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**Just War, Peace and Human Rights  
under Islamic and International Law**

**Hilmi M. Abdul Rahman**

**Institute of Islamic Studies  
McGill University, Montréal  
August 1997**

A thesis submitted to the Faculty of Graduate Studies  
and Research in partial fulfillment of the  
requirements for the degree of Master of Arts



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To the memory of my late parents,  
may *Allāh* bestow on them  
His mercy  
and be pleased with them

## Abstract

Author: Hilmi M. Abdul Rahman  
Title: Just War, Peace and Human Rights under Islamic and International Law  
Department: Institute of Islamic Studies  
Degree Sought: Master of Arts

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The present thesis attempts a critical examination of the theory of war under Islamic and public international law, in an effort to demonstrate that *jihād* is a just, defensive, and exceptional form of warfare, geared to the maintenance of peace, and the protection of human rights for all people, whether those rights be exercised alone or in association with others, without distinction as to race, sex, language or religious belief. Through an examination of the norms of Islamic and public international law on armed conflict, this thesis argues that Islamic law, which governs the doctrine of *jihād*, is realistic and practical. Further, it made a great contribution to international humanitarian law more than a millennium before the codification of the four Geneva Conventions of 1949, and eight centuries before the appearance of Hugo Grotius treatise "*De jure belli ac pacis libri tres*" in 1625.

Furthermore, this comparative study reveals that the word *jihād* might be one of the most misunderstood terms in the history of Islamic legal discourse. This analysis also claims that the division of the world into *dār al-Islām* (territory of Islam) and *dār al-ḥarb* (territory of war), which is not predicated on a state of mutual hostility, was dictated by particular events, and was not imposed by scripture. Moreover, this discussion provides that Islamic humanitarian law regulates conduct during a *jihād* on the basis of certain humane principles, compatible with those upon which modern international conventions are based. Finally, this thesis concludes that there is a unique relationship between *jihād* and the notion of just war, a matter which qualifies it as the *bellum justum of Islam*.

## Résumé

Auteur: Hilmi M. Abdul Rahman

Titre: Guerre juste, paix et droits de la personne sous le droit islamique et le droit public international

Département: Institut des études islamiques

Diplôme: Maîtrise en Arts

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La présente thèse tente de faire un examen critique sur la théorie de la guerre sous le droit public international et le droit islamique dans le but de démontrer que le *jihād* est une forme de guerre juste, défensive et exceptionnelle, orientée vers le maintien de la paix, et de la protection des droits de la personne et ce, qu'ils soient exercés seuls ou en association avec d'autres droits, sans distinction de race, sexe, langue ou croyance religieuse. À travers un examen des normes du droit public international et du droit islamique relatives aux conflits armés, cette thèse argüe que le droit islamique gouvernant la doctrine du *jihād* est réaliste et pratique. De plus, ce droit a contribué d'une manière importante au droit humanitaire international plus d'un millénaire avant la codification des quatre Conventions de Genève de 1949, et huit siècles avant l'apparition du traité de Hugo Grotius "*De jure belli ac pacis libri tres*" en 1625.

Par ailleurs, cette étude comparative révèle que le mot *jihād* pourrait bien être un des termes les plus incompris de l'histoire du discours légal islamique. Cette analyse prétend également que la division du monde en *dār al-Islām* (territoire de l'Islam) et *dār al-harb* (territoire de guerre), ce qui ne signifie en aucun cas qu'ils doivent être en hostilité mutuelle, a plutôt été dictée par des événements particuliers, et non pas imposée par les Écritures. Du reste, cet exposé démontre que le droit humanitaire islamique régularise la conduite générale durant un *jihād* sur le fondement de certains principes humains, compatibles avec ceux sur lesquels sont fondées les conventions internationales modernes. Finalement, cette thèse conclut qu'il y a une relation unique entre le *jihād* et la notion d'une guerre juste, ce qui en fait le *bellum justum de l'Islam*.

## **Acknowledgements**

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Institute of Islamic Studies  
McGill University

TRANSLITERATION TABLE

Consonants: ' initial: unexpressed ' medial and final: '

Arabic	Persian	Turkish	Urdu	Arabic	Persian	Turkish	Urdu
ب b	b	b	b	پ p	p	p	p
ت t	t	t	t	ط t	t	t	t
ث			ṭ	ظ z	z	z	z
ث th	ṭ	ṭ	ṭ	ع '	'	'	'
ج j	j	c	j	غ gh	gh	ğ	gh
چ ch	ch	ç	ch	ف f	f	f	f
ح h	h	h	h	ق q	q	k	q
خ kh	kh	h	kh	ك k	k	k	k
د d	d	d	d	ج ğ	ğ	ğ	ğ
ذ d			d	ث ṭ		ṭ	
ذ dh	z	z	z	ل l	l	l	l
ر r	r	r	r	م m	m	m	m
ز			r	ن n	n	n	n
ز z	z	z	z	و			u
ژ zh	zh	zh	zh	ه h	h	h	h
س s	s	s	s	و v	v	v	v
ش sh	sh	ş	sh	ي y	y	y	y

Vowels, diphthongs, etc. (For Ottoman Turkish vowels etc. see separate memorandum.)

short: ا a; ا i; ا u.

long: ا ā; ا ū, and in Persian and Urdu also rendered ō; ا ī, and in Urdu also rendered by ē; ا (in Urdu) ē.

alif maqṣūrah: ا ā.

diphthongs: ا ay; ا aw.

tā' marbūṭah: ا ah; in idāfah: at.

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## Introduction

Relying on a number of minor secondary sources, some Western scholars have argued that Islam was spread by the sword, force and compulsion,<sup>1</sup> and that a state of war must necessarily exist between Muslims and the rest of the world until the latter accepts Islam or submits to the power of the Islamic state.<sup>2</sup> They undoubtedly believe that every Muslim bears a religious duty to kill any unbeliever when *jihad* breaks out.<sup>3</sup> W. Montgomery Watt treats this issue in the following statement:

"For many centuries most Europeans believed that Islam was a religion of violence which spread by the sword.<sup>4</sup> This was part of the distorted image of Islam, which, as I have argued elsewhere,<sup>5</sup> was the negative identity of western Europe or Western Christendom - a picture of what it considered itself not to be."<sup>6</sup>

Among Western scholars who propagate this "distorted image" is

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<sup>1</sup>Sobhi Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine," *Recueil des Cours* 117 (1966): 241.

<sup>2</sup>Bernard Lewis, *The Political Language of Islam* (Chicago: The University of Chicago Press, 1988), 73; Majid Khadduri, *The Islamic Law of Nations: Shaybani's Siyar* (Baltimore, Maryland: The John Hopkins University Press, 1966), 13.

<sup>3</sup>Farooq Hassan, *The Concept of State and Law in Islam* (New York: University Press of America, 1981), 202; W. Gardner, "Jihad," *The Moslem World* 2: 1 (January 1912): 348.

<sup>4</sup>On the contrary, Sir Thomas Arnold conceives that the expansion of the Islamic religion has transpired through peaceful methods particularly preaching. See Thomas W. Arnold, *The Preaching of Islam: A History of the Propagation of the Muslim Faith* (Lahore, Pakistan: Muhammad Ashraf Publications, 1961), 115-119.

<sup>5</sup>W. Montgomery Watt, *The Influence of Islam on Medieval Europe* (Edinburgh: The University Press, 1972), 72-84.

<sup>6</sup>W. Montgomery Watt, "The Significance of the Theory of Jihad," in *Akten des VII. Kongresses für Arabistik und Islamwissenschaft*, eds. Herausgegeben Von and Albert Dietrich (Göttingen: Vandenhoeck and Ruprecht, 1976), 390.

Bernard Lewis, who views Islam "as a militant, indeed as a military religion, and its followers as fanatical warriors, engaged in spreading their faith and their law by armed might."<sup>7</sup> A similar approach was adopted by D.B. Macdonald in his article "*Djihad*" in "The Encyclopaedia of Islam."<sup>8</sup> Macdonald claimed that "*djihad* consists of military action with the object of the expansion of Islam."<sup>9</sup>

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<sup>7</sup>Bernard Lewis, *supra* note 2, at 71. In this sense, Max Weber stated that "Islam was never really a religion of salvation. It is a warrior religion." See Bryan S. Turner, *Weber and Islam: A Critical Study* (London: Routledge & Kegan Paul, 1974), 34; Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, 3 vols. (New York: Bedminster Press, 1968), 2:624-626; Ralph Schroeder, *Max Weber and the Sociology of Culture* (London: Sage Publications, 1992), 65-70.

<sup>8</sup>*The Encyclopaedia of Islam*, 2nd ed., s.v. "Djihad," by D.B. Macdonald.

<sup>9</sup>In his book entitled "*Promesses de L'Islam*," Roger Garaudy refutes Macdonald's notion. In the following statement, Garaudy points out that: "Il est de tradition, chez les Occidentaux, de traduire *djihad* par «guerre sainte», c'est-à-dire guerre entreprise pour la propagation de l'Islam. Le rédacteur de l'article «Djihad» dans l'*Encyclopédie de l'Islam*, l'orientaliste D.B. Macdonald, commence par affirmer: «L'expansion de l'Islam par les armes est un devoir religieux pour tous les musulmans.»

Ore, *djihad* ne signifie pas «guerre» (il existe un autre mot pour cela: *harb*), mais «effort» sur le chemin de Dieu. Le Coran est parfaitement explicite: «Pas de contrainte en matière de religion» (II, 256).

Tous les textes que l'on a invoqués pour faire de l'Islam un épouvantail, une «religion de l'épée», ont été invariablement séparés de leur contexte. On a, par exemple, appelé «verset de l'épée» le verset 5 de la IX<sup>e</sup> sourate en détachant «tuez les polythéistes partout où vous les trouverez» du verset précédent (IX,4) qui précise qu'il s'agit de combattre ceux qui ayant conclu un pacte l'ont ensuite violé, ou ceux qui prétendent empêcher les musulmans de professer et de pratiquer leur foi.

En un mot, si la guerre n'est pas exclue, elle n'est acceptée que pour la *défense* de la foi lorsque celle-ci est menacée, et non pas pour la *propagation* de la foi par les armes.

La guerre ne se justifie, selon le Coran, que lorsqu'on est victime d'une agression ou d'une transgression, actes que les musulmans eux-mêmes s'interdisent formellement s'ils obéissent au Coran: «Combattez dans le chemin de Dieu *ceux qui luttent contre vous*. Ne soyez pas transgresseurs; Dieu n'aime pas les transgresseurs.» Le Corân, II: 190.

Moreover, since the breakdown of the former Soviet Union and the end of the Cold War, an oriental school of thought has flourished in the West. This school, which is represented by Bernard Lewis, Samuel Huntington and Daniel Pipes, deems that hostility is a deep-rooted feature of the Muslim psyche,<sup>10</sup> and that Islam has replaced communism as the new world threat.<sup>11</sup> Bernard Lewis argues that Islamists display an antagonism which is tinged with humiliation, envy and fear. In his article entitled "the Roots of Muslim Rage", Lewis states that:

"It should by now be clear that we are facing a mood and a [fundamental Muslim] movement for transcending the level of issues and policies and the governments that pursue them.

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<sup>10</sup>For opposing viewpoints see Fred Halliday, *Islam and the Myth of Confrontation: Religion and Politics in the Middle East* (London: I.B. Tauris & Co. Ltd., 1996), 112; Michael Jansen, "Terrorism is a Response to Western Hypocrisy," in *Islam: Opposing Viewpoints*, ed. Paul A. Winters (San Diego: Greenhaven Press, Inc., 1995), 164-168.

<sup>11</sup>Shireen T. Hunter, "The Rise of Islamist Movements and the Western Response: Clash of Civilizations or Clash of Interests?" in *The Islamist Dilemma: The Political Role of Islamist Movements in the Contemporary Arab World*, ed. Laura Guazzone (Berkshire: Ithaca Press, 1995), 321. This theory has been reflected in the works of many Western Scholars, particularly: Daniel Pipes, "Political Islam is a Threat to the West," in *Islam: Opposing Viewpoints*, ed. Paul A. Winters (San Diego: Greenhaven Press, Inc., 1995), 190; Joseph Grinstein, "Jihad and the Constitution: The First Amendment Implications of Combating Religiously Motivated Terrorism," *The Yale Law Journal* 105:5 (March 1996): 1348; Steven Emerson, "Political Islam Promotes Terrorism," in *Islam: Opposing Viewpoints*, ed. Paul A. Winters (San Diego: Greenhaven Press, Inc., 1995), 160.

In his work *Islam and Colonialism*, Rudolph Peters emphasizes that "The Islamic doctrine of *jihad* has always appealed to Western imagination. The image of the dreadful Turk, clad in a long robe and brandishing his scimitar, ready to slaughter any infidel that might come his way and would refuse to be converted to the religion of Mahomet, has been a stereotype in Western literature for a long time. Nowadays this image has been replaced by that of the Arab "terrorist" in battledress, armed with a Kalashnikov gun and prepared to murder in cold blood innocent Jewish and Christian women and children. Rudolph Peters, *Islam and Colonialism: The Doctrine of Jihad in Modern History* (The Hague, The Netherlands: Mouton Publishers, 1979), 4.

This is no less than a clash of civilizations - the perhaps irrational but surely historic reaction of an ancient rival against our Judeo-Christian heritage, our secular present, and the worldwide expansion of both."<sup>12</sup>

Samuel Huntington seizes and expands upon this notion of a clash of civilizations.<sup>13</sup> In a widely read article published in *Foreign Affairs* in the summer of 1993, Huntington points out that:

"In Eurasia the great historic fault lines between civilizations are once more aflame. This is particularly true along the boundaries of the crescent-shaped Islamic bloc of nations from the bulge of Africa to central Asia. Violence also occurs between Muslims, on the one hand, and Orthodox Serbs in the Balkans, Jews in Israel, Hindus in India, Buddhists in Burma and Catholics in the Philippines. Islam has bloody borders."<sup>14</sup>

Taking into consideration the conscientious endeavors of other scholars to refute the above allegations,<sup>15</sup> a comparative analytical

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<sup>12</sup>Bernard Lewis, "The Roots of Muslim Rage," *The Atlantic Monthly* 266 (September 1990), 60.

<sup>13</sup>"Not Again: A Survey of Islam and the West," *The Economist* (August 6-12, 1994): 3.

<sup>14</sup>Samuel P. Huntington, "The Clash of Civilizations?" *Foreign Affairs* 72:3 (Summer 1993): 35. In his lecture on "Clash of Civilizations or Clash of Definition?" delivered in London, February 1995, and in Montreal, October 1996, Professor Edward Said, of Columbia University, has refuted Huntington's theory. Said implied that Huntington had lost his edge as one of the leading political theoreticians of the Cold War era, and has since branded Islam as the new enemy, knowing that the issue is a hot potato in the West.

In the same fashion, Judith Miller, the former Cairo Bureau chief of the New York Times, has alleged, in her 574-page book, that Islamic militants, since the days of the Prophet Muhammad, were bloody, fanatic, and intolerant. She attempts to confirm that only Westerners believe firmly in the inherent dignity of the individual and the value of human rights and legal equality for all. See Judith Miller, *God has Ninety-Nine Names Reporting from a Militant Middle East* (New York: Simon and Schuster, 1996), 88-94.

<sup>15</sup>See, for example, Gustave Le Bon, *La Civilisation des Arabes* (Paris: Librairie de Firmin-Didot et C<sup>ie</sup>, 1884), 110-154; John Kelsay, *Islam and War* (Louisville, Kentucky: Westminster/John Knox Press, 1993), 29-36; Marcel A. Boisard, *Jihad: A commitment to Universal Peace*

study, based on the primary sources of Islamic and public international law, reveals that Islam's so-called "bloody borders" and Lewis-Huntington's theory on *jihad* are fictive constructs. This study attempts a critical examination of the theory of war in Islamic and public international law in an effort to formulate an alternative view and demonstrate that *jihad* is a just, defensive, and exceptional form of warfare geared to achieve the ideal Islamic public order, and to secure justice and equality among all people.<sup>16</sup> To do so, the first chapter of this thesis will discuss in a comparative fashion the concept of war and belligerent occupation in Islamic and public international law. It will try mainly to establish clear and satisfactory answers to the following questions: what are the motives of *jihad* if its primary aim is not to convert unbelievers by force, or to expand the Islamic state? Is *jihad* a holy war? Is Majid Khadduri correct in surmising that *jihad* is equivalent to the Christian concept of the crusade?<sup>17</sup> Is there an obligatory state of war between Muslims and the rest of the world as argued by Bernard Lewis and Majid Khadduri?<sup>18</sup> What is the concept of war and belligerent occupation in Islamic international law? What are the characteristics of the duty of *jihad*? What are permissible and forbidden acts of hostility according to the doctrine of *jihad*? and when

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(Indianapolis, Indiana: The American Trust Publications, 1988), 23; and Rudolph Peters, *Jihad in Mediaeval and Modern Islam* (Leiden, The Netherlands: E.J. Brill, 1977), 3.

<sup>16</sup>Majid Khadduri, *supra* note 2, at 17.

<sup>17</sup>*Ibid.*, at 15.

<sup>18</sup>Bernard Lewis, "Politics and War," in *The Legacy of Islam*, eds. Joseph Schacht and C.E. Bosworth (Oxford: The Clarendon Press, 1974); 175; Majid Khadduri, *supra* note 2, at 13.

can *jihad* be terminated?

On the other hand, chapter two examines the Islamic state's relations with other nations in light of the doctrine of *jihad*. It investigates the legal status of protected minorities and enemy persons, their rights and obligations under Islamic Law, and demonstrates that the dividing of the world into *dar al-Islam* and *dar al-harb*, by Muslim jurists, was dictated by particular events, and did not necessitate a permanent state of hostility between these territories. Furthermore, this chapter will show that Muslim jurists fourteen centuries ago developed an Islamic theory of international relations, in the modern sense of the term, to regulate inter-state relations between *dar al-Islam* and other territories in times of peace and armed conflict. Thus, Islamic laws on concluding treaties and mutual relations, namely, reciprocity, diplomatic intercourse, foreign trade, arbitration and neutrality will be the object of a comparative discussion.

Chapter three tries to address the crucial question, "to what extent did Islamic humanitarian law contribute to the protection of civilians' personal rights during wars and armed disputes?" To this end, a number of these rights will be examined in light of the norms of Islamic and international law of human rights, particularly the right to life, the prohibition of torture and inhuman treatment, and the right to respect of one's religious beliefs, customs and traditions. All this indicates that civilians' rights are not only recognized by Islamic law, but are also protected by practical, realistic legal and administrative rules, which were designed to ensure their application without distinction of any kind. Moreover, this chapter reveals that Islamic



humanitarian law regards the right to life as a sacred right, and holds that any transgression against this right be considered a crime against the entire community.<sup>19</sup> On the other hand, it will be seen that the individual's right to freedom of belief, including the right to choose one's religion, is explicitly guaranteed by Islamic law, and treated as a component of the individual's fundamental right to the freedom of opinion and expression.<sup>20</sup>

Chapter four is devoted to formulating a clear response to the main issue of this thesis, namely "is *jihād* a just war?" To begin with, this chapter attempts to work out exactly what is meant by "just war" by scrutinizing the chronological development of the term within its historical context. Through an examination of the relevant major primary juristic works of both Western and Muslim writers, this chapter concludes that *jihād* is a defensive war, based on certain humane principles, all of which argues for it being considered a "just war."

The sources of Islamic international law and the sources of public international law, as indicated in Article 38(1) of the statute of the International Court of Justice, bear similarities. The texts of international covenants may be compared to the texts of the *Holy Qur'an* and the true Prophetic *ḥadīths*. In many respects, the international agreements are equivalent to the treaties made by the Prophet Muḥammad, the rightly-guided Caliphs (*al-Khulafā' al-Rāshidūn*) and later Muslim rulers. Moreover, the opinions of Western scholars often parallel the legal opinions and works issued by Muslim jurists.

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<sup>19</sup> *The Holy Qur'an*, V: 32.

<sup>20</sup> *Ibid.*, II: 256: X: 99.

Methodologically, in examining the theory of *jihad*, this study relies heavily on the *Holy Qur'an* and the Prophetic Traditions as law. The principles of *jihad* occupy twenty eight chapters (*sūra*), which is one-fourth of the *Holy Qur'an*. Furthermore, it should be made clear that the main features of the theory of *jihad* are explicitly outlined in the *Holy Qur'an*, while juristic works,<sup>21</sup> from classical, medieval and modern times, focus on the consequences of *jihad*, particularly the division of

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<sup>21</sup>See for example: Abū al-Hasan al-Māwardī, *al-Ahkām al-Sultāniyya wal-Wilāyat al-Dīniyya* (Cairo: Dar al-Fikr lil-Tibā'a wal-Nashr, 1983), 32-58 [hereinafter al-Māwardī]; Abū Muhammad 'Alī Ibn Hazm, *al-Isā'ī fī al-Muḥalla bil-Āṭhar*, 12 vols. (Beirut: Dar al-Kutūb al-'Ilmiyya, 1988), 11:333-362 [hereinafter Ibn Hazm]; Abū al-Walīd Muhammad Ibn Rushd, *Bidayat al-Mujtahid wa Nihāyat al-Muqtasid*, 2 vols. (Beirut: Dar al-Ma'rifa, 1986), 380-407 [hereinafter Ibn Rushd]; Abū ya'la al-Farrā', *al-Ahkām al-Sultāniyya* (Cairo: Matba'at Mustafā al-Bābī al-Halabī, 1938), 23-44 [hereinafter al-Farrā']; 'Alā' al-Dīn al-Kasānī, *Kitāb Bada'ī' al-Sana'ī' fī Tartīb al-Sharā'ī'*, 7 vols. (Cairo: al-Matba'a al-Jamāliyya, 1910), 7:97-142 [hereinafter al-Kasānī]; Imām al-Harāmīn Abū al-Ma'ālī al-Juwaynī, *Ghiyāth al-Umm fī Iltiyāth al-Zulām* (Alexandria: Dar al-Da'wa lil-Tab' wal-Nashr, 1979), 260-264 [hereinafter al-Juwaynī]; Muhammad Ibn Idrīs al-Shāfi'ī, *Kitāb al-Umm*, 7 vols. (Cairo: al-Hay'a al-Misriyya al-'Āmma lil-Kitāb, 1987), 6:202-336 [hereinafter al-Shāfi'ī]; Muhammad Ibn Isma'īl al-San'ānī, *Subul al-Salam Sharh Bulugh al-Maram min Jam' Adillat al-Ahkām*, 4 vols. (Beirut: Dar Maktābat al-Hayāt, 1989), 4:53-100 [hereinafter al-San'ānī]; Muhyī al-Dīn Yahya Ibn Sharaf al-Dīn al-Nawawī, *Minhaj al-Tālibīn* (London: W. Thacker & Co., 1914), 457-471 [hereinafter al-Nawawī]; Muwaffaq al-Dīn Ibn Qudāma and Shams al-Dīn 'Abd al-Rahmān Ibn Qudāma, *al-Mughnī wa Yālthī al-Sharh al-Kabīr*, 12 vols. (Beirut: Dar al-Kitāb al-'Arabī, 1983), 10:48-635 [hereinafter al-Mughnī]; Shāh Waliy Allāh al-Dahlawī, *Hujjat Allāh al-Baligha*, 2 vols. (Beirut: Dar al-Ma'rifa, n.d.), 2: 170-178 [hereinafter al-Dahlawī]; Shams al-Dīn Ibn Qayyim al-Jawziyya, *Zad al-Ma'ad fī Hudā Khayr al-'Ibad*, 2 vols. (Cairo: Matba'at Mustafā al-Bābī al-Halabī, 1950), 1:38-43 [hereinafter Ibn al-Qayyim]; Shams al-Dīn al-Sarakhsī, *Kitāb al-Mabsūṭ*, 30 vols. (Cairo: Matba'at al-Sa'ada, 1324 A.H.), 10:2-144 [hereinafter al-Sarakhsī]; Shams al-Islām Ahmad Ibn Taymiyya, "Qā'ida fī Qitāl al-Kuffār," in *Majmū'at Rasā'il Ibn Taymiyya*, ed. Muhammad Hamid al-Faqr (Cairo: Matba'at al-Sunna al-Muhammadiyya, 1949), 116-146 [hereinafter Rasā'il Ibn Taymiyya]; Shaykh al-Islām Ahmad Ibn Taymiyya: *al-Siyāsa al-Shar'iyya fī Islāh al-Ra'ī wal-Ra'iyya* (Beirut: Dar al-Kutub al-'Arabiyya, 1966), 102-144 [hereinafter Ibn Taymiyya]; Shaykh al-Islām Burhān al-Dīn al-Marghinānī, *al-Hidāya Sharh Bidāyat al-Mubtada'*, 4 vols. (Beirut: Al-Maktaba al-Islāmiyya, n.d.), 2:135-156 [hereinafter al-Marghinānī].

the world into the territory of Islam (*dār al-Islām*) and the territory of war (*dār al-ḥarb*); treaties; peaceful mutual relations; treatment of civilians in times of war, wounded combatants, and prisoners of war.

Before we proceed further with our examination, a clarification of the terms justice (*ʿadl*) and human rights (*ḥuqūq al-ʿibād*), frequently employed in this study, is due. Although no consensus has ever been reached on the definition of these terms, one may argue that according to the *Holy Qurʾān* justice embodies equity and fairness between individuals and communities of mankind. Justice can thus take legal, ethical, social, political and theological forms. When we approach the concept of justice in the doctrine of *jihād*, our attention is necessarily drawn to the concept of justice among nations, which is essentially a legal and procedural concept. On the other hand, human rights in Islam, are linked to human interests sanctioned by Qurʾanic injunction and protected by Islamic law. These basic rights include: respect of religious beliefs, customs and traditions; a right to life, and the prohibition of torture or inhumane treatment; children's rights to life, custody and education; the right to individual ownership and private property; and the right to freedom of thought, opinion and expression. In light of the theory of *jihād*, Islamic concepts of justice and human rights are integrated and overlapping, as the doctrine of *jihād* includes notions of human rights, the equality of all people, and the need for the rule of law.

Finally, this thesis intends to counter the distorted image of *jihād*, as it is one of the most misunderstood terms in the history of Islamic legal discourse. This issue cannot be addressed without examining

and elucidating some of the finer points of the doctrine of *jihad* according to the primary sources of Islamic international law, to which we now turn.

## I. Theory of War in Islamic and Public International Law

Ibn Khaldun, the pioneer Arab sociologist, observed that humanity has experienced wars and disasters of its own making, since the beginning of human society, which are rooted in a vengeful human imperative.<sup>22</sup> Since then, war has developed as a social phenomenon and accompanied humanity on its sojourn through history. Moreover, today, war remains a path to which modern nations resort in securing their various interests, in spite of so-called civilizational stride in the development of the human mind and thought.<sup>23</sup>

The rule of "might is right" was the mode of inter-state settlements. In the Grecian era, war was an absolute prerogative of nations, exercised without restraint. Nevertheless, ancient Rome drew a line between the so-called "just" war and "unjust" war, and upheld, what they termed, "the voice of God and Nature". The Romans, who believed in this doctrine feared the wrath of God or nature, when waging an unjust

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<sup>22</sup>Abd al-Rahman Ibn Khaldun, *Muqaddimat Ibn Khaldun* (Beirut: Dar al-Qalam, 1984), 270.

<sup>23</sup>In a study on world wars in history, from 1496 B.C. to 1861 A.D., that is a period of 3,357 years, it was concluded that there was only a short period of 227 years of peace as opposed to 3,110 years of war: one year of peace per 13 years of war. In a more recent study, it was found, furthermore, that in 5,555 years, from the beginning of known human history until 1990, a total of 14,531 wars have been fought. Since the end of World War II, the world has witnessed 270 wars, some lasting for no more than a few months or even weeks, but some for much longer. This means that humanity faces a new war every four months or so. See Herbert K. Tillema, *International Armed Conflict Since 1945: A Bibliographic Handbook of Wars and Military Interventions* (London: Westview Press, 1991), 276-286.

war.<sup>24</sup> In turn, the attitudes adopted by the heavenly religions were different one from the other. Judaism permitted war and imposed no restrictions on its conduct.<sup>25</sup> Christianity, on the other hand, rejected the use of force, "for all those who take up the sword, shall perish by the sword."<sup>26</sup> Islam, however, viewed war as a necessary evil in exceptional cases sanctioned by *Allāh* in defence of Islam, its protection, and as a deterrent against aggression. Furthermore, such conduct is to be regulated by a fundamental respect for the freedom of belief of all communities.<sup>27</sup>

#### 1. War and Belligerent Occupation in Islamic Legal Theory: Aims and Concepts

By examining the theory of war in Islamic international law, Sayyed

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<sup>24</sup>W.E. Hall, *International Law* (Oxford: The Clarendon Press, 1924), 446.

<sup>25</sup>*The Holy Scriptures*, Joshua VI: 21; I Samuel 15:2-3; and Deuteronomy 20:16-17. For more details see Gustave Le Bon, *Les premières civilisations* (Paris: C. Marpon et E. Flammarion, 1889), 81; Maurice Crouzet, *Histoire général des civilisation*, 7 vols. (Paris: Presses Universitaires de France, 1986), 1:270; Paul D. Hanson, "War and Peace in the Hebrew Bible," *Interpretation* 38:4 (October 1984): 341; Robert Carroll, "War in the Hebrew Bible," in *War and Society in the Greek World*, eds. John Rich and Graham Shipley (New York: Routledge, 1993), 36-40; Susan Niditch, *War in the Hebrew Bible; A Study in the Ethics of Violence* (New York: Oxford University Press, 1993), 128-137.

<sup>26</sup>*The New Testament*, Matthew XXVI: 52. For additional information see Lisa Sowle Cahill, "Non-resistance, Defense, Violence, and the Kingdom in Christian Tradition," *Interpretation* 38:4 (October 1984): 380; Roland H. Bainton, *Christian Attitudes Toward War and Peace: A Historical Survey and Critical Re-evaluation* (New York: Abingdon Press, 1961), 38; Victor Paul Furnish, "War and Peace in the New Testament," *Interpretation* 38:4 (October 1984): 370.

<sup>27</sup>*The Holy Qur'an*, II: 190. In this respect see al-Marghīnānī, *supra* note 21, at 135; Rasā'il Ibn Taymiyya, *supra* note 21, at 116-118; al-San'ānī, *supra* note 21, at 4:54; al-Sarakhsī, *supra* note 21, at 10:2.

Qutb concludes that peace is the rule, while war is the exception.<sup>28</sup> In the following statement, Qutb pinpoints the conditions which should be met by Muslims prior to their engagement in war:

"In Islam, peace is the rule, and war is a necessity that should not be resorted to, but to achieve the following objectives: to uphold the rule of *Allah* on earth, so that the complete submission of men would be exclusively to Him; to eliminate oppression, extortion and injustice by instituting the word of *Allah*; to achieve the human ideas that are considered by *Allah* as the aims of life; and to secure people against terror, coercion and injury."<sup>29</sup>

Similarly, John Kelsay perceives that the Islamic tradition presents evidence of both senses of peace: the desire to avoid conflict, and the interest in the achievement of an ideal social order. He proceeds to say:

"In the Islamic tradition, one must strive for peace with justice. That is the obligation of believers; more than, it is the natural obligation of all of humanity. The surest guarantee of peace is the predominance of *al-Islam*, "the submission" to the will of God. One must therefore think in terms of an obligation to establish a social order in which the priority of Islam is recognized.... The Islamic tradition stresses, not the simple avoidance of strife, but the struggle for a just social order. In its broadest sense, the Islamic view of peace, like its Western counterpart, is in fact part of a theory of statecraft founded on notions of God, of humanity, and of the relations between the two."<sup>30</sup>

Accordingly, *jihad*, in Islamic legal theory, is a temporary legal device designed to achieve the ideal Islamic public order, and to secure

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<sup>28</sup>Sayyed Qutb, *Islam and Universal peace* (Indianapolis, Indiana: The American Trust Publications, 1977), 9. Influenced by Ibn Khaldun's theory on war, Qutb discussed the unacceptable types of war according to Islamic law. These types are: "War based on racialism as contrary to the principles of the oneness of humanity, wars caused by ambition and exploitation, and wars of ostentation which seek to magnify the pride and pomp of kings."

<sup>29</sup>*Ibid.*

<sup>30</sup>John Kelsay, *supra* note 15, at 30.

justice and equality among all peoples.<sup>31</sup> As a matter of fact, there is not a single piece of evidence in Islamic legal discourse which instructs Muslims to wage perpetual war against those nations which fall outside of the sovereignty of the Islamic State, or to kill non-Muslims.<sup>32</sup>

The chief aim of *jihad* is not to force unbelievers to embrace Islam, nor to expand the boundaries of the Islamic state.<sup>33</sup> Ibn Taymiyya, for his part, notes that the *jihad* is a just war waged by Muslims whenever their security is threatened by the infidels.<sup>34</sup> Killing unbelievers who refuse to adopt Islam is worse than disbelief, and inconsistent with the spirit and the message of the *Holy Qur'an*. This point is illustrated by Ibn Taymiyya, who argues that "if the unbeliever were to be killed unless he becomes a Muslim, such an action would constitute the greatest compulsion in religion,"<sup>35</sup> which contradicts the *Qur'anic* verse *Lā ikrah fī al-dīn* (Let there be no compulsion in religion).<sup>36</sup> Ibn Taymiyya deemed lawful warfare to be the essence of *jihad* and a means to securing peace, justice and equity. No one is to be

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<sup>31</sup>Majid Khadduri, *supra* note 2, at 17.

<sup>32</sup>Abdulrahman Abdulkadir Kurdi, *The Islamic State: A Study Based on the Islamic Holy Constitution* (London: Mansell Publishing Limited, 1984), 97.

<sup>33</sup>Rudolph Peters, *supra* note 15, at 3.

<sup>34</sup>Rasā'il Ibn Taymiyya, *supra* note 21, at 123.

<sup>35</sup>*Ibid.* This point was emphasized by Maryam Jameelah, a contemporary American Muslim scholar, who deems that "*Jihad* is never used to compel anybody to embrace Islam against his will; its purpose is only to re-establish our freedom of operation." See Maryam Jameelah, *A Manifesto of the Islamic Movement* (Lahore, Pakistan: Mohammad Yusuf Khan Publications, 1979), 41.

<sup>36</sup>*The Holy Qur'an*, II: 257.



killed for being a non-Muslim, for the *Holy Qur'an* regards the subversion of faith and oppression as worse than manslaughter.<sup>37</sup> This point is emphasized in the *Qur'anic* verse "for tumult and oppression are worse than slaughter."<sup>38</sup> According to the basic *Qur'anic* rule of fighting, Muslims are instructed to "fight in the cause of *Allah* those who fight you, but do not transgress limits, for *Allah* loveth not transgressors."<sup>39</sup> Ibn Taymiyya marks out the following motives behind *jihad*: to defend Muslims against real or anticipated attacks; to guarantee and extend freedom of belief; and to defend the mission (*al-da'wah*) of Islam.<sup>40</sup> Based on the above argument, one concludes that peace is the rule and war is the exception in Islam, and that no obligatory state of war exists between Muslims and the rest of the world, nor is *jihad* to be waged until the world has either accepted the Islamic faith or submitted to the power of the Islamic state, as Bernard Lewis and Majid Khadduri suggest.<sup>41</sup> *Jihad* is a defensive war launched with the aim of establishing justice (*'adl*) and protecting basic human rights (*huquq al-'ibad*).<sup>42</sup>

*Jihad* cannot be understood out of its historical context, and can

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<sup>37</sup>Ibn Taymiyya, *supra* note 21, at 107.

<sup>38</sup>*The Holy Qur'an*, II: 192.

<sup>39</sup>*Ibid*, II: 191.

<sup>40</sup>Rasa'il Ibn Taymiyya, *supra* note 21, at 116-117.

<sup>41</sup>Bernard Lewis, *supra* note 2, at 73; Majid Khadduri, *supra* note 2, at 13.

<sup>42</sup>Ahmed Zaki Yamani, "Humanitarian International Law in Islam: A General Outlook," *Michigan Yearbook of International Legal Studies* 7 (1985), 190.

easily be misinterpreted if approached in terms of latter day occidental conceptions.<sup>43</sup> There is no exact equivalent in Islamic legal discourse to the concept of the "holy war" in Western Christendom.<sup>44</sup> Islamic law does not separate between state and religion and does not, as such, necessarily base the *jihad* on religious motives.<sup>45</sup> Furthermore, there is no resemblance between the concept of the *jihad*, as a religious collective duty, and the Christian concept of the crusade. Majid Khadduri's allegation that, "the *jihad* was equivalent to the Christian concept of the crusade",<sup>46</sup> was refuted by Rudolph Peters, who argues: "'Holy War' is thus, strictly speaking, a wrong translation of '*jihad*', and the reason why it is nevertheless used here is that the term has become current in Western literature."<sup>47</sup> In other words, the description of the *jihad* as a "holy war" is utterly misleading.<sup>48</sup>

Linguistically speaking, the term *jihad* is a verbal noun derived from the verb *jāhada*, the abstract noun *juhd*, which means to exert oneself, and to strive in doing things to one's best capabilities. Its

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<sup>43</sup>W. Montgomery Watt, *Islamic Political Thought: The Basic Concepts* (Edinburgh: Edinburgh University Press, 1968), 15.

<sup>44</sup>Bruce Lawrence, "Holy War (*jihad*) in Islamic Religion and Nation-State Ideologies," in *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions*, eds. John Kelsay and James Turner Johnson (New York: Greenwood Press, 1991), 142.

<sup>45</sup>Rudolph Peters, *supra* note 15, at 4.

<sup>46</sup>Majid Khadduri, *supra* note 2, at 15.

<sup>47</sup>Rudolph Peters, *supra* note 15, at 4.

<sup>48</sup>W. Montgomery Watt, *supra* note 43, at 18; Patrick Bannerman, *Islam in Perspective: A Guide to Islamic Society, Politics and Law* (London: Routledge, 1988), 86.

meaning is, in fact, extended to comprise all that is in one's power or capacity.<sup>49</sup> Technically, however, *jihad* denotes the exertion of one's power in *Allāh's* path, encompassing the struggle against evil in whatever form or shape it arises.<sup>50</sup> This definition is forwarded in similar words in the different works of Muslim scholars. In his legal work *Bada'ī' al-Ṣanā'ī'*, al-Kasānī stipulates that, "according to Islamic law (*al-Shar' al-Islāmī*), *jihad* is used in expending ability and power in struggling in the path of *Allāh* by means of life, property, words and more."<sup>51</sup>

However, the exercise of *jihad* is the responsibility of the *Imām* or Caliph, who is the head of the Muslim state.<sup>52</sup> In other words, the *Imām* declares the call of *jihad*, not the public. This point was made by Abū Yūsuf, who states that "no army marches without the permission of the

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<sup>49</sup>Abū al-Qāsim al-Zamakhsharī, *Asās al-Balāgha* (Beirut: Dār al-Ma'rifa lil-Tibā'a wal-Nashr, n.d.), 67; Muhammad Ibn Abī Bakr al-Rāzī, *Mukhtār al-Sīhah* (Beirut: Maktabat Lubnān, 1988), 48; Muhammad Ibn Manzūr, *Lisān al-'Arab al-Muḥḥḍ*, 3 vol. (Beirut: Dār Lisān al-'Arab, n.d.), 2:190.

Similarly, Abū al-A'la al-Mawdūdī advocates that "*jihad* means struggle to the utmost of one's capacity." See S. Abū al-A'la al-Mawdūdī, *Towards Understanding Islam* (Beirut: The Holy Qu'ān Publishing House, 1980), 140.

<sup>50</sup>Ahmad al-Sawī, *Bulghat al-Sālik li-Aqrab al-Masālik*, 2 vol. (Beirut: Dār al-Fikr lil-Tibā'a wal-Nashr wal-Tawzī', 1980), 1: 330 [hereinafter al-Sawī]; Ḥasan Moīnuddīn, *The Charter of the Islamic Conference and Legal Framework of Economic Co-operation Among Its Member States* (Oxford: The Clarendon Press, 1987), 22; Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore: The Johns Hopkins Press, 1955), 55; Moulavi Cheragh Ali, *A Critical Exposition of the Popular Jihad* (Delhi, India: Idarah-I Adabiyat-I Delli, 1884; Rudolph Peters, *Jihad in Classical and Modern Islam* (Princeton: N.J.: Markus Wiener Publishers, 1996), 1.

<sup>51</sup>al-Kasānī, *supra* note 21, at 7:97.

<sup>52</sup>al-Mughnī, *supra* note 21, at 10:373; Noor Mohammad, "The Doctrine of *Jihad*: An Introduction," *Journal of Law and Religion* 3 (1985): 390.

*Imām*." <sup>53</sup> Similarly, Abū al-Ḥasan al-Māwardī devotes a chapter in his work *al-Aḥkām al-Sulṭāniyya* to the duties of the *Imām*. The sixth of these basic duties, he argues, is the fight in the path of *Allāh*. al-Māwardī emphasizes the fact that a war cannot be waged without the permission of the *Imām*.<sup>54</sup>

Unlike Shīʿite scholars, who hold that *jihād* can only be exercised under the leadership of the rightful *Imām*,<sup>55</sup> and contrary to the view held by the Kharijites who believe that *jihād* is the sixth pillar of Islam,<sup>56</sup> Sunnite jurists conceive of *jihād*, in accordance with the nature of its obligation, as a collective duty (*fard kʿfaya*) on the one hand,<sup>57</sup> and an individual duty (*fard ʿayn*) on the other.<sup>58</sup> When war is waged against infidels living in their own country, *jihād* is a collective duty; that is to say that *jihād* is an obligation incumbent upon the

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<sup>53</sup>Abū Yūsuf Yaʿqūb Ibn Ibrāhīm, *Kitāb al-Kharāj* (Beirut: Dār al-Ḥadātha, 1990), 349 [hereinafter Abū Yūsuf].

<sup>54</sup>al-Māwardī, *supra* note 21, at 33.

<sup>55</sup>A. Query, *Droit Musulman: Recueil de lois concernant les Musulman schyites*, 2 vols. (Paris: Imprimerie Nationale, 1871-1872), 1: 321-325; Abū Jaʿfar Muhammad Ibn Jarīr al-Tabarī, *Kitāb Ikhtilāf al-Fuqahāʾ*, ed. Joseph Schacht (Leiden, The Netherlands: E.J. Brill, 1933), 12.

<sup>56</sup>Abd al-Qāhir al-Baghdādī, *al-Farq Bayn al-Firaq* (Beirut: Dār al-Maʿrifa lil-Tibāʿa wal-Nashr, n.d.), 84; Abū al-Fath Muhammad ʿAbd al-Karīm al-Shahrastānī, *al-Milal wal-Nihal* (Beirut: Dār al-Fikr lil-Tibāʿa wal-Nashr, n.d.), 116-117; Majid Khadduri, *supra* note 50, at 67-69.

<sup>57</sup>"Nor should the believers all go forth together: if a contingent from every expedition remained behind, they could devote themselves to studies in religion, and admonish the people when they return to them." *The Holy Qurʾān*, IX: 123.

<sup>58</sup>"Go ye forth, (whether equipped) lightly or heavily, and strive, and struggle, with your goods and your persons in the cause of *Allāh*. That is best for you if ye knew." *The Holy Qurʾān*, IX: 42.

Muslim community as a whole, which, if accomplished by a sufficient number of them, exempts the rest from being indicted for its neglect. If, however, no one performs this duty, all individual Muslims, qualified to take part in the *jihad*, are sinning.<sup>59</sup> *Jihad* is considered an individual duty "*fard 'ayn*" when infidels invade Muslim territory. In this scenario, *jihad* becomes a duty incumbent upon all the inhabitants of the occupied territory including the poor, women, minors, debtors and slaves without previous permissions.<sup>60</sup>

For his part, Bernard Lewis argues that "*jihad*, in an offensive war, is an obligation which is incumbent upon the Muslim community as a whole (*fard kifaya*); in a defensive war, it becomes a personal obligation of every adult male Muslim (*fard 'ayn*)."<sup>61</sup> Two things may be highlighted for criticism in that statement: the use of the term offensive war, and the misunderstanding of Muslim obligations where *jihad* pertains to individual duty. In point of fact, only one kind of *jihad* is acknowledged by Islamic law - the defensive one; whether it is waged against infidels living in their own country or when they attack Muslim territory.<sup>62</sup> With regards to the other claim in this statement, it should be made clear that *jihad* is an obligation upon every Muslim,

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<sup>59</sup>Rudolph Peters, *supra* note 50, at 3.

<sup>60</sup>Abū 'Abd Allāh Muḥammad al-Qurtubī, *al-Jāmi' li-Aḥkām al-Qur'ān*, 20 vols. (Beirut: Dār al-Kutub al-'Ilmiyya, 1988), 8: 186 [hereinafter al-Qurtubī]; Ibn Rushd, *supra* note 21, at 1:381; al-Juwaynī, *supra* note 21, at 260-261; al-Kāsanī, *supra* note 21, at 98; al-Marghīnānī, *supra* note 21, at 2: 135; al-Mughnī, *supra* note 21, at 10: 364; al-Nawawī, *supra* note 21, at 457-458; al-Ṣawī, *supra* note 50, at 330.

<sup>61</sup>Bernard Lewis, *supra* note 2, at 73.

<sup>62</sup>Needless to say, the adjectives added currently to the term *jihad*, like Islāmī and Muqaddas, are null and deceptive.

whether adult, minor, male, female, rich, poor, debtor or slave, only when it is *fard 'ayn*. In this case, *jihad*, therefore, must be performed by the *levée en masse* of every competent Muslim person.<sup>63</sup>

However, as a collective duty, *jihad* is incumbent upon every Muslim male, who is mature, sane, free, healthy and capable of adequate support.<sup>64</sup> Indeed, being a Muslim, adult and sane are the three necessary conditions for *bulugh al-takālf* (legal capacity).<sup>65</sup> In this respect, females, according to the Prophet, are only to be engaged in non-combative *jihad*; such as *hajj* and *'umra* (pilgrimage and the so-called minor pilgrimage to Mecca).<sup>66</sup> Thus, Islam exempts women from suffering wars' disasters and witnessing killing and bloodshed. In spite of this, however, women have taken part in the *jihad*, side by side with men, from the outset of the Islamic mission, nursing the wounded;<sup>67</sup> transporting

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<sup>63</sup>Ahmed Rechid, "L'Islam et le droit des gens," *Recueil des cours* 60 (1937): 466-467.

<sup>64</sup>al-Mughnt, *supra* note 21, at 10: 366.

<sup>65</sup>*Ibid.*

<sup>66</sup>Abu 'Abd Allāh Muhammad Ibn Isma'īl al-Bukhārī, *Sahih al-Bukhārī*, 8 vols. (Beirut: Dār al-Fikr lil-Tibā'a wal-Nashr, 1981), 3:220 [hereinafter al-Bukhārī]; Ahmad Ibn 'Alī Ibn Hajar al-'Asqalānī, *Fath al-Bārī bi-Sharh Sahih al-Bukhārī*, 13 vols. (Beirut: Dār al-Ma'rifa, n.d.), 6:75 [hereinafter Fath al-Bārī].

<sup>67</sup>Abu Muhammad 'Abd al-Malik Ibn Hishām, *al-Sira al-Nabawiyya*, 4 vols. (Beirut: Dār al-Jīl, 1987), 3:137 [hereinafter Ibn Hishām]; Khayr al-Dīn al-Ziriklī, *al-'Ilām: Qamūs Tarajim li-Ashhar al-Rijāl wal-Nisā' min al-'Arab wal-Musta'ribīn wal-Mustashriqīn*, 8 vols. (Beirut: Dār al-'Ilm lil-Malāyīn, 1980), 3:15; Muhammad Ibn Ahman al-Sarakhsī, *Sharh Kitāb al-Siyar al-Kabīr li-Muhammad Ibn al-Hasan al-Shaybānī*, 5 vols. (Cairo: Matba'at Sharikat al-I'tānāt al-Sharqiyya, 1971-1972), 1: 184-186 [hereinafter al-Siyar al-Kabīr].

the injured;<sup>68</sup> cooking and pouring water into the mouths of the soldiers;<sup>69</sup> scouting and intelligence;<sup>70</sup> fierce combat;<sup>71</sup> and army command.<sup>72</sup> The condition of freedom, mentioned earlier, is there because a slave is normally involved in taking care of his master's affairs.<sup>73</sup> In fact, the prophet used to take the pledge (*al-bay'at*) of free people for Islam and *jihad*, and that of slaves for Islam only.<sup>74</sup> The stipulation of good health means that the jihadist should be free of any permanent physical disability such as blindness, lameness or a chronic disease. The *Holy Qur'an* explicitly excludes that: "no blame is there on the blind, nor is there blame on the lame, nor on the ill (if

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<sup>68</sup>al-Bukhārī, *supra* note 66, at 3:222; Khayr al-Dīn al-Ziriklī, *Ibid.*; al-Sarakhsī, *supra* note 21, at 10:70; al-Siyar al-Kabīr, *supra* note 67, at 1:185.

<sup>69</sup>Abū al-Husayn Muslim Ibn al-Hajjāj al-Naysābūrī, *Sahih Muslim*, 5 vols. (Beirut: Mu'assasat 'Izz al-Dīn lil Tiba'a wal-Nashr, 1987), 4:89 [hereinafter Muslim]; al-Bukhārī, *Ibid.*

<sup>70</sup>Ibn Hishām, *supra* note 67, at 2:95, and 1:295.

<sup>71</sup>Abū al-'Abbās Ahmad Ibn Yahya al-Balādhurī, *Kitāb Futūh al-Buldan* (Beirut: Dār al-Nashr 'il-Jamī'iyyīn, 1957), 162 and 184 [hereinafter al-Balādhurī]; Abū Ja'far Muhammad Ibn Jarīr al-Tabarī, *Tārīkh al-Tabarī: Tārīkh al-Umam wal-Mulūk*, 6 vols. (Beirut: Mu'assasat 'Izz al-Dīn lil Tiba'a wal-Nashr, 1987), 2:201, 286, 291 and 298 [hereinafter al-Tabarī]; Ibn Hishām, *supra* note 67, at 3:136-137; Muslim, *supra* note 69, at 4:88-89; al-Siyar al-Kabīr, *supra* note 67, at 1:184.

<sup>72</sup>In the battle of al-Jamal, 'Ā'isha, the wife of the Prophet, commanded the army to oppose 'Alī Ibn Abī Tālib. See Abū al-Fida' al-Hafiz Ibn Kathīr, *al-Bidāya wal-Nihāya*, 14 vols. (Beirut: Maktabat al-Ma'ārif, n.d.), 7:238 [hereinafter Ibn Kathīr]; al-Tabarī, *Ibid.*, 2:539.

<sup>73</sup>al-Juwaynī, *supra* note 21, at 262; al-Marghīnānī, *supra* note 21, at 135.

<sup>74</sup>Islamic law gives precedence to the service of the master over taking part in the *jihad*, because the first is a personal duty, while the second is a general obligation.

he does not join the war)."<sup>75</sup> In another verse, the *Holy Qur'an* exempts the person who cannot earn his own household's daily living expenses, unless he is sponsored by the Muslim state, textually: "There is no blame on those who are infirm, or ill, or who find no resources to spend (on the cause), if they are sincere (in duty) to *Allāh* and His Apostle."<sup>76</sup> Finally, the *mujāhid* (Muslim fighter) should seek his parents' permission before taking part in the *jihād*<sup>77</sup> and, if he is indebted to any person, including *dhimmīs*,<sup>78</sup> must ask for an excuse from his creditor.<sup>79</sup>

As long as Islam has sanctioned *jihād* for the very reasons quoted above, it is only natural that military actions will take place, culminating, as it were, in the Muslim army's entry into the territory of war (*dar al-ḥarb*) and ruling over. This is the so-called *al-fath* (conquest or victory). According to *Lisān al-ʿArab al-Muḥḥḥ*, in linguistic usage, the word *al-fath* means entering the house of war and conquering it.<sup>80</sup> *Allāh* promises the Prophet of the Conquest of Mecca, saying: "When comes the help of *Allāh* and victory."<sup>81</sup> In this sense,

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<sup>75</sup>*The Holy Qur'an*, XLVIII: 17.

<sup>76</sup>*Ibid*, IX: 91.

<sup>77</sup>*al-Juwaynī*, *supra* note 21, at 262; *al-Mughnī*, *supra* note 21, at 381.

<sup>78</sup>The free non-Muslim subjects living in Muslim countries, who enjoyed protection and safety in return for paying the capital tax. See Fakhr al-Dīn al-Tarḥḥ, *Majmaʿ al-Bahrayn*, 6 vols. (Beirut: Dār wa Maktabat al-Hilāl, 1985), 6:66 [hereinafter *al-Tarḥḥ*]; Ibn Rushd, *supra* note 21, at 1:322; Muhammad Rawwās Qalʿajī and Ḥamid Sādiq Qunaibī, *Mufjam Lughat al-Fuqahāʾ* (Beirut: Dār al-Nafaʾis, 1988), '95.

<sup>79</sup>*al-Siyar al-Kabīr*, *supra* note 67, at 4: 1448-1457.

<sup>80</sup>Muḥammad Ibn Manẓūr, *supra* note 49 at 2: 1044.

<sup>81</sup>*The Holy Qur'an*, CX: 1.



*al-fath* in Islam is synonymous with belligerent occupation, in modern international law, regardless of the objectives underlying each. *Jihad* and *al-fath*, which follows it, are therefore a response to a human request that righteousness and justice prevail, that wrong doing be abolished, and that the message of *Allāh* be conveyed to all.

*al-Fath* was regulated by Islamic international law. Muslim jurists treated issues related to *al-fath* and the entry of the House of War in several works. Foremost among these works stands *Kitāb al-Siyar al-Kabīr* of Muḥammad Ibn al-Ḥasan al-Shaybānī, which included the principles and rules governing the conduct of the Islamic state during *al-fath*. Where Hugo Grotius is considered as the legitimate father of the public international law, Muḥammad Ibn al-Ḥasan al-Shaybānī, for his part, is seen as the father of Islamic international law. Among other Islamic international law jurists is al-Awzaʿī (88-157 A.H.) who wrote extensively on Muslim conquests and expedition.<sup>52</sup> In *al-Siyar al-Kabīr*, al-Shaybānī establishes the rules which govern the conduct of the conquests, including specific rules for dealing with war spoils (*al-ghana'im*), prisoners of war (*al-asrā*), the wounded and the dead. Furthermore, he establishes important international rules for settling disputes, treaties, peace and the rights and duties of the inhabitants of conquered territories.

However, Islamic international law did not make a terminological distinction between belligerent occupation without the use of force and

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<sup>52</sup> Abd al-Rahman Abū ʿAmr al-Awzaʿī, "Kitāb Siyar al-Awzaʿī", in *Kitāb al-Umm*, 7 vols. ed. Abū ʿAbd Allāh Muḥammad Ibn Idrīs al-Shafīʿī (Cairo: al-Hayʾa al-Misriyya al-ʿĀmma lil-Kitāb, 1987), 6: 318 and 324 [hereinafter al-Awzaʿī].

belligerent occupation through the use of force. Either case is called *fath* whether Muslim armed forces enter the *dār al-ḥarb* in the wake of fighting or peacefully in the light of agreements. For example, when Muslim armies entered Mecca without fighting, it was called a *fath*,<sup>83</sup> and when these armies entered Iraq and *al-Sha'am* (greater Syria), it was also called a *fath*.<sup>84</sup> However, Islamic law draws a distinction between invasion and military occupation in their respective sense in modern international law. In Islamic international law, invasion is different from *fath*; in the former, a group of Muslims invades enemy garrisons to achieve specific military objectives with no prior intention to stay in *dār al-ḥarb*, for example, the Tabūk expedition. In the latter, *fath* involves the transfer of sovereignty over *dār al-ḥarb* to the Muslim army and annexation of that land to *dār al-Islām*.

In this respect, it is useful to mention that Gustave Le Bon concludes in his book "La civilisation des Arabes" that the Arabs did not use force as much as they used magnanimity in their attempt to spread Islam. The world's nations, he adds, have never known as merciful and tolerant a conquerer as the Arabs. Moreover, the Arabs were the only conquerers who conjoined *jihad* with tolerance towards the followers of other religions whom they conquered but left them free to pursue their own religious practices. Such mercy and tolerance were cornerstones in

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<sup>83</sup>Mohammad Talaat Al Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (The Hague, The Netherlands: Martinus Nijhoff, 1968), 21-22 [hereinafter Al Ghunaimi]; al-Ṭabarī, *supra* note 71, at 2:197.

<sup>84</sup>Alfred Morabia, *Le ḡihād dans l'Islam médiéval: Le «combat sacré» des origines au XII<sup>e</sup> siècle* (Paris: Albin Michel, 1993), 77-81; Muhammad Ibn Ishāq, *Ṣirat Rasūl Allāh*, trans. A. Guillaume (Karachi, Pakistan: Oxford University Press, 1955), 549 [hereinafter Ibn Ishāq].

the expansion of the conquests and the conversion of many nations to the religion, regulations and language of the conqueror.<sup>85</sup> In this connection, al-Balādhurī and al-Ṭabarī reported that the people of Sughd, a small town close to Samarkand, complained to ʿUmar Ibn ʿAbd al-ʿAzīz, the Umayyad caliph, that Qutayba Ibn Muslim al-Bāhilī, a Muslim commander, has conquered their city without prior notice to the three options normally offered to conquered peoples by Muslim commanders.<sup>86</sup> They said: "Allāh has made known equity and justice, and Qutayba has oppressed and betrayed us, as well as usurped our town." ʿUmar Ibn ʿAbd al-ʿAzīz wrote the following message to Sulaymān Ibn Abī al-Surā, the Muslim governor of Samarkand:

"The people of Samarkand have complained to me that Qutayba oppressed and maltreated them, and eventually expelled them from their territory. On account of that, if you receive this letter, let the case be heard by the judge, and if the judgment is in their favour force out the Arabs to their camps outside the town."

Finally, when the judge Jamīʿ Ibn Ḥadīr adjudicated that the Arabs must withdraw to their camps in order to face the people of the town on an equal footing and offer them the three options, the people of the town willingly accepted the existing situation, chose peace, and embraced Islam in multitudes.<sup>87</sup>

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<sup>85</sup>Gustave Le Bon, *supra* note 15, at 110-154.

<sup>86</sup>al-Mughnī, *supra* note 21, at 8: 361; al-Sarakhsī, *supra* note 21, at 10:31; al-Shāfiʿī, *supra* note 21, at 4:172; al-Siyar al-Kabīr, *supra* note 67, at 1:78.

<sup>87</sup>Abū al-Hasan ʿAlī Ibn al-Athīr, *al-Kāmil fī al-Tārīkh*, 12 vols. (Beirut: Dar al-Kutub al-ʿIlmiyya, 1966), 5:22; al-Balādhurī, *supra* note 71, at 97; al-Ṭabarī, *supra* note 71 at 3:552.

## 2. The Concept of War and Belligerent Occupation in Public International Law

It can be inferred from the above that the concept of *jihad* in Islamic international law is based on the premise that an armed conflict arises between the Muslim state and non-Muslim state for the purpose of deterring aggression, protecting Islam, and defending the interests of the Muslim state.<sup>88</sup> Nevertheless, the concept of war in international law is, on the other hand, ambiguous. For example, we find that while international law jurists attempt to find a specific definition for the concept of war, the International Law Commission of the United Nations, for its part, decides not to include the concept of war in its agenda, on the grounds that the United Nations Charter considers war an illegal action.<sup>89</sup>

In an attempt to conclude a specific definition of war in international law, it is imperative therefore that we discuss various views posited by legists working on international law. Indeed, these views vary a great deal among themselves in this respect. To most legists, war is a real eventuality which cannot be stemmed by law, but law comes at a later stage in the process of war, regulating its actions and attempting to safeguard its humane standards of conduct. To others, war is seen as a state between two or more disputing parties, which requires the law's intervention to regulate its action in relation to rights and commitments arising from the conduct of war.

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<sup>88</sup>Sami A. Aldeeb Abu-Sahlieh, *Les Musulmans face aux droits de l'homme: religion & droit & politique* (Bochum, Germany: Winkler, 1994), 273-275.

<sup>89</sup>Hersch Lauterpacht, "The Problem of the Revision of the Law of War," *The British Year Book of International Law* 29 (1952): 361.

In this respect, Fauchille defines war as:

"La guerre est un état de fait contraire à l'état normal de la communauté internationale qui est la paix, état de fait dont la résolution, la fin, le but ultime est cette paix elle-même."<sup>90</sup>

Oppenheim, for his part, defines it as:

"War is a contention between two or more states through their armed forces, for the purpose of overpowering each other, and imposing such conditions of peace as the victor pleases. War is a fact recognized, and with regard to many points regulated, but not established, by international law."<sup>91</sup>

On the other hand, Hyde argues that war is "A condition of armed hostility between states."<sup>92</sup>

It is clear from these definitions that all law experts gravitate towards one definition despite ostensible differences. It is therefore plausible to define war as a condition of animosity arising between two or more parties, thereby terminating the peaceful state of co-existence between them through resorting to arms in settling disputes.

Moreover, international law is a recent phenomenon, dating back only to the writings of Hugo Grotius and the Treaty of Westphalia of 1648, which recognized states as units enjoying equal rights and responsibilities within the international community. It can be said that wars have raged ever since, as prevailing international practices do not impose any restrictions against countries resorting to power in their

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<sup>90</sup>Paul Fauchille, *Traité de droit international public*, Tome II, Guerre et neutralité (Paris: Rousseau, 1921), 5.

<sup>91</sup>L. Oppenheim, *International Law*, vol. 2, Disputes, war and Neutrality, 7th ed., revised by Hersch Lauterpacht (London: Longmans, Green and Co., Inc., 1952), 202.

<sup>92</sup>Charles Cheney Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, 3 vols. (Boston: Little, Brown and Co., 1945), 3: 1686.

respective relations, regardless of the emergence of the so-called just wars, and Grotius' exclusion of preventive wars.<sup>93</sup> That is why Grotius' theory on the distinction between just and unjust wars did not last long, and was overshadowed, in the centuries after him, by the principle that states may resort to war as a legitimate right of sovereignty; a principle maintained until the conclusion of the Hague conventions of 1907.<sup>94</sup>

Reference to the Covenant of the League of Nations reveals that Articles 11 and 12 do indeed deal with the use of force among nations, whereas Article 12 also obliges member states to submit any dispute among them to an arbitration council, and not to resort to war until three months has lapsed since the arbitration ruling. Articles 13 and 15 provide that states should implement this ruling in good faith, whereas Article 16, for its part, includes the imposition of sanctions against a state that resorts to war contrary to its commitments not to do so according to Articles 12, 13 and 15.<sup>95</sup>

In 1924, the Geneva Protocol signatories committed themselves not to resort to war except in certain cases specified by Article 2 of that Protocol. In 1925, member states signing the Locarno Treaty agreed among themselves not to resort to war against each other except in certain cases.<sup>96</sup> At the initiative of France and the United States, the General

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<sup>93</sup>Josef L. Kunz, "Bellum Justum and Bellum Legale," *AJIL* 45 (1951): 529.

<sup>94</sup>L. Oppenheim, *supra* note 91, at 180.

<sup>95</sup>Gerhard von Glahn, *Law Among Nations: An Introduction to Public International Law* (New York: The Macmillan Company, 1970), 518.

<sup>96</sup>*Ibid.*

Treaty for the Renunciation of War (the Briand-Kellogg Pact, or Pact of Paris) was signed in Paris on August 27, 1928, by representatives of 15 governments; at a later stage, several other states also signed it. In its first article, the Treaty condemns the use of power in solving international disputes, and denounces it as a means of maintaining national sovereignty in international relations. Article 3 bans aggressive wars completely.<sup>97</sup>

The United Nations Charter does not use the word "war" except in its preamble in which member states pledge not to use armed force for other than common interest. Article 1 provides that among the purposes of the United Nations is the promulgation of effective measures for the prevention of threats to international peace and security, and for the suppression of acts of aggression.<sup>98</sup> Article 2 (4) proclaims that member states commit themselves to refrain from threatening or actually using force against the safety of the territory or political independence of any state.<sup>99</sup> The Charter, however, proclaims that members, individually or collectively, may use armed force in self defence, if an armed aggression is perpetuated against them.<sup>100</sup> Nevertheless, the Geneva Conventions signed in the wake of World War II, in 1949, are seen as some of the most important agreements to establish international

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<sup>97</sup>Leon Friedman, ed., *The Law of War: A Documentary History*, 2 vols. (New York: Random House, 1972), 1: 468; Quincy Wright, "The Meaning of the Pact of Paris," *AJIL* 27 (1933): 41.

<sup>98</sup>*United Nations Charter*, signed at San Francisco, 26 June 1945. Entered into force on 24 October 1945.

<sup>99</sup>*Ibid.*

<sup>100</sup>Josef L. Kunz, "Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations," *AJIL* 41 (1947): 873.

principles in the laws of war and armed disputes.

Ever since the signing of the U.N. Charter, the United Nations has failed to prevent wars, as a result of the fact that the Charter could not establish a workable alternative capable of preventing the use of force once disputes have erupted into armed conflicts. Another argument, is that the Great Powers have continued to bend the international laws to their own desires, and to retain the right to veto any and all the Security Council's resolutions.

International law experts do indeed draw a distinction between the cold war and the actual war, as well as between acts of revenge exercised by some states against other states, in order to achieve certain ends without terminating the state of peace between the war parties and replace it with belligerency. Furthermore, the articles related to war in international law have defined the principles by which war could be begun; the conduct of the warring states during the process of military operations; the type of weapons to be used; and the relations of the non-warring states with those engaged in the war through legal principles stated in the law of neutrality.<sup>101</sup>

In addition to international treaties and conventions governing the conduct of military actions among the warring parties, and seen as the primary sources of the laws of war, there are also other sources for this law, such as customary practices and international laws acceptable to the international community. Among such practices and laws, in addition to the Nuremberg judgments, 1945-1946, the Tokyo war crimes trial, 1948; the statute of the International Criminal Tribunal for the Former Yugoslavia,

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<sup>101</sup>L. Oppenheim, *supra* note 91, at 634-652.



1993; and the International Tribunal for crimes in Rwanda, 1994, are rulings and principles that have been concluded from court martials, particularly in the aftermath of World War I and World War II.<sup>102</sup>

Nevertheless, belligerent occupation, which is sometimes known as *occupatio bellica* in international humanitarian law, does not differ, from a procedural point of view, from that of *fath* in Islamic international law. However, the first suggested definition of belligerent occupation is included in Articles 42-56 of the Hague Regulations,<sup>103</sup> Article 2 of the 1949 Geneva Conventions,<sup>104</sup> and Article 1 (3-4) of the 1977 Additional Protocol.<sup>105</sup> McNair, however, suggests three phases through which belligerent occupation goes: invasion, occupation and transfer of sovereignty as a consequence of concessions made in light of a treaty or by subjugation and annexation of a given

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<sup>102</sup>Among war crimes trials are the Trial of Captain Henry Wirz, 1865; Court-Martial of Major Edwin F. Glenn, 1902; Court-Martial of General Jacob H. Smith, 1902; Court-Martial of Lieutenant Preston Brown, 1902; Prosecution and Punishment of Major War Crimes of European Axis, 1945; Hirota, Dohihara, and Kido v. General MacArthur, 1948; the Eichmann Trial, 1961; and Court-Martial of William L. Calley, Jr., 1971.

<sup>103</sup>*The Hague Convention IV Respecting the Laws and Customs of War on Land*, signed on October 18, 1907, entered into force on January 26, 1910. J.B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907*, 3rd. ed. (New York: Oxford University Press, 1918), 100-127 [hereinafter *The Hague IV*]; Hersch Lauterpacht, *supra* note 89, at 360.

<sup>104</sup>The four Geneva Conventions of August 12, 1949, common Article 2, 75 U.N.T.S. (1950) 31-417.

<sup>105</sup>Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, signed at Geneva on December 12, 1977, entered into force on December 7, 1978, UK Misc. 19 (1977), Cmd. 6927 [hereinafter *Protocol I*].

territory.<sup>106</sup> Oppenheim argues that:

"Belligerent occupation is invasion plus taking possession of enemy country for the purpose of holding it, at any rate temporarily. The difference between mere invasion and occupation becomes apparent from the fact that an occupant sets up some kind of administration, whereas the mere invader does not."<sup>107</sup>

Furthermore, Hyde, for his part, conceives that: "belligerent occupation is that stage of military operations which is instituted by an invading force in any part of an enemy's territory, when that force has overcome unsuccessful resistance and established its own military authority therein."<sup>108</sup> From these definitions it is clear that belligerent occupation is the stage in war which immediately occurs after the belligerent state succeeds in entering the enemy territory and places it under its actual domination, culminating in the cessation of fighting and the end of military operations.

It must be emphasized that international humanitarian law draws a distinction between belligerent occupation and military occupation on the one hand, and that of invasion on the other. Belligerent occupation comes as a stage in the wake of fighting and armed military operations, as, for example, the occupation by the Axis forces of European territories during World War II. Military occupation, on the other hand, occurs as a result of the mutual surrender of antagonistic forces prior to the outbreak of war. In fact, a distinction is drawn between occupation and invasion, in that the latter does not establish any new

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<sup>106</sup> Lord McNair and A.D. Watts, *The Legal Effects of War*, 4th ed. (New York: Cambridge University Press, 1967), 319.

<sup>107</sup> L. Oppenheim, *supra* note 91, at 167.

<sup>108</sup> Charles Cheney Hyde, *supra* note 92, at 2:361.

actual administration in the transgressed territory, but is, rather, a kind of attack and retreat without the imposition of a state of complete domination over a territory and the eradication of its entire resistance.<sup>109</sup>

In this respect, T.J. Lawrence has pointed out that belligerent occupation constitutes a three-phase process, namely: a state of war and armed dispute arising between two nations in which one succeeds in invading the other's territory and occupying it totally or in part; second, an interim actual state of war arising between two nations in which the armed forces of one occupies the territory of the other and places it under its own control. In this case, belligerent occupation is not seen as a legal condition but a *de facto* situation established by the conditions of war and the victory of the second party over the first; and third, occupation should be actual, and must not arise unless the armed forces of one nation imposes its authority over the occupied territory of the other, and subjecting it to its military authority.<sup>110</sup>

Islamic international law, however, has not sanctioned belligerent occupation in its modern sense, for the *Holy Qur'an* considers that a transgression against the rights of the others, "do not transgress limits, for *Allah* loveth not transgressors,"<sup>111</sup> and "let there be no hostility except to those who practise oppression."<sup>112</sup> International

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<sup>109</sup> *Ibid.*, at 362; Paul Reuter, *Droit international public* (Paris: Presses Universitaires de France, 1958), 344.

<sup>110</sup> T.J. Lawrence, *The Principles of International Law*, 7th ed. (London: Macmillan, 1927), 177.

<sup>111</sup> *The Holy Qur'an*, II: 190.

<sup>112</sup> *Ibid.*, II: 193.

humanitarian law considers belligerent occupation to be null and void, an act of illegal aggression, unless it takes place as a form of legitimate self-defence, or sanctioned by the United Nations for the sake of maintaining world peace and security.<sup>113</sup> This is what the United Nations Charter states, and what has been emphasized by the U.N. Resolution 3734, in its 25th session by a majority of 140 votes, which states that nations commit themselves to refraining from threats to, or actual use of force, against the security of any territory, or the political independence of any other nation.

According to international humanitarian law, belligerent occupation does not abrogate the sovereignty of the victim state, nor does it transfer that sovereignty to the belligerent one, but rather maintains the sovereignty of the occupied nation over its own territory regardless of the fact that such sovereignty is suspended during the period of interim occupation. It was Vattel who became the first jurist to endorse this principle. Towards the end of the 19th century such views became more acceptable following their incorporation into the laws of land warfare.<sup>114</sup> In this respect, Fauchille states that belligerent occupation, in its capacity as an interim actual state, cannot replace the original authority over territory by that of the occupation.<sup>115</sup> In the same fashion, Liewellyn Jones notes that sovereignty is not

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<sup>113</sup>Adam Roberts, "What is a Military Occupation?" *The British Year Book of International Law* 55 (1984): 293.

<sup>114</sup>Emmerich de Vattel, *Le droit des gens, ou principes de la loi naturelle, appliqués à la conduite et aux affaires de nations et des souverains*, 2 vols. (Paris: Chez Janet et Cotellet, 1820), 2:174.

<sup>115</sup>Paul Fauchille, *supra* note 90, at 215.

transferred to the belligerent nation, whether its occupation takes place peacefully or by military means.<sup>116</sup>

Thus, prior to the Hague's agreements of 1899 and 1907, belligerent occupation used to imply the annexation of occupied territories and their subjugation to the occupying army's authority. However, this implication has become null and void and the annexation of occupied territory or the abrogation of nations' sovereignty is no longer seen as a necessary consequence of occupation. Accordingly, Kelsen, in his interpretation of the legal status of occupied Germany under the Allies, following World War II, argues for Germany's right to maintain complete sovereignty over its own territory despite the suspension of its jurisdiction.<sup>117</sup>

The modern principle of sovereignty originated in the sixteenth century with the emergence of the nation-state, and found its expression in the international arena after the establishment of the United Nations in 1945. Nonetheless, Islamic international law recognized this right as early as the seventh and eighth centuries. In *L'Arménie entre Byzance et l'Islam depuis la conquête arabe jusqu'en 886*, Joseph Laurent states that Mu'awiya Ibn Abi Sufyan, the first Umayyad ruler, recognised the sovereignty of the Armenian people - i.e. the right to preserve an independent identity and to exercise control over their own territory - in 653 A.D. Another case in point is that of the people of *Samarkand v. Qutayba Ibn Muslim* in 702 A.D. The Muslim judge agreed with the claims

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<sup>116</sup>F. Liewellyn Johnes, *Military Occupation of Alien Territory in Time of Peace: Transactions of the Grotius Society* (London: Macmillan, 1923), 159.

<sup>117</sup>Hans Kelsen, "The Legal Status of Germany According to the Declaration of Berlin," *AJIL* 39 (1945): 518.

of the people of Samarkand, and passed a judgment against Qutayba Ibn Muslim, the leader of the Muslim army. The judge ruled that the Muslim army must withdraw from the city, and take immediate steps to enable the people of Samarkand to exercise their right to territorial sovereignty and self-determination, peacefully and freely.<sup>118</sup>

### 3. Types of *Jihad*

In the course of discussing the theory of *jihad*, a considerable number of contemporary scholars have confused the types and modes of *jihad*. Nevertheless, while Ibn Qayyim al-Jawziyya distinguished four types of *jihad*: the struggle against the self; the struggle against evil; the struggle against non-believers; and the struggle against hypocrites,<sup>119</sup> al-Mawardi, for his part, divided *jihad* into two general categories: wars of public interest, and wars against polytheists and

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<sup>118</sup>Alan E. Buchanan, "The Right to Self-determination: Analytical and Moral Foundations," *Arizona Journal of International and Comparative Law* 8:2 (Fall 1991): 47; Ingrid Delupis, *International Law and the Independent State* (Glasgow: The University Press, 1974), 3-8; James Crawford, *The Creation of States in International Law* (Oxford, The Clarendon Press, 1979), 26-27; Joseph Laurent, *L'Arménie entre Byzance et l'Islam depuis la conquête arabe jusqu'en 886* (Paris: Fontemoing, 1919), 53; Nathaniel Berman, "Sovereignty in Abeyance: Self-determination and International Law," *Wisconsin International Law Journal* 7:1 (Fall 1988): 52; Patrick Thornberry, "Self-determination, Minorities, Human Rights: A Review of International Instruments," *International and Comparative Law Quarterly* 38 (October 1989): 877; al-Tabari, *supra* note 71, at 3:552.

<sup>119</sup>Ibn al-Qayyim, *supra* note 21, at 1:39-40; Sufyan Ibn 'Uyayna advocates that Allah gave the prophet Muhammad four swords to strive against unbelievers: "The first against polytheists, which the prophet himself fought with; the second against apostates, which Abu Bakr fought with; the third against the people of the Book, which 'Umar fought with; and the fourth against dissenters, which 'Ali fought with." al-Sarakhsi, *supra* note 21, at 10:3.

apostates.<sup>120</sup> In a similar vein, other Muslim jurists spelled out two types of *jihad*: the greater *jihad* and the lesser *jihad*.<sup>121</sup> The first type deals with the struggle against the self and evil, and may be performed by heart; and the second type deals with the strive against apostates and non-believers, which can be accomplished by tongue, wealth and self.<sup>122</sup> Based on the above categorization, and taking into consideration the current adaptation of the *Shari'ah* in a contemporary vein,<sup>123</sup> types of *jihad* can be subsumed under two categories: the moral struggle (greater *jihad*) and the armed struggle (lesser *jihad*). The first type is directed against the self and evil, while the second type deals with Muslims (highway robbers, rebels, apostates and unjust rulers),<sup>124</sup> and with non-Muslims (polytheists and scripturaries).<sup>125</sup>

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<sup>120</sup>al-Mawardi. *supra* note 21, at 50.

<sup>121</sup>Donna E. Arzt, "The Treatment of Religious Dissidents Under Classical and Contemporary Islamic Law," in *Religious Human Rights in Global perspective: Religious Perspectives*, eds. John Witte, Jr. and Johan D. van der Vyver (The Hague, The Netherlands: Martinus Nijhoff Publishers, 1996), 388.

<sup>122</sup>al-Awza'i, *supra* note 82, at 330; al-Farra', *supra* note 21, at 25, 35, 38 and 41; Ibn Hazm, *supra* note 21, at 333-361; al-Kasani, *supra* note 21, at 134-140; al-Sarakhsi, *supra* note 21, at 98-124.

<sup>123</sup>Shaykh 'Umar 'Abd al-Rahman, the leader of *al-Jihad* Movement, lecturing on *jihad* in Detroit in 1991. See *Jihad in America* (WNET television broadcast, Nov. 21, 1994), available in LEXIS, News Library, Curnws File.

<sup>124</sup>Contemporary Muslim scholars like al-Mawdudi, al-Banna, Qutb and 'Abd al-Rahman call upon Muslims to wage *jihad* against unjust Muslim rulers. These teachings have been used by the militants of *al-Jihad* Movement to justify the assassination of Anwar al-Sadat, the Egyptian president on October 6, 1981. See Michael Youssef, *Revolt Against Modernity: Muslim Zealots and the West* (Leiden, The Netherlands: E.J. Brill, 1985), 177; Tamara Sonn, "Irregular Warfare and Terrorism in Islam: Asking the Right Questions," in *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition*, eds. James Turner Johnson and John Kelsay (Westport, Connecticut:

Since this study is based on the rules of Islamic and public international law, it is best to concentrate on the armed *jihad*; which includes the struggle against Muslim dissidents and unjust rulers even if they claim to be Muslims; and the struggle against non-Muslims: polytheists and scripturaries. It is clear that the first type of fighting (against Muslims) falls within humanistic law, which deals with the rights of civilians and fighters in times of peace, while the other type (against non-Muslims) falls under humanitarian international law, which deals with the rights of civilians and combatants in times of international conflict.<sup>126</sup>

#### ***A. Jihad against Muslim Dissidents and Unjust Rulers***

However, *jihad* against dissidents, highway robbers, rebels, apostates and unjust rulers is in accord with the Muslim community's need to insure public security, social stability, and legal order.<sup>127</sup> Highway robbers (*al-Muḥaribūn*), are a group which raises weapons to take by force the property and life of travellers. This crime is defined as grand theft,<sup>128</sup> and explicitly discussed in the *Holy Qur'an*:

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Greenwood Press, 1990), 141.

<sup>125</sup>Relying on the works of Muslim jurists, Majid Khadduri called this type of *jihad* "*jihad* against unbelievers". Although he did not mention these works, one can argue that this naming is inaccurate since he treated scripturaries on the same footing as polytheists. In fact, the *Holy Qur'an* is extremely strict in distinguishing between the two categories.

<sup>126</sup>Ahmed Zaki Yamani, *supra* note 42, at 192.

<sup>127</sup>Aly Aly Mansour, "Hudud Crimes," in *The Islamic Criminal Justice System*, ed. M. Cherif Bassiouni (New York: Oceana Publications, Inc., 1982), 196.

<sup>128</sup>*The Holy Qur'an*, V: 37.



"The punishment of those who wage war against *Allāh* and His Prophet, and strive with might and main for mischief through the land is execution, or crucifixion, or have their hands and their feet cut off from opposite sides, or exile from the land. That is their disgrace in this world, and a great torment is theirs in the hereafter."

Although Muslim jurists disagree on the degree of punishment,<sup>129</sup> al-Farrā' argues that punishment should be devised according to the robbers' circumstances and not to their capacity:

"For murder accompanied by plunder: beheading followed by crucifixion; for murder only: beheading; for plunder only without loss to life: the amputation of hand and foot on alternate sides; and for raising arms with the intent of plunder and murder only: deportation to another territory."<sup>130</sup>

Fighting against *al-Bughāt* (rebels), who secede from the Muslim community, or rebel against the *Imām* (Muslim ruler) is based on the following *Qur'ānic* verse:

"And if two parties among the Believers fall into a quarrel, make ye peace between them, but if one of them transgresses beyond bounds against the other, then fight ye [all] against the one that transgresses until it complies with the command of *Allāh*; but if it complies, then make peace between them with justice, and be fair; for *Allāh* loves those who are fair [and just]."<sup>131</sup>

From the verse above, one may deduce that rebels (*al-bughāt*) remain Muslims despite their rebellion, and are allowed to live in security in Muslim territory if they reconcile themselves to peace.<sup>132</sup> This is what

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<sup>129</sup> Aly Aly Mansour, *supra* note 127, at 199.

<sup>130</sup> al-Farrā', *supra* note 21, at 41.

<sup>131</sup> *The Holy Qur'an*, XLIX: 9.

<sup>132</sup> John Kelsay, *supra* note 15, at 86; Khalid Abou El Fadl, "Ahkām al-Bughāt: Irregular War and the Law of Rebellion in Islam," in *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition*, eds. James Turner Johnson and John Kelsay (Westport, Connecticut: Greenwood press, 1990), 153; Al Ghunaimi, *supra*

was advocated by 'Alī Ibn Abī Ṭālib, the fourth rightly guided Caliph, who instructed his army before the battle of the Camel (*al-Jama'ī*), regarding the rebel forces:

"When you 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 is to remain covered, do not approach their property except what you find in their camp of weapons, beasts, male or female slaves: all the rest is to be inherited by their heirs according to the *Qur'an*."<sup>133</sup>

Unlike highway robbers or apostates, the punishment for a rebel, according to al-Mawardī, is not capital,<sup>134</sup> since the aim of fighting them is not to eliminate them, but to prevent them from disrupting peace and security.<sup>135</sup> This opinion cannot be taken for granted, as other jurists argue that rebels may be treated like apostates and polytheists if they have been forewarned of the battle.<sup>136</sup> A case in point is the *jihad* of 'Alī Ibn Abī Ṭālib against the *Kharijīs*. Before he crushed them in the battle of al-Nahruwan, he sent 'Abd Allāh Ibn 'Abbās to warn them and, thereby, to diminish the loss of Muslim life.<sup>137</sup> It is worth mentioning that rebels, according to al-Mawardī, are entitled to what is so-called a *de facto* state in the modern sense of the term. They can

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note 83, at 140.

<sup>133</sup>Abū al-Hasan 'Alī Ibn al-Husayn al-Mas'ūdī, *Murūj al-Dhahab wa Ma'adin al-Jawhar*, 4 vols. (Beirut: Dar al-Fikr, 1973), 2:371 [hereinafter al-Mas'ūdī].

<sup>134</sup>al-Mawardī, *supra* note 21, at 54.

<sup>135</sup>al-Kāsanī, *supra* note 21, at 140.

<sup>136</sup>Ibn Hazm, *supra* note 21, at 333; al-Sarakhsī, *supra* note 21, at 128-129.

<sup>137</sup>al-Farra', *supra* note 21, at 39; al-Marghīnānī, *supra* note 21, at 170; al-Mughnī, *supra* note 21, at 54.

collect revenue taxes and conclude treaties with foreign states.<sup>138</sup> However, the *jihad* against *al-bughat* (rebels) may correspond to the fighting referred to in article 3 of the 1949 Geneva Convention I for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field,<sup>139</sup> as well as to the 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts.<sup>140</sup> A comparison between the norms of Geneva Conventions, and its parallels in Islamic international law, reveals that the regulations of the Geneva Conventions relating to armed conflict of a non-international nature are weaker than those contained in the same conventions pertaining to international armed conflict. On the contrary, however, the regulations of Islamic international law pertaining to non-international armed conflict are stronger and more humane than those relating to international armed conflict of the same law.<sup>141</sup>

Waging war against apostates (*al-Murtaddun*), who renounce Islam

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<sup>138</sup> al-Mawardi, *supra* note 21, at 54; al-Sarakhsi, *supra* note 21, 130.

<sup>139</sup> *The Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, 75 U.N.T.S. (1950) 31-83 [hereinafter *The Geneva I*]. See Jean Pictet, *Humanitarian Law and the protection of War Victims* (Geneva: Henry Dunant Institute, 1975), 53.

<sup>140</sup> *Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 1125 U.N.T.S. 609 (opened for signature on December 12, 1977 and entered into force on December 7, 1978) [hereinafter *Protocol II*]. See Theodor Meron et al., "Application of Humanitarian Law in Non-International Armed Conflicts," *American Society of International Law Proceedings* 85 (1991): 84.

<sup>141</sup> Ahmed Zaki Yamani, *supra* note 42, at 195.

totally, or in part,<sup>142</sup> is justified by the Prophetic tradition:

"A Muslim's blood shall not be lawfully shed except for three causes: atheism after belief; adultery after marriage; or killing a person otherwise than in retaliation for another person."<sup>143</sup>

Before taking any action against apostates, Muslim jurists emphasize that the *Imām* should negotiate with them for three days, trying to persuade them to return to Islam,<sup>144</sup> as *Allāh* says: "but if they repent, establish regular prayers, and give regular charity, then open the way for them."<sup>145</sup> The *Imām* should do the same with apostates who separate themselves and become a *de facto* state exercising sovereignty over part of the territory of Islam (*dār al-Islām*), or who join the territory of war (*dār al-harb*).<sup>146</sup> The apostates have to return to Islam or accept the challenge of *jihad*. In other words, they must choose between Islam or the sword;<sup>147</sup> they cannot be given *aman* (safeguard)<sup>148</sup>

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<sup>142</sup>Apostasy punishments would not apply to the insane, minors, the intoxicated, or those who became Muslims under coercion. Apostate women would not be killed, but imprisoned until returning to Islam. See al-Kāsanī, *supra* note 21, at 7:134; Majid Khadduri, *supra* note 2, at 205, 215 and 227; al-Marghīnānī, *supra* note 21, at 2:165 and 170; al-Sarakhsī, *supra* note 21, at 10:98 and 123.

<sup>143</sup>Muslim, *supra* note 69, at 3: 506-507.

<sup>144</sup>al-Farra', *supra* note 21, at 35; al-Kāsanī, *supra* note 21, at 7: 135; Majid Khadduri, *supra* note 2, at 195.

<sup>145</sup>*The Holy Qur'an*, IX: 5.

<sup>146</sup>al-Kāsanī, *supra* note 21, at 7:136; al-Siyar al-Kabīr, *supra* note 67, at 5:1938.

<sup>147</sup>This issue has been expressed in the following verse: "Shall you fight, or they shall submit [to Islam]", *The Holy Qur'an*, XLVIII: 16; al-Sarakhsī, *supra* note 21, at 10: 98-99.

<sup>148</sup>al-Farra', *supra* note 21, at 37.

or allowed to become *dhimmis*.<sup>149</sup> If apostates choose the sword after being notified and warned, *jihad* should be waged against them on the same terms that *jihad* is waged against *harbīs* (the people of the territory of war).<sup>150</sup> Cases in point were the secession of the tribes of Arabia, except *Quraysh* and *Thaqf*, after the death of the Prophet,<sup>151</sup> and the Karmathians (*al-Qaramiṭa*) in the Abbaside era.<sup>152</sup> The Arab tribes who refused to return to Islam were severely fought by Abū Bakr, the first caliph, and the Karmathians were crushed by al-Muktaḥḥ bi-Allāh, the Abbaside caliph. Muslim jurists professed that apostates and their wives could not be enslaved,<sup>153</sup> nor could their property be confiscated.<sup>154</sup> If an apostate were killed, his property before renouncing Islam, would be distributed among his Muslim heirs,<sup>155</sup> while his property, after apostasy, would be taken over by the Islamic state as *fay'* (booty).<sup>156</sup> However, being treated like non-Muslim combatants, apostates, according to Islamic international law, are not responsible for losses sustained

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<sup>149</sup> *Ibid.*

<sup>150</sup> al-Sarakhsī, *supra* note 21, at 10:114; al-Siyar al-Kabīr, *supra* note 67, at 5:1941.

<sup>151</sup> al-Farra', *Ibid.*; al-Ṭabarī, *supra* note 71, at 2: 157.

<sup>152</sup> Albert Hourani, *A History of the Arab Peoples* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1991), 40; Ibn Kathīr, *supra* note 72, at 11:82.

<sup>153</sup> al-Kasānī, *supra* note 21, at 7:136; Majid Khadduri, *supra* note 2, at 216-217.

<sup>154</sup> al-Kasānī, *Ibid.*; al-Marghīnānī, *supra* note 21, at 2:165.

<sup>155</sup> Majid Khadduri, *supra* note 2, at 196; al-Marghīnānī, *Ibid.*

<sup>156</sup> al-Farra', *supra* note 21, at 36; al-Kasānī, *supra* note 21, at 7:139; Majid Khadduri, *supra* note 2, at 201; al-Marghīnānī, *Ibid.*; al-Sarakhsī, *supra* note 21, at 10: 101.

as a result of war,<sup>157</sup> and their negotiators and ambassadors are entitled to diplomatic immunity in the modern sense of the term.<sup>158</sup>

The primary sources of Islamic law give final authority to the leaders of the Islamic State (*u'lū al-amr*), and emphasize the need for their obedience and compliance by Muslims collectively and individually. The law concerning this issue is expounded in the *Holy Qur'an* as follows:

"O ye who believe! Obey *Allāh*, and obey the Prophet, and those charged with authority among you. If you differ in anything among yourselves, refer it to *Allāh* and His Prophet if you do believe in *Allāh* and the Last Day; that is best, and most suitable for final determination."<sup>159</sup>

However, Islamic law regulates the relationships between Muslims and their leaders. The subjects of the Islamic state owe a duty of obedience to the *Imām*, who in return has to defend their interests, enforce Islamic law, and establish public security.<sup>160</sup> Although many Muslim jurists argue that revolting against a corrupt *Imām* is worse than tyranny,<sup>161</sup> the *Qur'anic* verses and Prophetic traditions exhort Muslims to disobey the *Imām*, and even wage *jihād* (*sall al-sayf*) against him if

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<sup>157</sup> Majid Khadduri, *supra* note 2, at 202; al-Mughnī, *supra* note 21, at 10:73.

<sup>158</sup> The Prophet told the ambassadors of Musaylama al-Kadhhab "the liar" when they arrived at the Madīna: "By *Allāh* if you were not ambassadors, I would have ordered you to be beheaded." See Ibn Hishām, *supra* note 67, at 4: 183.

<sup>159</sup> *The Holy Qur'an*, IV: 59.

<sup>160</sup> Abū al-Hasan 'Alī al-Māwardī, *Adab al-Dunyā wal-Dīn* (Mecca: Dār al-Bāz lil-Nashr, 1987), 138.

<sup>161</sup> al-Farrā', *supra* note 21, at 20; Qamaruddin Khan, *The Political Thought of Ibn Taymiyyah* (Delhi, India: Adam Publishers & Distributors, 1988), 213; Shams al-Islām Ibn Qayyīm al-Jawziyya, *ʿIlām al-Muwaqqiʿīn ʿan Rabb al-ʿĀlamīn*, 4 vols. (Cairo: al-Maktaba al-Tijāriyya al-Kubrā, 1955), 3: 6-7 [hereinafter *ʿIlām al-Muwaqqiʿīn*].

he deviates from the right path, for "no obedience to any creature in disobedience to the Creator."<sup>162</sup> In other words, if the *Imam* commands something which violates the rules stated in the *Qur'an* and the *Sunna*, the Muslims' duty of obedience, is null and void.<sup>163</sup> In his first speech, after his ascension to the position of the first guided Caliph, Abū Bakr addressed the believers: "Obey me as long as I remain loyal to *Allāh* and His Prophet, but if I disobey them none should accord obedience to me."<sup>164</sup> This point finds support in the *Qur'an* and *ḥadīth* (prophetic tradition). *Allāh* puts the disbelievers and the rulers who do not enforce *Allāh's* laws, on an equal footing, "if any (rulers) do fail to judge by what *Allāh* has revealed, they are (no better than) unbelievers."<sup>165</sup> Through the glasses of this concept, the Prophet said: "The greatest *jihad* is a just word to a tyrant ruler."<sup>166</sup> In light of

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<sup>162</sup>Abū Muhammad 'Alī Ibn Hazm, *al-Faṣl fī al-Milāl wal-Aḥwā' wal-Nihāl*, 5 vols. (Beirut: Dār al-Jīl, 1985), 5:28 [hereinafter *al-Milāl wal-Nihāl*]; Fakr al-Dīn al-Rāzī, *al-Tafsīr al-Kabīr*, 32 vols. (Beirut: Dār Ihya' al-Turāth al-'Arabī, 1980), 4:42-43 [hereinafter *al-Rāzī*]; *The Holy Qur'an*, II:124, V:47, 48, 50; al-Juwaynī, *supra* note 21, at 88; Qamaruddin Khan, *supra* note 161, at 205-210; Shihāb al-Dīn al-Sayyid Mahmūd al-Aḥḍaf al-Baghdādī, *Rūḥ al-Ma'ān fī Tafsīr al-Qur'an al-'Azīm wal-Sab' al-Mathānī*, 29 vols. (Beirut: Dār Ihya' al-Turāth al-'Arabī, 1980), 1: 376-378 [hereinafter *al-Aḥḍaf*].

<sup>163</sup>al-Mawardī, *supra* note 21, at 15-16; Noel Coulson, "The State and the Individual in Islamic Law," *The International and Comparative Law Quarterly* 6 (1957): 57; Norman Anderson and Noel Coulson, "The Moslem Ruler and Contractual Obligations," *New York University Law Review* 33 (1958): 921.

<sup>164</sup>Ibn Kathīr, *supra* note 72, at 6:301; al-Ṭabarī, *supra* note 71, at 2:105.

<sup>165</sup>*The Holy Qur'an*, V: 47.

<sup>166</sup>Abū 'Abd al-Rahmān Ahmad Ibn Shu'ayb al-Nasā'ī, *Sunan al-Nasā'ī*, 8 vols. (Cairo: Al-Maktaba al-Tijariyya al-Kubrā, 1930), 7:161 [hereinafter *al-Nasā'ī*].

the above argument, it is obvious that the *bay'at* (homage) is a contract between the ruler and the ruled which, if breached by any of the two contracting parties, warrants a *jihad* against the violator until he follows the right path.<sup>167</sup>

#### ***B. Jihad Against Non-Muslims***

The other kind of lesser *jihad* is fighting against non-Muslims, polytheists and scripturaries (*Ahl-al-Kitab*). This external *jihad* may be called international *jihad*. As indicated earlier, it is important to emphasize that *jihad*, in any case, is a defensive war. In other words, according to the *Qur'an* and the Prophetic traditions, Muslims are not allowed to wage *jihad* against polytheists and scripturaries before they attack Muslims or breach their conduct with them.<sup>168</sup>

In discussing this point, Majid Khadduri advocates that "no compromise is permitted with those who fail to believe in God, they have either to accept Islam or fight..."<sup>169</sup> "When *Allah* sent the last of His Prophets to call them (scripturaries) to the truth, they accepted belief in *Allah* but not in His Prophet or the *Qur'an*. Hence, the scripturaries, like the polytheists must be punished."<sup>170</sup> In examining these statements, I recall one of Wael Hallaq's logical observations: "Rationality in drawing inferences means that the conclusion of an argument must follow from the premises and must not go beyond them; it

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<sup>167</sup> al-Mawardi, *supra* note 21, at 40.

<sup>168</sup> *The Holy Qur'an*, II: 190.

<sup>169</sup> Majid Khadduri, *supra* note 50, at 75.

<sup>170</sup> *Ibid.*, at 80.



must be true if the premises are true."<sup>171</sup> To disprove Khadduri's argument, and to show the irrationality of his inferences and his stereotyped conclusions, one must refer to the *Holy Qur'an*, Prophetic traditions and precedents within the framework of Islamic legal theory.

It is obvious that Khadduri attempts to demonstrate the definitive hostility of Islam to all non-Muslims. In other words, he argues that polytheists and scripturaries are liable to punishment since they fail to believe in Islam; the polytheists should choose Islam or the sword, while the scripturaries can choose one of three: Islam, the poll tax (*jizya*), or the sword.<sup>172</sup> As has already been explained, waging *jihad* against non-Muslims on account of their denial of Muhammad's mission is at variance with the *Qur'anic* teachings. This critical point has been expressed in the following verses:

"Let there be no compulsion in religion."<sup>173</sup> "if it had been your Lord's will, all who are on earth would have believed (in Islam). Do you want to compel mankind, against their will, to believe."<sup>174</sup> "And say, the truth is from your Lord. Whosoever will, let him believe, and whosoever will, let him disbelieve."<sup>175</sup> "Those who believe (in the *Qur'an*), those who follow the Jewish scriptures, and the Sabians, Christians, Magians, and Polytheists, Allah will judge between them on the Day of Judgment, for Allah is witness of all things."<sup>176</sup>

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<sup>171</sup>Wael B. Hallaq. "On Inductive Corroboration, Probability and Certainty in Sunnī Legal Thought," in *Islamic Law and Jurisprudence*, ed. N. Heer (Seattle: University of Washington Press, 1990), 3.

<sup>172</sup>Majid Khadduri, *supra note*, 50, at 80.

<sup>173</sup>*The Holy Qur'an*, II: 256.

<sup>174</sup>*Ibid.*, X: 99.

<sup>175</sup>*Ibid.*, XVIII: 29.

<sup>176</sup>*The Holy Qur'an*, XXII: 17

"You have your religion and I have mine."<sup>177</sup>

Furthermore, one must make reference to the Islamic concept of religious liberty and tolerance, as well as to Islamic respect paid to the People of the Book (Jews and Christians) as outlined in the following *Qur'anic* verses:

"Those who believe (in the *Qur'an*), and those who follow the Jewish (scriptures), and the Christians and the Sabians, and who believe in *Allah* and the Last Day, and work righteousness, shall have their reward with their Lord. On them shall be no fear, nor shall they grieve."<sup>178</sup>

"And dispute ye not with the People of the Book, except with means better (than mere disputation), unless it be with those of them inflict wrong (and injury)."<sup>179</sup>

Accordingly, Muslims are not allowed to fight against the scripturaries and polytheists unless they commit an aggression. Even in the battlefield, Muslim soldiers were prohibited from starting the war. Although non-Muslims start killing Muslims, the latter are not allowed to do the same until they show them the killed person and say to them: Would it not be better for you to achieve peace and security by embracing Islam or by concluding a covenant safeguarding peace? If they accept Islam, or choose to remain scripturaries under safe conduct and quarter (*aman*), they would be entitled to enjoy all the rights and obligations dictated by Islamic law.<sup>180</sup> If none of the choices above are accepted,

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<sup>177</sup> *Ibid.*, CIX: 6.

<sup>178</sup> *Ibid.*, II: 62.

<sup>179</sup> *Ibid.*, XXIX: 46.

<sup>180</sup> Majid Khadduri argues that if the People of the Book prefer to remain scripturaries at the sacrifice of paying the poll tax, they suffer certain disabilities which reduce them to second-class citizens. Khadduri, however, does not mention any of these disabilities. See Majid Khadduri, *supra* note 50, at 80; Majid Khadduri, "The Islamic Theory of

Muslim soldiers are permitted to wage *jihad* in defence of their faith and land. This approach is illustrated by the following Prophetic traditions:

"Narrated 'Abd Allāh Ibn Abī Awfā, the Prophet, during some of his battles, got up among the people and said: O people! Do not wish to face the enemy (in a battle) and ask Allāh to save you from calamities."<sup>181</sup>

"The Prophet instructed Mu'adh Ibn Jabal, when he sent him at the head of the Muslim army to conquer the Yemen. He said: Do not fight them before you call them [to be converted into Islam or to conclude a covenant]. And if they decline, do not fight them until they take the initiative, and when they do so, wait until they slay one of your men. Then show them the body of the slain and say to them: Is there no better way than this? If God converts one single man through your example, it will be better for you than to own the whole world."<sup>182</sup>

#### 4. The Development of the Doctrine of *Jihad*

A closer look at the verses of the *Holy Qur'an* would reveal that *jihad* developed through four stages: the first was that of forbidding Muslims from fighting.<sup>183</sup> This is the earliest period in the life of the Muslims when they were still a weak community in Mecca prior to the *hijra* (emigration to Medina) and the establishment of the Islamic state.

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International Relations and Its Contemporary Relevance," in *Islam and International Relations*, ed. J. Harris Proctor (New York: Frederick A. Praeger Publishers, 1965), 26.

<sup>181</sup>al-Bukhārī, *supra* note 66, at 4:9.

<sup>182</sup>Muhammad Abū Zahra, *Nazariyyat al-Harb fī al-Islām*, 4th ed. (Cairo: Wazārat al-Awqāf, 1961), 42; al-Sarakhsī, *supra* note 21, at 10:31; al-Siyar al-Kabīr, *supra* note 67, at 1:78; Wahba al-Zuhaylī, *Āthar al-Harb fī al-Fiqh al-Islāmī: Dirāsa Muqārana* (Damascus: Dār al-Fikr, 1992), 154.

<sup>183</sup>"Last thou not turned thy vision to those who were told to hold back their hands (from fighting) but established regular prayers and spend in regular charity, when (at length) the order for fighting was issued to them, behold! a section of them feared men as or even more that they should have feared Allāh." *The Holy Qur'an*, IV: 77.

In this phase, the Prophet started the greater *jihād* (*al-jihād al-Akbar*) by preaching non-violently, while Muslims were insulted, abused and persecuted for many years by the infidels of Mecca.<sup>184</sup> The second stage is the one in which the Prophet stopped preaching inside Mecca and turned his attention to the neighboring cities and countries. In this period, Muslims were given permission to fight, as the verse was revealed in the wake of the Muslims' forced departure from Mecca.<sup>185</sup> The third juncture is the one in which Muslims were given the order to fight. This significant development occurred following the establishment of the *post-Hijra* Muslim society in Medina, in a *Qur'ānic* verse which was the first to explicitly order Muslims to initiate a just war.<sup>186</sup> The fourth phase is the one in which Muslims received the order to fight against the polytheists (*al-Mushrikān*) after they had dishonored their pledges with Muslims.<sup>187</sup> This is the stage at which the Islamic state witnessed the peak of its strength in the days of the Prophet and when Muslims became

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<sup>184</sup>Aslam Siddiqi, "*Jihād: An Instrument of Islamic Revolution*," *Islamic Studies* 2 (1963): 383-384; Ibn Hishām, *supra* note 67, at 1: 258-259; Ibn Ishāq, *supra* note 84, at 131.

<sup>185</sup>"To those against whom war is made, permission is given (to fight), because they are wronged; and verily, *Allāh* is Most Powerful for their aid. (They are) those who have been expelled from their homes in defiance of right (for no cause) except that they say: Our Lord is *Allāh*." *The Holy Qur'an*, XXII: 39-40.

<sup>186</sup>"Fight in the cause of *Allāh* those who fight you, but do not transgress limits, for *Allāh* loveth not transgressors." *The Holy Qur'an*, II: 190.

<sup>187</sup>"Fight those who believe not in *Allāh* nor the Last Day, nor hold that forbidden which hath been forbidden by *Allāh* and His Prophet, nor acknowledge the religion of truth, (even if they are) of the People of the Book; until they pay the *jizya* with willing submission and feel themselves subdued." *The Holy Qur'an*, IX: 29.

established as a social and political force in Arabia.<sup>188</sup> In this period, the young Muslim state had become so vibrant as to extend its dominion over the entire Arabian Peninsula.

##### 5. Forbidden Acts of Hostility According to the Doctrine of *Jihad*

Nevertheless, Islamic international law recognizes that war, by its nature, implies violence and suffering.<sup>189</sup> Therefore, as a highly practical and realistic law, it does not require Muslim jihadists to love their enemies nor to receive them with damask roses,<sup>190</sup> but, strictly, lays down humane rules governing the conduct of war, and the treatment of enemy persons and property.<sup>191</sup> Limiting violence to the necessities of war, Islamic international law differentiates between combatants and civilians, as well as between military and civilian objects in time of war.<sup>192</sup> Furthermore, it provides a set of forbidden acts that relate directly to the above categories; combatants, civilians, and civilian objects.

With respect to the first category, Islamic international law

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<sup>188</sup>Jamilah Kolocotronis, *Islamic Jihad: A Historical Perspective*, (Indianapolis, Indiana: American Trust Publications, 1990), 74.

<sup>189</sup>Sobhi Mahmassani, *supra* note 1, at 300.

<sup>190</sup>Marcel A. Boisard, "The Conduct of Hostilities and the Protection of the Victims of Armed Conflicts in Islam," *Hamdard Islamicus* 1:2 (Autumn 1978): 10.

<sup>191</sup>al-Kasānī, *supra* note 21 at 7:101-102; al-Marghīnānī, *supra* note 21, at 2:136-137; al-Māwardī, *supra* note 21, at 38; al-Mughnī, *supra* note 21, at 10:542-544; al-Siyar al-Kabīr, *supra* note 67, at 1:39-55.

<sup>192</sup>Muhammad Ibn 'Alī al-Shawkānī, *Nayl al-Awtār Sharh Muntaqā al-Akhbar min Ahādīth Sayyid al-Akhyār*, 8 vols. (Cairo: Matba'at Mustafā al-Bābī al-Halabī, 1952), 7:258-263 [hereinafter al-Shawkānī]; 'al-San'ānī, *supra* note 21, at 4:62-64 and 85; al-Sarakhsī, *supra* note 21, at 10:30-77; al-Siyar al-Kabīr, *supra* note 67, at 4:1458-1467.

deters Muslim fighters from the following acts: (a) starting warfare before inviting their enemy to adopt Islam or to conclude a covenant.<sup>193</sup> Even if the enemy declines, Muslim fighters are still bound not to start the fighting until the enemy attacks;<sup>194</sup> (b) summary executions, decapitation and torturing of prisoners of war (*al-asrā*);<sup>195</sup> (c) delivering a *coup de grâce* to the wounded;<sup>196</sup> (d) burning captives to death;<sup>197</sup> (e) mutilating dead bodies;<sup>198</sup> (f) treachery and perfidy;<sup>199</sup> (g) using poisoned weapons;<sup>200</sup> and (h) killing of an enemy *hors de*

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<sup>193</sup>Fath al-Bārī, *supra* note 66 at 6:111; al-Kasānī, *supra* note 21, at 107; Muslim, *supra* note 69, at 4:8; al-Siyar al-Kabīr, *supra* note 67, at 1:38-59.

<sup>194</sup>al-Sarakhsī, *supra* note 21, at 10:31.

<sup>195</sup>*Ibid.*, at 10:32; al-Siyar al-Kabīr, *supra* note 67, at 1:110-111, 3:1024-1041; 4:1148-1158.

<sup>196</sup>Izz al-Dīn Abū Ḥamid Ibn Abī al-Ḥadīd, *Kitāb Nahj al-Balāgha*, 4 vols. (Beirut: Dār al-Maʿrifa, n.d.), 3: 425 [hereinafter *Nahj al-Balāgha*].

<sup>197</sup>Abū Dawūd Sulaymān Ibn al-Ashʿath, *Sunan Abī Dawūd*, 2 vols. (Beirut: Dār al-Jānān, 1988), 2:61 [hereinafter *Abū Dawūd*]; al-Siyar al-Kabīr, *supra* note 67, at 4:1467.

<sup>198</sup>Abū Dawūd, *supra* note 197, at 2:59; al-Shawkānī, *supra* note 192, at 7:262.

<sup>199</sup>*The Holy Qur'an* explicitly discusses this point: "If thou fearest treachery from any group, throw back (their covenant) to them, (so as to be ) on equal terms, for *Allāh* loveth not the treacherous." *The Holy Qur'an*, VIII: 58. See Muslim, *supra* note 69, at 4:8; Saīd El-Dakkak, "International Humanitarian Law Lies Between the Islamic Concept and Positive International Law," *International Review of Red Cross* 275 (March-April 1990): 106.

<sup>200</sup>Muslim jurists clearly rule that using poisoned weapons against an enemy in warfare is unlawful. See Abū ʿAbd Allāh Muḥammad al-Maghribī, *Kitāb Mawāhib al-Jalī li Sharḥ Mukhtasar Khalfī*, 6 vols. (Beirut: Dār al-Fikr, 1992), 6:291 [hereinafter *Mawāhib al-Jalī*].

combat.<sup>201</sup> However, some of these prohibited acts are reflected in several conventions and protocols of international humanitarian law. Despite the inclusion of a general clause for participation which provides that their regulations are binding only to the High Contracting Parties,<sup>202</sup> the four Geneva Conventions of 1949 and its Additional Protocols of 1977, as well as the Hague Conventions of 1899 and 1907 are mainly devoted to the protection of war victims.<sup>203</sup> The Hague Regulations, annexed to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, provide in Article 22 that, "the right of belligerents to adopt means of injuring the enemy is not unlimited."<sup>204</sup> More specifically, Article 23 of the same regulations prohibits the employment of poison or poisoned weapons, the killing or wounding of an enemy who has laid down his arms, and the employment of arms or material calculated to cause unnecessary suffering.<sup>205</sup> Similarly, these norms are affirmed by Article 3 of the 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in

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<sup>201</sup>Nahj al-Balāgha, *supra* note 196, at 425.

<sup>202</sup>Waldemar A. Solf, "Protection of Civilians Against the Effects of Hostilities under Customary International Law and under Protocol I," *The American University Journal of International Law and Policy* 1 (Summer 1986): 123.

<sup>203</sup>Su Wei, "The Application of Rules Protecting Combatants and Civilians against the Effects of the Employment of Certain Means and Methods of Warfare," in *Implementation of International Humanitarian law*, eds. Frits Kalshoven and Yves Sandoz (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1989), 377.

<sup>204</sup>The Hague IV, *supra* note 103.

<sup>205</sup>*Ibid.*

the Fields,<sup>206</sup> as well as, by Article 35 of the 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts.<sup>207</sup> Moreover, Article 37 of the same Protocol prohibits killing, injuring or capturing an adversary by resorting to perfidy.<sup>208</sup> Article 41 also includes provisions concerning the prohibition of extermination of the enemy and the killing of an enemy *hors de combat*.<sup>209</sup>

Islamic international law is rather cautious in dealing with civilians in times of war. It forbids (a) attacking, killing and molesting of non-combatant persons. This category includes children under 15 years of age, women, old men, monks, sick and disabled persons;<sup>210</sup> (b) rape in war and sexual molestation. Any Muslim fighter who may commit fornication, rape and other forms of gender-based sexual violence is subject to stoning to death or, to lashing, according to his status as single or married;<sup>211</sup> (c) ethnic cleansing, brutal massacres

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<sup>206</sup>The Geneva I, *supra* note 139.

<sup>207</sup>Protocol I, *supra* note 105.

<sup>208</sup>*Ibid.*

<sup>209</sup>*Ibid.*

<sup>210</sup>Abū Dawūd, *supra* note 197, 2:60-61; Abū Yūsuf, *supra* note 53, at 344; al-Bukhārī, *supra* note 66, at 4:21; al-Farrā', *supra* note 21, at 27; Hasan al-Bannā, *al-Jihād fī Sabīl Allāh* (Cairo: Maktabat al-Turāth al-Islāmī n.d.), 89; Ibn Rushd, *supra* note 21, at 1:382; al-Kasānī, *supra* note 21, at 7:101; al-Mughnī, *supra* note 21, at 10:541; al-Nawawī, *supra* note 21, at 459; al-Sarakhsī, *supra* note 21, at 10:32; al-Siyar al-Kabīr, *supra* note 67, at 4:1415-1419.

<sup>211</sup>Majid Khadduri, *supra* note 2, at 126; David Aaron Schwartz, "International Terrorism and Islamic Law," *Columbia Journal of Transnational Law* 29 (1991): 650. It is important to mention that Islamic international law has prosecuted and considered rape in war as a war crime, as early as fourteen centuries before the Geneva Conventions



and collective blood baths;<sup>212</sup> and (d) killing of peasants, merchants, and diplomats.<sup>213</sup>

A closer look at the provisions of the international humanitarian law reveals that prior to the establishment of the International Criminal Tribunal for the former Yugoslavia, rape was viewed as a secondary human rights abuse during war.<sup>214</sup> Rape was neither mentioned in the Nuremberg

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of 1949, and the statute of the International Criminal Tribunal for the Former Yugoslavia, 1993. In the case of *Khālid Ibn al-Walid v. Dirār Ibn al-Azwar*, the former complained to 'Umar Ibn al-Khattāb, the second Muslim Caliph, that the latter, a Muslim army commander, had had sexual intercourse with a captive woman during the Muslim war against Banū Asad. In response, 'Umar wrote to Khālid ordering him to stone Ibn al-Azwar to death. Before Khālid had received 'Umar's judgment, however, Ibn al-Azwar had passed away. See Abū Bakr Ahmad Ibn al-Husayn al-Bayhaqī, *al-Sunan al-Kubrā*, 10 vols. (Haydar Abad: Matba'at Majlis Da'irat al-Ma'arif al-'Uthmaniyya, 1925), 9:104 [hereinafter al-Bayhaqī]; Abū Yūsuf, *supra* note 53, at 336; al-Mughnī, *supra* note 21, at 10:561; al-Shāfi'ī, *supra* note 21, at 7:322.

<sup>212</sup>In spite of the brutal and cruel treatment of the Meccans, the Prophet instructed the Muslim army, before marching to Mecca in A.D. 630, to avoid fighting or shedding of blood. The Prophet emphasized that after he heard Sa'd Ibn 'Ubāda, one of the four commanders to enter Mecca saying: "Today is a day of war, sanctuary is no more," the Prophet replied: "Today is a day of mercy," and he replaced Ibn 'Ubāda by 'Alī Ibn Abī Tālib. When he conquered Mecca, the Prophet asked the Meccans: "What do you think that I am about to do with you?" They replied: "Good. You are a noble brother, son of a noble brother." He said: "Go your way for you are the freed ones." Similarly, 'Umar Ibn al-Khattāb, the second well-guided Caliph, did when he conquered Jerusalem in A.D. 638. 'Umar gave a formal pledge (*al-'uhda al-'umariyya*) to respect the Christian churches, crosses, and the extended security to the people of the city. As a matter of fact, it was the first time in history that Jerusalem was conquered without bloodshed. See Ibn Hishām, *supra* note 67, at 4:36; Ibn Ishāq, *supra* note 84 and 553; Ibn Kathīr, *supra* note 72, at 4:292 and 7:55; al-Tabarī, *supra* note 71, at 2:21 and 304.

<sup>213</sup>al-Siyar al-Kabīr, *supra* note 67, at 1:296 and 2:515.

<sup>214</sup>M. Cherif Bassiouni, "The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia," *Criminal Law Forum* 5: 2-3 (1994): 280; Christine Clinkin, "Rape and Sexual Abuse of Women in International Law," *European Journal of International Law* 5 (1994): 326.

Charter nor prosecuted in Nuremberg as a war crime under customary international law,<sup>215</sup> but it was prosecuted to a limited degree as a war crime in the Tokyo Tribunal.<sup>216</sup> However, Article 46 of the Hague Regulations of 1899 and 1907 can be broadly considered to cover rape, but has, in the past, been interpreted more narrowly.<sup>217</sup> Article 147 of the 1949 Geneva Convention IV, and Article 76 (1) of the 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949 provide that, "women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault."<sup>218</sup> Accordingly, Islamic international law could be considered as the first international law to consider rape during armed conflict, a war crime.

Islamic international law prohibits unnecessary destruction of an

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<sup>215</sup> *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal*, August 8, 1945, 82 U.N.T.S. 279, 59 Stat. 1544, E.A.S. No. 472.

<sup>216</sup> *Charter of International Military Tribunal for the Far East*, January 19, 1946, April 26, 1946, T.I.A.S. No. 1589, 4 Bevans 20.

<sup>217</sup> This Article provides that "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected." Hague IV, *supra* note 103.

<sup>218</sup> *The Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, 75 U.N.T.S. (1950) 287-417 [hereinafter *The Geneva IV*]. For more details concerning the protection of civilians, particularly women and children, in armed conflict, see Charles A. Allen, "Civilian Starvation and Relief during Armed Conflict: The Modern Humanitarian Law," *Georgia Journal of International and Comparative Law* 19:1 (Spring 1989): 23; Colleen C. Maher, "The Protection of Children in Armed Conflict: A Human Rights Analysis of the Protection Afforded to Children in Warfare," *Boston College Third World Law Journal* 9:297 (Summer 1989), 301; Geraldine Van Bueren, "The International Legal Protection of Children in Armed Conflicts," *International and Comparative Law Quarterly* 43:4 (October 1994): 810.

enemy's real or personal property;<sup>219</sup> devastation of harvest and cutting fruitful trees; and demolition of religious, medical and cultural institutions.<sup>220</sup> Citing *Kitāb al-ʿItibār* of Usama Ibn Munqidh, Marcel A. Boisard states that starting with the 3rd/9th century Islamic international law gave amnesty to hospitals, medical and paramedical personnel. Furthermore, he argues that Muslims knew military field hospitals as early as the 9th century, while it was found in Spain only in the 16th century.<sup>221</sup>

Articles 13 to 26, of the 1977 Additional Protocol I, specify the immunity of civilian hospitals and medical personnel, and Article 53 refers directly to the protection of cultural objects and places of worship during armed conflicts.<sup>222</sup>

#### 6. When Can *Jihād* be Terminated?

Being an exceptional, and purely defensive war designed to stem rebellion, repel aggression, or avert any danger to *dar al-Islām*, *jihād* could be terminated by causes which closely parallel the causes of terminating war in public international law.<sup>223</sup> According to *Kitāb al-*

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<sup>219</sup>David Aaron Schwartz, *supra* note 211, at 650.

<sup>220</sup>al-Bukharī, *supra* note 66, at 4:22; al-Shawkānī, *supra* note 192, at 7:262-263.

<sup>221</sup>Marcel A. Boisard, *supra* note 190, at 10.

<sup>222</sup>Protocol I, *supra* note 105. See J.G. Starke, "the Concept of Open Cities in International Humanitarian Law," *Australian Law Journal* 56:11 (November 1982): 596.

<sup>223</sup>A war may end in one of several ways: by a simple cessation of hostilities; by subjugation; and by a treaty of peace. See Gerhard von Glahn, *supra* note 95, at 572.

*Aḥkām al-Sultāniyya* of al-Mawardī,<sup>224</sup> and *al-Mughnī* of Ibn Qudāma,<sup>225</sup> *jihād* may be ended by one of the following ways: (a) surrender of the non-Muslim enemy by embracing Islam. According to the following Prophetic *ḥadīth* (tradition), enemy persons are entitled to acquire Muslims' rights and obligations on the same equal footing.

"I am commanded to fight with men till they testify that there is no God but *Allāh*; when they do that, they will keep their life and their property safe from me, except what is due to them, and their reckoning will be at *Allāh*'s hands."<sup>226</sup>

In this case, Muslim jurists hold that only the convert's young children become Muslims according to the Qur'ānic verse "and those who believe and their families follow them in faith, to them shall we join their families,"<sup>227</sup> but this rule does not apply to their wives and dependent children, for *Allāh* says: "each individual is in pledge for his deeds";<sup>228</sup> (b) defeat of the enemy. In this case, lives and properties of enemy polytheists will be subject to the rules of spoils of war;<sup>229</sup> (c) concluding a treaty of peace (*muwāḍaʿa*) or an armistice treaty

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<sup>224</sup>al-Mawardī, *supra* note 21, at 45.

<sup>225</sup>al-Mughnī, *supra* note 21, at 544-547.

<sup>226</sup>Abū Dawūd, *supra* note 197, at 2:50.

<sup>227</sup>*The Holy Qur'an*, LII:21. See al-Kāsanī, *supra* note 21, at 7:104; al-Mughnī, *supra* note 21, at 8:143; Muhammad Amīn Ibn ʿAbdīn, *Radd al-Muhtar ʿalā al-Durr al-Mukhtar*, 5 vols. (Cairo: al-Matbaʿa al-Amīriyya, 1326 A.H.), 3:316 [hereinafter Ibn ʿAbdīn].

<sup>228</sup>*The Holy Qur'an*, LII: 21. See Abū ʿAbd Allāh Muhammad al-Khirshī *Fath al-Jalīl ʿalā Mukhtasar al-ʿAllāma Khalfī*, 8 vols. (Cairo: Matbaʿat Būlāq, 1299 A.H.), 3:166 [hereinafter al-Khirshī]; Ibn Hazm, *supra* note 21, at 7:309; Muhammad Ibn Ahmad Ibn ʿArafa al-Dusūqī, *Ḥaṣhiya ʿalā al-Sharḥ al-Kabīr lil-Dardīr*, 4 vols. (Cairo: Matbaʿat Muṣṭafa Muḥammad, 1373 A.H.), 2:185 [hereinafter al-Dusūqī].

<sup>229</sup>al-Sarakhsī, *supra* note 21, at 10:7-8.

(*muhādana*). This treaty is usually granted by the *Imām* for a short period of time, in consideration of the payment of an annual tribute to the Muslim state. The *Imām* may renew the treaty for a similar period if he feels that Muslims are not powerful enough to launch a *jihād*,<sup>230</sup> and (d) a cessation of hostilities by one or both parties, which does not necessitate victory of one of them over the other. A clear example of this, is the battle of Mu'ta, where both armies parted from each other, without concluding an agreement.<sup>231</sup> However, Muslim jurists excluded the possibility of a Muslim defeat as a reason for the termination of fighting.

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<sup>230</sup> al-Shāfiʿī, *supra* note 21, at 4:110; al-Siyar al-Kabīr, *supra* note 67, at 5:1689.

<sup>231</sup> Ibn Hishām, *supra* note 67, at 4:7; al-Ṭabarī, *supra* note 71, at 2:18.

## II. Jihād and International Relations

During the first century and a half of the Islamic era, Islamic international humanitarian law developed and crystallized; when Muslim armies pounded on the gates of Europe, Africa, and the Far East,<sup>232</sup> claiming to emancipate peoples, defend freedoms, establish human equality and spread justice.<sup>233</sup> Consequently, established regimes, particularly, the Byzantine and the Persian Empires, opposed Islam and plotted against its revolutionary rhetoric.<sup>234</sup> Although Muslim wars were merely exceptional and defensive,<sup>235</sup> and war, in general, is strictly prohibited in Islamic law unless in response to aggression,<sup>236</sup> Majid Khadduri alleges that the normal state between Muslims and non-Muslim communities is one of hostility.<sup>237</sup> Khadduri bases this statement on the works of a number of prominent scholars. By examining the works cited by him, however, I found opposing viewpoints.<sup>238</sup>

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<sup>232</sup>Bernard Lewis, *supra* note 18, at 176.

<sup>233</sup>Muhammad Abd Zahra, *supra* note 182, at 33.

<sup>234</sup>*Ibid.*

<sup>235</sup>"Fight in the cause of Allah those who fight you, but do not transgress limits, for Allah loveth not transgressors." *The Holy Qur'an*, II: 190.

<sup>236</sup>"There is the law of equality. If then anyone transgresses the prohibition against you, transgress ye likewise against him." *The Holy Qur'an*, II: 194.

<sup>237</sup>Majid Khadduri, *supra* note 50, at 202.

<sup>238</sup>For example, Hans Kruse advocates that, "In the theory of classical Muslim jurists, the external conduct of the one Islamic state, the *Ummah*, is governed by a special set of rules exposed in *fiqh* works, under the heading 'siyar'. It is a wellknown fact that these rules demand the peaceful or even friendly relations between the *Ummah* and independent communities of the non-Muslim outer world." See Hans Kruse,

In discussing the *jihad* theory, Muslim jurists divided the world into three parts: the territory of Islam (*dār al-Islām* or *dār al-salām* or *dār al-ʿadl*); the territory of covenant (*dār al-ʿahd* or *dār al-muwadāʿa* or *dār al-ṣulḥ*); and the territory of war (*dār al-ḥarb* or *dār al-jawr*).<sup>239</sup> This division, which is not predicated on a state of hostility between the territory of Islam and other territories, was dictated by events and was not derived from Islamic legislation. Moreover, Marcel A. Boisard holds that "this division is not based upon geographical or juridical criteria but represents a state to be described rather than a situation which could be subjectively judged."<sup>240</sup>

Nevertheless, *dār al-Islām* includes all territories which are ruled by Islamic law and are subject to the sovereignty of the Islamic state.<sup>241</sup> In other words, a territory can be deemed Islamic if the rules applied are Islamic, and if Muslims and all protected monotheistic minorities reside safely and enjoy liberty to practice their religion individually or collectively.<sup>242</sup> In this respect, al-Shawkānī argues that a territory can be considered *dār al-Islām* even if it is not under

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"Al-Shaybani on International Instruments," *Journal of the Pakistan Historical Society* 1 (1953): 90.

<sup>239</sup>al-Kasānī, *supra* note 21, at 7:130-134; al-Māwardī, *supra* note 21, at 136; al-Mughnī, *supra* note 21, at 10:609; al-Sarakhsī, *supra* note 21, at 10: 19; al-Shafīʿī, *supra* note 21, at 4:103.

<sup>240</sup>Marcel A. Boisard, *supra* note 15, at 53; Muḥammad Abū Zahra, *supra* note 182, at 32.

<sup>241</sup>*The Encyclopaedia of Islam*, 2nd ed., s.v. "Dār al-Islām," by A. Abel; Al Ghunaimi, *supra* note 83, at 156; Marcel A. Boisard, *supra* note 15, at 6; Rudolph Peters, *supra* note 11, at 11; Sobhi Mahmassani, *supra* note 1, at 250.

<sup>242</sup>Al Ghunaimi, *supra* note 83, at 156-157.

Muslim rule as long as a Muslim can reside there in safety and freely fulfill his religious obligations.<sup>243</sup>

Conversely, *dar al-ḥarb*, which stands in opposition to *dar al-Islām*, can be defined as a territory which does not apply Islamic rules, and where a Muslim cannot publicly adhere to the ritual practices of his faith.<sup>244</sup> Marcel Boisard maintains that a state which authorizes oppression; violence; tyranny; religious coercion; usury; gambling; and any other form of activity prohibited by Islamic law should be deemed *dar-al-ḥarb* even if its leaders claim to be Muslim. On the other hand, Boisard continues, a non-Muslim state which does not threaten the community of believers, respects justice, and guarantees freedom of worship, should not be considered *dar al-ḥarb*.<sup>245</sup> Boisard's definition is complimented by Abū Ḥanīfa who cites three pre-conditions to the designation of any territory as *dar al-ḥarb*: (1) the prevalence of non-Islamic rules; (2) the country in question is directly adjacent to the *dar al-ḥarb*; and (3) Muslims, and those under their protection, no longer enjoy security except by obtaining a given pledge.<sup>246</sup> For his part, al-Kāṣanī, has expressly discussed Abū Ḥanīfa's argument which would not define a country as *dar al-Islām* or *dar al-ḥarb* by virtue of its being Muslim or non-Muslim. He discerns that Abū Ḥanīfa's argument is based

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<sup>243</sup>al-Shawkānī, *supra* note 192, at 8:29.

<sup>244</sup>*The Encyclopaedia of Islam*, 2nd ed., s.v. "Dār al-Ḥarb, by A. Abel; Rudolph Peters, *supra* note 11, at 12.

<sup>245</sup>Marcel A. Boisard, *supra* note 15, at 8-9.

<sup>246</sup>al-Kāṣanī, *supra* note 21, at 7:130.



on the premise of security and fear (*al-amn wal-khawf*).<sup>247</sup> In other words, *dār al-ḥarb* is the country where Muslims lack security, except by a given pledge, and *dār al-Islām* is the country where Muslims and *dhimmīs* enjoy protection and security. Although the majority of jurists classify a country as *dār al-Islām* or *dār al-ḥarb* according to the prevalence or absence of Islamic law, Abū Ḥanīfa's conception may be considered the nearest to the concept of *jihād* defended here, namely, establishing peace and resisting aggression.<sup>248</sup>

While Ḥanafites hold the opinion that a territory must be either *dār al-Islām* or *dār al-ḥarb*,<sup>249</sup> the Shāfiʿites observe *dār al-ʿAhd* as a temporary and often intermediate territory between *dār al-Islām* and *dār al-ḥarb*.<sup>250</sup> However, this tributary land is recognized as an independent nation by the Islamic state on the condition that the latter pays to the former an annual tribute, *al-kharāj*. Moreover, a development occurred within the Ḥanafite school when Muḥammad Ibn al-Ḥasan al-Shaybānī coined *dār al-Muwāḍaʿa*, as yet another type of territory.<sup>251</sup> It is worthwhile to mention here that *dār al-ʿAhd* is protected by the Islamic state, as far as the former pays the *kharāj* and respects the

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<sup>247</sup> *Ibid.*

<sup>248</sup> Muḥammad Abū Zahra, *supra* note 182, at 36-37.

<sup>249</sup> *The Encyclopaedia of Islam*, 2nd ed., s.v. "Dar al-ʿAhd," by Halil Inalcik; Al Ghunaimi, *supra* note 83, at 156-157.

<sup>250</sup> al-Mawardī, *supra* note 21, at 128; Rudolph Peters, *supra* note 11, at 11; al-Shāfiʿī, *supra* note 21, at 4:103-104; Yahyā Ibn ʿĀdam al-Qurashī, *Kitāb al-Kharāj* (Beirut: Dar al-Ḥadātha, 1990), 398 [hereinafter *al-Kharāj*].

<sup>251</sup> al-Kasānī, *supra* note 21, at 7:109; al-Siyar al-Kabīr, *supra* note 67, at 5:1689-1724.

provisions of the treaty. According to the Shāfi'ite school, *dār al-ʿahd* becomes *dār al-ḥarb* if people of the former land breach the agreement, while the Ḥanafites hold them as rebels, since, in their view, *dār al-ʿahd* is not sovereign from the Muslim state.<sup>252</sup>

The foregone historical scenarios were met in the case of Najrān and Nubia. In the former case, the Prophet Muḥammad concluded a treaty with the Christians of Najrān, giving them rights and imposing certain obligations on them.<sup>253</sup> Another case in point is that of Nubia, where ʿAbd Allāh Ibn Abī al-Sarḥ concluded a treaty (ʿahd) with the Nubians in the reign of ʿUthmān Ibn ʿAffān, the third Muslim Caliph, imposing on them an annual tribute of 360 slaves.<sup>254</sup> More recent examples include the *ʿahdnames* (peace treaties) granted by the Ottoman sultans to the tributary Christian princes. In his *ʿahdname*, the Sultan ensures the prince's peace, security and respect of religious beliefs upon the payment of an annual *Kharāj*. If the prince failed to fulfill any of his obligations, the Sultan, according to the Ḥanafī doctrine, could

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<sup>252</sup>The Encyclopaedia of Islam, *supra* note 249.

<sup>253</sup>Abū ʿUbayd al-Qasim Ibn Sallām, *Kitāb al-Amwāl* (Beirut: Dār al-Haditha, 1988), 198-199 [hereinafter Ibn Sallām]; Abū Yūsuf, *supra* note 53, at 185-187; al-Balādhurī, *supra* note 71, at 65; Ibn al-Qayyim, *supra* note 21, at 2:40; Majid Khadduri, *supra* note 2, at 278; Muḥammad Ḥamīdullāh, *Majmūʿat al-Wathāʾiq al-Siyasiyya lil-ʿAhd al-Nabawī wal-Khilāfa al-Rashida* (Beirut: Dār al-ʾIrshād, 1969), 140-142; Muḥammad Ibn Saʿd Ibn Manīʿ al-Zuhri, *Kitāb al-Tabaqāt al-Kabīr*, 14 vols. (Cairo: Dār al-Tahrīr, 1388 A.H.), 1:35-36 [hereinafter Ibn Saʿd]; Taqī al-Dīn Ahmad Ibn ʿAlī al-Maqrīzī, *Imṭāʿ al-Asmāʿ* (Cairo: Maṭbaʿat Lajnat al-Taʾlīf wal-Tarjama wal-Nashr, 1941), 1:502 [hereinafter al-Maqrīzī].

<sup>254</sup>Abū al-Qasim ʿAbd al-Rahman Ibn ʿAbd al-Hakam, *Futūḥ Miṣr wa Akhbārūha* (Cairo: Maktabat Madbūlī, 1991), 188-189 [hereinafter Ibn ʿAbd al-Hakam]; al-Balādhurī, *supra* note 71, at 236; J. Spencer Trimingham, *Islam in the Sudan* (London: F. Cass, 1949), 61-62; Taqī al-Dīn Ahmad Ibn ʿAlī al-Maqrīzī, *Kitāb al-Khitāt al-Maqrīziyya*, 4 vols. (Cairo: Maṭbaʿat al-Nīl, 1325 A.H.), 3:290 [hereinafter al-Khitāt].

consider him a rebel and designate his land *dar al-harb*.<sup>255</sup>

Furthermore, al-Mawardi classifies *dar al-Islam* into a variety of divisions and subdivisions. According to him, *dar al-Islam* consists of three main divisions: the *haram*, Hijaz and the rest of the Muslim territory.<sup>256</sup> The *haram*, place of security,<sup>257</sup> includes Mecca and the sanctified territory surrounding it. Other scholars, however, argue that the *haram* includes *al-haramayn al-sharfiyyin*, Mecca and Madina.<sup>258</sup> According to the Shafi'i doctrine, this territory is exclusively reserved for Muslims, but Abu Hanifa argues that non-Muslims (*dhimmis* and the people of *dar al-'ahd*) are permitted to pass through this territory not to reside there.<sup>259</sup> Moreover, the Prophet Muhammad prohibited bloodshed in the vicinity of al-*haram*, and declared its residents immune from war, even if they rebel against the Imam.<sup>260</sup> The Hijaz represents the second division of *dar al-Islam*. According to a Prophetic *hadith*, non-Muslims are permitted to travel through this territory, but not allowed to live

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<sup>255</sup>The Encyclopaedia of Islam, *supra* note 249; Halil Inalcik, "Ottoman Methods of Conquest," *Studia Islamica* 2 (1953): 107.

<sup>256</sup>al-Mawardi, *supra* note 21, at 136.

<sup>257</sup>*The Holy Qur'an*, III: 97.

<sup>258</sup>Ibn 'Abd al-Hakam, *supra* note 254, at 1; al-Farra', *supra* note 21, at 181.

<sup>259</sup>al-Farra', *supra* note 21, at 179; al-Mawardi, *supra* note 21, at 144.

<sup>260</sup>On the contrary, the Saudi security armed forces, assisted by American and French commando units, massacred hundreds of the members of the Saudi political opposition, after they resorted to the Holy Mosque (*al-Masjid al-haram*) in Mecca in 1979. Another time, the Saudi forces killed and injured hundreds of the Iranian pilgrims in a peaceful protest marched in Mecca in 1988.

there permanently.<sup>261</sup> The remaining part of the Muslim territory is the largest geographical division. This territory is open to the protected people, (*dhimmīs*) where they may live, and open to the people of *dar al-ʿahd* where they may travel with a permit.<sup>262</sup> Nevertheless, al-Māwardī divides this territory into four categories, three of them are called *ʿUshūr* (tithe) lands: the land of the people who embraced Islam; the uncultivated land reclaimed by Muslims; and the land taken by force of arms. The fourth category is the land acquired by peace treaties, and falls into two categories: *waqf* land which becomes the common property of the Muslim community. The original owners remain on their land and become *dhimmīs* paying a *kharāj* while their territory becomes *dar al-Islām*. The second type remains with its original people, and is called *dar al-ʿahd*. The original owners of this land are allowed to keep their estates through contract, and through the payment of *kharāj* as a *jizya* (poll tax).<sup>263</sup>

Needless to say, Islamic law is not simply a collection of religious precepts and rules, but a comprehensive legal system styled to preserve the interests of Muslims and to regulate their relations with the rest of the world in times of peace and war. In the light of Qurʾānic injunctions,<sup>264</sup> Prophetic tradition,<sup>265</sup> and the doctrine of

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<sup>261</sup>al-Māwardī, *supra* note 21, at 145; al-Mughnī, *supra* note 21, at 8:613-615.

<sup>262</sup>Marcel A. Boisard, *supra* note 15, at 7.

<sup>263</sup>*The Encyclopaedia of Islam*, 2nd ed., s.v. "Dar al-Sulh," by D.B. Macdonald and A. Abel; al-Māwardī, *supra* note 21, at 149.

<sup>264</sup>"But if the enemy incline towards peace, do thou (also) incline towards peace, and trust in *Allāh*." *The Holy Qurʾān*, VIII: 61; "Those who fulfill the covenant of *Allāh* and fail not in their plighted word."

*jihad*, Muslim jurists unanimously agree on the permissability of concluding peace treaties with the enemy. They also consent to diplomatic, commercial, and political ties with non-Muslim states,<sup>266</sup> in order to protect the public interest of Muslims,<sup>267</sup> whether they live in *dar al-Islam*, under Islamic dominion, or in other territories.<sup>268</sup> The afore-mentioned relations could be classified under so-called Islamic theory of international relations, in the modern sense of the term, namely: (a) *al-mu'ahadat* (treaties), which include *al-aman* (safe-conduct); *al-hudna* (armistice); and *al-dhimma* (pact, security); (b) *al-mu'amala bil-mithl* (reciprocity); (c) *al-tahkim* (arbitration); (d) *al-hiyad* (neutrality); (e) *tabadul al-wufud wal-safarat* (diplomatic exchange); and (f) *al-tijara al-Kharijiyya* (foreign trade). The implication of this theory will be the object of discussion in the following pages.

#### 1. Treaties (al-Mu'ahadat)

Many years before Islam, *al-mu'ahadat* (treaties) were known in

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*The Holy Qur'an*, XIII: 20.

<sup>265</sup>"When one has covenant with people, he must not strengthen or loosen it till its term comes to an end or he brings it to an end in agreement with them." *Abu Dawud*, *supra* note 197, at 92.

<sup>266</sup>Ahmad Ibn 'Alī al-Qalqashandī, *Subh al-A'sha fi Sin'at al-Insha*, 14 vols. (Beirut: Dar al-Kutub al-'Ilmiyya, 1987), 14:5 [hereinafter al-Qalqashandī]; Ibn Sallam, *supra* note 253, at 156; al-Siyar al-Kabīr, *supra* note 67, at 5:1689; al-Shawkānī, *supra* note 192, at 8:30.

<sup>267</sup>al-Ḍaḥḍaḍī, *supra* note 228, at 2:205.

<sup>268</sup>In fact, Islam, as a religion, has prevailed behind the borders of the Islamic state, and demanded all Muslims to comply with its rules. See al-Shāfi'ī, *supra* note 21, at 4:165; 7:322.

Arabia under the terms *muḥālafa*, *muṣālaḥa* or *muwālāh*.<sup>269</sup> Islamic law imposes the respect of treaties even above the respect of religious solidarity.<sup>270</sup> In other words, if the *Imām* concludes a treaty with the enemy, this treaty is binding upon all Muslims.<sup>271</sup> Moreover, Islamic law prohibited Muslims from assisting their fellow believers if the former were in violation of a treaty of peace concluded with the enemy.<sup>272</sup>

As early as the migration (*hijra*) of the Prophet Muhammad from Mecca to Medina, Muslims knew various types of treaties, which varied according to their nature and aim. Treaties concluded with *dhimmīs* were permanent in nature, while those made with *ḥarbīs* were temporary and did not exceed ten years.<sup>273</sup> Wahba al-Zuhaylī, an eminent scholar of

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<sup>269</sup>Arabian tribes concluded various alliances and treaties before Islam to regulate their social, economic and public life. Among those alliances were *Ḥilf al-Mutayyibīn* and *Ḥilf al-Fudūl*. See Abū al-Qāsim ‘Abd al-Rahmān Ibn Ahmad ‘al-Khath‘amī ‘al-Suhaylī, *al-Rawḍ al-Anaf fī Sharḥ al-Sīra al-Nabāwiyya li-Ibn Hishām*, 7 vols. (Cairo: al-Matba‘a al-Jamāliyya, 1914), 1:91 [hereinafter al-Suhaylī]; Ibn Hishām, *supra* note 67, at 1:120-122.

<sup>270</sup>Sobhi Mahmassani, *supra* note 1, at 268.

<sup>271</sup>"O ye who believes! fulfill (all) obligations." *The Holy Qur'an*, V:1; "Fulfill the covenant of Allāh when ye have entered into it, and break not your oaths after ye have confirmed them." *The Holy Qur'an*, XVI: 91.

<sup>272</sup>"But if they seek your aid on account of religion, it is your duty to help them, except against a people with whom you have a treaty of mutual alliance." *The Holy Qur'an*, VIII: 72.

This point has been emphasized in the following Prophetic *ḥadīth*. "Fulfill the trust towards the one who trusted you, and do not betray the one who betrayed you." See Muhammad ‘Abd al-Ra‘ūf al-Mināwī, *Mukhtasar Sharḥ al-Jāmi‘ al-Sagḥīr*, 2 vols. (Cairo: Dar Iḥyā’ al-Kutub al-‘Arabiyya, 1954), 1:21.

<sup>273</sup>Ibn Rushd, *supra* note 21, at 388; Ibn Sallām, *supra* note 253, at 170; al-Kasānī, *supra* note 21, at 7:108; al-Mughnī, *supra* note 21, at 10:518; al-Qalqashandī, *supra* note 266, at 14:9; al-Shafi‘ī, *supra* note

Islamic international humanitarian law, argues that the first treaty concluded between Muslims and non-Muslims was *Ṣaḥṭfat al-Madīna*,<sup>274</sup> while other scholars argue that the *Ṣaḥṭfa* was the first constitution of the Islamic state.<sup>275</sup> Reading the *Ṣaḥṭfa* carefully, one may conclude that it is neither a treaty nor a constitution. It is not a treaty because it was dictated by the Prophet Muhammad without the interference of other parties. On the other hand, treaties are usually concluded after negotiations and require an offer (*ʾiǧāb*) from one party and acceptance (*qabūl*) by the other, attributes which the *Ṣaḥṭfa* lacks.<sup>276</sup> However, the *Ṣaḥṭfa* could also be considered a constitutional charter as it organized relations between the Muslim and Jewish tribes of Medina. This charter emphasized the unity of the nation and underscored the freedom of religion and other fundamental rights.<sup>277</sup>

The Hudaibiya treaty might be considered as the first real *mūʿahada* between Muslims and non-Muslims.<sup>278</sup> In 6 A.H., the Prophet Muhammad

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21, at 4:109; al-Sarakhsī, *supra* note 21, at 10:88.

<sup>274</sup>Wahba al-Zuhaylī, *supra* note 182, at 352. See also Ismaʿīl Ibrahīm Abū Sharfʿa, *Nazarīyyat al-Ḥarb fī al-Sharʿa al-Islāmiyya* (Kuwait: Maktabat al-Falāḥ, 1981), 439; Majid Khadduri, *supra* note 50, at 205; Najīb al-Armanāzī, *al-Sharʿ al-Dawī fī al-Islām* (London: Riad El-Rayyes Books, 1990), 187.

<sup>275</sup>Muhammad ʿAmāra, *al-Islām wa Huqūq al-Insān: Darūrat lā Huqūq*, ʿĀlam al-Maʿrifa, no. 89 (Kuwait: al-Majlis al-Waṭanī lil-Thaqāfa wal-Funūn wal-ʿĀdāb, 1985), 152.

<sup>276</sup>Abd al-Razzāq al-Sanhūrī, *Masādir al-Haqq fī al-Fiqh al-Islāmī*, 6 vols. (Beirut: al-Majmaʿ al-ʿIlmī al-ʿArabī al-Islāmī, n.d.), 6:30.

<sup>277</sup>Ibn Hishām, *supra* note 67, at 2:106-107; Muḥammad Ḥamīdullāh, *supra* note 253, at 41-47.

<sup>278</sup>al-Maqrīzī, *supra* note 253, at 1:297-298; Muḥammad Ḥamīdullāh, *supra* note, 253, at 58-59; al-Sarakhsī, *supra* note 21, at 30:169.

with a number of his followers, marched to Mecca with the intention of making a pilgrimage. The Meccans blocked the Prophet entry, and denied his right to visit Mecca. The Prophet proffered a token of peace to Quraysh, which the latter accepted. The treaty concluded is known as *Ṣulḥ al-Ḥudaybiya*. It was broken by the Meccans two years later, a matter which motivated Muslims to march to Mecca and conquer it peacefully in 8 A.H.<sup>279</sup> In the year 17 A.H., ʿUmar Ibn al-Khaṭṭāb signed a *dhimma* pact with the Patriarch of Jerusalem. This treaty might be construed as a basic charter for *dhimmi* subjects in the Islamic legal discourse.<sup>280</sup>

Another type of treaty was developed during Muslim civil wars. During the conflict over power with ʿAlī Ibn Abī Ṭalīb, the fourth well-guided Caliph, Muʿāwiyah Ibn Abī Sufyān signed a treaty with the Byzantine emperor to deter him from attack on the boundaries of the Muslim state. Accordingly, Muʿāwiyah paid an annual tribute to the emperor.<sup>281</sup> However, this type of treaty was subject of controversy among Muslim jurists. Muḥammad Ibn al-Ḥasan al-Shaybānī argued against it and accepted it only when it was a matter of effectual necessity, while al-Shāfiʿī advised against its validity. On the other hand, al-Awzaʿī and al-Thawrī

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<sup>279</sup> Ibn Kathīr, *supra* note 72, at 4:293; al-Ṭabarī, *supra* note 71 at, 2:21.

<sup>280</sup> Ahmad Ibn Abī Yaʿqūb Ibn Jaʿfar al-Yaʿqūbī, *Tarīkh al-Yaʿqūbī*, 3 vols. (al-Najaf, Iraq: al-Maktaba al-Murtadawiyya, 1964), 2:167 [hereinafter al-Yaʿqūbī]; al-Balādhurī, *supra* note 71, at 138; Muḥammad Ḥamīdullāh, *supra* note 253, at 379-380; al-Ṭabarī, *supra* note 71, at 304-305.

<sup>281</sup> Abū al-Ḥasan ʿAlī Ibn al-Husayn al-Masʿūdī, *Kitāb al-Tanbīh wal-Ishraf*, 8 vols. (Leiden, The Netherlands: E.J. Brill, 1967), 2:91 [hereinafter al-Tanbīh wal-Ishraf]; al-Balādhurī, *supra* note 71, at 216; al-Ṭabarī, *supra* note 71, at 3:169.



approved it under certain conditions.<sup>282</sup>

In addition to the afore-mentioned treaties, another type was concluded during the Abbasid period called *al-mufādāh* (ransoming). Through these treaties, Muslims were able to set free prisoners of war, whether by interchange or by paying a certain amount of money.<sup>283</sup> Later on, Ṣalāḥ al-Dīn al-Ayyūbī concluded several treaties with the crusaders. Based on these treaties, he released a great number of poor crusaders for no charge, and imposed *fidya* on the wealthy; twenty *dīnārs* for a man, ten *dīnārs* for a woman, and one *dīnār* for a child.<sup>284</sup> However, the Islamic states of north Africa treated the European Christians on the same premise.<sup>285</sup> Below are three types of treaties which mirror this approach.

First, the *amān* (safe-conduct), in Islamic humanitarian law, is a

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<sup>282</sup>Ikhtilāf al-Fuqahā', *supra* note 55, at 17-20; al-Shāfi'ī, *supra* note 21, at 4:110; al-Siyar al-Kabīr, *supra* note 67, at 5:1692.

<sup>283</sup>Ibn Rushd, *supra* note 21, at 1:309; al-Kasānī, *supra* note 21, at 7:120; Majid Khadduri, *supra* note 50, at 217; al-Siyar al-Kabīr, *supra* note 67, at 4:1650.

<sup>284c</sup>Abd al-Rahmān Ibn Ismā'īl Abū Shāma, *Kitāb al-Rawdatayn fī Akhbār al-Dawlatayn*, 2 vols. (Cairo: Matba'at Lajnat al-Ta'līf wal-Tarjama wal-Nashr, 1956), 2:79-81 [hereinafter Abū Shāma]; Bahā' al-Dīn Yūsuf Ibn Shaddād, *al-Nawādir al-Sultāniyya wal-Mahāsīn al-Yūsufiyya* (Cairo: al-Dār al-Misriyya lil-Ta'līf wal-Tarjama, 1962), 64 [hereinafter Ibn Shaddād]; Ibn al-Athīr, *supra* note 87, at 11:538; Jamāl al-Dīn Muhammad Ibn Wāsil, *Mufarrij al-Kurūb fī Akhbār Banī Ayyūb*, 5 vols. (Cairo: Matba'at Jamī'at Fu'ad al-Awwal, 1953-1972), 2:195-196 [hereinafter Ibn Wāsil]; Jamāl al-Dīn Yūsuf Ibn Taghrībirdī, *al-Nujūm al-Zahira fī Mulūk Mīsr wal-Qahira*, 12 vols. (Cairo: Matba'at Dar al-Kitāb, 1930), 6:35 [hereinafter Ibn Taghrībirdī]; Taqī al-Dīn Ahmad Ibn 'Alī al-Maqrīzī, *al-Sulūk li-Ma'rifat Duwal al-Mulūk*, 4 vols. (Cairo: Matba'at Lajnat al-Ta'līf wal-Tarjama wal-Nashr, 1957), 1:94 [hereinafter al-Sulūk].

<sup>285</sup>Louis de Mas-Latrie, *Relations et commerce de l'Afrique septentrionale ou Magreb avec les nations Chrétiennes ou moyen-âge* (Paris: Firmin-Didot, 1886), 79-94.

pledge of security, granted to an enemy person for a limited period, under which his life, freedom, and property are protected by the sanctions of law.<sup>286</sup> This pledge is binding upon all Muslims, and substantiated by the Qur'anic verse, "If one amongst the Pagans ask thee for asylum, grant it to him, so that he may hear the Word of Allāh; and then escort him to where he can be secure."<sup>287</sup> However, Muslim jurists identified two types of *amān*,<sup>288</sup> the first of which is collective, granted only by the Imām or his representative to a *ḥarbf* town or territory; and individual, bestowed upon an enemy person or persons, by any muslim male or female, of full age, free, and sensible.<sup>289</sup> The Prophet Muḥammad approved the *amān* granted by Muslim women, when he expressly authorized Umm Hānī' Bint Abī Ṭālib to accord *amān* in the year of the conquest to a man from the polytheists, by saying, "We have given security to those to whom you have given it."<sup>290</sup> Another case in point is the Prophet's validation of the *amān* granted by his daughter, Zaynab,

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<sup>286</sup>*The Encyclopaedia of Islam*, 2nd ed., s.v. "Amān," by Joseph Schacht; Rudolph Peters, *supra* note 11, at 29; al-Siyar al-Kabīr, *supra* note 67, at 1:283.

<sup>287</sup>*The Holy Qur'an*, IX:6.

<sup>288</sup>Aḥmad Ibn Idrīs Ibn 'Abd al-Raḥmān al-Qarāfī, *al-Furūq*, 4 vols. (Cairo: Matba'at Mustafā al-Bābī al-Halabī, 1344 A.H.), 3:24 [hereinafter al-Qarāfī]; al-Kāsānī, *supra* note 21, at 7:106; Muḥammad al-Sharbfī al-Khatīb, *Mughnī al-Muhtaj ila Sharḥ al-Minhaj*, 4 vols. (Cairo: Matba'at Muṣṭafā al-Bābī al-Halabī, 1933), 4:236 [hereinafter al-Khatīb].

<sup>289</sup>*Ikhtilāf al-Fuqahā'*, *supra* note 55, at 30; al-Kāsānī, *supra* note 21, at 7:106; al-Khatīb, *supra* note 288, at 4:237; al-Khirshī, *supra* note 228, at 3:124; al-Marghīnānī, *supra* note 21 at 2:139; al-Mughnī, *supra* note 21, at 8:396; al-Shafi'ī, *supra* note 21, at 4:196; al-Siyar al-Kabīr, *supra* note 67, at 1:252-257; al-Shawkānī, *supra* note 192, at 8:30-31.

<sup>290</sup>Abū Dawūd, *supra* note 197, at 2:93.

to Abū al-ʿĀs, her husband.<sup>291</sup>

Moreover, Muslim jurists permitted the *amān* given by a slave, except Abū Ḥanīfa and Abū Yūsuf, who argued against its sanction, unless the slave is permitted to fight by his master.<sup>292</sup> In this connection, jurists also rejected the *amān* given by a minor or insane.<sup>293</sup> The *amān* accorded by a discerning minor is approved by Mālik Ibn Anas, Aḥmad Ibn Ḥanbal, and Muḥammad Ibn al-Ḥasan,<sup>294</sup> but repudiated by Abū Ḥanīfa, Abū Yūsuf and al-Shāfiʿī.<sup>295</sup> Ṣaḥnūn, for his part, upheld this *amān*, so

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<sup>291</sup>al-Kasānī, *supra* note 21, at 7:106.

<sup>292</sup>al-Awzaʿī, *supra* note 82, at 319; al-Kasānī, *supra* note 21, at 7:106; al-Marghīnānī, *supra* note 21, at 2:139; al-Siyar al-Kabīr, *supra* note 67, at 1:255; Zayn al-Dīn Ibn Ibrāhīm Ibn Nujaym, *al-Bahr al-Rāʾiq Sharh Kanz al-Daqaʾiq*, 8 vols. (Cairo: Matbaʿat Mustafa al-Bābī al-Ḥalabī, 1334 A.H.), 5:81 [hereinafter Ibn Nujaym].

<sup>293</sup>Abū Bakr Muḥammad Ibn Aḥmad al-Qaffāl al-Shāshī, *Hilyat al-ʿUlamāʾ ft Maʿrifat Madhāhib al-Fuqahāʾ*, 8 vols. (Amman: Maktabat al-Risāla al-Hadītha, 1988), 3:449 [hereinafter al-Shāshī]; Muḥammad Ibn ʿAbd al-Wāhid Ibn al-Humām, *Fath al-Qadīr Sharh al-Hidaya lil-Marghīnānī*, 10 vols. (Beirut: Dar al-Fikr, 1990), 4:302 [hereinafter Ibn al-Humām]; Mālik Ibn Anas, *al-Mudawwana al-Kubra*, 5 vols. (Cairo: Matbaʿat al-Saʿada, 1323 A.H.), 3:41 [hereinafter al-Mudawwana]; al-Mughnī, *supra* note 21, at 8:398; al-Shāfiʿī, *supra* note 21, at 4:196; Siddīq Ibn Ḥasan al-Qannūjī, *al-Rawda al-Nadiyya Sharh al-Durar al-Bahiyya lil-Shawkānī*, 6 vols. (Cairo: al-Matbaʿa al-Muniriyya, 1941), 2:253 [hereinafter al-Rawda al-Nadiyya].

<sup>294</sup>al-Mudawwana, *supra* note 293, at 3:41; al-Mughnī, *supra* note 21, at 8:397; Muḥammad Ibn Aḥmad al-Kalbī, *al-Qawānīn al-Fiqhiyya* (Tunis: Matbaʿat al-Nāḥda, 1344 A.H.), 157 [hereinafter al-Qawānīn]; al-Siyar al-Kabīr, *supra* note 67, at 1:257.

<sup>295</sup>Abū Ḥamid al-Ghazālī, *al-Wajīz ft Fiqh Madhhab al-Imām al-Shāfiʿī*, 2 vols. (Cairo: Matbaʿat al-Ādāb wal-Muʾayyad, 1899), 2:194 [hereinafter al-Ghazālī]; Aḥmad Ibn Yahyā Ibn al-Murtadā, *al-Bahr al-Zakhkhar al-Jamīʿ li-Madhāhib ʿUlamāʾ al-Amsār*, 5 vols. (Beirut: Muʾassasat al-Risāla, 1975), 5:452 [hereinafter al-Bahr al-Zakhkhar]; al-Khatīb, *supra* note 288, at 4:237; al-Siyar al-Kabīr, *supra* note 67, at 1:257.

long as it is explicitly approved by the Imam.<sup>296</sup> On the other hand, Muslim jurists denied the *aman* granted by *dhimms*,<sup>297</sup> except al-Awzaʿī, who endorsed it under two conditions: if *dhimms* were fighting to defend *dar al-Islam*, and if the *aman* were confirmed by the Imam.<sup>298</sup>

The *aman* is granted for a limited time. On the strength of the Qurʾanic verse, "Go ye, then, for four months, backwards and forwards throughout the land, but know that you cannot frustrate Allah, and Allah will cover with shame the polytheists,"<sup>299</sup> Shāfiʿites and Mālikites argue that the period of *aman* should not exceed four months.<sup>300</sup> The Hanafites, however, state that the period should not exceed one lunar year, and that if the *Mustaʿmin* (the person who has received the *aman*),

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<sup>296</sup>Abū al-Walīd Sulaymān Ibn Khalaf al-Bājī, *al-Muntaḡa Sharh Muwaṭṭaʾ Imam Dar al-Hijra*, 7 vols. (Cairo: Maṭbaʿat al-Saʿada, 1332 A.H.); 3:173 [hereinafter al-Muntaḡa]; ʿAlī ʿal-Saʿīdī al-ʿAdawī, *Hashiya ʿala Kifayat al-Talib al-Rabbānī li-Risalat Ibn Abī Zayd al-Qayrawānī ft Madhhab Mālik*, 2 vols. (Cairo: al-Maṭbaʿa al-Azhariyya al-Misriyya, 1309 A.H.), 2:7 [hereinafter al-ʿAdawī]; Muḥammad Ibn ʿAbd Allāh al-Qaṣī, *Lubāb al-Lubāb* (Tunus: Al-Maṭbaʿa al-Tunusiyya, 1346 A.H.), 72 [hereinafter al-Lubāb].

<sup>297</sup>al-Mudawwana, *supra* note 293, at 3:42; Muḥammad Ibn Shihāb Ibn al-Bazzāz, "al-Fatawī al-Bazzāziyya aw al-Jāmiʿ al-Wajīz," in *al-Fatawī al-ʿĀlimiyya*, 6 vols. (Cairo: al-Maṭbaʿa al-Amriyya bi-Būlāq, 1310 A.H.), 6:608 [hereinafter Ibn al-Bazzāz]; al-Sarakhsī, *supra* note 21, at 10:70; al-Shāfiʿī, *supra* note 21, at 4:196-197.

<sup>298</sup>Badr al-Dīn Maḥmūd Ibn Aḥmad al-ʿAynī, *ʿUmdat al-Qarī Sharh Saḥīḥ al-Bukhārī*, 25 vols. (Cairo: al-Maṭbaʿa al-Muniriyya, 1348 A.H.); 15:93 [hereinafter al-ʿAynī]; Fath al-Bārī, *supra* note 66, at 7:319; Ikhtilāf al-Fuqahāʾ, *supra* note 55, at 25; al-Mughnī, *supra* note 21, at 10:432; al-Shāfiʿī, *supra* note 21, at 7:319; al-Shawkānī, *supra* note 192, at 8:25.

<sup>299</sup>*The Holy Qurʾan*, IX: 2.

<sup>300</sup>Aḥmad Ibn Hajar al-Haytamī, *Tuhfat al-Muhtaj ilā Sharh al-Minhaj*, 8 vols. (Cairo: Maṭbaʿat Mustafā ʿal-Bābī ʿal-Halabī, 1933), 8:61 [hereinafter *Tuhfat al-Muhtaj*]; al-Qawānīn, *supra* note 294, at 154; al-Shāfiʿī, *supra* note 21, at 4:111.

prolongs his stay beyond this period, he becomes subject to the *jizya*.<sup>301</sup> On the other hand, the Hanbalites hold that no *jizya* is to be imposed on the *Musta'min* regardless of the *aman*'s length of time<sup>302</sup> However, the *aman* may be terminated if the *Musta'min* violates it, or it expires, or the *Musta'min* returns to his territory.

The second type of treaty is the *hudna* (armistice). The term derives linguistically from the past verb *hadana* (to make peace)<sup>303</sup> and is also known in Islamic international law as *mu'ahada*, *muhadana*, *muwada'a*, *musalama*, and *ṣulḥ*. Technically, *muhadana* denotes the process of entering into a peace agreement (*hudna*) with the enemy.<sup>304</sup> Concluding a *hudna* with the enemy is permitted on the basis of the divine injunction, "Fulfill the covenant of *Allāh* when you have entered into it, and break not your oaths after you have confirmed them."<sup>305</sup> As mentioned, the Prophet Muḥammad concluded the Ḥudaybiya treaty with the unbelievers of Mecca in 6 A.H., setting a precedent for subsequent treaties by his successors. Predicated on the most authoritative sources, *hudna* was established in Islamic international law, and validated by practice.

The Shafi'ites, Hanbalites, and Malikites concur that *hudna*-making

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<sup>301</sup>Abū al-Muzaffar Muḥyī al-Dīn Drak Ḥalīmī, *al-Fatawā al-Hindiyya wa Tūraf bil-Fatawā al-Ḥalīmīyya*, 6 vols. (Cairo: al-Matba'a al-Amīriyya bi-Būlāq, 1310 A.H.), 2:234 [hereinafter *al-Fatawā al-Hindiyya*].

<sup>302</sup>al-Mughnī, *supra* note 21, at 10:436.

<sup>303</sup>Muḥammad Ibn Manẓūr, *supra* note 49, at 3:786.

<sup>304</sup>*The Encyclopaedia of Islam*, 2nd ed., s.v. "Hudna" by Majid Khadduri.

<sup>305</sup>*The Holy Qur'an*, XVI: 91.

power rests in the hands of the *Imām*, and that any *hudna* concluded by individuals or even by Muslim commanders is considered null and void. Malikites, on the other hand, deem that the *Imām* has the right to repudiate or accept the treaty based on its conformity with the interests of the Muslim community.<sup>306</sup> In general, Muslim jurists stipulate the fulfillment of an immediate interest when the *Imām* concludes a *hudna*, but the Hanafites argue that the interest should be one which persists as long as the treaty is valid. In the absence of interest, the *Imām* has the right to terminate a *hudna* by denunciation (*nabdh*).<sup>307</sup> Pursuant to the Qur'ānic verse, "so lose not heart, nor fall into despair for you must gain mastery if you are true in faith,"<sup>308</sup> the Hanafites pronounce that an *Imām* can only conclude a *hudna* with the enemy when the Muslim state has declined in force or power.<sup>309</sup> This opinion is based on the Qur'ānic verse, "But if the enemy inclines towards peace, do thou (also) incline towards peace, and trust in *Allāh*."<sup>310</sup> For his part, however, Ibn Ḥazm, denied the validity of *hudna*,<sup>311</sup> arguing that the Prophet's example of *ṣulḥ al-Ḥudaybiya* was abrogated by divine legislation.<sup>312</sup>

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<sup>306</sup> al-ʿAynī, *supra* note 298, at 15:97; Fath al-Bārī, *supra* note 66, at 6: 196; Ibn Rushd, *supra* note 21, at 1:309; al-Khatīb, *supra* note 288, at 4:260; al-Mughnī, *supra* note 21, at 8:459.

<sup>307</sup> al-Dasūqī, *supra* note 228, at 2:205.

<sup>308</sup> *The Holy Qur'an*, III: 139.

<sup>309</sup> al-Kasānī, *supra* note 21, at 7:108; al-Sarakhsī, *supra* note 21, at 10:86; al-Siyar al-Kabīr, *supra* note 67, at 5:1689.

<sup>310</sup> *The Holy Qur'an*, VIII: 61.

<sup>311</sup> Ibn Ḥazm, *supra* note 21, at 7:307.

<sup>312</sup> "Renunciation by *Allāh* and his Apostle of the Pagans with whom you have made treaties." *The Holy Qur'an*, IX:1.

In general, Muslim jurists hold that *hudna* must be concluded for a certain period of time; not exceeding four months except in cases of absolute necessity.<sup>313</sup> Once the *hudna* is accepted by the *Imām*, its observation becomes an obligation upon all Muslims.<sup>314</sup> In this case, it is the *Imām's* responsibility to protect the *mu'ahidūn* (the enemy individuals) as long as they travel in *dar al-Islam*.<sup>315</sup> In this connection, al-Qalqashandī adds four stipulations to be considered before the conclusion of a *hudna*: it should be concluded by the *Imām* or his representative; it should serve the interests of the Muslim community; it must not include invalid provisions, such as returning the women of the enemy who have converted to Islam; and finally, the treaty must be concluded for a definite period of time.<sup>316</sup> However, the *hudna* will be terminated: if the treaty comes to its end; if the enemy terminates it by an explicit declaration; if the enemy takes up arms or propagates military information; and if the enemy kills a Muslim.<sup>317</sup>

Third, the Qur'ānic basis for the status of *dhimma* is found in the verse which refers to the *jihad* against those who have failed to

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<sup>313</sup>al-Mughnī, *supra* note 8, at 10:518.

<sup>314</sup>"So fulfill your treaties with them to the end of their term." *The Holy Qur'an*: IX: 4. On the other hand, the Prophet Muhammad said: "And the Muslims abide by their conditions." See Abū Dawūd, *supra* note 197, at 2:328; al-Bukhārī, *supra* note 66, at 3:52.

<sup>315</sup>"As long as these (the Pagans) stand true to you, stand ye true to them." *The Holy Qur'an*, IX:7.

<sup>316</sup>al-Qalqashandī, *supra* note 266, at 14: 8-9.

<sup>317</sup>al-Nawawī, *supra* note 21, at 470.

recognize the new faith of Islam.<sup>318</sup> According to this treaty, usually concluded by the *Imām* or his representative,<sup>319</sup> *dhimmi*s (Christians, Jews, Sabians, Samaritans and Magians) may acquire the rights to permanent residence in *dar al-Islām*, as well as the protection of Islamic law, in view of the payment of the *jizya* (poll tax), and the performance of certain duties.<sup>320</sup> Historically, the *jizya* was known as early as in the pre-Christian period of the Roman Empire. The Jewish Bible points to the *jizya* paid by Hoshe'a, the King of Judah, to Shalmane'ser, the King of Assyria.<sup>321</sup> Furthermore, Jews and Zoroastrians had also paid a fixed due (one *dīnār per annum* by every person) to the imperial

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<sup>318</sup>"Fight those who believe not in *Allāh* nor in the Last Day, and do not forbid what *Allāh* and His Apostle have forbidden, and do not acknowledge the religion of truth, (even if they are) of the People of the Book, until they pay the *jizya* readily and submissively." *The Holy Qur'an*, IX: 29.

This issue has also been illustrated in the following *hadīth*: "Fight in the name of *Allāh* and in His path. Combat (only) those who disbelieve in *Allāh*. Do not cheat or commit treachery, nor should you mutilate anyone or kill children. Whenever you meet the Polytheists who are your enemy, summon them to one of three things, and accept whichever of them they are willing to agree to, and refrain from them. Invite them to Islam, and if they agree, accept it from them, and refrain from them. Then summon them to leave their territory to the territory of the Emigrants (*dar al-Muhājirīn*), and tell them if they do so, they will have the same rights and responsibilities as the Emigrants; but if they refuse and choose their own abode, tell them that they will be like the desert Arabs who are Muslims, subject to *Allāh's* jurisdiction which applies to the believers, but will have no spoil or booty unless they strive with the Muslims. If they refuse (Islam), demand *jizya* from them, and if they agree, accept it from them, and let them alone; but if they refuse, seek *Allāh's* help and combat them." *Abū Dawūd, supra note 197, at 2:43.*

<sup>319</sup>A clear wording of the *dhimma* treaty is mentioned in al-Shafi'ī's legal work "*Kitāb al-Umm*," vol. 4, p. 118.

<sup>320</sup>*The Encyclopaedia of Islam*, 2nd ed., s.v. "Dhimma," by C. Cahen; al-Kāsānī, *supra note 21*, at 7:110; al-Mughnī, *supra note 21*, at 10:584; Sobhi Mahmassani, *supra note 1*, at 257.

<sup>321</sup>*The Holy Scriptures*, 2 Kings XVII: 1-5.



treasury of the Roman Empire.<sup>322</sup>

Under Islamic law, *jizya* has different connotations. According to the Qur'anic text, "Until they pay the *jizya* readily and submissively,"<sup>323</sup> *dhimmīs* have to pay an annual tribute in lieu of military service and protection. Hence, *jizya* is only due from every male adult, sane, free and able. On the other hand, women, minors, monks, the blind, the insane, slaves, crippled and other disabled persons are exempt.<sup>324</sup> Two precedents were advanced for this criteria by 'Umar Ibn al-Khaṭṭāb. When 'Umar saw an old Jew begging to collect money for the payment of the *jizya*, he exempted him from the tribute and ordered him a pension from the public funds (*bayt al-māl*).<sup>325</sup> It is also reported that 'Umar had directed his general Abū 'Ubayda not to oppress the *dhimmīs* nor to harm them. When the Muslim army failed to protect the people of Hims in Syria, 'Umar ordered Abū 'Ubayda to refund any *jizya* paid by the *dhimmīs* to the Muslim leader. Furthermore, depending on variant sources, Laurent mentions that Mu'awiya Ibn Abī Sufyān instructed his commanders to treat the Armenians kindly.<sup>326</sup>

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<sup>322</sup>Abū al-Qāsim 'Abd Allāh Ibn Khurraḍdhbih, *al-Masālik wal-Mamālik*, ed. Michel Jan de Goeje (Leiden, The Netherlands: E.J. Brill, 1889), 111.

<sup>323</sup>*The Holy Qur'an*, IX: 29.

<sup>324</sup>Abū Ishāq Ibrāhīm Ibn 'Alī al-Shīrāzī, *al-Muḥadhdhab*, 2 vols. (Cairo: Matba'at Mustafā al-Bābī al-Halabī, 1343 A.H.), 2:269 [hereinafter *al-Shīrāzī*], al-Kasānī, *supra* note 21, at 7:111; al-Marghīnānī, *supra* note 21, at 2:166; Shams al-Dīn Ibn Qayyim al-Jawziyya, *Ahkām Ahl al-Dhimma*, 2 vols. (Damascus: Matba'at Jami'at Dimashq, 1961), 1:47-51 [hereinafter *Ahkām Ahl al-Dhimma*].

<sup>325</sup>Abū Yūsuf, *supra* note 53, at 255; *Ahkām Ahl al-Dhimma*, *supra* note 324, at 1:38; Ibn Sallām, *supra* note 253, at 55.

<sup>326</sup>Abū Yūsuf, *supra* note 53, at 271; al-Balādhurī, *supra* note 71, at 187; Joseph Laurent, *supra* note 118, at 53.

Muslim jurists differed as to the amount of the *jizya*; 'Umar Ibn al-Khaṭṭāb asked 'Uthmān Ibn Ḥanṭf, the regent of Kūfa, to impose *jizya* on *dhimmīs* as follows: forty-eight dirhams from the rich, twenty-four from the middle class, and twelve from low-income persons.<sup>327</sup> While the Ḥanafites followed 'Umar's example, Mālik, for his part, classified *jizya* into three categories: one *ḍīnār* from the poor; two *ḍīnārs* from the middle class and four *ḍīnārs* from the wealthy. al-Shāfi'ī held the same view, leaving to the *Imām* the authority to scale up or down the *jizya* to a minimum of one *ḍīnār* per person.<sup>328</sup> It is worth mentioning here that except for the Shāfi'ītes, Muslim jurists agreed that the failure to pay the *jizya* for legitimate reasons does not constitute a breach of the *dhimma* treaty,<sup>329</sup> for the Prophet Muḥammad said: "I will be the opponent of whoever oppresses a *dhimmī* or over burdens him beyond his ability."<sup>330</sup>

Besides paying the *jizya*, there are certain duties to be performed

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<sup>327</sup>Ibn Sallām, *supra* note 253, at 68-69.

<sup>328</sup>Abū Yūsuf, *supra* note 53, at 253; Ahkām Ahl al-Dhimma, *supra* note 324, at 1:28; Ibn al-Humām, *supra* note 293, at 4:368; al-Kāsanī, *supra* note 21, at 7:112; al-Khirshī, *supra* note 228, at 2:443; al-Mawardī, *supra* note 21, at 126; al-Shīrāzī, *supra* note 324, at 2:267.

<sup>329</sup>Abū Yūsuf, *supra* note 53, at 161; Ahkām Ahl al-Dhimma, *supra* note 324, at 1:35; al-Kāsanī, *supra* note 21, at 7:113; al-Marghīnānī, *supra* note 21, at 2:161; al-Shīrāzī, *supra* note 324, at 2:273.

<sup>330</sup>Abū Dawūd, *supra* note 197, at 1:72; Abū Yūsuf, *supra* note 53, at 254. In this connection, Ann Elizabeth Mayer concludes that "it is fair to say that the Muslim World, when judged by the standards of the day, generally showed far greater tolerance and humanity in its treatment of religious minorities than did the Christian West. In particular, the treatment of the Jewish minority in Muslim societies stands out as fair and enlightened when compared to the dismal record of Christian European persecution of Jews over the centuries." See Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics*, 2nd ed. (Boulder, Colorado: Westview press, Inc., 1995); 148.

by *dhimmīs*. What the Christians of Syria accepted as part of their request for *amān*, submitted to ʿAbd al-Rahmān Ibn Ghunm and ʿUmar Ibn al-Khaṭṭāb, became the basis for concluding subsequent treaties with the *dhimmīs*.<sup>331</sup> The Christians of Syria took upon themselves not to build any new churches, or repair those falling into ruin; to hospitalize Muslim travellers for up to three days; not to shelter spies or harm the Muslims in any way; not to teach the *Qurʾān* to their children; not to celebrate their religious services publicly; not to prevent any of their people from freely embracing Islam; to respect Muslims and not imitate them in matters of dress or hairstyle; not to use riding-beasts with saddles, or to bear any arms; not to sell alcoholic drinks; to shave the front of the head and to wear *al-zunnār* (girdle); not to parade the emblem of the cross publicly in Muslim markets, or to ring the *nāqūs* (bell) or to chant loudly.<sup>332</sup>

On the other hand, al-Māwardī has classified these duties into two main categories. The first is the deserved (*mustaḥaq*) obligations, which include showing respect for the *Holy Qurʾān*, the Prophet, and the religion of Islam; not marrying or committing adultery with a Muslim woman; not persuading Muslims to abandon their faith;<sup>333</sup> and not

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<sup>331</sup>Aḥkām Ahl al-Dhimma, *supra* note 324, at 2:891.

<sup>332</sup>Abū Yūsuf, *supra* note 53, at 256-257; C.E. Bosworth, "The Concept of *Dhimma* in Early Islam," in *Christians and Jews in the Ottoman Empire: The Functions of a Plural Society*, 2 vols., eds. Benjamin Braude and Bernard Lewis (New York: Holmes & Merier Publishers, Inc., 1982), 1:46; al-Kāsanī, *supra* note 21, at 7:113-114; al-Mughnī, *supra* note 21, 10:606-607.

<sup>333</sup>In 383 A.D. the Council of Byzantine bishops had forbidden apostasy from Christianity, and death penalty was prescribed to any Jew who persuaded Christians to abandon their faith. See C.E. Bosworth, *supra* note 332, at 38; *Encyclopaedia Judaica*, 2nd ed., s.v. "Byzantine

supporting the enemy (*ahl al-ḥarb*). The commendable (*mustaḥab*) obligations are: wearing *al-zunnār*; not building houses higher than those of Muslims; not ringing their bells; not drinking wine in public or bringing crosses or pigs into view; burying the dead privately; and not riding horses, but mules or donkeys.<sup>334</sup>

By paying the *jizya*, an essential duty, and observing the above obligations, which are in most cases not imposed by scripture, *dhimmīs* are entitled to the same rights as Muslims: right to life and prohibition of torture and inhuman treatment;<sup>335</sup> respect of their dignity and their family rights;<sup>336</sup> respect of religious beliefs, customs and traditions;<sup>337</sup> and right to individual ownership and respect for private property rights. These rights are protected by Islamic law and the *dhimma* treaty, which is binding on all Muslims (*pacta sunt servanda*). Moreover, breaching the *dhimma* treaty, for a Muslim, is an offense and a renouncement of an obligation towards *Allāh*, Who considers Himself a third party in any treaty concluded by Muslims.<sup>338</sup> The *Holy Qur'an* explicitly discusses the principle of equality between the citizens of

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Empire."

<sup>334</sup>al-Māwardī, *supra* note 21, at 126-127.

<sup>335</sup>The Caliph ʿAlī Ibn Abī Talīb declared that the *dhimmīs*' property and blood are as sacred as that of the Muslims. See al-Kāsānī, *supra* note 21, at 7:111.

<sup>336</sup>ʿUmar Ibn al-Khattāb exhorted an Egyptian Copt to whip the son of ʿAmr Ibn al-ʿĀs, who was then the governor of Egypt, in retaliation for an offence of this type.

<sup>337</sup>In 638 A.D., ʿUmar Ibn al-Khattāb signed a *dhimma* treaty with the people of Jerusalem, in which he guaranteed their lives, property, churches, and crosses.

<sup>338</sup>The *Holy Qur'an*, V: 1; VI: 152; XVI: 91; XVII: 34.

*dar al-Islam*, notwithstanding their different faiths: "Those who believe (in the *Qur'an*), those who follow the Jewish (scriptures), and the Sabians and the Christians, and any who believe in *Allah* and the Last Day, and work righteousness; on them shall be no fear, nor shall they grieve."<sup>339</sup>

In spite of being oppressed during the reigns of al-Mutawakkil and al-Hakim,<sup>340</sup> the *dhimmis* were appointed to various governmental posts at certain periods. In the Umayyad, Abbasid, Fatimid and Ottoman caliphates, Christians and Jews occupied the posts of secretaries, prison warders, and *wazirs* (ministers).<sup>341</sup> However, it must be emphasized, as has been indicated earlier, that the *dhimma* treaty is binding on all Muslims, and cannot be abjured by the *Imam* in any case. In contrast, the *dhimmis* may terminate the treaty, according to al-Kasānī, by embracing Islam, joining *dar al-harb*, or taking up arms and revolting against Muslims.<sup>342</sup>

## 2. Reciprocity (al-Mu'amala bil-Mithl)

The law concerning this issue is provided in the *Qur'an* as follows: "if then any one transgresses the prohibition against you, transgress ye likewise against him, and fear *Allah*, and know that *Allah* is with those

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<sup>339</sup> *The Holy Qur'an*, V: 72.

<sup>340</sup> I. Lichter Stadter, "The Distinctive Dress of Non-Muslims in Islamic Countries," *Historia Judaica* 5 (1943): 37; *The Encyclopaedia of Islam*, 2nd ed., s.v. "Ghiyar," by M. Perlman.

<sup>341</sup> *Ahkām Ahl al-Dhimma*, *supra* note 324, 1:210-225; al-Mawardi, *supra* note 21, at 24.

<sup>342</sup> al-Kasānī, *supra* note 21, at 7:112-113.

who restrain themselves." <sup>343</sup> "And if you punish them, punish them no worse than they punish you, but if you show patience, that is indeed the best (course) for those who are patient."<sup>344</sup> Accordingly, Muslim soldiers are ordered to deal on a reciprocal basis with their enemy in the battlefield. In other words, Muslim jihadists are bound in their actions by the conduct of the enemy; if the enemy enslaves Muslim captives or use a certain weapon, Muslim soldiers should do the same.<sup>345</sup>

A careful examination of the above verses shows, however, that Muslim troops are commanded to exercise self-restraint as much as possible, and fear *Allāh* by showing adherence to virtue and ethical considerations. Consequently, if the enemy declares killing Muslim captives lawful, or mutilates the bodies of the dead Muslims, Muslims are not allowed to imitate the enemy or indulge in similar brutality. In this connection, two cases are in point. The first one is that Ṣalāḥ al-Dīn al-Ayyūbī released a large number of enemy captives when he could not find enough food for them. In contrast, the Crusader leader, Richard The Lion Heart, executed three thousand Muslim captives who had surrendered to him after having obtained his pledge to spare their lives.<sup>346</sup> The second case was an act of Byzantine treachery toward Muslims. In the Umayyad era, the Byzantines concluded peace treaties with the first Umayyad ruler, Muʿāwīya Ibn Abī Sufyān, who accordingly held a number of Byzantine hostages in Baalbek. When the Byzantine

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<sup>343</sup>*The Holy Qurʾān*, II: 194.

<sup>344</sup>*Ibid.*, XVI: 126.

<sup>345</sup>Muḥammad Abū Zahra, *supra* note 182, at 55.

<sup>346</sup>Gustave Le Bon, *supra* note 15, at 340-341.

breached their treaties with Mu'awiya, the latter spared the hostages' blood and released them all, saying: "loyalty against treachery is better than treachery against treachery."<sup>347</sup>

Nevertheless, reciprocity has been substantiated in the instruments of both customary and modern international humanitarian law. Article 62 of the Instructions for the Government of the Armies of the United States in the Field, of 1863, proclaims that troops giving no quarter were entitled to receive none.<sup>348</sup> Furthermore, the Convention on Treatment of Prisoners of War, of 1929, the 1949 Geneva Conventions, and the 1977 Geneva Protocol I Additional to the Geneva Conventions prohibit reprisals against prisoners of war.<sup>349</sup> Despite the limitation of reciprocity by the minimum standards given in these conventions, parties to the conflict should take the necessary measures to ensure the application of equal treatment for all prisoners of war. However, a comparison between concepts of reciprocity under Islamic and international humanitarian law reveals that the reciprocal basis, according to Islamic humanitarian law, must not exceed the bounds of human decency. On the contrary, it is limited and can be turned into reprisals under customary international

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<sup>347</sup>Ibn Sallam, *supra* note 253, at 174-175.

<sup>348</sup>The manual Instructions for the Government of the Armies of the United States in the Field was drafted by Professor Francis Lieber and issued to the Union Army, after minor revisions, on April 24, 1863. See Gerhard von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (Minneapolis: University of Minnesota Press, 1957), 8-16.

<sup>349</sup>D.W. Greig, "Reciprocity, Proportionality, and the Law of Treaties," *Virginia Journal of International Law* 34 (Winter 1994): 333; *Geneva Convention III Relative to the Treatment of Prisoners of War of August 12, 1949*, 75 U.N.T.S. (1950) 135-285 [hereinafter Geneva III]; René Provost, "Reciprocity in Human Rights and Humanitarian Law," *The British Year Book of International Law* 65 (1994): 405.

law.<sup>350</sup>

### 3. Arbitration (al-Taḥkīm)

Arbitration is as old as disputes and nations themselves. Kalston argues that the Greek city-states had developed institutions of arbitration by which they settled disagreements and concluded peaceful treaties. To resolve their disputes, the Greek litigant parties used to submit their disputes in a comprehensive procedural detail for arbitration.<sup>351</sup> However, in pre-Islamic Arabia, arbitration was resorted to as a legal institution to settle inter-tribal disputes. The *Naqīb* (tribal chief) of another tribe usually led this judicial machinery.<sup>352</sup> It was reported that Haram Ibn Sinān and al-Hirth ibn 'Awf had settled the fierce war of Dāḥis and al-Ghabrā' between the 'Abs and Fazāra tribes.<sup>353</sup> A short time before the emergence of Islam, the Prophet Muḥammad was elected, by the tribal chiefs of Mecca as an arbitrator (*ḥakam*) to settle disputes which arose between them concerning the lifting of the Black Stone of the Ka'ba. At a later time, the Prophet acted as an arbitrator to settle a historical dispute between the Aws and the Khazraj tribes of al-Madīna.

The word *taḥkīm* is derived from the root *ḥakama*, which means to

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<sup>350</sup>William Hall, *A Treatise on International Law* (Oxford: The Clarendon Press, 1924), 495.

<sup>351</sup>Jackson H. Ralston, *International Arbitration from Athens to Locarno* (Stanford, California: Stanford University Press, 1929), 11-15.

<sup>352</sup>Muhammad Hamīdullāh, "Administration of Justice in Early Islam," *Islamic Culture* 9 (1937): 165.

<sup>353</sup>Abū 'Abd Allāh al-Husayn Ibn Ahmad al-Zawzani, *Sharḥ al-Mufaḥḥaṣṣat al-Sab'* (Beirut: Dar al-Qamūs al-Ḥadīth, n.d.), 98.



decide, judge, or rule.<sup>354</sup> Both words, *ḥakam* (judge) and *ḥakīm* (wise), are among the ninety-nine attributes of *Allāh*. Moreover, the word *ḥakama* and its derivatives are cited in more than one hundred and forty verses in the *Holy Qur'an*. Apart from the linguistic meanings, *al-taḥkīm*, as a preventive measure and a preliminary peaceful step before resorting to war, has played a prominent role in settling disputes and promoting international justice.<sup>355</sup>

After the emergence of Islam, *al-taḥkīm* was recognized as a peaceful means of settling disputes both in civil and public international law.<sup>356</sup> During the first century of the Islamic era there were two cases in point: the first case was *al-taḥkīm* between the Prophet Muḥammad and Banū Qurayṣa; and the second was between ʿAlī Ibn Abī Ṭālib, the fourth Caliph, and Muʿāwiyah Ibn Abī Sufyān, the governor of Syria. In the first case, both parties agreed to submit their dispute to Saʿd Ibn Muʿādh, as an arbitrator,<sup>357</sup> and in the second precedent, each of the parties agreed to submit his dispute to an appointed *ḥakam* (arbitrator). ʿAlī appointed Abū Mūsā al-Ashʿarī, and Muʿāwiyah appointed ʿAmr Ibn al-ʿĀṣ.<sup>358</sup>

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<sup>354</sup>Abū al-Qāsim al-Zamakhsharī, *supra* note 49, at 91; Ahmad Rida, *Mufjam Matn al-Lughah*, 5 vols. (Beirut: Dar Maktabat al-Haya, 1958), 2: 139; Muḥammad Ibn Abī Bakr al-Rāzī, *supra* note 49, at 62; Muḥammad Ibn Manzūr, *supra* note 49, at 1: 688.

<sup>355</sup>Sobhi Mahmassani, *supra* note 1, at 273.

<sup>356</sup>Majid Khadduri, *supra* note 50, at 233; Sobhi Mahmassani, *supra* note 1, at 272.

<sup>357</sup>For more details see Ibn Hishām, *supra* note 67, at 3: 145-146; al-Siyar al-Kabīr, *supra* note 67, at 2: 587-593.

<sup>358</sup>al-Ṭabarī, *supra* note 71, at 3: 31-38.

However, according to Islamic law, *al-tahkīm* procedure can be characterized as follows: first, the free selection of arbitrators; second, arbitrators must respect the rules of Islamic law; third, parties who agree to submit their dispute to arbitration must respect its ruling, and comply with its provisions; fourth, no arbitration in *al-hudūd* and *al-Qaṣās* (punishments stipulated in the *Qur'an*); fifth, the award is considered null and void in two cases: if the arbitrator is not chosen freely by the parties, and if he is a close relative to one of the litigants; and finally, the arbitrator must be a wise and just believer.<sup>359</sup>

#### 4. Neutrality (*al-Hiyāḍ*)

The term neutrality is derived from the Latin *neuter*. According to Oppenheim, neutrality, which may be defined as the attitude of impartiality adopted by third states towards belligerents, was not recognized as an institution of international law before the writings of Grotius.<sup>360</sup> It is perceived that the concept of neutrality has been connected with the development of the idea of the international community.<sup>361</sup> Even Grotius did not know or use the term neutrality in its modern sense. He dealt briefly with this concept under the title *De his, qui in bello medii sunt* to support his theory of the just war.<sup>362</sup>

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<sup>359</sup> *The Encyclopaedia of Islam*, 2nd ed., s.v. "Ḥakam," by E. Tyan; al-Marghinānī, *supra* note 21, at 3:108-109.

<sup>360</sup> L. Oppenheim, *supra* note 91, at 514.

<sup>361</sup> Gerhard von Glahn, *supra* note 95, at 625.

<sup>362</sup> Hugo Grotius, *De jure belli ac pacis libri tres* (Amstelodami: Apud Viduam Abrahami Asmeren, 1701), 828-833. However, Emmerich de Vattel (1714-1767), whose writings appeared in 1758, one hundred and thirty-

In Vattel's time, as a result of the growing importance of international trade, belligerent states agreed to respect the neutrality of those states who decided to remain outside war.<sup>363</sup>

Although neutrality was accepted as a legal status by the end of the nineteenth century, the definitions of both neutral rights and duties remained unclear until the convening of the Hague Peace Conference in 1907, when two conventions on neutrality were adopted.<sup>364</sup> However, the failure of the Hague Conventions, to lay down precise rules on neutrality, led to different amendments being adopted in the Declaration of London of 1909; the Covenant of the League of Nations, (Article 16); the Pact of Paris of 1928; the United Nations Charter of 1945, (Article 2, paragraph 5 and 6); and the four Geneva Conventions of 1949.<sup>365</sup>

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three years after Grotius treatise, has used the term neutrality, and defined it as: "Les peuples neutres, dans une guerre, sont ceux qui n'y prennent aucune part, demeurant amis communs des deux partis, et ne favorisant point les armes de l'un au préjudice de l'autre." See Emmerich de Vattel, *supra* note 114, at 2:565.

<sup>363</sup>Gerhard von Glahn, *supra* note 95, at 626; L. Oppenheim, *supra* note 91, at 490.

<sup>364</sup>*The Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land*, of 1907, 3 Martens NRG, 3ème sér. (1862-1910) 504-532 (opened for signature on October 18, 1907, and entered into force on January 26, 1910) [hereinafter Hague V]; *The Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines*, of 1907, 3 Martens NRG, 3ème sér. (1862-1910) 580-603 (opened for signature on October 18, 1907, and entered into force on January 26, 1910) [hereinafter Hague VIII].

<sup>365</sup>Based on Article 2 (paragraph 5), and Article 41 of the United Nations Charter, Member States of the United Nations have no absolute right of neutrality. They may be called upon to apply enforcement measures against a state or states engaged in war pursuant to a decision passed by the Security Council. For example, the Security Council's Resolution 661, of August 6, 1990, calling upon all States, including non-member States of the United Nations, to take measures against Iraq after Iraq's invasion of Kuwait. Furthermore, rules of neutrality proved quite out of date, and could not be applied in many instances during

Examining the concept of neutrality in Islamic international law, Majid Khadduri maintained that such an institution did not exist in Islamic legal theory, since Islamic humanitarian law never recognized an attitude of impartiality on the part of other states.<sup>366</sup> He proceeded to say:

"If neutrality is taken to mean the attitude of a state which voluntarily desires to keep out of war by not taking sides, no such a status is recognized in Muslim legal theory. For Islam must *ipso jure* be at war with any state which refuses to come to terms with it either by submitting to Muslim rule or by accepting a temporary peace arrangement."<sup>367</sup>

A careful examination of the main sources of Islamic law, however, shows the contrary. It is obvious that Khadduri's viewpoint is based on his earlier claim that, "the normal relationship between Islam and non-Muslim communities is a state of hostility."<sup>368</sup> This notion is drawn from three irrelative cases,<sup>369</sup> of which Khadduri himself acknowledges, "such states were not neutral, in the sense of the modern law of nations."<sup>370</sup> Moreover, Khadduri ignores the *Qur'anic* verse, which the theory of

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World War I (1914-1918) and World War II (1939-1945). See J.G. Starke, *An Introduction to International Law* (London: Butterworths, 1977), 613.

<sup>366</sup>Moreover, in discussing the Islamic conception of justice, Khadduri claimed that Islamic law leaves no room for neutrality. He alleged that, "justice under neutrality had no place in accordance with the Islamic public order, if neutrality were taken to mean the attitude of a political community which voluntarily decided to refrain from hostile relations with belligerent parties." See Majid Khadduri, *The Islamic Conception of Justice* (Baltimore: The Johns Hopkins University Press, 1984), 168.

<sup>367</sup>Majid Khadduri, *supra* note 50, at 251.

<sup>368</sup>*Ibid.*, at 202.

<sup>369</sup>The cases of Ethiopia, Nubia and Cyprus.

<sup>370</sup>Majid Khadduri, *supra* note 50, at 252.

neutrality, in Islamic legal discourse, is based on. This verse reads: "therefore if they withdraw from you (*i'tazalukum*), and wage not war against you and offer you peace, then *Allāh* hath opened no way for you (to war against them)."<sup>371</sup> Both the context and the wording of the verse testify to the main components of the theory of neutrality: a war has broken out between two subjects of the law; a third political community voluntarily desires not to take sides with or against belligerent parties; and the warring parties fully recognize the rights of the neutral state. The verse, strictly speaking, indicates that the Islamic state must be committed to recognizing and respecting the neutrality of the states who have declared their impartiality toward the belligerent powers.<sup>372</sup> This shows clearly that the Islamic concept of neutrality is compatible with the same concept as it appears under international law in the modern sense of the term.

Although the classical juridical works do not leave much room for neutrality, a historical case in point is the treaty concluded in the second year of the *hijra*, between the Islamic city-state in Madina and the quasi-state of the tribe of Banū Ḍamra. The treaty, which was signed by the Prophet Muḥammad and Makhshī Ibn 'Amr al-Ḍamrī, runs as follows: "the Prophet will not attack Banū Ḍamra nor will they attack him or swell

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<sup>371</sup> *The Holy Qur'an*, IV: 90.

<sup>372</sup> David Aaron Schwartz, *supra* note 211, at 645; Marcel A. Boisard, *supra* note 15, at 10; Al Ghunaimi, *supra* note 83, at 217; Mustansir Mir, "Jihad in Islam," in *The Jihad and Its Times*, ed. Hadia Dajani-Shakeel (Michigan: The University of Michigan, 1991), 121.

the troops of his enemies nor help his enemies in any way."<sup>373</sup>

Furthermore, the Gulf crisis, that followed Iraq's unlawful invasion of Kuwait in August 1990, gave rise to the most recent examples of neutrality in the Muslim world. In spite of the popular support of their citizens for Iraq against the Western Coalition, Jordan, the Sudan and Yemen maintained a formal state of neutrality throughout the crisis.<sup>374</sup>

By contrast, the cases of Ethiopia, Nubia and Cyprus, which were cited by Khadduri, could not constitute a formal state of neutrality. In contrast, true neutrality requires sovereignty and independence, for a neutral state is one whose independence and integrity, both political and territorial, allow her to possess sovereignty over her subjects and affairs.<sup>375</sup> Although Ethiopia was an independent state, it did not in fact announce its neutral status. Muslims themselves voluntarily abstained from attacking Ethiopia and declared its immunity from war.<sup>376</sup> Moreover, Ethiopia may be considered *dar al-Islam* rather than a neutral

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<sup>373</sup>Ahmad Ibn Yahya al-Baladhuri, *Ansab al-Ashraf*, 5 vols. (Jerusalem: Hosta'at Sefarim, 1938), 1:287 [hereinafter al-Ansab]; Ibn Hisham, *supra* note 67, at 2:170-171; Ibn Sa'd, *supra* note 253, at 2:27; al-Maqrizi, *supra* note 253, at 1:53; Muhammad Hamidullah, *Muslim Conduct of State* (Lahore, Pakistan: Muhammad Ashraf, 1961), 296; al-Suhayli, *supra* note 229, at 2:58-59; al-Tabari, *supra* note 71, at 1:519-520.

<sup>374</sup>David Aaron Schwartz, *supra* note 211, at 645.

<sup>375</sup>J.G. Starke, *supra* note 365, at 113 and 140.

<sup>376</sup>Abu Dawud, *supra* note 197, at 2:101; al-Bayhaqi, *supra* note 211, at 9:176; Ibn Rushd, *supra* note 21, at 1:369; Ndr al-Din 'Alf Ibn Abi bakr al-Haythami, *Majma' al-Zawa'id wa Manba' al-Fawa'id*, 10 vols. (Cairo: Maktabat al-Quds, 1353 A.H.), 5:304 [hereinafter al-Haythami].

territory, for its King had accepted the Prophet's invitation of Islam;<sup>377</sup> protected those muslims who escaped persecution in Mecca and sought asylum in Ethiopia; and allowed Muslims to reside safely and to outwardly practice their religion individually and collectively.<sup>378</sup>

Soon after they failed to annex Nubia, Muslims were successful in concluding a treaty of interdependence with the Nubians on a reciprocal basis. This treaty, which was signed in 31 A.H., ensured security and peace between both parties. According to the norms of the treaty, Nubians shall pay an annual tribute of three hundred and sixty slaves to the chief of the Muslims. In return, the Muslims are bound by the treaty to supply the Nubians with wheat, horses and clothing.<sup>379</sup> It is clear that the Muslims and the Nubians signed a reciprocal trade agreement, not a treaty of neutrality. Therefore, it may be argued that Nubia was *dar al-'ahd*, not *dar al-ḥiyāḍ*.

Finally, from the legal point of view, Cyprus was not a sovereign state when it was attacked by the Muslim army. It was a Byzantine tributary island. Due to the fact that the annexation of Cyprus to *dar al-Islām* might lead the Muslims into a real confrontation with the Byzantine Empire, the Muslims and Cypriots concluded a peace treaty, which provided that the latter pay an annual tribute of seven thousand, two hundred dīnārs. According to this treaty, the Muslims would refrain

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<sup>377</sup> Ibn Kathīr, *supra* note 72, at 3:84; al-Qalqashandī, *supra* note 266, at 6:466-467; Ibn al-Qayyīn, *supra* note 21, at 3:60-61; al-Ṭabarī, *supra* note 71, at 1:643-644.

<sup>378</sup> Al Ghunaimi, *supra* note 83, at 156-157; al-Shawkānī, *supra* note 192, at 8:29.

<sup>379</sup> al-Balādhurī, *supra* note 71, at 236; Ibn 'Abd al-Hakam, *supra* note 254, at 188-189; al-Khitāṭ, *supra* note 254, at 1:323-324.

from waging war against the Cypriots.<sup>380</sup> However, in spite of its neutral attitude and acting as a buffer state between Muslims and Byzantines, Cyprus' neutral status was *ipso facto*, the thing which categorized it as being within *dar al-ʿahd*.

##### 5. Diplomatic Exchange (Tabādul al-Wufūd wal-Safārāt)

Generally speaking, no exclusive definition of diplomacy has been yet made.<sup>381</sup> The Oxford English Dictionary calls it "the management of international relations by negotiation," or "the method by which these relations are adjusted and managed."<sup>382</sup> However, based on the doctrine of *jihad*, in which "peace is the rule, war is the exception," diplomacy has played a distinct role in the peaceful missionary work of Islam.<sup>383</sup> Conversely, Majid Khadduri claims that the adoption of diplomacy by Islam was not essentially for peaceful purposes "as long as the state of war was regarded as the normal relation between Islam and other nations."<sup>384</sup> Despite the apparent differences, Islamic historical and juristic works show that diplomacy, as an organized profession, arose very early in the Islamic era. Thus, the following study will discuss the historical

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<sup>380</sup> al-Baladhuri, *supra* note 71, at 152-153 and 155-156; *The Encyclopaedia of Islam*, 2nd ed., s.v. "Cyprus," by R. Hartmann; Ibn al-Athir, *supra* note 284, at 3:37; Ibn Saʿīd, *supra* note 253, at 174.

<sup>381</sup> Norman D. Palmer and Howard C. Perkins, *International Relations: The World Community in Transition* (New York: Houghton Mifflin Company, 1953), 84.

<sup>382</sup> Lesley Brown, ed., *The Oxford English Dictionary on Historical Principles*, 2 vols. (Oxford: The Clarendon Press, 1993), 1:678.

<sup>383</sup> "Invite (all) to the way of *Allāh* with wisdom and beautiful preaching; and argue with them in ways that are best and most gracious." *The Holy Qurʾān*, XVI: 125.

<sup>384</sup> Majid Khadduri, *supra* note 50, at 239.



background of diplomacy and the functions, privileges and immunities of diplomats.

Until the late seventeenth century the word diplomacy meant verifying ancient documents. It is derived from the Greek verb *diploun* meaning to fold. The Romans used the word *diploma* for official documents, particularly those relating to foreign communities or tribes.<sup>385</sup> Diplomacy, meaning the management of international relations, was used for the first time in England in 1796, and was recognized as a distinct profession by the Congress of Vienna in 1875.<sup>386</sup>

In Arabic, the term *rasūl* (messenger) or *safīr* (ambassador) refers to a diplomatic agent. The word *rasūl*, which is derived from the verb *arsala* (to dispatch), has a religious connotation. The term *safīr* is derived from the verb *safara*, which means mediation and conciliation.<sup>387</sup> It must be pointed out that according to Muslim chronicles and jurists, diplomatic agents should display the following qualities: elegance, intelligence, dignity, eloquence, politeness, loyalty and education.<sup>388</sup>

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<sup>385</sup> Harold Nicolson, *Diplomacy* (London: Oxford University Press, 1969), 4.

<sup>386</sup> *Ibid.*

<sup>387</sup> Abū 'Alī al-Husayn Ibn Muhammad Ibn al-Farra', *Kitāb Rusūl al-Mulūk wa-man Yasluh 'il-Risāla wa'l-Safāra*, ed. Salah al-Dīn al-Munajjid (Cairo: Lajnat al-Ta'līf wal-Tarjama wal-Nashr, 1947), 3 [hereinafter *Rusūl al-Mulūk*]; Abū al-Qāsim al-Zamakhsharī, *supra note 49*, at 162 and 212; Muhammad Ibn Abī Bakr al-Rāzī, *supra note 49*, at 102 and 127; Muhammad Ibn Manẓūr, *supra note 49*, at 1: 1165 and 2:154.

<sup>388</sup> Muhammad Ibn 'Alī Ibn Tabātaba Ibn al-Taḳṭaḳī, *al-Fakhr fī al-Adab al-Sūltāniyya wal-Duwal al-Islāmiyya* (Cairo: Matba'at Muhammad 'Alī Subayh, n.d.), 57 [hereinafter *Ibn al-Taḳṭaḳī*]; *Rusūl al-Mulūk*, *supra note 387*, at 20-29; al-Siyar al-Kabīr, *supra note 67*, at 2:471; Sobhi Mahmassani, *supra note 1*, at 266.

However, diplomatic relations were known to Arab tribes before Islam. In Mecca, foreign affairs were entrusted to Banu 'Uday, and 'Umar Ibn al-Khaṭṭāb was the last Qurashite ambassador to other Arab tribes before Islam.<sup>389</sup> Following the emergence of Islam, diplomatic intercourse was developed to a considerable extent. In the sixth year of the Hijra, after he concluded the Ḥudaybiya Treaty with the pagans of Mecca, the Prophet Muḥammad dispatched envoys to various Arab and non-Arab kingdoms, inviting them to Islam. He sent Ḥaṭīb Ibn Abī Balṭa'a to Muqawqas, the governor of Alexandria; 'Abdullāh Ibn Ḥudhāfa al-Sahmī to the King of Persia; Daḥiyya Ibn Khalīfa al-Kalbī to Heraclius, the Byzantine emperor; 'Amr Ibn Umayya al-Ḍamrī to the Negus, the emperor of Abyssinia; 'Amr Ibn al-ʿĀs to the Kings of Oman; Salīṭ Ibn 'Amr to the Kings of Yamama; al-ʿĀla' Ibn al-Ḥaḍramī to the King of Al-Bahrain; Shujā' Ibn Wahb al-Asadī to the Ghassanid King; al-Muhājir Ibn Abī Umayya al-Makhzūmī to the Himyarite King; and Mu'adh Ibn Jabal to the Kings of Yemen.<sup>390</sup> Through a close look at the letters carried by the above ambassadors, one may observe a refined etiquette on the part of the Prophet.

On the other hand, the Prophet received delegations and embassies at *ustūwanat al-wufūd* (the pillar of embassies) in his mosque. He received deputations from Ta'if; Najrān; Banu Sa'd; Banu Tay'; Banu

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<sup>389</sup>Ahmad Shalabī, *Mawṣūʿat al-Tārīkh al-Islāmī*. 10 vols. (Cairo: Maktabat al-Nahda al-Misriyya, 1984), 1:570; al-Sayyid al-Jamīlī, *Manāqib Amr al-Mu'minīn 'Umar Ibn al-Khaṭṭāb* (Beirut: Dār al-Kitāb al-ʿArabī, 1985), 21.

<sup>390</sup>Ibn Hishām, *supra* note 67, at 3: 232; Ibn Sa'd, *supra* note 253, at 2:15-38; al-Qalqashandī, *supra* note 266, at 6: 376-377; al-Suhaylī, *supra* note 229, at 2:352-358; al-Ya'qūbī, *supra* note 280, at 2:83.

Tamīm; Banū Ḥanīfa; the Kings of Ḥimyar; and the Kings of Kinda.<sup>391</sup> At the time of the ceremonial reception of emissaries, the Prophet and his companions usually put on fine dress.<sup>392</sup> Before ceremonials took place, usually, envoys were instructed by a person who was later called the master of ceremonials.<sup>393</sup> In many cases the Prophet and his successors exchanged gifts with envoys as part of the diplomatic ceremonies. The gifts received by the prophet and the Muslim Caliphs went to the general exchequer.<sup>394</sup> In the time of the Prophet, there were a number of large houses (*dar al-dīfān*) in Madina to accommodate envoys according to their personal status and the rank of whom they represented.<sup>395</sup> In this connection, it might be important to mention here that diplomatic intercourse flourished and achieved great success in the late Islamic periods. In the times of the rightly-guided caliphs, as well as in the Umayyad and Abbasid periods, the Islamic state came into more sophisticated diplomatic relations when they negotiated and concluded truce and peace treaties with neighboring kingdoms.<sup>396</sup> Moreover, the Fatimid, Mamluk, Ayyubid, and Ottoman regimes exchanged diplomatic

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<sup>391</sup>Ibn Hishām, *supra* note 67, at 4:152-181; Ibn Kathīr, *supra* note 72, at 5: 40-98; al-Maqrīzī, *supra* note 253, at 1:509; Ibn Saʿd, *supra* note 253, at 1:153; al-Ṭabarī, *supra* note 71, at 2:48.

<sup>392</sup>al-Maqrīzī, *supra* note 253, at 1:509; Ibn Saʿd, *supra* note 253, at 1:153.

<sup>393</sup>al-Ṭabarī, *supra* note 71, at 2:49.

<sup>394</sup>*Ibid.* When the wife of ʿUmar Ibn al-Khattāb received a gift from the wife of the Emperor of Constantinople, ʿUmar confiscated it for the Muslim state treasury. See Ibn al-Athīr, *supra* note 284, at 3:74.

<sup>395</sup>Ibn Saʿd, *supra* note 253, at 1:153; al-Maqrīzī, *supra* note 253, at 1:509; Muḥammad Ḥamīdullāh, *supra* note 373, at 147.

<sup>396</sup>al-Qalqashandī, *supra* note 266, at 421-463.

representatives with European and Asian countries.<sup>397</sup>

Nevertheless, based on customary and conventional international law, diplomatic agents enjoy a considerable range of privileges and immunities to ensure their efficient performance and function.<sup>398</sup> According to the Vienna Convention on Diplomatic Relations, concluded on April 18, 1961, diplomatic envoys have the right to inviolability. In other words, the person of the diplomatic agent is inviolable. Article 29 of the above Convention proclaims that diplomatic agents are protected from molestation of any kind, as well as from arrest or detention by the local authorities. The second privilege is extraterritoriality. This concept involves a number of exemptions from local jurisdiction. Accordingly, diplomatic envoys are exempt from the jurisdictions of the receiving state, including local civil and criminal jurisdiction. Moreover, they cannot be asked to appear as a witness in a tribunal. Exemption from taxes and customs duties is provided in Articles 34 and 36 of the Vienna Convention. In addition, there are a number of minor immunities embodied in the articles of the convention, namely: the right to move and travel freely in the territory of the receiving state, except in prohibited security zones; the freedom of communication for official purposes; exemption from social security provisions; and exemption from

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<sup>397</sup>B. Sen, *A Diplomat's Handbook of International Law and Practice* (The Hague, The Netherlands: Martinus Nijhoff Publishers, 1965), 5.

<sup>398</sup>J.G. Starke, *supra note* 365, at 444. These privileges and immunities are minutely discussed in Articles 20 to 41 of the Vienna Convention on Diplomatic Relations, of April 18, 1961.

services and military obligations.<sup>399</sup>

Thus, diplomatic envoys enjoy specific immunities and privileges corresponding to those provided by public international law. In this sense, Bernard Lewis concludes that "the rights and immunities of envoys, including those from hostile rulers, were recognized from the start, and enshrined in the *Shari'ah*."<sup>400</sup>

To enable them to exercise their duties and functions, diplomatic agents enjoy full personal immunity under Islamic international law. They are not to be killed, maltreated or arrested even if they are convicted or have a criminal record.<sup>401</sup> The Prophet Muhammad granted these privileges and immunities to diplomatic envoys in his lifetime. Two incidents are on record: first, the Prophet granted immunity to Ibn al-Nawwaha and Ibn Athal, the emissaries of Musaylama - the liar - , in spite of their extremely rude behaviour towards him. The Prophet said: "I swear by *Allah* that if emissaries were not immune from killing, I would have ordered you to be beheaded."<sup>402</sup> Second, the Prophet treated

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<sup>399</sup> *Vienna Convention on Diplomatic Relations*, Articles 26, 27, 33 and 35. See Gerhard von Glahn, *supra* note 95, at 42, 199, and 386-394; J.G. Starke, *supra* note 365 at 440-445; L. Oppenheim, *supra* note 91, at 1: 629-636; Norman D. Palmer and Howard C. Perkins, *supra* note 381 at 90-91.

<sup>400</sup> Bernard Lewis, *supra* note 2, at 76.

<sup>401</sup> Afzal Iqbal, *The Prophet's Diplomacy: The Art of Negotiation as Conceived and Developed by the Prophet of Islam* (Cape Cod, Massachusetts: Claude Stark & Co., 1975), 54-55; al-Mas'udi, *supra* note 133, at 2:309; Muhammad Hamidullah, *supra* note 373, at 147.

<sup>402</sup> Abu Dawud, *supra* note 197, at 2:92-93; Ahmad Ibn Hanbal al-Shaybani, *al-Musnad*, 6 vols. (Beirut: al-Maktab al-Islami, 1969), 1:390 [hereinafter Ibn Hanbal]; al-Bayhaqi, *supra* note 211, at 9:211; Ibn Hisham, *supra* note 67, at 4:165; Ibn al-Qayyim, *supra* note 21, at 2:75; al-Sarakhsi, *supra* note 21, at 10:92; al-Shawkani, *supra* note 192, at 8:34; al-Jabarti, *supra* note 71, at 2:69.

kindly Wahshī, the ambassador of the people of al-Ṭā'if, who had murdered Ḥamza, the Prophet's uncle, at the battle of Uhud. The Prophet's generous treatment convinced him to embrace Islam.<sup>403</sup> Moreover, Islamic law accorded *droit de chapelle* to diplomatic agents. The Prophet allowed a delegation from the Christians of Najrān to hold their service in his mosque.<sup>404</sup>

In addition to the above privileges, the property of diplomatic agents is exempt from customs duties and other taxes during their stay in *dār al-Islām*.<sup>405</sup> This privilege could be provided on a reciprocal basis.<sup>406</sup> In this sense, Muslim jurists deem that diplomatic agents of foreign states enjoy the same privileges granted to Muslim envoys in such states.<sup>407</sup> To enjoy these privileges and immunities, foreign envoys must commit themselves to good breeding and fidelity. In committing any prohibited acts, which might disturb the peace and security of *dār al-Islām*, like engaging in espionage or exporting weapons from *dār al-Islām* to *dār al-ḥarb*, an envoy will be declared *persona non grata* and

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<sup>403</sup>Ibn Hisham, *supra* note 67, at 3:21-23; Ibn Kathīr, *supra* note 72, at 4:17-19; al-Ṭabarī, *supra* note 71, at 1:576.

<sup>404</sup>Afzal Iqbal, *supra* note 401, at 55; Ibn Hishām, *supra* note 67, at 2:160; Ibn Kathīr, *supra* note 72, at 5:52-56; Mohammad Ali Homoud, *Diplomacy in Islam: Diplomacy During the Period of Prophet Muhammed* (Jaipur, India: Printwell, 1994), 232.

<sup>405</sup>Abū Yūsuf, *supra* note 53, at 334-335; al-Khaṭīb, *supra* note 288, at 4:247; al-Shīrāzī, *supra* note 324, at 2:260.

<sup>406</sup>Abū Yūsuf, *supra* note 53, at 266.

<sup>407</sup>*Ibid.*; Muḥammad Ḥamīdullāh, *supra* note 373, at 148.

expatriated safely to his state of origin.<sup>408</sup> In this case, however, the emissary will not be killed or in any way molested or badly treated, for the rule is "loyalty against treachery is better than treachery against treachery."<sup>409</sup> In light of the above discussion, one may ask: On what grounds is Majid Khadduri standing when he concludes, "if hostilities began when the emissaries were still on Muslim soil, they were either insulted or imprisoned or even killed"?<sup>410</sup>

## 6. Foreign Trade (al-Tijāra al-Khārijīyya)

It is well known that Islam emerged in Mecca, the commercial centre of Arabia, at the crossroads of international trade.<sup>411</sup> The Prophet Muḥammad himself was a merchant, and the *Holy Qur'an* has made reference to the trade journeys of the Quraysh, a highbred Meccan tribe, to Yemen and Syria in winter and summer respectively.<sup>412</sup> The Qurashites' trade caravans and their prestige as custodians of the Ka'ba, the central

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<sup>408</sup>Abū Ishāq Ibrāhīm Ibn 'Alī al-Shīrāzī, *al-Tanbīh* (Cairo: Matba'at Mustafā al-Bābī al-Halabī, 1951), 147 [hereinafter al-Tanbīh]; al-Daṣūqī, *supra* note 228, at 2:206; Ibn al-Humām, *supra* note 293, at 4:294; Mansūr Ibn Idrīs al-Buhārī, *Kashshaf al-Qinā' 'an Maṭn al-Iqnā'*, 6 vols. (Cairo: Matba'at Ansār al-Sunna al-Muhammadiyya, 1947), 3: 87 [al-Buhārī]; al-Shāfi'ī, *supra* note 21, at 4: 185; Sharf al-Dīn Ismā'īl Ibn Abī Bakr al-Muqrī, *Asnā al-Matalib fī Sharh Rawd al-Talīb*, 2 vols. (Cairo: al-Matba'a al-Maymaniyya, 1306 A.H.), 2:204 [hereinafter al-Muqrī]; Tuhfat al-Muhtaj, *supra* note 293 at 4:294.

<sup>409</sup>Abū Dawūd, *supra* note 197, at 2:92; Muḥammad Ibn 'Isā al-Tirmidhī, *Sunan al-Tirmidhī*, 5 vols. (Beirut: Dar al-Fikr, 1983), 4:143 [hereinafter al-Tirmidhī].

<sup>410</sup>Majid Khadduri, *supra* note 50, at 244.

<sup>411</sup>Aḥmad Amīn, *Fajr al-Islām* (Beirut: Dar al-Kitāb al-'Arabī, 1975), 12-16; Ibn Kathīr, *supra* note 72, at 2:293; al-Ṭabarī, *supra* note 71, at 1:457.

<sup>412</sup>*The Holy Qur'an*, CVI: 1-2.

shrine of Arabia, enabled them to obtain covenants of security and safeguard from the rulers of neighbouring countries to protect their trade journeys.<sup>413</sup> At a later time, foreign trade became a considerable career in Muslim society, and played a great role in the expansion of the Islamic religion and civilization. Islamic commercial law left its imprint on the European trading profession through Andalusia and Italy. Although the details of this intercourse lie outside the scope of this study, it can be said that many Islamic commercial ideas and technical expressions were introduced into the European commercial discourse during the Crusades. Furthermore, Trend claims that while Europe was shrouded in the Dark Ages, Muslims began to trade with Europe on a large scale, getting as far as Sweden. Through trade, Muslims influenced Western legal principles.<sup>414</sup>

However, in examining the effect of the doctrine of *jihad* on commercial intercourse with the enemy, Muslim jurists held different opinions regarding trade between *dar al-Islam* and *dar al-harb*. While trading between the subjects of belligerent states usually ceases at the outbreak of war, Islamic law allows Muslims to conclude commercial

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<sup>413</sup>Abū al-Fida' Ismā'īl Ibn Kathīr, *Tafsīr Ibn Kathīr*, 4 vols. (Beirut: Dār al-Fikr lil-Tibā'a wal-Nashr wal-Tawzī', 1981), 4:554-555 [hereinafter *Tafsīr Ibn Kathīr*]; al-Qurtubī, *supra* note 60, at 20:137.

<sup>414</sup>In this respect, Le Baron Michel de Taube argues that "contre 38,000 monnaies arabes trouvées en Suède, on compte seulement 200 monnaies byzantines découvertes dans le même pays." See Le Baron Michel de Taube, "Etudes sur le développement historique du droit international dans l'Europe Orientale," *Recueil des cours* 1:2 (1926): 395; J.B. Trend, "Spain and Portugal," in *The Legacy of Islam*, eds. Thomas Arnold and Alfred Guillaume (London: Oxford University Press, 1931), 3; Majid Khadduri, *supra* note 50, at 224; Sobhi Mahmassani, *supra* note 1, at 271-272; W. Heyd, *Histoire du commerce du Levant au moyen-âge*, 2 vols. (Leipzig: Otto Harrassowitz, 1923), 1:24-51.



agreements and exchange commodities with the subjects of *dar al-harb*, with certain limitations imposed on exports and imports, for political and religious reasons.<sup>415</sup> Generally speaking, Muslim jurists agreed on trading with *dar al-harb*,<sup>416</sup> except for the Malikites, who deemed that Muslims should not enter *dar al-harb* to make commercial transactions, if such deals made them subject to the laws of the enemy. Furthermore, Malik and Ibn Hazm advised the *Imam* to keep Muslims from entering *dar al-harb* except for the performance of *jihad* or in diplomatic missionary.<sup>417</sup>

Muslim jurists prohibited the export of arms, riding animals, slaves, and all materials that can be used in the industry of weapons and may increase the fighting power of *dar al-harb*.<sup>418</sup> al-Shaybani goes so far as to prohibit the export of silk that might be used in cutting out war flags (*rayat al-harb*), and all kinds of iron, no matter what size or usage.<sup>419</sup> Moreover, Abu Yusuf advised the *Imam* to set up checkpoints (*masalih*) on the borderlines of *dar al-Islam*, to apprehend contrabandists

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<sup>415</sup>Najib al-Armanazi, *supra* note 274, at 219; Sobhi Mahmassani, *supra* note 1, at 271; Wahba al-Zuhayli, *supra* note 182, at 512.

<sup>416</sup>Abu Yusuf, *supra* note 53, at 334-338; al-Bahr al-Zakhkhar, *supra* note 295, at 3:301; Ibn 'Abidin, *supra* note 227, at 3:312; al-Kasani, *supra* note 21, at 102; Majid Khadduri, *supra* note 50, at 224; al-Marghinani, *supra* note 21, at 139; Rudolph Peters, *supra* note 11, at 26; al-Siyar al-Kabir, *supra* note 67, at 4:1408-1409 and 1567-1574; Wahba al-Zuhayli, *supra* note 182, at 512-524.

<sup>417</sup>Ibn Hazm, *supra* note 21, at 7:349; Muhammad Ibn Ahmad Ibn Rushd, *al-Muqaddamat al-Mumahadat*, 3 vols. (Cairo: Matba'at al-Sa'ada, 1325 A.H.), 2:285 [hereinafter *al-Muqaddamat*]; al-Mudawwana, *supra* note 293, at 10:102.

<sup>418</sup>al-Fatawi al-Hindiyya, *supra* note 301, at 2:197-198; al-Sarakhsi, *supra* note 21, at 88-89.

<sup>419</sup>al-Siyar al-Kabir, *supra* note 67, at 4:1568.

and inflict penalties upon them.<sup>420</sup> By contrast, al-Shāfiʿī permits the sale of *sabʿ* and iron to the subjects of *dar al-ḥarb*, if Muslims know for certain that such goods will not be used for military purposes.<sup>421</sup>

On the other hand, most Muslim jurists permitted the export of food, cloth and agricultural products to *dar al-ḥarb*,<sup>422</sup> except the Malikites, who stipulated that a truce must be concluded with them first.<sup>423</sup> A case in point of the first position is that the Prophet Muḥammad ordered Thāmā Ibn Athāl al-Ḥanafī to put an end to the alimentary boycott imposed on the Meccans, and support them with foodstuffs in spite of being in war with Muslims.<sup>424</sup>

As to imports, it is worthwhile to mention here that foreign merchants were not allowed to sell forbidden commodities such as wine and pork in *dar al-Islām*. At the same time, Muslim merchants were prohibited from carrying weapons, *sabʿ*, or any materials which might be used for the fabrication of arms, during their visit to *dar al-ḥarb*. Furthermore, the latter are not permitted to practice *riba* (usury), or to deal with

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<sup>420</sup>Abū Yūsuf, *supra* note 53, at 337; al-Siyar al-Kabīr, *supra* note 67, at 4:1569.

<sup>421</sup>al-Khatīb, *supra* note 288, at 2:10; al-Shāfiʿī, *supra* note 21, at 4:198; Shams al-Dīn Muḥammad Ibn Aḥmad al-Ramlī, *Nihāyat al-Muhtāj ilā Sharḥ al-Minhāj*. 8 vols. (Cairo: al-Maṭbaʿa al-Bahīyya al-Miṣriyya, 1304 A.H.), 3:15 [hereinafter al-Ramlī].

<sup>422</sup>al-Marghīnānī, *supra* note 21, at 2:139; al-Shāfiʿī, *supra* note 21, at 7:321; al-Siyar al-Kabīr, *supra* note 67, at 4:1408.

<sup>423</sup>al-Mudawwana, *supra* note 293, at 10:102; al-Muqaddamāt, *supra* note 417, at 2:287-288.

<sup>424</sup>al-Bayhaqī, *supra* note 211, at 6:319.

pork, wine, or wild animals.<sup>425</sup> However, 'Umar Ibn al-Khaṭṭāb, the second rightly-guided Caliph imposed the *'ushar* (tithe) duty. Accordingly, the *ḥarbf* merchants were required to pay ten percent of the value of their commercial commodities which exceeded two hundred dirhams.<sup>426</sup> The *Imām* has the right to increase or decrease this rate, according to the Muslim state foreign trade policy. The *Imām* is advised to invalidate *al-'ushar* duty if the state of the *ḥarbf* merchant does not collect such duty from Muslim merchants.<sup>427</sup>

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<sup>425</sup>Abū Ḥamid al-Ghazālī, *Ihya' 'Ulūm al-Dīn*, 4 vols. (Beirut: Dār al-Ma'rifa lil-Ṭibā'a wal Nashr, 1404 A.H.), 2:65 [hereinafter *Ihya' 'Ulūm al-Dīn*].

<sup>426</sup>Abū Yūsuf, *supra* note 53, at 263-270; Ahkam Ahl al-Dhimma, *supra* note 324, at 169; Ibn Sallām, *supra* note 253, at 501; al-Khaṭṭāb, *supra* note 288, at 4:247; al-Mughnī, *supra* note 21, at 10:599-600; al-Muqaddamāt, *supra* note 417, at 1:184; al-Muqrī, *supra* note 408, at 2:12; al-Shīrāzī, *supra* note 324, at 2:259; al-Wajīz, *supra* note 295, at 2:53.

<sup>427</sup>Abū Yūsuf, *supra* note 53, at 265-267; al-Bahr al-Zakhkhār, *supra* note 295, at 2:223; al-Mughnī, *supra* note 21, at 8:521; al-Siyar al-Kabīr, *supra* note 67, at 5:2136.

### III. *Jihād* and Civilians' Personal Rights

The issue of human rights in times of war and armed disputes is one of the most fundamental human issues and, consequently, one of the most sensitive and controversial. The following chapter attempts to address the critical question: to what extent did Islamic humanitarian law contribute to the protection of civilians' personal rights? To maintain that, a number of these rights will be examined in light of the norms of Islamic and public international law, particularly, the right to life, the prohibition of torture and inhuman treatment, and the right to respect one's religious beliefs, customs and traditions.

#### 1. Right to Life, the Prohibition of Torture and Inhuman Treatment

International humanitarian law guarantees the protection of individual human rights, whether those rights are exercised alone or in association with others. The right to life is an imperative norm of international law which should inspire and influence all other human rights.<sup>428</sup> In his article "Human Rights as the Modern Tool of Revolution", Irwin Cotler concluded that "The struggle for human rights and human dignity, as Havel and Mandela have put it - separately but in solidarity - is really initially and ultimately the struggle for ourselves."<sup>429</sup> Therefore, the international law of human rights, which

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<sup>428</sup>B.G. Ramcharan, ed., *The Right to Life in International Law* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1985), 6; Leo Kuper, *The Prevention of Genocide* (New Haven, CT: Yale University Press, 1985), 3.

<sup>429</sup>Irwin Cotler, "Human Rights as the Modern Tool of Revolution," in *Human Rights in the Twenty-First Century: A Global Challenge*, eds. Kathleen E. Mahoney and Paul Mahoney (Dordrecht, The Netherlands:

is concerned with the promotion and protection of human rights must be in the forefront of the discipline, charting new courses and establishing new models.

The United Nations Charter of 1945 made no explicit reference to the individual's right to life, but it emphasized the promotion of human rights and fundamental freedoms in the first chapter on purposes and principles.<sup>430</sup> In examining the other instruments of the Bill of Rights, one may find that the Universal Declaration of Human Rights, of 1948, clearly confirmed the right to life. Article 3 affirmed universal entitlement to the rights of life, liberty and security.<sup>431</sup> Any act of torture is declared to be an offence to human dignity, and condemned as a violation of human rights and fundamental freedoms proclaimed in the United Nations Charter and the Universal Declaration of Human Rights. Article 5 of the same declaration states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."<sup>432</sup> Furthermore, this right is also confirmed in Article 6 (Part III) of the International Covenant on Civil and Political Rights of 1966. Paragraph 1 of Article 6 declares that "every human being has the inherent right to life. This right shall be protected by law. No

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Martinus Nijhoff Publishers, 1993), 20.

<sup>430</sup> Albert P. Blaustein, Roger S. Clark, and Jay A. Sigler, eds., *Human Rights Sourcebook* (New York: Paragon House Publishers, 1987), 8-9; United Nations Charter, *supra* note 98.

<sup>431</sup> *Universal Declaration of Human Rights*. G.A. Res. 217 A (III), 3 (1) U.N. GAOR Resolutions 71, U.N. Doc. A/810, 1948.

<sup>432</sup> *Ibid.*

one shall be arbitrarily deprived of his life."<sup>433</sup> Paragraph 6 of this article asked the state parties to the Covenant not to delay or to prevent the abolition of capital punishment. In light of the above-mentioned statement, one may argue that Article 6 of the International Covenant on Civil and Political Rights is limited to arbitrary deprivation of life such as by homicide, and does not guarantee any persons security against death from famine or lack of medical attention. Therefore, mere toleration of malnutrition by a state will not be regarded as a violation of the human right to life.

On the other hand, the Convention on the Prevention and Punishment of the Crime of Genocide, of 1948, was designed to prevent, as well as to punish, the crime. The definition of genocide in the Convention reflects the emphasis on punishment of the crime. It reads as follows:

"In the present convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a. Killing members of the group;
- b. Causing serious bodily or mental harm to members of the group;
- c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d. Imposing measures intended to prevent births within the group;
- e. Forcibly transferring children of the group to another group."<sup>434</sup>

According to the article cited above, the crime of genocide is defined by reference to specific acts not in general terms, but the inclusion of

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<sup>433</sup>B.G. Ramcharan, *supra* note 428, at 30; *International Covenant on Civil and Political Rights*. G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) at 52, U.N. Doc. A/6316, 1966.

<sup>434</sup>*Convention on the Prevention and Punishment of the Crime of Genocide* G.A. Res. 260 A (III), 3(1) U.N. GAOR at 174, U.N. Doc. A/810, 1948.

*intent* raises some difficulties in proof, as the denial of intent could be used as a defense. The concept of *intent* was exploited, for example, when the defence minister of the government of Paraguay, in answering to charges of genocide against the Aché Indians, replied that there was no intention to destroy them.<sup>435</sup>

Seeking evidence on the individual's right to life outside the United Nations, one may refer to the Charter for the International Military Tribunal that tried the major war criminals at Nuremberg which specified, in Article 6, three types of crime falling under the jurisdiction of the tribunal.<sup>436</sup> These crimes are: crimes against peace, including the waging of a war of aggression; war crimes, such as murder of the civilian population, the killing of hostages, and the destruction of cities; and crimes against humanity such as murder, extermination, and inhuman acts committed against civilian populations before or during a war.<sup>437</sup>

Moreover, Article 3 which is common to all four Geneva Conventions, of 1949, prohibits, at any time and in any place, violence to life and person, in particular murder of any kind, mutilation, cruel treatment and torture.<sup>438</sup> Article 4 of Protocol II Additional to the Geneva

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<sup>435</sup>Leo Kuper, "Genocide and Mass Killings: Illusion and Reality," in *The Right to Life in International Law*, ed. B.G. Ramcharan (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1985), 115.

<sup>436</sup>Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, *supra* note 215.

<sup>437</sup>Benjamin Ferencz, "The United Nations and Human Rights Forty Years Later," in *Nuremberg Forty Years Later: The Struggle Against Injustice in Our Time*, ed. Irwin Cotler (Montreal & Kingston: McGill-Queen's University Press, 1995), 102.

<sup>438</sup>Adam Roberts and Richard Guelff, eds., *Documents on the Laws of War* (Oxford: The Clarendon Press, 1982), 273.

Conventions prohibits the same actions prohibited in Article 3.<sup>439</sup> Protocol I Additional to the same conventions, and relating to the protection of victims of international armed conflicts can be viewed as a convention within a convention.<sup>440</sup> The one hundred and two articles of this protocol are built on the four Geneva Conventions and other previous conventions which emphasize the protection of civilian populations.<sup>441</sup>

However, Islamic international law considers the right to life as the most basic and supreme right which human beings are entitled to have, without distinction of any kind, based on race, colour, sex, language and religion. The right to life is a sacred right, and any transgression against it is considered a crime against the entire community.<sup>442</sup> This right has been emphasized in the following verses:

"On that account: We ordained for the Children of Israel that if any one slew a person - unless it be for murder or for spreading mischief in the land - it would be as if he slew the whole people, and if any one saved a life, it would be as if he saved the life of the whole people."<sup>443</sup>

"Nor take life - which Allah has made sacred - except for just

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<sup>439</sup>Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicst, *supra* note 140.

<sup>440</sup>Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *supra* note 105.

<sup>441</sup>Charles A. Allan, *supra* note 218, at 19.

<sup>442</sup>Ahmad Farrag, "Human Rights and Liberties in Islam," in *Human Rights in a Pluralist World: Individuals and Collectivities*, eds., Jan Berting et al (Westport: Meckler Corporation, 1990), 137.

<sup>443</sup>*The Holy Qur'an*, V:32.



cause."<sup>444</sup>

"Nor kill yourselves: for verily *Allāh* hath been to you Most Merciful."<sup>445</sup>

Islamic humanitarian law guarantees fair treatment of civilians who have not engaged in war, and prohibited random use of weapons in a manner that would affect warriors and civilians indiscriminately. Muslim fighters have been instructed to avoid civilian targets. Article 47 of the Islamic Law of Nations states that, "Whenever the Apostle of *Allāh* sent forth a detachment he said to it: Do not cheat or commit treachery, nor should you mutilate or kill children, women, or old men."<sup>446</sup> This obligation is supported by another tradition which states that the Prophet Muhammad saw people gathered around something and sent a man to investigate saying: "see, what are these people collected around?" The man returned and said: "They are around a woman who has been killed." The Prophet said: "This is not one with whom fighting should have taken place." The Prophet sent a man to follow Khālid Ibn al-Walīd and said: "Tell Khālid not to kill a woman or a hired servant."<sup>447</sup>

Excessive killing is prohibited even when it is authorized. This principle has been expressed in the following verse: "If any one is killed wrongfully, we have given his heir authority, but let him not exceed bounds in killing."<sup>448</sup> Thus, Muslim fighters (*mujāhidūn*) are not

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<sup>444</sup> *Ibid.*, XVII: 33.

<sup>445</sup> *Ibid.*, IV: 29.

<sup>446</sup> Majid Khadduri, *supra* note 2, at 91.

<sup>447</sup> Abū Dawūd, *supra* note 197, at 2:739.

<sup>448</sup> *The Holy Qur'an*, XVII: 33.

permitted to push killing to the point where they cannot distinguish between civilians and combatants. Prophet Muḥammad instructed the Muslim fighters, dispatched against the Byzantine army, to "spare the weakness of the female sex; injure not the infants or those who are ill in bed. Refrain from demolishing the houses of the unresisting inhabitants; destroy not the means of their subsistence, nor their fruit-trees and touch not the palm, and do not mutilate bodies and do not kill children."<sup>449</sup>

The rightly-guided Caliphs followed the prophet's example. Abū Bakr al-Ṣiddīq, the first Muslim Caliph exhorted the Muslim army marching to Syria, to learn the following rules by heart:

"Do not commit treachery, nor depart from the right path. You must not mutilate, neither kill a child or aged man or woman. Do not destroy a palm tree, nor burn it with fire and do not cut any fruitful tree. you must not slay any of the flock or the herds or the camels, save for your subsistence. You are likely to pass by people who have developed their lives to monastic services; leave them to that to which they have devoted their lives."<sup>450</sup>

Furthermore, ʿUmar Ibn al-Khaṭṭāb, the second orthodox Caliph, warned the commanders of the Muslim army saying: "Do not mutilate when you have power to do so. Do not commit excess when you triumph. Do not kill an old man or a woman or a minor, but try to avoid them at the time of the encounter of the two armies, and at the time of the heat of victory,

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<sup>449</sup>Karima Bennoune, "As-Salamu ʿAlaykum" Humanitarian Law in Islamic Jurisprudence," *Michigan Journal of International Law* 15:2 (Winter 1994): 624.

<sup>450</sup>Waldemar A. Solf, *supra* note 202, at 118; al-Shawkānī, *supra* note 192, at 7:263; al-Siyar al-Kabīr, *supra* note 67, at 1:41.

and at the time of expected attacks."<sup>451</sup> By the same token, the fourth Caliph, 'Alī Ibn Abī Ṭalīb, prohibited the Muslim fighters from killing those who have laid down their weapons, or fled from the battlefield. During his struggle with the Umayyads, and before the battle of Ṣaffīn, 'Alī gave his fighters the following commands, which can be considered as basic rules of conduct in Islamic international humanitarian law. 'Alī said:

"If you defeat them, do not kill a man in flight, do not finish off a wounded man, do not uncover a pudendum, or mutilate the dead, do not rip open a curtain or enter a house without permission, do not take any of their property, and do not torture or harm their women even though they may insult your leaders, and remember *Allāh*, mayhap you will have knowledge."<sup>452</sup>

About the treatment of the enemy in the battlefield, Ahmed Zaki Yamani argues that Islamic humanitarian law is extremely concerned with the basic rules of the international humanitarian law. These rules are the object of many verses and traditions. The Muslim rules of war are highly practical and realistic.<sup>453</sup> Islamic international law of armed conflict has forbidden the breaking of promises and treaties and the separation of captive women from their children, and has called for the fair treatment of prisoners of war. Article 44 of the Islamic Law of

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<sup>451</sup>Abd Allāh Ibn Muslim Ibn Qutayba al-Dīnawarī, *Kitāb 'Uyūn al-Akhbār*, 4 vols (Cairo: Dār al-Kitāb al-'Arabī, 1957), 1:107-108 [hereinafter Ibn Qutayba]; Karima Bennoune, *supra* note 449, at 626. Shināb al-Dīn Ahmad Ibn 'Abd Rabbū al-Andalusī, *al-'Iqd al-Farīd* (Beirut: Dār wa Maktabat al-Hilāl, 1986), 1:79 [hereinafter Ibn 'Abd Rabbū].

<sup>452</sup>Ahmed Zaki Yamani, *supra* note 42, at 195; Nahj al-Balāgha, *supra* note 196, at 3:425.

<sup>453</sup>Marcel A. Boisard, *supra* note 190, at 10.

Nations, states that, "The prisoner of war should not be killed."<sup>454</sup>

In this sense, the Prophet Muhammad said:

"War prisoners are your brothers. *Allāh* has put them in your hands; so whosoever has his brother in his hands, let him give him food to eat out of what he himself eats and let him give him clothes to wear out of what he himself wears, and do not impose on them a work they are not able to do themselves. If at all you give them such work, help them to carry it out."<sup>455</sup>

The *Holy Qur'an*, a primary source of Islamic international law, confirms these rules in the following verse: "And they (the devotees of *Allāh*) feed the indigent, the orphaned and the captive in spite of their need and love of that food."<sup>456</sup>

In his book, *Kitāb al-Umm*, al-Shafi'ī says: "Whatever is accepted by the Muslims and receives their consensus as being permissible in the Land of Islam is not forbidden in the land of unbelievers, and whatever is forbidden in the land of Islam, is also forbidden in the land of unbelievers. He who commits a forbidden act will receive the punishment prescribed by *Allāh* for his offence."<sup>457</sup> In this connection, Ahmed Zaki Yamani reported that "Umar Ibn al-Khaṭṭāb heard that a Muslim soldier had said to a Persian combatant captive: Do not be afraid! then killed the Persian. Thereupon, Umar wrote to the commander of the army in these terms: "As *Allāh* is my witness, if I hear anyone has done this, I shall cut his neck."<sup>458</sup>

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<sup>454</sup>Majid Khadduri, *supra* note 2, at 91.

<sup>455</sup>Kartma Bennoune, *supra* note 449, at 633.

<sup>456</sup>*The Holy Qur'an*, LXXVI: 8.

<sup>457</sup>al-Shafi'ī, *supra* note 21, at 7:322.

<sup>458</sup>Ahmed Zaki Yamani, *supra* note 42, at 202.

Nevertheless, right to life, prohibition of torture and inhuman treatment are also confirmed by contemporary Islamic human rights law. Article 1 of the Universal Islamic Declaration of Human Rights affirmed that "human life is sacred and inviolable and every effort shall be made to protect it."<sup>459</sup> Article 7 also emphasized the right to protection against torture. It states that "No person shall be subjected to torture in mind or body, or degraded, or threatened with injury either to himself or to anyone related to or held dear by him, or forcibly made to confess to the commission of a crime, or forced to consent to an act which is injurious to his interests."<sup>460</sup> The other Islamic document is the Cairo Declaration on Human Rights in Islam, of 1990. Articles 2 and 11 (a) of this declaration affirm right to life, protection from torture and inhuman treatment, while Article 3 confirms civilians' protection in time of war. Article 2 states that life is a God-given gift, and the right to life is guaranteed to every human being, and safety from bodily harm is a guaranteed right, and it is prohibited to breach it without a Shari'a-prescribed reason.<sup>461</sup> Article 11 (a) maintains that human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them.<sup>462</sup> Article 3 asserts that in the event of the use of force and in case of armed conflict, it is not permissible to kill non-belligerents such as old men, women and children. The wounded and

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<sup>459</sup>Albert P. Blaustein, Roger S. Clark, and Jay A. Sigler, *supra* note 430, at 919.

<sup>460</sup>*Ibid.*, p. 920.

<sup>461</sup>*The Cairo Declaration on Human Rights in Islam.* (A/CONF. 157/PC/62/Add. 18) Annex to Res. No. 49/19-P, 9 June 1993.

<sup>462</sup>*Ibid.*

the sick shall have the right to medical treatment, and prisoners of war shall have the right to be fed, sheltered and clothed. This article also prohibits the mutilation of dead bodies or the destruction of the enemy's civil properties.<sup>463</sup>

Ann Elizabeth Mayer criticized Article 2 and Article 11 (a). She described Article 2 as "loosely modelled on modern international law provisions."<sup>464</sup> She added that this article "is another instance where the authors went beyond the Islamic sources in fashioning their principles."<sup>465</sup> In her critique of Article 11 (a), Mayer said:

"Article 11 (a) of the Cairo Declaration provides that no one has the right to enslave human beings - without any Islamic qualifications. This is emblematic of the selectivity with which rules taken from Islamic law have been resuscitated in Islamic human rights schemes. Slavery was a deeply ingrained feature of many Muslim societies and was extensively regulated in Islamic law."<sup>466</sup>

Comparing this commentary with the text of the two articles brings to our attention what was mentioned earlier that any interpretation of Islamic law out of its context is null and misleading. It is clear that Mayer has misunderstood Article 2 and distorted Article 11 (a). One may wonder about the accuracy and the obscurity of this critique. Article 11 (a) reads as follows: "Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be

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<sup>463</sup> *Ibid.*

<sup>464</sup> Ann Elizabeth Mayer, "Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?" *Michigan Journal of International Law* 15 (Winter 1994): 344.

<sup>465</sup> *Ibid.*

<sup>466</sup> *Ibid.*, p. 346.

no subjugation but to God the Most High."<sup>467</sup> Subjugation to God does not mean, in any case, an Islamic qualification to enslave human beings. On the other hand, the institution of slavery was not established according to Islamic law. Slavery pre-dated Islam by thousands of years and has, as an institution, been the source of great suffering for Muslims, taken as war prisoners, and sold to slavery. Islamic humanitarian law regulated slavery with protective injunctions which favoured the slave and ameliorated his status.<sup>468</sup> A slave is never called a slave in Islamic society but a brother. In this sense, the Prophet Muhammad said: "They (the slaves) are your brothers, and whoever has a brother under his care, has to feed him and cloth him of the same food and cloth he eats and wears."<sup>469</sup> In point of fact, Islamic humanitarian law has laid down the rules regulating slavery, with an eye to its gradual disappearance.

## 2. Right to Respect of Religious Beliefs, Customs and Traditions

A human right, including religious liberty, is defined as the ability and freedom to perform an action, and religion is a collection of beliefs that every individual has the right to decide on and adopt.<sup>470</sup> Therefore, all individuals have the right to freedom of religion, including the right to choose one's religion. This right shall include

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<sup>467</sup>The Cairo Declaration on Human Rights in Islam, *supra* note 461.

<sup>468</sup>Ahmed Zaki Yamani, *supra* note 42, at 212.

<sup>469</sup>*Ibid.*, p. 213.

<sup>470</sup>Leonard Swidler, "Human Rights and Religious Liberty: From the Past to the Future," in *Religious Liberties and Human Rights in Nations and in Religions*, ed. Leonard Swidler (Philadelphia and New York: Ecumenical Press and Hippocrene Books, 1986), vii.

the freedom of parents to ensure the religious and moral education of their children in conformity with their own convictions.<sup>471</sup> Contrary to the statement of Hurst Hannum that, "religion was certainly the most significant right among most groups until at least the eighteenth century,"<sup>472</sup> one can argue that religion is still the most significant distinction among societies, as most people still believe that religion is more than a set of beliefs, and often needs to be translated into actions.<sup>473</sup>

Respect for religious beliefs, in modern times, can be traced back to the Treaty of Westphalia, of 1648, which guaranteed equality of rights for both Roman Catholics and Protestants in Central Europe. In the aftermath of World War II, a new attitude towards human rights, including right to a religion, emerged. The United Nations Charter, of 1945 provides in Article 1 and 55, that universal respect shall be given to fundamental freedoms for all without distinction based on race, sex, language and religion. More concretely and without creating legal obligations, Article 18 of the Universal Declaration of Human Rights, which was adopted in Paris on 10 December 1948, states that, "everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest

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<sup>471</sup>Article 18(4) of the International Covenant on Civil and Political Rights, of 1966.

<sup>472</sup>Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990), 50.

<sup>473</sup>For instance, many Muslims believe that *Shari'ah* is a comprehensive code, that includes ethics, worship and religious practices.



his religion or belief in teaching, practice, worship and observance."<sup>474</sup> Moreover, Article 18 (1) of the International Covenant on Civil and Political Rights, of 1966, provides that, "everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."<sup>475</sup>

A comparison of these two articles will show that the guarantee to freedom of religion in Article 18 (1) of the International Covenant on Civil and Political Rights was proclaimed in better terms. It clearly states that "this right shall include freedom to have and to adopt a religion or belief of his choice", not only "to manifest his religion or belief," as provided in Article 18 of the Universal Declaration of Human Rights.<sup>476</sup> On the other hand, it is obvious that there is an overlap between the two articles as regards protection of the right to

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<sup>474</sup>Universal Declaration of Human Rights, *supra* note 431.

<sup>475</sup>International Covenant on Civil and Political Rights, *supra* note 433. Religiously speaking, *al-hijab* (Islamic women's head cover) is considered a part of a Muslim woman's beliefs. The first controversy regarding the wearing of the *hijab* in Quebec occurred in November 1993, when Quebec Judge Richard Alary asked Ms. Wafa Mousseiyine to remove her *hijab* in his court. In October 1994, Dania Baali, a tenth grade student at Ecole Regina Assumpta, a private Catholic girls' school, was told that she could not return to school the following year if she continued to wear the *hijab*. In January 1995, a public primary school instructed parents to have their daughter remove her *hijab* or change school.

<sup>476</sup>Karl Josef Partsch, "Fundamental Principles of Human Rights: Self-Determination, Equality and Non-Discrimination," in *The International Dimensions of Human Rights*, 2 vols., ed. Karl Vasak (Westport, Connecticut: Greenwood Press, 1982), 1: 83.

disseminate religious ideas.<sup>477</sup>

In 1981, the General Assembly of the United Nations adopted the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief. The eighth articles of the Declaration confirm, in line with the previous declarations, that discrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and should be condemned as a violation of human rights. The United Nations Commission on Human Rights willingly approved the draft of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, which was adopted by the General Assembly on 18 December 1992. Article 1 of the Declaration requires State Parties to encourage conditions for the promotion of the religious identity of minorities and to adopt appropriate legislation towards its realization.<sup>478</sup> In Article 2 (B) of Part II of the Vienna Declaration and Programme of Action on Human Rights, of 25 June 1993, the World Conference on Human Rights urged States and the international community to promote and protect the rights of persons belonging to national, ethnic, religious and linguistic minorities. The Vienna Declaration contains six paragraphs devoted specifically to racism, racial discrimination, xenophobia and other forms of intolerance.<sup>479</sup>

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<sup>477</sup>Brice Dickson, "The United Nations and Freedom of Religion," *International and Comparative Law Quarterly* 44:2 (April 1995): 340.

<sup>478</sup>*Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, G.A. E/1992/22, Chap. II, Section A.

<sup>479</sup>*Vienna Declaration and Programme of Action on Human Rights*, Doc. A/CONF. 157/24 (Part 1), 13 Oct. 1993.

Examining the documents of international law on armed conflict, one may find that the Annex to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Times of War, as well as the 1977 Additional Protocol I and Protocol II to the same convention, have recognized and respected the individuals' rights to thought, conscience and religion. Article 46 of the Annex to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land confirms that family honour and rights, as well as religious convictions and practice, must be respected.<sup>480</sup> Articles 27 and 93 of the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War proclaim that protected persons are entitled, in all circumstances, to respect for their religious convictions and practices, and their manners and customs.<sup>481</sup> Article 53 of the 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Article 16 of Protocol II Additional to the same conventions, prohibit the committing of any acts of hostility directed against historic monuments, works of art or places of worship which constitute a people's cultural or spiritual heritage.<sup>482</sup>

In spite of these fine-sounding ideals, the extent of state violations of religious freedom remains frighteningly high. Human rights Watch Report of 1995 notes that "hatred and violence along ethnic and religious lines continued to pose the paramount threat to human rights

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<sup>480</sup> Adam Roberts and Richard Guelff, *supra* note 438, at 56.

<sup>481</sup> *Ibid.*, 282 and 303.

<sup>482</sup> *Ibid.*, p. 417 and 456.

worldwide: genocide in Rwanda; ethnic war in Bosnia; the Indian government's failure to prosecute police for participating in attacks on Muslims; violence by Islamist movements, which was, in turn, aggravated by Middle Eastern governments' denial of political freedoms; the Egyptian government's clash with Islamist militants; and the raging violence in Algeria."<sup>483</sup>

However, in his book on autonomy and self-determination, Hurst Hannum concludes that: "A distinctive system of ensuring a certain degree of cultural and religious autonomy was the *"millet"* system developed by the Ottoman empire. The *millets* generally followed religious lines, with each religious community (the most important being the Orthodox, Armenian, and Jewish) having the authority to regulate such matters as personal status and inheritance."<sup>484</sup> This statement can be interpreted in light of the Islamic concept of rights of non-Muslims to freedom of religious beliefs, customs and traditions. Islamic international law considers this freedom as a component of opinion and expression. Consequently, everyone has the right to choose a religion which suits his/her personal inclinations. This freedom is guaranteed by the *Holy Qur'an*, *Sunna*, and by the order of early Muslim Caliphs to commanders in the battlefield.<sup>485</sup> Religious liberty is grounded in the *Holy Qur'an* in the following verses: "Let there be no compulsion in religion,"<sup>486</sup> and "Wilt thou then compel

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<sup>483</sup> *Human Rights Watch World Report 1995: Events of 1994* (New York: Human Rights Watch, 1995), XIX.

<sup>484</sup> Hurst Hannum, *supra* note 472, at 50-51.

<sup>485</sup> Ahmad Farrag, *supra* note 442, at 137.

<sup>486</sup> *The Holy Qur'an*, II: 256.

mankind against their will to believe."<sup>487</sup>

Moreover, Islamic law respects non-Muslim customs, traditions and places of worship. In their own towns and cities, non-Muslims have full freedom to practice their customs and traditions, as well as to celebrate their holy days and communal festivals. Non-Muslim places of worship are not to be interfered with and are well-protected in times of peace and war. Furthermore, if these places are damaged or destroyed in one way or another, they should be rebuilt or repaired.<sup>488</sup> Jews and Christians "the People of the Book" have a respected position and special status in Islamic international law. Muslims are ordered by the *Holy Qur'an* to treat them and argue with them gently. This issue is addressed in this Qur'anic verse: "And dispute ye not with the People of the Book except with means better."<sup>489</sup> Moreover, in the speech cited earlier, Abū Bakr al-Ṣiddīq, instructed the Muslim fighters, saying: "...You are likely to pass by people who have devoted their lives to monastic services; leave them to that to which they have devoted their lives."<sup>490</sup>

Similarly, in his peace treaty with the people of *Bayt al-Maqdis* (Jerusalem), 'Umar Ibn al-Khaṭṭāb, the second Muslim Caliph, gave them a guarantee that their churches and crosses would not be used by Muslims, or damaged or diminished in number, and that they would not be forced to

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<sup>487</sup> *Ibid.*, X: 99.

<sup>488</sup> Sayyid Abul A'la Maudūdī, *The Islamic Law and Constitution*, trans., Khurshīd Ahmad (Lahore, Pakistan: Islamic Publications Ltd., 1960), 309.

<sup>489</sup> Mohamed Talbi, "Religious Liberty: A Muslim Perspective," in *Religious Liberty and Human Rights in Nations and in Religions*, ed. Leonard Swidler (Philadelphia and New York: Ecumenical Press and Hippocrene Books, 1986), 186; See *The Holy Qur'an*, XXIX: 46.

<sup>490</sup> Waldemar A. Solf, *supra* note 202, at 118.

abandon their faith.<sup>491</sup> When ʿUmar visited Jerusalem to sign the peace treaty, he saw a huge building almost filled up with earth, and when he was informed that the building was a Jewish temple buried by the Roman army, he initiated removing the earth with his hands along with other Muslim soldiers until they cleaned it and asked the Jews to use it.<sup>492</sup> ʿAmr Ibn al-ʿĀṣ did the same with the Egyptians. He guaranteed that their churches and crosses would not be damaged or interefered with.<sup>493</sup> ʿAbdullaḥ An-Naʿīm affirms that the "Muslim Arabs showed promising signs of religious tolerance and political accommodation for the indigenous Coptic population."<sup>494</sup> In the pact issued by the Prophet Muḥammad and his successors to the people of Najrān, they affirmed that the people of Najrān "shall have the protection of *Allāh* and the guarantee of Muḥammad, the Apostle of *Allāh*, that they shall be secured in their lives, property, lands, creed, those absent and those present, their buildings and their churches. No bishop or monk shall be displaced from his parish or monastery and no priest shall be forced to abandon his priestly life. All their belongings, little or much, remain theirs."<sup>495</sup>

On the other hand, Articles 10 and 13 of the Universal Islamic Declaration of Human Rights of 1981 affirms that religious rights of

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<sup>491</sup>Zakariyya al-Birrī, "al-Islām wa Huqūq al-Insān." ʿĀlam al-Fikr 1:4 (January, February and March 1971), 115.

<sup>492</sup>*Ibid.*

<sup>493</sup>*Ibid.*

<sup>494</sup>Abdullaḥi Ahmed An-Naʿīm, "Religious Freedom in Egypt under the Shadow of the Islamic *Dhimma* System," in *Religious Liberty and Human Rights in Nations and in Religions*, ed. Leonard Swidler (Philadelphia and New York: Ecumenical Press and Hippocrene Books, 1986), 50.

<sup>495</sup>Majid Khadduri, *supra* note 2, at 279-280; Muḥammad Ḥamīdullaḥ, *supra* note 253, at 145.

non-Muslim minorities are governed by the *Qur'ānic* principle: "There is no compulsion in religion", and those minorities have the choice whether to be governed in respect of their civil and personal matters by Islamic law or by their own laws. According to his or her religious beliefs, every person has the right to freedom of conscience and worship.<sup>496</sup> Article 10 of the Cairo Declaration on Human Rights in Islam emphasized the prohibition of exercising any form of compulsion on anyone to convert him or her to another religion or belief.<sup>497</sup>

To this end, one may conclude that Islamic humanitarian law, under the doctrine of *jihād*, has affirmed and protected all personal individual rights, for all people, without distinction as to race, sex, language or religion. Islamic law which rests on two universal human principles, *al-'adl* (justice) and *al-iḥsān* (kindness), has recognized equality and justice as two sides of the same coin, and concluded that all rights become of little value when any of those who have a right cannot secure a remedy.<sup>498</sup> Accordingly, it must be emphasized that all personal

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<sup>496</sup>Albert P. Blaustein, Roger S. Clark and Jay A. Sigler, *supra* note 430 at 920-921.

<sup>497</sup>The Cairo Declaration on Human Rights in Islam, *supra* note 461.

<sup>498</sup>Lateef Adegbite, "Human Rights in Islamic Law," *The Journal of Islamic and Comparative Law* 7 (1977): 9. Furthermore, human rights in Islamic international law are based on the premise that these rights are considered necessary (*darurāt*) and essential to the preservation of world public order. These rights include: respect of religious beliefs, customs and traditions (*hifz al-dīn*); right to life, and prohibition of torture and inhuman treatment (*hifz al-nafs*); children's right to life, custody and education (*hifz al-hasl*); the right to individual ownership and private property (*hifz al-māl*); and the right to freedom of thought, opinion and expression (*hifz al-'aql*). These rights are protected by (*al-hudūd*), which are penalties established by *Allāh* and left a judge no discretionary authority.

See Abū Ḥamid al-Ghazālī, *Shifā' al-Ghālīl fī Bayān al-Shabāh wal-Mukhtl wa Māsālik al-Ta'ālīl*, ed. Ḥamad al-Kubāisī (Baghdad: Matba'at al-Irshād, 1971). 160; Abū Ishāq al-Shātibī, *al-Muwāfaqāt fī Uṣūl al-*

individual rights are not realized through the Islamic principle of equality alone, but are also accompanied by a system of legal and administrative rules, which are designed to ensure their application and implied that any violation of these rights should be brought before a judge.<sup>499</sup>

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*Shart'a*, ed. Muhammad 'Abdullah Darraz, 4 vols. (Beirut: Dar al-Ma'rifa, n.d.), 1: 38; Abū al-Ma'ālī al-Juwaynī, *al-Burhān fī Usūl al-Fiqh*, ed. 'Abd al-'Azīm al-Dīb, 2 vols. (al-Qāhira: Dar al-Ansār, 1400 A.H.), 2: 1151; Ahmad al-Raysūnī, *Nazarīyyat al-Maqāsid 'ind al-Imām al-Shātibī* (Beirut: al-Mu'assasa al-Jāmi'iyya lil-Dirāsāt wal-Nashr wal-Tawzī', 1992), 139-141; Hammād al-'Ubaydī, *al-Shātibī wa Maqāsid al-Shart'a* (Tripoli, Libya: Manshūrāt Kulīyyat al-Da'wa al-Islāmiyyā, 1992), 123-129.

<sup>499</sup>Abdur Rahman O. Olayiwola, "Human Rights in Islam," *The Islamic Quarterly* 36:4 (1992): 272.



#### IV. Is *Jihād* a Just War?

The word *jihād* might be one of the most misinterpreted terms in the history of Islamic legal discourse. However, discussion of the doctrine of *jihād* as *bellum justum* cannot easily proceed without first giving a clear definition of this term within its historical context. Therefore, this chapter will examine chronologically the relevant primary sources of both Islamic and public international law.

##### 1. Just War in Western Legal Discourse

It is a well-known fact that a distinction between just and unjust war has been made since antiquity. Even primitive people have recognized that if war was waged under certain conditions, and with certain methods, it would be a just war; and if it were waged under different circumstances, it could be unjust.<sup>500</sup> The term *bellum justum* has existed in the works of the Greek philosophers Plato and Aristotle, while ancient Roman used *jus fetiale*.<sup>501</sup> Aristotle, for his part, concluded that war should be waged only for the sake of peace. He outlined three cases:<sup>502</sup> self-defense; to establish a hegemony over those who would thereby be benefitted; and to set up political control over those nations that deserve to be enslaved.<sup>503</sup>

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<sup>500</sup>Hasan Moinuddin, *supra* note 50, at 26; William Ballis, *The Legal Position of War Changes in Its Practice and Theory from Plato to Vattel* (The Hague, The Netherlands: Martinus Nijhoff Publishers, 1937), 1.

<sup>501</sup>Josef L. Kunz, *supra* note 93, at 530; William Ballis, *supra* note 500, at 21.

<sup>502</sup>William Ballis, *supra* note 500, at 19.

<sup>503</sup>W.L. Newman, *The Politics of Aristotle*, 4 vols. (Oxford: The Clarendon Press, 1887), 1:328.

Nevertheless, the mediaeval concept of international relations has changed considerably from the form it took in ancient Greece and Rome. In the mediaeval times, the doctrine of *bellum justum* was painted with a theological brush, and developed by Saint Augustine and Saint Thomas Aquinas, who held that a just war was one which had a *causa justa*.<sup>504</sup> Influenced by the divine law,<sup>505</sup> Saint Aquinas mentioned three criteria for a just war: the authority of the prince; the just cause; and the right intent.<sup>506</sup> Furthermore, he distinguished seven kinds of war, four of which were just and three unjust. The just wars are: *bellum romanum*, waged by believers against infidels; *bellum judicale*, waged by the believers who have the authority of a judge; *bellum licitum*, waged on the authority of a prince; and *bellum necessarium*, waged by believers in self-defense. The unjust wars are: *bellum praesumptuosum*, waged by rebels; *bellum temerarium*, waged by believers against legal authority; and *bellum voluntarium*, waged by believers on their own authority.<sup>507</sup> In similar terms, Franciscus de Victoria stated three unjust causes of

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<sup>504</sup>Joan D. Tooke, *The Just War in Aquinas and Grotius* (London: S.P.C.K., 1965), 10; Lisa Sowle Cahill, *supra* note 26, at 384; M.H. Keen, *The Laws of War in the Late Middle Ages* (London: Routledge & Kegan Paul, 1965), 66; Paul Ramsey, "The Just War According to St. Augustine," in *Just War Theory*, ed. Jean Bethke Elshtain (New York: New York University Press, 1992), 8.

<sup>505</sup>*The Holy Scriptures*, Deuteronomy 20:10.

<sup>506</sup>A. Vanderpol, *La doctrine scolastique du droit de la guerre* (Paris: A Pedone, 1925), 56; G. Butler and S. Maccoby, *The Development of International Law* (London: Longmans, Green & Co., 1926), 4.

<sup>507</sup>C.L. Lange, *Histoire de l'internationalisme* (Kristiana: H. Aschenhoug & Co., 1919), 44; Ernest Nys, *Les origines du droit international* (Bruxelles and Paris: Alfred Castaigne and Thorin & Fils, 1894), 102; Thomas Aquinas, *Summa Theologica*, trans. Fathers of the English Dominican Province (New York: Benziger Brothers, 1917), 40; William Ballis, *supra* note 500, at 50.

war: differences in religion, extension of empires, and personal ambitions of princes.<sup>508</sup>

At a later period, the concept of just war was secularized and extracted from its theological soil by Gentili, Grotius and the *jus gentium* writers of the seventeenth and eighteenth centuries.<sup>509</sup> Hugo Grotius, a distinguished writer on the subject of war during the seventeenth century, led a legal reform movement. He argued that war was a legal right, while to preceding writers it was simply a historical fact. In his book *De jure belli ac pacis*, Grotius reached this idea by fusing natural law with the *jus gentium*.<sup>510</sup> According to him, there are three just causes of war: defense of self, recovery of property, and inflicting of punishment. In other words, Grotius' justification of war was mainly based on the fundamental morality of self-defense. Thus, just war could be either a war of self-defense against the *injustus aggressor* or a war of execution to enforce one's right.<sup>511</sup>

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<sup>508</sup>Franciscus de Victoria, *De Indis et de jure belli relectiones*, trans. H.F. Wright (Washington, D.C.: Carnegie Institution, 1917), 170.

<sup>509</sup>H. Kelsen and Robert Tucker, *Principles of International Law* (New York: Holt, Reinhart and Winston, 1966), 30; I. Brownlie, *International Law and the Use of Force by States* (Oxford: The Clarendon Press, 1963), 9; Lisa Sowle Cahill, *supra* note 26, at 394-396.

<sup>510</sup>Benedict Kingsbury and Adam Roberts, "Introduction: Grotian Thought in International Relations," in *Hugo Grotius and International Relations*, eds. Hedley Bull, Benedict Kingsbury, and Adam Roberts (Oxford: The Clarendon Press, 1990), 16-26; Hamilton Vreeland, *Hugo Grotius: The Father of the Modern Science of International Law* (New York: Oxford University Press, 1917), 171; Lord McNair and A. D. Watts, *supra* note 106, at 3; Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, Inc., Publishers, 1977), 168; William Ballis, *supra* note 500, at 110.

<sup>511</sup>Joan D. Tooke, *supra* note 504, at 219; Josef L. Kunz, *supra* note 93, at 530; Peter Haggenmacher, *Grotius et la doctrine de la guerre juste* (Paris: Presses Universitaires de France, 1983), 148-151; Robert L. Holmes, "Can War Be Morally Justified? The Just War Theory," in *Just War*

By the twentieth century, following the Hague Conventions of 1899 and 1907, the Covenant of the League of Nations, of 1919, the Kellogg-Briand Pact (Pact of Paris), of 1925, and the United Nations Charter, of 1945, legal developments came to represent a new trend in the concept of just war. Writers divorced the *bellum justum* doctrine from natural law, and unanimously introduced it into the norms of positive international law, as represented by the above treaties.<sup>512</sup> Consequently, the terms just and unjust were replaced by legal and illegal; the concept of war was replaced by "the threat or use of force"; and peace and security were emphasized more than justice.<sup>513</sup>

As a matter of fact, war was not declared unlawful under the Covenant of the League of Nations. It was classified into legal and illegal wars instead of being categorized into just and unjust wars, according to the classical doctrine under natural law. The right to take military action against a state which has resorted to illegal war is embodied in Article (16) of the Covenant. In this case, the action is taken against an illegal belligerent not an *injustus aggressor*.<sup>514</sup> Article (1) of the

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*Theory*, ed. Jean Bethke Elshtain (New York: New York University Press, 1992), 202.

<sup>512</sup>D.W. Bowett, *Self-Defense in International Law* (Manchester: Manchester University Press, 1958), 7; Joan D. Tooke, *supra* note 504, at 232; Josef L. Kunz, *supra* note 93, at 532.

<sup>513</sup>Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (New York: F.A. Praeger, 1950), 732; Josef L. Kunz, *supra* note 93, at 533; Yahuda Melzer, *Concepts of Just War* (Leyden, The Netherlands: Sijthoff International Publishing Company, 1975), 17.

<sup>514</sup>Hans Kelsen and Robert Tucker, *supra* note 509, at 34; I. Brownlie, *supra* note 509, at 57; Josef L. Kunz, *supra* note 93, at 532; L. Oppenheim, *supra* note 91, at 2:133; Myres Smith McDougal, *Law and Minimum World Order: The Legal Regulation and International Coercion* (New Haven: Yale University Press, 1961), 138.

Kellogg-Briand Pact condemned, in the name of the High Contracting Parties, recourse to war for the solution of international controversies, and renounced it as an instrument of national policy in their relations with one another.<sup>515</sup>

However, the failure of the Covenant of the League of Nations and the Kellogg-Briand Pact to maintain international peace and security, suggested to the drafters of the United Nations Charter that renunciation of all kinds of war was not possible. Although Article 2 (paragraph 4) of the Charter prohibited the threat or use of force against the territorial integrity or political independence of any state, Article (51) of the same Charter stated that force can be resorted to in the exercise of the right of self-defence. Hence, under this Article, force can legally be used against an armed attack until the Security Council takes the necessary measures. It is clear from this Article, as well as from Article 1 (paragraph 1) of the same Charter that the main purpose is to maintain international peace and security, not to achieve and maintain justice.<sup>516</sup> Generally speaking, the Charter definitely distinguished between legal and illegal wars, and gave the member states, by exercising their right of individual or collective self-defense, the right to resort to a justified war.<sup>517</sup> In light of the foregoing

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<sup>515</sup>D.W. Bowett, *supra* note 512, at 133; Hans Kelsen and Robert Tucker, *supra* note 509; at 37; I. Brownlie, *supra* note 509, at 34; L. Oppenheim, *supra* note 91, at 2:157; Leon Friedman, *supra* note 97, at 1:468.

<sup>516</sup>Hans Kelsen, *supra* note 513, at 733; Louis Henkin, "Force, Intervention, and Neutrality in Contemporary International Law," *Proceeding of the American Society of International Law* (1963): 155; Robert W. Tucker, "The Interpretation of War," *The International Law Quarterly* 4:1 (1951): 21.

<sup>517</sup>Josef L. Kunz, *supra* note 100, at 876.

analysis, one may understand that the concept of war as *bellum justum* has existed in the Western legal discourse, both classical and modern, under different terms. Just war, in the Western legal discourse, can be either a war of self-defense against the *injustus aggressor* or a war waged for *causa justa*.

## 2. *Jihad* as a Just War

To this end, two questions come to mind: was *jihad* the *bellum justum* of Islam? and if so, can a *jihad* be waged by contemporary Muslim states, although they are members of the United Nations?

Historically speaking, Ibn Khaldūn used the terms "just" and "unjust" to distinguish between wars. According to him, wars could be either *ḥurūb jihad wa 'adl* (just wars) or *ḥurūb baght* (unjust wars).<sup>518</sup> Unlike mediaeval Western doctors, Muslim jurists did not justify wars for such worldly purposes as territorial expansion, imposing their religion on unbelievers, or supporting a particular social regime.<sup>519</sup> The classical sources of Islamic legal theory maintain that all kinds of warfare are outlawed except the *jihad*, which is an exceptional war waged by Muslims

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<sup>518</sup>cAbd al-Rahman Ibn Khaldūn, *supra* note 22, at 271.

<sup>519</sup>Among wars which were justified by Saint Thomas Aquinas, was a war waged by believers against infidels. Furthermore, sixteenth century writers claimed that, under natural law and the *jus gentium*, that a just war can be waged to enforce a natural right including the right to travel and to conduct trade. According to Josef L. Kunz, it is exactly the natural right that ultimately justified the conquest of America. At a later time, Franciscus de Victoria rejected the arguments advanced by the Spanish Emperor's legislators in justifying the slaughter of the Indians and the occupation of their land. Those legislators claimed that the Indians belonged to a race lower than the Spanish, and consequently, there was no reason why the Spaniards should not occupy their land. See Franciscus de Victoria, *supra* note 508, at 116-165; Gerhard von Glahn, *supra* note 95, at 38; Josef L. Kunz, *supra* note 93, at 532; L. Oppenheim, *supra* note 91, at 1:104.

to defend the freedom of religious belief for all humanity, and constitutes a deterrent against aggression, injustice and corruption.<sup>520</sup> This does not mean, however, that Muslims have never waged unjust wars. The reason for this can be found in the conduct of Muslim commanders, not in the norms of Islamic law.<sup>521</sup>

There is considerable support for the belief that the norms of international humanitarian law adopted in more recent international agreements were in fact endorsed by Islamic international law fifteen centuries ago. In this connection, Ernest Nys argues that the early Spaniards derived their notion of the rules of war from Islamic Law, particularly, the rules included in *Las siete partidas*, written under the patronage of King Alphonse X, by the the Castilian jurists Ruiz, Martinez and Roland between 1256 and 1265. This document, described as a monument to legal science, deals with the laws of war, legislation, politics and penal law.

Moreover, one can trace the influence of Islamic law on public international law by examining its impact on the works of early European philosophers and godfathers of public international law. Alfred Guillaume asserts that Thomas Aquinas was very familiar with the Arabic legal works, and drew heavily from them in composing his *Summa Theologica*. Aquinas was most influenced by the works of al-Ghazali and Ibn Rushd. In a lecture to the Academy of Political Science, at the Hague in 1926, Le Baron Michel de Taube stated that "les diverses

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<sup>520</sup>Muhammad Abu Zahra, *supra* note 182, at 18; Rasa'il Ibn Taymiyya, *supra* note 21, at 123; Rudolph Peters, *supra* note 11, at 122; Sobhi Mahmassani, *supra* note 1, at 279.

<sup>521</sup>Hasan Moinuddin, *supra* note 50, at 28; Marcel A. Boisard, *supra* note 190, at 6; Rudolph Peters, *supra* note 11, at 123.

institutions dans la civilisation du Moyen âge européen portent une empreinte indélébile sinon de leur origine purement et simplement orientale, du moins de leur forte dépendance des institutions militaires analogues de l'Orient musulman." Furthermore, Scott argues that the ideas expressed in "*De jure belli ac pacis libri tres*," by the Dutch jurist Hugo Grotius, were taken from the Spanish jurists Francisco de Victoria and Francisco Suárez. In turn, the latter derived their ideas from Islamic law, as they themselves acknowledged.<sup>522</sup>

Moreover, Islamic international law regulates conduct during *jihad* on the basis of certain humane principles, compatible with those upon which modern international conventions are based. These rules include: preparedness, fortification, reciprocity, avoidance of non-military elements,<sup>523</sup> treatment and exchange of prisoners of war,<sup>524</sup> protection

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<sup>522</sup>Alfred Guillaume, "Philosophy and Theology," in *The Legacy of Islam*, eds. Thomas Arnold and Alfred Guillaume (London: Oxford University Press, 1931), 273-281; A. Nussbaum, *A Concise History of the Law of Nations* (New York: Macmillan, 1954), 52; C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (London: Macmillan, 1988), 157; Ernest Nys, *supra* note 507, at 209; J.B. Scott, *Classics of International Law* (New York: Oceana Publications, 1939), 17-21; Le Baron Michel de Taube, *supra* note 414, at 384; Marcel A. Boisard, "On the Probable Influence of Islam on Western Public and International Law," *International Journal of Middle East Studies* 2 (1980): 445.

Generally speaking, however, the contributions made by Islamic law have been marginalized by Western jurists involved in the development of public international law. This phenomenon was noted by Marcel A. Boisard, who argues that "there are many explanations for the general refusal of European authors to recognise their borrowings from the Muslim World. We must first mention human vanity. The most general explanation aside from the fact that most European writers of the time never referred to their sources - lies in the religious prejudice, even fanaticism of a West that could not admit to itself that it owed anything to the 'infidel'. This prejudice prevented any just appraisal of the contribution of Islamic culture." Marcel A. Boisard, *op. cit.*, 446.

<sup>523</sup>al-Kasani, *supra* note 21, at 7:100-102; al-Marghinani, *supra* note 21, at 2:144; al-Siyar al-Kabir, *supra* note 67 at 1:38-45.

<sup>524</sup>Ibn Hanbal, *supra* note 402, at 4:152.



of civilians during war, as well as peaceful settlements, treaties and neutrality. In other words, Islamic international law outlines a clear and firm distinction between combatants and non-combatants in times of war.<sup>525</sup> Muslim soldiers are instructed to regard as 'neutral' places of worship, residential areas, and medical personnel. Furthermore, they are strictly forbidden the following: waging *jihad* until all peaceful options have been exhausted;<sup>526</sup> using poisoned weapons or weapons of mass destruction;<sup>527</sup> delivering a *coup de grâce* to the wounded;<sup>528</sup> killing an enemy *hors de combat*;<sup>529</sup> and mutilating dead bodies.<sup>530</sup>

Although it would be hard to dispute the fact that the idea of just war existed before Islam, one has no difficulty seeing that this notion has been developed and refined by Muslim jurists. It becomes evident from the preceding study that *jihad*, in the form of armed struggle, must be just in its causes, defensive in its initiative, decent in its conduct and peaceful in its conclusion.<sup>531</sup> Hence, as a defensive war, *jihad* can be exercised individually or collectively by contemporary Muslim states,

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<sup>525</sup> al-Bukhārī, *supra* note 66, at 4:21; Ibn Hanbal, *supra* note 402, at 3:152; Ibn Rushd, *supra* note 21, at 1:304; al-Kurdi, *supra* note 32, at 109; al-Mughnī, *supra* note 21, at 10:542.

<sup>526</sup> al-Sarakhsī, *supra* note 21, at 10:31; al-Siyar al-Kabīr, *supra* note 67, at 1:78.

<sup>527</sup> Marcel A. Boisard, *supra* note 190, at 13.

<sup>528</sup> Nahj al-Balāgha, *supra* note 196, at 3:425.

<sup>529</sup> *Ibid.*

<sup>530</sup> Abū Dāwūd, *supra* note 197, at 2:59; al-Shawkānī, *supra* note 192, at 7:262.

<sup>531</sup> John Kelsay, "Religion, Morality, and the Governance of War: The Case of Classical Islam," *Religious Ethics* 18:2 (Fall 1990): 135; Marcel A. Boisard, *supra* note 190, at 7.

since such type of war is definitely sanctioned by the norms of international law, particularly the United Nations Charter.

## Conclusion

This thesis has shown that peace is the rule and war is the exception in the doctrine of *jihad*, and that no obligatory state of war exists between Muslims and the rest of the world. Nor is *jihad* to be waged until the world has either accepted the Islamic faith or submitted to the power of the Islamic state. Furthermore, there is no exact equivalent in Islamic legal discourse to the concept of "holy war" in Western Christendom, nor is there resemblance between the concept of *jihad*, as a collective religious duty, and the Christian concept of crusade. Thus, the description of *jihad* as "holy war" is most misleading.

*Jihad* is a defensive war launched with the aim of establishing justice, equity and protecting basic human rights. Accordingly, Islamic humanitarian law strictly lays down a number of humane rules compatible with those established by international humanitarian law governing the conduct of war and the treatment of enemy persons and property.

It has also been shown that the dividing of the world into *dar al-Islam* and *dar al-harb* by Muslim jurists, was dictated by particular events and did not necessitate a permanent state of hostility between these territories. Basing themselves on the doctrine of *jihad*, Muslim jurists tried to develop an Islamic theory of international relations, in the modern sense of the term, to regulate inter-state relations between *dar al-Islam* and other territories in times of peace and war. In this respect, Islamic law insists on honouring treaties even above honouring religious solidarity. In other words, if the *Imam* concludes a treaty with the enemy, this treaty is binding upon all Muslims, who are thus prohibited from assisting their fellow believers if this assistance

is in violation of a treaty of mutual alliance.

Moreover, since the beginning of the seventh century, Islamic international law has played a significant role in protecting the personal, economic, judicial and political rights of civilians during armed conflicts. It has introduced a human revolution, consisting of a number of human jural principles, as early as fourteen centuries before the drafting of the Universal Declaration of Human Rights in 1948, and eight centuries before the appearance of Grotius, the godfather of European international law. These claims have been acknowledged by a number of European scholars who have emphasized the fact that Islamic international law has made great contributions to international humanitarian law. Indeed, occasionally the substantive postulates of Islamic humanitarian law exceed the norms decreed by the Hague and the Geneva Conventions. Consequently, the principles of human rights used in international humanitarian law are not only the product of Western civilization, but also the experiences and teachings of non-European peoples, whose traditions have also made great contributions.

In sum, by carrying this study to its conclusion we find that there is a unique relationship between *jihad* and the notion of just war. Thus, *jihad* should be recognized as the *bellum justum* of Islam, and Lewis-Huntington's notion of "Muslim bloody borders" should be seen as inaccurate and groundless.

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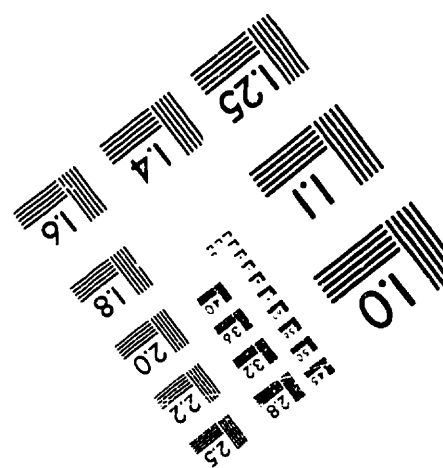
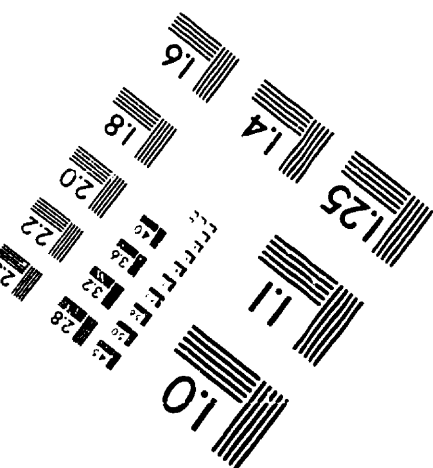
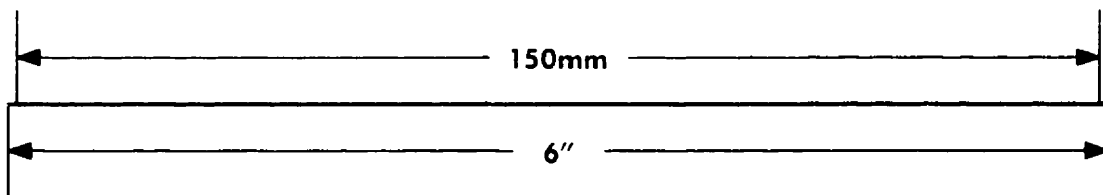
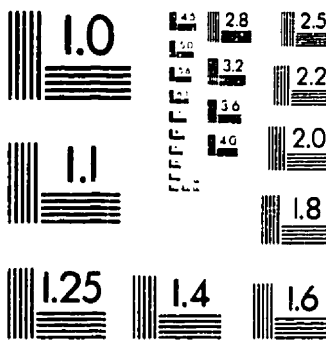
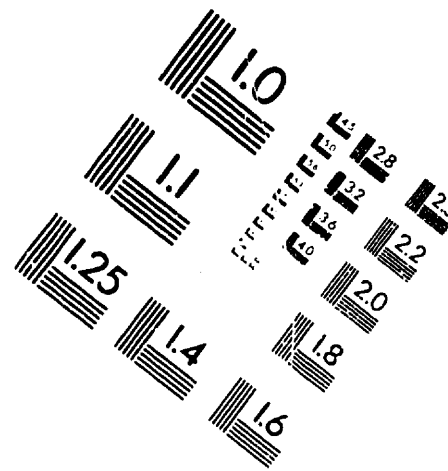
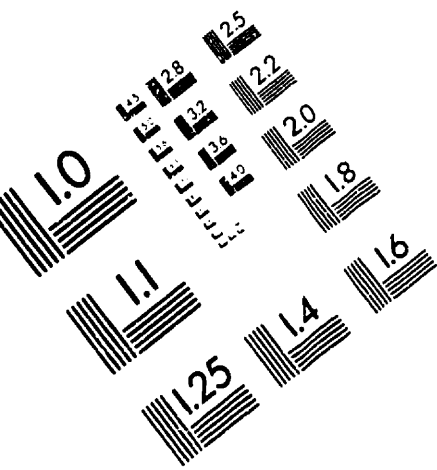
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