

GENESIS OF INTERNATIONAL RELATIONS IN ISLAM

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Our presentation deals with the general outlook of Islam on international relations, in other words, the general conception of Muslim international law. We mean by Muslim international law "the sum total rules and practices which Islam ordains or tolerates in international relations."

Islam began in Mecca as a religion, became a State in Medina and then spread as a culture. Nevertheless the contribution of modern writers to the interpretation of Muslim international law is remarkably deficient. (1).

To judge Islamic legal theory fairly, it is vital to take certain facts into consideration, namely :

Firstly : The True Task of Divine Law in Society :

Needless to say the task of law in a society is mainly to remedy its deficiencies and meet its needs. Especially is that so when law is revealed by divine power; we presume that it should mostly be predestined to redress society. To perform its function appropriately, the revealed law must select a society where certain deficiencies exist in regard to which the application of the divine process may convincingly illustrate the reformatory role of the legal system. Based on that assumption and taking into consideration that Muslim law is originally a

(1) Arthur Nassbaum maintains that "The Islamic law on international relations is scanty and vague, except for some aspects of war". Nassbaum, Arthur. *A Concise History of the law of Nations*, New York, 1963, p. 4.

divine law, we have to consider Arabia, where Islam initially emerged, as an ideal testing ground for trying out the Islamic technique of adjusting society. Thus, the state of Arab society, at the time when Islam was revealed by God to the Prophet Muhammad, should be construed as intuitively symbolizing the intolerable failure of human society; and the methods that Islam adopted are to be perceived as the heavenly rationalization for those very defects. Therefore, the way of life that prevailed in pre-Islamic Arabia should be regarded as a preliminary background against which we may come to understand the objectives of Islam insofar as our earthly life is concerned. Since the present study is exclusively interested in Muslim international law, we deem it expedient to confine ourselves to the international aspects of Arab life just before Islam came into being. To the best of my knowledge the worst manifestations of the Arab life, at the time, were mainly the widespread disintegration among the Arabs, with every clan or tribe, as the case may be, claiming complete independent status vis-à-vis the other clans or tribes. Obsessed by *assabiyah* (chauvinism) and clannish individualism, the Arabs failed to develop the principles of regional community within their circle. The clan strongly cherished patriotism within itself as an ultimate end and regarded other clans as its justifiable victims. The Arab who is not attached to a tribe is considered an outlaw. In this situation, violence and land piracy, nowadays considered as vices, were the code of dignity and honour of the Arab. This attitude manifests itself in the more than one thousand synonyms the Arabic language is said to have contained for the sword, and, equally in the chronicles called *ayyam al-Arab* (days of the Arabs), which narrate their diplomatic history through their wars. Even conferences, such as *Suq Ukaz*, were occasions for boasting and showing off, and nothing of importance to the cause of peace was achieved through such general gatherings. In fact, war was the ultimate resort for settling disputes. In other words, the clannish spirit was overwhelming international relations among the Arabs, if we may use the term international in this context. This deplorable disintegration and individuality tempt us to say that the chief purpose of Muslim international law was to mitigate, if not to banish, egoistical feelings and preach — as a substitute — fraternity, peace and security. This inference might suggest

that both Muslim and modern international law have common ends. The conception of fraternity, peace and security should be conceived as fundamental for understanding the orthodox norms of Muslim international law and as the pattern within which we interpret the injunction of the Qur'an and the traditions as well. Hence, this notion will generally form the framework of our attempt to trace both the history and concepts of Muslim international law.

We would like to point out, from the very outset, that Muslim history and thought were not always or necessarily identical with Arab history and thought, because when the Arabs, through their conquests, came into direct contact with the Greeks and the Persians they were influenced by the Greek and Persian culture, and Islamic civilisation reflected that influence.

It is a tragedy that the conjunctive bonds of common religion, race, language and customs, which might have been expected to develop some sort of Arab union, failed to do so. "The antiquated paganism of the peninsula seems to have reached a point where it failed any longer to meet the spiritual demands of the people and was outgrown by a dissatisfied group who developed vague monotheistic ideas, and went by the name of Hanifs.... On the political side the organised national life developed in early South Arabia was utterly disrupted. And anarchy prevailed in the political realm as it did in the religious. The stage was set, the moment was psychological, for the rise of a great religious and national leader" (1) it was Muhammad ibn Abdel Lah.

Secondly : The Nature of Islamic Expansion :

To judge Islamic expansion fairly, it is vital to look at it from the right angle. Islam, in our view, is a reformatory revolution to be counted among the great revolutions in the history of humanity. Islam, like the French and Russian revolutions, is based on particular dogmas and theories addressed to humanity as a whole and claiming universality. Such revolutions tend to prevail by their very nature and have a predestined role to enforce their philosophy upon the opponents of the new ideas, otherwise they betray their aim and "raison d'être". Hence a

(1) Hitti, Phillip K. History of the Arabs, London, 1951, p. 108.

war of publicity is an indispensable corollary to this sort of revolution with a view to enlightening humanity and forcing it forward to a better intellectual and social life. This is not fanatical because fanaticism implies abnormality which is far removed from what we have in mind. The cry for fraternity, liberty and equality echoed in the different corners of Arabia more than twelve centuries before the French revolution, and Islam launched the principles of an affluent society in a way far more acceptable than contemporary economic doctrines. We could not say then that by using force to spread these dogmas beyond the political boundaries of Arabia, Islam proved to be a warlike creed; otherwise we overlook the hostile attitude which the exponents of past political and religious ideas outside Arabia took towards Islam and ignore as well the universal claims of Islam. Thereby, the early Islamic conquests should be regarded as wars of publicity and not of imperialism; in other words, those conquests were directed towards the defence and propagation of the Islamic philosophy and not Arab domination. They were a necessity for the furtherance of civilization. The Arab conquerors were often received by the vanquished peoples as saviours. Our view may be better illustrated if we take into consideration the fact that the early Islamic conquests were directed against the then seats of world civilization in Syria, Persia and Egypt where the intellectual struggle must be settled one way or another.

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

who were administering the state and who gave up their possessions for the cause of Islam, would consider such an aim of substantial importance in planning Islamic foreign policy.

We, too, repudiate the widespread view that the outstanding victory of Islam over the two great powers of the day, Byzantium and Persia, was due to the weakness of these powers. Undoubtedly, nascent Islam was far less equipped than they were in numbers and war instruments, and had to concern itself with supplying its conquering forces. In fact, Islam as a belief was the driving factor and the essential element that cemented the Arab masses never united before. Muslims, at one time, fought against both Byzantium and Persia simultaneously when the Arab troops were engaged in wars in Persia and in Egypt as well. For instance, in 640 A. D. the Arab troops were facing 20,000 men, the Byzantine garrison at Babylon in the West, whilst other troops were forcing their way to the province of Pars (Persia proper) in the East. It is beyond all logic to ascertain that the Muslims who, thus, had to fight in two frontiers at the same time against the two powers of the day were, by any means, in a stronger position vis-a-vis Persia and Byzantium however weak the two empires might have been.

To us, it is common error that writers try to find out an explanation, beyond propagation and defence of faith, for the Islamic conquests in the seventh century of the Christian era.

What is really worthy of investigation is the magic expansion of Islam and its decisive victories over the two great contemporary masters of the world. To this effect we are inclined to accept the interpretation that the Byzantine Empire had never regarded its frontiers with the Arabs "as one of its vulnerable points, nor had it never massed there any large proportion of its military forces. It was a frontier of inspection which was crossed by the caravans that brought perfume and spices. The Persian Empire, another of Arabia's neighbours, had taken the same precaution. After all, there was nothing to fear from the nomadic Bedouins of the Peninsula, whose civilization was still in the tribal stage, whose religious beliefs were hardly better than fetichism, and spent their time making war upon one another, or pillaging the caravans that travelled from the South to the North, from Yemen to Palestine, Syria and the Peninsula of Sinai, passing through Mecca and Yathrib. Preoccupied by their secular conflict, neither Romans nor Persians seem to have any suspicion of the

propaganda by which Muhammad, amidst the confused conflicts of tribes, was on the point of giving his own people a religion which it would presently cast upon the world, while imposing its own domination the Arab onslaught took them by surprise". (1) In fact, both empires contented themselves with establishing spheres of influence within areas bordering their frontiers through which they hoped to have their dominance infiltrate into the rest of the Peninsula. Further, those areas under influence could assist in barring the expansion of the bedouins onto the settled land and at the same time act as buffer states between the two contending parties. The Persians thus supported the Lakhmids near the Euphrates and later were able to extend their influence to al-Yaman in the South. In like manner the Byzantines supported the Ghassanids who settled to the east of Damascus.

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

Thirdly : The distinction between the Shari'ah and the Fiqh.

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

(1) Pirenne, Henri — Mohamed and Charlemagne, London, 2nd. ed., 1940, p. 147 — 9.

(2) Vesiliev, A. A. — Byzantium and Islam, an Article in "Byzantium — an Introduction to the East Roman Civilization", Oxford paperbacks, 1961.

Early Muslim scholars have bequeathed to us a number of works on Muslim international law based fundamentally on the idea of universalism and that a religious war of aggression is one of the tenets of Islam prescribed by the Qur'an for securing conversions or exacting tribute. Such views, presumably, were intended by their authors to facilitate the application of the principles of the *Shari'ah* to specific questions. Naturally, their approach was dictated by the existing environmental socio-political requirements and conditions of the time. Therefore, their rulings cannot be considered as unconditionally applicable to the needs of the Islamic state in the twentieth century irrespective of modern socio-political exigences.

Nevertheless, as time elapsed, these ideas gained in the public mind a kind of sacrosanct soundness of their own and came to be regarded by the majority of Muslims as an inherent part of the *Shari'ah* itself although neither the Qur'an nor the tradition offer authority for such an unwarranted enlargement of the *Shari'ah*. On the contrary, the Law Giver deliberately provided a limited range of explicit ordinances to determine the general legal pattern within which society ought to develop, leaving the multitude of possible legal problems to be decided according to the changing requirements of time and society. Thus it is not accurate to include the doctrines of the various Islamic schools of thought in the *Shari'ah* *stricto sensu*. They are the media of making the *Shari'ah* accessible to common believers.

The rigidity of public opinion about the Islamic classical doctrine induced some modern Muslim commentators to accept Western political and legal concepts as the norm to which a modern Islamic state should conform. This, in many cases, resulted in the adoption of concepts which are in contradiction to the dictates of Islamic ideology due to the fact that Western jurists — for reasons of their own — consider questions of belief and of political life as two entirely different domains, whilst the close connection between religion and politics is one of the characteristics of Islam.

The right path in our view, is to turn to the roots of Islamic law, namely the Qur'an and the traditions and from there establish concrete principles of a contemporary Muslim international law. This effort, for those who do not know Arabic, is faced with the crucial problem of the lack of a precise translation of the Qur'an. Actually all translations at hand are but attempts to present the meaning of the

Qur'an. Technically, they can never take the place of the Arabic version of the Qur'an. Consequently the translations often show subtle difference, which might lead to different conclusions. This fact is apt to lead foreign scholars to adopt an altogether wrong attitude towards the teachings of Islam.

Historical Development of Muslim International Law :

Western writers vary considerably in the definition they adopt for international law owing to divergences in the sources from which they maintain that this law is derived. Generally speaking, most definitions suggest that for international law to exist there must be a combination of three elements, namely ;

1. numerous political entities,
2. mutual relations between those entities,
3. rules or principles to control these relations.

Obviously, the environment in which the external Muslim law developed included, from the very start, the required elements. The nascent Muslim state evolved in a society which knew independent states such as Persia, Abyssinia and Byzantium. This society had its particular system of international law. Besides, there were also principles and rules which the Muslim state considered as binding on it in its relations with other alien states.

It is noteworthy to emphasize here that theology is not in contradiction with international law. The fathers of the international law of our time, as well as those of Muslim law, were theologians. Moreover, the science of international law aims at the integration of humanity. In that sense, religion is in close accord with international law. The term "religion" is derived from "regulare", because the divine cult gathers and unifies men. (1).

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

(1) Laurent, F. — Etudes sur l'histoire de l'humanité, (*Histoire du Droit des Gens*), 2nd ed., Bruxelles, 1861, vol. 1, p. x.

The Apostle was the spiritual leader and the supreme head of the Islamic community and, through divine revelation, he was the lawgiver of the *communitus islamica*. Even before the establishment of the Islamic city-state of Medina, the Apostle, as such, concluded, in 622 A.D., a treaty known as the Second Pledge of Al Aqaba with a delegation representing the Medinan tribes. Besides, he enjoyed the passive and active right of legation, that is to say, to send and receive ambassadors. He, as apostle, received the said deputation of Medina. In 621, after the First Pledge of Al-Aqaba, Muhammad sent Mus'ab to Medina as his representative to teach people Islam. The emigrants whom the Apostle sent to Abyssinia, in 615 A.D., should be regarded as his deputation if we judge by the circumstances and the wording of the message the emigrants carried to the Negus calling on him to embrace Islam. We are inclined to infer that the emigrants must have had an extra mission relevant to the Mecca trade in the hope of inducing the Negus to boycott it as a measure of retaliation to Meccan hostility towards the Muslims. In this case the emigrants were actually a delegation representing Muhammad in his individual capacity as Prophet, and the friendly reply of the Negus should be considered as a legal recognition of that right. Throughout his lifetime, Muhammad assumed only the title of Prophet and Apostle and introduced documents by that title. After the formation of the Muslim State the Apostle constituted in his person what we call today personal union. The relation between his prophethood and his political leadership could be assimilated, constitutionally, to the relation between the Crown and the King in British constitutional law, in so far as the idea of separation of powers is concerned.

More convincing, however, is the argument that, even under the general principles of present international law, an international personality coheres in Muhammad as Apostle because these principles stipulate that legal personality is acquired by the person who is qualified and who is obligated by the rules of international law. In Western international law, the unique position of the Pope in the Christian community induced Western writers to recognize him as an international person. (1)

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- (1) Compare; (A) Kunz Joseph L. — The Status of the Holy See in International Law, A. J. I. L., vol. 46, 1952, pp. 308 — 14. Spiropoulos, Jena A. — L'Individu en Droit International Paris, 1928, p. 32.
- (B) Sorensen, Max — Principes de Droit International Public — R.C.A. D.I. Col. 101, (1960 III), p. 127.
- (C) Norgaard, Carl Aage — The position of the Individual in international Law, Copenhagen, 1926, p. 32.

Anyhow, the foundations of the first Islamic state in Medina were laid in the Second Pledge of Al-Aqaba. The Medinan delegates invited the Prophet to their city and pledged themselves not only to allegiance and to the normal precepts of Islam, but also "to war, in complete obedience to the Apostle, in weal and woe, in case of hardship and evil circumstances". Hence, the new society began to affirm its autonomy as regards the traditional tribal solidarity by the military bond which might be operated by the believers against their own kinsmen. When Muhammad arrived in Medina, he put the principles sworn in the Second Pledge of Al-Aqabah in a more detailed document named the Covenant of Medina. The main provisions of the Covenant that come into our study are : (1)

1. The believers are one community (Umma) to the exclusion of all men.
2. The Jews are one community with the believers.
3. Every clan according to their present custom shall pay the bloodwit within their number.
4. The peace of the unbelievers is indivisible.
5. The Jews shall contribute to the cost of war so long as they are fighting alongside the believers.
6. No polytheist shall take the property of Quraysh under his protection nor shall he intervene against a believer.
7. The close friends of the Jews are as themselves. None of them shall go out to war save with the permission of Muhammad, but shall not be prevented from taking revenge for a wound.
8. If any dispute likely to cause trouble should arise it must be referred to God and to Muhammad.
9. Yathrib shall be a sanctuary of the people of this document.

By defining the notion of *Ummah* as the community of persons who constitute the Islamic state, adopting Yathrib as a sanctuary, and investing Muhammad with certain powers of control and compulsory arbitration, the city of Medina was possessed of the required elements

(1) Welhausen was the first to divide the Covenant into Articles and translate it into an European language.

population, territory and government to be qualified a state under the principles of modern international law.

The city state of Medina began in what might be termed as a form of confederation because of a certain degree of autonomy which the tribes preserved towards the central authority of Muhammad, particularly in blood-wit and in waging war. After the military prestige that Muhammad achieved by his victory at Badr and the civic regulations introduced for the community, the city state of Medina turned into what may be called a federate state. This state was formally recognized by Mecca, in 629, in the Hudaibiyah agreement, since the agreement was concluded between two equals with the acknowledgement of Muhammad's political power in Medina. After the capture of Mecca and the victory the Muslims gained at the battle of Hunayn, the Islamic state spread over the whole of the Arab Peninsula. But it is questionable among writers whether or not Muhammad in the last year of this life became the ruler of the Arabian Peninsula. Some stress that his political authority was spread over almost the whole of Arabia. Others go to the other extreme maintaining that he only ruled a limited district round Medina and Mecca. A third group stand in between, suggesting that the Islamic state, in 632 AD., was "a conglomeration of tribes in alliance with Muhammad on varying terms, having as its inner core the people of Medina and perhaps also of Mecca"(1). This controversy is of minor importance since it relates to a very short period. When Abu-Bakr, a few months later, was elected as successor to the Prophet (632—634 AD) he, for certain, considered himself the ruler of Arabia and conducted his policy on that attitude. During the *riddah* some revolting tribes refused to pay tribute but confessed their belief in God and his Apostle and were ready to perform the prayers, trying thus to separate the political from the religious. Abu Bakr, in rejecting this view and waging war with them, expressed that in his understanding wherever the religious leadership is admitted its corollary is political leadership. Thus, under Abu Bakr, the Muslim state assumed the unitary form, having its central government in Medina. This state took its definite shape under Umar ibn al-Khattab (635—644 AD) who assumed the title of 'Amir al Mu'minin' (the commander of the believers) a title which implies the political character of the office.

(1) Watt, Montgomery — Mohammad at Medina, Oxford, 1962, pp. 22 — 23.

Talking about the emergence of the Islamic state, and referring to the treatment which the said state administered against the Jews of Medina, it might be questioned how far the nascent Islamic state respected what we call today the minimum standard of human rights because the conduct of the Islamic state towards the Jews of Medina is a highly controversial topic among commentators. The retributive justice inflicted on the Jews of Medina, particularly the Qurayzah, furnished to some Western writers a ground for attack. We would like, from the very outset, to exclude from the discussion the hypothesis that the measures taken were meant to annihilate the Jews as such. "The continuing presence of at least a few Jews in Medina is an argument against the view sometimes put forward by European scholars that in the second year after the *Hijrah* Muhammad adopted a policy of clearing all Jews out of Medina just because they were Jews"(1) To assess the actions performed, we first should outline the legal status of the Jews in Medina after the promulgation of the Covenant. The Jews were confederates either to the Aws or to the Khazraj. This fact was the driving element of integrating the Jews into the Medinan community. As such they became citizens of the new Muslim state and had to respect the public order of the state and refrain from active enmity to its creed which was the basis of the whole structure of the state. Any such act would be considered, according to modern standards, as a crime of high treason worthy of major punishment. But the Jews did not pay much heed to their duties as citizens, or to their commitments according to the Covenant of Medina. A few months after the organization of the state, they adopted a positive if hostile attitude towards the state, rejected the Prophet's mission and, in some cases even expressed contempt and deviousness. We could adequately appreciate the seriousness and danger of these polemics if we bear in mind the cultural superiority of the Jews as compared with the illiterate Arabs, and the influence the Jews can presumably gain in an unadvanced society where poets occupy the position of the press in modern times (2). This resulted in a religious and cultural break between the Muslims and the Jews. But when the state became the object of military campaigns ever since the battle of Badr the measures which the state could legitimately take against such acts must correspond with the amount of

(1) Watt — op. cit. p. 217.

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

of danger which threatened it. In such circumstances we should be ready to admit that the city state of Medina could no more tolerate a faction of active opponents who apposed its policy and were ready to compromise with the enemy at any convenient time, otherwise it would be in a very precaurious situation.

Exeptional circumstances justify exeptional measures. It is quite fair that, in accordance with the dictates of necessity, all regulative limitations might be deliberately rejected and the rigor belle introduced. We should not forget that at the present time, there are writers who advocate the doctrine which states that the binding force of the laws of war in general might be disregarded in case of extreme necessity "salus popule suprema lex". The principle of necessity was generally adopted by the Hague Convention 1907 under which collective penalties are not unlawful if the group partake in the illegal activities.

If we concentrate on the Qurayzah, it must be remembered that it lived in the proximity of Medina, and thus represent a potential danger to the Muslims. Expulsion of the Banu Qaynuqa and the Banu al-Nadir proved to be an indiscrete measure since they, form Khaybar, continued to intrigue diligently against Muhammad, and the Nadir played a prominent role in the formation of the great confederacy that undertook the Attack of the Trench. It is of significance that the Qurayzah, unlike the Qaynuqa' and the Nadir and to the contrary of the provisions of the Covenant, did not leave its destiny in the hands of the Prophet who most likely would be rather lenient, but insisted on being judged by the Chief of their Arab confederate clan. The powers of the arbiter were not restricted to the application of particular rules. Besides, the arbiter, before awarding his decree, made sure that both parties will surrender to his judgement without protest. Thereby, the arbiter decided to judge the incident according to the Jewish law, namely the Deuteronomy (1). We consider this a sincere implementation of Article 25 of the Covenant which stipulates that "... to the Jews their religion and to the Muslims their religion". In other words this is a Jewish and not an Islamic punishment.

(1) The Deuteronomy is the fifth book of the Pentateuch, called in Hebrew Debarim (words).

Going back to the international development of the Islamic state from the legal standpoint we observe that the first term to be used in Muslim practice to express the notion of state was the word "Ummah". In the Qur'an the term occurs in a number of varied and changing meanings. However, when Muhammad introduced it to the Convention the term became a specifically Islamic term to designate the Muslim state. After the exclusion of the Jews from the politico-religious community of Medina and the incorporation of Mecca and other parts of Arabia into the Muslim state, the term *ummah* became obsolete. Occasionally, it was replaced by one or two terms; *Jama'a* or *Hizb Allah*. However, we cannot claim that there was a conventional term to designate the Muslim state during its first decades, since diplomacy was carried out in the name of God and Muhammad. Anyhow, the state got a new definition under the Abbassid dynasty, namely *dawlah* which literally means new era. The Abbassids, in adopting this term for their state, were referring to their revolutionary movement. However, the term came in Arabic terminology to denominate the state.

Now we come to the question: how far the conception of *ummah* or *dawlah* is similar to or different from, the modern conception of state?

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

The Islamic state, in its formative period had at its head a prophet who integrated both the religious and the political; a unique incident which makes it without precedent or example in the history of international law. We have learned that the conception of the tribe was the centre of pre-Islamic Arab political organization. This conception continued to be influential on the Muslim thinking during the early history of the Muslim state. The Muslims stressed the social element in the structure of the state and emphasized that all Muslims, regardless of their geographical location, are members of one and the same body, namely the Muslim state. We do not pretend that the Islamic theory ignored the territorial element completely since Yathrib was delimited as the territory of the Medinan state. The importance of the territorial element showed again when 'Umar deported non Muslims from

Hijaz, while other non-Muslims living outside Hijaz, such as the Jews of Daral Qura in Syria, were left undisturbed. Nevertheless, the territorial basis was not officially recognized by Muslims. For example, the Islamic state of Medina comprised nomadic tribes, such as Juhaynah and Muzaynah, whose habitat lay outside the borders of Medina. Only in one instance territory was recognized as predominant in Muslim theory, i.e. the Meccan sanctuary as it is absolutely inaccessible for non-Muslims.

Thus, the territorial element had only practical validity but no recognition was given to it. It was rather a *de facto* than a *de jure* element in the structure of the Muslim state. This explains why Muslims regard the *hijra* as a change of tribal and social attachment not of location. Actually, this view might have been influenced by the nomadic custom that never recognized fixed lines without width as boundaries to tribal activities. It suffices for the Muslim state to be formed and come into being, that all believers should unite in a social grouping under the leadership of their head. "The question might be raised, why territory should be necessary at all, to constitute an international juristic person? Theoretically, there is no reason why a community of persons bound together by common interests of a sufficiently permanent character, [whose membership cuts across state boundaries, should not be recognized by international law as similar groups are recognized by municipal law" (1). "The rigidly territorial nature of statehood is not so much a matter of logical necessity as of historical circumstances growing out of the kind of systems and out of juristic conceptions of sovereignty prevailing at the time when international law began to take definite shape". (2)

Admittedly, the political notion of sovereignty (*sultan or mulk*), was dominated by the same opinion. Sovereignty was essentially personal. To enjoy his power, the head of the community need not establish his influence over a determined geographical domain, in other words his personal sovereignty could be recognized independently of any territorial sovereignty. Thus the sovereignty of the head of the community comprises a submissive relation between the head, personally, and the members of the community under which the believers owe

(1) Fenwick, Charles — *International Law*, 3rd ed., 1948, p. 105.

(2) Fenwick — *Op. Cit.*, p. 105 (in the footnotes).

obedience and fidelity to their chief. This interpretation is clearly reflected in the procedure of *bay'a* which includes no reference at all to territory expressing the concept that the authority vested in the chief is not conditioned by him possessing territory. The formula of the *bay'a* is exclusively a personal promise of obedience and fidelity. This interpretation may mean that the Islamic state is a theocratic state.

“Theocracy is a much maligned word used by modern writers for the concentration of authority in God exercised through a priest class or a king in an autocratic manner” (1). Theocracy, in this sense, is alien to Islam. The caliphate had no divine merits, since the revelation of God ceased at the death of the Prophet and it is the function of the *ulama* (the most learned) to interpret the sacred texts. Besides, there is no special class of divine theologians dedicated to the service of religion. The Prophet is said to have declared to his companions that in matters relating to mundane affairs they were perhaps better judges than himself. The secular aspect of the caliphate predominating under the Ummayyad period, was blended in a Persian expression emphasising religious considerations. The Abbassids claimed divine right as the basis of their power and this showed itself in the extravagant titles they chose for themselves such as *Khalifat Allah* (God's caliph) and *Zull Allah 'ala al-Ard* (God's shadow on earth). It was because of the caliphate that the Muslim community was divided into three main sects : the Sunnis, the Shi'is and the Kharjis. Therefore, after the advent of the Abbassids, the theory of state and sovereignty gained a new connotation in the Islamic doctrine and practice. Firstly, the full citizenship of the state, nationality, which formally was confined to the Arabs, now opened to encompass all Muslim subjects regardless of their race or origin. Secondly, the territorial idea began to be of importance in the conception of state. Eventually Muslim jurist theologians, of the Abbassid era, adopted the idea of a fixed territory as a constructive element in the structure of the state and divided the world geographically into two sections; *dar al Islam* (the world of Islam) and *dar al-harb* (the world of non-Muslims). Thirdly, the notion of caliphate underwent drastic metamorphoses. Both the Fatimid 'Ukayd-allah (A.D. 929) in North Africa and the Ummayed Abdel-Rahman III (A.D.909) in Spain, claimed the title of caliph, thus

(1) Sherwani, Haroon Khan — Studies in Muslim Political Thought and Administration, Lahore, 1959, p. 303.

creating the unprecedented phenomenon of three rival caliphs in the Muslim world at the same time each alleging the right of representing the community on the international level and exercising supremacy over a separate geographical realm. Other parts of the Islamic world split off from the rule of Baghdad in both the West and the East.

With this devastation the Islamic state was to face the crusades that sprang up as a response to the speech delivered on November 26, 1095 by Pope Urban at Claremont and lasted for about three centuries.

The Christian reconquest of Spain led eventually to the christianization and unification of Spain under Ferdinand and Isabella towards the end of the fifteenth century.

The reintegration of the Islamic state was — to a great extent — accomplished under the Turkish Empire when the Uthmanli Sultan undertook to unify the world of Islam under their rule. In the beginning the Turkish sultans did not show zeal for the title of caliph and the first international document to add this title to the Sultan was the treaty of Kuchuk Kay-Narji signed in 1774 with Russia. Finally, Turkey was defeated in World War I, and the caliphate was abolished by the Kemalist Government of Turkey. Britain and France managed to divide the Arab world into distinctive states with more or less defined borders. Most of these states soon developed a feeling of nationalism and were able to attain their independence as separate political entities after World War II. The Islamic world is still politically divided into separate independent states which, on the international level, act as distinctive entities. Actually, Muslims total now more than 400 million, that is to say about 1/6th of the world population.

The classical doctrine of international law considered :

According to the classical Muslim doctrine, the “raison d’etre” of the Islamic state is to achieve the universal rule of Islam. Hence, it conceived the Islamic state as a universal state by its very nature. As a corollary to this idea, the Muslim caliphs were determined to wage a constant war of conquest in the name of Islam, which they carried successfully during the first century of the Islamic era. This claim for universalism gave rise to the establishment of the doctrine of *Jihad* as the instrument of the Islamic state to perform its function, whenever peaceful methods fail. But victorious Islam failed to complete the

sun's circle as it halted, in the East, at the borders of India, and failed, in the North, to penetrate the mighty walls of Constantinople (717/18), while in the Far East it endured a decisive defeat at Tours (732).

Failing to correspond to the then known world, the Islamic state had to confront two major problems, i.e., its relations with the non-Muslim states that remained outside its orbit, and the treatment of non-Muslim subjects residing in its territory. In this situation the classical doctrine developed two notions, namely the division of the world into the Muslim world and non-Muslim world, and the rules regulating the status of the *dhimmis* in *dar al-Islam*. Therefore, the classical conception of Muslim international law is based on those main precepts, i.e., The *Jihad*, the division of the world into two parts and the status of the Dhimmis. We will tackle these topics below.

The *Jihad*, as we have learned, is regarded by Muslim jurists as the medium of establishing Muslim sovereignty since the reign of God's religion necessitates political supremacy of said religion. Actually, the doctrine of *Jihad*, being more or less a doctrine of warriors, was not entirely a new tenet to the Arabs who had been warriors throughout the pre-Islamic era of their history. This fact induced some writers to maintain that the Islamic concept of *Jihad* was indispensable for the existence of the Islamic state, assuming that there must be some way or another to exhaust the innate warlike energy of the Arabs outside the state, otherwise this tendency would have inevitably sought its satisfaction within the state. (1) To us this view is exaggerated because, presumably, during the lifetime of the Prophet, the Faith was strong enough to transcend tribal tendencies. Not long after the death of the Prophet the capital of Islam was transferred to Kufa and then to Damascus. After that the Arab element in the Muslim army began to be overshadowed by alien Muslim converts, whilst Arabs showed increasing interest in the luxuries of life which they came across in the conquered countries. In fact, it could be argued that the *Jihad* was an expansive rather than a preservative factor in history of the Islamic state.

To summarize, the *Jihad* is the Muslim doctrine of war.

(1) Khadduri, Majid — War and Peace in the Law of Islam, Baltimore, 1955, p. 62.

Technically speaking, the classical doctrine of *Jihad* deals with different types of hostile measures, some of which come under the rules of international law while some do not. For instance, the *Jihad* against international highwaymen could not, in our view, be included in the international types of *Jihad*. We will concern ourselves only with types of *Jihad* related to our study.

We can classify said types of *Jihad* under two categories :

1. Jihad of extermination(1), against those who are charged with the most palpable form of sins, i.e. the polytheists and apostates. A polytheist is a pagan who has not any sort of revealed book. We mean, too, those apostates who denounce their faith and either join *dar al-harb* or establish themselves in a territory of their own and acquire enough strength to threaten the authority of the Islamic state. Originally, the apostate was a Muslim who, it was hoped, would return to Islam, therefore Muslim jurists distinguish between the characteristics of *dar al-ridah* and *dar al harb*. Although the Muslim state is not entitled to conduct peaceful relations or to make alliances with the apostates or to accord them quarters, it has this discretion with regard to polytheists.

2. Jihad of reconciliation(2); against those who are accused of less palpable sins, namely the Scriptuaries and the *bughat* (disserters). Here Islam shows an inclination to leniency because the Scriptuaries believe in God, and the *bughat* are Muslims after all. The Scriptuaries are to choose one of three possibilities; Islam, in which case they enjoy full rights of citizenship, poll-tax, reducing them to second-class citizens with certain disabilities, or the *Jihad*.

(1) See; (a) Ibn Rushd — *Al Muqaddemat al Mumahidat*, Cairo, 1325 A. H., rol. 1, p. 285

(b) Al Mawardi — *Al Ahkam Al Sutaneya*, H. Cairo 1380 A.H., p. 143.

(c) Sahnun — *Al Mudwana Al Kubra*, Cairo, 1356 A.H., vol III, p. 46.

(2) See; (a) Hamidullah, Muhammed — *The Muslim Conduct of State*, Lahore, 1953.

(b) Welhausen — *Arab Kingdom and its fall*, translated by Margaret Graham Weir, Calcutta, 1927, p. 53.

If we turn to *bughat*, it is difficult to find a concrete provision relevant to that category of *Jihad* in Muslim positive law. Jurists usually cite the following verses to support their claim : “And if two parties of the believers fall to fighting, then make peace between them, and if one party of them doth wrong to the other, fight ye that which doth wrong till it return into the ordinance of God; then, if it return, make peace between them justly and act equitably.” In fact the bulk of Islamic rules dealing with this topic are based on the orthodox practice of the caliph Ali who was faced with the first two civil wars in Islam, namely the Battle of the Camel and his struggle with Mu’awiyah and under whose reign the Kharijites emerged as a case in point.

The *Jihad* against the *bughat* is prescribed only when they fail to obey the law and cause grievance to the state.

The *bughat*, in case of rebellion, are entitled to the rights of a *de facto* government in the modern sense of the term. Their jurisdiction over their territory during their maintenance of power is recognized as lawful and valid. The treaties they conclude with non-Muslim states, other than those to fight against the Muslims, are considered as binding over the Muslim state. They are not held responsible for any loss of life and property caused during the conflict. Their private property is not treated as spoil and their prisoners of war are not liable to be killed.

It seems that classical writers, when dealing with the general characteristics of the *Jihad*, had mainly in view the example of the *Jihad* against non-Muslims. This fact, together with the foregoing remarks on some peculiarities of the *Jihad* against *bughat* and apostates, should be borne in mind when we consider the characteristics of the *Jihad*, which we can group as follows :

1. The *Jihad* is a collective obligation, *fard kifayah*, that is to say as soon as a part of the Muslim community fulfils the duty of *Jihad*, it ceases to be any longer obligation on others. This quality excludes the *Jihad* from being one of the pillars of Islam. However, the *Jihad* becomes *fard’ ayn*, in two cases, i.e., for those who dwell in the territory nearest to the enemy, and when general mobilization is declared to repel an aggression. The Kharijites, who conceived the state as a garrison state, regarded the *Jihad* as the sixth pillar of of Islam.

2. The *Jihad* is a perpetual obligation, until the universal conversion of humanity to Islam is achieved. But the perpetuity of the *Jihad* is relative as the *Jihad* comes into being only when circumstances are favourable to the Muslim state and likely to be suspended if the interests of the Muslim state require it. Hence, the doctrine of the *Jihad* does not necessarily envisage constant fighting, but merely implies the existence of a state of war between the Muslim state and its neighbours. Under exigent needs, the suspension of the *Jihad* has now lasted for so long a period that it has virtually become a normal state for the Muslim community. For the Shi'ite, the Zaydi sect excluded, the *Jihad* entered into a state of quiescence in the absence of the *imam*. The *imam*, in his capacity as infallible ruler, is endowed with the sole authority of declaring the *Jihad* whenever he considers it due.

With the notion of perpetuation in mind, we could not assert, theoretically, that the Islamic state could enter into genuine peace treaties with-Muslim states. The general doctrine holds that only truce for a limited period, in principle not in excess of ten years subject to renewal for similar periods, is authorized (1). In fact, the classical theory knows three types of treaties, namely the *aman*, the *hudna* and the *muwada*.

The *aman* guarantees for the *harbi* (enemy alien) safety in life and property when he goes to the Islamic state. The duration of the *aman* should not exceed a period of one lunar year. This institution has strong affinities with the present system of visas and regulations for the residence of aliens in foreign countries. The *hudna* is equivalent to what we call today truce. Actually, classical doctrine did not emphasize a sharp distinction between *hudna* and *muwada* due to the fact that both institutions are of temporary character. However, these treaties are liable to unilateral repudiation before their term of expiration if repudiation proves to be in favour of the Muslim State. In this case the Muslim state should afford the infidel party sufficient delay to communicate the information to the different parts of its territory.

The last call to the *Jihad*, made in 1914 by the Ottoman sultan Muhammad Rachad, proved an utter failure. Presently similar attempts have been tried out with regard to the stand of the Arab states towards Israel.

(1) Al Shafi'i — Kitab Al Umm, Boulac, 1322 A. H., vol Iv, p. 100.

3. The *Jihad* is a formal obligation(1) since it should be preceded by addressing a formal invitation to the people against whom it is directed calling on them to join Islam or pay poll-tax, as the case may be. This was the constant practice of the Prophet to emphasize that the aim of the *Jihad* is to defend the Faith and not to win earthly gains. Although jurists unanimously profess to the principle of invitation, as such, yet they differ on its implementation. Some hold that the Muslim state is no longer under the obligation of addressing a prior invitation on the ground that Islam has been widely spread and heard of and, therefore, non Muslims have been duly forewarned. However, Muslim practice is in favour of addressing an invitation before starting acts of hostility. The conduct of the Ummayyad caliph, Umar ibn Abdel-Aziz, is significant in this. It is reported that, upon a complaint from the inhabitants of Samarqand against Qutayba, the commander of the Muslim army, that he conquered their city without previous notification, Umar referred them to the judge Djumai ibn Hader al-Baji, who decreed that Muslim troops should withdraw and the commander should invite the inhabitants of the city and give them sufficient delay. Anyhow, the Muslim state may renounce this obligation of invitation when it would result in a delay that ameliorates the situation of the enemy to the detriment of the interests of the Muslim state. The same applies, as well, to the case when the Muslims are, a priori, reasonably aware that the invitation will be of no avail.

4. The *Jihad* is a defensive as well as an offensive obligation. It is self-evident that the right of self-defence is an inherent right in every community. But instituting aggressive wars was, and still is, a subject of bitter controversy in both theory and practice. However, classical Muslim writers adhered to the doctrine that tolerates aggressive war provided that aggression aims at furthering Islam. If this is the attitude of Muslim classical writers, it is not surprising that a number of European writers of almost a century ago hold the same idea about the law of war in Islam.

According to the classical theory, the prisoners of war are the enemy combatants who, via legitimate war declared by a Muslim sove-

(1) Al Sarakhsee, Muhammed Ibn Ahmed — Sharh Al Siyar Al Kabir, Hyderabad, 1355 A.H., Vol. 1, pp. 57 — 9.

reign, were made prisoners by Muslims. The *imam*, or the commander, at his discretion may consider the prisoners of war as spoils of war and therefore condemn them to slavery. Thus, the prisoners become a common property of the body of the Muslim fighters. It is by distribution that a slave becomes the recipient's own property. The state is to respect this property and treat the slave as *mustamin* in the sense that reducing the prisoner to slavery is in itself some sort of safe-conduct. A slave cannot change his fate even if he joins Islam afterwards since his conversion does not cast off the right of his master to his ownership. None the less, Umar, based on a Qur'anic injunction, is reported to have maintained that a Muslim slave may claim the right to freedom if he offers to work and pay off his value, a right which the master cannot reject. Whether or not the Arabs are liable to slavery is a matter of controversy. Precedents during the lifetime of both the Prophet and Abu-Bakr warrant that Arabs could be subjected to slavery, while Umar contested this view. The Prophet enslaved the Arabs of Banul-Mustaliq in the Battle of the Maraisi, Hawazen and Banul Anbar. Abu Bakr also enslaved the Arabs of Banu Najiba.

It is noteworthy that Islamic classical institution of slavery is distinguished by two main characteristics, i.e. (I) the human treatment of the slave with view to raising his morale. A slave should be treated on the same footing with his master as regards food, clothing and dwelling, and (II) the wide possibility given to the slave to be emancipated. From this we may conclude that slavery in traditional Islam was originally meant to be an adequate medium of proselytizing non-Muslims rather than denigrating some individuals. As for civil inhabitants, the wives and children of combatants incur the same fate, that is to say they must become slaves. The rest of the population may face one of two possibilities, i.e. (i) slavery or (ii) treated as *dhimmis*.

The Islamic conquest put the Muslims in direct contact with people who were not people of the book and as a result, gave rise to the question of how to treat them. The first point at issue was relevant to the Magians, a fire worshipping people in Persia, then arose the case of the heathens of Harran and the pagan Berbers. To those the tolerated status of *dhimmis* was extended. We may conclude that all non-Arabs, who do not apostatize, are entitled to the Islamic *dhimma*. Actually, the *dhimmis* do not become citizens *stricto sensu* of the

Muslim state.(1) They constitute what we may call autonomous minority that govern itself under its authorized head who is responsible for it to the Muslim government. They are guaranteed certain rights and committed to particular duties. It is not easy to give an accurate account of the relation between the Islamic government and its *dhimmi* subjects. To sum up, in general terms, the *dhimmi* is guaranteed life, liberty and to a certain extent property. In return he has to pay a poll-tax, *jizyah*. Every male *dhimmi* is to pay the *jizyah* which ranged usually between ten to fifty piastres according to his financial situation. His land either becomes *Wakf* (public property) with his right to have the use, or he continues to hold it as his own. In both cases he pays a *kharaj* (land tax) on the land and its crops.

The classical theory, inevitably, reduces Muslim international law to an exclusive system since international law, if it is to have any claim to universal acceptance, must adopt the principle of mutual independence and legal equality among nations. If Muslim and modern international law failed to coalesce in that respect, then since Muslim civilization—under which Muslim international law had thrived—is now lagging behind, either Muslim international law will perish or else it will act as a barrier dividing Islamic from all other states: This conclusion, we believe, betrays one of the fundamental features of Islam, that is to say its universality and permanent validity. Furthermore, it is incompatible with the present intimate integration of Muslim countries in the modern community of nations as shown by their membership in the United Nations and its agencies. Such a paradoxical conjecture, undoubtedly, prompts a genuine and constructive effort to reconsider the classical interpretation of Muslim international law as regards its capacity to cope with international life as it is nowadays.

To assess the classical interpretation, with view to develop a conventional Islamic doctrine of international law, we have first to examine the Quranic and prophetic texts which classical writers forwarded in support of their theory. A preliminary step to this effect is to define accurately the meaning of the word *Jihad* as used in both the Quran and the *hadith*. The word *Jihad* literally and classi-

(1) Fattal, Antoine — *Le Statut Legal des non Musulmans en Pays D'Islam*, Beyrouth, 1958, p.p. 60 — 9.

cally signifies exertion, toil, painstaking, doing one's utmost or striving. It was only among jurists that the word began to acquire a narrower sense of hostility or waging war against infidels. In the course of time, this technical definition, it seems, overshadowed the classical one to the extent that some writers misrepresent the word *jihad* as synonymous to "holy war". This view is exaggerated since in some texts the word *jihad* is used in its literal sense and in some others it is used in its legal sense.

It is undebatable that in the Meccan texts the word *jihad* is to be construed in its classical meaning because Muslims, as of then, had not resorted to arms in defending themselves. Only in some Medinan texts the word may imply holy war. If we turn to the *hadith* and take, for instance, the Propnet's saying "The pilgrimage is the most excellent of all the jihads," we find that the word *jihad* is used in its wider sense. Thus, it is clear that the word *jihad* whether in the Quran or the *hadith* is not used exclusively in one sense. Moreover, the Quran, in referring to war, used also another word, i.e., *qital*. Hence, to develop a concrete doctrine of Muslim international law, it does not suffice to investigate only the verses containing the word "jihad". Even more important are those injunctions including the word *qital*, since the word explicitly signifies fighting.

Bearing the foregoing remarks in mind, it is not difficult for any fair commentator to observe that most of the verses quoted by Muslim legists, and their Western followers, in support of their theory are generally detached or dislocated from their context without paying due heed to the remainder of the context. Not only this, but sometimes they also did not comply with the basic rules of interpretation. It is a recognized principle that when two commandments seem to be contradictory, the interpreter should first try to reconcile their contentions. If he succeeds, the two commandments are to be held valid, each in its particular case. Another principle is that when two commandments have bearing on the same subject but one is in general terms and the other is conditional, the contention of the general commandment is to be limited by the conditions of the conditional commandment. A general review of the classical arguments will prove that comment.

We will start with the verse that reads "And do battle against them until there be no more *fitnah* (persecution)" (II : 193). This verse was revealed in the second year after the conclusion of the Hudaibiyah

Treaty when the Muslims were catering for pilgrimage but still doubtful about the intentions of the Meccans and whether the latter would allow them to perform their rituals. The Muslims were rather reluctant to measure swords with the Meccans in case the Meccans resort to force to prevent them. This attitude was due to the fact that fighting would be taking place within the sanctuary and during the sacred months. To this effect the divine permission was given. Thereby, the occasion of revelation clearly shows that the verse does not envisage the idea of an aggressive war. The very wording asserts that the word *fitnah* indicates that the Meccans, as then, were still attacking and torturing Muslims. If, therefore, Muslims repel the force of the aggressor, they are plainly on the defensive. This interpretation will apparently be more impressive if we read that verse in the context of the verses that preceded it, i.e., the verses 109—192. These verses read as follows : “Fight in the way of Allah against those who fight against you, but begin no hostilities. Lo! Allah loveth not aggressors.”

“And slay them whenever you find them, and drive them out of the places whence they drove you out, for persecution is worse than slaughter. And fight not with them at the Inviolable Place of Worship until they first attack you there, but if they attack you (there) then slay them. Such is the reward of disbelievers. But if they desist then Lo! Allah is Forgiving, Merciful.”

It is obvious that the right of the Muslims to fight the unbelievers could only be practiced “against those who fight against you,” and that they are forbidden to begin any hostilities (v.190). The verse 193 is connected with the verse 190 by the article “and” to specify the aim of fighting which is the suppression of the persecution, upon the achievement of which fighting should cease. It has nothing to do with the beginning of hostilities which is the subject of the verse 190.

The phrase “religion is for Allah ” is misinterpreted by some as meaning that all people should embrace Islam. This interpretation contradicts the remainder of the verse which runs as follows, “But if they desist let there be no hostility except against wrongdoers.” Desisting here refers to desisting from persecution. Therefore, the verse implies that fighting should come to an end provided that unbelievers stop imposing their creed by force on those who accept Islam.

Writers, in addition to what we have mentioned, rely on other verses which we will treat one by one. The verse II : 216 includes the above mentioned verses 190—193, and consequently undergoes the same logic in interpretation because the text goes on to mention the wrongdoings of the unbelievers and the attacks made by them on the Muslims. In this the verse 216 is nearly a repetition of the verse 191. Besides the term “war is prescribed” does not allow an aggressive war. This is a mere statement that the law of war has become a part of the Islamic institution of international law. In the same way we say now that the law of war is a part of modern international law but this does not necessarily imply that the term is confined to the war of aggression.

As for the verse IX : 5, it should be read in the context of the verses 1—13 if we are to understand it in its proper meaning. We quote the relevant verse, “Freedom from obligation (is proclaimed) from Allah and His messenger toward those of the idolaters with whom ye made a treaty.

“Travel freely in the law four months, and know that ye cannot escape Allah and that Allah will confound the disbelievers (in His guidance). And a proclamation from Allah and His messenger to all men is free from obligation to the idolaters, and (so is) His messenger. So, if ye repent, it will be better for you, if ye are averse, then know that ye cannot escape Allah. Give tidings (o Muhammad) of a painful doom to those who disbelieve.

“Excepting those of the idolaters with whom ye (Muhammad) have a treaty, and who have since abated nothing of your right nor have supported anyone against you. (As for these), fulfill their treaty to them till their term. Lo! Allah loveth those who keep their duty (unto Him).

“Then, when the sacred months have passed, slay the idolaters wherever you find them, and take them (captives) and besiege them, and prepare for them each ambush. But if they repent and establish worship and pay the poor-due, then leave their way free. Lo! Allah is Forgiving, Merciful.

“And if anyone of the idolaters seeketh thy protection (O Muhammad) then protect him so that he may hear the word of Allah, and afterward convey him to his place of safety. That is because they are folk who know not.

“How can there be a treaty with Allah and with His messenger for the idolaters save those with whom ye made a treaty at the Inviolable Place of Worship? So long as they are true to you, be true to them. Lo! Allah loveth those who keep their duty.

“How (can there be any treaty for the others) when, if they have the upper hand on you, they regard not pact nor honour in respect of you? They satisfy you with their mouths the while their hearts refuse. And most of them are wrongdoers.

“They have purchased with the revelation of Allah a little gain, so they debar (men) from His way. Lo! evil is that which they are wont to do.

“And they observe toward a believer neither pact nor honour. These are they who are transgressors.

“But if they repent and establish worship and pay the poor-due, then are they your brothers in religion. We detail our revelation for a people who have knowledge.

“And if they break their pledges after their treaty (hath been made with you) and assail your religion, then fight the heads of disbelief-Lo! they have no binding oaths-in order that they may desist.

“Will ye not fight a folk who broke their solemn pledges, and purposed to drive out the messenger and did attack you first? What: Fear ye them. Now Allah hath more right that ye should fear Him, if ye are believers.”

It is self-evident from the very first verse that the foregoing injunctions deal only with “those of the idolaters with whom ye made a treaty”. Idolaters could, accordingly, be classified into two categories: (1) Those who regard no pact nor honour in respect of the Muslims. In fact those verses were published at Medina when the Quraysh co-

mitted a breach to the treaty of Hdaybayah. The Meccans were thus given an ultimatum of four months to surrender in default of which they were to be attacked by the Muslims. Mecca capitulated by compromise and consequently the verses were not acted upon insofar as facultal war is concerned. (2) Those idolatrous tribes who were on friendly terms with the Muslims. The Muslims are not allowed to fight them and have to fulfill their treaty till their term.

Thereby the text of the verse IX : 5 is conditional by the stipulations of the other verses. Hence, this verse does not decree the absolute right of an aggressive war. Otherwise the verse will be inconsistent with the next verse which states that if any idolater seeks the Muslims' protection, they are to protect him. Undoubtedly, the idolater who needs a safe conduct is an enemy, that is to say a man who should be slain if we understand the verse as giving a general order to "slay the idolaters wherever ye find them."

Because of the persistence of the idolaters in ignoring their treaty obligations and their ferocity in torturing the Muslims, the injunctions insisted that they are to be subdued to "establish worship and pay poor-due" since this is the only alternative in this case to guarantee the safety and security of the Muslims.

The verse IX : 29 is quoted by some writers in a vague way. The verse in complete runs as follows : "Fight against such of those who have been given the scripture as believe not in Allah nor the Last Day and forbid not that which Allah hath forbidden by His messenger, and follow not the religion of truth until they pay the tribute readily, being brought low." The verse, as is clear from its phraseology, is not directed against all the Scriptuaries but only towards such of them who commit certain acts expressed in the verse. This verse is a prelude to the verses referring to the Tabuk expedition which the Muslims were to mobilize against the Byzantines. Thus, the incident of revelation asserts the conjecture we inferred from the text of the verse. This verse might be interpreted as meaning that fighting is to be enjoined against those who do not embrace Islam nor accept the prophecy of Mohammad.. This will be a misinterpretation because the verse still recognizes the definition of Scriptuaries for those against whom it commands fighting. Presumably, the verse refers to those of the Scri-

ptuaries who transgress and fear not God and the Last Day. This conception will be more established if we connect the verse with two others which shortly follow in the same chapter, i.e, the verses IX : 32 and 34. The two verses read respectively, "Fain would they put out the light of Allah with their mouths, but Allah disdainth (ought) save that He shall perfect His light, however much the disbelievers are averse." "O ye who believe Lo! Many of the (Jewish) rabbis and the (Christian) monks devour the wealth of mankind want only and debar (men) from the way of Allah."

As for the verse IX : 41, "March ye forth, the light and the heavy..." it is an exhortation for the Muslims to join the Prophet on the expedition of Tabuk which was a defensive measure from the Islamic point of view. This concept could be proved if we interpret the verse in the context of the verses 28—42 which denigrate the Arabs who failed to join the expedition and urge them to "go forth, light-armed and heavy -armed." The general principle which we may deduce from these verses in general and the verses IX : 29 in particular is that every able Muslim should not refrain from responding to the order of the *imam* to join the army when general mobilization is declared.

The verse IX : 36, which is held by some as the verse of the sword, is forewarded in this respect, "Attack those who join gods with God in all..." If we accept the classical argument the verse will signify that every Muslim with no exception is to wage war on every idolater with no exception. This interpretation does not go in line with the principle edicted by the following verse, "And the believers should not all go out to fight. Of every troop of them, a party only should go forth..." In fact the verse should be conceived as a whole. To induce the Muslims to "wage war on all of the idolaters, " it justified the commandment by the fact that the idolaters, on their part, are waging war "on all of you." Therefore the Muslims are ordered to fight in self-defense. We believe that the proper interpretation of the word "all" here should be "one unity" or "one hand." In short, the verse impels the Muslims to forget disparity and be one hand in fighting the idolaters because precedents show that the idolaters, on their part, unify to do battle with the Muslims.

Now there are three other verses of the Quran that implicate a seemingly unconditional injunction for waging an aggressive war against the unbelievers namely, II : 244, IX : 73 and 123.

The verse II : 244 reads "Fight in the way of Allah and know that Allah is Hearer, Knower." This verse does not indicate aggression on the part of the Muslims since it merely exhorts them to be on their guard and when threatened to defend bravely their Faith. Most likely this verse goes back to the first months after the arrival of the Prophet at Medina and before the Battle of Badr. As then the general tendency of the Muslims was influenced by the Meccan teaching of strict non-violence. The word *qatula* does not necessarily mean aggressive fighting but plainly fighting.

The verse IX : 73 is as follows "O Prophet strive against the disbelievers and the hypocrites. Be harsh with them ... "The word *jahid* here cannot yield to "making war." It is to be noted that the injunction is related to the unbelievers and the hypocrites as well, and decrees one and the same decision towards both parties. The hypocrites were considered and treated as Muslims, and hence, Muhammad never fought them. The same interpretation must apply to the unbelievers as well. However, let us suppose that the word *jahid* has two different meanings, one in connection with the unbelievers i.e. making war; this even does not justify that the verse exhorts aggressive war. The verse that directly follows the verse in question emphasizes our inference. This verse explains the reasons why the Muslims are to embark on *jihad* against the unbelievers. It accuses the enemy of certain wrongful acts and, in retaliation, prescribes fighting-if we accept here *jihad* in the sense of fighting. We are again in front of the principle of defensive war.

The verse IX :123 states that "O ye who believe, fight those of the disbelievers who are near you, and let them find harshness in you, and know that Allah is with those who keep their duty (unto Him)." Obviously, the order is confined to "those of the disbelievers who are near to the Muslims. „This specification proves that the verse is of a procedural rather than a positive relevance. It deals with the Islamic tactics and shows that normally the best way to defeat the enemy is to begin with the nearer who is more threatening. It is therefore groundless to draw from this verse a positive rule about aggressive war. It would be in contradiction with the general tenor of the whole *surah* of "immunity" to push the text to that length.

If we turn to the *hadith*, the first *hadith* reads “The *jihad* will last up to the Day of Ressurrection.” We believe that this *hadith* is of no authority since its chain of relation to the Prophet includes a certain yazid ibn Abi Shaika who is a *majhul* (of an unknown biography).

The second *hadith* runs as follows, “I have been commanded to fight people until they confess that there is no god but Allah.” It is always to be recalled that an authentic *hadith* cannot go against the Quran. The *hadith* does not mean that the Prophet was commanded to wage war against people until they accepted Islam; it simply means, as a reference to the Quran shows, that he was commanded to cease fighting with people who were at war with Muslims if they with their own accord embraced Islam.

In fact, the idea that the *hadith* tolerates a war of aggression could hardly be consistent with the conditions in which the Prophet carried out his ministry. Throughout the prophetic office, Muhammad was ill-treated by the Meccans to the length that they made him an outlaw and forced him to seek safety in a distant city, Medina. Despite this emigration, Muhammad did not escape the offence and onslaught of the Meccans and thier allies. Even from within Medina he confronted the strong opposition of the Jews who were supported by the hypocrites. Being constantly in a precarious situation, Muhammad, by no means, could be taken as aggressor. Under the circumstances, his resorting to force on some occasions is to be generally construed in the terms of self-defense policy.

From the foregoing presentation we conclude that neither the Quran nor the *hadith* can amply support the theory of waging unprovoked war against the unbelievers.

In fact, earliest Muslim commentators of the first two centuries of the Islamic era, like ibn Umar, Amr ibn Dinar, ibn Shubrumah, Ata and Sufyan al Thawri, held that only those were to be fought against who attacked the Muslims.

Besides, it is one of the methods of the Quran to give practical examples and comment on each, in approval or dismay, to indicate its injunctions on the relevant incident. With respect to our view we

foreward the example of the Prophet Samuel when the Jews asked him to raise up a king to lead them in a war of emancipation from the oppression of the Palestenians (v.II : 247, 249—51). This shows that the type of war which the Quran tolerates is only the defensive war.

Since the twofold division of the world into *dar al Islam* and *dar al harb* is a corrolary to the theory of constant *Jihad* which has been discussed with the conclusion that the *Shari'ah* favours no aggression, the division is no more of dogmatic meaning. As a matter of fact, this division, under the Abbassids, corresponded to the factual relation between the Islamic State and non-Muslim states. Classical writers intended to give a legal justification to that situation.

From the practical point of view, this dual division proved to be short of answering the needs of the Islamic State, a fact that has been met by some legists by introducing a third division, namely *dar al-sulh* or *dar al-'Ahd*. This additional division did not bridge the gap completely because it does not cover all the non-Muslim states which are not in actual war with the Islamic state.

Another offshot of the principal of permanent *Jihad* is the theory according to which the duration of a treaty should not exceed a fixed period. This view has been proved groundless and of no legal support.

Towards a Conventional Interpretation :

From the preceding study we know that Muslim classical doctrine rather reflects the impact of socio-political circumstances on the understanding of jurists particularly under the Abbassids. A certain degree of affinity between the said doctrine and the Greco-Roman laws could not be denied in regard to the dual division of the world. The Roman division of the world into Romans and Barbarians may in some way be compared to the Islamic division into Muslims and non-Muslims considering that the rights acknowledged by Muslim classical doctrine for non-Muslims are far more humane than those recognized by the Romans to the Barbarians. However, a confusion should be removed. The alleged affinity exists between Islamic classical jurisprudence-not the *Shari'ah* — and Greco Roman laws.

In pursuance of said view we proceed to see how far the *Shari'ah* accepts the basic ideas of modern international law, namely the principle of legal equality between states and peace as the initial state of relations between the members of the family of nations.

In our view, Islam bases its international injunctions on a primary hypothesis, namely the existence of an international community consisting of separate political entities. Several verses in the Quran testify to this statement : "Had Allah willed He could have made you one community. But that He may try you by that which He hath given you (He hath made you as you are) so vie one with another in good works" "and if thy Lord had willed, He verily would have made mankind one nation, yet they cease not differing." "For had it not been for Allah's repelling men by means of others, cloisters, and churches and oratories and mosques, wherein the name of Allah is oft mentioned, would assuredly have been pulled down."

It is to be recalled in interpreting the foregoing verses that the terms "community" and "nation" are used in the jargon of the Quran to mean what we describe presently as "State." It might be argued that the oneness or division referred to in these verses relates to religion. But if we consider the close and indispensable relation between the religious and the political, we will come to the conclusion that the ideas expressed by the said verses apply to political aspects as well.

If Islam tolerates the division of the international community into different states, how far does it adopt the idea of legal equality and peaceful relations among states ? Islam promulgated the *magna carta* of religious freedom by the verse : "There is no compulsion in religion" (v. 11 : 256). The way the Islamic State should follow in fulfilling its missionary duty is defined in several verses among which we quote : "Call unto the way of the Lord with wisdom and fair exhortation and reason with them in the better way ..." (v. XVI : 125).

However, Muslim classical writers in asserting the God-given responsibility of the Muslims to govern and educate the unbelievers sustained a theory which, thirteen centuries later, Kipling survived under the motto "The white man's burden." They were not far from what modern international law has adopted under the system of Mandate and Trusteeship.

Thus, it is conspicuous that the idea of universalism in Islam originally means universalism of principles and not necessarily of sovereignty. In other words, universalism in Islam embarks, in the first place, on ideological not political lines.

Does this doctrinal conflict, as we witness nowadays, engender between the Islamic state on the one hand and the non-Islamic state on the other some sort of cold war dividing the world into two opposing camps ? Some may argue in favour of such inference : “O ye who believe. Take not for intimates other than your own folk, who would spare no pains to ruin you; they love to hamper you. Hatred is revealed by (the utterance of) their mouths, but that which their breasts hide is greater ...” (v. III : 118). The prohibition referred to here is not of general scope. It specifies only those who spare no pains to ruin the Muslims and love to hamper them. If non-Muslims do not reveal such hatred, Muslims are to establish with them bonds of friendship sanctioned by the verse : “Allah forbideth you not those who warred not against you on account of religion and drove you not from your homes, that ye should show them kindness and deal justly with them. Lo ! Allah loveth the just dealers” (v. LX : 8).

The policy of Islam towards Abyssinia, during the early centuries of the Islamic era, constitutes a precedent of significance in this respect. The Prophet is reported to have said, “Leave the Abyssinians in peace, so long as they do not take the offensive.” The Islamic state of Medina, it is to be recalled, was surrounded by unfriendly states. The only exception to this antagonist attitude was Abyssinia.

The Islamic conception of universalism could be compared with the same conception as conceived by the Charter of the United Nations, Article 2/6 which provides that “The Organization shall assume that states which are not members of the United Nations act in accordance with these Principles so far may be necessary for the maintenance of international peace and security.” The affinity between the Charter theory and the Islamic theory lies in the fact that both theories consider universalization of certain principles for the welfare and furtherance of humanity to be the proper concern of a particular entity.

Universalism as a peaceful doctrine is demonstrated in the way the Prophet invited foreign monarchs to accept Islam.

Islam, consequently, insists on trying to settle international disputes by peaceful means and only tolerates war for ideological ends whenever it is dictated by offensive necessities.

The Islamic injunction stresses the respectability of treaties and emphasizes the principle *pacta sunt servanda*. Any breach of a treaty is an unforgivable sin since it is also a renouncement of an obligation towards *Allah*. It might be argued that this attitude is inconsistent with the classical theory that tolerates unilateral repudiation of a treaty as a result of changed conditions. In fact this theory is rather an early expression of what we term today as the *Clausula rebus sic stantibus*.

We believe that the basis of the Islamic theory of equality is laid by the verse : "Say : O people of the Scripture come to an agreement between us and you ; that we shall worship none but Allah and that we shall ascribe no partner unto Him, and that none of us shall take others for lords beside Allah" (V.III : 64). This connotes that from the Islamic point of view, the acknowledgement of the unity of God is the preliminary prerequisite for establishing continual relations between Muslims and non-Muslims. In other words, a state under Muslim international law is not entitled to claim the right of legal equality unless it attains a certain degree of civilization, that is to say when its civilization is moulded with the idea of unity of God. This attitude may be compared to the Western theory which divides the world into civilized and uncivilized nations and recognizes the application of international law only to the civilized nations. The Western theory, in this respect, adopted the Christian civilization as a criterion while the Islamic theory, more tolerably, accepts only the unity of God. It is interesting that Ethiopia in 1936, a Christian country, according to the Italian Government, was not worthy of statehood in the family of nations because Ethiopia had not brought herself up to the level of civilization of the world.

However, if we adhere to the Malkite view, this division would be void since the Islamic state could exact *jizya* even from the pagans provided that they were not of Quraysh. In other words, pagan states could be admitted to the pale of Muslim international law. It is noteworthy that the Charter of the United Nations reflects a similar

idea. Under Article 4 the membership in the United Nations is open to peace-loving states “which accept the obligations contained in the present Charter ...” Thus, the adherence to certain principles is a necessary condition for endowing the qualification of member on a state according to the Charter.

As to the place of peace in Muslim international law, we have pointed out before that Islam considers peace as the normal state of international community. The verses imply that the division of the world is meant to be a cause for competition in good works, or if we use the words of the Charter of the United Nations “to practice tolerance and live together in peace with one another as good neighbours, and—to employ international machinery for the promotion of the economic and social advancement of all people..” “O Mankind Lo! We have created ye male and female, and have made you nations and tribes that ye may know one another. Lo! the noblest of you, in the sight of Allah, is the best in conduct ...” (V XLIX : 13).

Islam not only advocates peace but also condemns serious causes that may endanger peace. In line with this policy, Islam condemns domination. The incident of Pharaoh and his abusive treatment of the people of Israel is a telling example to show that Islam hates nations being dominated or oppressed by others. Islam favours economic development only when it is based upon the exploitation of a country's own resources and on equitable sharing with others of the bounties which God has provided for each people. This admonition is referred to in the following verse: “And strain not thine eyes toward that which we cause some wedded pairs, among them, to enjoy, the flower of the life of the world. that we may try them thereby ...” (V. XX : 131) In pursuance of the same idea, Islam prohibits stronger states to behave in arrogance towards the weaker. This principle is expressed by the verse : “O ye who believe let not a folk deride a folk who may be better than they (are)”. (Ç XLIX : 11). The obligatory character of Muslim international law is based on its divine origin. Hence, Islam combines the rule of law to that of morals in a balanced way that engenders a better juridical international society more able to cope with needs of the development of international law. “It is most hateful in the sight of Allah that ye say that which ye do not.” (V. LX 1 : 3).

With the notions of peace and war in mind, it is normal that the Islamic theory should enshrine the principle of neutrality as well.

In fact, the Arabs, even in pre-Islamic history, exercised the practice of neutrality and referred to it by the word *itizal*. "so, if they hold aloof from you, and wage not war against you and offer you peace, Allah alloweth you no way against them". (V. IC : 90).

In vouching for the admissibility of the notion of neutrality in the Islamic legal theory, we can cite two more verses. The first verse testifies to the possibility of an Islamic state being in a state of neutrality in a war among other Muslim states. The relevant verse reads : "and if two parties of believers fall to fighting, then make peace between them". The second verse runs as follows : "The alms are only for the poor and the needy, and those who collect them and those whose hearts are to be reconciled." (V. IX : 60) "Those whose hearts are to be reconciled" could be reconciled in time of war. Reconciliation in this case is nothing but convincing non-Muslims to take a neutral position in a war which Muslims undertake.

Epilogue :

In fact what we term today the orthodox Islamic theory of law could be said to have started with the second century A.H. This theory represents an idealization that never met with full practical expression, a fact which deprives the classical doctrine of much of its pragmatic value. Actually, the central problem facing a commentator on Islamic law is : what is the true meaning and right commands of the *Shariah*. God only knows best what He reveals. Thus, the task of Muslim jurists is to discover and understand the genuine injunctions of the Revelation. And so, when we commented on the classical doctrine we did not seek at all to accuse classical writers of being unscrupulous. We only intended to emphasize that their theory is, by no means, sacrosanct since it is speculative and inevitably influenced by environmental conditions.

We trust that our study which, to the best of our capacity is unprejudiced, will induce those who seek the truth to contribute to its more profound elucidation and substantiation. This will be of most

pragmatic utility to the world as one of the main sources of modern international law is the general principles of law as applied in civilized nations. The place of Islam among the great legal systems of the world is universally recognized by the fact it is presented by a judge in the International Court of Justice. It is laudible, before we terminate our presentation, to call for dedicating to the Islamic world a seat on the Security Council of the United Nations as well.

