, through their help, took the Muslim ally Khuza'ah by surprise and killed some of their men. When Khuza'ah appealed to Muhammad for help he set about collecting a force to conquer Mecca, and on 1st January 630 the Muslim army headed for Mecca. With virtually no bloodshed Muhammad triumphantly entered Mecca on 12th January, 630.

A few weeks after the victory the Muslims gained

1. Arabi, Abdul Rahman - L'Islam et la Guerre à l'Epoque du Prophète Mahomet, Ambilly, 1954, p. 30.

at Mecca, they had to achieve their ultimate supremacy over the Arabs through the Battle of Hunayn which took place on 31st January, 630 between the Muslim army and the tribes of Hawazen, two or three days' journey away from Mecca. Since then, the Islamic state spread over the whole surface of the Arab peninsula.

To define the relation of his community with other communities Muhammad entered into peaceful relations with the chiefs of other sects in foreign countries; gave his safeguard to the Christians of Najran, the Jewish governor of Taima and prolonged a treaty of protection for Yuhama, the Patriarch of Willah on the gulf of 'Aqaba¹. Besides he sent messages to the potentates of the immediate neighbouring countries, that is to say Abyssinia, Egypt, Byzantium and Persia calling them to embrace Islam and to adopt it as the official religion of the state, and warning them against the divine punishment that will befall them if they fail to do so. The traditions say that the Muslim migrants handed the Negus a message from the Prophet and that the Negus honoured it.² A similar

1. Arabi - op. cit., p.17.

2. The message is compiled and photographed in Hamid-Allah, Majmu'-at al-Watha'iq, op cit., pp. 43-5.
For its authenticity see Hamid-Allah's article in Jars, London, January 1940.

attitude towards the messages of Muhammad is reported to have been held by the potentates of Egypt and Byzantium.¹ The authenticity of Muhammad's messages to foreign monarchs is accepted by many authorities on the subject.² But the newly organized state, under the reign of Abu-Bakr, the first caliph (632-634), confronted a serious set back when most of the Arabs outside al-Hijaz broke off from it and followed a number of local and fake prophets. Abu-Bakr declared a ruthless war against the apostates, and campaigns were conducted by Muslim generals until the riddah movement, secession or apostasy, was completely destroyed. This state took its definite shape under the second caliph, 'Umar ibn al Khattab (635-44), who assumed the title of Amir al-Mu'minin, the commander of the believers, a title which implies the political character of the office.

The starting point of 'Umar's organizations was that Islam was the only religion that should be tolerated in Arabia. In line with this he expelled, among others,

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1. In fact the stand which the Byzantine emperor took in this incident could be described as friendly with a pinch of salt. We will mention later on more details on this issue.
 2. To this effect see the data mentioned in Hamid-Allah-Majmu'at al-Watha'iq, op. cit.

the Jews and the Christians. The second point in 'Umar's policy was to organize the Arabs, now all Muslims, into a coherent religio-military commonwealth with its members keeping themselves pure and unmixed. Accordingly the Arabs were not to possess or cultivate land outside the Arab peninsula, a condition which actually did not last long. In Arabia proper they had to pay a kind of tithe, 'ushr, on the land they owned. The dhimmis were to enjoy the protection of the state, administer their own common laws and be exempted from military service, but they had to pay tribute. The third principle was that the ghanimah, booty, which was to be shared among the warriors, ~~but~~ was confined to moveable property and prisoners - so land as well as money constituted fa'y and belonged to Muslim treasury.¹

The Arab conquest was relaxed during the civil war that took place between 'Ali and Mu'awiyah.² Mu'awiyah, the governor of Syria, to secure his backing, devised in 658 or 659 a truce with the Byzantine Emperor Constans II (641-68) at the price of a yearly tribute. But no sooner was the civil war issue settled in his favour than Mu'awiyah, and his successors after him, made zealous and

1. Hitti - op. cit., pp. 169-72.

2. cf. pp. 48-50

persistant attacks against the Byzantian possessions. A line of strongholds, designated as thughurs, was established to protect Mesopotamia and Syria.¹ It seems that the practice of the Islamic state of paying tribute to Byzantium was of common occurrence under the Umayyads. In 678, and because of the naval defeat which Muslims encountered beneath the walls of Constantinople, Mu'awiyah "found himself compelled to conclude a thirty year peace with Byzantium and agreed to pay the Emperor 3,000 gold pieces annually and to send, in addition, fifty prisoners and fifty horses."²

Another factor was conducive to peace treaties, namely; the Mardaites, styled al Jarajimah by the Arabs. The Jarajimah were semi independent people of undetermined origin who installed in al-Lukkan

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1. The strongholds that guarded Mesopotamia were named al thughur al Jaza'iriyah and those that guarded Syria were called al thugur al Shamiyah.
 2. Diehl, Charles - Histoire de L'Empire Byzantin, Paris, 1920, p.53. and Ostrogorsky, George - History of the Byzantine State, translated by Joan Huxley, Oxford, 1956, p.112.

(Amanus) on the Arab borders in Asia. They pledged themselves to the service of the Byzantine cause.

The Jarajimah proved to be a serious danger that Mu'awiyah, in 666 agreed to the payment of an annual tribute to them as well as to the Byzantine Emperor. This precedent was followed, in 689, by another when Abdel Malik had to accept terms forwarded to him by Justinian II and to pay a weekly tribute of a thousand dinars to the Jarajimah.¹

The hostile relations with Byzantium were resumed during the Abassid era. Al Mahdi (775-805) directed, in 782, a successful attack against Constantinople, resulting in a humiliating treaty, imposing on the Empress Irene (797-802) a tribute of 70,000 to 90,000 dirhams to be effected in semi-annual instalments. Her successor Nicephorus I (802-11), attempted to rid the empire of this burden and even asked Harun al-Rashid to restore the amount

1. Eventually, the Jarajimah emigrated to the inner and coastal parts of Asia Minor.

which had been paid. Harun, obsessed with anger sent an expedition that ravaged Asia Minor and undermined Heracles and Iyana. Nicephorus, in 806, had but to sue for peace. He, in addition to the tribute, was to endure a personal tax inflicted on himself and the members of his family as well. Apart from these events, the contacts between Baghdad and

Byzantium, through the ninth century, are of minor importance to our study. In fact, the Byzantine Emperor, once considered the Roman Emperor, due to Islamic invasion, was reduced to the Emperor of Constantinople and his main concern was the defence of the Greek waters since, after the loss of Spain and Africa, the Western Mediterranean became a Muslim lake.

"At first sight the interests of these two political and religious enemies seem irreconcilable. But this was not the case. Warlike expeditions put no impenetrable barrier to cultural relations. This period was a long succession of war and peace, ruin and creation, enmity and friendship. There was no race hatred. According to Oriental sources, the Emperor Nicephorus I (802-11) was of Arabian, probably Mesopotamian origin. Under Leo III (717-41) a mosque was constructed in Constantinople, so that one Greek chronicler referred to this Emperor as 'the Sarcen - minded'. In the first half of the tenth century the Patriarch of Constantinople, Nicholas Mysticus, writing to the Emir of Crete addressed him as (most illustrious and most honourable and beloved) and said (two powers of the whole universe, the power of the Sarcens-Arabs- and that of the Romans, are excelling and shining like two great luminaries in the firmament.

For this reason alone we must live in common as brothers although we differ in customs, manners, and religion). As political intercourse with the Arabs, both in the East and in the West, was essential to Byzantium, the ritual of the reception of the Arab embassies which were sent to Constantinople during the periods of peace was minutely elaborated and the ambassadors were welcomed with all sorts of brilliant Court ceremonies, diplomatic courtesies, and the astute display of military strength..... At the imperial table the Agaren friends (Arabs) occupied higher places than the Frank friends, and the Eastern Arabs were placed higher than the Western. Moreover, when Byzantine ambassadors made their appearance in Baghdad, e.g. in 917, they were solemnly received by the Caliph with full pomp of Oriental magnificance and military parade. In 947-8 the ambassadors of the Emperor Constantine Porphyrogenitus appeared at the Court of the famous Spanish Caliph Abdar-Rahman III and received a brilliant welcome. Among the gifts presented by the Byzantine ambassadors to the Caliph in the name of the Emperor was a beautiful Greek manuscript of the History of Orosius..... Treaties of peace between Byzantium and its neighbours, of course including the Arabs, were made forever, (as long as the sun shines and the world

stands fixed) or (as long as the sun shines and the world endures henceforth and for ever-more.)"¹

On the other hand the Abbassids maintained friendly intercourse with the Franks. These relations commenced as early as 756, when Pippin sent an embassy to al-Mansur in Baghdad.²

Evidently, the foundation of an Umayyad dynasty in Spain in 765,ⁱⁿ opposition to the Abbassids in Baghdad, should be expected to spring more peaceful relations between the Carolingian state and the Islamic state since it was in the interest of both Baghdad and Cordova to gain friendship of the Franks. It is not surprising therefore that the Umayyads of Spain hastened to send, in 768, their envoys to Pippin in Aquitaine and that, in 812, al Hakam signed a treaty with Charlemagne. Yet these friendly manifestations were rather exceptional in the oft-belligerent relations between the Muslims of Spain and the Franks. The inevitable clashes on the frontiers between the two parties made Charlemagne a natural enemy of the Umayyads of Spain and an ally of the Abbasids. This fact, in 777, encouraged a confederacy of Arab chiefs in the north-east to invite Charlemagne to

1. Vasiliev - op. cit., pp. 311-12.

2. Pirenne, Henri - Mohammed and Charlemagne, London, 2nd ed., 1940, p. 160.

join an alliance against the Umayyad Abdel Rahman I the new prince of Spain. Thereby, Charlemagne, in 778, despatched an army which failed to capture Saragossa and whose rearguard, on its way back, was annihilated at Roncesvalles. After that defeat, Charlemagne adopted a defensive policy until the Arab invasion of Septimania, in 793, when he conducted the Spanish March (795) which his son, Louis king of Aquitaine, later took over and advanced as far as Tortosa, (817).

The cordial feelings, activated by self interest, that bound the Carolingians and the Abbasids were expressed in a number of embassies and gifts between the two imperial contemporaries of the eighth century; Harun al-Rashid and Charlemagne¹. "Avec le roi de Perse Aaron,² de qui dependait presque tout l'Orient, sauf l'Inde, les rapports furent si cordiaux que celui-ci attachait plus de prix à ses bonnes graces qu'à l'amitié de tous les rois et de tous les princes du reste du monde et n'avait d'attentions et de munificences que pour lui"³. We read

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1. In fact, Harun al-Rashid hoped to gain the help of Charlemagne against his rival, the Umayyads in Spain, whereas Charlemagne regarded Harun al-Rashid as a prospective ally against Byzantium.
 2. The king meant here is Harun. Apparently the author took him for the king of Persia because his capital, Baghdad, is situated in ex-Persian territory.
 3. Eginhard - Vie de Charlemagne, edited and translated by Louis Halpern, Paris, 1923, p. 47.

in the Royal Annals that¹ in the year 799, Charlemagne sent to the East an ambassador equipped with presents to the saint Sepulchre "cui et donaria sua ad illa veneranda loca deferenda commisit"² in the next year the ambassador returned with the keys of the saint Sepulchre and Calvaire "qui benedictionis gratia sepulchre dominici ac loci Calvariae cum vexillo dtulerunt".

The truth about the details of this incident is controversial. Chroniclers are almost unanimous on the fact that Harun granted Charles the Sepulchre of Christ. Yet whether or not this was accompanied by protectorate over the Holy Places is a debatable matter. Kleinclausz³ denies that such protectorate was accorded by Harun, while Bedier⁴ holds that Harun conceded to Charles a moral authority over the Christians of Palestine. However, an amicable gesture of high religious significance was somehow

1. Eginhard - op. cit., pp. 48-9 (comments)

2. On the facts of handing the key of the saint Sepulchre Eginhard and the Royal Annals do not agree. Eginhard (p. 47) cites that Harun "renonca au profit de Charles a la domination sur ces lieux sanctifies", whilst the Annals refer the fact of handing the keys of the saint Sepulchre to the patriarche of Jerusalem. It is most likely that the keys were handed by the patriarche at the order of Harun.

3. Kleinclausz - La Legende du Protectorat de Charlemagne sur la Terre Sainte, Syria, 1926, pp.211-233.

4. Bedier - Charlemagne et la Palestine, Revue Historique, vol. CLVII, 1928, pp.277-291.

performed by Harun towards Charlemagne, whose assistance against the Umayyads of Spain he was anxious to obtain.

In the year 801, ambassadors of Harun al-Rashid disembarked in Pisa, accompanied by a certain Isaac, a Jew whom Charlemagne had sent to Persia four years before and with him an elephant sent by Harun. In 807 a new embassy of Harun arrived at the Court of Charlemagne with many precious gifts.

It is noteworthy that the Ambassadors of the Carolingians to the Abbasids were Jews chosen among the merchants of the Palace established at Aix-la-Chapelle. This is explained by the fact that those Jews, who endured persecution at the close of the Visigothic period in Spain, found protection and enjoyed important privileges in the Frankish empire. For this reason, the Carolingians made use of the Jews in their diplomatic affairs.¹

While Islam, in Baghdad, was conducting a friendly intercourse with the Franks; Islam in Spain was in militant relations with them. It is very difficult, during the first three centuries of Islam in Spain, to come across significant peaceful relations between the two parties. Hence, it might be of interest to mention

1. Pirenne - op. cit., p. 256.

here that Eudes, king of Aquitaine, gave his daughter in marriage to 'Uthman, the Arab chief of the frontier. The main purpose of this marriage, for Eudes, was to safeguard himself against the Arab threat¹. Also, Abdel Rahman el Nasir received Queen Regent Tata of Navarre, who came to seek medical advice for her son Sancho who was suffering from excessive corpulence, and to ask for military aid to restore the throne for him. Sancho was given the due medical care by the court physician, Hasday, and in 960, he regained his throne through Abdel Rahman's efforts.²

Only when the Islamic power in Spain began to endure decadence that the petty Muslim rulers were to seek alliance with Christian princes in support of their precarious authority, until at last the country was thoroughly swept by the crusades in the thirteenth century.

In 1009 the insane Fatimid Caliph of Egypt, al Hakim, to whom Palestine belonged, ordered the destruction of the Church of the Holy Sepulchre in Jerusalem. After

1. Pirenne - op. cit., p. 207.

2. Tota, it will be recalled, together with King Ramiro II, in 939, encountered Abdel Rahman in a battle at Alhandega where the latter suffered a serious defeat, the first in his twenty-seven years of constant warfare.

his death (1020) a period of tolerance towards Christianity set in again. His successor, al Zahir, in 1027 made an agreement with the Emperor Constantine VIII which is an interesting illustration of the religious relation between Islam and the Empire. It was agreed that the Fatimid Caliph should be prayed for¹ in every mosque in the Byzantine dominion, and permission was granted for the restoration for the destruction of the Church of the Holy Sepulchre in Jerusalem as well as for the institution of a muezzin, a Muslim priest to call the faithful to prayer. In his turn, al Zahir, agreed to permit the rebuilding of Church in Jerusalem".²

Virtually, crusades against Islam started in both the West and the East at the same time. Due to facts, crusades in the East are of greater concern to our study since "it is a history of the political relations between the states which the crusades founded and those Moslem states with which they waged war, a history of the struggle between the Latins and the Moslems in Syria during the 12th and 13th centuries."³ From the practical point of

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1. The author means that Caliph's name should be mentioned in the ceremony.
 2. Vasiliev - op. cit., p. 317.
 3. Stevenson, W.B. - The Crusaders in the East, Cambridge, 1907, (The Preface) p.v.

view, this epoch offers a most significant outlook of a lengthy intercourse between Muslim and Christian states both, presumably, basing their mutual relations on the idea of the holy war. Hence, we deem it convenient to select from this period some expressive incidents which, later, will be of relevance when we come to comment on the Muslim classical doctrine and see how far Muslim practice was ^{not} adaptable to it.

The first important instance we meet in this connection took place in 1108.¹ At that time Baldwin and Jocelin, the Latin princes, were prisoners of the mamluk emir, Jawali. Jawali was suspected of disloyalty by the sultan and efforts were made to reduce Jawali to obedience. On this occasion, in the middle of August 1108, Jawali released the two Latin princes on certain terms. They had to pay ransom, to set their Muslim prisoners free and to support Jawali whenever he was menaced in his person, his army or his possessions.

In October 1109, Radwan offered to pay Tancred twenty thousand pieces of gold if Tancred gave up the seige he was holding against Ezaz, but the offer was refused.

1. Stevenson - op. cit., p. 84.

"When Zanki threatened Damascus in 1139, Mu'izz ed-din Anar resolved to appeal for help to Fulk of Jerusalem. By securing alliance with him he saved the situation and inaugurated a new period in the relations between Damascus and its neighbours..... Through Usama ibn Munkidh he offered to defray by monthly payments the cost of the troops which might be sent, and agreed that Banyas should be handed over to the Latins after the capture from Zanki's governor. He urged that Zanki was the common foe of all Syrian states and that if he gained Damascus the Latins would suffer by the increase of his power. The Latins were convinced that his arguments were reasonable. They were specially desirous to recover Banyas and agreed to help him..... Then the allies porceeded together to attack Baynas. Anar fulfilled his agreement by joining in the seige. Raymond of Antioch and Raymond of Tripoli both took part. Moslems and Latins fought side by side and vied with one another in their zeal."¹

In 1160, Nejm el-din Ayub purchased peace for three months from Baldwin at the price of 40,000 pieces of gold.

1. Stevenson - op. cit., pp. 143-45.

In 1191, when Akka was besieged, the Muslim princes sued for a truce. "It was agreed that Saladin should be invited to share in the negotiations and a representative of his discussed terms with the Latins..... The conditions of surrender are not altogether clear. The Latins required, besides surrender of the city

(i) payment of a certain ransom (200,000 pieces of gold),

(ii) the liberation of certain prisoners and

(iii) the restoration of the holy cross. In return they promised to respect the liberty and perhaps the personal property, both of the garrison and of the inhabitants."¹

In the truce that was concluded in 1204, between el-Adil and the Latins, the contracting parties accepted the status quo and agreed to share together the revenue of the district of Sidon.

In April 1250, peace was finally made between Egypt and King Louis who, together with most of

1. Stevenson - op. cit., pp. 269-70.

his nobles, were prisoners of sultan Turan Shah of Egypt. "It was agreed that all prisoners made since the battle of Gaza, in 1244, should be released; that the territory of both parties should be as it was before the Christians landed; that Damietta, accordingly, should be restored, that the persons and property of the Latins in the city should be respected and that Louis should pay the expenses of the war and a certain ransom for himself and all the captives. These terms cannot be regarded as severe."¹

In the midst of these militant relations, flickers of friendly attitudes occasionally glittered. An example manifested in the fact that Richard's sister was to be given in marriage to Saladin. Only the threat of ex-communication stopped Richard from achieving this project.

Events of telling legal relevance to be included in a brief exposé are seldom in the Islamic-Christian relations after the close of the

1. Stevenson - op. cit., pp.328-9.

crusades and up to the advent of the Ottoman empire. The foregoing lines show that Muslim practice knew alliances between some Muslim princes and the Crusaders against other Muslim princes. It also records treaties in which Muslim princes sued for peace by paying tribute. The non compliance of the Islamic practice, during the Crusades, with the classical doctrine is to be recalled when we come to comment on the said doctrine.

The rise to power of the Ottomans marks a turning point in the legal history of Islam. Their internal as well as external policy, from the beginning, tended to be

temporally independent of the Shari'ah. In asserting the right of the temporal power to legislate "the sovereign's own enactments, formulated as occasion demanded, should become law, and the theory within the Ottoman State came to be that every manifestation of the 'Royal Will' (*irāda saniya*) was a valid command, provided it did not run counter to those provisions of the shar' which were generally recognized and in force in the country. A distinction was, however, made in practice between (a) a manifestation of the royal will promulgated after deliberation in the council of ministers and (b) an arbitrary expression of the royal will. The former was called a qanun or *nizam*, while the latter was an irada saniya properly so called. The sovereign's power thus to establish law was in Turkey called 'urf, here distinguished from 'ada, established custom, which was recognized as another source of law.....In spite of protestations to the contrary, the royal will was on occasion at variance with some well-known provision of the Shar'. A notable example is to be found in the decree that led to the formation of the corps of the Janissaries. According to the Shar', it was established that no dhimmi (..... who paid a poll-tax), could be enslaved or compelled to give up his children as the sovereign demanded in order that

they might be converted and used to form the slave corps of the Janissaries. The initiation of the system is attributed to Murad I, whose law of drafting (*devshirmeh*) thus arbitrarily provided that in the conquered districts of Europe Christian youths should be denied the exemption from military service implied by the payment of kharaj..... By 1924, however, political events had advanced so far that the temporal authorities felt strong enough to disregard traditions, and on 20th April of that year the Great National Assembly declared that all legislation and executive powers in the Ottoman empire were concentrated in its hands and that it, and it alone, had the power to initiate, modify or abrogate laws."¹

Those secular powers assumed by the sultans helped them to accommodate the Islamic law to the requirements of a living state and to conduct their foreign relations with non-Muslim powers in a more conciliatory way, particularly when the Ottoman commercial interests were affected by the new geographical discoveries in the 15th century. Thus abstention from entering into an alliance with the infidels was definitely abandoned on the occasion of the struggle between Francois I and Charles-Quint. In December 1525 Solayman II received a letter from the King

1. Levy - op. cit., pp. 266-9.

of France, who was a prisoner in Madrid, praying "le grand empereur du monde, maitre du siècle, de l'aider à respousser un ergeuilleux".¹ In February 1535, a treaty was concluded between Francois I, the King of France, and the Sultan of Turkey.² Article I of the treaty provides that the sultan and the king of France "ont traité, fait et conclu bonne et sûre paix et sincère concorde aux noms des susdits grandseigneur et Roi de France, durant la vie de chacun d'eux..."³ "The French were to enjoy exemption rights from the poll-tax, the right to practice their religion and the right of trial in their own consulates by their own laws. The King of France was also given the right to send to Constantinople or Peza or other places of this Empire a bailiff just as at present he has a consul at Alexandria. The said bailiff and consul shall be received and maintained in proper authority so that each one of them may in his locality, and without being hindered by any judge, qadi, soubashi, or other according to his faith and law, hear, judge and determine all cases, suits and differences, both civil and criminal, which might

1. Nys - op. cit., p. 161.

2. The examples cited in the text are just for illustration. A complete historical review of Islamic Christian peaceful relations seem to be beyond the scope of our study.

3. Testa, Le Baron I. De -Receuil des Traités de la Porte Ottomane, Paris, MDCCCLXIV, p.15.

arise between merchants and other subjects of the king (of France)..... The qadi, or other officers of the Grand Signior may not try any differences between the merchants and subjects of the king even if the said merchants should request it, and if perchance the said qadi should hear a case their judgement shall be null and void...." The treaty, moreover, states that "Le roi de France a nomme la Saincheté du pape, le roi d'Angleterre, son frère et perpetuel confederè, et le roi d'Ecosse, auxquels se laisse d'entrer audit traité de paix, si bon leur semble, à condition qu'y voulant entrer, ils soient tenus, d'ici à huit mois, demander audit grand-seigneur leurs ratifications et prendre la sienne." However, the king of England preferred, in 1580, to conclude a separate treaty with the Sultan. The other beneficiaries, mentioned in the Article failed to adhere to the treaty.

Apart from the treaties of capitulation, which began as early as 1535 and to which we will refer later on, we can enumerate the main treaties that bound the Sublime Porte to the Western public law, before, 1856, as follows:

(1) With Russia: (a) the treaty of 1713 about the partition between the two powers of the greater part of North Persia,

(b) the Treaty of Belgrade which followed the Turkish victory in 1739 at Krotzka,

(c) the Treaty of Kucak Kaynarji, in 1774.

Most writers consider this treaty the first international document to recognize the authority of the Turkish sultan over Muslims outside his empire.

Actually, the sultan claimed - and was admitted to - religious authority over the Tartars who broke away from his temporal sovereignty, as a counter agreement to the claims of Catherine II to the patronage of the Orthodox Christians residing in the Ottoman Empire. We believe, from facts and diplomatic correspondence, the Sultan's spiritual authority over the Muslims, though vaguely, was contemplated by European powers who were on friendly terms with Turkey. To substantiate our view, we refer to Pope Alexander VI who sent a representative to the Turkish sultan to reveal to him the project of Henry VIII about the Empire of the East and to request the sultan's financial aid in fighting the French.¹ Another example is the prelude to a letter dated August 25th, 1759, and addressed to Mourad III from Henry III (of France). It begins "Très haut, très excellent, très puissant, très

1. Nys, Ernest - Les Origines du Droit International, 1894, p. 161.

invincible et magnanime prince, le grand empereur des Musulmans, Sultan Mourad...."¹

- (d) the treaty of Jassy, in 1792, about territorial problems.
- (e) the treaty of Bucharest, in 1812, which ceded a slice of the Ottoman Empire to Russia.
- (ii) With Austria: (a) The Peace of Passarovitz, in 1718, allowing Austria certain territorial concessions.

(b) The Treaty of Sistowa, keeping the status quo between the two powers as it was before the war, and dealing with diplomatic privileges and immunities.² Article 13 provides that the ministers accredited by either party to the other "Joueront en vertu du statu quo strict de toutes les prérogatives du droit des gens..."

We can add to these treaties the voluminous diplomatic intercourse between France and Turkey,³ and also the convention pertaining to the Sanitary Conference of 1852, though Turkey - like other signatory powers - did not ratify that convention.

1. Testa - op, cit., vol. I, p.118.

2. For fuller information see Le Tèvre, G.J.S. (Baron Eversely - The Turkish Empire from 1288 to 1922, London, 1923.

3. A detailed compilation of these documents is to be found in Testa - op. cit., 10 volumes.

When Turkey, under Article 7 of the Treaty of Paris, 1856, was admitted to the benefits of European public law,¹ the legal status of Turkey did not change because the Treaty had only a declaratory effect² since the Sublime Porte had already pledged himself to the acceptance of the European international law. The end of the World War I witnessed the split of the Islamic world into multi-national states with ever increasing activities in the international sphere and a strong tendency towards adhesion to the principles of Western international law.³ Consequently we could say that the historical development of the Islamic state, under its particular atmosphere, came to a standstill a few decades after the rise of the Ottoman Empire. Since then Muslim international law began to loose its direct impact on international Muslim conduct of state. Turkey, which was once the seat of the Islamic

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1. To this effect, the text of the Treaty states that the European group of Nations "declarent La Sublime Porte admettre à participer aux avantages du droit public et du Concert Européen".
 2. See Wood, Hugh McKinnon - The Treaty of Paris and Turkey's Status in International Law, A.J.I.L., vol. 37, 1913, pp. 262-74.
 3. In fact the Arab countries, after World War I, were virtually spheres of influence for both Great Britain and France. North Africa was a French protectorate, with the exception of Lybia which was an Italian colony and Egypt which was a British protectorate. Syria and Lebanon were under French mandates whereas Palestine, Transjordan and Iraq were under British mandate. Up till now a part of the Arabian peninsula, known as the Protectorates of the South, is still under the British

3. Cont...

influence. The Arab independent countries are, at present, members of one League; namely, the Arab League. However, this League is a response to the idea of Arab nationalism which envisages elements other than religion. Consequently, the Constitution of the Arab League is mainly contained of precepts of modern international law. However, this League manifests a certain degree of solidarity among Arab countries which is, as we will see, an imperative of Islam as well.

caliphate, now could be given as the example of the most politically heretical country from the Islamic point of view, if we can use the term "heretic" in this context. This does not mean that Islam lost its practical importance. Islam is still the inspiring force in Muslim countries and there is a strong trend at present to revive it under a modern interpretation. A telling example is Pakistan.¹ Another example is the United Arab Republic whose National Charter, issued in 1963, specifies that the new reform should be based on the spiritual values of the nation.

4. The Theory: Historical and dogmatic development.

(i) Rise of the Muslim state

We mentioned before that we will trace the history of Muslim international law back to the rise of the first Muslim state, i.e. the city-state of Medina. Actually, the foundation of the said state were laid in the Second Pledge of al-'Aqaba. Medinans did not pledge themselves only to allegiance and to the moral precepts of Islam but also "to war in complete obedience to the apostle, in weal

1. The first draft of the Pakistan Constitution was derived from orthodox Islamic conceptions. The present Constitution is also inspired by Islamic views.

and woe, in ease and hardship and evil circumstances.¹

Thus a new element was introduced into the structure of the Muslim society. It was no more a society founded on the sole confession of some religion. It comprised, furthermore, a political element manifesting itself in the obligation of the believer to fight under the commandment of the Prophet. Hence, the new society began to affirm its autonomy as regards the traditional tribal solidarity by military bond which might be operated by the believers against their own kinsmen. When Muhammad went to Medina, in 622, he put the principles, sworn under the Second Pledge of al-'Aqaba, in a more detailed document; the Covenant of Medina. By defining the notion of ummah as the community of persons who constitute the Islamic state, and adopting Yathrib as a sanctuary, or in other words as the territory of the state², and investing Muhammad with certain powers of control and compulsory arbitration to help the stability and organization of the community, the city of Medina was possessed of the required elements--

1. Guillaume - op. cit., p. 208.

2. Tradition reports that the Prophet charged Ka'b ibn Malik with putting signs to delimit the territory of Medina. Hamidullah - La Vie du Prophète, op. cit., vol. I, p. 127.

population, territory and government¹-- to be qualified as a state under the principles of modern international law. But because of a certain degree of autonomy which the tribes preserved towards the central authority of Muhammad, particularly in blood-wit and in waging war, this state began in what might be termed as a form of confederation. After the military prestige that Muhammad achieved by his victory at Badr, on 19th March, 624, and the civil regulations he introduced for the community,² the city-state of Medina turned into what may be called a federate state.³

This state was formally recognized by Makkah in 746, in the Hudaibiyah agreement, since the agreement was

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1. In fact the document, among other topics, dealt with defence, legislation and administration of justice.
 2. We give, as example, the regulations relevant to marriage succession and the tax called sadaqah.
 3. The city state of Medina, during the lifetime of Muhammad, maintained the federal structure and did not achieve the unitary form because both the Emigrants and the Helpers kept some sort of internal autonomy and individual responsibility, as each tribe was to pay, as before, for the delinquencies of its members and for the ransom of kinsmen who were prisoners. But two new principles were introduced, namely,
 - (i) The obligation of every tribe to produce anyone of its members who commits a wrong to a member of another tribe for vengeance to be exacted.
 - (ii) The ultimate authority rested not with the chieftains but with Muhammad and, beyond him God. This attitude was conspicuous in the discussions about the succession to power that took place immediately after the death of the Prophet.

concluded between two equals with the acknowledgement of Muhammad's political power in Medina. The agreement commences "This is what Muhammad b. 'Abdullah has agreed with Subayh b. 'Amr: they have agreed to lay aside war for ten years during which men can be safe and refrain from hostilities...." The agreement further stipulates that both parties "will not show enmity one to another and there shall be no secret reservation or bad faith."¹

As we noticed before, this agreement was signed by Muhammad in his political power and this we take as a legal and political recognition of the city-state of Medina.

In 630, and after the capture of Mecca and the victory of the Muslims gained at the battle of Hunayn, the Islamic state spread over the whole of the Arab peninsula. But it is questionable among writers whether or not Muhammad, in the last year of his life - 'Amul Wufūd - or the year of deputations, became the ruler of the Arabian peninsula. Some stress that his political authority was spread over almost the whole of Arabia. Others go to the other extreme maintaining that he only ruled a limited district round Medina and Mecca. A third group stands in between, suggesting that the Islamic

1. Guillaume - op. cit., p. 504.

state, in 632, was "a conglomeration of tribes in alliance with Muhammad on varying terms, having as its inner core the people of Medina and perhaps also of Mecca."¹ But this controversy is of minor importance since it relates to a very short period. When Abu-Bakr, a few months later, was elected as successor to the Prophet (632-634), he for certain considered himself the ruler of Arabia and conducted his policy on that attitude.²

Talking about the emergence of the Islamic state, and referring to the treatment which the said state administered against the Jews of Medina, it might be questioned how far the nascent Islamic state respected what we call the minimum standard of human rights because the conduct of the Islamic state towards the Jews of Medina is a highly controversial topic among commentators. We would like from the very outset, to exclude from the discussion the hypothesis that the measures taken were meant to annihilate the Jews as such. "The continuing presence of at least a few Jews in Medina is an argument

1. Montgomery - Muhammad, op. cit., pp. 22-23.

2. The bay'a, pledge, to Abu-Bakr, although given by a limited number of the electorate in Medina, was construed as binding on all the Arabs. Such was the interpretation at least as regards the first three righteous caliphs.

Tyan - op. cit., pp. 166-176.

against the view sometimes put forward by European scholars that in the second year after the Hijirah Muhammad adopted a policy of clearing all Jews out of Medina just because they were Jews, and that he carried out this policy with ever increasing severity".¹

To assess the actions performed, we first should outline the legal status of the Jews in the Medinese community after the promulgation of the Covenant. A preliminary question to this study is; when was the Covenant promulgated? The sources are not clear about this, so different theories were suggested in that respect. For us, the conception most likely to be accepted is that the Covenant was drafted by two stages. In the first year of the Hijirah, the first part of the Covenant concerning the Muslims consisting of the first 23 articles, was formulated. This part included Article 16 which provided that "whoever of the Jews follow us has the (same) help and support (as the believers), so long as they are not wronged (by him) and he does not help (others) against them". This provision means that the Covenant was open to the adherence or accession of the Jews on certain

1. Watt - Muhammad at Medina, op. cit., p. 217.
When Muhammad died his coat was found pledged to a Jewish merchant in Medina.

conditions. That adherence was achieved in the second year of the Hijirah and before the Battle of Badr.¹ The sources must have admixed the two parts and fictioned them as being originally one document since actually they are complementary. There is a possibility that some alternations may have occurred to that Charter during the lifetime of the Prophet, but they could not be of great significance. Some Western scholars object to this view on the assumption that the Covenant did not mention the three main Jewish tribes which were subjected to persecution. In fact, this is not a serious objection as it may appear on its face because the Covenant did not refer to both the Aws and the Khazraj as individual entities as well, yet there is no doubt that the Covenant applied to the two tribes. We must remember that the new organization rejected the old tribal system based on either birth or affiliation and innovated a new dynamic idea of solidarity. Therefore the Charter confined itself to mentioning the old tribal entities through their subdivisions, and in line with that it referred to the Jews in their qualifications as confederates to the Aws or the Khazraj, since this fact

1. Our view is based on the reports of ibn Manzur-Lisan al-'Arab', and Abu Dawūd-Sunan; referred to by Hamidullah in his work on "Le Prophète de l'Islam"- op. cit., vol. I., p. 128.

was the driving element of integrating the Jews into the Medinan community. We know that the Qaynuqā' were confederates to the Khazraj and the al-Nadīr and the Qurayza were confederates to the Aws. It would be illogic to assume that the Covenant gave all that attention to the Jews at a time when the main body of the Jews was either deported or executed. Our idea could be asserted by practice such as the remark given by abu-Bakr in his quarrel with Finhas of Banu Qaynuqa' "if it were not for the Charter between us and you, I would have cut off your head", and the fact that the Jews who fought with the Muslims at Uhud did so as confederates to Abdullah -ibn Ubbay.

Hence, the Jews of Medina became citizens of the new Muslim state. As such, they had to respect the public order of the state and refrain from active enmity to its creed which was the basis of the whole structure of the state. Any such act would be considered, according to modern standards, as a crime of high treason worthy of major punishment. This is a common trend in most laws. But the Jews did not pay much heed to their obligations as citizens, or to their commitments according to the Covenant of Medina. A few months after the organization of the state, they adopted a positive if hostile attitude

towards the state, rejected the Prophet's mission and, in some cases even expressed contempt and derision. We could adequately appreciate the seriousness and danger of these polemics if we bear in mind the cultural superiority of the Jews as compared with the illiterate Arabs, and the influence the Jews can presumably gain in an unadvanced society where poets occupy the position of the press in modern times. This resulted in a religious and cultural break between the Muslims and the Jews. But when the state became the object of military campaigns since the battle of Badr the measures which the state could legitimately take against such acts must correspond with the amount of danger which threatened it. It is true that the Muslim state was victorious but the state of war did not cease because the Meccans, while they were still in the battlefield, swore to come back in a year's time, a statement which means that the city-state of Medina would stay in a state of war for this period. In such circumstances we should be ready to admit that the city-state of Medina could no more tolerate a faction of active opponents who opposed its policy and were ready to compromise with the enemy at any convenient time¹ otherwise

1. The incident of Ka'b ibn al-Ashraf could be cited as an example. After Badr, he paid a visit to Mecca and was thought to have encouraged the leaders of Quraysh against the Muslims.

it would be in a very precarious situation. To be fair, let us suppose, for the sake of argument, that the Covenant of Medina was not drafted until 627, would that affect our view? To answer this question we have to consider the situation of the Jews in Medina when, in 622, Muhammad arrived there--The Jews were actually in an inferior position to the Medinans and could not maintain themselves had they not entered into alliances with Arab clans.¹ In other words, the Jews were under the protection of the Medinans who pledged themselves to embrace Islam and defend Muhammad as they did their own kin. So, the Jews must have behaved in a friendly manner at the very beginning of Muhammad's arrival in Medina, otherwise Muhammad would not take an amical attitude towards them to such a degree as to adopt some of their religious rituals. Moreover, the Jews' opposition was directed against the Islamic concepts and not against the political alliance which the Medenians concluded with Muhammad, that is to say they did not resent the political agreement but rejected bitterly the Muslim religious claims. Thereupon we have to infer that the Jews, even under the pre-Islamic customary law, were committed to that alliance and that

1. Montgomery - op. cit., pp. 84-8.

their obligations, as citizens of the Medinese State, were ruled by the Second Pledge of 'Aqaba. These obligations, for the Jews are based on political and not religious allegiance. As the Covenant of Medina was but a detailed interpretation of the said Pledge, we believe that the commitments of the Jews towards the city state of Medina were the same, whether the Covenant was drafted before or after their expulsion. This brings us to the conclusion that the conduct of the state towards the Jews was quite in order, regardless of the date of the Covenant.

Exceptional circumstances justify exceptional measures.

It is quite fair that, in accordance with the dictates of necessity, all regulative limitations might be deliberately rejected and the rigor belli introduced. We should not forget that at the present time, there are writers who advocate the doctrine which states that the binding force of the laws of war in general may be disregarded in case of extreme necessity; "Salus populi suprema lex".

This principle of necessity was generally adopted by The Hague Convention, 1907, concerning land war regulations, which contain several references to military necessities as a justification for not complying with some prohibitions. Under these Conventions, collective penalties are not unlawful if the group partake in the illegal

activities.¹

So, even if we take the bare facts and try to consider, according to modern standards, the conduct of the city state of Medina towards the Jews we will find that it is permissible under the Hague Conventions. However, if those acts were not justified for self defence, they, at least, are legitimate as reprisals. Reprisals enclose means, which illegitimate per se, are allowed as a counteraction against prohibited activities already done by the enemy. Reprisals are to be carried out to the extent that guarantees no future infringements and the method they take is a matter of discretion for the party who institutes them since there is no relevant rule of law. Hence, even under the Geneva Convention of 1949, collective penalties could be inflicted upon enemy non combatant nationals; counter reprisals are not allowed.²

"It is thus sufficient to justify the imposition of collective penalty that the population has known of the

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1. This could be inferred from Article 50 of the Conventions which states that "No collective penalty, pecuniary or otherwise, shall be inflicted upon the population on account of acts of individuals for which it cannot be regarded as collectively responsible".
 2. For details see
 - (i) Greenspan, Morris - Modern Law of Land Warfare, California, 1959, pp. 407-13.
 - (ii) Castren, Erik - The Present Law of War and Neutrality, Helsinki, 1954, pp. 60-72.

criminal intentions of individuals but has them secret or has not prevented the crimeit has been further considered that a reasonable belief on the communal liability of the population is enough. In practice, however, belligerents have often inflicted collective penalties on much vaguer grounds, often relying on mere assumptions".¹

These rules, obviously, render the conduct of the Muslim state legitimate. It is to be recalled that Muhammad, in his endeavour to regulate the matter by other means, sent an envoy to the Jews but the envoy was arrogantly received. We would like to add that reprisals should not be regarded as modes of punishment or revenge, "although they are often referred to, as such, in everyday language and the desire for revenge is often an important factor in the resort to reprisals. Reprisals are often a form of self help in international law".² The experience of the world wars indicates how far the law of war have been lost in a welter of reprisals and counter reprisals.

The retributive justice inflicted on the Jews of Medina, particularly the Qurayzah, furnished to some Western writers a ground for attack. "Human nature is so constituted that, however criminal the acts of an

1. Castren - op. cit., pp. 77-8.

2. Castren - op. cit., p. 69.

individual may be, the moment he is treated with severity which to our mind seems harsh or cruel, a natural revulsion of feeling occurs, and the sentiment of justice gives place to pity within our hearts".¹ Certainly the destiny of the Banu Qurayzah was sealed in a deplorable manner through a sentence given by an infuriated soldier who had been deadly wounded in the attack of the Trench, but we must not, in the sentiment of pity, ignore the exigences of justice and culpability. The Qurayzah were settling in the proximity of Medina, and thus represent a potential danger to the Muslims and could treacherously show the enemies the weak points of the city. "It must be remembered that the crime of these men was high treason against the state during a time of seige, and those who have read how Wellington's march could be traced by the bodies of deserters and pillagers hanging from the trees, need not be surprised at the summary execution of a traitorous clan".² Expulsion proved to be an indiscreet measure since the Nadir, from Khaybar, continued to intrigue diligently against Mohammad, and they played a prominent role in the formation of the great confederacy that undertook the attack of the Trench. It is of

1. Ameer Ali - op. cit., p. 80.

2. Lane, Poole -- Selections from the Koran, Introduction, p. Ixv.

significance that the Qurayzah, unlike the Qaynuqa' and the Nadir, did not leave its destiny in the hands of the Prophet who most likely would be rather lenient, but insisted on being judged by the chief of their Arab confederate clan.¹ Moreover the Jews were prosecuted and sentenced according to their own laws. The powers of the arbiter, who was appointed to settle the dispute, were not restricted to the application of particular rules. Both the Muslims and the Jews, presumably, left the choice of the appropriate rule of law to the discretion of the arbiter since neither party insisted on applying any rule in particular. Besides, the arbiter, before awarding his decree, made sure that both parties will surrender to his judgement without any protest. Thereby, the arbiter decided to judge the incident according to the Jewish law, namely, the Deuteronomy.² Under these rules "when thou

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1. Expulsion was the punishment inflicted on the Nadir although they were accused of attempting an assault on the Prophet. When the Prophet heard the sentence he murmured "It is their destiny decided by the God of the seven heavens", a reaction which shows that he did not applaud it. Anyhow, in his powers as head of state, the Prophet granted free pardon in some individual cases. Hamidullah - Le Prophète, op.cit., p.389.
 2. The Deuteronomy is "the fifth book of the Pentateuch, called in Hebrew Debarim (words)... It is composed in the main of the discourse which Moses is represented as having delivered, immediately before his death on the other end of Jordan, for the purpose of teaching the Israelites the laws which they have to obey and the spirit in which they were to obey them when they should be settled in the Promised Land." The Jewish Encyclopaedia, New York and London, MD222VII, vol. IV, pp. 538-9.

drawest unto a city to fight against it, then proclaim peace unto it. And it shall be, if it make thee answer of peace, and open unto thee, then it shall be, that all the people that is found therein shall become tributary unto thee, and shall serve thee. And if it will make no peace with thee but will make war against thee, then thou shalt beseige it and when the Lord thy God delivereth it into thine hand, thou shalt smite every male there with the edge of the sword; but the women, and the little ones and the cattle, and all that is in the city, even all the spoil thereof, shalt thou take for a prey into thyself; and thou shalt eat the spoil of thine enemies, which the Lord thy God hath given thee...".¹ We consider this a true implementation of Article 25 of the Covenant which stipulates that "... to the Jews their religion and the Muslims their religion..." "This applies both to their clients and to themselves, with the exception of anyone who has done wrong or acted treacherously; he brings evil on himself and on his household". - In other words, this is a Jewish, and not an Islamic decree.²

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1. Deut., XX: 10-15 - The Holy Bible, The British and Foreign Bible Society, London, 1955, pp.201-2.
 2. This is not a case of applying the Jewish law to Muslims. Here Muslim private international law tolerates the application of a foreign law due to the existence of a foreign element in the conflict on whom law is to be inflicted.

(ii.) Definition of "State"

Actually, a development can be observed in the course of Muslim *modus operandi* as regards the expression of the notion of state. The first term to be used in Muslim practice was the word "ummah", a word derived from the Hebrew (*umma*) or Aramaic (*ummetha*). In the Qur'an the term occurs in a number of varied and changing meanings, but on the whole it refers to "technical, linguistic or religious bodies of peoples who are objects of the divine plan of salvation".¹ Thus, the Muslim community was styled as "an ummah in the middle"² and that the Muslims "have become the best ummah that hath been raised up for mankind".³ The term was as well, used to designate the righteous among the ahlel-Kitab: "And of Moses' folk there is a community (*ummah*) who lead with truth and establish justice therewith".⁴ However, when Muhammad introduced the term to the Convention of Medina the term became a specifically Islamic term to designate the Muslim state. This statement could be inferred from Articles I and 25 of the said Covenant. According to

1. Paret, R. *Umma*, an article in the *Encyclopaedia of Islam*, London and Leyden, 1934, vol. iv, p. 1015.

2. Qur'an; II: 143.

3. Qur'an; III: 110.

4. This conception was implied in 'Umar's policy when he reorganized the Muslim state.

Article I the Emigrants and the Ansars, and presumably those who follow them, constitute "a single ummah distinct from (other) people," or in the modern terms, the Muslim community enjoys an independent legal personality.

Article 25 states that "The Jews.... are an ummah along with the believers." Admittedly, this article could be construed in the sense that the Jews constitute a community parallel to that of the believers, but, to our mind, it is preferable to hold that they were included in the one ummah. It seems that the retention of the Jews as a distinct group, as well as the other groups mentioned in the Convention, could be explained by administrative convenience such as in case of their responsibility for blood money, ransom and the like. Nevertheless, this system of subdivisions did not remain for long in Muslim practice. Therefore, the term ummah, came to mean a state the people of which are almost exclusively the Muslims, the Jews and the Christians or some section of them.¹ After the exclusion of the Jews from the politico-religious community of Medina and the incorporation of Mecca and other parts of Arabia into the Muslim state, the term ummah became obsolete. Occasionally, it was replaced by one of two terms; Jam'ah or Hizb Allah.

1. Watt - Muhammad at Medina, op. cit., p. 241.

This interpretation of the idea of state was more crystalized in Abu-Bakr's mind. When, during the riddah, some revolting tribes refused to pay tribute but confessed their belief in God and His People and were ready to perform the prayers they were actually trying to separate the political from the religious. Abu-Bakr, in rejecting this view and waging war with them, expressed that, in his understanding, wherever the religious leadership is admitted its corollary is political leadership. Thus under Abu-Bakr, the Muslim state assumed the unitary form having its central government in Medina. 'Umar I, being aware of this fact, assumed the rather political title of amir al-Mu'minin.

However, we cannot claim that there was a conventional term to designate the Muslim state, particularly in its formative period, since diplomacy was carried out in the name of God and Muhammad. But the state which, during the period of the caliphate and the Umayyads, was called ummah¹ and jama'ah, got a new definition under the Abbassid dynasty; namely, dawlah, which literally means

1. The delicate concept of ummah is used at present to show the modern national divergences of the Muslims. In this sense we speak, for example, about the Arab ummah.

new era. The Abbassids, in adopting this term for their state, were referring to their revolutionary movement. However the term came in Arabic terminology to denominate the state.

Now we come to the question: how far the conception of ummah or dawlah is similar to the modern conception of state and how far different? This, of course, calls for tracing how far the constituent elements of the modern state; namely, the people, government and territory are adopted in Muslim theory. To understand such study, three facts should be kept in mind, i.e.

(i) In fact the Qur'an contains almost nothing that may be conceived as civic or state legislation. The nearest verse to be invoked in this context is an exhortation to the believers to obey God, his Apostle "and those in authority",¹ and even this verse is interpreted in a different way by some Arab commentators who held that it is a behest to the troops of a given commander setting out on a campaign at the time.

(ii) The Islamic state, in its formative period had at its head a prophet who integrated both the religious and the political; an unique incident which makes it without precedent or example in the history of international

1. Qur'an; IV: 59.

law. The solidarity of the Muslim community was basically dependent on the religious bond. How the religious and the political came to be intertwined may be seen from a copy of a letter purporting to have been sent by 'Umar to Musa'al Asha'ri, his governor at Basrah: "People have an aversion from their rulers, and I trust to Allah that you and I are not overtaken by it, and unexpectedly, or by hatreds conceived against us. See to the execution of the laws even if it be for only one hour in the day, and if two matters present themselves to you, the one godly and the other one worldly, then choose as your portion the way of God. For the present world will perish and the other world remains. Strike terror into wrongdoers and make heaps of mutilated limbs out of them. Visit the sick among Muslims, attend their funerals open your gate to them and give heed in person to their affairs, for you are but a man amongst them except that God has allotted you the heaviest burden."¹

1. Levy, R. - The Social Structure of Islam, Cambridge, 1957, p. 276.

Levy, in a footnote on the same page, compares, the Muslim state, in that respect with the Ancient Israelite community, and adds that in Roman jurisprudence the ius sacrum was part of the ius publicum, while the emperor was also "pontifex maximus."

Subtle differences render this comparison rather unacceptable. The Jewish community was split into two co-existing kingdoms, that of Judah and that of Ephraim. "The two seats were rarely friendly".

(iii) We have learned that the conception of the tribe was the centre of pre-Islamic Arab political organization. This conception continued to be influential on the Muslim thinking in the early history of the Muslim state since the Islamic ummah maintains some similarities with the tribe. This is due to the fact that the earliest Muslim builders of the state did not differ basically in their organization from the old tribal framework. They rather expanded and reformed it in a way to answer the needs of the larger community of Islam.

Taking the foregoing factors into consideration, we turn to view the constitutional elements of "state". Correspondingly, the Muslims conceived the theory of state in a way which went in line with their thinking and was adapted to their own organization. They described the state as Umma or Jama'a (and sometimes Mulk) stressing mainly the social element in the structure of the state and emphasising that all Muslims, regardless of their geographical location, are members of one and the same body, namely, the Muslim state. The Muslims did not consider a fixed territory as an essential element in the structure of the state.¹ We do not pretend that the

1. Although under the principles of modern international law, a fixed territory is a substantial prerequisite for an entity to claim to be a state, yet writers are not agreed on the legal nature of that territory.

Islamic theory ignored the territorial element completely since Yathrib was delimited as the territory of the Medinan state. Locality, or territory, as a basis for the Medinese state could also be inferred from the incorporation of the Jews of Medina in the said state, and allowing them to practice their own religion since this fact suggests that locality, and not only common religion, was envisaged as basic for the Islamic state. The importance of the territorial element showed again when 'Umar deported non-Muslims from Hijaz while other non-Muslims living outside Hijaz, such as the Jews of Daral Qura in Syria, were left undisturbed. Nonetheless, the territorial basis was not officially recognized by Muslims. For example, the Islamic state of Medina comprised nomadic tribes, such as Juhaynah and Muzaynah, whose habitat lies outside the borders of Medina. Only in one instance territory was recognized as predominant in Muslim theory, i.e. the Meccan sanctuary as it is absolutely inaccessible for non-Muslims. Thus the territorial element had only practical validity but no recognition was given to it. This explains why Muslims regarded the hijira as a change of tribal and social attachment not of location.

Actually this view might have been influenced by the nomadic custom that never recognized fixed lines without width as boundaries to tribal activities.¹ It suffices for the Muslim state to be formed and come into being, that all believers should unite in a social grouping under the leadership of their head, the prophet or his successor. Yathrib, at the beginning, and the Arab peninsula afterwards, were rather a de facto than a de jure element in the structure of the Muslim state. The Muslim state was not circumscribed by a territory, it was factually related to a territory. On the same understanding Abu-Bakr repudiated the claim of the rebelling tribes to give their religious allegiance and remain politically autonomous. This, too, was the background of 'Umar's theory in grouping the Arabs all over the Arab world in one distinct unit. "The question might be raised, why territory should be necessary at all, to constitute an international juristic person? Theoretically, there is no

1. Khadduri provides that "We may argue from a philosophical viewpoint, that Islam, as a universal religion, laid emphasis on individual allegiance to a point which recognized no boundaries for its kingdom, for under a system which claims to be universal territory ceases to be a deciding factor in the intercourse among people"- Khadduri op. cit., p. 46. This interpretation is obviously inspired by the idea of the universal state which will be a topic of discussion later.

reason why a community of persons bound together by common interests of a sufficiently permanent character, whose membership cuts across state boundaries, should not be recognized by international law as similar groups are recognized by municipal law."¹ "The rigidly territorial nature of statehood is not so much a matter of logical necessity as of historical circumstances growing out of the kind of systems and out of juristic conceptions of sovereignty prevailing at the time when international law began to take definite shape".²

Admittedly the political notion of sovereignty, sultan or mulk³, was dominated by this opinion. The sovereignty was essentially a personal sovereignty. Identifying the sovereignty by its relation to a constitution instead of a territory is a logical result when law, as was the case in the Islamic state, entered into all the said relations as a reinforcing element. "The definition enables the term (state) still to be equated

1. Fenwick - op. cit., p. 105.

2. Hall; International Law, p. 81 - quoted by Fenwick op. cit., p. 105 (in the footnotes).

3. In Arabic literature and tradition "mastery" implies only the su'udud, supremacy and prestige. But "mulk" or sultan less satisfactorily translated "royalty" and more precisely "monarchy" indicated the political authority and right to enforce the chief's will, which amounts to the powers of the state in modern terminology. Ibn Khaldun - Prologomena, p. 139.

with the term (nation) in which we have the phenomenon of identifying by the governed with the nation through (nationality)"¹ This concept of state fits in with the view that the distinctive element of the state is only the existence of a coercive authority legally supreme which is explained as sovereignty,² regardless of territory.

The consolidation and development of the political aspects of sovereignty during the first century of Islamic history, having at the same time been accompanied by the development of the religious aspect of the community, did not affect the personal character of sovereignty. The religious attachment, being the primordial element for the political unity of the Muslim community, was bound to be preserved by a unique leadership. To enjoy his powers, the head of the community need not establish his influence over a determined geographical domain, in other words his personal sovereignty could be recognized independently of any territorial sovereignty. Thus the sovereignty of the head of the community comprises a submissive relation between the head, personally, and the members of the community under which the believers owe obedience and

1. Carlston, Kenneth S. - Law and Structures of Social Action, London, 1956, p. 58.

2. Tyan - op. cit., pp. 382-85. But that does mean the caliph was a kind of pope with the spiritual jurisdiction over the Muslims.

fidelity to their chief. This interpretation is clearly reflected in the procedure of bay'ā which includes no reference at all to territory expressing the concept that the authority vested in the chief is not conditioned by him possessing territory. The formula of the bay'ā is exclusively a personal promise of obedience and fidelity. Some exaggerated formulas assimilated the relation between the chief and the members of the community to the relation between the master and his slaves. Endowed with all these powers, the chief of the community, who was normally called the caliph or the imam, was necessarily the legal mouth of the community and the sole organ who was internationally entitled to represent it. He was the personification in which the corporate personality of the community materialized, thus not far from the case of the head of state in modern international law. The title of caliph or imam was commonly given to the head of the community after the death of the Prophet. It is noteworthy that the notion of caliphate played a decisive role in the history of Islam. The caliphate was an original system, unlike any other. It was unlike the Holy Roman Empire, for it did not compete with any pre-existing Islamic political institution. Besides, the caliphate had no divine merits, since the revelation of God ceased at

the death of the Prophet and it is the function of the 'ulamā (the most learned) to interpret the sacred texts. The secular aspect of the caliphate predominated during the Umayyad period, but under the Abbassids emphasis was laid, at least formally, on religious considerations. The Abbassids claimed divine right as the basis of their power and this showed itself in the extravagant titles they chose for themselves such as Khalifat Allah (God's caliph) and Zill Allah'ala al-ard (God's shadow on earth).¹ It was because of the caliphate that the Muslim community was divided into three main sects, the Sunnis, the Shi's and the Kharijis.² This division happened on the occasion

1. Here the legal status of the caliph could be compared with that of the Basileus of Byzantium.

2. The Sunnis are the party to whom the historical caliphate belongs. "The majority of Muslims are Sunnis claiming that they follow the sunnah, the habitual usage of the Prophet, of his companions, of the first four rightly guided caliphs and of the immediate successors."

Dermenghim, Emile, - Muhammad and the Islamic Tradition, New York and London, 1958, p.66.

The Shi'is believe in 'Ali and his sons as the true imams. The Shi'is split into different camps on some issues. They assigned to the Imam an exalted authority as an exponent of divine truth.

The Kharijis formed the earliest religio-political sect and adopted the motto: La hukma illa li-Allah and became ruthless opponents of both the Sunnis and the Shi'is.

2. Cont....

For more information on this subject see:

- (i) Arnold, Sir Thomas W. - The Caliphate, Oxford, 1924.
- (ii) El-Sanhoury, Abdel Raziq - Le Caliphat.
- (iii) Ridda, Muhammad Rashid - Al Khilafa aw al-Imamah al-Kubra, Cairo.

of the conflict (656-661) between 'Ali (the fourth righteous caliph) and Mu'āwiyah who was then the governor of Syria) about the secession to the post. Nevertheless, in the course of time, and due to the definitive results of the Arab conquests, the affirmation of the new power on the conquered territories and the establishment of a system to satisfy the government of those territories, the theory of state and sovereignty gained a new connotation in the Islamic doctrine and practice, particularly after the Advent of the Abbassid dynasty.

To this advent correspond major legal developments. Firstly, the full citizenship of the state, nationality,¹ which formally was confined to the Arabs, now opened to encompass all Muslim subjects regardless of their race or origin. In effect, the older ideas of narrow political exclusiveness gave way to wider cosmopolitan conceptions. Secondly, the territorial idea began to be of importance in the conception of the state. Eventually the Muslim jurist-theologians, of the Abbassid era, adopted the idea of a fixed territory as a constructive element in the structure of the state and divided the world geographically,

1. In our view, this bipartite division of the Muslim State was a de facto division if we consider the allegations of each of the three caliphs.

into two sections: the world of Islam and the world of war.¹ Thirdly, the notion of caliphate underwent drastic metamorphoses.² Both the Fātimid 'Ukayd-allah (A.D. 929)³ in North Africa and the Umayyad Abd al-Rahman III (909) in Spain, claimed the title of caliph, thus creating the unprecedented phenomenon of three rival caliphs, in the Muslim world at the same time each arrogating the right of representing the community on the international level and exercising suzerainty over the separate geographical realm.⁴

Moreover the institution of a new post of amir al umara (commander of commanders), a title which was hastily substituted by another sultan, proved a humiliation to the Abbassid caliph. The holders of this post went so far as to have their name joined with the caliph in the Friday prayers and stamped on the coinage. Actually, the caliphate was put under the tutelage of those sultans and the caliph became a puppet holding but a shadow of his former powers and his empire became virtually dismembered.

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1. Some writers adopted a tripartite division: The World of Islam, the World of war and the World of covenant. We will refer to this discussion in more detail, in the third part of this thesis.
 2. "Arabism fell, but Islam continued, and under the guise of international Islam, Iranianism marched triumphantly on" Hitti - op. cit., 207.
 3. The Fatimid caliphate, which transferred its main seat to Cairo in A.D. 969 was a Shi'i one.
 4. See footnote No. 1. on Page 145.

Since A.D. 1261 the caliph turned into a nonentity with merely nominal powers when the Abbassid al-Mustansir escaped the Hūlāgan massacre at Baghdad and was installed by the Egyptian ruler, Baybars (A.D. 1260-77) as caliph.¹ Since then the honorific post of caliph was that of supreme pontiff whose chief function was to grant a ritual charge such as nominally granting the titles and the thrones, thus coming nearer to the international function of the Papacy before the nineteenth century. Now the rulers of the different Muslim states became their international representatives. When the Turks under the Ottoman Empire, by the middle of the fifteenth century assumed the title of caliph - and that was virtually in a complimentary way, the rudiments of modern international law were about to materialize. This fact reacted deeply on the historical development of the Islamic state. The Sublime Porte gradually adopted a secular approach to foreign affairs.² Nationalism, a western concept, began

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1. This was repeated in 1922, when the Turkish Abdul-Majid was made caliph with no political powers whatever until the caliphate was definitely abolished by the Kemalist government in March 1924.
 2. The Turkish law of nationality, for example, Turkey under the influence of the European powers, introduced the principle of ius loci instead of ius religionis. This is no doubt a nationalistic trend which, in the course of time, became emphasized, as shown in the history of Turkey.
Gardet, Louis - La Cité Musulmane (Vie Sociale et Politique, Paris), 1954, p. 29.

to influence the development of Islamic law. In brief, Muslim classical international law, has, as subjects, individuals rather than territorial groups. It applies to individuals regardless of location, a view advocated by some modern writers particularly the exponents of the sociological school. Duguit, maintains that "Dans toute société humaine, grande ou petite, où on en voit un homme ou un groupe d'homme ayant une puissance de contrainte d'imposer aux autres, on doit dire qu'il y a une puissance politique, un Etat".¹ Duguit also maintains that "only the individual, conscious and master of his acts, is the person of law. Reglade developed the views of Duguit maintaining individuals as subjects of international law."² Scelle defined the subject of law as "L'agent juridique". "L'agent juridique est l'individu muni de compétence par le Droit positif pour produire ou modifier des situation juridiques".³ For Krabbe only individuals can be subjects of international law.⁴

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1. Duguit, Leon - *Traité de Droit Constitutionnel*, vol. I. Paris, 1927, pp. 453, 536-7.
 2. Reglade, Marc - *Perspectives qu'ouvrent les Doctrines du Doyen Duguit pour un renouvellement de l'Étude du Droit International Public*, R.G.D.I.P., vol. XXXVII (1930), pp. 396 et seq.

3. Scelle, George - Manuel de Droit International Public, 3rd ed. Paris, 1948, p.507.
4. Krabbe, Hugo - The modern Idea of the State, English translation, New York and London, 1927, p. 241.

Not only is the theory of Duguit adaptable to the earlier Muslim concept of state but also is the normatif theory of Kelsen, in its conclusion that dualism of the state and the law does not exist, the law is the state and the state is the law.¹ He classifies the individual as an international person, in specific cases, when he is entitled to assert his rights before an international court or if he has, the right, not being satisfied, to appeal to an international organization.¹ Verdross² and Guggenheim³ expressed similar views as regards the individual.

For Lauterpacht,⁴ there is nothing in international law that prevents or excludes the individual from being a subject of law.

Based on the foregoing discussion we can classify the group relations, in turn, into intergroup relations - governed by national law and intragroup relations - governed by international law. Therefore Muslim international law under that interpretation of the notion of

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1. Kelsen, Hans - General Theory of Law and State, translated by Anders Wedberg, Stockholm, 1945.
 2. Verdross, Alfred - Règles Générales du Droit International de la Paix, R.D.G.A.D.I., vol. 30, (1929V), pp.275-507.
 3. Guggenheim, Paul - Traite de Droit International Public, Geneve, 1953/54, vol. I, pp. 171, 210 et seq., 283, 284 et seq., 305 and 310 et seq.
 4. Lauterpacht, Sir Heirsch - International Law and Human Rights, London, 1950, p. 38. See infra Pt.II Ch.3.

state could be identified with the intra-group rules and principles.

(iii) Notion of War:

(A) General background: As we have already learnt, the Muslim state existed for the greater part of its history as an integrated state. Even when petty states broke off under the Abbassid dynasty they generally constituted some sort of Islamic commonwealth with the pontiff caliph as the symbol of their unity. The Muslim state came back to a unitary form under the Turkish 'Uthmanlis. It was only in the first decades of the twentieth century that the Muslim world became disintegrated into independent states and entered into reciprocal relations on the basis of sovereign equality under the principles of modern international law. Consequently, and because of what we have briefly stated about the caliphate, the principles of Muslim inter-relations are not of any great advantage to historical study if the study is concerned with reviewing the development of dogmas. In fact that aspect of study in Muslim legal history is more of a constitutional matter than of international concern.

With regard to the relations between the Muslim state and non Muslim states, we explained that, when Islam

emerged in Arabia in the seventh century of the Christian era, the peninsula was limited by Persia, Abyssinia and Byzantium. Only Abyssinia displayed a friendly attitude towards Islam. This showed itself in its cordial reception of the Muslim emigrants. Both Persia and Byzantium were claiming universal domination and proclaiming war as the effective way to achieve their ambition.

Persia revealed its antagonism to Islam in the way the Sāsānīd emperor received the message addressed to him from Muhammad calling him and his people to embrace Islam.¹ Judged by the standards of international law of that time, this behaviour was considered a grave act of hostility because "in case of refusal by the competent authorities to receive legations, and treaties at the time subsisting between the states concerned were broken off, and this rupture might, and usually did, signify preliminary steps to war. Where there was no existing treaty, refusal implied an intention to continue hostile relationships that may already have been commenced or where hostilities had not yet been begun, it might imply a determination to remain without regular systematic relations with the other

1. The authenticity of Muhammad's message to the Persian emperor is accepted by many authorities on the subject. To this effect see the data mentioned in Hamid-Allah, *Majmu'at al-Wathā'iq*, op. cit., p. 76.

The Persian emperor was likely to have reacted to it in a hostile manner since it was a message sent from an Arab individual who dared to challenge the emperor's supremacy. Presumably the emperor must have shown his belligerent sentiments on this occasion.

community.....Herodotus gives a striking account of the remorse and expiation of the Spartans for maltreating the Persian envoys of Darius. The latter having despatched heralds to Athens and Sparta (to demand earth and water), the Athenians threw them into the barathrum and the Spartians into a well, telling them to carry earth and water to their king from those places. Subsequently, however, two Spartain nobles offered their lives as an atonement to Xerxes for the violence done to the envoys of Darius. But Xerxes replied that he would not act like the Lacedaemonians, who by killing the herald, had broken the common laws of mankind, and, as he blamed such conduct on them, he would never be guilty of it himself. This shows a clear recognition of an obligation, sanctioned by religion and law alike, even towards those who were considered barbarians outside the pale...any offence against an envoy was an offence against the sovereign power.. Enemy envoys were just as inviolable as those of a friendly state".¹

After all this incident reflects the general trend in Persian policy at the time. The Persians considered themselves superior to other people, they are the masters and others should be attached to them. The aliens who followed them never ranked with them. Thus the Persians imagined

1. Phillipson - op. cit., vol. I, pp. 309, 329, 330 and 332.

themselves the heirs of all Asia and formulated a universal monarchy assuming the title of "King of Kings". They were extremely barbarous warriors showing little respect for the Mazidyan religion in their conduct as conquerors.¹ "Persia is an example of constant devotion to pillage, destruction and massacre. Herodotus relates that when Darius took Babylon he not only demolished the walls, and bore away all the gates, he impaled some three thousand of the most distinguished inhabitants... still later, in A.D. 359, a Persian monarch crucified Roman captives, treacherously seized Arsaces, the Armenian king, blinded him and tortured him."²

Actually the Byzantines should be held responsible for inaugurating the belligerent relations between Islam and Christianity. The case in point is that the Prophet, in the summer of 627, sent his envoy Dihyah b, Khalīfah al-Kalbī to the governor of Bashra (Busrā) as representative of the Byzantine emperor, on a peaceful mission to call to him to embrace Islam. The messenger was plundered by Judhān on his return.³ We should not underestimate the seriousness of this incident. "A further ground for war, as involving a serious infringement of a well established

1. Arberry, A. J. - The legacy of Persia, Oxford, 1953, pp. 1-38.

2. Phillipson - op. cit., vol. II, pp. 205-6.

3. Watt - Muhammad at Medina, op. cit., p. 345.

law amongst the ancient nations, was the violating of the sacred character of ambassador....The Veientians, by order of their king, Tolumnius, had put to death four Roman ambassadors who were sent to them to inquire about the defection of Fidenae, a Roman colony, to the Veientians. Hostilities were therefore commenced by Rome, and in the course of a battle in 436 B.C. Aulus Corenelius Cossus, a tribune of the soldiers, perceiving the approach of Tolumnius rushed forth towards him with the exclamation: "Is this the breaker of human treaties, the violater of law of nations? This victim I will now slay-if it is the wish of the gods, that there should be anything sacred on earth - and I will offer him up to the shades of the ambassadors".¹ Accordingly a punitive expedition was sent against the Byzantines about October 627, and, thus started the long to be struggle between Islam and Christianity. Moreover, Byzantium, also was preaching the motto of universal empire² and for that purpose it considered that

1. Phillipson - op. cit., vol. II, p. 187-88.

2. The Prophet's ambassador to the Ghassanid prince, a feudatory of Byzantium, was cruelly murdered. "this wanton outrage on international obligations became eventually the cause of war which placed Islam in conflict with the whole of Christendom".
Ameer Ali - op. cit., p. 90-91.

war was holy and legitimate provided that it envisages the interest of the state and its supreme head.¹ Islam and Christianity engaged from the very beginning in continuous war for about thirteen centuries.

These wars, which constitute a sanguinary chapter in world history, could be divided into four periods. The first and the shortest, is the Arab expansion towards the west which began immediately after the death of the Prophet and secured for the Arabs the Byzantine Middle East, the Maghrib, Spain and Sicily. The second is the Christian reaction in Spain, Africa and ^{Asia} to the Crusades. This came to an end in a success in the Western Mediterranean and a check in Palestine. The third was a retaliatory action by the Muslims, this time the Turks. It was marked by the capture of Constantinople, the temporary occupation of the Balkans and central Europe and the halt of the European expansion in North Africa. The fourth is another Christian opposition in chasing the advance of the Turks from their European possessions. We may be witnessing now the commencement of a fifth episode consisting of antagonism to colonialism and of the liberation of Islam.²

1. Taub - op. cit., p. 366.

2. Roux, Jean Paul - L'Islam en Occident (Europe - Afrique), Paris, 1959, pp. 68-9.

Due to the course of events and amongst a world of adamant warriors, the contribution of the classical Muslim doctrine to the science of international law was bound to be mostly in the domain of the law of war. It may be argued that the Islamic history of war and conquest made the very existence of international law impossible. Such an exaggerated assertion is untenable. The history of the Islamic state may have been a long series of war and conquest, but nevertheless, it evolved and practiced a large body of principles which provided the basis of international law of the time. A commentator on Muslim international law would find no lacuna in so far as the law of peace is concerned.¹ Moreover, law is a subject of a rather practical nature in the sense that it is primarily concerned with the factual needs of the society to which it applies. Therefore, if a given society experiences a continuous state of war it is only to be expected that for that society the law of war should transcend the law of peace. This fact even manifested itself in the works of eminent Western writers. Grotius, for one, because he lived in a period of religious and political quarrels, was influenced by the trend of his time.

1. See the third part of this thesis about the adaptability of the Islamic law to the uses of peace.

"Using a phrase of Cicero, Grotius chose the title of *De Jure Belli ac Pacis* (On the Law of War and Peace), but the law of peace is treated as incidental to the law of war rather than as co-ordinate with the law of war. The work centres in the traditional manner around the problem of war."¹

(3) The Muslim and the Christian Doctrines of War²

Originally the Muslim doctrine regarded war as evil and only tolerated it, if it were just. But eventually both the interpretation of Muslim writers and, the practice of Muslim state contemplated "justness" in a way which is not strictly consistent with the genuine principles of Islam. Since we are presently dealing with the history of Muslim international law we will confine ourselves, for the time being, to a short exposition of the actual evolution of the theory of war.³ To this effect it might seem less complicated and perhaps more comprehensible if we avow the view point of one of the earlier eminent legists as an example of the classical doctrine. In this

1. Nassbaum - op. cit., p. 107.

2. The comparison between the Muslim doctrine and the modern international law will be reviewed in the third part of the present study.

3. The Muslim theory of international law will be scrutinized in the third part of the present work.

regard we deem al-Sarakhsee¹ as a good enough choice. He writes:² "Know thou, that the command about fighting has been revealed by degrees. First the Prophet was enjoined to proclaim and withdraw, 'Profess publicly then, what thou hast been bidden and withdraw from those who join other gods with God' (XV, 94). Then he was ordered to dispute kindly: 'Summon thou to the way of thy Lord with wisdom and with kindly warnings; dispute with them in the kindest warning' (XVI, 126). Then they were allowed to fight, 'A sanction is given to those who are attacked...' (XXXI, 40). Then they were allowed to fight if they (the unbelievers) attacked them, 'If they attack you, then kill them' (II, 187). After this they were enjoined to fight on the condition of the sacred months having ended: 'And when the sacred months are passed, then kill the polytheists' (IX, 5). After this they were enjoined to fight absolutely, 'And fight for the cause of God...' (XX, 1869, 245). And thus the matter was settled."

Here the author, as well as many a commentator on Muslim international law, makes out five successive periods in the policy of the Qur'an regarding warfare against

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1. Al-Sarakhsee was called Shamsul 'Imma (the Sun of Leaders). He died in 671 A.H.
 2. The view above mentioned of al-Sarakhsee is quoted in ibn Abdin-Radd el-Muhtar, part III, p. 29.

unbelievers:

- (i) a period of trust, forgiveness and withdrawal,
- (ii) a second period summoning them to Islam,
- (iii) a third period of fighting in self defence,
- (iv) a fourth period of aggressive fighting at certain times.
- (v) a fifth period, of aggressive fighting in general or absolute terms.

We shall explain--when dealing with the Muslim approach to international law--how erroneous this rational is. As to this theory, the classical Muslim writers divided the world into dar al-Islam and dar al-Harb. The territory of Islam is that which is already under Muslim rule, whilst the territory of war is that which is actually or potentially a seat of war... Thus the Muslim state, theoretically at least, is, more or less, in permanent war with the non-Muslim states, until by conquest they are turned into the abode of Islam. Yet the Muslim sects hold different views regarding the doctrine of Jihad. "For the Sunnis it is a duty which must continue to be obligatory but it is fardd 'alal kifayah, i.e. a duty not necessarily incumbent on every individual but sufficiently performed when done by a certain number.

The Khārijīs consider it the sixth pillar of Islam. The Shi'īs, because their imam is now invisible, maintain that they cannot have a jihad until he reappears.

Admittedly, the Muslim who dies in jihad is a shahīd, martyr, and is promised paradise.

However, a close examination of Islamic history shows that the problem of the caliphate and the disintegration of Muslim unity, both often entailed fighting between the contending Muslim parties. These wars, most of the time, were not devoid of secular purposes if not only for personal interests. Hence, the holy war was not the only kind of war that Muslim rulers waged throughout the history of Islam, though, to disguise their individual ambition, the rulers usually resorted to the casus foederis of the jihad. These wars could not be included in the notion of the jihad proprio sensu. Some writers classify them as qital or muqatala (conflict, war). It is not surprising then that Muslim commentators, in later times, began to study war from a secular point of view. Ibn Abdullah¹ regards wars as casual social diseases and "gives seven reasons for the recurrence of war in society:

1. Ibn Abdullah, Al Hassan in his book entitled "Athārul-Uwal fi Tartibel-Duwal", Cairo, 1295 A.H. The book was originally written in A.H.708.

First for the establishment of a new state, (dawla) or dynasty; second for the consolidation of an already established state or dynasty; third, the wars of a just state (dawla 'ādila) against rebels and dissenters; fourth, wars between two nations or tribes in the form of raids; fifth, the annexation of one state by another regardless of whether the latter was just or unjust; sixth, wars for the purpose of mere robbery, not for any political reasons; seventh, inter-tribal warfare as those existed in pre-Islamic Arabia."¹

Ibn Khaldun maintained "that war has existed in society since (Creation)....Wars according to Ibn Khaldun are of four kinds. First is the tribal warfare as that which existed among the Arabian tribes; second, feuds and raids which are the characteristic of primitive people; third, the wars prescribed by the Shari'ah, i.e. the jiḥād; fourth, wars against rebels and dissenters. Ibn Khaldun contends that the first two are unjustified because they are wars of disobedience, the other two are just wars."²

As for the Christian doctrine of war, we could actually say from the technical point of view that Rome held a doctrine of war which differed from that of

1. Khadduri - War and Peace, op. cit., p.70 (note 45).

2. Khadduri - War and Peace, op. cit., pp.70-1.

Byzantium since each of them treated the topic from a different angle. Practically, as we shall see, both doctrines amount eventually to the same result.

In Rome the theologians - headed by St. Augustine and Ambrose - maintained that war is originally anti-Christian and could not be tolerated except in very special cases. From this emanated the Catholic principle that war is a legitimate evil if inevitable, si inevitabilis urget opportunitas. In the middle ages, however, this dogma gave way to war propaganda, a shift which sounds contradictory to the original principle. For this reason, St. Thomas endeavoured to reconcile what seem irreconcilable by stating that the clerical chivalry are not revenging their own injuries but God's.¹ In fact the Papacy held that the propagation of Christianity is a good reason to justify forcible measures. Hence the Catholic peace embodied the principle of an eternal holy war against infidels. For that purpose the Church blessed war if it had for its aim the conversion of the vanquished people. In line with that view the Roman Church applauded the sanguinary victory of Charlemagne over the Saxons and the crusades that took place within Europe itself to convert the Prussians and other infidels.

As for the attitude of the Roman Church towards

1. Laurent-op. cit., vol. 7. p. 255.

the Muslims, there were two theories. Some held that war against the Muslims was just, for the simple reason that they are infidels. Gentilis admitted that war between the Christians and the Turks is irreconcilable.¹ Grotius, too, was of this opinion advocating a Christian alliance against those whom he called the enemies of religion.² Others, like William Fulpecke and Just Lipse, attacked this view.³

Unfortunately the less tolerant theory prevailed. Hatred to Muslims showed itself in almost all chronicles and in poetry as well. Arabs were considered enemies of God, and Muhammad as a devil. The success of Islam is due to that "qu'elle lache la bride a toutes les mauvaises passions, et permet aux hommes de se livrer à volupté plus que ne font les animaux".⁴

A striking manifestation of these feelings was reflected in the creation of the military orders, a union of chivalry and clergy for fighting against the enemies of the faith.

1. Nys - op. cit., p. 157.

2. Nys - op. cit., p. 159.

3. Nys - op. cit., p. 158.

4. Gulbert de Noget, quoted in Laurent - op. cit., vol. 7, p. 266.

"Les frères de la milce du Temple" and "Les Frères de l'Hopital de Saint-Jean" appeared in the beginning of the 11th century.¹ They were given great privilege by the Pope as well as by kings.

So the dominant Christian doctrine condemned Islam and the Muslims to eternal damnation. From this attitude sprang the crusades that persisted for three centuries forming a deplorable chapter in the sanguinary drama of Islamic-Christian relations.

In Byzantium, the combination of the two powers - spiritual and temporal - in the emperor had its repercussions on the legal conception of war. Byzantium held that war is just, meritorious and even holy so long as it serves the interests of the state.

Constantine VII justified that creed on the ground that his majesty is not anticipating gain but aiming uniquely at the security, liberty and prosperity of his subjects. In line with their belief, the Byzantine emperors introduced a new cult that quickly became very popular, namely, the santification of a series of national military heros such as St. George, St. Demitrios and St. Theodoros. To that

1. "C'est une inspiration de la divine Providence qui a force les ordres militaires, le Christ a maintenant ses chevaliers, qui peuvent en toute conscience frapper les ennemies, car ils combattent au nom du Dieu".
Nys - op. cit., p. 142.

effect Nicephore Phocas took a further step by promulgating an imperial ordinance inviting the clergy to honour, as martyrs, those who die in war against infidels. Thereupon the Christian peace involved an implacable and unending war against all those who are not Christians, a theory which is not far from the Islamic classical interpretation except in its intolerance. "In the case of the early Christians, the doctrine of humility and meekness, preached by the Prophet of Nazareth, was soon forgotten in the pride of power. From the moment Christianity became a recognized force, the dominant faith of a community - it became aggressive and persecuting... It has been said that a warlike spirit was infused into medieval Christianity by aggressive Islam! The massacres of Justinian and the fearful wars of Christian Clovis in the name of religion, occurs long before the time of Muhammad.

Compare, again the conduct of the Christian Crusades with that of the Moslem (when the Khalif Omar took Jerusalem, A.D. 637), he rode into the city by the side of the Patriarch Sophronius, conversing with him on its antiquities. At the hour of prayers, he declined to perform his devotions in the Church of the Resurrection, in which he chanced to be, but prayed on the steps of the

Church of Constantin for, said he to the Patriarch 'had I not done so, the Musulman in a future age might have infringed the treaty, under cover of imitating my example'. But in the capture by the Crusaders the brains of young children were dashed out against the walls, infants were pitched over the battlements, men were roasted at fires, some were ripped up, to see if they had swallowed gold, the Jews were driven into their synagogue, and there burnt, a massacre of nearly 70,000 persons took place, and the pope's legate was seen partaking in the triumph). When Saladin recaptured the city he released all Christians, gave them money and goods and allowed them to depart with safe conduct."¹ Because of this and the failure of the crusades some of the later Western writers tried to justify the theory on political grounds conceiving it as a survival of the old war between Europe and Asia, civilization against barbarism.

Anyhow, the bitter deception in which the Crusades resulted, inspired a new dogma - that it was not true that God desired "holy war" or the destruction of the power of the Muslims; it even seemed that he rather wished to protect them.²

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1. Ameer Ali - op. cit., pp.207 and 220-21. Words between the brackets are quoted from Draper, History of Intellectual Development of Europe, vol.ii. p.22.
 2. Laurent - op. cit., vol. 7. p.

(iv) The notion of peace in the Islamic legal theory and the Christian approach:

In fact, the Muslim classical law of peace is, to a great extent, influenced by the doctrine of the jihad, though Islam, as well as Christianity, regards war as an evil and peace as the normal state of things. Synthetically speaking, the conception of the dhimma contained the basic rules governing peaceful relations between the Islamic state and the other groups. It is rather difficult to give a precise definition for the obscure term "dhimma" due to its fluidity.

Al-Shaibani professes that dhimma is synonymous with hulf, covenant, basing his interpretation on the Qur'anic verse: "And they observe toward a believer neither pact nor (dhimma) honour".¹ In this sense the term was used in the legal jargon to mean commitment through a covenant.²

Actually, the term occurs also in the Qur'anic injunction: "How can there be any treaty for the others) when, if they have the upper hand of you, they regard no pact nor honour in respect of you? They satisfy you with their mouths the while their hearts refuse. And most of them are wrongdoers."³ In both cases the translation

1. Qur'an; IX; 10.

2. Al-Sarakhssee - op. cit., vol. I, p.31.

3. Qur'an; IX; 8.

"compact" would suit, in our view.

As for the tradition we come across the term in the Covenant of Medina as well as in various letters and treaties related to the Prophet.

Article 15 of the Covenant stipulates that "The security (dhimma) of God is one; the granting of neighbourly protection, yujir, by the least of them (the believers) is binding on them...." Here the two terms - dhimma and jiwar are used with the same meaning. "This implies that all members of the ummah are equally protected, that all are equally capable of giving protection which the whole ummah is obliged to make effective."¹

It is most likely that the term dhimma was introduced in the Covenant to replace the pre-Islamic Arab custom that the tribe or the kinship group was under the obligation of guaranteeing security of its members. This replacement became an imperative necessity for the nascent state which reorganized society on a new basis - the bond of religion.

The diplomatic practice of the Prophet suggests two meanings for the dhimma, namely (i) a guarantee of security or protection,² (ii) a compact of an obligation

1. Watt - Muhammad at Medina, op. cit., p. 244.

2. This meaning could be inferred from the letter of the Prophet to the tribe of Ghifar "the Prophet covenants ('ahada) to them the dhimma of God and the dhimma of His Messenger".

binding, whether on the Muslims or on the infidels or on both parties.¹ During the prophetic period this dhimma was defined as "the dhimma of God and of Muhammad" or "the dhimma of God and of His Messenger". Yet on rare occasions we find that the dhimma was confined only to Muhammad with the omission of the dhimma of God. It is hard to give a convincing explanation for this. To quote Watt on this issue: "Muhammad's hesitation of course, was only about the propriety of God's dhimma being extended beyond the community of Muslims, for he had no hesitation about accepting non Muslims as allies."² Al Awza'i maintains that the Muslims should not give the dhimma of God and of His Messenger to the infidels. His view conforms with a literal interpretation of a tradition said to have been asserted by the Prophet in this context on the ground that it is not laudable to repudiate a covenant which was secured by the dhimma of God and of His Messenger. As we shall later discover, the Islamic legal theory tolerates the repudiation of treaties before their duration

1. As was the case, for example, in the letter of the Prophet to the clan of Hadas of Lakhm: "who performs his duties is secure by the dhimma of God and the dhimma of Muhammad, but if he apostasizes the dhimma of God and the dhimma of Muhammad His Messenger is free of him".

2. Watt - Muhammad at Medina, op. cit., p. 246.

elapses. Therefore it is commendable to give the unbelievers a secular dhimma, that is to say the dhimma of the Muslims as such.¹

This religious nature of the dhimma could be compared with the Christian oath, in the Middle Ages, which confers a religious character on the treaty and recalls the Pope's intervention whenever a breach to peace occurs. Very often the Pope guaranteed treaties with a decree confirming them under sanction of excommunication.²

From the foregoing illustrations we can conjecture that the term "dhimma", in Muslim international terminology, means "guarantee of security" and even "protection".³

In Muslim legal theory and practice, the dhimma expressed itself in three main types, i.e. (i) the aman, safe conduct, (ii) the hudna, truce, and (iii) the muwāda'h or sulh, covenant.⁴ In the course of time, the institution of aman was preceded by state treaties granting privileges to foreigners. These treaties developed in what we know as "the system of Capitulations". The retreat of the Turks in Europe, the restoration of Christianity in Spain, the Portuguese activities in the Indian ocean and the discovery of a new route to India via the Cape,

1. Al Sarakhsee - op. cit., vol. I., p. 31.

2. Nys, Ernest - Les Origines du Droit International, Bruxelles et Paris, 1894, pp.269,271.

3. Watt - Muhammad at Medina, op. cit., p. 244.

4. cf. Part three for more details.

all these factors threatened trade in the Mediterranean. Whereby, the Turkish and Mamluk sultans, endeavouring to save their trade, adopted a liberal policy towards Western subjects, sanctioned by the famous treaty of 1535 between Turkey and France. Iran, in the seventeenth century, resolved to take the same attitude on the assumption that this will establish it in the international community. The rivalry between the Shi'ite Iran and the Sunnite Turkey was quite conspicuous at that time. Hence, Shah Abbas, in 1600, issued an imperial Firman announcing that his empire is open to all the Christian nations and guaranteeing for aliens liberty of trade and religion and stating that "aucun de nos juges n'aura le pouvoir sur leur personne et leur biens pour n'importe quelle cause ou n'importe quel acte." In 1708 a treaty of commerce was concluded between France and Iran wherein the first grounds of French capitulations in Iran were laid.¹ The treaty was followed by another, the treaty of Versailles in 1715, whereby the capitulations were firmly established.²

As for the treaties of hudna and muwada'h, we notice two major characteristics. First, one important element of international law was absent: the equality of

1. Capitulations in Iran were abolished in 1928.

2. Daftary - op. cit., pp. 25-7.

the contracting states.¹ That is why most of the earlier Islamic treaties were concluded on the basis of a foedus inaequalis. Second, those treaties were not presumably genuine treaties of peace, since they were to be concluded for a defined period of time not exceeding, in any case, ten years (with the right to the Islamic state, under certain circumstances, to repudiate a treaty). Nevertheless, these fundamental features did not delay to disappear. As we have seen in the historical expose of practice, the Islamic state entered into treaties with Christian countries on bases of equality; if it did not, as was the case in some instances, the inequality was in favour of non-Muslim states. Moreover, as early as the Byzantine era, some treaties of peace between Byzantium and the Islamic state were meant to last for ever. However, the present practice of the Islamic state displays that these conditions are now completely in abeyance. Muslim countries nowadays are bound, in their international relations, with the principals of international law.

The term dhimma was used also in connection with non-Muslims living under the Muslim security system on Islamic territory. Those are called the dhimmis, the

1. This came into practice only when the Islamic state was strong enough to enforce its conditions on its adversaries.

people of the covenant. The dhimmis were subjected to a particular system of taxation as a tribute for protection. Their lands were liable to a special financial levy.

"From the very beginning taxation varied according to the nature of the soil and the system that has prevailed in that locality under the old rule, whether Byzantine or Persian; it did not necessarily depend upon the acquisition of land by capitulation (sulhan) or by force ('anwatan) nor upon any legislative act on the part of 'Umar. Conquest by capitulation and conquest by force as used to explain the variation in taxation was often a late legal fiction rather than the real cause. Likewise the distinction between jizyah as poll-tax and kharaj (from Gr. choregia or Aram. keragga) as land tax had not arisen at the time of the second caliph (634-44). The two words in this early period were used interchangeably; both meant tribute in general. In the Koran the only occurrence of the word jizyah is in sur.9:29, where it has in no sense a specific legal meaning.¹ Kharaj occurs also once in the Koran (23:72),² and then in the sense of

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1. "Fight against such of those who have been given the Scripture as believe not in Allah nor the Last Day, and forbid not that which Allah hath forbidden by His Messenger, and follow not the religion of truth, until they pay the tribute (jizya) readily, being brought low".
 2. "Or dost thou ask of them (O Muhammad) any tribute? But the bounty of thy Lord is better, He is best of all who make provision".

remuneration rather than land tax. Evidentially the original terms made with the conquered people were well-nigh forgotten by the time the historians began to record those events, which they interpreted in the light of later conditions and developments.

QThe differentiation between the two forms of taxation implied in jizyah and kharaj was not made until the time of the late Umayyads. The land tax was paid in instalments and in kind from the produce of land and from cattle, but never in the form of wine, pigs and dead animals. The poll tax was paid in a lump sum and as an index of lower status."¹

As a matter of fact, those rulings conform with the idea that the dhimmis were only subjects of the Muslim state. They were not considered, therein, as citizens. At the present day, the Muslim states have entirely departed from this concept,² and dhimmis as well as Muslims are all citizens enjoying full rights of citizenship regardless of their religion.

1. Hitti - op. cit., p. 171.

2. The law in Saudi Arabia, still confines the right of citizenship to Muslims only. Non Muslims could not acquire the Saudi nationality. Hence, all dhimmis residing on the Saudi territory are nationals of foreign states.

Impact of Muslim Law on the Science of International Law:

It is a matter of course that the precepts of international law, in effect nowadays, are not the exclusive offspring of our civilization. They belong, in various degrees, to previous civilizations that had flourished over history.¹

It is also undeniable that Islam, assuming the responsibility of the world civilization during the Middle Ages, bequeathed to humanity a voluminous amount of literature. Through the medium of the Islamic state, the Roman and the Greek heritage was preserved for our generations. This first infiltrated into the Western thought through Spain, Southern Europe, and, then the Crusades. "It should be remembered in the first place that the Christians came to the Holy Land with the notion that they were far superior to its people, whom they considered idolators, worshipping Muhammad as a god. At first contact they were dis-illusioned."² "Ces derniers trouvèrent chez leurs chevaleresques adversaires du temps des croisades des règles toutes prêtes concernant

1. Kroff, Baron S. A., - An Introduction to the History of International Law, A.J.I.L., vol.18, No. 2. p.247.

2. Hitti - op. cit., p.643.

la declaration de la guerre, les combattants et les non-combattants, les malades et les blessés, les prisonniers de la guerre, la repartition du butin, la prohibition de certains moyens de suivre à l'ennemi, etc."¹ It is no wonder, therefore, that the Popes, and other clerical dignitaries, showed great interest in learning Arabic. Luther is a telling example. Europeans, from all parts of the Continent, flocked to study Arab laws and culture in the Arab universities where Siyar, international law, was taught as a part of fiqh, law. "It was the Latin translation of Arabic books that supplied the educational needs of Europe for centuries."²

It is to be noted that the Muslim publicist, Al Shaibani, in the 8th century of the Christian era, wrote his admirable treatise on the Muslim conduct of state towards the infidels - that is to say that international law was a subject matter of Islamic writings almost three centuries before the first codification of the Western law of war, if we were to apply this pompous term to the Causa XXIII of the second part of Dectretum by Gratien.³

1. Taub - op. cit., p.393.

2. Hamidullah - Muslim Conduct, op. cit., p.64.

3. Taub - op. cit., p.392.

"De bonne heure, les Musulmans avaient rédigé les règles de la guerre. Le droit de la guerre est relativement humain.... C'est là que les Espagnols trouvèrent l'idée première de leurs incursions sur les terres des Maures, des Cavalgadas, si minutieusement réglées par Alphonse dans les Siete Partidas, c'est évidemment la aussi, que les chevaliers de l'Ordre Teutonique, se souvenant de l'époque où, en Palestine, ils luttaient contre les Sarrasins, trouvèrent l'idée des Reizen que Paul Wladimir de Bradzewo leur reprocha en plein concile de Constance, et qu'ils entreprenaient deux fois par an, à la fête de la Purification de la Vierge, leur patronne, et à la fête de l'Assomption, pour piller et ravager les territoires de païens."¹

In fact, the rules of war that most influenced European principles, apart from the humane treatment of the enemy, were those relevant to the booty and its distribution. We find strong impact of these rules on the notion adopted by the Siete Partidas.

Furthermore, the impact of Islam on the development of international law is amply felt in the domain of commerce, and, consequently the relevant legal institutions. Damascus, Bagdad, Cordova and Cairo were the world centres

1. Nys, Ernest - Les Origines, op. cit., pp.209, 210.

of prodigious wealth and international significance, and in between lay Europe, darkened by the medieval clouds, where was the stage for Arab commercial activities. In fact, the Arabs carried their trade to the remotest north of Europe. "Contre 38000 monnaies Arabes trouvées en Suède, on compte seulement 200 monnaies Byzantines découvertes dans le même pays."¹ In this sphere of relations, the Arab influence manifested itself in strengthening the rule "pacta sunt servanda", the occurrence of envoys negotiating commercial interests and, in particular, the rules regulating the status of aliens.² The Islamic institution of aman, safe-conduct, which was later substituted by state treaties tolerating more rights to foreigners, played a primordial and impressive role in this respect.³ The Islamic impact also shows its traces in the general principles incorporated into different European civil codes. An interesting study to that effect

1. Taub - op. cit., p.394.

2. This aman was often granted even to the crusaders, with whom "soon agreements were entered into so that hunting parties may be free from danger of attack. Safe-conducts for travellers and traders were often exchanged and usually honoured by both sides." Hitti - op. cit. p.643.

3. Some writers go so far as to assert that the institution of aman is of Roman origin. We believe that this assertion is wrong. The Islamic aman is the development of the pre-Islamic Arab system of jiwar.

is given by an Egyptian scholar,¹ who held a comparative study of both the Islamic and the French civil codes. It will be remembered that the general principles of civil law inspired the earliest European publicists when they first laid the basic foundations of modern international law.²

In this atmosphere and during the renaissance, which was the indirect issue of Islam, the fathers of modern international law were born and lived. Quite a good number of them, such as Vittoria,³ Ayala, Gentili⁴ came from Spain and Italy where Islam was dominating for a long time. It is therefore no exaggeration if we presume

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1. Abdulla, Muhammad - Al Muqaranat al Tashri'iyah, Cairo, 4 vols. 1947. As an _____, compare the Islamic dictum "al-'aql shari'at al-muta'qidin" - the contract is the Shari'a, or sacred law, of the contracting parties - with the French expression of the same principle in Article 1134 of the French Civil Code: "Les conventions legalement formées tiennent lieu de loi entre les parties contractantes".
 2. Islam caused a rupture in the European equilibrium which resulted in the establishment of the Empire of Charlemagne and consequently gave an opportunity for Germanism to play its part in history. Now a Romano-Germanic civilization developed. This paved the way for the renaissance.
 3. James Brown Scott called Vittoria the founder of International law - Scott - Discovery of America and its Influence on International Law, p.7.
 4. Some called Gentili the real father of international law because of his achievement in the method of writing on international law which was far more realistic than any of the other classical writers since he restored to contemporary practice as a source of law. This tendency is likely to be due to an Islamic influence. Muslim jurists dedicate to practice a considerable room among sources of law.

that these ideas on jure belli were influenced by Islamic philosophy and that their works echoed the theories compiled in the Muslim siyar on the jihad. This presumption could be emphasized by the fact that the works of those jurist-theologians which were written in the light of Muslim cultural torches, had no counter-part in the Greco-Roman literature.

It may be argued that the world, when Islam came into being, was in possession of a considerable legal fortune left by the Greeks and the Romans; and that on the whole Islam did not innovate principles of great scholarly significance as compared with the corresponding Greco-Roman principles.

In fact, we do not pretend that Muslim international law was a complete innovation in the domain of legal studies and international relations. Nevertheless, Muslim international law according to its classical interpretation, was a great advance over both the Greek and the Roman systems of international law. First, Muslim international law attaches much more importance to ethical values because, though the study of international law evolved into an independent branch of law, yet it continued to be subservient to the religion. Second, in

Muslim international law we find, for the first time in recorded history, a full-pledged notion of recognized rights for the enemy, in peace as much as in war. Moreover, Muslim jurists were the first to develop the science of international law as an independent branch of law in general, and distinct from political science in particular. After all, the influence of Christianity, to this respect, is not to be emphasized. "Grotius, father of European International Law, for instance, mentions in the preface of his *De jure belli ac pacis* (§28) as the occasion of his compiling that book (published 1625), that in his time the Christian nations of Europe behaved in their wars in a manner that even barbarians would be ashamed of."¹

In the words of the eminent Italian jurist, D. de Santillana: "Among our positive acquisitions from Arab law, there are legal institutions such as limited partnership (*girad*), and certain technicalities of commercial law. But even omitting these, there is no doubt that the high ethical standard of certain parts of Arab law acted favourably on the development of our modern concepts, and

1. Hamidullah - Muslim Conduct, op. cit., p.65.

therein lies its enduring merit."¹

It is worthy of noting here that Islam influenced modern international law in an indirect way.

Europe, obsessed by the fear from Islamic expansion, for the first time since it embraced Christianity, was united under one banner to fight its common foe. To us, this unity marks the remote origins of the present notion of international organization.

We will see, later, that the legal theory of Muslim international law is capable of contributing to further development of modern international law. "No wonder that Edouard Lambert, the founder of the relatively modern of comparative law, and more recently, René David of the law faculty of the University of Paris, should deal with the Shari'ah as one of the leading systems of law in the world today".²

"The treaty of 1535, concluded at a time when the modern law of nations was at the beginning of its development, might have provided an excellent opportunity to reconcile Christian and Muslim law. However, the political motives which brought the treaty to life were not conducive

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1. De Santillana, D., - Law and Society in the Legacy of Islam, ed. Sir Thomas Arnold and Alfred Guillaume, Oxford, 1931, p.310.
 2. Habachy, Saba - An introduction to the work of professor J. N. D. Anderson entitled "Islamic Law in the Modern World", London, 1959, p.X.

to accommodate the one to the other. Francis I was in dire need of support against his Christian rival, Charles V, and Suleyman, after his unsuccessful attack on Vienna (1529), sought to divide the combination against him by creating dissension among the Christian princes. This alliance, which helped indirectly to foster the Reformation, created resentment for the schism within Christianity as well as for the co-operation of a Christian prince with the infidel.

"Nor were the European jurists and publicists, who advocated a new law of nations based on the principles of territorial sovereignty and equality among nations, prepared to regard the Ottoman Empire as part of the European community.....It is a tempting conclusion to make that at this period neither Islam nor Christendom had yet been prepared to meet on a common ground and modify their religious principles for the purpose of developing a law of nations based on equality and reciprocity."¹

1. Khadduri - Islam and the Modern Law of Nations, op. cit., pp.362, 364.

PART TWO

MUSLIM LEGAL LEGACY

CHAPTER ONE

NATURE AND GENESIS OF INTERNATIONAL LAW

Nature of Muslim international law and its monistic character:

The nature of international law displays a highly problematical issue in the Western legal theory. This is due to the fact that many writers, when they speak of law, they think of it in terms of national or municipal law, and, consequently, judge the nature of international law by the same standards. This analysis convinced some to deny international law the definition of law since the international society lacks the three indispensable elements required for producing a rule of law; namely, the legislature, the executive and the sanction. Others endeavour to prove that the international society combines the three premises, and, thereby, the phenomena of international law could be described by rules of law of the same kind as the rules by which national law may be described. A third group, among whom is Kelsen, try to compromise by professing to a common criterion for the concept of law. "Thus, the antagonism of freedom and

coercion - fundamental to social life - supplies the decisive criterion. It is the criterion of law, for law is a coercive order".¹ Claiming that this argument is correct, it is possible to describe so-called international law as law in the same sense as national law. Assuming that international law is law in the same sense as national law, how can we define the normative or categorical relation between the two systems? Western writers are not agreed on this topic.

According to one view the two institutions are distinct from each other. They differ as regards: (i) their sources since international law regulate the relations between states whereas municipal law functions within the boundaries of a particular state, (ii) their subjects; States are the main subjects of international law. Municipal law deals with individuals in general; (iii) their substance, for international law is a law of co-ordination among sovereigns. Municipal law is concerned with a sovereign overdominating individuals. This dualistic view engenders that the law of nations per se is not a part of municipal law. Therefore,

1. Kelsen; Hans - Principles of International Law, New York, 1959, p.5.

International and Municipal Law are two different realms of law.

The three premises of the dualistic view are rejected by another doctrine, i.e., the monistic doctrine. The monistic doctrine holds that law as such, in the ultimate analysis, regulates the conduct of the individuals, and, its commands are binding upon its subjects regardless of their will. Hence both international and municipal law are two manifestations of an integral conception of law.

Western jurists, in determining the nature of international law, tackle another point, i.e. the difference between a legal and a moral or religious order. When the sanction is transcendental, that is to say when it emanates from a super human authority, the order providing for such sanction is a religious order, whereas, in a legal order sanction is to be executed by men according to a social order established by them.

The foregoing discussion, as a whole, is of minor importance to the Islamic legal theory. This is due to the fact that Islamic law is essentially religious, whereas Western law is essentially secular. Islam is a complete way of life that covers every aspect

of life and every field of law. "There is, in fact, no essential distinction in Islam between the sacred and the secular and it is man's duty to serve his Master in every circumstance and relationship of life. Similarly, from this viewpoint it may be said that there is no distinction in Islam between the law on the one hand and religion and morals on the other".¹

The sources of law, as we will see, are one and the same for all branches of all, since it is to revelation (of law) that the orthodox Muslim turns as the primary source, and, in one sense, the only source of law. In the orthodox view, God, through revelation, revealed His law to man. Thus the nature of the rules of law is the same whether they regulate internal or international relations. Consequently, there is no problem, in the Islamic theory as regards the nature of international law stricto sensu nor, the difference between law and religion. Both are maintained by the same sanctions of the shari'ah. Hence, the Islamic theory, by all means, subscribes to the monistic theory in so far as the normative relation between national and international law is concerned. This

1. Anderson, J.N.D.-Law as a Social Force in Islamic Culture and History, BSOAS, 1957, XX, p.13. The Islamic classical theory, in this regard, classifies the rules into two sections: (1) 'ibadat, ordinances of divine worship which include the articles of the creed, and, (ii) mu'āmalāt, transactions, or ādāt, usages, which compromise rules relating to worldly interests.

view is applauded by Oppenheim. "From a more general point of view it must be regarded as a beneficial doctrine in as much as it brings into prominence the fact that obligations of international law, are, in the last resort, addressed to individual human beings. To that extent it serves as yet another explanation of the reason why the general principles of law and morality must also lie at the basis of the rules of international law".¹

Besides, Islam maintains the overriding character of international law. This is to be inferred from the following verses: "Fulfil the covenant of Allah when ye have covenanted, and break not your oaths after the asservation of them, and after ye have made Allah surety over you. Lo! Allah knoweth what ye do. And be not like unto her who unravelleth the thread, after she hath made it strong, to thin filaments, making your oaths a deceit between you because of a nation being more numerous than (another) nation...."² The verse, unequivocally, forbids the Islamic state to set its treaty obligations at defiance. Thereby, if the Islamic state disregards these

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1. Oppenheim's International Law by H.Lauterpacht, 8th ed. London, 1955, vol.I, p.39.
 2. Qur'an; XVI: 91:92.

obligations, putting forward municipal law as a justification, this engages its responsibility. It is interesting to compare the judgement rendered by the Permanent Court of International Justice, in 1926, on the "Certain German Interests in Polish Silesia" Case¹. The Court stated that "From the standpoint of international law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of states, in the same manner as do legal decisions or administrative measures.....there is nothing to prevent the Court's giving judgement on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention".

This interpretation may mean that the Islamic state is, necessarily, theocratic. "Theocracy is a much maligned word used by modern writers for the concentration of authority in God exercised through a priest class or a king in an autocratic manner".² Theocracy, in this sense, is alien to Islam.

1. A 7, p.19

2. Sherwani, Haroon Khan - Studies in Muslim Political Thought and Administration, Lahore, 1959, p.303.

An introductory word about sovereignty¹ in Islam is necessary here. The close correlation of the mundane and the spiritual in Islam, entails that the concept of sovereignty, pervades all aspects of international life since sovereign powers belong uniquely to the Almighty. This qualification is embodied in the verses: "Say Lo! my worship and my sacrifice and my living and my dying are for Allah, Lord of the Worlds."² "Lo! all power appertaineth to Allah"³ "Whoso desireth power (should know that) all power belongeth to Allah".⁴ "He hath no partner. This am I commanded and I am first of those who surrender (unto Him)".⁵ The Sovereign God is absolute, irresponsible and his commands irrevocable: "He will not be questioned

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1. Some Muslim writers unduly maintain that the notion of sovereignty, being of French origin, is alien to Islamic thought. In fact terms are not the monopoly of a particular school of thought. We use modern terminology in this study to make it easier for the reader to grasp our ideas. Besides, regardless of the phrase we use, the legal organization of any society depends on the existence of an authority endowed with supreme powers, i.e. sovereign authority.
 2. Qur'an; VI: 163.
 3. Qur'an; IV: 139.
 4. Qur'an; XXXV: 10.
 5. Qur'an; VI: 164.

as to that which He doeth, but they will be questioned".¹

It is worthy of passing a note that Hobbe's theory about sovereignty has some affinities with the Islamic theory. In both doctrines the law making authority must be above the law, must be sovereign. But the Islamic theory is an advancement upon Hobbes's theory in so far as the location of sovereignty is concerned. In Islam the locus of sovereignty is the person of God whereas according to Hobbes it is some person or some body of persons. This point in Hobbes's theory is precisely the point that led to controversy, since absolute power in any human being is inconsistent with the ends of the state.²

However, God exercises his political powers through human agency. God has promised to delegate His powers of earthly sovereignty to those who believe in Him and do good deeds, "And when thy Lord said unto the angels: Lo! I am about to place a viceroy in the earth, they said: Wilt Thou place therein one who will do harm..."³

1. Qur'ân; XXI, 23.

2. "This is the generation of that great Leviathan, or rather (to speak more reverently) of the Mortal God, to which we owe under the Immortal God our peace and defence... And he that carryeth this Person, is called Sovereigne..."

Quoted from Brierly, James Leslie - The Basis of Obligation in International Law and Other Papers, Oxford, 1959, p.25.

3. Qur'ân; II: 30.

"Allah hath promised such of you as believe and do good works that He will surely make them to succeed (the present rulers) in the earth even as He caused those who were before them to succeed (others); and that He will surely establish for them their religion which He hath approved for them, and will give in exchange safety after their fear".¹

This study leads to a consequential question regarding the locus of delegation. The classical theory, it seems, adheres to the idea that prevailed in the Medieval Ages. It maintains that the delegation is effected to the Imam; the prince in Western theory. We believe that Islamic legal theory could afford the interpretation that the delegation is invested in the people since God's promise, in this respect, is made to "such of you as believe and do good works...." Henceforth, the state, as a legal personification of the community, could be endowed with such a delegation. Both interpretations, the classical and the one to which we subscribe, are equally valid. It is up to those concerned to hold either. Thereby, the Islamic ruler, as the mouthpiece of the

1. Qur'an: XXIV, 55.

state is a delegate of the delegate. His delegation, obviously, entails responsibility towards God as well as towards the ruled, for it is for the imam to uphold rather than promulgate the sacred law, to which ruler and ruled are alike subject. It is true that some men of religion recognized that obedience even to an impious and despotic ruler was preferable to civil war and social chaos. But this view, in fact, represents some sort of modus vivendi between jurists and the executive. Abū Bakr, it is to be recalled, asked the people to obey him -only- so long he obeys God and His Apostle. Therefore the Islamic theory, by no means, tolerates an autocratic imam. Furthermore, the Islamic theory bids the imam to seek advice in conducting the state affairs and praises those "whose affairs are a matter of council"¹ Thereby, Islam, in no case, bases the constitutional organization of the state on autocracy.

When the Prophet founded the first Islamic state in Medina, he assumed a double rôle. He was a preacher of spiritual truth and a leader of the Muslim community as well. In his capacity as leader, he was responsible for guiding and helping the community to tackle its

1. Qur'ân; XLII: 38.

problems. These problems were, in fact, of politico-religious nature and the Prophet never made a sharp distinction between the two issues. His politics could hardly be separated from religion. Thus, Islam from this angle is not a religion in the secular sense of the word. "It became the ideology behind the state, the creed which was to determine the policy and legislation of the new polity. This was a position to which Christianity never attained either in Byzantium, when Constantine associated it with the Roman state; nor in Rome under the hegemony of the Popes. The only parallel for this phenomenon is to be found in the socialistic states, such as Soviet Russia where we find a state based on a particular creed, and, ideology guides the policy and legislation of the state. No doubt, Soviet Russia believes in dialectical materialism and Islam is the faith in the spiritual basis of life, but this is only so far as the contents of their ideology go....It is apparent that the elaboration of Islamic doctrine and practice by the Holy Prophet left no room for official interpreters of religion who could form a theocracy".¹

1. Siddiqi, Muhammad Mazheruddin - Islam and Theocracy, Lahore, 1953, pp.30 and 32.

In fact, the Prophet and the righteous caliphs bequeathed the Islamic state with a state-directing ideology which inspired the Muslims over the ages. From this we see nothing in common between the ideological state of Islam as conducted by Muhammad and his successors, and the Western Church as organized and headed by the Pope.

In the Islamic state the temporal and the spiritual co-exist in a unitary concept. There is no special class of divines and theologians dedicated to the service of religion since Islam, basically, repudiates any form of privileged classes. The destiny of the Muslims is guided by those who are chosen to represent the people. The Prophet is said to have declared to his companions that in matters relating to mundane affairs they were perhaps better judges than himself. Whereas, in the Christian order, theocracy endeavours to overrule the individual life alongside the state. The Western church, which is organized on the model of a political state, was at one time a parallel authority with the state. It even challenged the authority of the emperors thus representing a dualistic conception of life in which the temporal and spiritual are sharply marked off.

Gardet, quoting Massignon, used the most inconsistent term of "secular theocracy".¹ Massignon substantiates his view as follows: "Le magistère législatif (amr) appartient au Qur'an seul, le magistère judiciaire (fiqh) appartient à tout croyant.....Reste le pouvoir exécutif (hukm) à la foi civile et canonique, il n'appartient qu'à Dieu seul....."² The term "secular theocracy" reduces theocracy to a meaningless concept, unless we take it as meaning that the Islamic state is a dogmatic state, which in fact is ~~the~~ an attribute of modern states which, generally speaking, are divided into capitalist and socialist countries.

Theocracy, in fact, grew out of the peculiar historical circumstances under which Christianity developed. It has no relation to the Islamic notion^{cf} state, particularly after the death of the prophet.

Definition of Muslim International Law:

The literature of modern international law is rich in definitions owing to its changing concepts. This fact led Korowicz, after painstaking effort, to conclude that: "It appears that it is an arduous undertaking to elaborate a

1. Gardet - op. cit., p.23.

2. Massignon - La Passion d'al-Hallaj, ed. Geunther, Paris, 1922, p.719.

definition corresponding to the present state of international legal as well as diplomatic practice on the one hand, and to take into account the scholar's own opinions de lege ferenda, on the other hand. As long as the classical definition dealt with only states as subjects of international law, definitions were clear and easy but the relative inadequacy of definitions which endeavour to embrace also other subjects give evidence to embrace also other subjects give evidence of the necessity of further intellectual strain toward a satisfactory result".¹ The same argument, we trust, applies to Muslim international law. Its definition depends on the concept one adopts as regards the object, the domain and the aim of law.

For Hamidullah, Muslim international law is: "The part of the law and custom of the land and treaty obligations which a Muslim de facto or de jure State observes in its dealings with other de facto or de jure States". Hamidullah adds: "We have emphasised the point that what a Muslim state accepts as such is the Muslim international law....Muslim international law depends wholly and solely upon the will

1. Korowicz - op. cit., p.18.

Korowicz suggests the following definitions: "Public International law is the body of rules which govern mutual relations of States and the situations of other collectivities as well as for organizations and individuals, which are not subject to the internal legal order of a State" - Korowicz - *ibid*, p.15.

2. Hamidullah - Muslim Conduct, op. cit., p.3.

of the Muslim state".¹ This positivist definition, which, obviously, stresses the consensual basis of obligation is untenable. It is true that a large element in Muslim international law is increasingly conventional but, it is equally true that one should look at the usul, sources of the shari'ah, for primary evidence of the Muslim law of nations. In the Islamic theory the treaty is capable of having juridical effect only because there exists an underlying general rule tolerating that this act of consent shall produce precisely that effect. This does not imply that in its ultimate basis, the rule of law which gives binding force to the consent, is itself consensual in character.

For Armanazi, Muslim international law is "l'ensemble des regles dont l'usage est impose exclusivement aux Musulmans pour regler leur rapports de guerre et de paix avec les non-Musulmans, individus ou Etats, dans le pays de l'Islam et en dehors de ce pays."² We rather prefer

1. Hamidullah - *ibid*, p.4.

2. Armanazi, Najib - *Les Principes Islamiques et les Rapports Internationaux en Temps de Paix et de Guerre*, Paris, 1929, p.40.

to look at Islamic law from a wider angle and not to confine it exclusively to Islamic states. Moreover, this definition is inspired by the idea that the Muslim world should be integrated into one state.

Khadduri maintains that the term "law of nations" means "the sum total of the rules and practices of Islam's intercourse with other peoples".¹ This definition is, consistent with the classical Islamic doctrine which views the world as consisting of two integral parts - Islamic and non-Islamic. In fact, Muslim international law is not confined to the intercourse of Islam with other peoples. It also embraces the inter-Islamic relations. This fact is proved in various parts of the present thesis.

Assuming that the foregoing discussion is correct, we could define Muslim international law as "the sum total of rules and practices which Islam ordains or tolerates in

1. Khadduri - War and Peace, op. cit., p.47.

international relations". Such a definition postulates nothing about the basis of obligation in Muslim international law, which will be the object of our inquiry in the following lines, for - to quote Brierly¹ "an adequate definition of terms is the result of an inquiry into any subject and not its starting-point, yet some provisional understanding of the meaning in which a term is used is necessary at the outset".

Basis of obligation in Muslim international law:

"Traditionally there are two rival explanations of the basis of obligation in international law: the doctrine of the natural or fundamental right of states, and the doctrine of their consent. Powerful attacks have been made on both these doctrines in the recent literature of the subject, but they do not lack defenders, and it may still be not superfluous to reiterate the objections to either".²

The doctrine of fundamental rights claims that states are invested with natural rights because, in relation to one another, states still exist in a state of nature, they lack a central authority to administer their mutual intercourse. This, in fact, is a false picture. In the

1. Brierly, op. cit., p.2.

2. Brierly - op. cit., p.3.

first place, historical facts bely it. A state is not a static, but a dynamic phenomenon of which we can trace the main traits. Secondly, nature knows nothing of rights. A right presupposes, for its recognition, the existence of a valid objective legal system. Besides the international community comprises, not only independent, but also dependent entities. That is to say the fundamental right of independence - per contra - should not, according to this theory, be considered as inherent in statehood. This doctrine, as it seems, demonstrates an individualist trend in the international arena ignoring the actual increasing dependence of states on one another. It may help to survey the ground on which we could construct the edifice of law, but it is incapable of materialising the edifice itself. It is an aberration of the doctrine of natural law which is "the indispensable element of growth in law... however resolutely the jurist may banish it from his formal creed".¹

The doctrine of consent professes that a state can be obliged only by its consent. This theory is not disputed if we consider it from the point that legal

1. Brierly - op. cit., p.8.

obligation arises ex consensu. But a treaty derives its obligatory force from the axiom "pacta sunt servanda" which, in turn, acquires its force from natural law. In fact this doctrine shakes international law to its foundation. Firstly, if a state desires to renounce its treaty obligations we will be faced by this dilemma: either we tolerate its renunciation and in this case we deny the very obligation which we are professing; or we hold the obligation as existant and, thus, we have to seek an explanation for it other than consent. Secondly, it gives rise to a problem regarding the process of bringing new states under the obligation of international law, a problem which may lead to the virtual denial of the existence of any universal system of international law. Oppenheim tried to explain this by general or common consent which he defines as "the express or tacit consent of such an overwhelming majority of the members that those who dissent are of no importance whatever".¹ It is clear that Oppenheim's view assumes "the existence of a factor other than the consent of the individual state from which obligation may arise when that consent is not forthcoming, and a doctrine which leaves the factor

1. Oppenheim - op. cit., 3rd ed., vol.I, p.14.

unexplained cannot be regarded as satisfactory".¹

Jellinek gave a systemized form to the consensual theory advocating that the intrinsic faculty of a state is self-determination by which a state, at its convenience, can subject itself to the principles of international law failing to which these principles are non-obligatory. But Jellinek fails to offer a juridical basis for his theory.

Triepel advances no better solution in his theory of the Vereinbarung. The Vereinbarung is not a contract, it is a fusion of different wills having the same contention.² According to Triepel, the Vereinbarung is the basis of obligation in international law. But as how this common will can be obligatory, Triepel gives no juridical answer because for him the basis of validity of law should be fetched outside the law. This answer, obviously, does not conform to a theory which professes to law as a manifestation of a superior will.

"By a curious paradox the consensual basis of international law is the chosen theory of the school which calls itself 'positivist'. A 'positivist' by

1. Brierly - op. cit., p.13.

2. Abu Heif, Ali Sadek - Al Qanun al Dawli al 'Am, Alexandria, 1965, p.92.

definition recognizes as law everything that is 'posited' as law by states and nothing else; and he professes to discover what states have 'posited' as law by referring only to their customs, which he explains as based on their tacit, and their treaties, which are based on their ~~express~~ consent. But actually the practice of states themselves is not limited in this way, for they habitually recognize as valid and binding on themselves principles not derived from either of these sources.... In illustration here it will be sufficient to refer to Article 38 of the statute of the Permanent Court of International Justice".¹

The foregoing analysis of the two traditional bases of the obligation in international law shows that no such obligation can exist unless it is moulded in the pattern of natural law. Therefore we will proceed to discuss other views.

Duguit's theory, commonly known as the Sociological school, regards as fiction the conception that the state is a person or a sovereign. The two postulates which he maintains are that: (i) only individuals are endowed with consciousness and will, and ((ii) man, by nature, is

1. Brierly - op.cit., p.17. See, for the discussion of Article 38 of the Statute of the I.C.J., Chapter II of this Part.

a social being for whom solidarity is an essential necessity as much as he must eat and drink to live. Duguit claims that solidarity gives rise to rules of conduct and therefore is the basis of obligation. Assuredly, Duguit's theory could be objected to by the simple argument that solidarity is not the only natural fact. The struggle for existence and the difference in physical attributes are natural facts as well. This misleading logic on the part of Duguit induced some writers to qualify Duguit's notion of solidarity in terms of the old conception of natural law.

The question of the basis of obligation has been discussed by the writers of the contemporary Austrian School, or what may be termed the Imperative School. "They observe that the validity of any rule of law rests on another rule which governs its creation, and that we inevitably arrive in the end at a supreme or fundamental norm from which the validity of all the inferior norms is derived: and they ask what is the nature of this norm which constitutes, so to speak, the apex of the legal edifice. For M. Kelsen¹ this

1. Kelsen defines law as a "system or hierarchy of norms which prescribe what always ought to happen in given circumstances". The validity of all norms, in the final analysis, rest on the "basic norm" of the "first constitution" of the state concerned. Kelsen H. - General Theory of Law and the State, Cambridge Mass., 1949, p.123.

fundamental norm can only be an hypothesis.... M. Verdross objects to this that an hypothesis in the strict sense of the word ought to be and can be verified by experience, whereas the fundamental norm is in no case verifiable by reality.... For this reason he prefers to call it 'un axiome dont la vérité doit être prouvée par une autre méthode que celle dont se servent les sciences de l'expérience'.¹

Coming to the Islamic legal theory, we find that "everything rests on the divine revelation, without which man remains in a state of almost unrelieved ignorance. But, in the orthodox view, God has not revealed Himself and His nature, but rather His law.... But if the Person of God is, to the orthodox Muslim, beyond human knowledge, this is certainly not true of the divine commands. It is partly for this reason that law has normally taken precedence over the theology in the Muslim world, for it is far more profitable and seemly to concentrate on the study of what may be known or deduced of God's commands regarding how man should behave, than to speculate on the essentially inscrutable mystery of His nature and attributes. It is enough to be certain that God is the Sovereign Lord and man his 'abd' (slave), whose primary

1. Brierly - op. cit., pp.64-5.

duty is 'ibada (service)¹.... For the orthodox Muslim the fount of divine revelation dried up with the death of Muhammad, for it was only he who could authoritatively reveal the divine will... Every human act is regarded as characterized, to some degree, by husn or qubh, seemliness unseemliness, conformity or difformity; and these qualities can only be known by divine revelation...Nor, in the dominant view of Muslim orthodoxy, is this classification based on any essential quality in the acts concerned, but exclusively on the divine command or prohibition.²

We will try to look at this interpretation with the eye of a student of Western theories. Let us, take in the first place, Duguit's theory. Here we observe that both the Islamic and Duguit's doctrines adapt in so far as the two claim that "law is something completely independent of the idea of state, antecedent, and above it."³ However, Professor Anderson sees that the Sociological School "may represent an admirable picture of how Islamic law did in part develop in the pages of history; but it

1. Ibada here is not limited to religious duties. It embraces every field of law as well.

2. Anderson - op. cit., p.13.

3. Brierly - op. cit., p.58.

is radically incompatible with its juristic theory. For by that theory, it is clear, it is not society that influences law, but the law that provides a divinely revealed norm and standard to which Muslim society is under a perpetual duty to conform.¹

Or take, in the second place, the Austrian School. Kelsen's definition of law "can only be applied to Islamic law - in its jurisprudential theory - if we conceive this basic norm or first constitution in terms of the sovereignty of God and the authority of His revelation (as the Muslim regards it)."²

"It is when we turn finally to the exponents of natural law, " to put it in the words of Anderson, "that we find a far more congruous comparison."³ For the natural lawyers, like the Muslim jurists, conceive of law in terms of an eternal, transcendental norm to which mankind is of necessity required always to attempt to approximate. Yet even here there are certain fundamental differences between the two concepts which are,

1. Anderson, J.N.D., - Islamic Law in the Modern World, London, 1959, p.7.

2. Anderson - Islamic Law, op. cit., p.6.

3. It is obvious, from the brief account we have given of the Western theories, that those theories, more or less, tolerate or have to tolerate the idea of natural law if they were to patch their lacuna.

I think deeply significant. I must confine myself in the context to two: first, that the natural lawyers conceive of that law as being inherent in the very nature of things, in the universe, in the nature of rational creatures, and in the fundamental rights of man; and, second, that they also conceive of that law as being discernible - in large part - by human reasons, which is competent to determine the general outline, at least, of natural justice. But when we turn to what I may term the dominant or central doctrine of Muslim orthodoxy, we find that neither of these propositions is in fact accepted; for the Ash'aris¹ deny not only that human mind, apart from divine revelation, is capable of discerning the ethical quality in human actions, but even that such an ethical quality exists at all, apart from the divine command or prohibition. To them God does not command certain actions because they are intrinsically good, nor forbid certain behaviour because it is inherently evil; instead actions are good or bad exclusively because God commands or forbids them".²

Notwithstanding professor Anderson's comments, we would

1. "The Ash'aris are named after al Ash'ari, the founder of orthodox scholasticism, kalam."

2. Anderson - Islamic Law, op. cit., pp.8-9.

like to add that the theory of natural law, in its very origin, was professed by theologians who connected the natural law with the Divine will and defined the natural law as a divine law.¹ The impact of this trend shows clearly on the writings of Grotius - who is known as the father of natural law. Grotius provides that "Le droit naturel consiste dans certains principes de droit de raison qui nous font connaître qu'une action est moralement honnête ou deshonnête selon la convenance ou la disconvenance nécessaire qu'elle a avec un autre raisonnable et sociable et par conséquent que Dieu, qui est l'auteur de la nature, ordonne ou défend une telle action".² Furthermore, Islam recognizes for reason a considerable domain particularly, in the realm of what Muslim jurists term as mu'amalat.³ Islamic dictums, such as tataghayar al-ahkham bi taghayer al zaman, decrees may change by the changing of time, testify to the capability of mind to deduce legal concepts from natural

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1. Al Ghunaimi, Muhammad Talaat - Al 'Urf Fil Qanun al Dawli, Al Huquq Review, vols. 3, 4, 9th year, Alexandria, 1961, p.186.
 2. Grotius, Hugo - Du Droit de la Guerre et de la Paix, traduction Barbeyrac. Discours preliminaires, p.64.
 3. See, in support of this view: Hubballah, Muhammad - Mawqif al Islam menal Ma'rifah wal Taqadum al Fiqri, an article in Al Thaqafa al Islameya wal Hayat al Mu'asera.

law. This maxim is virtually quoted by some writers, like Stammler and Saleilles in their theory about natural law "à contenu variable".¹

Talking about the attributes of the logos, it might be of interest to review, in brief, the mu'tazilite doctrine in this respect. To mu'tazilis² all human behaviour was intrinsically good or evil, and God commanded the good because it was good and forbade the evil because it was evil. Further, they held that in some cases human reason could indeed perceive - quite independently of any direct revelation that an act was good or bad in itself and in such cases revelation did no more than confirm this judgement of the human mind. In other cases, however, man could not of himself perceive the inherent ethical quality in a certain course of conduct, and in such circumstances he was, of course, dependent, on divine revelation for guidance. And although the Mu'tazalis were largely discredited by the passage of the years, others - such as the Maturidis³ and

1. Al Ghunaimi, M.T., - *Drūs fi Usūl al Qanūn al Wad'i*, Alexandria, p.150.

2. The Mu'tazalis are those who profess the doctrine of 'itizal'. They compose the great theological school which created the speculative dogmatics of Islam. At present they are branded as heretical.

3. The Maturidis are the followers of Al Maturidi "the titular head of the Maturidite School of theology which, with the Ash'arite School, form orthodox Sunnite Islam". Shorter Encyclopaedia of Islam - op. cit., p.362.

many Hanafi jurists - shared their views in regard to these two propositions". The Mu'tazalite approach shows more noticeable rapprochement to the Western doctrine of natural law.¹ Besides, their views are, to a certain extent, represented in Krabbe's theory of the "sense of right". For Krabbe, "The basis of the authority of law is not an external force, as the theory of sovereignty teaches, but internal; it is the feeling or sense of right....By the sense of right, however, M. Krabbe does not mean the sense of ideal justice; the sense of right may and often does reveal itself in a defective form."²

To sum up, the Islamic doctrine of natural law, so to speak, with God as the unique fount of eternal standards and concepts revealed in the Shari'ah, can argumentatively withstand those criticisms that have been put forward against the different theories on the basis of obligation in international law.

The residuum of truth underlying the Islamic doctrine could be better supported if we adhere to the conclusion which Brierly has arrived at in the end of his admirable article on the basis of obligation in Inter-

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1. Logos, it is to be recalled, is the medium of discovering and understanding the divine injunctions, i.e. the principles of Muslim natural law.
 2. Brierly - op. cit., pp 65 & 67.

national law. Brierly holds that "Legal science tends necessarily to insist on the distinction between law and morality; its field is not the whole of human conduct but only a part, and it is rightly concerned to mark off its own territory from that which belongs to other sciences. This has been the great service of positivism to the study of law. But too often we have been tempted to forget that the connection between law and morals is really much more fundamental than their distinction, and that the ultimate basis of the obligation to obey the law cannot be anything but moral. Just as the problem of the obligatory character of international law is only one aspect of the problem of the obligatory character of law in general, so this in its turn is only one aspect of a still wider problem, the problem of obligation in general, and this is a problem of ethics.....I confess that I can see no general principle of solution ultimately, I suppose, we must fall back on metaphysics and say that we believe duty to be duty because we believe the world to be a kosmos, an ordered whole....This no doubt is to believe in natural law, but I confess that to me the modern resurgence of natural law theories seems to open a vista full of hope for legal science."¹

1. Brierly - op. cit., pp.65 & 67.

The notion of "ordre public" and the Islamic legal theory:

The Islamic doctrine of jus naturae caused a mass of writers to describe law, in the classical Islamic theory, as "a divinely ordained system preceding and not preceded by the Muslim state, controlling and not controlled by Muslim society".¹

This assertion, in our view, is questionable. From the historical point of view, the Islamic concepts of law are revealed by the Medinan verses. That is to say, the time of revelation was corresponding to, or even later than, the emergence of the Muslim city state of Medina. They were revealed in piecemeal mostly to handle related occurrences and situations. It is therefore uncomprehensible to conceive of the Islamic law as a system "preceding and not preceded by the Muslim state". It may be argued that Islamic theology professes to explain that these precepts are as old as time and were not revealed until the advent of Islam. This mystic explanation, in fact, could apply to all facts of life in the domain of science as well as in the domain of law. If we believe in the Almighty, then all the facts which human mind discloses, ex-hypothesi, are created from the

1. Coulson - op. cit., pp.1-2.

very beginning of time and brought about to man in a fragmentary way according to an eternal divine device. Thus this argument is inherently extra-juridical and relates rather to the metaphysics. The Islamic law, as a revelation, materialized in the general principles of the shari'ah which are available to any reader.

Furthermore, the needs of society shape, to a considerable extent, law in the Islamic society. The Islamic legal theory, as a matter of fact, represents an interesting amalgam of the sociological and natural divine elements. "Yet the needs and aspirations of society cannot be in Islam, the exclusive determinant of the law; they can legitimately operate only within the bounds of the norms and principles irrevocably established by the divine command. And it is precisely the determination of these limits which is the unfinished task of legal modernism".¹

On the other hand, the statement in discussion, puts the Islamic conception of international law on the other extreme with the Western thought "for the theory of sovereignty of states reveals itself in international law mainly in two ways; first, as the right of the state

1. Coulson - op. cit., p.6.

to determine what shall be for the future the content of international law by which it will be bound; secondly, as the right to determine what is the content of existing international law in a given case".¹

In fact, the Islamic law, as we have said, is not an abstract body, but also a social machinery for effecting security in the community since it is the science of knowing one's rights and obligations towards God or men. The law, in Islam, is to be divided into two parts: (i) usūl, roots, and (ii) the furū', branches. The said allegation, in one sense, may apply to the usūl. The furū' lays down the particular rules of daily life. They could be therefore likened to the Western positive law. Thereby, the branches as Muslim positive law should be adaptable to answer to the requirements of the environment.

Moreover, the classification of human acts in the Islamic theory confirms our view. "Human acts are divided into five classes: (1) Obligatory - the doing of which is absolute command... (2) Recommended, but no compulsory... (3) Permissable. Here the law is neutral

1. Lanterpacht, M. - The function of law in the International Community, Oxford, 1933, p.2.

you may or you may not do a thing. (4) Disapproved, makruh (5) Absolutely forbidden."¹ This classification demonstrates that, within the pattern of the permissible and recommended, there is a wide scope where the society is not rigidly controlled by the law.

As for the roots, the relatively limited range of explicit divine ordinances as compared^{to} the whole edifice of the Islamic law, particularly, Muslim international law, however, induces us to conceive of these ordinances in terms of what modern writers define as rules "d'ordre public".

It is true that the notion of "ordre public" is still vague in the literature of international law, but it seems that international courts are rather inclined to adopt it.²

To give an approximate idea about this notion, we quote here the definition adopted by the second Hague Conference of 1894 which is "dans cet ensemble (d'ordre public international) se classent les dispositions qu'on

1. Fayzee - op. cit., p.33.

2. See for example, the awards rendered in the following cases: (i) The Canevro Case between Italy and Peruvia (8 May 1912). (ii) The French Peruvian Case (11 October 1921) (iii) The Foreign Congregations in Portugal (2 September 1920).

ne pourrait modifier sans changer, ebranler ou detruire l'ordre public social ou constitutionnel dans le pays".¹

In fact, the idea of "ordre public" is comprehensible in Islamic legal theory whereas it is rather unfamiliar to modern international law² owing to the present international community's lack of a higher authority endowed with supreme powers. We have seen that in Islamic legal theory these sovereign powers reside ultimately in God. God has the power of imposing imperative rules, i.e. rules of "ordre public". The concept of "ordre public" in Islamic legal theory co-ordinates with its basis of obligation - namely natural law sui generis.

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1. Quoted from Daneff, S. - Conception du Droit International Prive d'apres la Doctrine et la Pratique en Bulgarie, R.A.D.I. vol.33, No III, p.505.
 2. In a way, we can say that the Charter of the United Nations adheres to the concept of "ordre public", if we judge by some of its articles. Take, for example, Article 51 which describes self-defence as a natural right.

CHAPTER TWO

SOURCES AND METHODS OF INTERPRETATION OF MUSLIM INTERNATIONAL LAW

Terminology:

Etimologically, the word "source" means a spring or a well. Technically, the word is used in a metaphoric sense. In the legal jargon the word assumed an ambiguity which caused great divergence among jurists with regard to the kinds and number of sources of law.¹

We believe that in juridical terminology, the word "source" could afford two meanings; i.e., (i) the productive origin. In this sense we say that God is the source of life. This meaning adapts with the term "basis of obligation"; and, (ii) the demonstrative evidence, as we say the heart is the source of life. This signification corresponds to the formal sources of law. This second meaning is what concerns us in the present chapter. We have dealt with the first meaning in the former chapter.

1. Oppenheim - op. cit., vol. I, p.24.

Sources of Muslim International Law:

We deem it relevant, before we proceed to our discussion, to clear up a point of terminology. Muslim writers usually employ the terms shari'ah and fiqh to identify the law, and maintain that the fiqh is a version of the shari'ah if not a synonym. To us the two terms do not designate the same thing. The shari'ah is the divine law which God has revealed and He alone knows best its precise meaning and commandments. Fiqh is the process of discovering and understanding the injunctions of the shari'ah. Therefore fiqh is necessarily speculative by its very nature. Admittedly it could be changeable according to place and time. The shari'ah is the substance. The fiqh is the procedure that makes the substance accessible, presumably within the available means. Hence we are inclined to confine the term shari'ah only to the Qur'an and the Sunna as such. Thereby the shari'ah or God's will as revealed in the Qur'an and the Sunna, is the creative origin of the Islamic law, while fiqh

is the demonstrative evidence of the Islamic principles.¹

Owing to the fact that Western writers differ sharply on the formal sources of international law, so it might be advisable, within the limits of our study, to consider Article 38 of the Statute of the International Court of Justice as the starting point of our comparative study.

Article 38 stipulates that: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

"1. (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states.

" (b) international custom, as evidence of a general practice accepted as law.

1. Compare Fayzee, Asaf A. A. - Law and religion in Islam, Journal of the Bombay Branch Royal Asiatic Society, vol. XXVIII, Pt. I, pp. 29-48.

" (c) the general principles of law recognized by civilized nations.

" (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

"2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto".

As is obvious, the Article classifies the sources of law into two categories; namely, the primary sources and the secondary sources. The primary sources, stated in clauses a-c, are in fact the law creating processes. Whereas the secondary sources, alluded to in clause (d) concern law determining agencies.¹ But, in both cases, the article deals with sources in the formal sense of the term. It may be argued that the first paragraph of the Article shows the inclination of the Statute to subscribe to the doctrine of the consent of states as the basis of obligation in international law. Yet treaties, custom, and general principles recognized by civilized nations,

1. Schwarzenberger, Georg - International Law, vol.I, 3rd ed., London, 1957, p.26.

as we indicated before, are introduced by the Article in their formal sense, that is to say as demonstrative evidence of the international rules. They produce their juridical effect "only because there exists an underlying general rule of law to the effect pacta sunt servanda, and we may well speak of a legal obligation as consensual, meaning only that the occasion out of which it arises is a consensus of parties, and not intending to imply that its ultimate basis, the rule of law which gives binding effect to the consensus, is itself consensual in character".¹

To this dual division of formal sources in the Statute, corresponds to the Islamic division of adilla,² arguments, into: (i) the adilla qat'eva, sure argument or the primary sources (the roots). They imply the Qur'ān and the Sunna, and, (ii) the adilla ijtihadeva, arguments obtained by ijtihad. These are the secondary sources.

It is interesting to notice that the adilla qat'eva, like the primary sources of the Statute, comprise law creating processes and the adilla ijtihadeva, as well as

1. Brierly - op. cit., p.10.

2. The arabic word "adilla", in this context, is rather relevant than the English word "source" because it is more telling in emphasizing the formal sense of the term.

the secondary sources of the Statute, embrace law determining agencies. Moreover, the primary sources, in both Islam and the Statute, represent exclusiveness, that is to say the Courts could not apply any asserted rule of international law unless it is the product of one or more of the said sources. But let us proceed to a more detailed comparison of the two institutions, the Islamic and the Western.

When we talk about formal sources we do not mean the places where the rules are first to be found but the rules themselves which are included in those forms. Hence, a comparative study, in this regard, should consider, in the first place, the content of the rules codified in these sources.

The wording of Article 38 confirms our view. The provision of paragraph I - which does not appear in the corresponding Article of the Statute of the old Court - that it is the function of the Court to decide the disputes submitted to it "in accordance with international law" - is not superfluous. It shows that our concern with norms referred to in clauses a-c is, in the first place, due to the specific rules which they contain not to the given material shape in which the rules are contained.

Part III of this thesis deals with a comparative study of the principles in both Islamic and modern doctrines. When we come to that part we will see how far these principles adapt.

Nonetheless, if we consider the formal structure of rules we will find that the primary sources are not the same in either Islam and the Statute. This is due to the divine nature of the primary sources in Islam which would have no equivalent in the secular international law. However law-making treaties and custom could be included in the secondary sources of Muslim international law under the category of rules whose performance or omission is left to the discretion of the Muslims.

Turning to the secondary sources, we observe that in both Islam and the Statute, these sources depend on human reason. They are therefore the product of the exercises of judgement by secular authorities. Hence, the ijtihād in Islam could be compared to the "judicial decisions and the teachings of the most highly qualified publicists"; as the Statute put it.

Primary sources of Muslim International Law (the roots):

(1) The Qur'ān: The Qur'ān is the Holy Book of Islam. It has been delivered by God to all mankind through the

Prophet Muhammad. "And surely this is a revelation from the Lord of the worlds, the Faithful Spirit has come down with it upon thy heart that thou mayest be of the warners, in plain Arabic language".¹ It was revealed in piecemeal, a fact to which the following verse testifies: "And those who disbelieve say: why has not the Qur'ân been revealed to him all at once? Thus we may establish thy heart by it".² However the assemblage of the Qur'ân was not left to the arbitrary discretion of the Muslims but was a part of the divine scheme "Surely on us devolves the putting together thereof and the reading thereof".³ So, the Qur'ân is to be regarded as one whole delivered in one and the same manner. The first official attempt to publish the Qur'ân in a standard compilation was undertaken by Abu-Bakr. Later, during the reign of Uthman, copies of that complete manuscript were distributed in different parts of the Islamic world. Historically, the verses of the Qur'ân are divided into:

(1) The Meccan verses which were revealed over the thirteen years of the Prophet's sojourn in Mecca after his being raised to the dignity of prophethood, (ii) the

1. Qur'ân; XXVI: 192-5.

2. Qur'ân; XXV: 32.

3. Qur'ân; LXXV: 17.

Medinan verses that relate to the ten years of the Prophet's residence at Medina, after the immigration. The significance of this division lies in the fact that the Medinan verses are concerned with detailing the legal rules, a phenomenon which is virtually lacking in the Meccan verses.

"The Qur'ân speaks of the best rules relating to social life, commerce, marriage, inheritance, penal law, international law, and so on. But the Qur'ân is not a book in the common sense, it is a collection of the Words of God, revealed from time to time, during 23 years, to His messenger sent among human beings. It has direction for everybody, everywhere and forever".¹

An objective assessment of the Qur'ân as a legislative document reveals peculiar characteristics of the Qur'ân. In the first place we find that "most of the basic notions underlying civilized society find such a mode of expressions in the Qur'ân".² Secondly, "while the Qur'ânic legislation, then, is predominantly ethical in quality, the quantity is not great by any standards... No more than approximately eighty verses deal with legal

1. Brelvi, Mahmud - Islam and the Contemporary Faiths, Karachi, 1965, p.232.

2. Coulson - op. cit., p.11.

topics in the strict sense of the term.... Certain topics, it is true, are dealt with at considerable length. But even here there is no single comprehensive exposition of the topic. It was simply that certain problems of a recurring nature gave rise to a series of regulations disjointed in point both of time and substance, on the same general subject, and these, when gathered together from their various positions in the Qur'ân, afford some semblance of a detailed treatment".¹ Thirdly, the legal implications of injunctions are not always self evident. Moreover, on certain subjects the rules are rudimentary. On some others the Qur'ân is completely silent.

Another problem arises from the issue of abrogation on which jurists differ sharply. Two opposite theories, in this respect, are expounded. One holds that, in certain incidents, verses of the Qur'ân could be abrogated by others. The second, to which we subscribe, qualifies the doctrine of abrogation as wholly unfounded on the assumption that no verse in the Qur'an nor in the hadith could warrant it. Let us review the arguments of the two theories.

The first theory alleges that two Qur'ânic passages

1. Coulson - op. cit., p.12 and 13-14.

tolerate abrogation. The second holds that what occurred in the said verses does not relate to Qur'ānic injunctions. It refers to the revelation that preceded Islam, and to which Islam came as a substitute. We will discuss the two verses, in question, in turn.

The first verse runs as follows: "And when we put a revelation in place of (another) revelation, - And Allah knoweth best what He revealth - they say: Lo! thou art but inventing. Most of them know not".¹ This is a Meccan verse and, consequently, is not dealing with legal topics. Since we are concerned with abrogation in its legal sense, the verse could not be accepted in support of the first view. It actually refers to the previous divine revelations and messages. The phraseology of the verse ascertains this interpretation. The verse mentions that the unbelievers called Muhammad an inventor. Such denigration most likely pertains to his claim that the Qur'ān is a divine revelation intended to replace the previous revelations; and, not to the abrogation of certain verses of the Qur'ān by others.

The second verse provides that: "Such of Our revelations as We abrogate or cause to be forgotten, we

1. Qur'an; XVI: 101.

bring (in place) one better or the like thereof. Knowest thou not that Allah is able to do all things".¹ This verse, as well, is addressed to the followers of other revelations, particularly, the Jews. It tends to convince them that it is for the welfare of humanity that God sometimes abrogates a previous revelation by a later one.

If we turn to hadith, no single tradition relevant to abrogation could be traced back to the Prophet, who is, presumably, the only authority that could be accepted on such a serious matter. The interruption in the link of transmission of a hadith has but one result; that is the rejection of according the hadith any valid authority.

It seems that the exponents of abrogation are influenced by a misconception of the equivalent Arabic word "naskh", which jurists - in a loose way - used to denote the ^{situation in which} ~~case~~ when a verse is limited by another or when a later verse clears up the ambiguity of a preceding one. Soon the use of the term became indiscriminate to the extent that when a commentator fails to reconcile two verses, he would declare one of them to be abrogated by

1. Qur'ān; II: 106.

the other. Furthermore, the theory of abrogation is not consistent with the tenor of the verse: "Will not then ponder on the Qur'ân? If it had been from other than Allah they would have found therein much incongruity".¹

The legal commandments of the Qur'ân could be classified into two categories, in so far as interpretation is concerned namely, (i) the muhkam, decisive which contain the fundamental precepts of Islam and are, therefore, the basis of the Book. These rules correspond to what western writers call rules "de droit strict". They are of obligatory force; (ii) the mutshabih, allegorical, which comprise the verses liable to different interpretation. They are not of obligatory character since they conform to what is defined in modern terms as explicative, interpretative and complementary rules. This classification is inferred from the following verse: "He it is Who has revealed unto thee (Muhammad) the Scripture wherein are clear revelations - They are the substance of the Book - and others (which are) allegorical. But those in whose hearts is doubt pursue, forsooth, that which is allegorical seeking (to cause) discussion by seeking to explain it. None knoweth its

1. Qur'ân; IV: 82.

explanation save Allah.¹ And those who are of sound instruction say: We believe therein, the whole is from our Lord; but only men of understanding really heed."²

In brief, the Qur'ân theoretically at least, is the basic foundation on which the whole superstructure of the Islamic legal theory rests. It is the absolute and final authority in any discussion that may have bearing on the principles of Muslim laws. Schacht maintains, however, that: "The Koran taken in itself, apart from its possible bearing on the problem raised by the traditions from the Prophet, can hardly be called the first and foremost basis of early legal theory. The ahl al kalam, it is true, profess to make the Koran, interpreted rationally, the only foundation of their doctrine; but this conscious formula, which shows an anti-traditionist bias, is the outcome and not the starting point of an intricate theoretical development".³

(2) Sunna or hadith: Supna literally means a way or rule, or manner of acting or mode of life, and hadith a saying

1. This is Pickthall's translation. We are inclined to adopt the interpretation that connects with Allah "those who are of sound instruction". That is to say that the learned men can, as well, know the explanation of the allegorical revelation.

2. Qur'ân; III; 6.

3. Schacht, Joseph - The Origins of Muhammadan Jurisprudence, Oxford, 1950, p.224.

conveyed to man, either through hearing or through revelation, or in another expression Sunna is the substance and hadith is the way of transmitting it. Shāfi'i was the first lawyer to define sunna as the predecessors for whom it was not necessarily connected with the Prophet, but represented the traditional, albeit ideal, usage of the community, forming their "living tradition" on an equal footing with customary or generally agreed practice. For Shāfi'i, therefore, only the actions of the Prophet carry authority and he admits on principle only traditions from the Prophet himself, although he still shows traces of the earlier doctrine by admitting traditions from the Companions of the Prophet, and opinions of their Successors and even later authorities as subsidiary arguments.... Two generations before Shāfi'i reference to traditions from Companions and Successors was the rule, to traditions from the Prophet himself the exception, and it was left to Shāfi'i to make the exception his principle.¹

Hence, sunna indicates the doings of the Prophet, whereas hadith refers to his sayings.² However, both came to be virtually synonymous.

1. Schacht - Origins, op, cit., pp.2-3.

2. Another definition is that sunna is the substance and hadith is the way of conveying it.

Understood in the foregoing context, the sunna is of three types: (i) qawl, a saying of the Prophet in connection with a religious topic, (ii) fi'l, action or practice of the Prophet in regard to a religious matter, and (iii) tagrīr, approval of the Prophet of an action or practice of someone else.

During the lifetime of the Prophet Muslims refrained from compiling his traditions under the impression that it might get confused with the Qur'ān. They rather relied on their memory to keep what the Prophet had said or done. After the death of the Prophet, the Muslims felt the need of a collection of the sunna to be available for consultation whenever they failed to invoke a verse of the Qur'ān, particularly, after the passing of the Companions. Thus, in the middle of the second Islamic century, some Muslim theologians undertook the monumental task of collecting genuine sunna. The main works are by Bukhari, Muslim, Abu Dawūd, Tirmidhi, ibn Maja and Nasa'i. Among those compilers al Bukhari, in fact, holds the first place in several respects. Their impressive work was brought to completion in the third century of the Hegira.

"It is generally conceded that the criticism of traditions as practised by the Muhammadan scholars is

inadequate and that, however many forgeries may have been eliminated by it, even the classical corpus contains a great many traditions which cannot possibly be authentic. All efforts to extract from this often self-contradictory mass, an authentic core by 'historic intuition', as it has been called, have failed. Goldziher, in his 'sceptical reserve' with regard to the traditions contained even in the classical collections, but shown positively, that the great majority of traditions from the Prophet are documents not of the time to which they claim to belong, but of the successive stages of development of doctrine during the first centuries of Islam. This brilliant discovery became the cornerstone of all serious investigation of Muhammadan law and jurisprudence, even if some later authors, while accepting Goldziher's method in principle, in their natural desire for positive results were inclined to minimize it in practice".¹ This view goes in line with the idea that a hadith should be held as unacceptable until its authenticity is proved. However, we should not under-estimate the effort of the theologians who pledged themselves to the cause of verifying the hadith and bequeathed us with a reliable collection. "In the course of time it became established that each tradition

1. Schacht - Origins, op. cit., p.4.

must include a chain of authorities through which it could be traced back to the actual Companions of the Prophet who were present on the occasion concerned, and traditions were classified and compiled according to the relative certainty with which they could be - or were - accepted as authentic".¹ Hence we subscribe to the view that the hadith included in the accepted Muslim sources, should be tentatively considered genuine until it is proved otherwise.

The locus standi of the traditions in the Islamic legal theory aroused a keen controversy among jurists. We do not intend to go into this topic in detail. The relationship between the Qur'ân and the sunna may be of three kinds: (i) in entire agreement with the Qur'ân; (ii) an explanation of the sacred text; (iii) not directly connected with the sacred text. We do not recognize the last since we give the sunna a direct connection with the sacred text. As we have rejected the doctrine which professes to the repeal of the Qur'ân by the Qur'ân, a fortiori, the Qur'ân cannot be repealed by the sunna which is supplementary to it. Thus, from the legal point of view, the sunna is one of the primary sources of Muslim international law but, undoubtedly, secondary to the Qur'ân.

1. Anderson - Law as a Social Force, op. cit., p.15.

Secondary source of Muslim International Law (Ijtihad):¹

The Ijtihad, as a secondary source of Muslim law, is recognized on the authority of a tradition related to the Prophet. "On being appointed Governor of Yaman Mu'dh was asked by the Holy Prophet as to the rule by which he would abide. He replied, (By the law of the Qur'an) (But if you do not find any direction therein), asked the Prophet. (Then I will act according to the sunna of the Prophet), was the reply. (But if you do not find any direction in the Sunna), he was asked again. (Then I will exercise my judgement and act on that), came the reply. The Prophet raised his hands and said (Praise be to Allah who guides the messenger of His Apostle as He pleases)"² Ijtihad, as an activity of reason, could as well, be warranted by several verses of the Qur'an which invite individuals to appeal to reason in their personal judgements. It is true that the Qur'an stresses the preponderance of revelation to reason as a source of formulating legal rules, yet it acknowledges the indispensability of ijtihad for reaching decisions; "And when there comes to them news of security or fear, they spread it abroad and if they had referred to the Apostle and

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1. See the detailed study on the subject given by Sheikh M.M. Shalaby in his course for post graduate students at the Faculty of Laws, University of Alexandria in the academic year 1964/1965.
 2. Ali - op. cit., p.98.

those in authority among them, those among them who can search out knowledge of it would have known it".¹

For this, ijtihad came into use as a secondary source of law as early as the Prophet's lifetime for it was impractical to consult the Prophet on every problem especially when Islam expanded over different parts of Arabia. "At first the individual jurist had always enjoyed the right, if sufficiently learned, to go back to the original sources of the law and interpret them for himself. But with the crystallization of the schools of law in the second and third centuries A.H. this right of independent deduction, or ijtihad, was regarded as having progressively fallen into abeyance, and in the classical view the 'door' of ijtihad became 'closed' by about the end of the third century. Thenceforth every jurist was in practice regarded as a mere mugallid, one who had to take the decisions of his predecessors as authoritative without the exercise of independent thought. True, it was never denied that another great mujtahid (i.e. one who could exercise the right of ijtihad) might conceivably arise, and from time to time

1. Qur'ân: IV: 83.

some jurist, greatly daring, would in fact claim to have reached the almost impossibly exacting qualifications postulated for such a claimant; but in practice any open or accepted use of the right of ijtihad had been in abeyance for centuries. The orthodox schools mutually recognized each other's orthodoxy even in regard to the many points on which they differed; and within each school the vagaries of individual jurists became progressively unified in the doctrine which established itself as dominant".¹ Thus we could classify the ijtihad, as it stands to-day, into three categories; i.e. (i) ijtihad fil shari'ah, exercise of judgement in legislation for issuing new laws. This type of ijtihad centres, in particular, in the four imams;² (ii) ijtihad fil madhab, exercise of judgement in a juristic system. This was limited only to the disciples of the four imams; (iii) iftihad fil masa'il, exercise of judgement in particular

1. Anderson - Law as a Social Force, op. cit., p.16.

2. We gave a brief before on two of these imams; namely abu Hanifa and al Shafi'i. The other two are Malik and ibn Hanbal. Malik was born at Medina in 93 A.H. (113A.D.) where he spent his life and died at the age of eighty-two. His book, al Muwatta', is one of the reliable references on the hadith. Ibn Hanbal was born in Baghdad in 164A.H., and there he died in 241 A.H. He engaged himself in a thorough study of the hadith, yet his Musnad includes some refutable hadiths.

*cf Supra pp. 72-3 & 74-5.

cases. This could be practiced by the Muslim jurist of the day in terms of taglid.

This rigid attitude which levelled the ijtihad up to the standard of the shari'ah endowed the Islamic law with a predominantly static nature. It is obviously inconsistent with the general principle of Islam which acknowledges absolute obedience only to Allah. "O you who believe obey Allah and obey the Apostle and those in authority from among you; then if you quarrel about anything, refer it to Allah and the Apostle".¹ The verse, on purpose, did not repeat ahl al-amr, those in authority, in its latter portion. For it assumes that the quarrel, referred to in the text, may take place between those in authority and the masses of the Muslims. In this case God and His Apostle are the only authority to which the Muslims have to resort. On the whole, the Islamic ideology tolerates intellectual independence for every honest individual.

It is noteworthy that the first gathering of Mu'tamar Ulama al-Muslimin, the Congress of Muslim learned men, held in Cairo during March and April 1962, passed a resolution opening the door of ijtihad. The resolution invested the right to ijtihad in those who acquire the

1. Qur'an; IV: 59.

required qualification for ijtihad but merely viewed collective ijtihad and only when the orthodox schools of law fail to provide with the answer. For the Congress the right to regulate the process of practising the ijtihad lies within its own power. This resolution, to us, is a landmark in the development of modern Muslim thought, despite the fact that it still envisages the right to ijtihad proper with noticeable scepticism.

We would like here to emphasize the fact that one of the essential features of the Islamic legal science is that it is a lawyer's law based on the opinions of the eminent jurists and their fatwas in legal questions.

Anderson insists that this feature "evolved from the background of the Roman jurisprudentes and their responsa, or the Jewish Rabbis and their decrees".¹ This comment is not unfounded especially, when we see that the ijmā is a peculiar aspect of ijtihad and the latter was, to a great extent, taken over from the Romans.

Ijmā (Consensus)

Ijmā, technically, means agreement of an opinion in a particular age on a particular question. This agreement could be effected by one or more of these

1. Anderson - Law as a Social Force, op. cit., p.19.

processes: (i) quawl, word, expressing an opinion, or (ii) fi'l, deed, when there is agreement in practice, or finally (iii) sukut, silence, if it is implicitly inferred because of the absence of opposition.

Ijmā stands on the border line between primary and secondary sources in the Islamic theory. In the classical theory, the ijmā is the third of the primary sources of law, but subordinate to the Qur'an and the sunna. This view is based on the assumption that the consensus of the Muslim community, or of its jurists, never err in appreciation of what the law required, and therefore, it represents an authoritative expression of the divine will. The Prophet is reported to have said: "my people will never be unanimous in error", and "what Muslims agree to be good is also good in the sight of God".¹ And much more to the same effect. But when we come to a more detailed discussion of the ijmā we will see that it is actually either collective ijtihad or custom; and, in both cases, it forms a secondary source of law. The classical view would escape criticism if the ijmā in its ideal form, that is, the unanimous agreement of the whole Islamic community, or all its jurists, could be attained.

1. Compare the tradition with the latin maxim "vox populi vox dei". In fact the authenticity of this hadith is doubtful.

But history and facts, unequivocally, show that this hypothesis is absolutely impracticable.

The legal theory of the ancient Muslim schools of law distinguishes between the consensus of the community at large, both the jurists and the people, on essentials, and the consensus of the scholars on points of detail; in both cases consensus is infallible.

"One feature in which the Medinese idea of consensus differs from the Iraqi is that the Medinese restrict themselves to a local consensus, that is, count only the authorities in Medina... In contrast to the Medinese concept, the Iraqi idea of consensus is not provincial, but extends in theory to all countries... But in practice the consensus of the Iraqians shows the same local character as that of the Medinese... Shafi'i's doctrine of consensus shows a continuous development throughout his writings... Finally he reached the stage of refusing it any authority and even denying its existence. But so deeply ingrained was the habit of referring to it that he did not completely abandon it, but went on using it, mostly as a subsidiary argument and as an argument ad hominem".¹

Origins,

1. Schacht -/op. cit., pp.83, 85 and 88.

In short, ijmā as a technical legal principle was practically conceived of in terms of provincialism. Shafi'i even regarded it as a material source of minor importance. Within these limits ijmā could not be construed as the expression of God's will nor the paramount criterion of legal authority which guarantees the totality of the results of ijtihad. Ijmā, failing to achieve unanimity, could not stop an honest jurist from re-opening the discussion on a particular subject. Undoubtedly, the opinion of a majority carries its weight but this does not imply that it is infallible. A tradition conveys that "the differences of my people are mercy". Besides, a reward is promised to every muitahid, even in case of unintentional error. To this effect the Prophet is reported to have said: "When the judge gives a judgement and he exercises his reasoning faculty and he is right he has a double reward, and when he gives a judgement and exercises his reasoning faculty and makes a mistake there is a reward for him". After all ijmā should be based on the principles of the shari'ah as is inferred from the verse: "O you who believe obey Allah and obey the Apostle and those in authority from among you, then if you quarrel about anything, refer it to

Allah and the Apostle".¹ From our foregoing discussion of this verse, we know that it could not substantiate the "ijmā in its absolute sense. The ijmā, in the final analysis, is a particular form of collective ijtihad, if we consider it as an agreement of jurists or, custom, and if we conceive of it as agreement of the community,

The ijmā in its proper definition could be compared to what the Statute of International Court of Justice terms as "the general principles of law recognized by civilized nations". That does not mean that we contradict ourselves by comparing ijmā to one of the primary sources under the Statute. In fact, the general principles too, stand on the border line between primary and secondary sources.²

Methods of Interpretation:

Any commentator on the Islamic legal theory could not fail to notice that this theory is barely connected with the study of the methods of interpretation of the law. This attitude is due to the fact that classical writers intermingle two congruous subjects; namely, sources and methods of interpretation.

1. Qur'ān: IV: 59.

2. Schwarzenberger - op. cit., pp.19-20 and Quadri, Rolando - Diritto Internazionale Pubblico, Palermo, 1956, pp.90-93.

They present the two as adilla, an ambiguous term in this context. The sources of law, in our view, are only the Qur'an, the Sunna and the iitihad.¹ Other sources introduced by the classical theory are, in fact, methods of interpretation since they genuinely represent the technique of inferring the rules from their sources. They are the media through which iitihad produces its conclusions, or the instruments of clearing up the lacuna of the rule of law or bridging its nonliquet. In other words, they are the methods of interpreting the rules of law. The mission of interpretation, in international law, is to define the juridical significance of all the possible requirements of states in their mutual relations.² This is precisely what qiyas,³ and other methods, could achieve in the sphere of Muslim international law. For all this, we did not include these methods in our study of the sources of Muslim international law. The deficiency

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1. The tradition relevant to the discussion that took place between the Prophet and Mu'adh confirms that these are the only sources of Muslim law.
 2. Visscher, Charles De - Problèmes d'Interprétation Judiciaire en Droit International Public, Paris, 1963, p.9.
 3. De Visscher in his admirable treatment of the problem of juridical interpretation in international law introduced analogy, qiyas, as a method of interpretation. See Visscher - Problème d'Interprétation, op.cit., pp.38-44. This is also the viewpoint of the French "Ecole de L'Exégèse". See Metwalli, Abdel Hamid - Masadir al Ahkam al Dustūreya, Majallat al-Huqūq, Alexandria, 11th year, vol.I. & II, pp.185-207 (2) El 'Adawi, Galal Aly - Al Ijbar al Qanūnī āla al Mu'awada - thesis, Alexandria, 1960, pp.223-4.

of the classical theory could partly be explained by the fact that the methods of interpretation under it, are enunciated in canons. These canons might have confused the writers and made them unaware of the subtle distinction between "sources" and "methods" of interpretation. This juridical nature of the methods of interpretation is debatable in the Western thought. Some Western writers profess to the idea that the rules of interpretation do not constitute, in the proper sense, rules of international law. They are simply rational criteria or rules of reasoning and their use is not predetermined by the law. Moreover they describe these canons as useless, contradictory and even dangerous to the liberty of the interpreter's judgement. An inquiry into international jurisprudence does not bear witness to this view. The methods of interpretation offer to the interpreter hypotheses for further work. They assist him only temporarily and always with the impediment of necessary verification. They help to clear up the themes of inference and appreciation and raise in his spirit a speculative curiosity which, in fact, guarantees independence of thought. In short, the essential benefit of the canons of interpretation is that they attach the attention of the interpreter to the

alternatives which are available for his selection.¹ In fact, the need for interpretive canons is more apparent in the Islamic theory, because the rules which will be the subject of interpretation are mostly written. In this respect, the Islamic international law and the modern treaty law - the written international law - reveal the same tendency. Modern writers who talk about canons or methods of interpretation, generally have the "treaty" in the background.

Let us, now, have a look at the methods of interpretation in Islamic legal theory. We need not enter into detailed discussion of them. The ijtihad, in Islam, comprises various methods of deduction and interpretation which are, to varying degrees, accepted by the different schools of law. These methods, broadly speaking, are the qiyas, the istihsan or istislah (masaleh mursala) and the istidlal. We will comment on them briefly in turn.

(1) The qiyas, analogy, is an extension of a rule of law to a new case on the assumption that the original contention of the two incidents is similar. If we put it in the words of de Visscher: "L'analogie est un procédé

1. De Visscher - Problèmes d'Interprétation, op. cit., pp.70-1.

de raisonnement qui permet à l'interprète d'étendre une norme qui régit certains rapports à des rapports nouveaux juridiquement semblables à ceux que visait son contenu originaire".¹ Qiyas is essentially the expression of

an assimilative tendency of reason to bring together situations which, despite their exterior dissimilarity, are concordant because of the identity of the juridical reasoning. De Visscher provides that: "Le rôle qu'elle tient dans l'interprétation est, par ce côté, semblable à celui des principes généraux de droit reconnus par les nations civilisées" (Art.38 du Statut de la C.I.J.)

Comme eux, elle tend à élargir la sphère d'application du droit en assurant, par un appel à un principe commun sous-jacent, un traitement égal à des situations qui relèvent d'exigences juridiques identiques. Dans l'un et l'autre cas, il s'agit de dégager au-delà des particularités de l'espèce, la ratio legis".²

Although some jurists, like the hanbali Qudamah, reject the qiyas and substitute it by istislah, the majority accept qiyas as one of the adilla. Owing to the ever increasing needs of the society, qiyas plays an extensive role in the Islamic legal activity.³

1. De Visscher - Problèmes d'Interprétation, op. cit., p.38.

2. De Visscher - ibid., p.38.

3. Shalaby, Muhammad Mustafa - Al Madkhal Fil Ta'rif Bel Fiqh al Islami, Cairo, 1959, p.170.

(ii) Istihsan and istislah (or masaleh mursala):

These two methods of reasoning are of such close relationship that they are sometimes confused.

Istihsan, equity, technically means giving a decision on the basis of public good or the interests of justice. The supporters of this method, who are mainly of the hanafi school, quote the following two verses of the Qur'an:¹ "who hear advice and follow the best thereof. Such are those whom Allah guideth, and such are men of understanding"² "(ii)" And follow the better (guidance) of that which is revealed unto you from your Lord, before the doom cometh on you suddenly when ye know not".³ It is a concealed qiyas (qiyas khafi), a divergence from an externally obvious qiyas to an inner and self-conditioned decision. "This method of reasoning, which originally aroused such misgiving because it was undefined, is given a place in the casuistic step-ladder of the 'ilm usul al-fikh', and its possibility of application is thus limited to a few accurately definable cases. Nevertheless, discussion continues on whether it is justified or not,

1. Qur'an: LIX: 2.

2. Qur'an: XXXIX: 18.

3. Qur'an: XXXIX: 55.

and can only be explained by the fact that the followers of the Shafi'i school themselves are bound by a certain traditional principle not to drop the polemic against istihsan, which had long ago been originated by their master - under different conditions and with greater right".¹

Istilah is a method which was championed by Malik. "Istislah is more limited and more closely defined in content than istihsan in so far as it replaces the, in itself only formally, 'finding-good' of the latter by the material principle of maslaha. It argues with the demands of human welfare in the widest sense".²

The istihsan and the istislah could be termed as methods of functional interpretation. It is the primary purpose of such interpretation to give the fullest effect to the rule. It must fulfil the functions for which it is intended. As the Permanent Court of International Justice put it "an interpretation which would deprive the Minorities Treaty of a great part of its value is inadmissible".³ "The Permanent Court of International

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1. Shorter Encyclopaedia of Islam - op. cit., p. 185.
See Al Sarakhsi, Abu Bakr Muhammad b. Ahmad. Usul al-Sarakhsi, Cairo, 1372 A.H., vol.II, pp.199-208.
 2. Shorter Encyclopaedia of Islam - op. cit., p. 185.
 3. B 7, p.17.

Justice tried to fathom the spirit and underlying principles of treaties, and used a number of techniques in an attempt to explore the functions they fulfilled. It investigated their position within the system of customary international law and related to them other treaties.¹ In fact, the techniques of functional interpretation which the International Court has used are not far removed from the above-mentioned Islamic technique.

(iii) Istidlal, inference.² That is accepting prevailing principle, customs and usages so long as they are not in contradiction to the core of the shari'ah. In fact a custom may be regarded as having the force of ijma' when it assumes the acceptance of a vast majority. The istidlal, taken apart, is founded on the maslaha as well. That is why certain jurists do not consider it as an independent method.

It is noteworthy that the disagreement of Muslim jurists about the istihsan and the istidlal as methods of interpretation does not mean that they are differing about the maslaha as such as a pattern for interpreting the law. This is unanimously accepted. The diversity

1. Schwarzenberger - International law, op. cit., p.220.

2. This method is referred to by some writers as the 'urf'.

reflects a vigilant caution against the abuses of some responsables who disguised their personal interests behind the maslaha.¹

We would like to point out that the above mentioned methods of interpretation are not cited restrictively. A commentator on the Islamic legal theory could refer to other accepted methods such as the historical interpretation which implies the social circumstances of revelation,² the grammatical interpretation that is the prima facie exploration of the meaning of the text, or the systematic interpretation by interpreting the part in the context of the whole.

It is also of interest to emphasize that the interpretation of the Islamic texts was almost the responsibility of jurists. Tribunals played a secondary and minor role in this respect. That is why the Islamic legal science is predominantly lawyer's law. This fact convinced some writers to profess to the influence of foreign factors such as the Roman, Sasanid and Rabbinic precepts, on the substantive law of Islam.

1. Khallaf, Abdel Wahab-Masader al-Tashri's al Islami Masina, Al Qanun wal Iqtisad Revue, April & May 1945, p.271.

2. This corresponds to the reference to preparatory work.

CHAPTER THREE

SUBJECTS AND DOMAIN OF MUSLIM INTERNATIONAL LAW

Introductory:

It is hardly possible to speak about the subjects of international law without basing the discussion, at least by implication, on some particular views of the legal personality. The legal personality, after all, is the central theme in all study of subjects of international law since the subject of law is that in whom the legal system invests a legal personality.

The international legal personality implies direct subordination to international law. "An entity which exercises international rights and is bound by international obligations, in short which has international legal capacity, is one which is endowed with international legal personality".¹ Thereby, the subject of international law is the person upon whom international law directly imposes duties and confers rights. Hence

1. Weissberg, Guenter - The International Status of the United Nations, New York and London, 1961, p.23.

"legal personality may be called a term of art, a legal fiction, an artificial creation of the law. It is the means by which a particular legal system attributes rights and obligations to an entity. The legal order may grant personality to anything it chooses".¹ Subjects of law are either legal or physical persons. For the moment it is the corporate personality as a distinct and separate legal personality which is of primary concern for our study. The discussion of the legal personality usually brings about the problem of the legal personality of the State.

Practically speaking, modern international law came into being with the emergence of the national state. Consequently, the state is a legal person, par excellence, in international law. However, some writers, like Duguit, Scelle and Kelsen, deny the legal personality to the state. They consider the individual the only juridical person since he alone enjoys an independent will of his own whereas the state is but a grouping of individuals and its ultimate aim is the welfare of the individual. Thereby they describe the legal personality

1. Weissberg - *ibid*, p.21.

of the state as fictitious and unreal. This theory goes in line with the Muslim classical theory which does not know the conception of the legal person.¹ This philosophy, as obvious, is not correct from the positive viewpoint. In the international society states are still the masters of their own decisions. The individual could not claim the vested qualities and rights of the state.

The Corporate personality in Islam:

The preliminary question whether Muslim classical doctrine is or is not correct about the denial of the corporate personality, could be determined by way of inference from the following two verses of the Qur'an.

The first verse runs as follows: "And when we would destroy a township we send commandment to its folk who live at east,² and afterward they commit abomination therein, and so the Word (of doom) hath effect for it, and We annihilate it with complete annihilation".³ This verse in our view, implies the acts of the state doctrine. Here an act is performed by the heads of a state in their

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1. Sheikh Sayed Abdallah Hussein expounds that the shri'ah recognizes the conception of the legal person. See Hussein - op. cit., vo.I, p.62.
 2. The reference here is to the responsables and heads of the state - See al Maraghi - op. cit., vol.XV, p.21.
 3. Qur'an; XVII: 16.

quality as an instrument or organ of the state; the responsibility of which rests on the collectivity of individuals which is the state. This structure, necessarily, connotes the recognition of a legal personality for the state since an individual cannot be a legal organ except of a legal person. This connotation is the only logical interpretation which construes the Qur'anic injunction in a justified and equitable way. If we disregard the idea of organ as basis of the responsibility of the individual for the misconduct of other individuals, the injunction would seem unjustifiable and aggressive, an attitude which the Qur'ân never assumes.

The same argument applies to the second verse which reads: "And guard yourselves against a chastisement which cannot fall exclusively on those of you who are wrong-doers, and know that Allah is severe in punishment."¹ If we interpret this verse in the context of the general principle "And no burdened soul can bear another's burden"² we will come to the conclusion that the responsibility is originally inflicted on the state as a legal person, and eventually on the individuals who compose it.

1. Qur'ân; VIII: 25.

2. Qur'ân; XXXV: 18.

In fact, several verses connote the idea of the state as a sovereign entity.¹ We chose the above two because they are more related to the conception of the legal person which is our primary interest for the time being.

Besides, the practice of the Prophet and his successors sustain the idea of the state as a legal person.²

Assuming that the Islamic theory can afford the notion of the international legal person, and that international law deals mainly with the activity of international entities, then states - as legal persons - are subjects of Muslim international law in as much as they are under modern international law.

1. In testimony to this fact we cite, for example, the following verses: (i) "We verily sent Our messenger with clear proofs, and revealed with him the Scripture and the Balance, that mankind may observe right measure, and He revealed iron, wherein is mighty power and (many) uses for mankind, and that Allah may know him who helpeth him and His messengers, though unseen" (LVII:25), (ii) "That which Allah giveth as spoil unto His messenger from the people of the townships, it is for Allah and His messenger..." (LIX:7). (iii) "And when they appeal unto Allah and His messenger to judge between them, Lo! a faction of them are averse" (XXIV:48). In these verses reference is made to peculiar institutions which could not be conceived of without the establishment of a state. These "implied powers" were the argument which the I.C.J. used in 1949 in its advisory opinion about the reparation for injuries suffered in the service of the United Nations, to confer an objective international legal personality on the Organization. Thus the legal personality could be proved by connotation. cf. supra pp.4A-4D, and infra, the related verses in Part III of this thesis.

2. cf. - supra pp.132.- 151.

Individuals as subjects of international law:

The legal status of the individual under international law is a matter of controversy among publicists. Too many writers consider the individual as object of international law, exclusively or in principle, on the ground that international law only imposes duties on the individual but confers no right. This idea is hardly tenable in an age which boasts the liberty and freedom of human beings. It is also rejected by the Universal Declaration of Human rights of the United Nations which pronounces in its Article 6 that: "Everyone has the right to recognition everywhere as a person before the law". In fact, "individuals may be subjects of international law or they may not.... The idea that international law rules not only the intercourse of independent States but also that its provisions are directly binding on individuals without the intermediary of their states, is as old as the science of international law itself. Grotius considered the law of nations as a body of rules governing the activities of individuals in international relations rather than a body of provisions binding on States in their relations with other states... Numerous writers of the nineteenth century, although not advocates of the School of Natural Law, proclaimed the international

personality of individuals parallel to that of States... After the First World War, a great number of writers pronounced themselves in favour of the international personality of individuals as well as of States... The trend in legal literature to recognize the international personality of the individual continued during and after the Second World War."¹

Besides that doctrine which recognizes the international personality of both state and individuals there is a theory professing to the "emancipation of the individual from his dependence on the state, and the placing of him under the direct protection of the international community".² Under this theory "individuals should be recognized as the exclusive subjects of international law, and thus the States should cease to enjoy rights of international personality."³ Today this idea has only a few supporters.

Another group of writers are reluctant to accept the international personality of individuals. This reluctance is the outcome of the state sovereignty. This concept is accused of being rigid and at defiance with the

1. Korowicz - op. cit., pp.327-332.

2. Korowicz - op. cit., p.339.

3. Korowicz - op. cit., p.339.

current development of international law in the twentieth century.¹ The study of practical cases prove that individuals "have been given the personality of substantive international law as well as the capacity for claiming their rights before international bodies, the following cases may be cited:

"1st. The Hague Convention XII of 1907 provided for the creation of an International Prize Court and in its Articles 4 and 5 allowed neutral individuals to claim their rights against a foreign state before the Court...

"2nd. The Central American Court of Justice was created by the Treaty of Washington of December 20, 1907... individuals citizens... were admitted to assert their claims directly before this Court against one of the... signatory States²...

"3rd. The Treaty of Versailles of June 28, 1919, in Part II, 'Penalties', provided in Articles 227-230, for the punishment of German war criminals, and above all William II, who should have been tried before an international tribunal.

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1. Eateb, Aisha - L'individu et le Droit International Public, Thèse, Le Caire, 1959, pp.25-6.
 2. Another recent example is the European Convention on Human Rights of 1956, under which a Commission and a Court were established. "The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person..." (Article 25/1). This individual petition could be brought before the Court by the contracting States or the Commission.

"4th. The Versailles Treaty... created the International Labor Organization... The General Conference of Representatives of the Members has been composed from the very beginning of four representatives of each of the member States, of whom two are to be government delegates and the two others have to represent respectively the employers and the employees of each of the Members...

"5th. The German-Polish Upper Silesian Convention...of May 15th 1922, under the provisions of which individuals acquired active international personality to an extent unknown in the history of the law of Nations...

"6th. Individuals become active subjects ad hoc of international law in plebiscites and individual options.

"7th. Members of international tribunals and Courts are subjects of international law, since they derive their powers directly from an international agreement."¹

The Islamic theory definitely rejects the idea that individuals are objects of international law.

"Verily we have honoured the children of Adam. We carry them on the land and the sea, and have made provision of good things for them, and have preferred them above many

1. Korowicz - op. cit., pp.348-52.

of those whom We created with a marked preferment".¹

One may argue that Islam accepts the view that individuals are objects of international law since it tolerates slavery. The stand of Islam towards slavery will be discussed in Part III of this thesis. Now we will proceed on the assumption that slavery is a legal institution in Islam.

This does not affect our statement. The slave in Islam is not a res who has duties but no rights. He is a human being who enjoys, particularly vis-à-vis his master, certain rights which Muslim international law pedantically guarantees for him.²

The Islamic theory, as well, does not exclude the individual from the subjectivity to international law. Self-evidently most of the Qur'ân verses address individuals. Furthermore, the individual is endowed with certain rights which emanate directly from Muslim international law. For instance, the Muslim can give a safe-conduct to an alien without prior authorization from the Islamic government, and this safe-conduct will be binding on the said government. Another example is the rights

1. Qur'ân; XVII: 70.

2. We will see for example that the slave has the right to regain his liberty if he fulfils certain conditions, in which case his master cannot object. See Chapter II, Part III of this thesis.

which Islam recognizes for the aliens and the dhimmis residing in Islamic territory.¹ Hence, Muslim international law confers rights upon the individual. It also imposes duties on him such as the duty of every Muslim, when the Islamic state is attacked, to contribute to the defensive jihad. Thus, the individual under the Islamic legal theory, is considered a subject of international law. The extent of his rights and duties may vary from that of the state and the procedure by which his rights are claimed or his obligations are enforced may likewise vary, but nonetheless the individual is subject of international law. Limited attributes is not a negation of personality because the legal personality is a mere convenient device of the law.

On the other hand, Islam does not consider the individual as the exclusive subject of international law. The state, as we have forwarded, is also an international legal person under the Islamic theory.

In summation the Islamic legal theory subscribes to the doctrine that recognizes the international personality of both the individual and the states.

It will be remembered that the Islamic legal theory

1. Cf. *infra*, Part III of this thesis.

confers an international personality on the Prophet as individual.¹

However, subjects of Muslim international law are not confined to states and individuals, they also include the bughat, or belligerent rebels who have acquired resisting power.²

The domain of international law:

The problem of the domain of modern international law, in the various stages of the development of the said law from an inter-European legal system to world-wide universality has changed its character.

During the early period of colonial expansion, the African, Asiatic and American communities were regarded as uncivilised communities to whom international law could not apply. These countries were treated as territoria nullius. The colonial companies, such as the Dutch East India Company and the English East India Company formed establishments and exercised sovereign jurisdiction therein. The Arbitrator in the Palmas case (1928) defined the acts of these companies as entirely assimilated to acts of

1. Cf. Supra pp.66-71 of this thesis.

2. The Islamic theory comprises all kinds of states whether independent or dependent. We will see later on that the classical legal theory contains certain rules for the protectorates. Cf. infra; Part III of this thesis.

their respective states themselves. These communities were merely considered as objects of international settlements between states.

Other non-European countries, such as the Ottoman Empire, which were not weak enough to permit the policy of the strong hand were nevertheless considered to be outside the pale of international law. It was only in 1856, and under the Treaty of Paris, that Turkey was admitted to the privileges of the European public law. Other countries, like Japan, followed.

By the beginning of the present century, territories without master became relatively few. All the backward territories were brought into the framework of international society either as dependent on one of the Western sovereign states, or as subject - or even object - of international law. This trend still manifests itself in the remnants of colonialism as well as the systems of mandate and trusteeship.

According to the classical theory, Muslim international law was confined to the Islamic world. Non-Muslims were considered to be outside its pale. This de facto interpretation echoed the then dominating policy of the Islamic state. To us the domain of Muslim international law enshrines all civilized nations. By

civilization we mean here, the ideological belief in God and the Hereafter. This common doctrinal standard secures an adequate basis for international law and understanding. A state which recognizes such a belief is entitled to the privileges of Muslim international law. In fact, this belief in itself serves as an effective sanction for international law, and consequently, its respect. The status of atheistic countries is doubtful. It may be said that these states are also admitted to the pale of Muslim international law. This view accords Muslim international law universal application. Another, equally valid, denies to this category of states the privileges of Muslim international law.¹ According to the latter view, communist countries² with their dialectical materialism should be placed outside pale of Muslim international law.

To sum up, in both Muslim and Western international law, entities are not entitled to claim the privileges of international law unless they acquire an essential prerequisite, namely, a certain degree of civilization. In the Western world, civilization is

1. Unless it is exceptionally in the interest of the Islamic state to maintain peaceful relations. See *infra*. Part III of this thesis.

2. We mean countries which are ideologically, and not constitutionally, atheistic. Because, constitutionally speaking, the United States of America is no less heretical than Soviet Russia.

measured by a material criterion whereas in Islam it is judged by spiritual and dogmatic qualities.

This explanation should not be confused with the universal mission of Islam. Islam, like modern international law, tends to gain universal acceptance. Common principles, presumably, relaxes the antagonism of states and helps more to the advancement of humanity. When this propagation attains its ultimate goal, the international law will lose its domain of activity. Meanwhile, the split of the world into political entities of different standards of civilization still poses the questions.

Another common aspect is that both systems contain regional as well as universal rules. Broadly speaking, some rules of Muslim international law apply only to the relations between Islamic states,¹ assuming thus some sort of regionality. Besides, the geographical circumstances may entail the adoption of peculiar rules by a given group of states. It is to be

recalled, for example, that the Abbasids' interpretation of Muslim international law differed from that of the Umayyads of Spain. Modern writers, in like manner, talk about American or European law of nations, for instance.

1. Such as the principle of federative solidarity which is imperative as regards inter-Islamic relations.

PART THREE

THE MUSLIM CONCEPTION OF INTERNATIONAL
LAW

Introduction:

Early Muslim scholars - particularly those of the Abassid period - have bequeathed to us a number of works on Muslim international law based fundamentally on the idea of universalism and that a religious war of aggression is one of the tenets of Islam prescribed by the Qur'an for securing conversions or exacting tribute. Actually, such views were intended by their authors to facilitate the application of the principles of the Shari'ah to specific questions. Naturally, their approach was dictated by the existing enviromental socio-political requirements and conditions of the time. Therefore their rulings cannot be considered as unconditionally applicable to the needs of the Islamic state in the twentieth century irrespective of contemporary socio-political exigences. Nevertheless, as time elapsed, these ideas gained in the public mind a kind of sacrosanct soundness of their own and came to be regarded by the majority of Muslims as an inherent part of the Shari'ah itself although neither the Qur'an nor the traditions offer the remotest authority for such an unwarranted enlargement of the Shari'ah. On the contrary, the Law-Giver deliberately provided a

limited range of explicit ordinances to determine the general legal pattern within which society ought to develop; leaving the multitude of possible legal problems to be decided according to the changing requirements of time and society. Thus it is not accurate to include the doctrines of the various Islamic schools of thought in the Shari'ah stricto sensu. These schools, in fact, represent different processes of speculation on what the divine law, the Shari'ah, might be. They are the media of making the Shari'ah accessible to common believers.

This rigidity of public opinion about the Islamic classical doctrine induced some modern Muslim commentators to accept the Western political and legal concepts as the norm to which a modern Islamic state should conform. This attitude, in many cases, resulted in the adoption of concepts which are in contradiction to the dictates of Islamic ideology¹ due to the fact that Western jurists - for reasons of their own - consider questions of belief and of political life as two entirely different domains, whilst the close connection

1. Pakistan in early years of independence and modern Turkey could be given as two present examples of trying out the opposite extreme concepts about the Islamic state.

between religion and politics is one of the essential characteristics of Islam.

Hence, neither the labours of our predecessors nor those of our contemporaries can provide an adequate basis on which a proper Muslim international law, which takes into consideration the political requirements of our time, can be built up. The right path, in our view, is to turn to the roots of Islamic law (namely, the Qur'an and the traditions) and from there establish certain concrete principles of a contemporary Muslim international law. To pursue this idea we deem it appropriate to summarise the classical doctrine¹, comment on it, and then we shall come to certain conclusions of our own. Inevitably, my views will provoke debate but we believe in the positive value of such controversy and its laudible effect on the intellectual progress of Islamic society, since the Prophet said: "The differences of opinion among my community or according to another account, the most learned of my community - are a sign of God's grace."

1. We will mainly deal with the sunnite doctrine.

CHAPTER ONE

MUSLIM CLASSICAL CONCEPTION OF INTERNATIONAL LAW

Preliminary Remarks

According to the classical Muslim doctrine, the "raison d'être" of the Islamic state is to achieve the universal rule of Islam. Hence, it conceived the Islamic state as a universal state by its very nature. As a corollary to this idea, the Muslim caliphs were determined to wage a constant war of conquest in the name of Islam, which they carried out successfully, during the first century of the Islamic era. This claim for universalism gave rise to the establishment of the doctrine of Jihaed as the instrument of the Islamic state to perform its function, whenever peaceful methods fail.

But victorious Islam failed to complete the Sun's circle as it halted, in the east, at the borders of India, and failed, in the north, to penetrate the mighty walls of Constantinople (717/18), while in the far west it endured a decisive defeat at Tours (732).

Failing to correspond to the then known world, the Islamic state had to confront two major problems, i.e. its relations with the non Muslim states that remained outside its orbit; and the treatment of the non Muslim subjects residing in its territory. In this situation the classical doctrine developed two notions: namely, the division of the world into the Muslim world and non-Muslim world and the rules regulating the status of the dhimmis in Dar al-Islam. Therefore the classical conception of Muslim international law is based on those main precepts, i.e. The Jihad, the division of the world into two parts and the status of the dhimmis. Consequently we will tackle these topics below.

Terminology.

Etymologically the word "Jihad" is derived from Jahada or Juhd meaning ability, exertion or power. Hence, Jihad, literally, means "an effort directed towards a determined objective"¹; i.e., (1) against a visible enemy, (2) against the devil, (3) against one's self, nafs. According to ibn Athir² "Jihad" means

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1. The Encyclopedia of Islam - new edition - 1962, edited by B.Lewis, Ch.Rellat and V.Schacht, Leyden and London, under the term "Jihad" p.538.
 2. Ibn Athir, al Mubarak ibn Muhammad ibn Mubammad Jazri-al Nihaya fi Gharibel-Hadith wal-Athar, quoted by Maulawi Muhammad Ali in his "The Religion of Islam", Lahore, 1936, pp.45-6.

fighting with unbelievers, and that is an intensive form, (muhalaghah), and exerting one's self to the extent of one's ability and power whether it is by word (qawl) or deed (fi'l)". Lane¹ gives the following significance: "Jihad, inf. n. of Jahada, properly signifies the using or exerting of one's utmost power, efforts, endeavours, ability in contending with an object of disapprobation, and this is of three kinds, namely, a visible enemy, the devil, and one's self, all of which are included in the term as used in the Sur.XXII.77". However the Muslims jurists used the word jihad in a narrower sense due to the fact that when they codified Muslim law in their books of fiqh they had to deal with the various subjects of law amongst which fighting, qital, had to find a place. Admittedly, the jurists had to interpret the term "jihad" in a legal sense. For this reason they disregarded the connotation of the jihad the invitation to Islam - as being of no legal significance on the assumption that such invitation implies a matter of free individual choice. They dwelt on using the word jihad as a synonymous to the word qital. In the course of time this

1. Lane's Arabic-English Lexicon -

narrow legal use prevailed and the wider significance of the word faded away, though it is accepted by the commentators of the Qur'an when dealing with some injunctions such as XXV:52.¹ This misuse of the term coincided with the development of a doctrine advocating that the Muslims were to carry on a permanent war against non-Muslims even aggressively or, in other words, in Muslim law the jihad "is a sanction against polytheism and must be suffered by all non-Muslims who reject Islam or in the case of the dhimmis, refuse to pay the poll tax. The jihad, therefore, may be defined as the litigation between Islam and polytheism, it is also a form of a punishment to be inflicted upon Islam's enemies and the renegades from the faith".² If we use Klein's words, jihad is "The fighting against unbelievers with the object of either winning them over to Islam, or subduing and exterminating them in case they refuse to become Muslims, and thus causing Islam to spread and triumph over all religions is considered a sacred duty of the Muslim nations".³

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1. The verse reads "So obey not the disbelievers, but strive against them herewith with a great endeavour."
 2. Khadurri - The Law of War, op. cit., p.59.
 3. Klein, F.A. - The Religion of Islam, Madras, 1906.

The jiḥād, as we have learned, is regarded by Muslim jurists as the medium of establishing Muslim sovereignty since the reign of God's religion necessitates the political supremacy of the said religion. Actually the doctrine of jiḥād, being more or less a doctrine of warriors, was not entirely a new tenet to the Arabs who had been warriors throughout the pre-Islamic era of their history. This fact induced some writers to maintain that the Islamic concept of jiḥād was indispensable for the existence of the Islamic state, assuming that there must be some way or another to exhaust the innate warlike energy of the Arabs outside the state, otherwise this tendency would have inevitably sought its satisfaction within the state.¹ To us, this view is exaggerated because, presumably, during the lifetime of the Prophet the Faith was strong enough to transcend tribal tendencies. Not long after the death of the Prophet the capital of Islam was transferred to Kufa and then to Damascus. After that the Arab element in the Muslim army began to be over shadowed by the alien Muslim converts, whilst Arabs showed increasing interest in the luxuries of life which they came across in the conquered countries. In

1. Khadduri - The Law of War, op. cit., p.62.

fact, it could be argued that the jihad was an expansive rather than a preservative factor in the history of the Islamic state. This and the suppression of tribal rivalry might be among the reasons why jurists outlawed all other wars and recognised only the jihad as the Muslim bellum justum. To summarize, the jihad is the Muslim doctrine of war.

Types of Jihad:

Technically speaking, the classical doctrine of jihad deals with different types of hostile measures some of which come under the rules of international law while some do not.¹

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1. For instance the Jihad against international highwaymen could not, in our view, be included in the international types of Jihad. International highwaymen, or deserters and pirates, are treated as international criminals and the punishment of their crimes, called the "great" theft by Muslim jurists, enters into the domestic jurisdiction of the Islamic state and is punished under its municipal law, whether the highwaymen were Muslim subjects or foreigners. See Tabari - Tafsir op. cit., vol.VI pp.132-33. The punishment prescribed by Muslim law corresponds to the seriousness of the act committed. It is included in the Qur'anic verse: "The only reward of these who make war upon God and His Messenger and strive after corruption in the land will be that they will be killed or crucified, or have their hands and feet on alternate sides cut off, or will be banished from the land..."(Qur'an V:33). Jurists differ on the banishment mentioned in this injunction. Malik held that the criminal should be banished from the state, while others maintain that he should be deported from his district or imprisoned.

Since the present study is interested in public international law, we will concern ourselves only with the types of jihad particularly related to our study.¹

The importance of the jihad, it is to be recalled, lay in its significance as an instrument of the Muslim state to propagate the Faith. The essence of the Faith is the belief in the unity and supremacy of the Deity. This basic principle is expressed in the maxim, la illaha - illa-Allah, there is no God but Allah, a confession which - combined with the recognition of the prophethood of Muhammad - admits a man to the fold of Islam. Failing to acknowledge the oneness of God, whether with regard to His attributes or His works or with respect to the obedience which is uniquely due to Him, is the gravest of all sins, "Allah does not forgive the association of other gods with Him and forgiveth what is besides that to whomsoever He pleases".²

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1. Muslim jurists add another type of jihad, namely the ribat or safeguarding of frontiers. Malikites, particularly in Spain, emphasized the importance of the defensive significance of the ribat, considering it as a vital obligation incumbent on Muslims. This attitude is due to the fact that the Spanish borders were constantly raided by Christian forces. To us, the ribat is not a separate type of jihad in the proper sense of the term. It is rather a measure of security like any other internal preventive measures, which a vigilant state has to take for the preservation of its independence.
 2. Qur'an; IV: 48.

Taking this fact into consideration, we can classify the types of Jihad under two categories:

1. Jihad of extermination, against those who are charged with the most palpable form of Sins, i.e. the polytheists¹ and apostates. We mean here those apostates who denounce their faith and either join dar al-harb or establish themselves in a territory of their own and acquire enough strength to threaten the authority of the Islamic state.² To keep with its basic principle, Islam can neither co-exist nor tolerate polytheism.³ Islam is also utterly intolerant of any form of secession from the faith, since this constitutes a politico-religious rebellion.⁴ Hence, for both the polytheist and the apostate Islam offers a limited choice of embracing (or re-embracing) the Faith or the Jihad.⁵ Originally, the apostate was a Muslim who

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1. A polytheist is a pagan who has not any sort of revealed book.
 2. This meaning, it seems, is not very clear in the classical theory if we come to some of its details.
 3. This principle was literally enforced in Arabia, but later on, when the Islamic state became an empire, the principle was somewhat relaxed.
 4. The wars of jihad undertaken by the caliph Abu Bakr, and alluded to before, are the earliest and most serious incidents in the history of Islam in that respect.
 5. Strictly speaking, this seems to be the view of Shafi'i and ibn Hanbal. The Hanafis and Zayd b-Ali maintain that the choice of paying a jizya could be accorded to the pagans provided that they are not Arabs. Malik professes to that, apart from the Qurayshites, the jizya may be imposed on the pagans.
- Ibn Rushd - *Al Muqaddemāt al Mumahidāt*, Cairo, 1325 A.H. (1907), vol. I, p.285.
 Al Mawardi - *Al Ahkam al Sultaneyah*, Cairo, 1380 A.H. (1960), p.143. Sahnun - *Al Mudawana al Kubra*, Cairo, 1356 A.H. (1938), vol.III, p.46.

it was hoped, would return to Islam, therefore Muslim jurists distinguish between the characteristics of dar al-riddah and those of the polytheism, or dar al-harb in general. Although the Muslim state is not entitled to conduct peaceful relations or to make alliances with the apostates or to accord them quarter, it has this discretion with regard to polytheists. It cannot spare the apostate's life by enslavement or by imprisonment since his inevitable destiny is death if he refuses to re-embrace Islam. Consequently, because the apostate had not the right of conversion to any other religion but Islam, his wife and children are not liable to slavery and his property, during his lifetime, is held in trust and not subject to confiscation. At his death as an apostate, whether in battle or otherwise, his property becomes fay', or state property.¹

(ii) Jihad of reconciliation against those who are accused of less palpable sins, namely, the Scriptuaries² and the bughat, or dissenters. Here Islam shows an

1. Hamidullah, Muhammad - Muslim conduct, op. cit., pp.163-4.

2. The Scriptuaries are the Jews, the Christians, the Sabians and the Magians (Zoroastrians). However, it is doubtful if the Arab scriptuaries could be treated as ahl al kitab (Al Shafi'i - vol.IV, p.194).

inclination to leniency because the Scriptuaries believe in God, though in a distorted way according to the Islamic point of view, and the bughat are Muslims after all. The Scriptuaries are to choose one of three possibilities: Islam, in which case they enjoy full rights of citizenship; poll-tax, reducing them to second-class citizens with certain disabilities; or the jihad.

If we turn to the bughat, it is difficult to find a concrete provision relevant to that category of jihad in Muslim positive law. Jurists usually cite the following Qur'anic verses to support their claim: "And if two parties of the believers fall to fighting, then make peace between them. And if one party of them doth wrong to the other, fight ye that which doth wrong till it return into the ordinance of God; then, if it return, make peace between them justly and act equitably. Do God loveth the equitable".¹ In fact the bulk of Islamic rules dealing with this topic are based on the orthodox practice of the caliph Ali who was faced with the first two civil wars in Islam, namely, the Battle of the Camel² and his struggle with Mu'awiyah; and under whose reign

1. Qur'an, XLIX: 9.

2. When Ali was elected caliph, Aisha, the mother of the Faithful, Talha and Zubair led a hostile movement taking Basra as their seat. In face of this, 'Ali moved to Iraq, attacked Basra and defeated his opponents in the battle of the Camel, "So called because it raged round the camel of Aisha (9 December 656)".
Wellhausen - Arab Kingdom and its Fall, translated by Margaret Graham Weir, Calcutta, 1927, p.53.

the Kharijites emerged as a case in point.

The jihad against the bughat is prescribed only when they fail to obey the law and cause grievance to the state. But if they resort to peace they are allowed to life in safety in dar al-Islam, perform their prayers in the mosques, and would be immune from attack by the Imam. This was what 'Ali admitted to the Kharijites. But when they rebelled he conquered them and destroyed their forces in the battle of Nahruwan (656). Presumably, this view corresponds to the concept that obedience is due to the imam even if he diverts from the right path.

The bughat, in case of rebellion, are entitled to the rights of a de facto government in the modern sense of the term. Their jurisdiction over their territory during their maintenance of power is recognized as lawful and valid. The treaties they conclude with non-Muslim states, other than those to fight against the Muslims, are considered as binding over the Muslim state. They are not held responsible for any loss of life and property caused during the conflict.

Their private property is not treated as spoil, and their prisoners of war are not liable to be killed. In this contest 'Ali is reported to have instructed:¹

1. Quoted from Hamidallah - Muslim Conduct of State, op. cit., pp.171-2.

"When ye defeat them, do not kill their wounded, do not behead the prisoners, do not pursue those who return and retreat, do not enslave their women, do not mutilate their dead, do not uncover what should remain covered, do not approach their property except what weapons, beasts, male or female slaves you find in their camps; all the rest is to be inherited by their heirs according to the law of God."

Characteristics of the Jihad:

It seems that the classical writers, when dealing with the general characteristics of the jihad, had mainly in view the example of the jihad against non-Muslims. This fact, together with the foregoing remarks on some peculiarities of the jihad against Muslims (Bughat and apostates), should be borne in mind when we consider the characteristics of the jihad; which we can analyse as follows:

(1) The jihad is a collective obligation, fard al-kifayah, that duty which is binding upon the community as a whole and not on all individuals, that is to say as soon as a part of the Muslim community fulfils the duty of jihad, it ceases to be any longer obligation on others. Consequently, the jihad, in a modern state, should be a state

institution, and, as a result, it is a fard 'ayn, an individual duty on the head of the state and its proper implementation is his personal responsibility.¹ Hence, at present, the recruitment of an army may be regarded as an adequate performance of the jihad. Actually, in a developed society we could not expect all the members, at the same time, to do military service since a part of the population is indispensable for other requirements of the welfare of the society.² Nevertheless, the whole community is held liable if the duty is not fulfilled at all.

This quality excludes the jihad from being one of the pillars of Islam, namely fasting, prayers, pilgrimage, almsgiving and profession of the faith; as these five pillars are all individual duties. However, the jihad becomes fard 'ayn in two cases, i.e. for those who dwell in the territory nearest to the enemy; and when general mobilization is declared to repel an aggression.

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1. However, Dr. M. Badr takes up an extreme view with regard to the jihad. He maintains that "if the Sultan or the Khalif call on believers to defend the faith, the men called on are judges of the righteousness of the command whether it is to the defence of Islam they are called or to the help of the Sultan's special territory." Quoted by Gardener, W.R.W., in his article about "Jihad", published in "The Moslem World" Review, 1912, - p.351.
 2. Islam disqualifies - as fighters - disabled men such as the blind, the crippled and the sick.

The Kharijites, who conceived the state as a garison state, regarded the jihad as the sixth pillar of Islam. To them the duty of the jihad is incumbent on every Muslim individually, even if the imam does not take the lead, since the Prophet Muhammad spent almost his whole lifetime in the jihad. Fanatics as they are, the Kharijites, profess to a ruthless jihad, not only against non-Muslims but against those Muslims, as well, who do not accept their version of Islam as the true faith for they believe that they can force this faith on reluctant individuals in compliance with the tradition. "My fate is under the shadow of my spear."

From the religious point of view, the individual who dies in the performance of the jihad is considered as a martyr in the path of Allah, and is rewarded by eternal life in paradise without trial on the Judgement Day.

(ii) The jihad is a perpetual obligation: The jihad, being a means to an end, i.e. the universal conversion of humanity to Islam, is presumed to exist until this aim is achieved. But the perpetuity of the jihad is relative as the jihad comes into being only when circumstances are favourable to the Muslim state and likely to

be suspended if the interests of the Muslim state require it. Hence, the doctrine of the jihad does not necessarily envisage constant fighting, but merely implies the existence of a state of war between the Muslim state and its neighbours. For this reason some jurists comment that preparations for the jihad under justifiable circumstances, could amply constitute a fulfilment of the obligation. Actually, under exigent needs, the suspension of the jihad has now lasted for so long a period that it has virtually become a normal state for the Muslim community. It is true that the imam has the right to revive it when he deems it appropriate for Islam, but it is doubtful that present conditions of world society would, in the foreseeable future, warrant such a decision.¹

For the Shi'ites the jihad entered into a state of quiescence in the absence of the imam. The imam, in his capacity as infallible ruler, is endowed with the sole authority of declaring the jihad whenever he considers it due.²

With the notion of perpetuation in mind, we could

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1. The last call to the jihad against non-Muslims "made as late as the autumn of 1914 by the Ottoman Sultan - Caliph Muhammad Rachad, proved an utter failure". Hitti - op. cit., p.139. Presently, similar attempts have been tried out with regard to the stand of the Arab States towards Israel.
 2. The Zaydi sect does not recognize this dogma and adopts the Sunnite view with regard to the jihad.

not assert, theoretically, that the Islamic state could now enter into genuine peace treaties with non-Muslims states. Obviously, such treaties impair one of the essential characteristics of the jihad. The general doctrine holds that only truces for a limited period, in principle not in excess of ten years subject to renewal for similar periods, are authorized.¹ However, these treaties are liable to unilateral repudiation before their term of expiration if repudiation proves to be in favour of the Muslim state. In this case, the Muslim state should afford the infidel party sufficient delay to communicate the information to the different parts of its territory.

(iii) The jihad is a formal obligation since it should be preceded by addressing a formal invitation to the people against whom it is directed calling on them to join Islam (or pay poll-tax as the case may be).² This was the constant practice of the Prophet to emphasize to the enemy that the aim of the jihad is to propagate the Faith and

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1. Al Shafi'i - Kitab al Umm, a collection of works by el-Shafi'i, Arabic text, Boulac, 1322 A.H., vol.IV, p.110.
 2. Al Sarakhsi; Muhammad ibn Ahmed - Sharh al-Siyar al-Kabir; A commentary on al Shaibani's treatise on the Muslim laws relative to war, entitled "Al Siyar al-Kabir"; Arabic text: Hayderabad, 1335 A.H., vol.I, pp.57-8.

not to win earthly gains.¹ This is explained by the fact that the jiḥād is not an end in itself but a forcible means to spread Islam; and therefore peaceful means should be examined before the Islamic state resorts to war. This often resulted in peaceful settlement, as in a number of incidents in Syria and Iraq. In fact the invitation covers a wider measure than the modern condition of the declaring of war since the former is not confined to the declaration of war only, but it first invites the enemy to embrace Islam, in which case hostilities are to be terminated. Although jurists unanimously profess to the principle of invitation; as such, yet they differ on its implementation. Some hold that the Muslim state is no longer under the obligation of addressing a prior invitation on the ground that Islam has been widely spread and heard of, and, therefore, non Muslims have been duly forewarned. Hence, it is for the discretion of the Islamic state to repeat or not the invitation. However, the Muslim practice is in favour of addressing an invitation before starting acts of

1. "In the early Muslim conquests the commanders often waited for three days after the invitation had been sent before actual fighting took place". Khadduri - The Law of War; op. cit., p.56.

hostility. The conduct of the Umayyad caliph, 'Umar ibn Abdel - 'Aziz; is significant in this respect.¹

It is reported that, upon a complaint from the inhabitants of Samarqand against Qutaybah the commander of the Muslim army that he conquered their city without previous notification, 'Umar referred them to the judge Djumai ibn Hader al-Baji, who decreed that Muslim troops should withdraw and the commander should invite the inhabitants of the city and give them sufficient delay. This proves that the invitation "was considered to be a condition sine qua non for the legitimacy of the jihad."²

Anyhow, the Muslim state may renounce this obligation of invitation when would result in a delay that ameliorates the situation of the enemy to the detriment of the interests of the Muslim state.³ The same applies as well to the case where the Muslims are, a priori, reasonably sure that the invitation will be of no avail.⁴

(iv) The jihad is a defensive as well as an offensive obligation: It is self-evident that the right of self

1. Arabi - op. cit., p.19.

2. Shehata, Ibrahim-Islamic Law and the World Community, Harvard International Club Journal, vol.4 N°1, December 1962, p.111.

3. Al-Shrakhsee - op. cit., vol.I, p.58.

4. Al-Sarakhsee - op. cit., vol.I, p.59.

defence is an inherent right in every community. Since earlier times, it is almost accorded to human groups. Hence, if the Islamic state carries out the jihad for defensive purposes; it is presumably moving on conventional lines. There is nothing much to be said against the jihad as a defensive measure. On the contrary, it is a natural corollary to the fundamental right of self-preservation. But instituting aggressive war was, and still is, a subject of bitter controversy in both theory and practice. However, classical Muslim writers adhered to the doctrine that tolerates aggressive war provided that aggression aims at furthering Islam. Debatable as this may be, the notion of aggressive jihad is worthy of being treated in some detail to grasp its justification according to the classical doctrine. In line with this attitude we are confident that the exposition of the views of some of the Muslim and Western authoritative commentators, who advocated the precept, is very helpful in this regard since it will give us a clear account of their ideas and the argument that supported them.

With respect to this review we will begin by quoting some Muslim writers and follow that by quotations as from some Western writers.¹

1. The views which will be cited below do not essentially differ from those on the same topic of both al-Shaibani in his "Al Siyar al-Kibar - al Sarakhsee op.cit. vol.II p.125) and al-Shafi'i in his "Kitab al-Umm".

As we have mentioned before, almost all early Muslim commentators propagate the idea that a religious war of aggression is one of the tenets of Islam prescribed by the Qur'an for the purpose of proselytizing, exacting tribute or exterminating the idolators. On that subject the Hedaya¹ relates that "The destruction of the sword is incurred by the infidels, although they be not the first aggressors, as appears from the various passages in the sacred writings which are generally interpreted to this effect".

The author of Kifaya², a commentary on the Hedaya, annotates on the foregoing text; "fighting against the infidels who do not become converts to Islam, and do not pay the capitation tax, is incumbent, though they do not attack first". The same author writes in continuation of the above quotation, and attempts to reconcile his theory with the numerous precepts of the Qur'an, "know that in the beginning the Prophet was enjoined to forgive and withdraw from those who joined other Gods with God. God said 'wherefore dost thou forgive with kindly forgiveness, and withdraw from those who join other Gods with Me'.

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1. Nuraddin Ali of Murghinan (died in 593 A.H.) - The Hedaya (or a commentary on the Muslim Laws) translated by Charles Hamilton, vol.II Book IX, Ch.I p.141.
 2. The Hedaya with its commentary called Kifaya, Calcutta 1834, vol.II, p.708. The author of the Kifaya flourished in the seventh century of the Hegira.

"Then He enjoined him to summon the people to the faith by kind warning and kind disputation, saying, 'Summon thou to the way of the Lord with wisdom and kindly warning: dispute with them in the kindest manner'.

"Then He allowed fighting, when they, the unbelievers, were the aggressors, and said: - 'A sanction is given to those who have fought because they have suffered outrages,'; i.e. they are allowed to fight in self defence. And God said, 'If they attack, then kill them' (II, 187); and also said; 'If they lean to peace, lean thou also to it' (VIII. 63).

Then he enjoined him to fight aggressively during a certain period. God said, 'And when the sacred months are passed, kill them who join other gods with God whenever ye find them, and seize them' (IX; 5).

"After this He enjoined for fighting absolutely, at everytime and in every place. God said; 'And do battle against them until there be no more (fitnah) persecution' (II.193)".

Another commentator of the Hedaya - Ainee¹- substantiates the Kifaya, already quoted, by other injunctions of the Qur'an on aggressive war, which the

1. Ainee - Binayah, a commentary of the Hedaya, vol.II Part II, p.789.

author of Kifaya did not mention in his treatise. They are as follows:

".....Then do battle with the ring leaders of infidelity, for no oaths are binding on them - that they may desist". (IX,12).

"War is prescribed to you, but from this ye are averse" (II, 216).

"March ye forth, the light and the heavy, and contend with your substance and your persons on the way of God" (IX. 41). Ainee, in defending the aggressive war against unbelievers, quotes another verse from the Qur'ān and two traditions from the Prophet. The verse is IX.5 which reads: "Then, when the sacred months have passed, slay the idolators wherever ye find them, and take them (captives) and besiege them, and prepare for them each ambush. But if they repent and establish worship and pay the poor-due then leave their way free. Lo! Allah is Forgiving, Merciful." The traditions are: "The jihad will last till the day of Resurrection", and "I have been enjoined to fight the people until they confess there is no god but Allah". Then he adds that "If it be objected that these absolute injunctions are restricted by word of god, 'If they attack you, then kill them' (II.191), which shows that the fighting is only incumbent when the

unbelievers are the aggressors in fighting; as it was held by Thawri, the reply is that the verse was abrogated by another, 'So fight against them until there be no more persecution' (II,193), and 'Fight against those who do not believe in God' (IX.29)".¹

Ibn Hajar comments² "fighting was prohibited before the Hegira, as the Prophet enjoined only to preach and warn and be patient in the persecution of the unbelievers in order to conciliate them. After this, God gave sanction to the Moslems for fighting, (after that he had been prohibited in seventy odd verses), when the unbelievers were the aggressors, and said, 'And fight for the cause of God against those who fight against you' (II.190). And it is a genuine tradition from Zohri that the first revealed verse sanctioning it was, 'A sanction is given to those who are attacked because they have suffered outrages' (XXII,40): that is a sanction was given for fighting on the ground of the word "attacked". Then the war of aggression was made lawful in other than the sacred months. 'When the sacred months are over...' (IX.5). After this, in the eighth year of the Hegira, after the

1. Ainee - op. cit., vol.II part II, p.790.

2. Ibn Hajar, Shehabuddin Ahmed Mokki - (died in 855)
Tahafutul Muhtaj Fi Sharhel Minhaj, part IV, p.137.

victory of Mecca, the fighting was enjoined absolutely by the words of God: 'March ye forth, the light and the heavy' (IX.41), and 'attack those who join gods with God in all' (IX.36). And this is the very verse of sword, and some may say the preceding verse is the verse of the sword, while others think that both bear the same subject, ie. of the sword."

Al Halabi¹ maintains that "It is not hidden that the Prophet ten odd years was warning and summoning people without fighting, and bearing patiently the severe persecutions of the Meccan Arabs and the Medinan Jews on himself and on his followers because God had enjoined him to warn and to have patience to bear the injuries by withholding from them, in accordance with his words, 'Withdraw from them (V.46) and endure them with patience' (XVI.128, XVIII.27, XXXI.16) LII.48; and LXXIII.10). He also used to promise them victory. His companions at Mecca used to come to him beaten and injured, and he used to tell them, 'Endure with patience I am not commanded to fight,' because they were but a small party at Mecca and his followers who preferred him to their fathers,

1. Al Halabi, Nureddin 'Ali (died in 1044 A.H.) - *Insanul-Uyān* (a biography of the Prophet), part II, pp.289-91, chapter on Campaign).

children and wives became numerous. After this, when he was settled at Medina after the Hegira and the unbelievers persisted in their idolatry, charging him with falsehood, then God permitted his followers to fight, but against those only who used to fight against them (the Muslims), and were aggressors, as he said; 'If they fight you, then kill them' (II.191).Then the whole Arab host marched against the Muslims to fight against them from every direction. The Muslims passed whole nights in arms, and during the day they were in the same state and longed to pass peaceful nights without fear from anybody except from God. Then it was revealed, 'God hath promised to those of you who believe and do the things that are right, that he will cause them to succeed others in the land, as he gave succession to those who were before them, and that He will establish for them that religion which they delight in, and after their fears He will give them security in exchange' (XXIV.55). After this, to attack first was allowed against those who had not fought, but in other than the sacred months, viz., Rajab, Zulqi'ida, Zulhijja and Moharram, according to the precept, 'And when the sacred months are passed, kill those who join gods with God' (IX.5). Then the order became incumbent after the victory of Mecca, in the next year, to fight

absolutely without any regard to any condition and time by the words of God, 'Attack those who join gods with God in all' at any time (IX.30). So it is known that the fighting was forbidden before the Hegira up to the month of Safar in its second year, as the Prophet was in this period ordered to preach and warn without any fighting, which was forbidden in seventy odd verses. Then it was allowed to fight against those who fought aggressively in other than the sacred months. After this it was enjoined absolutely to wage war against them whether they did or did not fight, at all times, whether during the sacred months, or others of the year".

If this was the attitude of Muslim classical writers, it is not surprising that a number of European writers of almost a century ago, hold the same idea about the law of war in Islam of whom we quote some.

For Muir¹ the principles of Islam require constant prosecution of war. He says, "It was essential to the permanence of Islam that its aggressive course should be continuously pursued, and that its claim to an universal acceptance, or at least to an universal supremacy, should be enforced at the point of the sword. Within the limits

1. Muir, Sir William - Life of Mahomet, vol.IV pp.251-52.

of Arabia the work appeared now to be accomplished. It remained to gain over the Christian and idolaterous tribes of the Syrian desert and then in the name of the Lord to throw down the gauntlet of war before the empires of Rome and Persia, which having treated with contempt the summons of the Prophet addressed to them in solemn warning four years ago, were now ripe for chastisement".

The Reverend Stephens writes¹ "In the Koran, the Mussulman is absolutely and positively commanded to make war upon all those who decline to acknowledge the Prophet until they submit, or, in the case of Jews and Christians, purchase exemptions from the conformity by the payment of tribute. The mission of the Mussulman, as declared in the Koran, is distinctly aggressive. We might say that Mahomet bequeathed to his disciples a roving commission to propagate his faith by the employment of force where persuasion failed. 'O Prophet, fight for the religion of God' - 'Stir up the faithful to war', such are the commands which Mahomet believed to be given him by God. 'Fight against them who believe not God, nor the Last Day', (attack the idolatrous in all the months'). 'Such are his own exhortations to his disciples'.

1. Stephens Mey.W.R.W. - Christianity and Islam, The Bible and the Koran, London, 1877, pp.98-9.

Smith¹ holds that "The free toleration of the purer among the creeds around him, which the Prophet had at first enjoined, gradually changes into intolerance. Persecuted no longer, Mohammed becomes a persecutor himself, with the Koran in one hand, the scymitar in the other; he goes forth to offer to the nations the three-fold alternative of conversion, tribute, death".

A. - Prisoners of war: The prisoners of war are the enemy combatants who, in a legitimate war declared by a Muslim sovereign, were made prisoners by Muslims.

The iman, or the commander, to his discretion, may consider the prisoners of war as spoils of war and therefore condemn them to slavery, in which case they are to be divided among the Muslim combatants who are entitled to the booty.

The right of the Muslims to enslave the prisoners of war could not be substantiated by a direct expression in the Qur'ân. Jurists base it on an inference from an indirect indication in the following verse: "O Prophet Lo! We have made lawful unto thee thy wives whom thou hast paid their dowries, and those whom thy right hand possesseth of those whom Allah hath given thee as spoils

1. Smith, R. Bosworth - Mohammad and Mohammedanism, lectures delivered at the Royal Institute of Great Britain in February and March 1874, 2nd ed., London, 1876, p.137.

of war..."¹ However, the practice of the Prophet warrants that right.

According to Muslim legal theory, the prisoners of war become slaves by the mere fact of their imprisonment and the announcement of the Muslim leader, and hence, a common property of the body of Muslim fighters. It is by division² that a slave becomes the recipient's own property. The state is to respect this property³ and treat the slave as must'amin in the sense that reducing the prisoner to slavery is in itself some sort of safe-conduct. A slave cannot escape his fate even if he joins Islam afterwards since his conversion does not cast off the right of his master to his ownership.⁴ None the less, 'Umar is reported to have maintained that a Muslim slave may claim the right to freedom if he offers to work and pay off his value, a right which the master cannot reject. 'Umar's view is based on his interpretation of the Qur'anic verse which reads "And those who cannot find a match keep chaste till Allah give them independence by His grace.

1. Qur'an; XXXIII: 50.

2. In division, a general principle is not to separate a wife from her husband nor a child from his parents.

3. On the emancipation of the Hawazinites the Prophet was to compensate, from the public treasury, the Muslims who were reluctant to free their slaves.

4. Islam prevents slavery that occurs after embracing the Faith by the individual concerned.

And such of your slaves as seek a writing (of emancipation), write it for them if ye are aware of aught of good in them, and bestow upon them of the wealth of Allah which He hath bestowed upon you. Force not your slave girls to whoredom that ye may seek enjoyment of the life of the world, if they would preserve their chastity. And in one force them, then (unto them), after compulsion - Lo! Allah will be forgiving Merciful".¹

Whether or not the Arabs are liable to slavery is a matter of controversy. Precedents during the life time of both the Prophet and Abu-Bakr warrant that Arabs could be subjected to slavery,² while Umar contested this view. For Umar, the Arabs are "the essence of Islam" and therefore "No ownership of an Arab is permitted". In fact Umar was not in favour of slavery and preferred to exact tribute from non Muslims to enslaving them.

1. Qur'an, XXIV; 33. Ameer Ali states that the Prophet - and not 'Umar - ordered that slaves should be allowed to purchase their liberty by the wages of their service, and that in case the unfortunate beings had no present means of gain and wanted to earn in some other employment enough for that purpose, they should be allowed to leave their masters on an agreement to that effect. Ameer Ali - op. cit., p.263.

2. The Prophet enslaved the Arabs of Banul-Mustaliq in the battle of the Muraisi. Upon the Prophet's marriage of Juwayriyyah who happened to be the daughter of the chieftain, the Muslims were persuaded to free their slaves. Hawazin was faced by the same fate. On account of their conversion to Islam and their kinship six thousand of them were set free. Banul Anbar were released, some ransomed and some gratuitously. Abu Bakr, also, enslaved the Arabs of Banu Najiba.

It is noteworthy that the Islamic classical institution of slavery is distinguished by two main characteristics, i.e. (I) the human treatment of the slave with view to raise his morale. A slave should be treated on the same footing with his master as regards food, clothing and dwelling and, (II) the wide possibility given to the slave to be emancipated. Both the Qur'ân and the tradition exhort pious Muslims, against considerable worldly and heavenly rewards, to free their slaves. The slave has also, under certain conditions, the change of claiming his own freedom.

For this we may conclude that slavery in traditional Islam was originally meant to be an adequate medium of proselytizing non-Muslims rather than denigrating some individuals. Yet history records some deplorable incidents which occurred in spite of the legal precepts that Islam has advanced with view to minimize slavery. Slavery, however, persisted in some Muslim societies until very recently when it was legally abolished in those countries.

B. - The Civil Inhabitants:¹ Part of those inhabitants, as well as the wives and children of combatants, incur an inevitable fate, that is to say they must become slaves. The rest of the population may face one of two

1. We mean by civil inhabitants those who do not engage in active war.

possibilities,¹ i.e. (i) slavery, the imam may condemn part of the whole population to slavery, in which case they are divided among Muslim combatants as spoils of war and endure the status of slavery which we have defined before. 'Umar, being unfavourable to slavery as we have mentioned, is reported to have ordered that peasants, professionals and artisans of conquered countries were not to be enslaved. That was the policy he effected when the Muslims occupied Syria and Iraq. (ii) On the other hand, the imam may spare the lives of the enemy and nationals and treat them as dhimmis, people of the covenant or obligation.

Strictly speaking, the term "dhimmis" refers to people who have a revealed book, namely the Jews, the Christians² and the Sabians³. All others are to be

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1. Ex-enemy subjects of occupied territory are expected to remain peaceful, law-abiding and in no way hostile to the conqueror. But they are not forced to become subjects of the new state if their district or country is finally annexed; but they are given a year in which to quit the territory or become the subjects of the Muslim state, their new master. It is not necessary to accept all the inhabitants as subjects; some of them might be expelled. The caliph 'Umar deprived the Jews, the Greeks and the bandits of the choice of living in Jerusalem. Hamidullah - Muslim Conduct, op. cit., p.214.
 2. In the earlier years of the Islamic state some Arabs, the best known of whom is Taglib, were still Christians. Those Christian Arabs felt it a denigration for them to pay a jizya. In view of this they were allowed to pay the zakat, only doubled. Yet 'Umar, who considered it a disgrace that those Arabs are clinging to their Christianity, was not lenient in their treatment "For they are Arabs and not people of the book".
 3. See next page.

classified as dharis, or materialists, and considered as idolators who are not entitled to the Islamic dhimma. The Islamic conquest put the Muslims in direct contact with people who were not people of the book, as a result, gave rise to the question of how to treat them. The first point at issue was relevant to the Magians, a fire-worshipping people in Persia. When 'Umar was discussing their case with the Companions, Abdel Rahman b.'Awf said: "I testify that the Prophet said 'Treat them like people of the book'". Hence, the Magians were accorded a treatment much as the other tolerated religions. Then arose the case of the heathen of Harran and the pagan Berbers. To those also, the tolerated status had been extended. Thus technicality gave way to expediency and peoples who were not devoted of a revealed book had been admitted to the pale of protection and dhimma. We may conclude from this that all non-Arabs, who do not apostatize, are entitled to the Islamic dhimma. "Abu-Hanifah opines (all non-Muslims will be considered as one category)...As Sarakhasy after a prolonged and scholarly discussion, concludes: (It is clear from this that the mention of Scriptuaries in the Qur'an is not to restrict

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 3. The Sabians were regarded as believers in the true God in accordance with the Qur'anic verses that referred to them, (II.59, V; 73, XXII, 17).

the rule but only to show that capitation tax may be accepted from the Scriptuaries). More explicit is Abu-Yusuf (The capitation tax is accepted from all non-Muslims whether the Magians, the worshippers of idols or fire or stones, the Sabeans, the Samaritans, except the apostates from Islam and the idolaters of Arab origin".¹

Actually the dhimmis do not become citizens stricto sensu of the Muslim state, they are rather subjects who enjoy a particular status. They constitute what we may call autonomous minority that governs itself under its authorized head who is responsible for it to the Muslim government. They are guaranteed certain rights and committed to particular duties. It is not easy to give an accurate account of the relation between the Islamic government and its dhimmi subjects. It is commonly said that a covenant, ascribed to 'Umar, contained a thorough list of the rights and obligations of the dhimmis. Traditions are not very precise about the form of that covenant which is to be collected in scattered places² and, moreover, some scholars insist that it had been

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1. Hamidullah - Muslim Conduct, op. cit., pp.102-3. See also Al Shaibani - op. cit., vol.I, p.127.
 2. Fattal gave convincing reasons to prove the non-authenticity of that document - See Fattal, Antoine - Le statut legal des non-Musulmans en Pays d'Islam, Beyrouth, 1958, pp.60-69.

drawn up by 'Umar II and wrongly attributed to his greater namesake 'Umar I¹. Thereby we prefer to quote one of the pattern treaties which schools of law did suggest. To this effect we select a pattern suggested by al-Shafi'i in his the kitab al--Umm as an idealized cohesion of legal status of the dhimmis in the Muslim state. "After a preamble in which the name of the contracting party and its prince could be inserted, it proceeds: (I, and all Muslims promise you and your fellow Christians security as long as you and they keep the conditions we impose upon you. Which are: you shall be under Muslim laws and no other, and shall not refuse to do anything we demand of you. If any of you says of the Prophet, of God's book or His religion what is unfitting, he is debarred from the protection of God, the Commander of the Faithful and all Muslims, the conditions on which security was given are annulled, and the commander of the Faithful has put his property and life outside the pale of law, like the property and lives of enemies. If one of you commits fornication with or marries a Muslim woman, or robs a Muslim on the highway, or turns a Muslim from his

1. Hitti - op. cit., p.234.

religion, or helps their enemies as a soldier or guide to Muslim weaknesses, or shelter their spies, he has broken his agreement, and his life and property are without the law. He who does lesser harm than this to the goods or honour of a Muslim shall be punished. We shall scrutinize your dealing with Muslims, and if you have done anything unlawful for a Muslim we shall undo it and punish you, e.g. if you have sold to a Muslim any forbidden thing, as wine, pigs, blood, or an (unclean) carcase, we shall annul the sale, take the price from you (if you have received it) or withhold it from you (if it has not been paid), we shall pour out the wine or blood and burn the carcase. If he (the Muslim) wishes it to be destroyed we shall do nothing to him but we shall punish you. You shall not give him any forbidden thing to eat or drink, and shall not give him a wife in the presence of your witnesses, nor in an illegal marriage. We shall not scrutinize nor enquire into a contract between you and any other unbeliever. If either party wishes to annul the contract, and brings a request to us, if we think it should be annulled we shall annul it, if it is legal we shall allow it. But if the object has been taken and lost we shall not rest on it, for a sale between

unbelievers has been finished. If you or any other unbeliever asks for judgement we shall give it according to Muslim law, if we are not approached we shall not interfere between you. If you kill accidentally a Muslim or any ally, Christian or not, then the relative (of the homicide)^I shall pay blood money, as among Muslims. For you, relatives are on the father's side. If a homicide has no relatives, then his estate must pay. A murder shall be killed unless the heirs wish to take blood money, which shall be paid at once. A thief, if his victim complains shall have his hand cut off, if this is the punishment, and shall pay a fine. The slanderer shall be punished if the punishment is fixed, if not, he shall be punished according to Muslim law. You shall not display in any Muslim town the cross nor parade your idolatry, nor build a church nor place of assembly for your prayers, nor beat the nakus, nor use your idolatrous language about Jesus, the son of Mary, to any Muslim. You shall wear the zannar above all your clothes, cloaks and others, so that it is not hidden, you shall use peculiar saddles and manner of riding, and

1. The translator means a "deceased".

make your kalanswas different from those of the Muslims by a mark you put on them. You shall not take the rest of the road nor the chief seats in assemblies when Muslims are present. Every free adult male of sound mind shall pay poll-tax, one dinar of full weight, at new year. He shall not leave his town till he has paid and shall not appoint a substitute to pay it, one who pays no jizya till the beginning of the year. A poor man is liable for his jizya till it is paid, poverty does not cancel any of your obligations nor abrogate the protection given to you (Text ?) If you have anything we shall take it. The jizya is the only burden on your property as long as you stay in your town or travel in Muslim land, except as merchants, you may not enter Mecca under any condition. If you travel with merchandise you must pay one tenth to the Muslims, you may go where you like except the Hedjaz, where you may stay three days only till you depart.

These terms are binding on him who has hair under clothes,¹ is adult or has completed fifteen years before this date, if he agrees to them, if not, there is no treaty with him. Your little boys, immature lads,

1. This expression refers to adults since hair growing in certain parts of the body is a sign of the maturity of the individual.

lunatics and slaves do not pay jizya. If a lunatic becomes sane, a boy grows up, a slave is set free and follows your religion, he pays jizya. The terms are binding on you and those who accept them, we have no treaty with those who refuse them. We will protect you and your lawful (according to our law) property against any one, Muslims or not, who try to wrong you, as we protect ourselves and our own property, our decision about it will be the same as those about our own property, and ourselves. Our protection does not extend to forbidden things, like blood, carcass, wine and pigs, but we will not interfere with them, only you must not obstrude them on Muslim towns. If a Muslim or other buys them we will not force him to pay, for they are forbidden and have no price, but we will not let him annoy you about them, and if he does it again we will punish him, but will not force him to pay. You must fulfil all the conditions we have imposed on you. You must not attack a Muslim nor help their enemies by word or deed.

"The Treaty of God and His promise and the most complete fulfilment of promise He has imposed on any of His creatures, you have the treaty of God and the promise

and the protection of N.N. the Commander of the Faithful, and of the Muslims to fulfil their obligations towards you. Your sons, when they grow up, have the same obligations as you. If you alter or change them then the Protection of God, of N.N. the Commander of the Faithful, and of the Muslims is taken from you. He who is at a distance, yet receives this document and approves it, these are the terms that are binding on him and on us, if he approves them, if he does not approve, we have no treaty with him.¹

This treaty model, although it lacks systematic representation of ideas, may amply serve as a basis for a legislation regulating, according to the classical view, the status of the dhimmis in the Islamic state.

To sum up, in general terms, the dhimmi is guaranteed life,² liberty³ and to a certain extent,

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1. Quoted from Tirtton, A.S., - The Caliphs and Their non-Muslim Subjects, Mysore City, 1930, pp.12-16. However, in certain incidents, such as that of the Nubians, the dhimmis, as we will argue below, were treated on equal footing with the Muslims.
 2. The Prophet is reported to have said: "If anyone wrong a man to whom a treaty has been granted, or burdens him above his strength, I am an advocate against him till the Day of Judgement", and, "Who so kills a dhimmi will not smell the scent of paradise, and its scent spreads a journey of forty years". 'Umar, in his will to his successor, said: "I charge the caliph after me to be kind to the dhimmis, to keep their covenant, to protect them and not to burden them above their strength".
 3. In obedience to tradition "Two religions shall not remain in the land of the Arabs", the dhimmis, since 'Umar's reign were not allowed to settle permanently in Arabia.

property. In return he has to pay a poll-tax, jizyah. Every male, free, sane dhimmi is to pay the jizyah according to the amount fixed in the agreement.¹ This amount usually ranged between 12 to 48 drachmas (about two to ten shillings) according to the financial situation of every individual. His land either becomes wakf, public property, with his right to have the use, or he continues to hold it as his own. In both cases he pays a kharaj, land tax, on the land and its crops. This kharaj is to be effected even if the land comes into the possession of a Muslim.

Therefore it was decreed that the dhimmis who cultivate fay'i estate, were to continue to pay the kharaj, even if they adopted Islam.² But in the course of time, the new converts began to avoid paying the kharaj and

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1. It is noteworthy that the dhimmis are exempt from the zakat, the surplus property tax, which every Muslim, regardless of sex and age, pay. The zakat is a heavier burden than the jizyah since it is paid at the rate of 2½%. Moreover, the dhimmi is exempted from the jizyah if he renders military service, whilst all Muslims are subject to compulsory military service and still have to pay the zakat.
 2. "The only exception was those districts whose inhabitants had voluntarily surrendered on the approach of the Arab army on condition that they are allowed to retain possession of their lands".
Shorter Encyclopaedia of Islam - edited by H.A.R. Gibson and S.H. Kramers, London and Leyden, 1953, p.96. See also, on this footnote, Al Sarakhsee - op. cit., vol.IV, p.284.

only saved the zakat, like the Arabs. Thus gradually, their lands ceased to be defined as fay'i.

"In theory, the dhimmi had to fulfil all the conditions of the covenant if he would claim protection. In practice a few actions only put him outside the protection of Muslim law. The lawyers did not entirely agree what these actions were.

"Malik, Shafe'i and Ahmad b. Hanbal hold that failure to pay the poll-tax deprives them from protection. This was not the view of abu-Hanifa. Ahmed and Malik hold that four things put the dhimmi outside the law - blasphemy of God, of His book, of His religion and of His Prophet.

"Abul Kasim said that eight deeds made a dhimmi an outlaw. They are an agreement to fight the Muslims, fornication with a Muslim woman, an attempt to marry one, an attempt to prevent a Muslim from his religion, robbery of a Muslim on the highway, acting as a spy for unbelievers or sending them information or acting as a guide to them, and the killing of a Muslim man or woman.

"Abu Hanifa thought that they must not be too severe with the dhimmis who insulted the Prophet. Shafi'i said that one who repented of having insulted the Prophet

might be pardoned and restored to his privileges. Ibn Taymiyah taught that the death penalty could not be evaded.¹

IMPACT OF THE IDEA OF JIHAD ON THE LEGAL THEORY:

I) The twofold division of the world: Evidently the doctrine of the jiḥād necessitates a proper definition of what constitutes a Muslim territory. Moreover, the jiḥād, presumably, exists so long the Muslim state is facing enemies with whom it has to resort to force for settling the schismatic struggle, or, in other words with whom it is in a state of war whether or not actual hostilities have been launched. Therefore as a corollary to the jiḥād, Muslim jurists professed a twofold division of the world, namely the dar al-Islam, the world of Islam and the dar al harb, the world of war. This division is supposed to remain valid until the achievement of the Islamic universal state or the universalization of Islam, an object which is still far from being attained.

Yet jurists did not come to an agreement about what is dar al-Islam and what is dar al-harb. They even

1. Tritton - op. cit., pp.16-17.

differed in the method they maintained for definition. Some give a particular definition to each dar and some define one dar and regard the other as including whatever territory remains outside the definition. The first is adequate for those who subdivide non Muslim territories into dar al-harb and dar al-sulh, whilst the second suits better those who insist that non Muslim territories, as a whole, are dar al-harb. To give a fuller exposition of the classical doctrine we will follow the first method.

Dar al-Islam, in general, comprises the territories subjected to Muslim rule and sovereignty. A dar becomes incorporated into dar al-harb when it combines one or both of the following criteria, i.e. (1) if the Muslim rule and decisions are not applied therein, or (11) if the Muslims and their dhimmis can find no protection and their residence is not safe.

Admittedly, we can infer from this definition that territories that are no man's land may be included in dar al-Islam so long as Muslims could settle safely therein. We may, accordingly, enlarge the foregoing description of the dar al-Islam to absorb this category, that is to say; dar al-Islam enshrines territories where

Muslim law prevails or where the Muslims and their dhimmis could reside safely even if the territory is not under Muslim rule.¹

As we have mentioned before, scholars are not agreed on the non-Muslim territory. Some, particularly the hanafites, provide that a territory must be either Muslim or harbi since they do not accept that a given territory may stay outside the pale of the Islamic conquest. Others, with al-Shafi'i at their head, in a rather tolerant attitude, advocated a third division of the world, viz. dar al-sulh, world of peace, or dar al muwad'ah or al'ahd, world of covenant. This dar is an independent state in tributary relationship with the Islamic state. Thereby dar al-sulh is a state recognized by the Muslim state on condition that the latter pays to the former an annual jizya or cede a portion of its territory. This doctrine is substantiated by two historical incidents. The first was experienced by the Prophet himself when he entered in treaty relations with the Christians of Najran. The people of Najran were accorded safety and security against paying a given tribute.² The second was the agreement concluded by

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1. Al Shawkani - Naylul Awtar; 2nd ed., Cairo, 1952, pp.28-9, (Arabic text).
 2. Jurists differed about the nature of this tribute. Some considered it as kharaj and other qualified it as jizya.

'Abdallah b.Sa'd, then the Arab governor of Egypt, with the Nubians who succeeded in defending their independence against the Arab expansion. In this treaty one of the parties was defined "The Muslims, non-Muslims and the protected peoples". The Nubians committed themselves to protect "the Muslims and dhimmis travelling in Nubia", and agreed to pay a certain tribute in slaves. The case of Nubia was interpreted by the Hanafis as a truce and an agreement for exchanging commodities, and not a peaceful treaty.

"The constitutional situation on the matter is thus formally laid down by al-Mawardi. All territories into the control of which in different degrees of directness, Muslims come, fall into three divisions (1) Those taken by force of arms (11) those taken without fighting after the flight of their previous owners, (111) those taken by treaty, sulhan. The last divides again into two, according as the title to the soil is (1) vested in the Muslim people as a wakf or (2) remains with the original owners. In the first case the original owners can remain in actual possession, being dhimmis and paying kharaj and the land becomes dar al-Islam. In the second case the terms of the treaty are that the

owners retain their lands and pay kharaj from their product, that this kharaj is regarded as a jizyah which falls away when they embrace Islam, that their country is neither dar al-Islam nor dar al-harb but dar al-sulh, otherwise called dar al-'ahd and that their lands are absolutely their own to sell or pledge.... and the jizya cannot be collected from them as they are not in dar al-Islam".¹

However, if we turn to practice and take the Islamo-Byzantine relations as precedent - from the factual point of view - we find it hardly difficult to classify, Byzantium, during the periods she was committed to pay tribute to the Islamic state,² as dar sulh though, technically speaking it should have been ranked as one.

An interesting question arises when a territory, which once has been a Muslim territory, breaks away from

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1. The Encyclopaedia of Islam - edited by M.Th.Houstma, T. W. Arnolds, R. Bassot and R. Hartwan, Leyden and London, 1913, p.919.
 2. "Theodomir agreed to pay yearly tribute to the Arab conquerors of the first century of Higraph while at the same time retained his independence. So also under the Abbassid al-Mansur and all his successors down to al Mu'tasim, the Emperors of Constantinople paid tribute more or less regularly to Baghdad. Caliph al Mahdi received tribute from the Empress Irene and Harun ar Rashid not only received tribute but also capitation tax (jizyah) from the Emperor Nicephorus and his family". Hamidullah - Muslim Conduct, op. cit., pp.91-2.

the Islamic state, would it become, ipso facto, dar al-harb or retain its appellation as dar al-Islam? Scholastic views differ about this problem. Al Shafi'i maintains that the territory in discussion becomes dar al-harb by the mere fact of its secession from the Islamic state and if it was then conquered it is reduced to the category of lands gained by force. Abu Hanifa stipulates that, in such case, the territory does not become part of dar al-harb except when it is not separated from dar al-harb by a Muslim territory, otherwise it keeps its definition as dar al-Islam and its inhabitants are regarded as bughat, rebels.

In fact, no matter to which theory we adhere, the reality remains that a non-Muslim state could not enter into peaceful relations with the Islamic state unless it yields to some sort of dependency.¹ Consequently, the classical law of peace does not tolerate the principle of legal equality, in its full form, between the Muslim state on one hand and the non-Muslim state on the other.

II) The precarious character of treaties: The Muslim legal theory knows three main types of treaties,

1. Inevitably this interpretation engenders the exclusion of the doctrine of neutrality in its legal sense from classical international law of Islam.

namely, the aman, the hudna and the mu'wada.¹

The aman, literally, is safety. The word occurred in the Qur'ân as synonym to dhimma.² In this meaning, the Prophet and Abu-Bakr used the term in their diplomatic documents.³

"Later on, when the Muslim legal theory was elaborated the term came to mean a pledge of security by which a harbi, enemy alien, becomes protected in his life and property for a limited period".⁴

Muslim individuals as well as the state, are entitled to grant the aman. Every free adult individual, male or female, has the right to give the aman.⁵ This

1. Actually classical doctrine did not emphasize a sharp distinction between hudna and muwada'ah due to the fact that both institutions are of temporary character.
2. "And if anyone of the idolaters seeketh thy protection (O Muhamed), then protect him so that he may hear the word of Allah, and afterward convey him to his place of safety. That is because they are folk who know not". Qur'an IX:6.
3. Article 15 of the Covenant of Medina, it is to be recalled, states that the security (dhimma) of God is one, the granting of (neighbourly protection), yugir, by the least of them (the believers) is binding on them..."
4. The Encyclopaedia of Islam - new edition vol.I, 1960, Leydon and London, p.429.
That is why, in its defined legal meaning, the term "aman" could be translated as: protection, safe-conduct, and quarter. The aman given to a Muslim in a non Muslim territory is called idhn, permission.
5. The slave, according to most doctrines, is qualified to give the aman.

individual practice was witnessed from the late Ummayyad epoch (104-108) (723-726). However, when the aman is addressed to a community as a whole it is the privilege of the iman only to grant it. The state, from the end of the 6th century of the Muslim era (12th century of the Christian era), began to monopolize granting the aman, and to that effect a multitude of treaties were concluded with non Muslim countries since then.¹

Examples of the letters of aman was compiled by Qalqashandi in his "Subh al 'Asha".

The aman could be given in words or by an intelligible sign. The aman, validly given, is binding even if the recipient state is in belligerent relations with the Islamic state.²

The musta'min, he who receives the aman, is guaranteed safety in life and property when he goes to the Islamic state. In general terms, the musta'min enjoys the status of the dhimmi in civil affairs. As regards criminal matters, scholars differ in a wide range varying from subjecting him to the hadd, punishment, applicable

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1. "The treaties which gave later rise to be Capitulations, did not develop out of the Islamic concept of aman but represented a type of treaty which had already come into being between the trading cities of Italy and the Byzantine Empire and the states of the crusaders". The Encyclopaedia of Islam - ibid., p.430.
 2. Ambassadors who are known or can prove their diplomatic mission enjoy aman ipso facto.

to the dhimmi to holding him responsible from the civil point of view only.

Admittedly, the right of a musta'min to claim protection under his safe-conduct is conditioned by his compliance with the general order of the Islamic state. If he disturbs the interests of the state, his aman is annulled and the imam is to deport him to his "place of safety."

The duration of the aman should not exceed a period of one lunar year¹ at the end of which he is to leave the Islamic territory. If he prefers to stay after the expiration of his aman he will be treated as a dhimmi.

The aman is most likely an Islamic interpretation of the pre-Islamic system of jiwar by which an alien assumes the protection of a member of a given tribe and, as a result, the protection of the whole group. This institution has, also, strong affinities with the present system of visas and regulations for the residence of aliens in foreign countries. It played a considerable role in the Islamo-Christian commercial relations since it gave the opportunity for non-Muslim merchants to trade the Islamic state supply.

1. According to Shafi'i the maximum period of the aman is four months.

Although the aman has a time limit, yet in the context of its purposes, the aman is not to be considered as a precarious treaty since this limit is still adopted by modern states regarding the institutions they organize as equivalent to the Islamic aman. In fact, this character is rather conspicuous in the other types of treaties which, unlike the aman, are treaties stricto sensu.

As we have illustrated before, a genuine treaty of peace could not be contemplated under the classical conceptions of the jihad since such a treaty is construed as an abandonment of the obligation of the jihad, a fact which renders the whole community faulty and religiously sinful.

The perpetual character of a treaty with non-Muslims is denounced by the jurists on the basis of the idea laid down by the Qur'ân as follows: "O ye who believe. Take not the Jews and the Christians for friends. They are friends one to another. He among you who taketh them for friends is (one) of them. Lo! Allah guideth not wrong-doing folk.... Your friend can be only Allah, and His messenger and those who believe, who establish worship and pay the poor-due, and bow down (in prayer). And whoso taketh Allah and His messenger and those who

believe for friend (will know that), Lo! the party of Allah, they are the victorious. O ye who believe. Choose not for friends such of those who received the Scripture before you, and of the disbelievers, as make a jest and sport of your religion. But keep your duty to Allah if ye are true believers".¹ The general doctrine, therefore, fixes the maximum duration of a treaty peace with non-Muslims according to the actual strength of the infidel enemy. If the unbelievers are weak and their defeat by the believers is confidently expected, the Muslims should not exceed the term of four months in a truce concluded with them.^{1A} The view is based on an interpretation of the following verse: "Freedom from obligation (is proclaimed) from Allah and his messenger toward those of the idolaters with whom ye made a treaty. Travel forcibly in the land for four months, and know that ye cannot escape Allah and that Allah will confound the disbelievers (in His guidance)."² The Prophet is reported to have declared, when these injunctions were revealed, that all treaties for defined terms should remain valid during the remaining of the contracted period, yet those

1. Qur'ân; IX: 51, 55-7.

1A. Al Shafi'i - op. cit., vol.IV, p.111.

2. Qur'ân IX: 1,2.

without any time limit were thereby repudiated with a notice of four months. As regards a strong enemy whom the Muslims could not conquer, the imam is authorized to conclude a treaty with him for a defined time not exceeding ten years. This period may be extended for similar terms if the interests of the Islamic state demand. However, a treaty signed for an initial duration beyond ten years is nil and void for the excessive period no matter how the position of the Islamic state is.²

The maximum period of ten years is fixed by the jurists in conformity with the duration established in the treaty of Hudaibiyah between the Prophet and the Meccans.

Suhail, however, records that the jurists of Hijaz allow peace for a definite period, even exceeding ten years provided the supreme ruler, and not any lesser authority, agrees to it.

As a general principle, all treaties may be repudiated by the Islamic state even before the expiration of their defined term if the interests of the state command it, i.e. the Islamic state becomes strong

1. Al Shafi'i - op. cit., vol.4, p.110.

2. Hamidullah - Muslim Conduct. op. cit., p.261.

enough to effect a decisive victory upon the enemy.

The only condition which the Islamic state is to comply with for such a repudiation is the inbadh, that is to say: (i) to afford the other state party enough time to communicate the news to the different parts of its territory and, (ii) to exhort their nationals, who are residing in the Islamic states to retire to their "place of safety."

CHAPTER TWO

THE CLASSICAL DOCTRINE CONSIDERED

Preliminary Remarks:

The problem of the legality of war is intimately linked with the problem of forbidding war and some of its forms. In general terms, we may say that it is an ancient agreed principle that war is not allowed unless there is a special cause to warrant it although there were considerable differences between the various formulations of these causes. The Romans, for example, maintained a distinction between a just and unjust war based essentially on a formal criterion. Grotius adopted the same distinction and, in a painstaking fashion, enumerated the types of lawful and unlawful wars. Nevertheless, in the 19th century the legal distinction between just and unjust wars gave way in face of the exigences of the doctrine of national sovereignty.¹ A state is free to wage war upon another state on any ground provided that there are no treaty obligations committing the parties

1. At that time the Hague Convention III, 1907, to the "Opening of Hostilities" was formulated. It therefore reflects the prevailing ideas of the time.

to refrain from using force in their mutual relations. This trend began to reverse under the disastrous effects of the all-embracing World War I. It was generally felt that, for the well-being of the international community, the decision of war should not remain in the absolute discretion of individual states. This tendency led to the Paris Pact of 1928¹ which stipulates in Article I that "The High Contracting Parties solemnly declare, in the name of their respective peoples, that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another". In Article II, they "agree that the settlement of all disputes or conflicts, of whatever nature or of whatever origin they may be which arise among them, shall never be sought except by pacific means". Relying mainly on that Pact, the Nuremberg Tribunal decreed that the London Charter of 1945, in considering aggressive war a crime, was not an arbitrary exercise of power on the part of the victorious nations but the expression of international law existing at the time of its creation. Then came the Charter of

1. This pact was signed by thirty six nations including the big powers of the day.

2. Greenspan - op. cit., p.40.

the United Nations, 1945, which has as one of its fundamental purposes "the suppression of acts of aggression and other breaches of the peace".¹ However, the Charter tolerates engagement in war against former enemies of the last World War. Besides, another topic is still a matter of legal discussion; namely, the nature of wars aimed at maintaining some general principle such as defence of human rights. All the same, if we adhere to the theory that condemns aggressive wars, then we must hold the view that "war is in principle forbidden, it is permitted only as a reaction against an international delict and only when directed against the state responsible for this delict. Like reprisals, war has to be a sanction if it is not to be considered as a delict. This is the doctrine of "bellum justum", just war."²

Meaning of the word "Jihad:"

Muslim jurists, it will be recalled, advocated a holy war of aggression under the doctrine of the jihad. This concept, as we have illustrated, influenced the whole institution of Muslim international law and resulted in a theory that is generally unreconciliable with the modern standards of international law.

1. Art.II .

2. Kelsen, Hans - The law of the United Nations, London, 1951, p.707.

Some writers find affinities between the Muslim classical doctrine of war and the Soviet viewpoint on the same subject which, in the words of Trainin, stresses that "A truly people's war is one for the basic interests of the people, for its rights, honor, freedom and independence. Such a war is a justifiable war, in contradistinction to an unjustifiable war, that is a war directed to the seizure of foreign territories, to the enslavement and subjugation of peoples, to the destruction of their independence as a state".¹

To assess the classical interpretation, with a view to develop a conventional Islamic doctrine of international law, we have first to examine the Quranic and prophetic texts which classical writers forwarded in support of their ideas. A preliminary step, to this effect, is to define accurately the meaning of the word "jihad" as used in both the Qur'an and the hadith.

The word "jihad", as we have expressed, literally and classically, signifies exertion, toil, painstaking, doing one's utmost or striving. It was only among jurists that the word began to acquire a narrower sense of

1. Trainin - Questions of Guerilla Warfare in the Law of War, 40, A.J.I.L. p.554.

hostility or waging war against infidels. In the course of time, this technical definition, it seems, overshadowed the classical one to the extent that some writers misrepresent the word "jihad" as synonymous to "holy war". This misconception induced other commentators to adopt the opposite extreme that "the popular word jihad, occurring in several passages of the Koran, and generally construed by Christians and Muslims alike as meaning hostility or the waging of war against infidels, does not classically or literally signify war, warfare, hostility or fighting and is never used in such a sense in the Koran.....the change of its meaning or the technical signification occurred only in the post-classical period, i.e., long after the publication of the Koran."¹

Both views, we believe, are exaggerated since in some texts the word jihad is used in its literal sense and in some others it is used in its legal sense. It is the task of the interpreter to infer the proper meaning from the relevant text.

It is undebatable that, in the Meccan texts, the word jihad is to be construed in its classical meaning

1. Chiragh, 'Ali - A Critical Exposition of the Popular jihad, 1885, pp.163, 170-1.

because Muslims, as then, had not restored to arms in defending themselves. But in some Medinan texts, the word rather implies holy war.

An example is the following verse "And when a surah is revealed (which saith): Believe in Allah and strive along (wajahidoo) with his messenger, the men of wealth among them still ask leave of these and say: Suffer us to be with those who sit (at home)".¹

If we turn to the hadith and take, for instance, the Prophet's saying "The pilgrimage is the most excellent of all the jihads", we find that the word jihad is used in its wider sense. On the other hand, the word connotes holy war in the saying of the Prophet: "A party of my community shall not cease to be triumphant, being holders of Truth". Thus, it is clear that the word jihad, whether in the Qur'an or the hadith, is not used exclusively in one sense. To use Muir's words, "The word jihad is the same as subsequently used for a religious war, but it had not yet probably acquired its fixed application. It was employed in its general sense before the Hegira and probably up to the battle of Badr".²

1. Qur'an; IX: 86.

2. Muir - op. cit., vol.III.

However, this controversy is of little significance since the legal use of the word jihad is restrictive. In fact holy war could be one of the ways in which exertion or striving may be implemented. Thereby, emphasizing that the word jihad is used by the Qur'an only in its literal or wider sense does not entirely exclude the implication of the holy war whenever circumstances amply warrant such interpretation. Moreover, the Qur'an, in referring to war, used also another word; i.e., qital. Hence, to develop a concrete doctrine of Muslim international law, it does not suffice to investigate only the verses containing the word "jihad". Even more important are those injunctions including the word qital since the word explicitly signifies fighting.

The Classical argumentation on aggressive jihad:

Bearing the foregoing remarks into mind, we proceed to tackle the contention of the authorities we have already quoted in the first chapter of this part. It is not difficult for any fair commentator to observe that most of the verses quoted by Muslim legists, and consequently, their Western followers, in support of their theory are generally detached or dislocated from their context without paying due heed to the remainder of the context. Not

only this, but they also did not comply with the basic rules of interpretation. It is a recognized principle that when two commandments seem to be contradictory, the interpreter should first try to reconcile their contentions. If he succeeds the two commandments are to be held valid, each in its particular case. Another principle is that when two commandments have bearing on the same subject but one is in general terms and the other is conditional, the contention of the general commandment is to be limited by the conditions of the conditional commandment. This is due to the fact that the conditional commandment is assumed to be more specific and expressive of the intention of the law-giver. Muslim jurists, failing to consider these remarks, came to an ambiguous and objectionable interpretation of the divine texts. It is not surprising that Muslim jurists are faulty in this respect. "As a matter of fact, they have compiled the Common Law from different sources irrespective of the Koran, and the commentators of the Common Law take the trouble of indicating its views, principles and casuistics, and justifying the Muslim conquests under the Abbassid Khaliphs by the authority of the Koran. Then they commit the blunder of citing isolated parts of solitary

verses of the Koran, which are neither expressive enough nor are in general terms. In doing so they avoid too many other conditional and more explicit verses on the same subject.¹

These lapses are almost common among the legists whom we have quoted before. A cohesive review of their arguments will easily prove that. But we will interest ourselves only in investigating the part of their discussions relevant to the doctrine of Islamic aggressive war against the unbelievers since this idea is the axis round which revolves the particular principles of the classical legal theory.

To start with, the Kifaya, substantiates its views by a verse that reads: "And do battle against them until there be no more fitnah, persecution".² This verse was revealed in the second year after the conclusion of the treaty of Hodaybiyah when the Muslims were catering for pilgrimage but still doubtful about the intentions of the Meccans and whether the latter would allow them to perform their rituals. The Muslims were rather reluctant to measure swords with the Meccans in case the Meccans

1. Chiragh - op. cit., p.119-20.

2. Qur'an; II: 193.

resorted to force to prevent them. This attitude was due to the fact that fighting would be taking place within the sanctuary and during the sacred months. To this effect divine permission was given to the Muslims to defend themselves by force within the limits prescribed by that verse. Thereby, the occasion of revelation clearly shows that the verse does not envisage the idea of an aggressive war. The very wording of the verse asserts that it, by no means, tackles a war of aggression. The word fitnah, persecution, indicates that the Meccans, as then, were still attacking and torturing the Muslims. Islam's view is that "persecution is worse than slaughter",¹ a definition which shows that the Meccans are the party who began the persecution. In other words, the unbelievers were on the offensive. Therefore, if the Muslims repel the force of the aggressor they are plainly on the defensive, and the fighting tolerated by the verse under discussion is in self-defence.

This interpretation will apparently be more impressive if we read that verse in the context of the verses that preceded it, i.e. the verses 190-192. These

1. Qur'an; II: 191.

verses are as follows: "Fight in the way of Allah against those who fight against you, but begin no hostilities. Lo! Allah loveth not aggressors.

"And slay them whenever you find them, and drive them out of the places whence they drove you out, for persecution is worse than slaughter. And fight not with them at the Inviolable Place of Worship until they first attack you there, but if they attack you (there) then slay them. Such is the reward of disbelievers.

"But if they desist then Lo! Allah is Forgiving; Merciful.

"And fight them until persecution be no more, and religion is for Allah. But if they desist, then let there be no hostility except against wrongdoers".

It is obvious that the right of the Muslims to fight the unbelievers could only be practised "against those who fight against you", and that they are forbidden to begin any hostilities (v.190). The verse 193 is connected with the verse 190 by the article "and" to specify the aim of fighting which is the suppression of the persecution, upon the achievement of which fighting should cease. It has nothing to do with the beginning of hostilities which is the subject of the verse 190.

The phrase "religion is for Allah" is misinter-

preted by some as meaning that all people should embrace Islam. This interpretation contradicts the remainder of the verse which runs as follows; "But if they desist, then let there be no hostility except against wrongdoers".

Desisting, here, refers to desisting from persecution.

In other words, since religion is a matter of conscience between the individual and his God nobody is to interfere in it by force. That is why interference is regarded by Islam as something worse than slaughter. Therefore, the verse implies that fighting should come to an end provided that the unbelievers stop imposing their creed by force on those who accept Islam.

Ainee relies, in addition to what the Kefaya mentioned, on the verses II.216, IX.5, IX.12, IX.29 and IX.41. We will treat these verses one by one.

The verse II.216 is contained in chapter II, which includes the above mentioned verses 190-193, and, consequently the verse II.216 undergoes the same logic in interpretation because the next verse, 217, mentions the wrongdoings of the unbelievers and the attacks made by them on the Muslims. In this, the verse 217 is nearly a repetition of the verse 191. Besides, the term "War is prescribed" does not allow an aggressive war

since it only mentions war with no further description. To us, this is a mere statement that the law of war has become a part of the Islamic institution of International law. In the same way, we say now that the law of war is a part of modern international law but this does not exclusively imply that the term is confined to the war of aggression. To define what type of war is permissible we have to refer to the verses dealing with the conditions of legitimate war. Even if we adopt the view that the injunction signifies that war has become fard kifayah,¹ it would be an unwarranted relaxation of the text to add that this entails that a war of aggression is also tolerated by the same injunction, particularly if we recall that the word used here is qital and not jihad. Qital, in so far as war is concerned, covers a wider scope than jihad from the literal and classical point of view. An extensive significance of the word qital may entail awkward rulings if we interpret it here in the meaning of aggressive war.

1. It is to be noted that the expression used by the Qur'ân to refer to qital is the same as that used to indicate fastening. Yet commentators interpreted the injunction appertaining to qital as implying a fard kifayah and not a fard'ayn as is the case of fastening. This difference in interpretation has its significance in supporting our point of view.

The verse IX:5 should be read in the context of the verses I:13 if we are to understand it in its proper meaning. It is of importance to quote here the relevant verses: "Freedom from obligation (is proclaimed) from Allah and His messenger toward those of the idolaters with whom ye made a treaty.

"Travel freely in the land four months, and know that ye cannot escape Allah and that Allah will confound the disbelievers (in His guidance).

"And a proclamation from Allah and His messenger to all men on the day of the Greater Pilgrimage that Allah is free from obligation to the idolaters, and(so is) His messenger. So, if ye repent, it will be better for you, but if ye are averse, then know that ye cannot escape Allah.¹ Give tidings (O Muhammad) of a painful doom to those who disbelieve.

Excepting those of the idolaters with whom ye (Muhammad) have a treaty, and who have since abated nothing of your right nor have supported anyone against you (As

1. This injunction is supposed to be applied to the pagan Arabs. Some writers infer from it the principle that the pagan Arabs are to embrace Islam or to be slain. The Muslims should not accept the jizya from them - Abu Yusuf, Ya'qub b.Ibrahim al Ansari - Al Radd'Ala Siyar Al Awza'i - Cairo 1357 A.H. pp.132-3.

for these), fulfil their treaty to them till their term.
Lo! Allah loveth those who keep their duty (into Him).

"Then, when the sacred months have passed, slay the idolaters wherever you find them, and take them (captives), and besiege them, and prepare for them each ambush. But if they repent and establish worship and pay the poor-due, then leave their way free. Lo! Allah is Forgiving, Merciful.

"And if anyone of the idolaters seeketh thy protection (O Muhammad), then protect him so that he may hear the word of Allah, and afterward convey him to his place of safety. That is because they are folk who know not.

"How can there be a treaty with Allah and with His messenger for the idolaters save those with whom ye made a treaty at the Inviolable Place of Worship? So long as they are true to you, be true to them. Lo! Allah loveth those who keep their duty.

"How (can there be any treaty for the others) when, if they have the upper hand on you, they regard not pact nor honour in respect of you? They satisfy you with their mouths the while their hearts refuse. And most of them are wrongdoers.

"They have purchased with the revelation of Allah

a little gain, so they debar (men) from His way. Lo! evil is that which they are wont to do.

"And they observe toward a believer neither pact nor honour. These are they who are transgressors.

"But if they repent and establish worship and pay the poor-due, then are they your brothers in religion. We detail Our revelations for a people who have knowledge.

And if they break their pledges after their treaty (hath been made with you) and assail your religion, then fight the heads of disbelief - Lo! they have no binding oaths - in order that they may desist.

"Will ye not fight a folk who broke their solemn pledges, and purposed to drive out the messenger and did attack you first? What! Fear ye them. Now Allah hath more right that ye should fear Him, if ye are believers".

It is evident from the very first verse that the foregoing injunctions deal only with "those of the idolaters with whom ye made a treaty". Idolaters could be classified into two categories: (1) Those who "regard no pact nor honour in respect" of the Muslims. In fact those verses were published at Medina when the Quraysh committed a breach to the treaty of Hodaybiyah and attacked the Muslim allies, the Beni Khoza'ah. The Meccans were thus given

an ultimatum of four months to surrender, in default of which they were to be attacked by the Muslims. Mecca capitulated by compromise and, consequently, the verses were not acted upon in so far as factual war is concerned.

(ii) Those idolaterous tribes who were on friendly terms with the Muslims, and respected their obligations towards the Muslims. The Muslims are not allowed to fight them and have to fulfil their treaty till their term.

Thereby, the text of the verse IX:5 is conditional by the stipulations of the other verses. The idolaters against whom the Muslims may wage war are those who committed a serious breach of a treaty and thus became aggressors; as is explicitly expressed in the verse 10 "These are they who are transgressors". Hence, it is refutable to maintain that this verse decrees the absolute right of an aggressive war. Otherwise the verse will be inconsistent with the next verse which states that if any idolater seeks the Muslim's protection, they are to protect him "so that he may hear the word of Allah". Undoubtedly, the idolater who needs a safe-conduct is an enemy, that is to say a man who should be slain if we understand the verse IX:5 as giving a general order to "slay the idolaters wherever ye find them".

Because of the persistence of the idolaters in ignoring their treaty obligations and their ferocity in torturing the Muslims, the injunctions insisted that they are to be subdued to "establish worship and pay poor-due" since this is the only alternative in this case to guarantee the safety and security of the Muslims.

Presumably, in the above discussion we implicitly proved that Ainee's interpretation of the verse IX:12 is objectionable. Ainee, it is to be recalled, detached a part of the verse to uphold his view. The verse, if completed, reads "And if they break their pledges after their treaty (hath been made with you) and assail your religion, then fight the heads of disbelief - Lo! they have no binding oaths - in order that they may desist". It is conspicuous that the order to "fight the heads of disbelief" is conditional since it provides that a prior break of a pledge is indispensable to render fighting legitimate.

The verse IX:29 is partly quoted by Ainee in a way that obscures the meaning. The verse, in complete, runs as follows "Fight against such of those who have been given the Scripture as believe not in Allah nor the Last Day and forbid not that which Allah hath for-

bidden by His Messenger, and follow not the religion of truth, until they pay the tribute readily, being brought low". The verse, as is clear from its phraseology, is not directed against all the Scriptuaries but only towards such of them who commit certain acts expressed in the verse. The Arabic text indicates better this inference because it includes the word min before the word ahl al-kitab. The word min is an article which connotes secession if it precedes a noun. Thereby, the injunction deals with some of the ahl al-kitab and not all of them.¹ This verse is a prelude to the verses referring to the Tabūk expedition² which the Muslims were to mobilize against the Byzantines in a time of the year when weather was very inclement. Thus, the incident of revelation, being relevant only to some of the Scriptuaries; namely, the Byzantines, asserts the conjecture we inferred from the text of the verse. This verse may be interpreted by some as meaning that fighting is to be enjoined against those who do not embrace Islam nor accept the prophecy of Muhammad. This will be a misinterpretation because the

1. Darwazah, Muhammad Ezzat - Al Dustūr al-Qanūni Fi Shu'ūn al Hayah, Cairo, p.235.

2. Some hold that it relates to Kheybar expedition which was, too, of defensive character.

verse still recognizes the definition of Scriptuaries for those against whom it commands fighting. Presumably, the verse refers to those of the Scriptuaries who transgress and fear not God and the Last Day. This conception will be more established if we connect this verse with two others which shortly follow it in the same chapter, i.e. the verses IX:32 and 34. The two verses read respectively; "Fain would they put out the light of Allah with their mouths, but Allah disdaineth (aught) save that He shall perfect His light, however much the disbelievers are averse." "O ye who believe Lo! many of the (Jewish) rabbis and the (Christian) monks devour the wealth of mankind want only and debar (men) from the way of Allah". These verses show that Islam concerns itself with any active movement aiming positively at its suppression. This was the main reason for ordaining war against the idolaters and the Scriptuaries as well.

Ainee alleges that the verse IX:29, together with the verse II:193, abrogate the verse II:191. This allegation is based on no authority. Moreover both verses, IX:29 and II:193, as we have explained, do not allow a war of aggression.

As for the verse IX:41, it is an exhortation for

the Muslims to join the Prophet on the expedition of Tabūk, which was a defensive measure from the Islamic point of view.¹ This concept could be proved if we interpret the verse in the context of the verse 38-42 which we quote now: "O ye who believe. What aileth you that when it is said unto you: Go forth in the way of Allah, ye are bowed down to the ground with heaviness. Take ye pleasure in the life of the world rather than in the Hereafter? The comfort of the life of the world is but little in the hereafter.

"If ye go not forth He will afflict you with a painful doom, and will choose instead of you a folk other than you. Ye cannot harm Him at all. Allah is able to do all things.

"If ye help him not, still Allah helped him when those who disbelieve drove him forth, the second of two;

1. Muhammad was informed, perhaps in an exaggerated way, that the Byzantines were preparing an expedition to conquer Arabia and subdue the newly rising power of Islam. He had no choice in the height of the summer heat of 630 and despite the reluctance of some of his followers, to call for a campaign as a counter-attack against the Byzantines. When the Muslim army arrived at Tabūk, an oasis near the Byzantine frontiers, they found that the Byzantine forces had been withdrawn. So Muhammad, who marched for defensive purposes, returned back at the head of his followers without being enjoined in any serious fight. See Haikal, Muhammad Hussein - Hayat Muhammad, Cairo, 1935, pp.425-30.

when they two were in the cave, when he said unto his comrade: Grieve not. Lo! Allah is with us. Then Allah caused His peace of reassurance to descend upon him and supported him with hosts ye cannot see, and made the word of those who disbelieved the nethermost, while Allah's word it was that became the uppermost. Allah is Mighty, Wise.

"Go forth, light-armed and heavy-armed, and strive with your wealth and your lives in the way of Allah. That is best for you if ye but knew.

"Had it been a near adventure and an easy journey they had follow thee, but the distance seemed far for them. Yet will they swear by Allah (saying): If we had been able we would surely have set out with you. They destroy their souls, and Allah knoweth that they verily are liars".

The foregoing verses denigrate the Arabs who failed to join the expedition of Tabūk and urge them to "go forth, light-armed and heavy-armed". But, by no means, the verses prescribe an aggressive war. The general principle which we may deduce from these verses in general, and the verse IX:29 in particular, is that every able Muslim should not refrain from responding to the order of the imam to join the army when general mobilization is declared.

Both ibn Hajar and el Halabi in their reasonings forward the verse IX:36 which some hold as the verse of the sword. If we accept the argument of the two authors, the word "all" will mean "everyone with no exception". This leads us to a contradictory conclusion. The verse will signify that every Muslim with no exception is to wage war on every idolater with no exception. This interpretation does not go in line with the principle edicted by the following verse: "And the believers should not all go out to fight. Of every troop of them, a party only should go forth, that they (who are left behind) may gain sound knowledge in religion, and that they may warn their folk when they return to them, so that they may beware".¹ In fact, the verse should be conceived as a whole. To induce the Muslims to "wage war on all of the idolaters", it justified the commandment by the fact that the idolaters, on their part, "are waging war on all of you". The idolaterous war is referred to in the verse in the present continuous tense which shows that the Muslims, at the time of the revelation of the verse, were enduring a persecution launched by the idolaters, and therefore the Muslims are ordered to fight in self-defence.

1. Qur'an; IX:122.

Besides, we believe that the proper interpretation of the word "all", occurring in the verse, should be "one unity" or "one hand" if we were to reconcile this verse with other verses of the Qur'ân and with recognized principles of the legal theory. This interpretation conforms with the general tenor of the whole surah as have been plainly represented throughout our discussion of other verses of the same surah. In short, the verse impels the Muslims to forget disparity and be one hand in fighting the idolaters because precedents show that the idolaters, on their behalf, unify to do battle with the Muslims. Even, the verse carries indication in its very wording to the fact that relates to war of defence.

Thus "it is due to the Mohammadan legists and commentators that ihad came to be interpreted as a religious war waged against unbelievers, who might be attacked even though they were not the aggressors, but such a doctrine is wholly unauthorised by the Qur'ân and can only be extracted there from by quoting isolated portions of different verses, considered apart from the context and the special circumstances under which they were delivered and to which alone they were held to refer, being in no way intended as positive injunctions for future observance

or religious precepts for coming generations".¹

Classical legists were not less illusory about interpreting the hadith appertaining to fighting. Some misrepresented those traditions. It is always to be recalled that an authentic tradition stated the basic characteristics of the Muslim as being "one from whose hands and tongue people - or, according to another narration, Muslims - are secure". This tradition, in fact, gives the general set up within which we should understand the traditions that speak of the jihad and fighting.

The first hadith mentioned in the "Binaya" of Ainee, reads: "The jihad will last up to the day of the Resurrection". Ainee quotes this hadith from the compilation of Abu-Dawūd. But we believe that this hadith can have no authority since its chain of relation to the Prophet includes a certain Yazid Ibn Abi Shaiba who is majhul, of an unknown biography.

The second hadith runs as follows: "I have been joined (or cammanded) to fight the people until they confess that there is no god but Allah". It is self-evident that a hadith cannot go against the Qur'ān. If

1. Arnold - op. cit., p.352.

we interpret this hadith as meaning that an aggressive war is commanded against people until they embrace Islam, this will contradict the Qur'anic verses which, as we have shown and will show, do not indicate any injunction to propagate Islam by a war of aggression. But, to use the argument of Muhammad Ali, "let us consider the words of the hadith. It begins with the words (I am commanded to fight), and surely, the commandments to the Prophet were given through Divine revelation and are therefore all of them contained in the Holy Qur'ân.¹ The reference in the Hadith is thus undoubtedly for a Qur'anic verse. In fact, such a verse is met with in the second section of the chapter entitled (immunity). (But if they repent and keep up prayer and pay the zakat, they are your brethren in faith).² The subject matter of the hadith is exactly the same, and clearly the commandment referred in the hadith is that contained in this verse. It only requires to read the context to find out the purport of these words.....

The hadith does not mean that the Holy Prophet was commanded to wage war against people until they accepted

1. The expression of the author here is not very precise because the tradition is not only a mere repetition of the Qur'anic injunctions.

2. Qur'an; IX:11.

Islam; it simply means, as a reference to the Holy Qur'ân shows, that he was commanded to cease fighting with people who were at war with the Muslims if they of their own accord embraced Islam. Even who had been guilty of the murder of a Muslim were not to be put to death if they accepted Islam afterwards".¹

We add to the foregoing discussion that commentators are not right to introduce the verses containing injunctions for turning aside, forgiving, shunning and withdrawing as representing the first stage in the development of the Muslim theory about war. In fact, these verses denote the core of the prophetic ministry, and, therefore, are not limited to any particular period throughout the life time of Muhammad. The Prophet was exhorted, even during the actual warfare, to accord safe-conduct to the enemy, if he desired, "so that he may hear the word of Allah".²

In fact the idea that the hadith tolerates a war of aggression could hardly be consistent with the conditions in which the Prophet carried out his ministry. Throughout the prophetic office, Muhammad was ill treated by the Meccans to the length that they made him an outlaw and forced him to seek safety in a distant city;

1. Muhammad Ali - op. cit., pp.564-66.

2. Qur'ân; IX:6.

Medina. Despite this emigration, Muhammad did not escape the offence and onslaught of the Meccans and their allies. Even from within Medina he confronted the strong opposition of the Jews who were supported by a party of hypocrites. Being constantly in a precarious situation, Muhammad, by no means, could be taken as aggressor. Under the circumstances, his resorting to force on some occasions, and, consequently, the explanations he gave to his conduct in this respect, is to be generally construed in the terms of a self-defence policy. In the midst of these facts it sounds untenable the idea that the Prophet's diplomatic correspondence with the neighbouring powers demonstrate an aggressive attitude. Moreover, the phraseology of these messages, which were more or less the same, definitely goes to the contrary of this allegation. To prove our view, we quote here the general wording of the said messages, i.e. "I invite thee with the invitation of Islam; become a Muslim, and thou wilt have entered security; Allah will give thee a double reward. But if thou turnest back, the sin on thee is the sin of your people..." Such invitation, formulated in such expression, could by no means warrant the conclusion that Islam is to be spread by the sword.

Now, there are three other verses of the Qur'an that implicate a seemingly unconditional injunction for waging an aggressive war against the unbelievers; namely, II:244, IX:73 and 123.

The verse II:244 reads "Fight in the way of Allah, and know that Allah is Hearer, Knower". Al Maraghi,¹ in interpreting this verse, connects it with the verse 243 which runs as follows; "Bethink thee (O Muhammad) of those of old, who went forth from their habitations in their thousands, fearing death, and Allah said unto them: Die; and then He brought them back to life. Lo! Allah is a Lord of kindness to mankind, but most of mankind give not thanks". This verse preceded the verse under discussion to persuade the Muslims to defend the independence of their state and maintain its existence - which is the subject of the verse 244 - by giving an example to show the close connection between individual and public interests on the assumption that one is more stimulated when one feels that one's own interest is involved. In al Maraghi's view this verse has no indication to aggression on the part of the Muslims since it merely

1. Al Maraghi, Ahmed Mustafa - Tafsir al-Maraghi, Cairo, 1953, vol.II, pp.206-10.

exhorts them to be on their guard and when threatened to defend bravely their Faith. Most likely this verse goes back to the first months after the arrival of the Prophet at Medina and before the battle of Badr. As then the general tendency of the Muslims was influenced by the Meccan teaching of strict non-violence. Thereby they were reluctant to accept the idea of fighting the Meccan, though in self-defence. At that time war between the Meccans and the Medinans was clearly expected. Therefore, the Muslims were to be prepared to face it, even by force, if it should happen. This is clearly expressed in several verses of the same chapter. In line with the same idea the verse was revealed to induce the Muslims to fight the unbelievers if the latter fought them, since the Muslims had to defend their religion and their community. To rationalise the idea, which was then new to the Muslims, the verse 243 indicated the relation between individual and public interests in so far as the very existence of the state is concerned. Besides, the commandment is to "fight in the way of Allah", in other words the fighting is conditioned to be "in the way of Allah". The word qatilū, in the Arabic text, does not necessarily mean aggressive fighting but plainly fighting.

So the nature of the fighting ordained by the verse depends on whether or not, in Islam, the way of Allah is an aggressive way. As we have seen, there is no evidence in the Qur'an or the hadith that the propagation of the Faith should be carried out by armed aggression. On the contrary, a few verses later in the same chapter we read: "There is no compulsion in religion, the right direction is henceforth distinct from error. And he who rejecteth false deities and believeth in Allah hath grasped a firm handhold which will never break. Allah is Hearer, Knower".¹ Thereby, it is an unwarranted relaxation of the text to infer that fight here implies even aggressive fighting.

The verse IX:73 is as follows "O Prophet Strive against the disbelievers and the hypocrites. Be harsh with them. Their ultimate abode is hell, a hapless journey's-end". The word "jahid" here cannot yield to "making war". It is to be noted that the injunction is related to the unbelievers and the hypocrites as well, and decrees one and the same decision towards both parties. The hypocrites were considered and treated as Muslims

1. Qur'an, II:256 - The same argument applies, a fortiori, to the following verse: "And strive for Allah with the endeavour which is His right. He Hath chosen you and hath not laid upon you in religion any hardship.." Qur'an XXII:78.

and, hence, Muhammad never fought them. The jihad Muhammad enjoined against the hypocrites was unequivocally in other ways than measuring swords. If the jihad here was meant in the sense of armed struggle Muhammad would never have had the choice of ignoring the divine commandment. Consequently, the same interpretation must apply to the unbelievers as well; The feeling that guided the Prophet's conduct towards them is rather indicated in XXXIII:47 "Obey not the infidels and hypocrites and take no heed of their evil entreating and put thy trust in God."¹ This, admittedly, leads to the conclusion that the verse contains no indication to construe jihad as meaning war. On the contrary it excludes such significance. However, let us suppose that the word "jihad" - as some Muslim commentators hold - has two different meanings, one in connection with unbelievers; i.e. making war, and another for the hypocrites; i.e. peaceful striving; does this justify that the verse exhorts aggressive war? We are confident that the answer should be in the negative. The verse that directly follows the verse in question emphasizes our inference. The verse 74 reads "They swear by Allah that they said

1. Arnold - op. cit., p.350.

nothing (wrong), yet they did say the word of disbelief, and did disbelieve after their surrender (to Allah). And they purposed that which they could not attain, and they sought revenge only that Allah by His messenger should enrich them of His bounty. If they repent it will be better for them; and if they turn away, Allah will afflict them with a painful doom in the world and the Hereafter and they have no protecting friend nor helper in the earth". This verse explains the reasons why the Muslims are to embark on jihad against the unbelievers and the hypocrites, in other words the verse 74 gives us the argumentation which stands at the background of the commandment cited in the verse 73. This argumentation accuses the enemy of certain wrongful acts and, in retaliation, prescribes fighting if we accept here jihad in the sense of fighting. Hence, we are again in front of the general principle of defensive war. The jihad here is a measure of reprisal in self defence or self-help.

The verse IX:123 states that "O ye who believe. Fight those of the disbelievers who are near to you, and let them find harshness in you, and know that Allah is with those who keep their duty (unto Him)" Obviously, the

order here is not general. It is confined to "those of the disbelievers who are near to" the Muslims. This specification is of great significance because it proves that the verse is of a procedural rather than a positive relevance. It deals with the Islamic tactics and shows that normally the best way to defeat the enemy is to begin with the nearer who is more threatening. It is therefore groundless to connote from this verse a positive rule about aggressive war. It would be in contradiction with the general tenor of the whole surah of "Immunity" to push the text to that length.

The misinterpretation of the Muslim legal precepts is not only attributed to Muslim legists but also to some Western commentators. An example is the translation given by the Reverent Mr. Stephens for the verse IX:36. If we refer to the passage we quoted¹ we will find that the translation he adopted runs as follows: "attack the idolaterous in all the months" First it is unfair to translate the Arabic word "qatilu", occurring in the original text, for "attack". "Attack" may connote the idea of aggression while qital in Arabic plainly means "fighting" with no further connotation. Second, the

1. cf. p.298

phrase "in all months" is an addition which has no equivalent in the Arabic text. Such addition is likely to spring a misconception about the rule we may deduce from the verse. However, it is first the responsibility of Muslim legists to conceive the Qur'anic injunctions in the right way. We cannot put all the blame on the Western writers some of whom were misled by Islamic references.

That it is a mistake to assert that the Qur'ân tolerates an unprovoked war against the infidels is shown by the testimony of Lane. Lane says "Misled by the decision of those doctors and an opinion prevalent in Europe, I represented the laws of "holy war" as more severe than I found them to be according to the letter and spirit of the Kur'an, when carefully examined, and according to the Hanafee code. I am indebted to Mr. Urguhart for suggesting to me the necessity of revising my former statement on the subject, and must express my conviction that no precept is to be found in the Kur'an, which, taken with the context, can justify unprovoked war".¹

From the foregoing presentation we conclude that neither the Qur'ân nor the hadith² can amply support

1. Lane, William Edouard - The Modern Egyptians, London, 1871, vol.I, 117.

2. We do not pretend that our discussion is exhaustive. We tackled only the verses of primary significance and relevance. The same views apply to the others which we skipped.

the theory of waging unprovoked war against the unbelievers. Even if, for the sake of discussion, we presume that these sources permit waging a war of aggression there will be a point for consideration. The texts we discussed relate only to two categories of people; namely, (i) the pagan Arabs, and (ii) the Jews who unscrupulously disregarded their covenants with the Muslims. The point is therefore whether or not these texts are intended as positive injunctions for future observance, that is to say whether or not they are binding on other peoples who are not under similar circumstances, as the Muslims were under during the life time of the Prophet.

In fact, earliest Muslim commentators of the first two centuries of the Islamic era, like ibn 'Umar, 'Amr ibn Dinar, ibn Shubrumah, 'Atā and Sofyan al Thawri¹ held that the fighting was not religiously incumbent (wajib) and that it was only a voluntary act, and that only those were to be fought against who attacked the Moslems.²

Besides it is one of the methods of the Qur'an

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1. Ibn 'Umar is one of the eminent Companions of the Prophet Ibn Dinar, Shubrumah and 'Atā rank among the tab'is, followers. Al Thawri is a jurist-theologian of the highest authority.
 2. Chiragh - op. cit. p.134.

to give practical examples and comment on each, in approval or dismay, to indicate its injunction on the relevant incident. Presumably, the incident which the Qur'ân represents as an evidence of the international good conduct are to be considered as a guidance for the Muslims in their intercourse with non-Muslims. On the contrary, if the incident is condemned by the Qur'ân the Muslims, in their relations with non-Muslims, should refrain from committing a similar wrong-doing. It is also to be recalled that several of the examples given by the Qur'ân on international matters are taken from the Jewish diplomatic history. With respect to this view we find that the only example from the Jewish warlike history cited by the Qur'ân appertains to defensive war. It relates the incident of the Prophet Samuel when the Jews asked him to raise up a king for them to lead them in a war of emancipation from the oppression of the Palestinians¹

"Hast thou not considered the assembly of the children of

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1. "Their Prophet said unto them: "Lo! Allah has raised up Saul to be a king for you.....And when Saul set out with the army, he said: Lo! Allah will try by (the ordeal of a river.....And when they went into the field against Goliath and his hosts they said: Our Lord Bestow on us endurance, make our foothold sure, and give us help against the disbelieving folk. So they routed them by Allah's leave and David slew Goliath and Allah gave him the kingdom and wisdom, and taught him of what which He willeth....." Qur'ân; II:247, 249-51.

Israel after (the death of) Moses, when they said to a prophet of theirs, - 'Raise up for us a king, we will do battle for the cause of God' He said, "May it not be that when fighting is ordained you, ye would not fight?' They said 'And why should we not fight in the cause of God, since we are driven forth from our dwellings and our children?' Yet when fighting was prescribed for them, they turned away, all save a few of them. Allah is aware of evil-doers."¹ This shows that the type of war which the Qur'ân tolerates is only the defensive war. As a matter of fact, the Qur'ân expressly provided that the purpose of the division of the peoples into political entities is to give them a chance to strive for being brought together into co-operation and peaceful relations, not to let some dominate others. "Wherever such an attempt is made, God's purpose works for the uplift of these who are dominated or oppressed. In this connection the instance of Pharaoh and his treatment of the people of Israel is cited as an example".² "And verily We sent Mose with Our revelation and a clear warrant unto Pharaoh and Haman and Korah, but they said "spring sorcerer and

1. Qur'an XL:23-25 and X:84, 91-92.

2. Zufrullah Khan - op. cit., p.167.

when he brought them the Trunk from Our presence, they said slaught the sons of those who believe with him and spare their women. But the plot of disbelievers is in naught but error" ".....Lo! Pharaoh was verily a tyrant in the land and lo! he verily was of the wanton.....

And We brought the children of Israel across the sea, and Pharaoh with his hosts pursued them in rebellion and transgression, till, when the (fate of) drowing overtook him, he exclaimed: I believe that there is no God save Him in whom the Children of Israel believe, and I am of those who surrender (unto Him) What! Now! When hitherto thou hast rebelled and been of the wrong-doers? But this day We save thee in thy body that thou mayest be a protent for those after thee. Lo! most of the mankind are heedless of Our portents."¹

The Prophet's practice:

It is of due relevance to review the practice of the Islamic state under the reign of the Prophet to see how far it adopted a policy of aggressive war.

In fact, the external efforts of the City-state of Medina, during the life time of the Prophet, were mainly directed towards the achievement of the Arab unity,

1. Qur'an; XL: 23-25 and X:84, 91-92.

in other words its foreign policy was based on what we may describe as "Arab nationalism". Such policy, assumably, is not in direct connection with the principles of international law stricto sensu. International law is not interested in the theory of nationalism neither the national measures of developing a nation into a state. Nevertheless, if we construe this policy as a concern of international law, the precedents taken from the Muslim diplomatic history of that period cannot serve as an adequate basis for the future conduct of the Islamic state towards non-Muslim states. Several injunctions dealing with this topic are confined to the Arabs and incumbent only on them as such. The legal and political theory of Islam gives a special regard to the Arabs and consider their unification in a politico-religious community of primordial importance as this unity would be the kernel of the propagation of the Faith.¹ Hence, this vital aim had to be fulfilled by one way or another. Presumably, even the acts which some may qualify

1. We quote here some of the Qur'an verses of relevance. "Thus We have appointed you a middle nation, that ye may be witness against mankind, and the messenger may be a witness against you..."(II:143). "Now We have revealed unto you a Scripture wherein is your reminder. Have ye then no sense?" (XXI:10) "And lo! it is in truth a Reminder for thee and for the folk, and ye will be questioned" (XLIII:44).

as acts of aggression against the pagan Arabs do not constitute models for the future policy of the Islamic state towards the unbelievers outside Arabia. However, neither towards the pagan Arabs nor towards the unbelievers the Islamic state, during the life time of Muhammad, was aggressive. In order to appreciate fully this fact we need to realize how far Muhammad himself was responsible for the outbreak of hostilities. Muhammad suffered from a furious persecution inflicted on him and his followers for years and eventually he was declared by the Meccans an outlaw whose life is of no value. Muhammad sought refuge in the distant city of Medina. There he was still pursued by the increasing hatred and aggression of the Meccans who allotted a substantial prize for the man who could kill Muhammad. Besides, they contacted Abdullah ibn Ubayy - the head of the hypocrites - and exhorted him and his fellow citizens to deport Muhammad from Medina, in default of which, the Meccans would advance upon Medina in a great army to secure this expulsion. Ibn Ubayy and his supporters were very much inclined to respond to the Meccan request.¹ Those, together

1. The Meccans devised too for the use ^{of} their trade caravans as a means of antagonist propaganda against Muhammad and Islam. To incite as many as they can of the tribes on their route, the Meccans even diverted their caravans from the regular route to spread wider activities. The Meccans, powerful as they were, were not obliged to take such a measure to avoid the raids of Muslims who were then weak and few.

with the Jews, constituted within Medina a strong party of opposition and intrigues conspiring with the outside enemy at Mecca, against the Prophet. The Meccan hostile attitude towards the Islamic Medina was expressly announced by Abu Jahl, the Meccan leader, when he met Sa'd ibn M'uaz who was performing the customary circuit of the Ka'bah. Abu Jahl informed Sa'd, in a very arrogant way, that the Meccans considered the Medinans their enemies so long as they sheltered Muhammad. Now, Muhammad's own life was in danger, the city-state of Medina was threatened by a disastrous invasion from Mecca, even a civil war among its very inhabitants. It was therefore needful for the Muslims to be on their guard and know what plans and preparations were afoot at Mecca. Accordingly, we find mention of small parties sent by the Prophet from time to time to reconnoitre along the routes to and from Mecca. Describing the task of these patrols as raiding ignores the foregoing facts. Moreover, it is untenable to suppose that these parties, very few in number, were intended to raid the caravans which were accompanied by an armed guard normally numbering from one hundred to five hundred men. None of these patrols resulted in bloodshed with one exception; "The Prophet had

sent 'Abdullah ibn Jahsh and a party of eight men, with instructions to bring news of the movements of the Quraysh. His written orders were, "When you read this letter, march on and halt at Nakhla between Mecca and Ta'if; there lie in wait for the Quraysh and bring us news from them". Ibn Jahsh interpreted his orders in accordance with the impetuous impulses of his own warrior spirit, and returned to Medina with two prisoners and the sack of a caravan. In so doing he had not only acted without authority but had violated the sacred truce which Arab custom caused to be observed throughout the month of pilgrimage. Muhammad received him coldly with the words, 'I gave thee no command to fight in the sacred month', dismissed the prisoners, and from his own purse paid blood-money for a Meccan who had lost his life in the fray." The facts of the case plainly indicate that the task of these patrols was scouting. About a year after the arrival of Muhammad at Medina, intelligence advised the Prophet that Quraysh are preparing a strong army to conquer Medina. Their excuse was that a rich caravan returning from Syria was likely to be raided by the Muslims and they had to guarantee its free passage. Although news arrived that there was no

attempt to attack the caravan and that the caravan passed the dangerous zone, the Meccan army advanced upon Medina. The two parties measured swords at the Battle of Badr, and thus began the series of battles ending in Muhammad's triumphal entry in Mecca in 630 A.D. Treachery was another device of the enemies of Islam. "Two tribes, one after the other, pretended interest in, and sympathy toward, the new faith and begged the Prophet to send them persons who could instruct them in its tenets and practices. To the first tribe, the Prophet sent ten selected instructors who were treacherously and cruelly murdered. To the second, he sent seventy instructors... They met with a similar fate.

"This and other incidents convinced the Prophet that if peace were ever to be established and freedom of conscience were to be for all, he would have to take more active steps than had hitherto been possible to secure law and order and the observance of treaties and agreements. Henceforth, trying to stem the evil at its source, he would lead an expedition whenever he received information that hostile forces were gathering for attack against him."¹ Thus, the clear attribute of Muhammad's war

1. Zafrulla Khan - op. cit., p.48.

against the Arab infidels is defensive and not offensive.

As for the commencement of belligerent activities with the Byzantines we should not forget that Syria is an Arab territory since it is inhabited by Arabs. In that capacity, it is to be included in the Muslim Arab state if the Arab nationalist movement were to achieve its ultimate goal. Anyhow, like all his expeditions, the Prophet's first expedition against Syria was of defensive and disciplinary nature. Writers differ on the motivations to that expedition. Some hold that it was to retaliate for the killing of the fifteen Muslims whom Muhammad had sent to Zatul-Talh (in Syria) to propagate Islam. Others say that it was to avenge the murder of the Prophet's envoy to the governor of Bosra. According to either views, the expedition was in answer to an aggression committed against the Muslims. His second expedition, known as the Tabūk expedition was also for defensive purposes as we have learnt before.

From the foregoing discussion we conclude that the Prophet's warlike policy was confined to defensive measures. He never envisaged a war of aggression. Consequently, the precedents during the life time of the Prophet do not back the theory of aggressive jihad as

maintained by Muslim classical writers.

Dar al-Islam and Dar al-Harb. -

The doctrine of aggressive jihad, as we have learnt, professes to a constant fight against the infidels until they embrace Islam. Consequently, a state which is not in actual war with the Muslim state is considered, theoretically at least, in a state of war with the Muslim state. Thereby jurists artificially divided the world into Dar al-Islam and Dar al-Harb. To support their theory, they introduced Qur'anic quotations dealing with the idea of jihad. We discussed these quotations above and came to the conclusion that the Qur'ân favours no aggression.

In fact, the twofold division of the world could have factual significance when it relates to reality, that is to say when we want to describe actual war between the Muslim and non-Muslim states. It can have no dogmatic meaning. We object to including this division into the Muslim legal theory as one of its principles. As a matter of fact, this division, under the Abassids, corresponded to the factual relations between the Islamic state and non-Muslim states. Classical writers only intended to give a legal justification to that situation¹ but in such

1. Abu Zahrah, Muhammad - Al Ilaqat al-Dawliyah fil Islam, Cairo, 1964, p.51.

a way that corrupted the conception. Their argumentation is not only unfounded but also introduces two terms which never occur in the Qur'ân neither the hadith. The terms dar al-Islam and dar al-Harb are an innovation of the Abassid legists. As their idea on the division of the world is dependent on the notion of constant or aggressive jihad, and since this notion is not warranted, inevitably the alleged division should collapse too.

From the practical point of view, this dual division proved to be short of answering the needs of the Islamic state, a fact that has been met by some legists by introducing a third division, namely, dar al-sulh or dar al-'ahd. This additional division did not bridge the gap because it does not cover all the non-Muslim states which are not in actual war with the Islamic state. For this, and because the tripartite division is generally based on the same philosophy of the tripartite division we reject it as well.

The precarious character of treaties.

Another upshot of the principal of permanent jihad is the theory according to which the duration of a treaty should not exceed a fixed period, i.e. four months for a truce and ten years for a peace treaty. It is true

that the period may, successively, be prolonged for similar periods, but still the question is whether or not the fixation of the original period is founded from the legal point of view.

Classical writers, as usual, rely on an interpretation of their own for the Qur'anic verses: IX:1,2¹ to substantiate their view. We have explained² that this interpretation is erroneous. The injunction contained in the verses provides the minimum for the ultimatum the Muslims should accord to a counter party when they repudiate their treaty with him or in case there is no treaty obligation between the Muslims and the enemy. The classical misinterpretation is due, to a certain extent, to the confusion of the notion of a truce and a peace treaty in the mind of classical writers. The two instances are not clearly defined in their writings. For example, they introduce the Hdaybeyah Treaty as a peace Treaty. To us it is a genuine truce. A peace treaty is a treaty which puts a definite end to the state of war.

1. "Freedom from obligation (is proclaimed) from Allah and the messages toward those of the idolaters with whom ye made a treaty. Travel freely in the land four months, and know that ye cannot escape Allah and that Allah will confound the disbelievers (in His guidance)."

2. Cf. p.340 et seq.

The Hudaybeyah Treaty provided for a suspension of hostilities only for a period of ten years. On the contrary, the wording of the verse IX:4 justifies that the Qur'ān did not envisage a fixed time-limit for a treaty; "fulfil their treaty to them till their term". This is the interpretation given by 'Alī ibn abi-Talib who was charged by the Prophet to announce the said verses to the public on the day of the Greater Pilgrimage.¹ The practice of the Prophet offers several examples of treaties concluded for even undefined periods of time, and so the righteous caliphs. The covenant given by them to some Scriptuaries is no doubt a treaty.² Under the Abassids, Muslim legists advised the caliphs that these covenants were still binding on the Islamic state. Moreover, the whole idea is built up to conform to the basic principle of constant jihad which is not a correct principle and contradicts the very fundamentals of the shari'ah. Thereby the view that defends the precarious character of treaties in Muslim legal theory is groundless and of no legal support.

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1. Ibn el Athir al Jizri, Aboul Sa'adat Mubarek b. Muhammad-Jami ' al Usūl Men Ahadith al-Rasūl, Cairo, 1950, vol.II, pp.235-6.
 2. It is true that these treaties are of constitutional function but that does not negate their international nature.

The legal status of Dhimmis:

Here we like to raise a point of correction to the term "saghirūn" which occur in the verse IX:29.¹ Many scholars translate this term as meaning bringing the Scriptuaries to humiliation or inflicting on them a contemptuous situation. This is an objectionable translation. The verse, as explained before, prescribes a defensive war against the Scriptuaries who divert from the right path of Allah. Admittedly, the ultimate object of fighting them is to secure their respect for the word of Allah, as Scriptuaries, and not necessarily by embracing Islam. This is crystal clear in the following verses; "How come them for judgement when they have the Torah, wherein Allah hath delivered judgement (for them). Yet even after they turn away. Such (folk) are not believers. Lo! We did reveal the Torah, wherein is guidance and a light, by which the Prophets who surrendered (unto Allah) judged the Jews and the rabbis and the priests (judged) by such of Allah's Scripture as they were bidden to observe, and thereunto were they witnesses. So fear not mankind,

1. This verse reads: "First against such of those who have the Scripture as believe not in Allah nor the Last Day, and forbid not that which Allah hath forbidden by His messenger, and follow not the religion of truth, until they pay the tribute readily - 'an yadin-, being brought low - saghrūn."

For the discussion of this verse see pages 344-346.

but fear Me. And barter not My revelations for a little gain. Whoso judgeth not by that which Allah hath revealed such are disbelievers..... And We caused Jesus, son of Mary, to follow in their foot-steps, confirming that which was (revealed) before him, and We bestowed on him the Gospel wherein is guidance and a light, confirming that which was (revealed) before it in the Torah - a guidance and an admonition unto those who ward off (evil)."¹ Under these verses the right path of God is that revealed in the Torah, the Gospel or the Qur'ān and not exclusively the Qur'ān. Consequently, fighting - according to these verses, as understood in the context of each other - is not intended to impose inferiority on the Scriptuaries. Fighting here is a measure to secure the compliance of the Scriptuaries with the right path since this is a common ground of understanding and friendly relations between them and the Muslims. Our view could be confirmed by the fact that their obligation to pay the tribute is conditioned by their capability - 'en yadin - of paying. Moreover, we should not understand the classical view, that does not consider the dhimmi citizens of the Islamic state, as a

1. Qur'ān; V:43, 44, 46.

sign of disgrace. In fact, they are not a second class below the Muslims. Denying the Islamic nationality to the dhimmis is due to the fact that the classical legal theory interpreted Islam as religion and nationality as well. The Muslims, irrespective of their residence, are regarded as citizens of the Islamic state and subjected to the Islamic rule. This is an application of the notion of the personal character of the Islamic theory. This attitude which regards the common creed and spiritual ideal as the delimitation of the extension of the state could not comprehend the idea of nationality in its modern sense, that is to say as a bond between man and a defined territory. The element of territory did not play a decisive rôle in the conception of state as we have illustrated in Part I of this thesis. Consequently, a non Muslim who settles in among the Islamic community was rather a mujawir. He could not be incorporated into the Islamic community for the simple reason that he is not a Muslim, or, in other words because he does not acquire the requirements necessary for the membership. This by no means was intended to put him in an inferior position. It was an inevitable corollary of the Islamic legal theory as had been developed by classical jurists. Our view could be more substantiated

if we review the alleged discrimination which the dhimmis incur according to the classical theory. The main premises which writers advance in this context are:

(1) the jizya. The jizya, as we have explained, is a less heavy levy if compared with the zakat which the Muslims are to pay.¹ The jizya, in fact, is a duty and not a tax because it was exacted to satisfy the expenses of services rendered to the dhimmis by the Islamic state, that is protection, (ii) retaliation and blood money. Some jurists maintain that a Muslim could not be put to death, in retaliation, if he kills a dhimmi since the dhimmi is not an equal to the Muslim. This is the view of Malik, Shafi'i and ibn Hanbal. The hanafis, on the contrary, insist that the lex talionis applies to the Muslim who murders a dhimmi. They hold that the term kafir which occurred in the traditions cited by their opponents refer to the harbi and not to the dhimmi. Furthermore, they invoke the verse: "O ye who believe, retaliation is prescribed for you in the matter of the murdered, the freeman for the freeman and the slave for the slave, and the female for the female..."²

1. See, in support of this view, Siddiqi, S.A. - Public Finance in Islam, Lahore, 1952.

2. Qur'an; II:178.

Some hold that the blood money due to a dhimmi is also less than that due to a Muslim. This view is not warranted because 'Abu-Bakr and 'Umar maintained equality in the blood wit between the Muslims and the dhimmis. This latter view is adopted by the hanafis.

Hence, with that divergence in opinion, we find ourselves inclined to subscribe to the views that prefer the equality of the Muslim and the dhimmi in matters of retaliation and blood money for the same argument that support these views, (iii) the civic and political rights. As for the military service, Malik and ibn Hanbal claim that only those who possess the Faith are entitled to defend it. Non-Muslims may serve in the auxiliary corps as servants, guides or the like. Abu-Hanifa, on the contrary, sustains that the dhimmis can combat side by side with the Muslims with no restriction at all. The only exception is that the dhimmi gets a remuneration to be fixed by the imam; and not a part of the booty.

The historical facts support the hanafite doctrine. At Khaybar in the year 7 A.H. (628 A.D.) the Jewish tribe of banu Qaynuqā' combatted on the side of the prophet. In the year 8 A.H. (629 A.D.) we find among the Muslim army the idolaterous Safwan b.Umayyah at the

battle of Hunayn. The Christian tribes of Taghlib, Tanuh and Bakr contributed to the operations of the Muslim troops and distinguished themselves, particularly during the conquest of Persia. The Jarajimah, according to an agreement they signed with 'Ubayda in 18 A.H. (639 A.D.), became auxiliaries and spies for the Muslims. The Islamic history is rich with several other incidents that show the prominent military services rendered by the non Muslim subjects to their Islamic state.

Classical jurists proclaim that the dhimmis should be excluded from public service. They offer to sustain their idea, verses of the "Qur'ân and traditions. Besides they allege that a dhimmi does not regard it as a sin to deceive, the Muslims. This doctrine is similar to the Byzantine legislation which, under the Christian era, denied the Jews the right of access to the imperial offices of the court and the public offices as well.

However, it is in formal contradiction with the practice of the Islamic state from the very early history. 'Umar employed the christian Abu Zubaid al-Mundhir. During the Arab conquest of Egypt, Menas, the prefect of the northern province, Schnouti the governor of the province of Rif, and Philozène, the governor of Arcadia (Fayoum)

were Coptics. Under the reign of 'Ali b.Abi Talib, the administrator of Najran was a Christian. In Armenia the ishans, princes, received the title of delegates of the Umayyad caliph and were invested with wide powers even over the Muslims dwelling in their divisions.

Al Mawardi accepted the appointment of the dhimmis even in high offices provided that they do not enjoy the right of final decision.

In face of this practical consensus doctrinally adopted by some authoritative writers; we believe that the dhimmis are apt to be entrusted with any office in the Islamic state apart from the office of the head of state and the premier. A similar practice is sanctioned in almost all the modern states where more than one sect is tolerated among nationals.

In fact, 'Umar II was the first to disqualify the dhimmis as officials. Al Mutawakkil¹ revived the decree of 'Umar, and later on al Muqtadir² enacted the same ordinance. However, these are isolated incidents. Their significance is of little importance from the scholar viewpoint. We believe that if the Islamic doctrine accepts

1. 232-247 A.H. - 847-861 A.D.

2. 296 A.H. = 908 A.D.

the participation of the dhimmis in the warlike activities of the Islamic state in time of war, it should, a fortiori, accord them an equivalent right in time of peace.

We deem it suitable to add here a word about the view that holds that the infidels are impure. This, in fact, is not the prevailing theory. Under the Umayyads in Spain and the Fatimids in Egypt, the dhimmis occupied convenient positions. Most jurists refute it and invoke, in this respect the verses: "This day are (all) good things made lawful for you. The food of those who have received the scripture is lawful for you, and your food is lawful for them. And so are the virtuous women of the believers and the virtuous women of those who received the Scripture before you (lawful for you) when ye give them their marriage portions and live with them in honour, not in fornication, nor taking them as secret concubines. Whoso denieth the faith, his work is vain and will be among the losers in the Hereafter".¹ Moreover, the tradition attests to the prevailing idea. It has been reported that the Prophet ate at a table of a Jew, and 'Umar I took water for his ablution from a jar of a scriptuary.

1. Qur'ân; V:5.

Thereby, the non-citizenship of the dhimmis of the Islamic state and their legal status therein are not due to a tendency of imposing on them an inferior social position nor minimising the humane treatment they are entitled to. The conditions of acquiring the nationality of a particular state is a matter of its own discretion. It is not to be construed as an indication of contempt to those who could not combine the necessary qualifications.

Human rights, as any right, are not absolute rights. They are to be enjoyed according to the national laws governing the exercise of these rights. Consequently, in a modern state, we often come across restrictions imposed on the nationals, in one way or another, for a better organization of the society. This is likewise with the rights of the dhimmis in the Islamic state.

Enslavement of prisoners of war:

The destiny of the prisoners of war is dealt with in the verse that reads: "Now when ye meet in battle those who disbelieve, then it is smiting of the necks until, when ye have routed them, then making fast of bonds, and afterward either grace or ransom till the war lay down its burdens".¹ This is assumably the general principle

1. Qur'ân; XLVII:4.

appertaining to the treatment of the prisoners of war. According to this principle, the Islamic state has the choice only between two alternatives; either to set free the prisoners of war gratuitously or to claim ransom. The verse unequivocally does^{not} entitle the Muslims to enslave their prisoners of war since it does not contemplate such right. Moreover, it -ab contrario- forbids enslavement. However, Muslim Scholars, to justify enslavement, introduce the verse to which we have alluded before.¹ This verse does not contain a direct permission of enslavement. It only enumerates the wives whom God has made lawful unto men, including among them, "those whom by right hand possesseth of those whom Allah hath given thee as spoils of war". Here the verse indicates the possibility of women treated as spoils of war, and, consequently becoming the property of the Muslims, i.e., slaves. The phraseology of the verse does not suffice by itself to warrant adding a third choice to the powers of the Islamic state towards the prisoners of war. It only states a conclusion without elucidating the conditions which may justify it. Hence, we have to seek these

1. The verse XXXIII:50: It reads; "O Prophet Lo! We have made lawful unto thee thy wives unto whom thou hast paid their doweries, and those whom thy right hand possesseth of those whom Allah hath given thee as spoils of war....."

conditions in some other principles. We cannot refer to the above mentioned general principle dealing in particular with the treatment of the prisoners of war because, as we have learnt, it does not tolerate this view. Thereby, the justification must be found in another injunction. This injunction, we believe, should be fetched among the general principles that govern the whole conduct of the Islamic state as regards its enemies. The injunction which we deem most relevant to the topic under discussion is that which tolerates retaliation.¹ This means that the permission of enslaving the prisoners of war is given as a measure of retaliation and not as a right ab initio. Therefore, the Muslims are not entitled to enslave their prisoners of war whenever they like but only when their enemy enslaves the Muslim prisoners of war. In other words the Islamic law of war does not contain enslavement as one of its tenets but as a sanction that could be inflicted on a basis of reciprocity.

This inference goes in line with the general philosophy of Islam towards slavery as such. It is note-

1. "And one who attacketh you, attack him in like manner as he attacked you". (Qur'ân; II:194).
 "If ye punish, then punish with the like of that wherewith ye were afflicted" (Qur'ân; XVI:126).

worthy that the divine injunctions deal only with the means of emancipation, none provided slavery as an imperative system. This is due to the fact that Islam tries to solve the problem of slavery on pragmatic basis. When Islam emerged, slavery was a worldly recognized institution deeply routed in all societies to the length that any abrupt banishment of the system would result in shaking the very foundations of society. For this, Islam's policy in putting an end to slavery is rather practical. Islam restricted the causes of slavery and widened the possibilities of freeing the slaves. Such device is capable, in the course of time, of abolishing the system of slavery without affecting the social values or springing economic crisis.¹

"Verily We have honoured the children of Adam. We carry them on the land and the sea, and have made provision of good things for them, and have preferred them above many of those whom We created with a marked preferment."²

1. Falaki, Ibrahim Hashem - La Riqqa Fil Islam, Cairo.

2. Qur'ân; XVII:70.

CHAPTER THREE

TOWARDS A CONVENTIONAL INTERPRETATION

INTRODUCTION:

From the preceding Chapters we know that Muslim classical doctrine rather reflects the impact of socio-political circumstances on the understanding of jurists particularly under the Abbasids. A certain degree of affinity between the said doctrine and the Greco-Roman laws could not be denied especially in regard to the religious nature of war and the dual division of the world. The Roman division of the world into Romans and barbarians in some way, may be compared to the Islamic division into Muslims and non-Muslims considering that rights acknowledged by the Muslim classical doctrine for the non-Muslims are more human than those recognized by the Romans for the barbarians. Two opposite theories try to rationalize this affinity. One maintains that the resemblance discloses a Roman intellectual influence on the Islamic thought. The second holds that this affinity is a mere coincidence, and, adds that the Islamic classical conception is far more advanced in the path of

humanity and legal civilization. It is hard to refuse either of the two views, though the lacking of mention of any Greco-Roman reference in the works of the Muslim jurists stands in favour of the second theory. Notwithstanding both theories, this affinity assumes that we are to admit that the Islamic classical doctrine, in the general history of Public International Law, played an equivalent rôle to that of the Greco-Roman Laws as a remote shape of modern international law. However, a confusion should be removed. The alleged affinity, whatever it may be, exists between Islamic classical jurisprudence - not the Shari'ah - and Greco-Roman Laws. That inter-connection is due to the way the jurists interpreted the original texts of the Qur'ân and the hadiths. The Shari'ah, is contained of unchangeable texts. Those texts as such if examined under the modern standards, could provide us with solutions which cope with the needs of the present international relations. Thereby, the similarity only exists between the individual or collective interpretation of the Islamic divine texts and the corresponding texts. Consequently, it is inaccurate to say there is affinity between the Islamic Shari'ah and the Greco-Roman Laws.

In pursuance of our view we proceed to see how far the Shari'ah accepts the basic ideas of modern international law; namely, the principle of legal equality between states and peace as the initial state of relations between the members of the family of nations. This will be our concern in this present chapter.

Conception of international society in Islam:

If we imagine that two distinct groups¹ come into contact for the first time, they, inevitably, will become bound together by continual relations. Gradually, the importance of their relations gives rise to common interests whose satisfaction involves a common pattern of behaviour expressed in terms of rules of law. When frequent serial relations reach this stage a society, in the legal sense of the term, is born. Thus, the term "international society" refers to the existence of a number of groups; namely, states that succeeded in adjusting their mutual behaviour and common interests to a particular body of legal rules generally defined in treaties as much as in customs. Consequently, as a legal reality, the international society creates and provides a certain legal order, known as Public International Law, in which states, irrespective of all other factors, recognize each other as similar and apply to their mutual intercourse the rules which they deem valid for all mankind. Thereby, in a proper international legal

1. "A group is an organized society in which the furtherance of common interests is ensured by a differential of functions and powers to the benefit of certain members of the group". Reuter, Paul - International Institutions, translated by J.M.Chapman, London, 1958, p.17.

order freely negotiated relations find a considerable room besides relations of violence and constraint. The international society, unlike a group, is presumably unorganized and lacks its own organs; save that the U.N. modestly provides. However a society of this kind enjoys its distinct independence towards the individual groups that compose it. Hence, international law still is essentially based on the voluntary consent of the members of the international society. The only guarantee for maintaining international peace is the good will of the states. For this, it is not inaccurate to define international law simply as a law of co-ordination. Nevertheless, the division of the world among legally equal states does not impair the fact that powerful states, directly or indirectly wield considerable influence on the international society.

States acknowledge the obligatory character of international law as an institution but keep to themselves the right to determine what rules exist and how they apply to specific facts. This fact leads to another; i.e. the problem of obligation in international law evolves round the notion of material sovereignty. In fact, the problem of obligation, in general, is connected with the moral

problem since the idea of justice which forms the specific contents of law is inseparable from the idea of good which is a moral idea. The final analysis of society, and of law as well, explains the existence of society by reasons found beyond society itself, it is the individual conscience¹ "La communauté internationale est un ordre en puissance dans l'esprit des hommes, elle ne correspond pas à un ordre effectivement établi. Il lui manque pour être une communauté religieuse, la contrôle du droit sur l'emploi de la force....Seuls.... les fins humaines du pouvoir peuvent prêter un fondement moral à son action".²

From the preceding lines we may conclude that the basic elements of the international society, which is a prerequisite for the emergence and existence of international law, are: (i) a number of political entities, (ii) formally equal, (iii) whose common interests are satisfied by rules of law giving enough room to peaceful relations (iv) although it lacks a strong moral element to emphasize and strengthens the obligatory character of the legal rules.

1. Visscher, de Charles - *Théories et Réalités en Droit international Public*, Paris, 1953, p.127.

2. Visscher - *op. cit.*, p.128.

It is time now to turn to our fundamental topic about the organization conceived by Muslim international law for the international society and see how far the two conceptions modern and Islamic, adapt.

In our view, Islam bases its international injunctions on a primary hypothesis; i.e. the division of the world into separate political entities. Several verses in the Qur'an testify to this statement. "Had Allah willed He could have made you one community. But that He may try you by that which He hath given you (He hath made you as you are) So vie one with another in good works"¹ "Among them there are people who are moderate, but many of them are of evil conduct".² "Mankind were but one community; then they differed; and had it not been for a word that had already gone forth from thy Lord it had been judged between them in respect of that wherein they differ".³ "And if thy Lord had willed, He verily would have made mankind one nation, yet they cease not differing."⁴ "Had Allah willed, He could have made them one community".⁵

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1. Qur'an; V:48.
 2. Qur'an; V:66.
 3. Qur'an; 10:20.
 4. Qur'an; 11:118.
 5. Qur'an; XLII:8.

Moreover, the Qur'ân stresses the fact that it is the wish of God that the world continue to be divided among different political groups. This idea could be inferred from the following two verses: (i) "And were it not that mankind would have become one community, We might well have appointed, for those who disbelieve in the Beneficient, roofs of silver for their houses and stairs (of silver) whereby to mount".¹ (ii) "For had it not been for Allah's repelling men by means of others, cloisters, and churches and oratories and mosques, wherein the name of Allah is oft mentioned, would assuredly have been pulled down..".²

It is to be recalled in interpreting the foregoing verses, that the terms "community" and "nation" are used in the jargon of the Qur'ân to mean what we describe presently as "state".³ It may be argued that the oneness or division referred to in these verses relates to religion. But if we consider the close and indispensable relation between the religious and the political in the Islamic theory we will come to the conclusion that the ideas expressed by the said verses apply to political

1. Qur'an; XLIII:33.

2. Qur'an; XXII:40.

3. Cf. pp.132-151.

aspects as well. Thereby the verses postulate the division of the world community into separate political entities as the normal state. If Islam tolerates the division of the Islamic community into different states,¹ a fortiori, must accept the division of the world community among different states.

This conclusion gives rise to another question; whether or not world community, as thus conceived by Islam, constitutes an international community in the legal sense. The answer to this question depends on how far the Qur'anic injunctions adopt the idea of legal equality and peaceful relations among states.

As for the notion of equality; "Le véritable axiome d'égalité statue que les mêmes normes valent pour tous les Etats. Il n'y a pas de privilèges. Les membres de la communauté internationale participent aux mêmes droits et devoirs. En d'autres termes l'égalité statue le caractère universel, l'unité du droit des gens. On peut aussi dire: l'égalité c'est la réciprocité."²

Korowicz comments that "The doctrine of the absolute equality of States, of equality of rights, which was

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1. "And if two parties of believers fall to fighting then make peace between them" Qur'ân XLIX:9 This verse envisages a case in which there is more than one Islamic state.
 2. Redslob, Robert - Histoire des Grands Principes du Droit des Gens, Paris, 1923, p.35.

dominant in the eighteenth and nineteenth centuries is today definitely abandoned by most theorists. The presently dominant theory makes a distinction between the equality of rights which is not always found within an international organization or international organism created for special purposes by multilateral treaties, and the legal equality of States still remaining a valid fundamental principle of international law..... Indeed, equality has no substantive contents of its own. It is connected with the manner and degree in which substantive rights are or may be taken advantage of by the subjects of law concerned....C.W.Jenks rightly points out that the concept of equality of States, while still variously interpreted, continues to evolve toward equal protection of the law rather than toward an equality of rights and functions which would make impossible any progress in international organization."¹ In fact, the recent practice in international law is full of cases of legal inequality such as the practice of the weighted vote and the right of veto.

We believe that the basis of the Islamic theory of equality is laid by the verse that reads: "Say: O

1. Korowicz - Introduction op. cit., pp.251-2 and 255.

people of the Scripture Come to an agreement between us and you: that we shall worship none but Allah and that we shall ascribe no partner unto Him, and that none of us shall take others for lords beside Allah..."¹ In fact, the term "an agreement" which occurs in the verse is the translation of the Arabic text "qualimatin sawaā" which literally means "a word on basis of equality". The Arabic text, thus, connotes that the agreement to which the Scriptures are called is based on the principle of legal equality since the only condition is to admit the oneness of God, not to become Muslims. From the Islamic point of view the acknowledgement of the unity of God is the preliminary prerequisite for establishing continual relations among the Muslims and the non-Muslims. In other words, the Islamic state could not tolerate being bound with another state by common interests unless the latter's civilization is based on the idea of unity of Deity. A state, under Muslim international law, is not entitled to claim the right of legal equality unless it attains a certain degree of civilization, that is to say when its civilization is moulded with the idea of the unity of God. This attitude may be compared to the

1. Qur'ān; III:64.

Western theory which divides the world into civilized and uncivilized nations and recognizes the application of international law only to the civilized nations. The Western theory adopted the Christian civilization as a criterion while the Islamic theory, more tolerately, advocates the unity of God.

To put it in the words of Ballis: "The distinction between peoples with respect to war, as it has been drawn in different periods and on different occasions, has been founded on the fact that peoples are different as to race, language, custom, religion, etc. Such a difference has often afforded a justification for waging war. Furthermore, once such a war has been commenced, rules for waging it, may be followed which are different from those which would be applied if the war were between peoples of the same race, language, etc.,. In a lengthy memorandum presented to the Council of the League of Nations on September 4, 1935, the Italian representative, Baron Aloisi, implied such a distinction between peoples with respect to war...Ethiopia, according to the Italian Government, was not worthy of statement in the family of nations because Ethiopia had not brought herself up to the level of civilization of the world.

Ethiopia through her barbaric practices had placed herself beyond the 'pale' of international law... The distinction between peoples with respect to war was also evident in the Sino-Japanese dispute of 1931-33.... A very well known British jurist of the nineteenth century, Lorimer, divided humanity into three concentric zones or spheres - that of civilized humanity, that of barbareous humanity and that of savage humanity. The particular sphere to which a people belonged determined the recognition it received vis-à-vis other states.... It may be pointed out although there is doubt whether the 'distinction between peoples with respect to war' is incorporated in modern international law, nevertheless this distinction does exist in current notions of international morality, and more importantly in contemporary international practice."¹

However, if we adhere to the Malikite view, this division would be void since the Islamic state could exact jizya even from the pagans provided that they were not of Quraysh.² In other words, the pagan states could be admitted to the 'pale' of Muslim international law.

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1. Ballis, William Belcher - The legal Position of War: Changes its Practice and Theory from Plato to Vattel, The Hague, 1937, pp.3-6.
 2. Obviously there is no pagan Qurayshite today.

Accordingly, Muslim international law covers the activities of all the countries of the world society, a fact which comes to what the family of nations is endeavouring to attain at present.

It is noteworthy that the Charter of the United Nations reflects the same idea in a different way. Under article 4 "Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter, in the judgement of the Organization, are able and willing to carry out these obligations". Thus, the adherence to certain principles and the capability and willingness are necessary conditions for endowing the qualification of member on a state according to the Charter. It is likewise in Islam, the acquiescence to the principle of the unity of Deity and the capability and willingness are primary conditions for the membership of the international society on basis of legal equality. This issue differs from that relevant to the ideological conflict between marxist and capitalist states since Islam acknowledges the existence of a particular body of rules as international law while "from the point of view of the Marxian definition of the law, so-called international law is no law at all. But

political interest forces the Soviet Government to recognize this law as a set of legally binding norms regulating its relationships with the other states, and the Soviet legal theorists to make the futile attempt to interpret this set of norms as law in conformity with the Marxian definition."¹

As to the place of peace in Muslim international law, we have pointed out before that Islam considers peace as the normal state of the international community. To this effect we cite the two following verses: (i) "Had Allah willed He could have made you one community. But that He may try you by that which He hath given you (He hath made you as ye are) So vie one with another in good works..."² Here the verse implies that the division of the world among different states is meant to be a cause for competition in good works, and, consequently, provokes men to vie in good works, or if we use the words of the Charter of the United Nations "to practice tolerance and live together in peace with one another as good neighbours, and..... to employ international machinery for the promotion of the economic and social advancement of all people."

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1. Kelsen, Hans - The Communist Theory of Law, London, 1955, p.150.
 2. Qur'an; V:48.

(11) "O mankind Lo! We have created you male and female, and have made you nations and tribes that ye may know one another. Lo! the noblest of you, in the sight of Allah, is the best in conduct..."¹. The term "That ye may know one another" is the translation of the Arabic text "Li tā'arafū" which derives from the word 'urf'. It connotes, besides knowledge, what people rationally accept in their conduct as the right pattern of behaviour.² Admittedly, maintaining peace in mutual relations enters under the connotation of 'urf'. Hence, the verse states that peace should be one of the basic aims of states in their mutual intercourse. We are confident that the term "urf" could include the purposes of the United Nations as mentioned in Article 1/1,2,3, which reads: "The Purposes of the United Nations are:

- 1- To maintain international peace and security.....
- 2- To develop friendly relations among nations, based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

1. Qur'ān; XLIX:13.

2. Al Mu'gam al Wasit published by the Academy of Arabic Language, "Majma' Allugha Al 'Arabia", Cairo, vol.II, p.601.

3- To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion..."¹

In fact there are several verses, most of which we introduced in our previous study, that insist on peace as the main pattern for international relations. Besides Islam not only advocates peace but also condemns some serious causes that may endanger peace. In line with this policy, Islam opposes all forms of imperialism. The incident of Pharaoh and his abusive treatment of the people of Israel² is a telling example to show that Islam hates nations being dominated or oppressed by others. He uplifted the oppressed Israelites and made of His revenge of Pharaoh a warning lesson for the sponsors of political imperialism. Islam views, with disfavour, economic imperialism and disapproves exploitation in that respect since it, inevitably, develops into a threat of peace. It favours economic

1. The purpose mentioned in para.3 could be inferred too from the reference of the verse to the common origin of mankind.

2. Qur'ân; X:91-93.

These verses have been quoted before.

development only when it is based upon the exploitation "of a country's own resources and on equitable sharing with others of the bounties which God has provided for each people". This admonition is referred to in the following verse: "And Skain not thine eyes toward that which We cause some wedded pairs, among them to enjoy, the flower of the life of the world, that We may try them thereby..."¹. In pursuance of the same idea, Islam prohibits stronger states to behave towards the weaker in arrogance or contempt and prompts all states to trade on basis of equality. This principle is expressed by the verse; "O ye who believe Let not a folk deride a folk who may be better than they (are)".²

"Therefore, Islam seeks to bring about reconciliation between the followers of different faiths and to establish a basis of respect and honour among them. The objective of Islam in the international sphere is an association of strong and stable states allied together in pursuance of the maintenance of peace, freedom of conscience and promotion of human welfare."³ In other

1. Qur'ân; XX:131.

2. Qur'ân; XLIX:11.

3. Khan - op. cit., pp.166, 171.

words, from the legal point of view, the Islamic theory properly conveys of the existence of an international society where some of the obstacles that endanger the structure of our present international society are solved, particularly, the problem of obligation. The obligatory character of Muslim international law is based on its divine origin. Hence Islam combines the rule of law to that of morals in a balanced way that engenders a better juridical international society and more answerable to the needs of the development of international law. For this Islam insists on complete conformity of conduct to declaration and profession of intent; "It is most hateful in the sight of Allah that ye say that which ye do not".¹

The Idea of universalism in Islam:

No doubt the propagation of Islam is a religious duty of the Islamic state since Islam is a missionary religion. It is the birth right of every true Muslim, and of the Islamic state as well, to spread the message of Islam and to invite other peoples to embrace Islam. We have seen that the spread of Islam by force is a doctrine of which no trace can be found in the shari'ah and that

1. Qur'ān; LXI:3.

the permission to fight has no connection with the preaching of Islam.

Islam promulgated the magna charta of religious freedom by the verse; "There is no compulsion in religion"¹, and explained the reason for that by stating that "The right direction is henceforth distinct from error. And he who rejecteth false deities and believeth in Allah hath grasped a firm hand-hold which will never break...".² We have explained too that the Civitas Maxima is not an imperative aim of Islam. The international society as envisaged by Islam is a collective grouping of states even if all states were Islamic states.

The way the Islamic states should follow in fulfilling its missionary duty is plainly defined in several verses of the Qur'ân among which we quote the following two verses: (i) "Call unto the way of thy Lord with wisdom and fair exhortation and reason with them in the better way. Lo! thy lord is best Aware of him who strayeth from His way, and He is Best Aware of those who go aright".³ (ii) "And argue not with the People of

1. Qur'ân; II:256.

2. Qur'ân; II:256.

It is noteworthy that this verse was revealed after the permission for war had been given.

3. Qur'ân; XVI:125.

Scripture unless it be in (a way) that is better, save with such of them as do wrong: and say We believe that which hath been revealed unto us and revealed unto you; our God and your God is One, and unto Him we surrender".¹

However, Muslim classical writers in asserting the God-given responsibility of the Muslims to govern and educate the unbelievers sustained a theory which, thirteen centuries later, Kipling revived under the motto: "The White Man's Burden". Anyhow, they were not far from what modern international law has adopted under the system of Mandate and Trusteeship. To explain our view in the words of Goodrich; "Modern Imperialism - the control by the economically and politically more advanced states areas inhabited by peoples of a different culture - reached its height in the closing years of the nineteenth century... It was largely to meet the endictement of imperialism as formulated by Hobson and other writers, that proposals were advanced at the time of the elaboration of the League Covenant to place certain dependent territories under an international mandate system.....intended to provide international guarantees, that in certain dependent areas

1. Qur'ān; XXIX:46.

administered by more advanced states the interests of the native peoples and of other states would not be disregarded... A major defect of the League mandates system, as experience was to show, was that it applied to only a part, and a relatively small part, of the areas under colonial rule. It applied to those territories formerly parts of the German and Ottoman Empires which were ceded to the victor nations but obviously these were not the only territories.... The Mandates system came in for a great deal of criticism, partly because of the weakness of its provisions for guaranteeing international accountability, and partly because of its discriminatory characters. It was viewed by many as being little more than an attempt to give added respectability to old-fashioned colonialism.... With the outbreak of the Second World War, the problem of dependent peoples was presented in a different and more urgent context.... The Charter of the United Nations represents a considerable advance over the Covenant of the League of Nations in its provisions for the protection and advancement of dependent peoples... According to Article 73 of the Charter....

'Members of the United Nations which have or assume responsibilities for the administration of territories whose

peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories'.....The basic objectives of the trusteeship system are stated in Article 76...The listed objectives include: (a) the furtherance of international peace and security, (b) the promotion of the political economic, social and educational advancement of the inhabitants and "their progressive development towards self-government or independence", (c) the encouragement of respect for human rights and fundamental freedoms and of recognition of the interdependence of peoples; and (d) the assurance of equal treatment in social, economic, commercial and legal matters for all Members and their nationals. The duties of administering states as well as the extent of their authority are spelled out in greater detail in the trust agreement that have been concluded and approved by the General Assembly for each territory."¹

1. Goodrich, Leland M. - The United Nations, London, 1960, pp.293-302.

We may notice some differences between the mandate and the Trusteeship institutions on one hand, and the classical Muslim theory on the other. These differences concern details and the way of implementation. Both notions, more or less, are inspired by the same philosophy and aim at similar ends.

Thus, it is conspicuous that the idea of universalism in Islam originally means universalism of principles and not of sovereignty. In other words universalism in Islam embarks, in the first place, on ideological, not political lines. It may be argued that there are common features between Islam and communism in so far as the idea of universalism is concerned. Such argument ignores the lacking features which are perhaps the most important. "I would like to quote a passage from the Danish writer Gobeck, who says: "The trouble is that we confuse religiosity with religion, just because people are so devout in their personal way, they are unable to conceive a religion which is the soul of society, the observe of the practical, a living and real religion, the practical relationship of the people to God, soul and eternity, that manifests itself in worship and works a life-giving power in politics and economics, in crafts and commerce,

in ethics as in law".¹

Does this doctrinal conflict, as we witness nowadays, engenders between the Islamic state on one hand and the non-Islamic states on the other, some sort of cold war dividing the world into two opposing camps facing each other in a war-like state of mind although not actually engaged in an armed struggle. Some may argue in favour of such division on the assumption that the Islamic state is prohibited from maintaining with the non-Islamic states a wide range of common interests and purposes in accordance with the verse that stipulates: "O ye who believe. Take not for intimates others than your own folk, who would spare no pains to ruin you; they love to hamper you. Hatred is revealed by (the utterance of) their mouths, but that which their breasts hide is greater. We have made plain for you the revelations if ye will understand".² This allegation is due to misinterpretation. The prohibition referred to by the verse is not of general scope. It specifies a certain category of non-Muslims; namely, those who spare no pains to ruin the Muslims and love to hamper them.³

1. Lewis, Bernard - International Affairs, vol.XXX, 1954, pp.11-12.

2. Qur'ân; III:118.

3. Al Maraghi - op. cit., vol.IV, pp.44-50.

If non-Muslims do not reveal such hatred, the Muslims are forced to establish with them bonds of close friendship sanctioned by the following verse: "Allah forbideth you not those who warned not against you on account of religion and drove you not out from your homes, that ye should show them kindness and deal justly with them. Lo! Allah loveth the just dealers."¹

The policy of Islam towards Abyssinia, during the early centuries of the Islamic era, constitutes a precedent of great significance in this respect. The Prophet is reported to have said: "Leave the Abyssinians in peace, so long as they do not take the offensive".² For centuries the Muslims considered Abyssinia as immune from the Jihad and refrained from attacking it. On the other hand, they held a friendly attitude towards it. This conduct could not be justified on the basis that Abyssinia was regarded as a part of dar al-Islam since the classical criterion to acknowledge this qualification does not apply to Abyssinia. The Islamic rule was not exacted therein. The only conceivable reason for this

1. Qur'ān; LX:8.

2. Quoted from Khadduri - War and Peace, op. cit., p.257. The author adds that "While Malik was not sure as to genuineness of this hadith, he advised abiding by it, adding that the Muslims had habitually refrained from attacking Ethiopia".

policy, in our opinion, is that Abyssinia, from the very beginning, recognized the newly emerging Islamic state in an amicable way and did not carry out an offensive policy against it. Hence, the Islamic-Abyssinian relations are a practical example to prove our view. It may be argued that these relations stand as a unique example in the history of the orthodox Islamic state and, consequently, should be construed as an exception not a rule. This argument, in fact, intermingles the general principle and its implementation. The Islamic state of Medina, it is to be recalled, was surrounded by unfriendly states. It had no choice but to defend her independence and vital interests against its hostile neighbouring states. The only exception to this antagonist attitude was Abyssinia. Abyssinia gave its full recognition to the then nascent Islamic state, and was therefore the only case that permitted the application, ab initio, of the rules of peace regarding friendly relations on the basis of equal sovereignty. To sum up, the Islamic state, so long as it is not attacked, is ordained to co-operate with non-Muslim states in terms of peaceful co-existence. That is to say to "abstain from the use of armed forces as an instrument of national policy, refrain from any violation of

territorial integrity and political independence of another state, renounce intervention in the internal affairs of other states, and undertake to seek the adjustment of its differences by peaceful and orderly procedures."¹

These commitments recall those stated by Article 2/1,3,4 of the Charter of the United Nations which reads: "The Organization and its Members...shall act in accordance with the following principles;

- 1- The Organization is based on the principle of the sovereign equality.....
- 3- All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
- 4- All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state....."

In fact, the aspect of co-existence which belongs to the legal field "is concerned with the establishing and maintaining of and the respect for the legal rules governing the intercourse of actually coexisting states.

1. Holcombe; Arthur N. - Conditions of Peaceful Coexistence, The Challenge of Politics, 1961, p.320.

The body of those rules is international law."¹ Co-existence in the Islamic theory is a fact and not a disguise as is the case in the present relations between Marxist and Western countries. "In a frank as well as startling declaration, Joseph Stalin, expressed the Soviet diplomatic and legal philosophy: 'Words must have no relations to actions - otherwise what kind of diplomacy is it? Words are one thing, actions another. Good words are a mark for concealment of bad deeds. Sincere diplomacy is no more possible than dry water or wooden iron'.² In Islam "It is most hateful in the sight of Allah that ye say that which ye do not".³ This shows that the Islamic policy should be conducted in the framework of the recognized principles of international law.

For all this, we are confident that the Islamic conception of universalism could be compared with the same conception as conceived by the Charter of United Nations, Article 2/6 which provides that "The Organization shall assume that states which are not members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of International peace and security."

1. Korowicz - op. cit., pp.152-3.
 2. Korowicz - op. cit., pp.152-3.
 3. Qur'ân; LXI:3.

In his comment on this provision, Kelsen provides that: "The Organization is certainly authorized to ensure that non-member states shall act in conformity with the principles laid down in Article 2, paragraphs 3, 4 and 5; that is to say, that non-member states are obliged by the Charter, just as members are, to refrain in their relation to other states from the threat or use of force, to give the United Nations every assistance in any action it takes in accordance with the Charter, and to refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action".¹

The affinity between the Charter theory and the Islamic theory lies in the fact that both theories consider the universalization of certain principles for the welfare and furtherance of humanity to be the proper concern of a particular entity. In brief, universalism here means ideological propagation by peaceful preaching and not through forcible domination. This idea manifests in the following verses: "And we have not sent thee (O Muhammad) save as a bringer of good tidings and a

1. Kelsen, Hans - The Law of the United Nations, London, 1951, p.107.

warner unto all mankind, but most of mankind know not."¹

".....We have not sent thee (O Muhammad) as a warden over them."² "Had Allah willed; they had not been idolaterous. We have not set thee as a keeper over them, nor art thou responsible for them."³ The verses plainly state that the mission of the Prophet is to bring good tidings and to warn, not to dominate people. It may be alleged that the Islamic theory tends to be imperialistic, as the propagation is, unlike the Charter, the responsibility of the state and not an international organization. This allegation is untenable. Firstly, from the legal point of view, there is no difference between the nature of an action taken by an international organization and that taken by an individual state, in so far as a non-member state is concerned. Otherwise, it would be easy for the Islamic states to establish an international organization and invest in it the right of propagating Islamic principles and thus evade such criticism. Secondly, if we understand the provision of Article 2/6 in the context of its preamble we will come to the conclusion that the doctrinal propagation is not the exclusive function of

1. Qur'ân; XXIV:28.

2. Qur'ân; XVII:54.

3. Qur'ân; VI:108.

the Organization. It is incumbent on member states as well. In assessing our view one should recall that international practice, and a part of jurisprudence as well, recognize what is called humane intervention, that is to say intervention dictated by humane reasons or by virtue of necessities for the general welfare of the international community.¹

Universalism as a peaceful doctrine is demonstrated in the way the Prophet invited foreign monarchs to accept Islam. He never tried, by word or deed, to trespass into their domains. Wiet commented² on the general conduct of the Prophet saying "Mahomet n'hésite jamais à exposer sa vie lorsqu'il le fallait. Toutefois ses grandes réussites furent surtout diplomatiques. Dans son esprit négociation ne signifie pas pussillanimité; il s'agit d'être avare du sang de ses partisans de créer le moins possible chez l'ennemie de prétexte de vendetta." However, Islam assumes a certain degree of solidarity among the Islamic states. Muslim jurist-theologians conceived

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1. Rousseau mentions, as an example, the practice that was particularly directed against Turkey for the benefit of its Christian subjects, especially Armenians, to stop Turkish cruelty and atrocities.
Rousseau, Charles - Droit International Public, Paris, 1953, pp.324-5.
 2. Wiet, G. - L'Islam dans l'Histoire Générale des Religions, Quillet, Paris, 1947, p.337.

this solidarity in some sort of civitas maxima under one iman. Some tolerated disintegration only for emergency reasons such as in case the Islamic territory lacks due means of communication owing to its immensity.¹ In fact this view is exaggerated and influenced by the classical doctrine of the dual division of the world. The unity of the imamate is presumably a corollary to the unity of the Islamic world. We have seen that there is no obligatory injunction in the Shari'ah as regards this unity. On the contrary, the Qur'an envisages the possibility of the partition of the Islamic world into politically independent entities. This trend could be inferred from the verse that reads: "And if two parties of believers fall to fighting, then make peace between them. And if one party of them doeth wrong to the other, fight ye that which does wrong till it return unto the ordinance of Allah, then, if it return, make peace between them justly, and act equitably."² This verse foresees three independent parties of Muslims, two of them engaged in an armed conflict and the third neutral. It, thereby, connotes the probability of the Islamic world being

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1. Rida, Muhammad Rashid - Al Khilafa aw Al Imama al Kubra, Cairo, 1341 A.H., pp.48-51.
 2. Qur'an; XLIX:9.

divided among several states independent of each other. As a matter of fact, the doctrine of the unity of the Caliphate is based on a consensus which is, at present, contradicted by another consensus accepting the multiplicity of caliphs. Hence, the oneness of the caliphate as an obligatory regime should be considered obsolete. We believe that Islam binds Islamic states together in some sort of commonwealth, not excluding any stronger form of federation or unity as circumstances may necessitate for the welfare of the faith. "The believers are naught else than brothers. Therefore make peace between your brethren and observe your duty to Allah that haply ye may obtain mercy."¹ It is worthy of noting that some writers, though accepting the classical doctrine, attempt to analyse the relation between the Muslim and non-Muslim states in terms of modern international law. Khadduri,² for one, maintains that this relation is "rather equivalent to what is called in Western legal terminology non-recognition, that is the incompetence of the world of war to possess a legal status under Muslim law so long it lacked the essential doctrinal prerequisite of the true faith."

1. Qur'ân; XLIX:10.

2. Khadduri - War and Peace, op. cit., p.144.

When he tackles negotiations and diplomatic intercourse that took place between Muslim and non-Muslim states, Khadduri comments that "the nearest equivalent, perhaps, to this situation in the modern law of nations is the recognition of insurgency....The Islamic state, in like manner, in entering into diplomatic negotiations with a non-Muslim state, does not intend to recognize (in the modern sense of the term) that is to extend the area of validity of Muslim law to the non-Muslim state, but merely to admit that a certain authority or authorities were needed in the world of war so long as it remained beyond Muslim sovereignty". This explanation is relevant to a doctrine which we have repudiated. However, it is to be noted that Muslim international law, as modern international law, includes two categories of rules, i.e., regional and universal. The regional tackles mostly the inter-relations of the Islamic states. This regionality, of course, does not impair the international character of the law as a whole.¹

Peace and aggression in Islam:

We could tackle this issue from an easy angle and

1. An interesting instance here is the title which Karl Strupp chose for his work; namely, "Elements du Droit International Public - Universel, Européen et Americain" Paris, 1930.

advance against those who describe Islam as aggressive, the apologia which Schuon provides, "on oublie, premièrement, que la persuasion a joué un plus grand rôle que la guerre dans l'expansion globale de l'Islam; deuxièmement, que seuls les polytheistes et les idolâtres pouvaient être forcés d'embrasser la religion nouvelle; troisièmement que le Dieu de l'Ancien Testament n'est pas moins guerrier que le Dieu du Koran, bien au contraire, et quatrièmement que la Chréienté, elle aussi, se servait de l'épée dès l'avènement de Constantin. La question qui se pose ici est simplement la suivante: l'emploi de la force est-il possible en vue de l'affirmation et de la diffusion d'une vérité vitale? Il n'y a pas de doute qu'il faille répondre par l'affirmative, car l'expérience nous prouve que nous devons parfois faire violence aux irresponsables dans leur propre intérêt, puisque cette possibilité existe, elle ne peut pas ne pas se manifester dans les circonstances voulues, exactement comme c'est le cas de la possibilité inverse, celle de la victoire par la force inhérente à la vérité même, c'est la nature interne ou externe des choses qui détermine le choix entre deux possibilités".¹

1. Schuon, Fritjof - Comprendre l'Islam, Gallimard, 1961, pp.33-4.

However, when we analyse the Qur'anic injunctions relevant to war we come to the conclusion that war is not aimed at ambitious or beneficial ends. War, in the Islamic theory, seeks to attain one or more of the following objectives¹: (i) to repel acts of aggression against the Islamic community, (ii) to redress violation of law, with a view to setting right injustice committed to the detriment of the Muslims, (iii) to allow the followers of revealed religions to practice their faith freely, (iv) to co-operate in establishing an operable system of peace and security. The Prophet is reported to have said that fighting for the cause of God is the only right path for he who combats. This was in answer to a question about he who fights for the sake of God; he who combats for wealth or he who combats for vanity or lastly he who fights for glory.

In fact, the notion of war in Islam embarks on ideological trends. In line with this philosophy and to delimit the range of war, Islam defined the cause of just war; i.e. aggression, on an ideological basis as well.

Aggression is, assuredly, one of the vaguest concepts of international law. The term "aggression"

1. Arabi - op. cit., p.59.

which occurs in several verses of the Qur'an is relatively new for modern international law. The Christianity of the middle ages used instead the expression "unjust war". It was only at the beginning of the twentieth century that the term "aggression" was introduced into international law. States at San Francisco Conference of 1945 failed to agree on a definition and therefore the Charter of the United Nations does not include any definition of aggression. "Comment définir l'agression. Une personne à qui on demandait de définir un elephant a répondu (je ne saurais définir l'elephant, mais je sais que c'est quelque chose de gros)."¹ The Islamic theory solved this problem by adopting what we call the concept of ideological aggression. In other words Islam envisaged aggression only when its ideology is endangered because of statelike activity. In this case, the Islamic state is to defend the faith and repel aggression, even by force if necessary. This concept of ideological aggression which Islam adopted fourteen centuries ago has been very recently introduced into modern international law on the assumption that the element of violence or the use of armed force is not necessarily required to qualify an act as aggressive. Indirect aggression and particularly

1. Aroneau, Eugene - La Definition de l' Agression, Paris, 1958, p.348.

when an act causes incitement against a certain ideology, may constitute a cause good enough for justifying an act of self-defence. "L'agression est un concept en soi qui s'impose à l'esprit humain et qui, en tant que notion primaire, n'est pas susceptible d'être définie....c'est une notion naturelle."¹ Islam condemns aggression in all its forms by verses in the Qur'an that should be construed as laying general principles. When God says "Allah loveth not aggressors"², He states one of His universal and unchangeable qualities.

However, Islam insists on trying to settle the international disputes firstly by the peaceful means; namely, mediation, conciliation and arbitration. War is the last resort when peaceful methods fail to redress aggression. "And Allah summoneth to the abode of peace"³ "...and say not unto one who offereth you peace: (Thou are not a believer)"⁴. The Islamic orthodox practice supports this view too. In war, "It has been the tradition of the Muslims not to fire first. This tradition is said to have been held by the Ottomans even in their wars of the 19th Century".⁵ In the Charter of Medina,

1. Eugène - op. cit., p.139.

2. Qur'an; II:190.

3. Qur'an; X:25

4. Qur'an; IV:94.

5. Chehata - op. cit., p.111.

arbitration was the means adopted to settle disputes and Muhammad was recognized the supreme arbitrator with obligatory competence.¹ When Muhammad heard that there was a conflict among the inhabitants of Qoba, near Medina, he exhorted his companions to reconcile them.² Muhammad's activity as an arbiter and conciliator convinced al-'Asha to call him the king and arbiter of the Arabs.

It might be argued that this Islamic peaceful attitude is inconsistent with the classical theory that tolerates unilateral repudiation of a treaty as a result of changed conditions. In fact, this theory could not be construed as an infringement upon the sanctity of treaties stricto sensu. Rather it is an early expression of what we term today as the "Clausula Rebus Sic Stantibus". The Permanent Court of International Justice, in the French Swiss Zones case, "was prepared to recognize the principle, although refused to say to what extent, that a change of conditions may have an effect on the continuation of treaty obligations."³ This cautious attitude of the Court is due to the fact that this doctrine is very controversial among the

1. Arabi - op. cit., p.51.

2. Dermengham, E. - La Vie de Mahomet, Paris, 1922, p. 348.

3. Lanterpacht, Sir Hersch - The Development of International Law by the International Court, London, 1958, p. 85.

theorists.¹ Some maintain that the principle is a tacit clause included in every treaty of undefined duration. Others describe it as a rule of customary law that applies to all treaties regardless of their duration. Publicists differ also as to whether the determining factor which was envisaged by the parties and the change of which effects the clause should be fetched among the objectives of the treaty or its motives. As for the procedure affecting the clause, four theories are advanced; namely, (i) the treaty lapses "de plein droit", (ii) any party to the treaty can unilaterally denounce it, (iii) the treaty is to be denounced by common accord, (iv) the party who seeks the caducity of the treaty may provisionally suspend the performance of his obligations pending agreement by the parties upon, and decision by, a common international tribunal or authority.

The Islamic classical doctrine subscribes to the view that motives may serve as determining factors the changing of which permits the Islamic State to denounce unilaterally its treaty obligations irrespective

1. See on that material (i) Leca, Jean - *Les techniques de Révision des Conventions Internationales*, Paris, 1961, pp.295-314. (ii) Ghanem, M.Hafez - *Al Usûl Al-Jadida Lil Qanûn al Dawli*, Cairo, 2nd.ed.1954, pp.345-8.

of the duration of the treaty.¹

This doctrine, considered in the circumstances under which it was professed, is fairly warranted. To use the words of McNair: "It must be remembered that very many of the rules of international law date from a time when arbitration between states was either non-existent or very rare. Consequently, these rules were evolved rather as a guidance for statesmen and diplomatists than as guidance for advocates and judges.

I suggest that the so-called clausula rebus sic stantibus is one of these rules, for the argument that circumstances have changed since a bargain was made makes a stronger appeal to diplomatists and statesmen than it does to lawyers. We must bear in mind the difference in atmosphere that results from the availability of arbitration and judicial settlement - a fact which in itself promotes the tendency of international law to become more legal".²

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1. It is worthy of passing a note that the Charter of the United Nations, in its Article 14, adheres to the doctrine rebus sic stantibus. The Article reads; "Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the purposes and principles of the United Nations."
 2. McNair, Lord - The Law of Treaties, Oxford, 1961, p.682. (Footnote No.1.).

In such a theory treaties of peace, admittedly, can find wide room. The Islamic injunctions stress the respectability of these treaties and emphasize the principle pacta sunt servanda.

In this respect, Islam does not innovate a new principle. However, this principle was recognized by municipal laws only. It had no validity in the inter-state relations. Islam is to be accredited with its strong adherence to the principle and its strict implementation of it in the international intercourse to the extent that if Islam did not create the principle yet it brought it up and introduced it to international law in a way that made it a well-established principle in the international legal theory. "For the Islamic peoples, the principle pacta sunt servanda has also a religious basis (Muslims must abide by their stipulations). This is early expressed by the Koran in many places, for example, when it is said (Be you true to the obligations which you have undertaken)".¹ God, in the Islamic theory, considers Himself a third party in every treaty the Muslims conclude. Any breach of a treaty is an unforgiveable sin since it is also a

1. Wehberg, Hans - Pacta Sunt Servanda, A.J.I.L. vol.53 (1959), p.775.

renouncement of an obligation towards Allah. In this respect, we believe that the Islamic theory is rather an advance over the Western theory in giving a satisfactory basis of obligation. Writers on international law could not for long fail to perceive that international law was being undermined, if one based contracts on the will of the state. They therefore tried to find a basis which would leave unaltered the principle of sanctity of contracts, in spite of a continued adherence to the will of the state as foundation of international law. The Islamic theory amply provides with this foundation.

The confusion we rebuke about the classical doctrine is due to the fact that the jurist-theologians who developed the theory had not been practically invited to discuss a case relevant to a genuine state of peace between the Islamic state and a non-Muslim state since the Islamic state was almost in a state of constant war. Hence, they did not have a suitable opportunity to tackle the conditions of a genuine treaty of peace. The treaties they meant are rather truces and not genuine treaties of peace. Obviously, the present state of the Islamic world differs basically from that of the first centuries of the Islamic era. Thus, there is no point in extending

classical rulings to regulate the present relations of the Islamic state with non-Muslim states.

Since the Islamic state trades with other states on a peaceful level, considers peaceful/^{means} as primary means to settle disputes, and enters into diplomatic relations with other states, we are confident that the Islamic theory of peace does not differ, on the whole, from the Western theory except in some details which are to the credit of the Islamic theory.

Status of the dhimmis and human rights:

As is shown in several places of this work, Muslim jurists conceived of the Islamic solidarity, from the political point of view, in its closest possible form. From the constitutional viewpoint they considered Islam as both religion and nationality. "A common ideology is the basis of nationality among the Muslims, and Islam distinguishes itself with the feature that it does not exact the renunciation of the world, but insists on the body and soul growing and operating simultaneously."¹ This attitude, as we have explained, was an inevitable corollary of the classical Islamic conception of the state.

1. Brelvi, Mahmud-Islam and the Contemporary Faiths, Karachi, 1965, p.251.

This conception is no more valid. The notion of state now is understood in territorial terms. Consequently, the status of the dhimmis should change accordingly.

This change could be traced back to the 12th century when a number of Occidental Christians settled in the territory of Islam but keeping their own nationality. They did not undergo the system of the dhimmis. They were subjected to the competence of their consulates. This first and serious twist in the classical concepts regarding the dhimmis was later on prolonged through the institution of Capitulations. Another landmark in the development of the classical principles was the treaty of Kutchouk Kainardji, 1774, which accorded to Russia the protection of the Christian Orthodox subjects of the Ottoman Sultan. Since then the status of the dhimmis tended to be confused with that of the aliens. When sultan Abdel Mejid issued the Khatti-Sherif of Gulhane, in 1839, proclaiming the principle of equality between the Muslims and the Christians, the classical legal status of the dhimmis, presumably, was to disappear. It was the treaty of Lausanne on 24th July, 1923, which, practically, put a definite end to the status of the dhimmis as prescribed by the classical doctrine on the assumption that this

status which had its raison d'être in the Muslim theocratic Ottoman Empire lacks justification in secular republican Turkey.¹ In fact, the status of the dhimmis is not connected with the religious nature of the state. That status, as we have indicated, is rather an implication of the social conception of the state where neither jus sanguinis nor jus soli but religion grants citizenship. Gardet, in his study of the status of dhimmis came to the conclusion that: "la condition humiliée du dhimmi dans la cité musulmane, pour traditionnelle qu'elle soit, ne semble point liée aux principes mêmes de l'Islam: Il suffit pour s'en convaincre de se reporter au pacte du Hajar, et à ce que nous savons de l'attitude historique de 'Umar I."²

Nowadays, the Islamic state is no more a community. It has become a political entity of defined territorial sovereignty. The rulings relevant to the legal status of the non-Muslims residing in the Islamic state should adapt with the present organization. Therefore, a dhimmi, generally, ~~dhimmi~~ could acquire the nationality of the Islamic state in which he resides with full rights of citizenship. An exception may be made as regards Hejaz, if we consider the tradition that does not tolerate therein

1. Fattal - op. cit., pp.366-7.

2. Gardet - op. cit., p.346.

any religion save Islam as genuine.

The principle of equality between the citizens of the Islamic state, regardless of religion, is stated by the verse: "Lo! those who believe, and those who are Jews and Sabeans and Christians - whosoever believeth in Allah and the Last Day and doeth right - these shall no fear come upon them neither shall they grieve."¹ A telling precedent, in this respect, was advanced by Umar I when he exhorted an Egyptian Coptic to whip 'Amr's son² in retaliation. 'Umar commented by asking the governor's son, denying: "When did you enslave people who had been born free?" It is also reported that 'Umar saw a Jew begging. Knowing that he begs to pay the sum due for the jizya, 'Umar released him from the levy, gave him food and clothes and ordered a pension for him.³ 'Umar, also, directed his general, Ubu 'Ubayda, not to oppress the dhimmis nor to harm them. It is noteworthy that the Prophet and 'Umar I assigned for the dhimmis allocations from the product of the Sadaga.⁴ We would like to point out that the equality envisaged by the verse is meant to be applied to non-Muslims even if they were not subjects of the Islamic states. Breksoussi provides that: "Les Conventions de Genève s'inspirent du principe même qui est le fondement des religions

1. Qur'an; V:69

2. 'Amr was then governor of Egypt.

3. Arabi - op. cit., p.87.

4. Fattal - op. cit., p.369.

telles qu'elles ont été envisagées par tous les prophètes, c'est-à-dire que Dieu a préféré l'homme à toutes les créatures. C'est cette distinction que l'on peut appeler la dignité humaine. Le Coran confirme cette conception de la dignité à plusieurs occasions.... Nous voyons l'enseignement du Coran concorde à celui des Conventions de Genève en ce qui concerne la nécessité d'être juste envers l'ennemi qui possède, lui aussi, sa dignité personnelle. Tout homme a le droit d'être traité avec justice et humanité".¹ The Islamic view echoes, we believe, in Article 1/3 of the Charter which stipulates that the organization will achieve international co-operation "without distinction as to race, sex, language or religion."

It is of interest to compare the Qur'anic concise expression: "these shall no fear come upon them neither shall they grieve" with the lengthy articles of both the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948, and the European Convention of Human Rights signed in Rome on 4 November 1950.² Though the two documents are formulated in some sort of a bill of rights, yet the Qur'anic verse covers a wider range of rights and

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1. Ereksonssi, M.M.K. - Le Coran et les Conventions Humanitaires, Revue de la Croix Rouge XLII, 1960, No.493, pp.642, 646.
 2. The Universal Declaration of Human Rights is composed of 30 articles. Section I of the European Convention, which defines the rights and freedoms, contains 18 articles.

liberties. Its implication could offer a better guarantee for the individual. This remark calls for a word about the international Islamic guarantees of Human rights.

Jenks provides that¹ "Historically, the pre-occupation of international law with human rights has developed in four main contexts: (a) international action for the suppression of slavery and the slave trade... (b) other international measures for the protection of backward peoples, notably Berlin and Brussels Acts of 1885 and 1890, and the mandates and the trusteeship agreements, (c) international arrangement for the protection of minorities...culminating in the minorities treaties and declarations administered by the League of Nations which embodied undertaking to assure the full and complete protection of life and liberty without distinction of birth, nationality, language, race or religion and included provision for the free exercise of religion, rights of nationality and emigration, equality before the law, educational facilities for minorities and similar matters, and (d) the development in the law of State responsibility of the concept of an international

1. Jenks, C.Wilfred - The Common Law of Mankind, London, 1958, pp.44-5.

standard for the treatment of aliens, applicable to such matters as unlawful detention, harsh treatment during imprisonment, refusal of access to court or its equivalent, unreasonable delay in administering justice, irregularities in the conduct of proceedings, and contractual and property claims."

Throughout our study we have elucidated how the Islamic legal theory interested itself in the above mentioned topics. We explained the humane view of Islam towards slavery and its device to abolish this institution. As for the measures for the protection of backward peoples, Islam treats this issue from an ideological angle. It endeavours to propagate its culture as a means to raise the social standard of peoples. The protection of minorities and aliens is guaranteed on a basis of equality as we have already explained in the preceding lines. Hence, it is no exaggeration if we maintain that the Islamic legal theory is far advanced, in the domain of human rights, to the standards which modern international law has attained.

The doctrine of Neutrality in Islam:

Neutrality presupposes a state of war, in the

formal or material sense, between two or more subjects of law capable of waging war. The subject of law assuming the benefit of neutrality is distinguished from the belligerents by the fact that he takes neither side in war.¹

Khadduri claims that "if neutrality is taken to mean the attitude of a state which voluntarily desires to keep out of war by not taking sides, no such a status is recognized in Muslim legal theory. For Islam must ipso jure be at war with any state which refuses to come to term with it either by submitting to Muslim rule or by accepting a temporary peace arrangement."² This comment may have a basis in fact if we consider it in the terms of the classical doctrine.

Nevertheless, Khadduri admits that "if in principle the concept of neutrality has no place in the Muslim jural order, the law, however, was not enforced without regard to certain exceptional cases for doctrinal no less than for practical consideration. Islam voluntarily refrained from attacking certain territories which were regarded whether in difference to their benevolent attitude toward the Prophet Muhammad and his companions or because of their inaccessibility, as immune

1. Guggenheim, Paul - *Traité de Droit International Public*, Genève, 1954, vol.II, pp.393-4.

2. Khadduri - *War and Peace*, op. cit., p.251.

from jihad".¹

In fact, the "Arabs, even in the pre-Islamic history, exercised the practice of neutrality. They commonly refer to it by the word 'itizal'. Hamidullah is convinced that "the notion and the fact of neutrality were not unknown to early Muslims".² He advances, as substratum for his view, some Qur'anic verses among which we choose the following verse: "Except those who seek refuge with a people between whom and you there is a covenant, or (those who) come unto you because their hearts forbid them to make war on you or make war on their own folk. Had Allah willed He could have given them power over you as that assuredly they would have fought you. So, if they hold aloof from you --'itazalukum-- and wage not war against you and offer you peace, Allah alloweth you no way against them".³ The wording of the verse vouches for the view that Islam conceives and tolerates the notion of neutrality and that the Islamic state is committed to respect the legal status of a neutral state.

Hamidullah, also, substantiates his idea by offering some cases and treaties of neutrality from the

1. Khadduri - Ibid. p.252.

2. Hamidullah - Muslim Conduct, op. cit., p.308.

For a fuller idea about Hamidulla's view see the same reference pp.289-311.

3. Qur'an; IV:90.

time of the Prophet and the orthodox caliphs. An interesting incident is the following passage which occurred in a treaty concluded in the year 2 A.H. between the Prophet and the banu-Damrah. The passage reads: "He (i.e., the Prophet) will not attack banu Darmah nor will they attack him nor swell the troops of his enemies nor help his enemies in any way". This provision, obviously, envisages a state of neutrality for banu-Damrah.

Yet Hamidulla confesses that "as the Muslim jurists do not treat the question in a separate chapter but describe its provisions partly in the laws of peace and partly in the laws of war, it is not easy to glean all that is relevant to our purpose here".¹

In vouching for the admissibility of the notion of neutrality in the Islamic legal theory, we can forward two more verses. The first verse testifies to the possibility of an Islamic state being in a state of neutrality in a war among other Muslim states. The relevant verse reads: "And if two parties of believers fall to fighting, then make peace between them".² The verse, admittedly, presupposes that there is a third

1. Hamidullah - Ibid. p.308.

2. Qur'ân; IX:60.

state which keeps out of war, or, in other words neutral. Thereby, the neutral state is to make peace between the two contending parties. This is the only conceivable hypothesis to operate the verse amply. The second verse runs as follows: "The alms are only for the poor and the needy, and those who collect them and those whose hearts are to be reconciled..."¹ What interests us in this verse is its reference to "those whose hearts are to be reconciled".² Jurists³ advocate that the phrase applies to four categories of people; namely, (i) leading men to whom gifts are given and regard shown in the expectation of the conversion of their followers, (ii) leading men who are to be reconciled so that they become Muslims, (iii) those who are to be reconciled to come to the help of the Muslims, and, (iv) those who are to be reconciled to refrain from doing harm to the Muslim. This last category, in fact, is the category that concerns our study. Presumably, this division embraces non-Muslims.

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1. This is the translation of Pickthall. Watt holds that "The normal meaning of mu'allafah would be "are reconciled" that is 'are already reconciled'; the meaning 'are to be reconciled' though perhaps possible, is unusual" - Watt-Muhammad at Medina, op. cit., p.348.
 2. We could have cited this verse in favour of our view about the peaceful attitude of Islam towards the non-Muslims, but we preferred to skip it in that regard because some may wrongly think that material inducements were the dominant factor in attracting men to Islam.
 3. Al Farra' Abu Ya'la Muhammad b.al Hussein - Al Ahkam al Sultaneyah, Cairo, 1957, p.116.

According to al-Mawardi¹ they are to be given their gifts from the fifth of spoil, or from the fara'i, what remains over after four camels or their equivalent has been given to every combatant.² This means that they are reconciled in time of war. Reconciliation in this case is nothing but convincing non-Muslims to take a neutral position in a war which Muslims undertake.

Thereby neutrality is aimed at as one of the purposes of reconciling non-Muslims. Assuredly, we do not come across detailed provisions on neutrality, but that is due to the fact that the laws of neutrality were almost very rudimentary until little more than half a century ago. To put it in Sultan's³ words, it seems that the primitive form of the institution of neutrality "était une attitude en vue d'assurer la paix à l'Etat qui s'en prévalait. Profitant de l'anarchie internationale, se basant sur le principe de l'équilibre européen et se présentant comme le symbole de la paix,

1. Al Mawardi - Al Ahkam Al Sultaneya, Cairo, 1380 A.H. (1960 A.D.) p.123.

2. It is to be recalled that the verse deals with the sadaqat, the contributions of the Muslims, but for al-Mawardi the sadaqat are dedicated only for the Muslims.

3. Sultan, Hamed - L'évolution du Concept de la Neutralité, thèse pour le doctorat, Cairo, 1938, p.315.

l'existence de l'institution de la neutralité fut tolérée, puis reconnue par le droit inter-étatique, comme une attitude engendrant des devoirs d'impartialité et d'abstention. Pour assurer la paix, son rôle principal, le concept de la neutralité ne contenait, à l'origine, que des devoirs et ne comportait aucun droit. Cela.... continuant son évolution, se basant sur la conception négative de solidarité internationale, et s'appuyant sur l'idée de la souveraineté, la neutralité se présentait dans les relations internationales sous une nouvelle forme persuasive: un compromis entre les intérêts des belligérants et ceux des neutres". There is no objection to the Islamic theory of neutrality developing on the same modern lines.

It is true that abu-Hanifa viewed that the institution of "those whose hearts are to be reconciled" should be regarded as obsolete on the assumption that Islam had become strong enough and was no more in need for compromising with its enemies. The argument of abu-Hanifa may conform with the position of the Islamic State at his time, but that does not mean that it is valid for all times. Abu Hanifa, in this, is rather stating a political rather than a legal rule. The

decisive point is whether or not the principle, as such, is recognized by the Islamic theory, and this, abu-Hanifa did not deny.

E P I L O G U E

"For centuries the law has held a paramount place in the civilization and structure of the Muslim world, at least in the Islamic ideal. The prestige it has enjoyed may, indeed, be regarded as without parallel in history, for this civilization was uniquely based on religion, and the religion of Islam always accorded a pre-eminent place to law".¹ Therefore Islamic ambition to reconquer its lost field of cultural glory should coincide with a legal theory that would fit in with the changed conditions of the world. This task would have been easier had almost the first Islamic law books and collections of traditions not long since perished.

These primary sources were capable of offering the authentic information which we still lack and seek. This deficit is aggravated by the fact that the intricate and involved history of the course of law is virtually tedious to trace during the Umayyad period, so one has to pass direct to the Abassids when the four schools of law began to elaborate a legal theory of their own in an anti-Umayyad political and legal atmosphere.

1. Anderson - Law as a Social Force, op. cit., p.13.

In fact what we term today the orthodox Islamic theory of law may be said to have started with the second century A.H. "Islamic jurisprudence thus began not as the scientific analysis of the existing practice of courts whose authority was accepted, but as the formulation of a scheme of law in opposition to the practice. The first scholar jurists were men of religion rather than men of law, concerned, almost exclusively, with the elaboration of the system of ritual practices. Their interest in the field of legal relationships strictly so called was a subsequent development, deriving its major impetus from political ideals of the Abbassids, and their apparent approach to law, therefore, was initially, that of religious idealists. Such an activity of academic speculation contrasted sharply with the pragmatism of Umayyad legal tradition and marked a new point of departure."

"Historical circumstances had thus produced a distinction between the legal doctrine expounded by the scholars and the legal practice of the courts".¹

It is much to be regretted that the doctrines which the orthodox schools have elaborated "put Islam into a strait jacket which, if it were accepted with all

1. Coulson - op. cit., p.37.

its implications - and it never was - would make all development in Muslim society impossible. It also corrupted it from within, for once Shāfi'i's principle was accepted the only way to enforce a new law or validate existing practice was to invent a tradition with an isnad which conformed to the accepted pattern....The process of stiffening and hardening the legal system of Islam was carried through. The old and comparatively elastic régime of the Umayyads, which, apart from certain obvious but unimportant departures from Qurānic legislation, faithfully represented the mild reasonableness of Muhammad's rule was replaced by a rigid unbending code of law which in spirit was opposed to the whole tenor of his life and thought, and yet claimed, by the benefit of his name, the authority of God himself".¹ Thus existed a considerable gulf between theory and practice. "In theory the sacred law, based exclusively on divine revelation and deduction therefrom reigned supreme and customary law had no official locus standi either in jurisprudence or substantive law. In practice on the other hand, a great deal of customary law was incorporated in the Shari'ah".²

1. Guillaume, Alfred - Islam, Penguin Books, 1962, p.98.

2. Anderson - Law as a Social Force, op. cit., p.19.

In fact, the central problem facing a commentator on Islamic law is: what is the true meaning and right commands of the Shari'ah? God only knows ~~what~~ best what He reveals. Thus the task of Muslim jurists is to discover and understand the genuine injunctions of the Revelation. And so, when we commented on the classical doctrine we did not seek, at all, to accuse classical writers of being unscrupulous. We only intended to emphasize that their theory is, by no means, sacrosanct since it is speculative and inevitably influenced by environmental conditions.

In addition, the Islamic classical theory represents an idealization that never, as has been shown throughout our study, met with full practical expression, a fact which deprives the classical doctrine of much of its pragmatic value. The idea of Islam being both religion and state proved to be impractical in a world divided into independent political entities. A precedent in support of this fact, is the "case of Abdel Hakim", a Tunisian and consequently a French protégé. Abdel Hakim, resident in Morocco, alleged Moroccan nationality on the grounds that as a Muslim he could become the national of any Muslim state. This claim was repudiated, in 1905, by the Tribunal of the Seine. Moreover, the limit of ten years for a peace treaty was not regarded on several occasions. The Umayyads signed,

with the Byzantines, treaties of which the duration was thirty years, some even for unlimited periods.¹ The treaty of 1535 between Turkey and France was to remain valid for the whole life-time of the signatory potentates.² From the international legal point of view, the classical doctrine of the jihad proved to be incompatible with the Islamic basic ideology of peace.³ Furthermore, Islamic history demonstrates situations which one finds it difficult to define in terms of the classical doctrine of jihad. Such is the case of a territory, whose revenues are shared by both Muslims and non-Muslims.⁴ Another instance is when a non-Muslim state recognizes nominal spiritual supremacy by the Muslim caliph over its Muslim subjects.⁵

We have explained how close present precepts of international law could be to a modern interpretation of Islamic

1. Cf. supra p. 92 & 95-97.

2. Cf. supra p. 110-111.

3. It is a salient historical fact that inhabitants of the territories conquered by Muslims did not embrace Islam until after centuries of conquest. Islam in the Far East, where one quarter of all Muslims live, spread through the peaceful efforts of merchants and missionaries.

4. The Umayyads and Byzantines shared the revenues of Cyprus. Another example was Sidon, the revenues of which were, at one time, shared by Muslims and Crusaders. See supra p. 106.

5. Two examples in this respect are: (i) the treaty of 1027 between the Fatimid al-Zahir and Constantine VIII (see supra p. 102), and (ii) the treaty of Kucak-Kaynarji in 1774 (see supra p. 112).

theory. This semblance is, assuredly, a credit to those Islamic principles which came into being some ten centuries before the emergence of modern international law. In fact, within the wide range of what is mubah, permissible, and matruk, indifferent, Islam has been, and should be adaptable with the circumstances of time and place. This is the task of those enlightened jurists whom the Prophet is reported to have considered as perhaps more aware of their earthly affairs than himself.

In conclusion, an interesting question may pose itself as regards the pragmatic utility of our study. We are confident that this work entails matters of vital practical importance. Today we witness an ever-increasing trend in the Muslim world towards the revival of Islam and the implementation of its concepts.¹ Sooner or later this movement will prevail, in which event the rigid classical doctrine is likely to cause a breach between the Islamic and non-Islamic states or, at least, debar further co-operation and interdependence of the two worlds. Hence, it is about time to introduce an adequate interpretation to be of service to the cause of world peace and security. Apart from many details

1. Mauritania has assumed the title of "The Islamic Republic of Mauritania". The first constitution of independent Pakistan mentioned that Pakistan was an Islamic state. The National Charter of the U.A.R. explicitly stipulates that the Arab socialism should be based on the spiritual values of the nation.

of considerable interest, Islamic legal theory, as we have elucidated, represents an advance on modern thought as regards the fundamental problems of international law:

(i) Codification - efforts up till now have failed to compile the general precepts of modern international law, whereas the general principles of Muslim international law are contained in the written formal sources of the Shari'ah. Needless to say an available, accepted compilation greatly helps in the furtherance of international prosperity, being a common ground for better international understanding. (ii) Sovereignty and obligation - modern writers failed to offer an acceptable theory as regards these two highly debatable subjects, a deficiency which Islamic theory evades owing to its religious background. (iii) Aggression - the vagueness of this notion threatens to shake modern international law to its foundations since it reveals the fact that the arbitrary discretion of states is still the real safeguard of world peace. The ideological approach of Islam to this subject relaxes, to a great extent, the relevant doctrinal and practical arguments.

We trust that our study which, to the best of our capacity is unprejudiced, will induce those who seek the mere truth to contribute to its more profound elucidation and substantiation. Some may find that our conclusions

were, in some respects, far fetched. This attitude, we are confident, will be due to the influence of classical doctrine which they, assuredly, consider as the starting point of their judgement on our views. "I desire naught save reform as far as I am able. My welfare is only in Allah. In Him I trust and unto Him I turn (repentent)".¹

1. Qur'an; XI:88

B I B L I O G R A P H Y

Primary Sources:

- Abu Yusuf, Yaqûb b.Ibrahim al Ansari: (i) Al Kharaj, Cairo, 1352 A.H. (ii) Al Radd 'Ala Siyar al Awza'i, Cairo, 1357 A.H.
- Abu Ya'la, Muhammad b.al Hussein al Farrâ': Al Ahkam al Sultaneyya, Cairo, 1957.
- Abul Fidâ', Imaîl b.Ali: Al Mukhtasar fi Tarikh al Bashar, Constantinople, 1286, A.H.
- Al Jazri, Abul Sâ'dat Mubarak b.Mohammed b.Al Athir-Jami': Al-Usûl fi Ahadith al Rasûl, Cairo, 1950.
- Al Halabi, Ali b.Ibrahim b.Ahmad: Insân al-Uyûn, fi Sirat al-Nabeyy al-Mâ'mûn.
- Ainee, Badr el-Dîn Mahmûd b.Ahmad b.Mussa: Al Binaya, fi Sharh al-Hedaya.
- Bukhari, Muhammad b.Ismail: Al Jami'al-Sahih, Cairo, 1376 A.H.
- Baladadhuri, Abul Abbas Ahmed b.Yahya b.Jabir: Futûh al Buldan, ed.de Goeje, Leyden, 1866.
- Isbahani, Abu Faraj: Kitab al Aghani.
- Ibn Rustah: Al 'Alaq al Nafisah, ed.de Goeje, Leyden, 1892.
- Ibn Khaldûn, Abdel Rahman: Al Muquaddima, ed.Quartemère, Paris, 1858

- Ibn Qutayba, Abu Muhammad Abdalla b. Muslim: (i) Al-Akhabar, Cairo, 1925, (ii) Kitab al Ma'rif, ed. G. Wusterfeld, Gutingen, 1850.
- Ibn Taymeya, Taqey el-Din b. Abdel Salam: (i) Al Siyasa Al Shar'-iyya, Cairo, 1322 A.H. (ii) Iqtida' al-Sirah al Mustaqim Mukhalafat Ahl al-Jahim, Cairo, 1950.
- Ibn Hajar, Shehabuddin Ahmed Makki: Tuhfat al Muhtaj fi Sharh al Minhaj.
- Ibn 'Abd Allah, al-Hassan - Athar al-Uwal fi Tartib al-Duwal, Cairo, 1395 A.H.
- Mubarrad, Muhammed b. Yazid b. 'Abdel Akthar al Themali al Azdi Abul Abkas: Al Kamil, ed. W. Wright, Leipzig, 1864.
- Maqrizi, Taqey el Din Ahmed b. 'Ali b. Abdel Qader: Al Mawa'iz wal 'Itibar bi Zikr al Khitat wal Athar, Bulaq, 1270 A.H.
- Muslim, Abul Hussein b. Al Hajjaj: Sahih Muslim, Cairo 1929-30.
- Murghinani, Burhanuddin 'Ali: Al Hedaya.
- Mawardi, Abul Hassan Muhammad b. Habib: Al Ahkam al-Sultaneyya, Cairo, 1960.
- Qur'an: The translation of Peckthall was often used for the purposes of this thesis.

- Qummi, Nizamuddin - Tafsir Ghara'eb al Qur'ān, Cairo.
- Shafi'i, Abu Abdallah Muhammad Idris: Kitab al-Umm,
Cairo, 1321-25 A.H.
- Shawkani, Muhammad b.Ali: Nayl al-Awtar, 2nd.ed. Cairo,
1952.
- Sarakhsi, Shams el Din: (i) Usūl al Sarakhsi, Cairo,
1372 A.H. (ii) Sharh al-Siya al-Kabir, a comment
of the treatise of Muhammad b. al-Hassan al-
Shaybahi "Al Siyar al-Kabir", Hayderabad,
1335 A.H.
- Sahnūn, b.Sa'id al Tanukhi - Al Mudawwana al-Kubra,
Cairo 1323 A.H.
- Tabari, Abu Ja'far Muhammad b.Jarir: (i) Tarikh al-Rusul
wal Mulūk, ed.de Goeje, Leyden, 1879-1901,
(ii) Tafsīr al Tabari, Cairo, 1374.
- Yaqūt b.Abdallah al Hamawi: Mu'jam al Buldān, ed.G.
Wusterfeld, Leipzig, 1866-73.

Secondary Works:

A. - Works in Arabic

- Amin Ahmed: Duha al-Islam, Cairo, 1956.
- 'Adawi, Jalal: Al Ijbar al Qanuni 'ala al Mu'āwada,
thesis, Alexandria, 1960.

Abu Heif, Ali Sadek: Al Qanun al-Dawli al 'Ām, Alexandria, 1965.

Abu Zahra, Muhammad: Al 'Ilaquat al-Dawleyah fil Islam, Cairo, 1964.

Al Ghunaini, Muhammad Talaat: (i) Usūl al-Qanun al Wadi'i, Alexandria, (ii) Al 'Urf fil Qanūn al Dawli, Majallat al Huqūq, Alexandria, 1961.

Darwaza, Muhammad Izzat: Al Dustūr al Qur'āni fi Shu'ūn al Hayah, Cairo.

Ghanem, Muhammad Hafez: Al Usūl al-Jadida fil Qanūn al Dawli, Cairo, 2nd.ed., 1954.

Hussein, Sayed Abdallah: Al Muqaranat al-Tashri'yya, Cairo 1947.

Heikel, Muhammad Hussein: Hayat Muhammad, Cairo, 1935.

Hubballah, Muhammad: Mawqif al-Islam menal Ma'rif wal Taqaddum al Fkiri, an article in a collection entitled "Al Thaqafa al-Islameyah wal Hayat al-Mu'asira", compiled by Muhammad Khalaf Allah, Cairo.

Hamidullah, Muhammad: Majmu'at al Watha'iq al-Siyaseya fil 'Ahd al Nabawī wal Khilafa al Rashida, Cairo, 1941.

- Khallaf, 'Abdel Wahab: (i) Al Siyasa al Shari'iyya aw Nizam al Dawla al-Islamiya fil Shu'un al Dustureyya, Cairo, 1350 A.H. (ii) Masadir al Tashri' al Islami Marina, Majallat al Qanun wal Iqtisad, Cairo, April and May, 1945.
- Maraghi, Ahmed: Tafsir al Maraghi, Cairo 1st.ed., 1946 and 2nd ed., 1953.
- Metwali, Abdel Hamid: Masadir al-Ahkam al Dustureyya fil Shari'ah al-Islameyya, Majallat al Huquq, 11th year, vols. 1, 2.
- Rida, Muhammad Rashid: (i) Al Wahy al Muhammadi, Cairo, 1948, (ii) Al-Khilafa aw al-Imama al Kubra, Cairo, 1341 A.H.
- Shaltūt, Mahmud: Al Islam, Shari'a wa 'Aqida, Cairo.
- Said Amin: Tarikh al Islam al Syasi, Cairo.
- Shalabi, Muhammad Mustafa: (i) Al Madkhal fil Ta'rif bel Fiqh al Islami, Cairo, 1959, (ii) Ta'li'l al Ahkam.
- Sha'abān, Zakeyuddin: Delalat al-Kitab wal Sunna 'ala al al-Ahkham al-Shar'iyya, Majallat al 'Ulum al-Qanuneyya wal Iqtisadeyya, Cairo, July, 1951.

WORKS IN EUROPEAN LANGUAGES

A. - Books:

Arberry, A.J. (i) The Legacy of Persia, Oxford, 1953.

(ii) The Koran interpreted, London, 1955.

Anderson, J.N.D. - Islamic Law in the Modern World, London, 1957.

Arabi, Abdel Rahman - L'Islam et la guerre à l'Epoque du Prophète Mahomet, Ambilly, 1954.

Armanazi, Najib - Les Principes Islamiques et les Rapports Internationaux en Temps de Paix et de Guerre, Paris, 1929.

Ameer Ali, Sayed - The Spirit of Islam.

Arnold, Sir Thomas - (i) The Caliphate, Oxford, 1924.

(ii) The Preaching of Islam, 3rd.ed., London, 1935.

Brierly, James Leslie - The basis of Obligation in International Law and other Papers, Oxford, 1959.

Bentwich, Norman - The Religious Foundations of Internationalism, 2nd.ed. 1959.

Ballis, William Belcher - The Legal Position of War, The Hague, 1937.

Brevli, Mahmud - Islam and the Contemporary Faiths, Karachi, 1965.

- Bukhush, Khuda S. - Contribution to the History of
Islamic Civilization, Calcutta, 1930.
- Carlston, Kenneth S. - Law and the Structure of Social
Action, London, 1956.
- Casterin, Erik - The Present Law of War and Neutrality,
Helsinki, 1954.
- Coulson, W.J. - A History of Islamic Law, Edinburgh, 1964.
- Chiragh, Ali - A Critical Exposition of the Popular
Jihad, 1885.
- Gibb, Sir Hamilton - Mohamedanism, 2nd.ed., London, 1953.
- Diehl, Charles - Histoire de l'Empire Byzantin, Paris,
1920.
- Dermengheim, Emile - Muhammad and the Islamic Tradition,
New York, and London, 1958.
- Duguit, Léon - Traité de Droit Constitutionnel, Paris,
1927.
- Deutonomy (The Holy Bible, The British and Foreign
Bible Society), London, 1955.
- Eginhard - Vie de Charlemagne edited and translated by
Louis Halpern, Paris, 1923.
- Fenwick, Charles - International Law, 3rd.ed., 1948.
- Fattal, Antoine - Le Statut Légal des non-Musulmans en
Pays d'Islam, Beyrouth, 1958.

- Gardet, Louis - La Cité Musulmane, Vie Sociale et
Politique, Paris, 1954.
- Guggenheim, Paul - Traité de Droit International Public,
Genève, 1953/54.
- Grotius, Hugo - Du Droit de la Guerre et de la Paix,
traduction Berbyrac. Discours préliminaires.
- Guillaume, Alfred - (i) The Life of Muhammad, a
translation of Ishac's Sirat Rasûl Allah, 1955.
(ii) Islam, Penguin Books, 1962.
- Glubb, Sir J.B. - The Great Arab Conquests, London, 1963.
- Greenspan, Morris - Modern Law of Land Warfare,
California, 1959.
- Goodrich, Leeland M. - The United Nations, London, 1960.
- Hitti, Philip K. - History of the Arabs, London, 1951.
- Hamidullah, Mohammad - (i) The Muslim Conduct of State,
Lahore, 1953. (ii) Le Prophète de l'Islam,
Paris, 1959.
- Jenks, C. Wilfred - The Common Law of Mankind, London, 1958.
- Krabbe, Hugo - The Modern Idea of State, English
translation, New York and London, 1927.
- Khadduri, Majid - War and Peace in the Law of Islam,
Baltimore, 1955.

Kelsen, Hans - (i) General Theory of Law and the State, (Cambridge, Mass. 1949). (ii) Principles of International Law, New York, 1959. (iii) The Communist Theory of Law, London, 1955. (iv) The Law of the United Nations, London, 1951.

Leca, Jean - Les Techniques de Révision des Conventions Internationales, Paris, 1961.

Le Tèvre, G.J.S. (Baron Everrely) - The Turkish Empire from 1288 to 1922, London, 1923.

Lane, Poole - Selections from the Koran.

Moberg, Axel - The Book of Himyarites, London, 1924.

Mc Nair, Lord - The Law of Treaties, Oxford, 1961.

Main, Sir Henry - International Law, London, 1888.

Muir, Sir William - Life of Mahomet.

Mawlawi Muhammad Ali - The Religion of Islam, Lahore, 1936.

Norgaard, Carl Aage - The Position of the Individual in International Law, Copenhagen, 1962.

Nuruddin Ali of Mirghinan - The Hedaya translated by Charles Hamilton with its comment called "Kifaya", Calcutta, 1834.

Nys, Ernest - Les Origines du Droit International, Bruxelles, 1894.

- Nussbaum, Arthur - A Concise History of the Law of Nations, New York, 1963.
- Ostrogorsky, George - History of the Byzantine State, translated by Joan Huxley, Oxford, 1956.
- Olinder, Gunnar - The Kings of Kindah, London, 1927.
- Oppenheim's International Law by Lauterpacht, 8th ed., London, 1955.
- Proudhon - La Guerre et la Paix.
- Pirenne, Henri - Mohamed and Charlemagne, London, 2nd. ed., 1940.
- Phillipson, Coleman - The International Law and Custom of Ancient Greece and Rome, London, 2nd ed., 1940.
- Quadri, Rolando - Diritto Internazionale Pubblico, Palermo, 1956.
- Russell, Bertrand - Power, 3rd.ed., Unwin Books, 1963.
- Rateb, Aisha - L'individu et le Droit International, Thesis, Cairo, 1959.
- Reuter, Paul - International Institutions, translated by J.M.Chapman, London, 1955.
- Redslob, Robert - Histoire des Grands Principes du Droit des Gens, Paris, 1923.

- Roux, Jean Paul - L'Islam en Occident (Europe-Afrique)
Paris, 1959.
- Shafi'i - Risala, translated with an introduction by
Majid Khadduri, Baltimore, 1961.
- Schacht, Joseph - (i) Esquisse d'une Histoire du Droit
Musulman, translated by Jeanne et Felix Awi,
Paris. (ii) The Origins of Muhammedan Juris-
prudence, Oxford, 1950.
- Schwarzenberger, Georg - International Law, 3rd ed.,
London, 1957.
- Stephens, May W.R.W. - Christianity and Islam, The Bible
and the Koran, London, 1877.
- Smith, R. Bosworth - Muhammad and Muhammedanism, Lectures
delivered at the Royal Institute of Great
Britain, 2nd ed., London, 1876.
- Sultan Hamed - L'évolution du Concept de la Neutralité,
Thesis, Cairo, 1938.
- Sharwani, Haroon Khan - Studies in Muslim Political
Thought and Administration, Lahore, 1959.
- Siddiqi, S.A. - Public Finance in Islam, Lahore, 1952.
- Schuon, Fritjhof - Comprendre l'Islam, Gallimard, 1961.
- Sanhoury, Abdel Razzaq - Le Caliphat.
- Scelle, George - Manuel de Droit International Public,
3rd.ed., Paris, 1948.

Stevenson, W.B. - The Crusaders in the East, Cambridge,
1907.

Spiroupolos, Jean A. - L'individu en Droit International,
Paris, 1928.

Tritton, A.S. - The Caliphs and their non-Muslim Subjects,
Mysore City, 1930.

Tyan, Emile - Institutions du Droit Public Musulman,
Recueil Sirey, Paris, 1954.

Testa, Baron de - Recueil des Traités de la Porte Ottomane,
Paris MDCCCLXIV.

Visscher, Charles de - (i) Théories et Réalités en Droit
International Public, Paris, 1953. (ii) Problème
d'Interprétation Judiciaire en Droit Inter-
national Public, Paris, 1963.

Weissberg, Guenter - The International Status of the
United Nations, New York and London, 1961.

Welhausen - Arab Kingdom and its Fall, translated by
Margaret Graham, Calcutta, 1927.

Watt, Montgomery - (i) Muhammad, Prophet and Statesman,
Oxford Paperbacks, 1961. (ii) Muhammad at
Medina, Oxford, 1962.

B. - Articles:

Anderson, J.N.D. - Law as a Social Force in Islamic
Culture and History, BSOAS, 1957, XX.

- Bedier - Charlemagne et la Palestine, Revue Historique,
vol.CLVII, 1928.
- Daneff, S. - Conception du Droit International Privé
d'après la Doctrine Pratique en Bulgarie, R.A.D.I.,
vol.33, No.111, 1930.
- Gardener, W.R.W. - Article in the Muslim World Review,
1912, about "jihad".
- Kunz, Joseph - The status of the Holy See in International
Law, A.J.I.L., vol.46, 1952.
- Taub, Baron Michel - Etudes sur le Developpement
Historique du Droit International dans l'Europe
Orientale, R.A.D.I., vol.III, 1926.
- Trainin - Questions of Guerilla Warfare in the Laws of
War, A.J.I.L., vol.40.
- Reglade, Marc - Perspective qu'ouvrent les Doctrines du
Doyen Duguit pour un renouvellement de l'Etude
du Droit International Public, R.G.D.I.P.,
vol.XXXVII, 1930.
- Shehata, Ibrahim - Islamic Law and the World Community,
Harvard International Club Journal, vol.I,
No.4, Dec.1962.
- Sorensen, Max - Principes du Droit International Public,
R.A.D.I., vol.III, 1960.

Verdross, Alfred - Règles Générales du Droit International
de la Paix, R.A.D.I., vol.30, 1929.

Vasilier, A.A. - Byzantium and Islam, an article in a
book entitled "Byzantium", Oxford Paperback,
1961.

Wood, Hugh McKinnon - The Treaty of Paris and Turkey's
Status in International Law, A.J.I.L., vol.37,
1913.

Encyclopaedias:

1. The Jewish Encyclopaedia, New York and London, MD CCC VII.
2. The Encyclopaedia of Islam by M.Th.Houtsma and
H.J.Wensinck, Leyden and London, 1934.
3. Shorter Encyclopaedia of Islam, by H.A.R.Gibb and
J.H.Kramers, Leiden, 1953.

Dictionaries:

1. Lane's Arabic English Lexicon.
2. A Dictionary of Islam by Thomas Patrick, London, 1935.
3. Al Mū'jam al-Wasit, by Majmā al Lughā al-Arabia (The
Academy of Arabic Language), Cairo, 1960.