

The Right to Asylum between Islamic Shari'ah and International Refugee Law

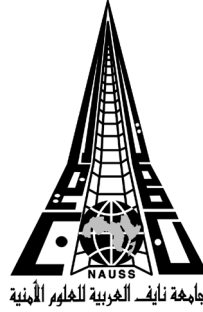
A Comparative Study



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Prof. Ahmed Abou-El-Wafa

Riyadh - 2009 (1430 H.)



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**In The Name of Allah The Most
Gracious, The Most Merciful**

“Those who believed and emigrated, and strove in the cause of GOD, as well as those who hosted them and gave them refuge, and supported them, these are the true believers. They have deserved forgiveness and a generous recompense.” (Quranic Surat al-Anfal, "The Spoils of War" [Chapter 8 verse 74])

“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”

(Universal Declaration of Human Rights. Article 14)

"Every man shall have the right, within the framework of the Shari'ah... if persecuted, is entitled to seek asylum in another country. The country of refugee shall be obliged to provide protection to the asylum seeker until his safety has been attained, unless asylum is motivated by committing an act regarded by the Shari'ah as a crime".

(Article 12 of the Declaration on Human Rights in Islam)

**United Nations High Commissioner for Refugees
(UNHCR)**

Regional Office in the Arab Republic of Egypt	Regional Office in the GCC Countries
E-mail: areca@unhcr.org	E-mail: sauri@unhcr.org
Arabic Website: www.unhcr.org.eg	English Website: www.unhcr.org

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Foreword

The United Nations High Commissioner for Refugees

The deeply rooted Arabic traditions and customs have, for a very long time, served as a solid foundation for protecting human beings and preserving their dignity. Notions such as “*istijara*” (plea for protection), “*ijara*” (granting protection), “*iwaa*” (sheltering) and others are variations on the concept of “protection” which is the heart of the mandate conferred on the United Nations High Commissioner for Refugees.

The Islamic Shari’a further consolidated the humanitarian principles of brotherhood, equality and tolerance among human beings. Relieving suffering and assisting, sheltering, and granting safety to the needy, even enemies, are an integral part of Islamic Shari’a, which preceded by many centuries current international human rights treaties and norms, including the right to asylum and the principle of non-refoulement, which are designed to preserve the refugee’s life and ensure his or her well-being.

The Islamic Shari’a addressed the issue of asylum explicitly and in detail, and guaranteed safety, dignity and care for the “*musta’men*” (asylum-seeker). Moreover, Islamic society followed specific procedures in responding to asylum requests. Hence, the return, or refoulement, of the “*musta’men*” was prohibited by virtue of Shari’a. Today, what is known as non-refoulement constitutes the cornerstone

of international refugee law and relies on this very same principle.

The custom of “aman” (safety) implies the protection of asylum-seekers, whether they are believers or non-believers. This is clearly stated in Surat “Al-Tawba” (repentance): “And if anyone of the Mushrikin (polytheists, idolaters, pagans, disbelievers in the Oneness of Allah) seeks your protection, then grant him protection so that he may hear the Word of Allah (the Qur’an), and then escort him to a place where he can be secure, that is because they are men who know not”.(Ayah (verse) 6) The “istijara” featured as an overall umbrella for the asylum seeker, his or her family and property, and was particularly associated with holy places, as Surat “Al Baqarah” states: “And when We made the House (the Ka’bah at Makkah) a place of resort for mankind and a place of safety. And take you (people) the Maqam (place) of Ibrahim (Abraham) [or the stone on which Ibrahim (Abraham) stood while he was building the Ka’bah] as and We commanded Ibrahim (Abraham) and Isma’il (Ishmael) that they should purify My house (the Ka’bah at Makkah)) for those who are circumambulating it, or staying (I’tikaf), or bowing or prostrating themselves (there in prayer)”.(Ayaha 125). Also, the holy Hadith states, “He who enters the holy mosque is safe, He who enters the house of Abu Sufyan is safe; he who drops his weapon is safe; he who stays behind his closed door is safe”.¹

As expressed by many scholars, the migration of Muslims to

1 Produced by Muslim in *fateh makkah chapter*, from *kitab al-jihad was-siyar, saheeh al-bukhari* 3.-1408 No. 1780, ibn Shaybah and *kitab al-maghazi*, verified by Dr. Abdul-Aziz al-'Omari, Riyadh, Dar Ishbilila, 1420 AH (1990 AD)

Abyssinia (Habasha) and the flight of the Prophet, (PBUH), to Medina, to avoid persecution and oppression by the people of Qureish, were acts of mercy. Yet these set an important precedent for the relationship between the asylum-seeker and the asylum provider, whereby the rights of the former are linked to the duties of the latter.

More than any other historical source, the Holy Qur'an along with the Sunnah and Hadith of the Prophet of Islam are a foundation of contemporary refugee law. Even though many of those values were a part of Arab tradition and culture even before Islam, this fact is not always acknowledged today, even in the Arab world. The international community should value this 14-century-old tradition of generosity and hospitality and recognize its contributions to modern law.

In this solid study the author provides a detailed explanation of Islamic Shari'a and Arab customs, including the standards and norms which underpin the legal framework on which the Office of the United Nations High Commissioner for Refugees bases its activities.

The author describes how Islam honoured refugees, even if they were non-Muslims, forbade forcing them to change their beliefs, did not compromise their rights, helped reunite families and guaranteed the protection of their lives and possessions. The author has also collected a number of Qoranic texts and ancient Arabic poetry, dated before and after the appearance of Islam, and provides a thorough explanation of these texts and sources. These are some of the enlightening truths the book unveils about the Arab and Islamic traditions, which consider someone who shelters a migrant a true believer, and which hold the right

to asylum as basic and sacred, guaranteeing it also to non-Muslims.

Today, the majority of refugees worldwide are Muslims. This fact occurs at a time when the level of extremism, ethnic and religious, is on the rise around the globe, even in the world's most developed societies. Racism, xenophobia and populist fear-mongering manipulate public opinion and confuse refugees with migrants and even terrorists. These attitudes have also contributed to misperceptions about Islam, and Muslim refugees have paid a heavy price. Let us be clear: refugees are not terrorists, they are first and foremost the victims of terrorism. This book reminds us of our duty to counter such attitudes.

This is also a valuable comparative study on the norms of Islamic Shari'a and international law regarding refugees and asylum, as well as migration and forced displacement. It is the outcome of the continuous and close cooperation between the United Nations High Commissioner for Refugees and Organization of the Islamic Conference.

Of course, what is more important is not theory or the status accorded to a person, but the actual protection provided to him or her, and that is a strong tradition and practice of member-States of the Organization of the Islamic Conference. The fruit of partnership between UNHCR and this Organization can be seen in the Declaration on Human Rights in Islam, adopted in 1990 by the Organization of the Islamic Conference, which stipulates that "every human being... if persecuted, has the right to seek asylum in another country; and the country of asylum shall ensure his protection until he/she has reached safety (aman)".

This book is a valuable reference and should be read by anyone working or interested in human rights, refugees and migration issues. It is also a timely study of the Arab and Islamic values which have served, directly and indirectly, as a reference for many international laws and conventions.

A genuine strategic partnership between UNHCR and the Islamic world is vitally important to the continuation of this 14-century old commitment to generosity, hospitality and non-discriminatory protection. These principles, along with a respect for basic human rights, are explored here in detail and shown to be the foundation for much of the international law that informs humanitarian work. We would do well to remember the Islamic principle that “before all the calamities of the world, all human beings are equal”.

António Guterres
The United Nations High Commissioner for Refugees

Foreword

Secretary-General of the Organisation of the Islamic Conference

Praise be to Allah, the Lord of the Two Worlds and prayers and peace to the gracious Messenger of Allah, his blessed kinsmen and good Companions.

I was gratified by this precious chance of giving a foreword to this major scientific work under the aegis of the United Nations High Commissioner for Refugees, the international humanitarian agency that provides good care and protection of refugees in many parts of the world. The UNHCR's work and endeavors are indeed appreciated and blessed and it pleases me to extend thanks to them for their attention to the question of refugees, given its humanitarian dimensions and the fact that a high percentage of the world's refugees are Muslims.

The commissioning by UNHCR of Dr. Ahmad Abul-Wafa to compile a study of the right to asylum in Islamic Shari'ah stands as a clear evidence to its objectivity and keen interest in its humanitarian mission. This is confirmed by the words of the United Nations High Commissioner for Refugees Mr. Antonio Guterres, "The Islamic Shari'a further consolidated the humanitarian principles of brotherhood, equality and tolerance among human beings. Relieving suffering and assisting, sheltering, and granting safety to the needy, even enemies, are an integral part of Islamic Shari'a, which preceded by many centuries current international human rights treaties and norms, including the right to asylum and the principle of non-

refoulement, which are designed to preserve the refugee's life and ensure his or her well-being and safety from persecution or murder.

The Islamic Shari'a addressed the issue of asylum explicitly and in detail, and guaranteed safety, dignity and care for the "musta'men" (asylum-seeker). Moreover, Islamic society followed specific procedures in responding to asylum requests. Hence, the return, or refoulement, of the "musta'men" was prohibited by virtue of Shari'a. Today, what is known as non-refoulement constitutes the cornerstone of international refugee law and relies on this very same principle".

He adds, "More than any other historical source, the Holy Qur'an along with the Sunnah and Hadith of the Prophet of Islam are a foundation of contemporary refugee law. Even though many of those values were a part of Arab tradition and culture even before Islam, this fact is not always acknowledged today, even in the Arab world. The international community should value this 14-century-old tradition of generosity and hospitality and recognize its contributions to modern law."

The topic of the right to asylum from an Islamic perspective was most elaborately examined by the researcher Prof. Dr. Ahmad Abou-El-Wafa, Professor and Chief of the Department of Public International Law, Faculty of Law, Cairo University. He provided an accurate definition of refugee, and asylum in both the international law and Islamic Shari'ah. He elaborated on the requirements for granting asylum and the principles governing the right to asylum, highlighting its humanitarian characters. He also explained in details

the types of asylum including religious, territorial and political asylum, in addition to the rights of refugees in both Islamic Shari'ah and the international law.

This research characteristically demonstrates the equitable and tolerant rules Islamic Shari'ah applies to refugees and how it is keenly concerned with their welfare and interests, while confirming human integrity and man's right to free decent life. In many parts of the study, the researcher has shown Islam's precedence in this field and the distinction of its prescribed rules and provisions. In this respect, he says, "The foregoing texts show how far Islam towers over many positive legal systems that adopted colour or race-based discrimination against people, as happened in the United States of America and elsewhere (for example in South Africa) in spite of the fact that neither their colour nor race is of their making. This is corroborated by the recognition by many Western thinkers of Islam's honourable attitude against racial discrimination. Some even argued that the prohibition in Islam of race or colour-based discrimination was one reason for its wide spread as well as a factor of regulating international relations between its followers and non-followers."

In this connection, the researcher gives tribute to and lists some resolutions adopted by the Organization of the Islamic Conference on human rights.

Characteristic of this study is that it closely reviews Shari'ah texts from the Holy Quran and Sunnah from which the principles and rules governing this subject originate. Additionally, it reviews the detailed

jurisprudential viewpoints of this subject and their various aspects. The researcher's interest was not only confined to the foregoing aspects, but it also covered related historical events. On the contemporary level, the researcher constantly cites and refers to the relevant resolutions and covenants issued by the OIC and other international organizations. This has imparted to this study both a theoretical distinction and a contemporary practical interest. Thus, it says at the beginning of its General Conclusion, "Islamic Shari'ah has laid applicable rules and acceptable grounds for exercising the right to asylum, in form and content, in letter and spirit and in words and deeds. Observance of this right as enshrined by Islam is a duty for every zealous Muslim."²

In his study, the researcher has shown honesty in documenting and attributing views to their originators. He objectively and independently exposed the standpoint of Islamic Shari'ah, giving attention to comparison, while attempting to contrive semblances or approximations between Shari'ah and international law. This gives this study a high scientific value among comparative informative studies on the rich contributions made by Islamic Shari'ah to the progress of humanity, particularly in the fields of international law in general and in refugee care and rights, in particular.

I pray Allah the Almighty for this study to be highly useful and for its author to successfully accomplish more achievements. Once again, I thank and congratulate the United Nations High Commissioner for Refugees and his Excellency the High Commissioner for this

2 See p. 166

achievement that enriches the course of comparative international legal studies.

My appreciation and respects to Prof. Dr. Ahmad Abou- El-Wafa, may Allah preserve him.

*Professor Ekmeleddin Ihsanoglu
Secretary-General of the Organisation of the Islamic
Conference*

Foreword

The President of

Naif Arab University for Security Sciences

What really characterize our noble Islamic Shari'ah are its comprehensive principles, provisions and approach to all aspects that provide security for man in his life in both this world and the world after. It serves as a shield to protect his rights in general, including the right to comprehensive security. Man's right to asylum is one of the most important basic rights guaranteed and effectively secured by Shari'ah. The protection by Islamic Shari'ah of this right is consistent with firmly established Arab culture, traditions and noble traits.

While the international community has sought to regulate the right to asylum through issuing and adopting several international declarations and conventions, for such regulation to be effective, moral commitment on the part of implementing parties is required. Hence, arises the importance of the regulation endorsed by Islamic Shari'ah for the right to asylum addressed by this study. Characteristic of this regulation is the expanded scope and humanitarian nature of protection for this right.

The theme of this study gains importance in the light of the increase, in recent years, in the numbers of refugees in Arab and Islamic countries, as a result of international and regional events taking place in the region. This requires international cooperation and activation of Shari'ah and legal provisions related to the right to asylum.

On this occasion , it pleases me to underscore the bilateral relations between Nayef Arab University of Security Science and UNHCR. These relations can lead to more programs and studies that can help further highlight this subject and the role of the civilized world in addressing asylum and refugee issues.

Allah is the Sustainer for success.

Prof. Dr. Abdul-Aziz S. al-Ghamdi
The President of Naif Arab University for Security Sciences

Foreword

Rector of al-Azhar University

In the name of Allah, the Most Compassionate and Most Merciful Probably Islam is the only religion that had been open to other religions as well as to their moral and legislative cultures and treasures. In so doing, Islam takes from them and adds to its own intellectual and spiritual stock. In this process, Islam makes only and exclusively one condition, i.e. that any element taken from here or there should be compatible with sublime morals and virtues and instrumental to an established interest that ultimately converges with these virtues. Suffice, in this respect to quote this honorable hadith by Prophet Mohammad (May Allah's Peace, Mercy and Blessing be upon him) (PBUH), as reported by Abu-Horayrah (May Allah be pleased with him), saying, “ Indeed, I was sent (with a Divine Message) to consummate noble manners.”³ This means that noble manners are a supreme target for the Islamic Message and the prime human virtues that had been virtually obliterated and effaced in pre-Islamic communities, were revived in this upright religion. Moreover, with this religion, there were revived Divine legacies that could have been wiped out had it not been for the emergence of Islam.

A pensive reader of the Holy Quran would find no religious

³ *Al-Hakim* , Abu Abdullah Mohammad ibn Abdullah: *al-mustadrak 'ala as-saheehayn* , described as correct but not produced by either ; agreed by az-Zahabi in *at-talkhees*, No. 4221, Vol. 2, p. 67; reported by al-Bukhjari in *al-adab al-mufrad* and al-Bayhaqi in *sho'ab al-iman*, No. 20571, described as correct by as-Soyouti in *al-jamie' as-sagheer* No. 2584 p.155.

plurality or diversity of Divine Messages as it definitely and explicitly stresses the oneness of Heavenly Religion that manifested itself in successive historical appearances and messages starting with Adam and ending with Mohammad through Noah, Abraham, Moses, Jesus and other Prophets and Messengers (Prayers and peace may be on them). It also indicates that Heavenly Guidance to man has never ceased throughout history and the wisdom involved in the Messages of Prophets and Messengers and their radiations had served as the ever-lighting and unfading torch that guided humanity whenever it lost its way or its prospected looked dim.

Thus the Message of Islam has formed, together with preceding Heavenly messages an “organic unity” that manifested itself in the intimate fraternity that closely bound the Messenger of Islam Mohammad (PBUH) with the preceding Messengers of God, without any discrimination or distinction. From among his prophetic wisdom, we cite his saying, as reported by Abu-Horayrah (May Allah be pleased with him) : “Of all people I am the most entitled to care for Jesus son of Mariam (Mary) in both this world and the world after, as Prophets are stepbrothers; they have different mothers but one religion.”⁴ Many verses of the Holy Qur’an stipulate that a Muslim cannot achieve true faith unless he believes in all Prophets and Messengers as equally as he believes in the Prophet of Islam. Likewise, belief in the Holy

4 Al-Bukhari, Abu-Abdullah Mohammad ibn Ismail: *saheeh al-bukhari*, verified and numbered by Mustafa Deeb al-Bogha, Damascus, Dar Katheer wal-Yamamah, 5th ed. 1414 AH (1993 AD). Stepbrothers descend from one father and several mothers. .

Qur'an cannot settle into the heart of a Muslim unless he has believed in all the Book of Allah revealed to His Prophets and Messengers. The Holy Qur'an is brother to the Torah that was revealed to Moses as well as brother to the Bible that was revealed to Jesus (Prayers and peace may be on them both). The Holy Qur'an describes both Books as guidance and light. What matters for the reader in this humble preface is to know that such organic unity is not confined to brotherhood in prophets and Holy Books, but it manifests itself with great clarity in the content, legislation and rulings of Islam itself. This is clear in the words of Allah in the Holy Qur'an: "The same religion has He established for you as that which He enjoined on Noah - that which We have sent by inspiration to thee - and that which We enjoined on Abraham, Moses, and Jesus: namely, that ye should remain steadfast in Religion, and make no divisions therein: to those who worship other things than Allah, hard is the (way) to which thou callest them. Allah chooses to Himself those whom He pleases, and guides to Himself those who turn (to Him). (Surat ash-Shura, 13).

This is also reflected in the fundamental rule established by the saying of the Prophet (PBUP), as reported by Abu-Horayrah (May Allah be pleased with him) " Are you asking about the metttles of Arabs? The best of them in the Jahihian (pre-Islamic) era are the best in Islam, should they only understand well."⁵: "The law of our predecessors is ours, unless superseded."⁶ This rule shows that Islam

5 Al-Bukari, saheeh al-bukhari, op.cit No. 3175, Vol. 3, p. 1224; Muslim: *saheeh muslim, kitab alfadha'il*.

6 This means that the law of our predecessors has been verified through our own

is the religion that guarantees the continuity of moral virtues across generations and opens its doors to everything human, even if derived from ages of darkness and ignorance. Asked about the mettle of Arabs, Prophet Mohammad (PBUH) replied, “The best of them in the Jahilian (pre-Islamic) era are the best in Islam, if they know well.”⁷

Hence emerges the value of “jiwar” or protection. Indeed, this excellent research provides a comparative study of this valuable concept between Islamic Shari’ah and instruments of contemporary international law. The study reveals the richness of the jiwar concept as well as the moral and ethical dimensions that are enshrined in Islamic Shari’ah but now extinct or hardly visible in international law instruments. The research reveals that Islam was a forerunner in establishing the right to jiwar (asylum). Nevertheless, I believe that the exposition of the precedence of Islam in this domain is not sufficient to demonstrate the moral and ethical dimension that constitutes the firmly established background for the legislation of human rights in the philosophy of Islam.

This research refers on many occasions to the methodological origination of this concept, to which we have partly referred above. The author has identified compatibilities and incompatibilities between the wisdom of Islam and contemporary international law on the right

sources; the Holy Quran and Sunnah. Other rules, reported by other sources, Muslim or non-Muslim, may not be taken as grounds for reasoning or rule-setting.. Al-abdus-Salam; Anwar Shu’aib: *shar’ man qablana : mahiyyatuhu, hujjuyyatuhu wa naash’atuhu wa dhawawbituhu wa tatbeeqatuhu* , 1st ed. University of Kuwait, 2005, p.383

7 See:full text in *fat-h ul-bari*, 6\ 471, 1st ed., 1419 AH (1998 AD)

to asylum. As the author indicates, the concept of “asylum” or “ijarah” offered a basis for contemporary law and was even observed by Arabs before Islam. This principle was endorsed by Islamic Shari’ah, because it was one of the established good practices in their traditions and customs, involving noble manners and ethical values such as rescue of people in distress and protection of the oppressed. Therefore, Islam calls for this practice and enjoins Muslims, men, women and children, freemen and slaves, at any time and any place to exercise it. We know that since history tells us that, before he embraced Islam, Abu-Sufian had asked Fatimah, daughter of Prophet Mohammad (PBUH), to order her son al-Husayn, then only a toddler, to grant him asylum or ijarah amidst people in al-Madinah. Abu-Sufian’s request was turned down because he had breached a covenant concluded by Prophet Mohammad (PBUH) with disbelievers at al-Hodaybiyya peace.⁹

On reading this research, a Muslim must feel proud at the reference by the author to the fact that Islam seeks every possible means to provide the right to asylum (*aman*) for any non-Muslim. Here we find that Prophet Mohammad (PBUH) granted asylum to

8 Jurists are unanimous on the fact that a non-discriminating child (minor) has no right to give *aman*. According to Ibn Qodamah, “ Anyone of us, a man, woman or slave may give *aman* . So any adult, rational and discriminating Muslim, be he male or female, freeman or slave may give *aman*. However, an *aman* given by a minor shall not be valid. (Ibn-Qodamah *al-mughni* , Vol.31, p. 57). Refer to al-fatawa al-hindiyyah, Vol.2, p.155; mughn- al-hujjaj, Vol.4, p.237; kashshaf al-qina’, Vol.3, p.104; mawahib al-jaleel, Vol.3, p.331; Az-Zayd, Saleh Abdul-Kareem: ahkam ‘aqd al-aman wal-musta’mineen fil-islam , a published M.A. thesis , Riyadh, Ad-Dar al-Wataniyya Publishing House, 1406 AH, p.55.

9 Ibn Salam , Abu-Obayd al-Qasim : kitab al-amwal, verified by Sayyid Rajab, Saudi Arabia, Dar al-Fadheelah, 1428 AH (2007 AD, Vol. 1, p 295

disbelievers merely on account of taking refuge with the Haram (Sacred) Mosque or simply keeping to their homes or entering Abu-Sufian's house. This provision holds for all cases, and circumstances, where these conditions are satisfied. The author cites a statement by Caliph Omar ibn Al-Khattab that the word 'mitras' in Persian means safety and if a Muslim says it to a non-Muslim enemy fighter who does not speak Arabic, he will thus grant him security. This is an area of Islamic jurisprudence, where we read that a fighter (non-Muslim) under a covenant of protection shall not be assaulted or killed and his property shall be secure. If a Muslim tells a non-Muslim fighter to stop to lay down his arms, he will have thus re-assured him of his safety. In this respect Ibn Qodamah says, "Caliph 'Umar ibn al-Khattab said to Hormozan, 'Speak, don't be afraid.' When Hormozan spoke, 'Umar ordered him to be killed, but Anas ibn Malik intervened in favor of Hormozan saying to 'Umar, 'You can't; you've reassured him saying speak, you have no fear.' Thereupon, 'Umar spared Hormozan's life. On all this, we know of any disagreement."¹⁰ It will take us long to review the relevant comparisons of the concept of asylum in Islam, which are so many in this serious scientific research. Suffice to stress the articulate presentation and in depth comparisons mentioned in this book. The author Prof. Dr. Ahmed Abou-el-Wafa was quite successful in these sound scientific insights, particularly his attribution of the right to asylum in Islam to the "interest" theory. He has shown full awareness of the imperatives and areas of application of this theory as well as insight into fundamental rules of jurisprudence.

10 Ibn Qodamah: *al-mughni*, Vol.31, p.291, Hajar ed..

This enabled him to make the elaborate statements and expositions contained in this excellent research that gives the reader a strong impression that Islamic Shari'ah is not merely texts to be cited, or provisions memorized but a mobile life methodology.

In conclusion, I would like to cite the same concluding remarks with which the author wound up his research, i.e. the statement by Imam ibn an-Nabulsi the Hanfite:” To force someone to reside in a specific place and obligate him by coercion and compulsion to stick to it is indeed an unjust act and a violation. These acts should not be inflicted on Muslims. It is a mandatory duty on Muslims to prevent, deter and restrain perpetrators of this unjust act.”

***Prof. Dr. Ahmad At-Tayyib,
Rector of al-Azhar University - Cairo,***

Acknowledgments

To my dear departed mother,

To my dear departed father,

From me with loyalty, gratitude and in memoria

Ahmed Abou-El-Wafa

General Introduction

A. Preliminary Remarks

Islam is concerned not only with religious but also with worldly (day-to-day life) matters related to relations between individuals, groups, peoples and states¹¹. No wonder, Islam was revealed to shed light on every thing: religious as well as worldly. This is confirmed by the words of Allah Almighty in the Holy Qur'an:

“... and we have sent down to thee the Book explaining all things, a Guide, a Mercy, and glad tidings to Muslims.”(Surat an-Nahl, 89);

“... and we have sent down unto Thee (also) the Message; that thou mayest explain clearly to men what is sent for them.” (Surat an-Nahl, 44)

“This day I perfected your religion for you, completed My favour upon you and have chosen for you Islam as your religion.” (Surat Al-Ma'idah, 4)

A refugee is considered a vulnerable person¹². A person may be refugee:

on an individual basis, if, alone or in company with his family, he flees from a country, where he is subject to persecution to a country of asylum; or

11 Dr. Ahmed Abou El-Wafa: *kitab al-"ilam bi qawa'wid al-qanoon ad-dawli wal-"ilaaqat ad-dawliyya fi shari'ah al-islam*, Dar an-Nahdha al-"Arabiyya, Cairo, 2007 (1428 AH), Vol. 1, pp.5-6.

12 Dr. Ahmed Abou El-Wafa: *al-himayah ad-dawliyya li-hoqooq al-insan*, Dar an-Nahdha al-"Arabiyya, Cairo, 2008 (1428 AH), 3rd ed., pp.53-62.

as part of mass exodus as a result of political, religious or military conditions, where he may be subject to persecution.

A refugee is different from an internally displaced person or an economic migrant as follows:

A refugee is a person who crosses international borders to another country in search of protection, security and asylum.

An internally displaced person may have the same objective as a refugee, but he differs from the latter in that he stays within the territory of his state and avails himself of its protection and is consequently subject to the laws of that state.¹³

An economic migrant leaves his country, usually on a voluntary basis and without fear of persecution, but with a view to improving

13 «It is worthy of note that a person may be a refugee *sur place (in situ)* such as diplomats, official functionaries, prisoners of war, students and immigrant workers : as those persons, who are outside their country of origin originally with no intention of seeking asylum, but rather as a result of subsequent circumstances, have also well-founded fear of being persecuted (on grounds of race, religion, nationality, membership of a particular social group or political opinion), or owing to dissatisfaction with occurrences taking place in their home country or their contacts with politicians resident abroad or with members of the opposition to the regime etc.) Such persons may be considered as refugees, if they qualify for recognition as such.

It is understood that a person may be considered as a refugee, if he or she himself is in such circumstances. Consequently, the recognition by the state of asylum of that person as a refugee, has a declaratory rather than a constitutive effect (what a large difference between both!), given that asylum is a *de facto* state that takes place whenever it satisfies its conditions and elements, without being contingent on extraneous elements.

Therefore a person "does not become a refugee because of recognition, but is recognized because he is refugee" Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, UNHCR, Geneva, 1992, p. 9.

his conditions and seeking a physically better life. Therefore, the Arab Declaration on International Labour Migration adopted by the League of Arab States in 2006 calls on concerned governments to recognize “the essential difference between immigrants and refugees who have different and distinct rights and needs.”

B. The concept of refugee and asylum in Islamic Shari’ah and international law:

In this section, we will address the concept of refugee and asylum in Islamic Shari’ah and then in international law.

i. In Islamic Shari'ah:

There are many Arabic synonyms for the word ‘malja’ (refuge), equivalent of the following: stronghold, asylum, home, habitat, etc., such as : hisn; malaz; mau’il, ma’az; wazar; kahf; maqsid; mu’tamad; mu’tadhad; hirz; mu’tasam; manja; mahees,ma’al and kanaf. ¹⁴

There are also many Arabic synonyms for the word “istajarah” (seeking refuge), including istasrakha; istanjada; istashara; istajasha; lahafa ilayi; istazhhar bihi and istawhasa bihi).

The word “isti’azha” (to seek protection) also has many synonyms including iltaja’a; i’tasama; tahassna; and as well as. The Holy Quran says, “When thou dost read the Qur’an, seek Allah’s protection from Satan the rejected one.” (Surat An-Nahl, 98).

14 Ibn Malik at-Ta’ie: kitab al-alfazh al-mukhtalifah fil al-ma’ani al-mu’talifah, verified by Dr. Njat Nooli , Ummul-Qura University . Makkah, 1411 AH (1991 AD), pp.34-35.

The Arabic word *malja'* (refuge) has many meanings including
As a verb: to take refuge in a safe place such as fortress to ward off
danger;

As a noun: a place of refuge such as a fortress, mountain or cave as
mentioned in the Holy Quran:”If they could find a place to
flee to, or caves, or a place of concealment, they would turn
straightaway thereto, with an obstinate rush. (Surat at-Taubah,
57). The word also occurs in Surat at-Taubah, 118 and Surat
ash-Shura, 47.¹⁵

The verb “*awa*” can also mean to have mercy on and give shelter
or refuge to someone.¹⁶

Undoubtedly, all these meanings are applicable to the right to
asylum, because, while, on its face, the right to asylum appears as a
kind of shelter, it is, in essence and purpose, a touch of mercy to the
refugee under the circumstances enveloping him/her.

The right to refuge or protection is a genuine and non-derogable
Arab practice. Offering protection to people in distress has been an
innate peculiarity of Arabs and Muslims. Therefore, this virtue was
glorified by poets in their works in order to insemminate it into the hearts
and minds of people and urge them to be always committed to it.

15 Refer to Arabic Language Academy: *mu'jam alfazh al-quran al-kareem*. Vol.2.
The Egyptian General Book Organization , Cairo, 1390 AH (1970 AH) , pp.564-
565.

16 Ibn Qutaybah: *adab al-katib*, verified by Mohammad Muhiyeddin
abdel-Hameed, Dar al-Fikr, a photocopy of the 4th edition by =
= al-Maktaba at-Tigariyya al-Kobra Bookshop, Cairo, - 1382-1962 , p. 752.

In this connection, poet Hameed ibn Thawr al-Hilali¹⁷ says,

متى أَدع قومي يجب دعوتي فوارس هيجاء كرام النسب
تري جارهم آمناً وسطهم يروح بعقد وثيق السبب
إذا ما عقدنا له ذمة شددنا العناج وعقد الكرب»

Whenever I call my folk for help,

Highborn knights of war would respond to my call.

You can see their protégé safe and sound amongst them,

Living under a closely knit contract.

If we give him a covenant (of protection),

We hold fast to it.

Another poet says¹⁸

وجار سار معتمداً إلينا أجارته المخافة والرجاء
فجاور مكرماً حتى إذا ما دعاه الصيف وأنصرف الشتاء
ضمنا ما له فغداً سليماً علينا نقصه وله النماء
فلم أر معشر أسروا هدياً ولم أر جار بيت يستباء
وجار البيت والرجل المنادي أمام الحي عهدهما سواء

A refugee came to us seeking protection out of fear

and hope and we offered him our protection.

He lived under protection in dignity

All through summer up to the end of winter

Although he lavished his money on us, it remained intact.

17 Hameed ibn Thawr al-Hilali : *diwan hameed ibn thawr* (Collection of Poems), edited by Abdul-Azeez al-Maymani, Darul-Kutob al-Misriyyah Printing Press, Cairo, 1951 AD(1371 AH), P. 46.

18 Abul-Abbas Thālab: *sharh diwan zuhair ibn abi-salma*, National Printing and Publishing House, Cairo, 1964 AD (1384 AH), PP. 79- 80.

*Whatever we consumed of his money
Turned into growth in his favor.
Never have I seen a folk put into captivity
A respectable man (gentleman) and never have I
Seen a protégé of a household asked to leave.
Both the protégé of a household and
The protector before the community are equal.*

The granting of asylum and response to a request for it also figured out in the works of the protection-seeking poets (al-Mustajereen)¹⁹.

19 Tofayl ibn al-Ghanawi, one of them says,

جزى الله عنا جعفرأ حين أزلفت بنا نعلنا في الواطين فزلت
هم خلطونا بالنفوس وأجأوا إلى حجرات أدفأت وأكنت
أبوا أن يملونا ولو أن أمنا تلاقى الذي لا قوة منا مللت
وقالوا هلموا الدار حتى تبينوا وتنجلي العمياء عما تجلت
سنجزى بإحسان الأيادي التي مضت لها عندنا ما كبرت وأهلت

(May Allah reward the Ja'afars for the favour they gave us,
When our feet drove us into their way,
They let us mix with their people,
and sheltered us in warm and cozy rooms.
They were never impatient with us,
and were so caring that even our mother could have never tolerated us as they did.
They welcomed us into their house so as to see how it is.
We will reward the helping hands stretched to us.
And we greet them by praising Allah the Greatest.

See: *diwan tofayl ibn al-ghanawi*, al-Kitab al-Gadeed House, Cairo, 1968, P. 98.

Marwan ibn abi-Hafsah says, eulogizing M'an ibn- Za'idah and praising the good manners of the bani-Shaiban and their protection of the people who sought refuge with them,

هم القوم إن قالوا أصابوا وإن دعوا أجابوا، وإن أعطوا أطابوا وأجزلوا
هم يمنعون الجار حتى كأنما لجارهم بين السماكين منزل

They are the folk who, when speaking, say the right words,
when giving, give the best and most generously.
They grant protection to its seeker,
as if their protégé is given status among the planets.

See: Ibn abdu-Rabbah: *al-'iqd al-fareed*, al-Kotob al-'Ilmiyyah House, Beirut, 1983
AD (1404 AH). Vol. 1 pp. 121-122.

On the other hand, those who failed to grant protection to seekers were bitterly lampooned by poets,²⁰ apart from being looked down upon with disapproval and indignation.

It is well-established that granting asylum aims to provide safety and security to a refugee. This is evident from the second al-Aqaba pledge of allegiance (bay'ah) that preceded Prophet Mohammad's Hijra (migration) to al-Madinah. When the people of Yathrib (al-Madinah's name before Hijrah) accepted Hijrah to them by the Messenger of Allah (PBUH), he said, "I will give a pledge of protection, provided you protect and defend me as much as you do your wives and children."²¹

Arabs, and later Muslims, have been pioneers in this respect. 'Abdul-Malak ibn Marwan (a Muslim ruler) was reported to have asked Jo'ayl ibn 'Alqamah, "How far do you offer protection to others?" Anyone of us would defend and protect any other person who is not one of his kinsfolk as strongly as he does himself," the man replied. "So rightly have you described your folk," said ' Abdul-Malak.²²

In view of the richness of the Arabic language, the medium of

20 Dr. Mohammad as-Sidaisi: *ijabat ad-da'ie wa ghawth al-mustanjid 'ind al-arab hasab tasweeriha fi al-shi'r arabi al-qadeem*, Imam Mohammad ibn Saud Islamic University Journal, Issue 6, 1413 AH (1992 AD), pp.441-446.

21 Produced by Ahmad in his musnad reporting Ka'b ibn Malik, No. 15798, Vol. 25, pp 92-95, verified by Shu'aib al-Arnaout et al, Muassasat ar-Risalah , 2nd ed., 1420 AH (1999 AD) . Described by verifiers as a strong and well-reported hadith.

22 See: Ibn abdu-Rabboh: *al-'Iqd al-fareed*, al-Kotob al-'Ilmiyyah House, Beirut, 1983 AD (14/04 AH). Vol. 1 pp. 441-446..

Qur'an, a variety of words are used to express one concept and one system: "the right to asylum". Sometimes the word "iwa"²³ (shelter) is used, as shown in the following verses of the Holy Qur'an:

"Call to mind When ye were a small (band), despised through the land, and afraid that men might despoil and kidnap you; but He provided a safe asylum for you.." (Surat al-Anfal , 2)

"Those who gave (them) asylum and aid,- these are (all) friends and protectors, one of another." Surat al-Anfal, 72)

"Those who give (them) asylum and aid,- these are (all) in very truth the believers: for them is the forgiveness of sins and a provision Most generous." (Surat al-Anfal, 74)

"Did He not find Thee an orphan and give Thee shelter (and care)?" (Surat Ad-Dhoha, 6)

Sometimes, the word "hijrah' (immigration) is used to refer to the right of refuge, as in the following:

"But those who before them, had homes (in Medina) and had adopted the Faith, Show their affection to such As came to them for

23 The Arabic word *iwa'* (to shelter) is used both as transitive and intransitive verb. Linguists often combine sheltering with hosting a guest. Related to this meaning is the word " *hajar'* (immigrate). Scholars divide immigration into two categories: flight –driven migration and quest-driven migration. The former is sub-divided into several sub-categories: migration from a non-Muslim to a Muslim land; exit from a land where infractions or abominations prevail; flight from potential illness or disease in infested land, etc.. The latter is divided into migration in quest of worldly benefits and that for the cause of religion, such as for performing *hadj* (pilgrimage) or 'umrah (lesser pilgrimage), trading, wage earning, seeking knowledge or visiting friends and relatives.

refuge, and entertain no desire In their hearts for things given to the (latter), but give them preference over themselves, Even though poverty was their (own lot). And those saved from the covetousness of their own souls, they are the ones that achieve prosperity.” (Surat al-Hashr, 9)

The word “refuge (malja’) is also used to connote the same concept, in many contexts, including the following Ayahs:

“ They swear by Allah that they are indeed of you; but they are not of you; yet they are afraid (to appear in their true colours). “ If they could find a place to flee to, or caves, or a place of concealment, they would turn straightaway thereto, with an obstinate rush.” (Surat at-Taubah, 56- 57)

“ (He Turned In Mercy also) to the three who were left behind; (They felt guilty) to such a degree that the earth seemed constrained to them, for all its spaciousness, and their (very) souls seemed straitened to them,- and They perceived that there is no fleeing from Allah (and no refuge) but to himself. Then He turned to them, that they might repent: for Allah is Oft-Returning, Most Merciful. “. (Surat at-Taubah, 118)

“ That Day there will be for you no place of refuge nor will there be for you any room for denial (of your sins).” (Surat ash-Shura , 47).

The word “azhimma” means to provide refuge and to protect, while “zhamma” means dispraise.²⁴

²⁴ Undoubtedly, all these meanings are applicable to the right to asylum, because, while, on its face, the right to asylum appears as a kind of shelter, it is, in essence and purpose, a touch of mercy to the refugee under the circumstances enveloping him/her.

ii. In International Law:

A refugee is a person, who, “... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”²⁵

This definition provided for in the 1951 Convention was further extended as follows²⁶:

The Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969²⁷ added to the 1951 Convention’s definition the following:

“The term “refugee” shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his

25 Article 1 (A-2) of the 1951 Convention relating to the Status of Refugees, as amended by the 1967 Protocol. United Nations General Assembly Resolution 50/152 (1995) states that the 1951 Convention and 1967 Protocol are the cornerstone of the international refugee protection regime.

26 See in the same context: Article 1 of the Arab Convention on Regulating Status of Refugees in Arab Countries, 1994 in»Collection of International Instruments and Legal Texts Concerning Refugees And Others of Concern to the UNHCR, UNHCR, Geneva, June 2007, Vol. 3, p. 1130.“

27 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted on September 10, 1969 and entered into force on June 20, 1974.

country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.” Accordingly, a person shall be considered a refugee if he/she finds him/herself in the above mentioned circumstances, even if he/she has no individual fear of persecution. This Convention is based on the principle under which the need for international protection is invoked because of the absence of national protection, in a situation where the state of origin is either unwilling or unable to provide necessary protection for its citizens, which usually happens during civil wars or military occupation.

The Cartagena Declaration on Refugees, 1984, added to the 1951 Convention’s definition the following: “ Hence the definition or concept of a refugee to be recommended for use in the region is one which, ... includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.” Although the Declaration is not a binding instrument or an international treaty and is consequently not subject to the ‘ Pacta sunt servanda’ or ‘Ex consensus advenit vinculum’ principles, yet it has been actually applied in the practices and national legislation by some Central American countries.

Moreover, Article 14 of the Universal Declaration of Human Rights, (1948) provides that “1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.²⁸

Moreover, the right to asylum means “the protection granted by a state on its own territory or other places under its jurisdiction to an individual who seeks such protection.”²⁹

This means that the right to asylum comprises several components:

The admission of the person into a certain territory, presupposing that such person has sought asylum (meaning in legal terminology “offer”) on the one hand, and approval by the state concerned (acceptance) on the other.

The given person is allowed to stay on that territory, thus leading to two outcomes: first that such person shall not be refouled and second

28 Article 1 of the Declaration on Territorial Asylum adopted by the United Nations General Assembly Res. 2312 (1967) stipulates, »1. Asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke article 14 of the Universal Declaration of Human Rights, including persons struggling against colonialism, shall be respected by all other States. 2. The right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes. 3. It shall rest with the State granting asylum to evaluate the grounds for the grant of asylum.”

29 See: Ann. IDI, 1950, Vol. 43, t. I, p. 157.

See also: P. Weiss: The present state of international law of territorial asylum, Ann. Suisse de DI, 1975, Vol. 31; Mubanga-Chipoya: The right to everyone to leave any country, including his own and to return to his country, E/C4/Sba. 2, 1988, p. 35, June 1988, pp. 103 – 106. S. Aga Khan: Legal problems relating to refugees and displaced persons, RCADI, 1976.

For a definition of the right to asylum, see also: An Introduction to International Protection of Refugees, UNHCR, August 2005, P. 184 (in Arabic).

that he/she shall not be extradited to a state or non-state party, should this result in the person concerned being subjected to persecution.

The asylum-seeker shall not be punished on account of his illegal entry into the territory of that state. This is justified by the concept of ‘compulsion or necessity’ that drives a refugee to flee from his/her state of origin to the other state for fear of persecution that he/she might be subjected to.

Chapter I

Conditions of granting asylum in Islamic Shari'ah and international law

Chapter I

Conditions of granting asylum in Islamic Shari'ah and international law

Protection of refugees basically relates to persons satisfying conditions required for them to be recognized as refugees or “bona fide refugees” as stipulated in Paragraph 1/A of Annex I of the International Refugee Organization Statute (1946)³⁰.

1.1 In Islamic Shari'ah

According to Islamic Shari'ah, asylum may be given under the following conditions:

1.1.1 The person should be present in the land of Islam or in a territory subject to an Islamic state. This is an a priori condition. Islamic territory includes territories, where Islamic Shari'ah is applied and where all inhabitants, Muslims as well as non-Muslims and others under Muslim protection, enjoy the aman of Islam. Imam Abu-Haneefah sets three conditions for a territory of Muslim land, namely:

Islamic provisions are visible in the territory, i.e. that Islamic Shari'ah is the applicable law.

It is neighboring to Muslim land.

30 See also concerning *bona fide* refugees: Conclusion No. 15, adopted by the UNHCR Programme Executive Committee on “Refugees without country of asylum”, included in the UNHCR Conclusions on International Protection for Refugees approved by the Executive Committee, Arabic Version, Cairo 2004, p. 31.

Its inhabitants, Muslims as well as non-Muslims (zimmis) enjoy the aman of Muslims³¹.

The Malikites maintain that Daral-Islam, (Land of Islam) is that where Muslim provisions prevail³² and the Shafi'tes maintain it is the land where Muslim inhabitants can display the provisions of Islam. According to Hanbali jurisprudence, "Every land, where Islamic provisions prevail, is a Muslim land, but any land, where the provisions of non-believers prevail, is a land of non-believers and there is no other land but those."³³

Asylum may be granted also, as will be discussed later, in places subject to the jurisdiction of the Islamic state, such as premises of diplomatic missions or military vessels.³⁴

Muslim jurists also recognize asylum granted by other states, in accordance with the "territorial jurisdiction" rule and non-extension of Islamic state jurisdiction to territories beyond Muslim land.

31 Al-Kasani says, « There is no difference between our friends, the Hanafites that *Darul- Kufr* (non-Muslim land) shall be considered as *Daral-Islam*, (land of Islam) if laws and regulations emerge there.», al-Kasani, Abu-Bakr ibn Mas'oud: *badai' as-sanai'*, verified by 'Adnan Yaseen Darweesh, Beirut, Dar Ihya; at-Turath al-Islami House , 3rd ed. 1421 AH (2000 AD, Vol. 6, p. 12 .

32 Ibn Rushd, Abu Leed : *al-muqaddimat al-mumahhidat*, verified by Mohammad Hijji et al, Qatar, Dar at-Turath al-Islami House, 1408 AH, 2: 153; Zakaria al-Ansari: *asna al-matalib : sharh rauth at-talib*, photocopied from al-Maymainiyya edition, 1313 AH, Vol. 4, p. 204

33 Imam ibn Moflih al-Hanbali: *al-adaab ash-shar'iyyah wal- minah al-mar'afiyah*, Riyadh modern Bookshop, Riyadh, 1391 AH (1971 AD), Vol. 1, p. 213.

34 *Vide infra*: Diplomatic asylum.

1.1.2 There should be a motive for asylum, but in Islam, all motives for asylum are equal: ³⁵

This means that the granting of asylum is not only contingent upon the fact that the person had fled to Muslim land owing to fear of “persecution” he/she is subject to. Additionally,³⁶ asylum may be granted to any person, who wishes to reside in Muslim land, because he embraced Islam or because he wants to live as a non-Muslim under protection in Muslim land (zimmi or a musta’min). Thus, unlike the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, which exclusively define a refugee as someone who flees for fear of persecution, Islam adopts a broad definition of a refugee.

1.1.3 The refugee’s unwillingness or inability to avail himself of the protection of the state of his nationality:

This needs no comment, because the arrival by that person to Muslim land and his desire to stay there imply such unwillingness or inability. We have earlier said that the words’ *istijarah* and *ijarah*, mentioned in the Holy Qur’an, imply the same concept.

35 *Vide supra*, pp. 28-30.

36 As an evidence to the respect by Muslim jurists of the call for help by refugee, Imam ibn-abdus-Salam says,» If someone sentenced to death flees from the ruler, who dispatches someone after him to kill him and the former appeal for our protection, we will defend and protect him, for it is our duty to give protection as long as we know not of the incidence. But once we know the inside story, we would help him. The reward lies in assisting him because it is our duty as enjoined by Allah the Almighty.” See: Imam ibn ‘abdus-Salam: *qawa’ied al-ahkam fi masalih al-anaam*, verified by Taha abdur-Ra’ouf Sa’d, al-Kolliyyat al-Azhariyyah Bookshop, Cairo, 1411 AH (1991 AD), Vol. 2, p.59.

1.1.4 Non-conflict of asylum with Shari'ah rules:

Naturally, the granting of asylum in terms of its essence, outcomes or effects, should not conflict with the rules and provisions of Shari'ah.³⁷

1.1.5 Rules of the right to asylum as enshrined in the Holy Quran :

Ayah 9 of Surat al-Hashr lays down five basic rules on the right to asylum and how refugees should be received and treated. Allah the Almighty says in the Holy Qur'an:

“ But those who before them, had homes (in Medina) and had adopted the Faith, - Show their affection to such as came to them for refuge, and entertain no desire in their hearts for things given to the (latter), but give them preference over themselves, even though poverty was their (own lot) and those saved from the covetousness of their own souls, - They are the ones that achieve prosperity.” (Surat al-Hashr, 9)

This Ayah reflects the following rules:

Refugees (or migrants who move from one territory to another) should be warmly welcomed (received with affection) and well treated. This is clear from the divine phrase those who “show their affection to such as came to them for refuge...” and consequently should not be expelled to the borders (refouled) or denied admission.

³⁷ «Therefore, Imam abu-Haneefa maintains that a covenant of *aman* for a non- Muslim living in Muslim land is breached if he does something harmful to Muslims, such as giving shelter to a spy for non-believers” See: Imam ibn Jama'ah: *tahreer al-ahkam fi tadbeer ahl al-islam*, ath-Thaqafa House, Doha, 1408 AH (1988 AD), p. 262.

Muslims should treat them well and give them preference over themselves. Altruism is to “give others preference over oneself, in terms of one’s share of mundane stuff in anticipation of religious rewards. This emanates from strength of psyche, sure love and patient endurance of hardship.”³⁸ Moreover, it is better to give others preference over oneself than over one’s property, even if this gives returns to one’s self.”³⁹

Refugees should be received, no matter whether they are well-off or poor, as the holy Ayah says”... and they entertain no desire in their hearts for things given to the latter (refugees)”. It makes no difference whether a refugee is well-off or poor; what matters is to give him protection, safety, security and stability in the place of asylum.

Immigrants should not be rejected , even if the inhabitants of the territory of asylum are in dire poverty, indigence and need and have scarce resources and money, as the holy Ayah says, “... even though poverty was their (own lot)” .

The Ayah provides also evidence to territorial asylum, which is clear from the reference therein to” ... those who, before them, had homes (in Medina) and had adopted the Faith”, i.e. “were empowered in both and well- settled there”.⁴⁰ This shows that it is the duty of the inhabitants of the territory to admit all incoming immigrants.

38 See: Ibn al-Arabi: *ahkam al-Qur’an*, al-Jeel House, Beirut, 1407 AH (1987 AD), p. 1777.

39 Loc.cit.

40 See: Ibn at-Turkomani: *bahjat al-areeb fi bayan ma fi kitab AllahAl-Azeez min Al-ghareeb*, Supreme Council for Islamic Affairs, Cairo, 1422 AH(2002 AD), Vol. 2, p. 157.

1.2 In International Law:

It is clear from the definition set forth in Article 1 of the 1951 Convention and the 1967 Protocol that for a person to be granted a refugee status, he/she shall meet the following conditions:

“ The person is outside the country of his nationality, or, not having a nationality, his former habitual residence.

There is well-founded fear of being persecuted⁴¹ for reasons of race, religion, nationality, membership of a particular social group or political opinion.

The person is unable or unwilling to avail himself of the protection of his/her country of origin; or who, not having a nationality, that of the country of his/her former habitual residence.”

41 For this reason, the Government of Netherlands dismissed the application made by some Christian Turkish nationals for the grant of refugee status claiming that they were subjected to persecution, saying,» The Government considers that Christian Turkish nationals have no well-founded grounds to fear persecution in their homeland within the meaning of the Geneva Refugee Convention. The application made by Turkish Christians for the grant of refugee status have, therefore, been dismissed without exception» (NYIL, 1985, p. 345).

Chapter II
Principles Governing the Right to
Asylum in Islamic Shari'ah and
international law

Chapter II

Principles Governing the Right to Asylum in Islamic Shari'ah and international law

It is established that the right to asylum is governed by several principles in Islamic Shari'ah and international law. However, before pointing out these principles, it is worthwhile indicating the difference between them and the goal of granting asylum.

2.1. Difference between the goal of and the principles governing the granting of asylum:

The goal is the final by-product resulting from the grant of asylum, i.e. to ensure safety and protection for a person seeking protection on the territory of the state, where he/she is present.

The principles governing asylum are the applicable rules of conduct or the rules of game to be observed in order to attain the said goal: they are the means of access to the ultimate end of asylum. Consequently, they should be also observed because the ultimate goal of asylum is legitimate and so should be its means. In the context of the right to asylum, as in the case of other systems, the end does not justify the means.

In its preamble, the Arab Charter on Human Rights, 2004 refers to “the eternal principles of fraternity, equality and tolerance among human beings enshrined by Islam and the other Divine religions...”

Moreover, the preamble of the Arab Convention Regulating Status of Refugees in the Arab Countries, 1994 provides that states parties shall stick to “their religious beliefs and principles that are deeply rooted in Arab and Islamic history, making man a great value and a noble target for various systems and legislations to cooperate in ensuring his/her happiness, freedom and rights.”

Additionally, the First Seminar of Arab Experts on Asylum and Law of refuge also Refers to “the everlasting Arab and Islamic traditions of asylum and refuge”⁴². The Fourth Seminar Refers to the humanitarian principles, particularly those of “social solidarity and asylum and the humanitarian principles of asylum in Islamic Shari’ah and Arab values⁴³” that are deeply rooted in Arab and Islamic traditions.⁴⁴

The final communiqué issued by the Arab Parliamentarians’ Symposium and Seminar on international and regional refugee laws, held in Sharm el-Sheikh (Egypt) in October 2008 stated that “the rich traditions, customs and practices involved in Arab and Islamic values serve as a firm underpinning for the integrated protection of refugees and respect for their human integrity”.

2.2 . Salient principles governing the right to asylum:

42 See text in «Collection of International Instruments and Legal Texts concerning Refugees and Others of Concern to UNHCR”, op. cit., Vol. 3, p. 1130.

43 Ibid, p. 1136.

44 Ibid, p. 1143-1144.

Salient principles governing the right to asylum are as follows:

2.2.1 Principle of non-refoulement:

2.2.1.1 In Islamic Shari'ah:

Islam categorically disallows that a refugee be returned to a place where there are fears for his basic freedoms and rights (such as being subjected to persecution, torture, degrading or other treatment.) It was even said that Islam was first to establish the non-refoulement principle and the rule of non-extradition of those who committed political crimes.⁴⁵ The underlying rationale lies in the following arguments:

1- As stated above,⁴⁶ the principle of non-refoulement is recognized as a principle of customary law. It is established in Islam that “what is customarily recognized is tantamount to that provided for by provision⁴⁷”, that “what is established by custom is tantamount to that established by text”⁴⁸, that “custom is a reference for judgment”, i.e. it can be appealed to as a reference.⁴⁹

45 See S. Mahmassani: *The Principles of International Law in the Light of the Islamic Doctrine*, RCADI, Vol. 117, 1966, p. 256.

46 *Vide infra* .

47 Al-Farghani, Abul-Mahasin Hasan: *fatawa qadhikhan (al-tawaa al-kahiniyyah)* , Vol.1, p.385, (Footnote on *al-fatawa al-hindiyyah*).

48 As-Sarkhasi: *sharh kitab as-siyar al-kabir lil-imam ash-shibani* , ; *al-qawa'ied wal- dhawabit al-mustakhlasah min sharh al-jami' al-kabeer* , compiled and verified by Dr. 'Ali ibn Ahmad an-Nadwial-Hindi, al-Madani Press, Cairo, 1411 AH pp.283-285.

49 Ibn as-Sobki, Tajuddeen <abdul-Wahhab: *al-ashya'wan-nazhar*, verified by 'Adel Abdul-Maujoudand 'Ali 'Awadh, Beirut, Darul-Kotob al-'Ilmiyyah, 1st ed., 1411 AH (1991 AD), Vol. 1, p.50 ; Nazhir Zadah, Moohammad ibn Sulaiman: *tarteeb al-laali fi silk al-amali*, studied and verified by Khalid ibn Abdul-Azeez.

2- This principle has been applied since the early beginnings of the Islamic State to Prophet Mohammad (PBUH), who endorsed it, thus making it applicable to any refugee. For example, when chieftains of Quraysh asked the Prophet’s uncle to surrender him, he turned down their request , retorting in poetry,⁵⁰

كذبتهم وبيت الله نبذى محمداً ولما نطاعن دونه وناضل
ونسلمه حتى نصرع حوله ونذهل عن أبنائنا والحلائل
وينهض قوم بالحديد إليكم نهوض الروايا تحت ذات الصلائل

You liars, I would not give up Mohammad
and we will fight tooth and nail for him.

We would not surrender him before
we have been killed around him
and taken away from our sons and women.

Then other people would arise
with the same clattering swords against you.

3. Refoulement of a refugee to a place where there are fears of his being subjected to persecution or torture conflicts with the reputed Islamic principle of “inadmissibility of breaching aman (safe conduct) or that of “inadmissibility of renegeing on a covenant of protection for those who are safe or are seeking protection (protégés)”.

Caliph ‘Umar ibn al-Khattab was reported as saying, “The word “mitras” in Persian means safety and if you say it to someone who does not understand your language, you have thus reassured him (of his safety)⁵¹.

50 Ibn Katheer : *al-bidayah wan-nahayah*, Dar al-Hadith House, Cairo, 1418 AH (1998 AD), Vol. 3, pp.103-104.

51 Ibn Qodamah: *al-mughni*, Vol. 3 p.193

«إن مترس بالفارسية هو الأمان، فمن قلتم له ذلك ممن لا يفقه لسانكم فقد أمتموه»

This undoubtedly means that aman should not necessarily be given in Arabic, but rather in any language whatsoever. After Negus, Emperor of Abyssinia, had refused to extradite Muslim refugees to the emissaries of Quraysh (Amr ibn al-’Aas and ‘Umara ibn Al-Waleed), Ja’far ibn Abi-Talib commented, “We were indeed in the best of houses and under the most hospitable asylum “.⁵²

4. Returning a refugee to a state, where his life may be at risk or his basic rights violated is deemed as treachery, which is forbidden according to the law of Islam. This applies equally, no matter whether a refugee is a Muslim or a “convert”. In the latter case, such person enjoys all rights of a Muslim, including protection of his life and personal safety, regardless of the fact that the refugee is a non-Muslim seeking protection or a non-Muslim living in Muslim territory (zimmi), because, having been granted aman or a covenant of protection, he is to enjoy the same sanctity as any Muslim.

Moreover, jurists argue that an Islamic state may not extradite a hostage or a non-Muslim protection-seeker (musta’min) against his will to his state of origin, even in the context of exchanging him with a Muslim hostage or prisoner of war and even though the state of origin for the non-Muslim protection-seeker threatens to wage war should the Islamic state refuse to extradite him.

52 See: Imam ibn Hadeedah al-Ansari: *al-misbah al- mudhee’ fi kottab an-nabiyy al-omiyy wa- rosolihi ila molouk al-ardh min ‘arabi wa-a’jami*, An-Nadwah Al-Gadeedah House, Beirut, 1406 AH (1986 AD), p 231.

In this context, it is stated in *as-siar al-kabeer*⁵³, “If a non-Muslim enemy fighter comes to us soliciting *aman* and then they ask us to exchange a prisoner of war for this person and he refuses saying, ‘If you push me up to them, they will kill me.’ we should not do so, because he lives in peace with us. He should be treated as a *zimmi* should he refuse to be exchanged. By returning him, we would be doing injustice to him, subjecting him to death, because injustice is forbidden for any non-Muslim protection-seeker, *zimmi* and Muslim. But we tell him go back to your country or anywhere else you like, should non-Muslims so wish. The Imam has jurisdiction over a non-Muslim protection-seeker, even if he has no fear over a Muslim prisoner of war being killed. Do not you think that if he stays long in our country should we ask him to leave? Should there be fears over a Muslim prisoner of war being killed or in exchanging him, if they were satisfied with it; it would be advisable to prove to him such jurisdiction.”

An Islamic state may not extradite a non-Muslim protection-seeker (*musta'min*), even in the context of exchanging him with a Muslim hostage or prisoner of war. For it is a duty in Islam to keep away from treachery and to extradite such a person is deemed to be an act of treachery.⁵⁴

Imam ash-Shaibani even maintains that it is inadmissible to extradite a non-Muslim protection-seeker even though his state of

53 See: *sharh as-siyar al-kabeer* by ash-Shibani, Institute of Manuscripts, League of Arab States, Cairo, 1972, Vol. p.1612; see also Hyderabad ed., Vol. 3 pp.300-301.

54 Loc. Cit.

origin threatens to fight and declares war. In this connection, he says, “Should non-Muslims ask Muslims to surrender him, otherwise they would fight them and even if Muslims have no power to fight back, they should not do so.” For, by so doing, they would be committing treachery, which is not authorized. This sounds as if they say surrender him, otherwise we will fight you. Muslims may say get out of Muslim land to any where you like in the kingdom of God. What if they tell him to go out within a given time period, otherwise we would extradite you to them, and he accepts but does not leave. If he accepts on his own free will, we may extradite him, but if he does not agree, we should not extradite him either. That is because he lives safely with us until he goes back to a safe haven of his own. It is said that his stay with us until the time period has expired is an equal evidence of acceptance to be extradited as the Emir telling a *musta'min* unless you leave within a given time period, you will be considered a *zimmi* (a non-Muslim living in a Muslim territory), based on the evidence of his acceptance of this arrangement. (We say) this is a probable evidence for the *aman* to be given to him. Based on such probable evidence, he may not be at risk of being killed, unless he explicitly expresses his acceptance to be extradited to them. “Being considered a *zimmi* is a judgment that is proven on the basis of suspicion, because in such a case, probable evidence may be adopted.”⁵⁵

55 See: *sharh as-siyar al-kabeer* by ash-Shibani, Institute of Manuscripts, League of Arab States, Cairo, 1972, Vol. p.1612-4; see also Hyderabad ed., Vol. 3 pp.300-301.

Indian scholar Shibli an-Nuḡmani: *fadhī al-islam ‘ala al-hadharah al-insaniyya*, translated by Dr. ‘abdu-l-Azeez ‘abdu-l-Galeel, Islamic Research Academy, Cairo, 1401 AQH(1981 AD), p. 1.

The following conclusions can be inferred from the foregoing statement by Imam ash-Shibani:

- 1- In no case shall a musta'min be extradited to his state (of origin) , even if he is to be exchanged for Muslim prisoners of war or even if failure to extradite him would result in his state (of origin) waging war against the Muslim state, because extradition in such a case is tantamount to an unwarranted treachery.
- 2- The head of state or competent authorities have the exclusive power to offer a musta'min the option of leaving Muslim land to any other place or state of his own choice. Therefore, the choice is that of the person involved.
- 3- It thus appears that Ash-Shibani had, several centuries before, forerun the provisions adopted in modern international conventions and covenants on human rights, including the right to asylum, providing for prohibition of expulsion or non-refoulement of a refugee at the border to a country, where his life or freedom is threatened.

Fulfillment of aman given to a refugee has primacy over anything else. The purpose of the prohibition of extraditing a refugee to his state is to ensure physical safety of the refugee, by protecting him against the risk of persecution or loss of life, as this can not be tolerated in Islam.

Examples in the history of Islam, where refugees were not extradited, are many:

- Emperor Negus of Abyssinia (Ethiopia) refused to extradite Muslim

immigrants to Quraysh delegation, when they so requested and gave protection to Muslims , who stayed “with the best protector in the best land’ , as Ummu Slamah (may Allah be pleased with her) says. ⁵⁶

- In Yemen, there was an attempt to arrest ibn-Najeeb ad-Dawlah who came in to assist Sayyeda (Lady) bint-Ahmad on the strength that he was insinuating people to show allegiance to him against the ‘Obaidi commander. Once the latter knew that, he sent a force of 100 men led by ibn-al-Khayyat to arrest him. Coming to Sayyeda (Lady) bint-Ahmad , ibn-al-Khayyat asked her to surrender ibn-Najeeb ad-Dawlah to him, she categorically refused, saying,” You’re but a messenger; a letter-bearer, take our reply letter and go or wait until we write to the Caliph and we receive his response. Senior staff of the state so ardently cautioned her that she elicited forty solemn oaths from ibn-al-Khayyat. She wrote to Al-’Obaidi requesting him to grant amnesty for ibn-Najeeb ad-Dawlah and to accept her intercession. Then, she surrendered him to ibn-al-Khayyat. When he had gone, on his way back , a short distance past a place called Dhi Jabalah, he reneged on his promise and attached a 100-libra block of iron to ibn-Najeeb ad-Dawlah’s leg , humiliated and insulted him. Then he took him to Aden and then by boat to Egypt.⁵⁷

- When ‘Abdullah al-Qa’shari was appointed ruler of Iraq, the Emperor of Persia had ordered Mani , leader of Manianian sect to be killed and all his followers to be chased and exterminated. However, they

56 Ibn Ishaq : *al-maghazi was-siyar*, 213-217 ; *sirat ibn hisham*, 289.

57 See: Yahya ibn al-Hussain: *ghayat al-amani fi akhbar al-qotr al-yamani*, verified by Dr. Sa’ied ‘Ashour, al-Kitab al-Arabi House, Cairo, 1388 AH (1968 AD), pp.286-287.

enjoyed safety and peace under the Islamic government.⁵⁸

- When Othman ibn Abi-al-'Ala' was defeated in a battle near Fez at the hands of the army of Sultan Sulaiman ibn ar-Rabee' al-Mureeni 1309 AD (707 AH), he fled for his life to Granada, Andalusia. There, Sultan Nasr abul-Jiush appointed him commander of the Andalusian army. As he scored sound victory in most battles, the Andalusian sultan turned down Sultan al-Mureeni's request to extradite him, although the latter resorted sometimes to threat and other times to warning to cut off Moroccan assistance to Andalusia.⁵⁹

2.2.1.2 In International law:

The principle of non-refoulement means that a refugee shall not be expelled or returned ("refouler") in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion, regardless of whether or not he has been formally recognized as a refugee (Article 33 of the 1951 Convention).⁶⁰ This applies also to a person for whom there are substantial grounds for believing that he would be in danger of being subjected to torture. In this connection, Article 3 of the Convention

58 Indian scholar Shibli an-Nuḡmani: *fadhīl al-islām 'ala al-hadharah al-insaniyya*, translated by Dr. 'abdu-l-Azeez 'abdu-l-Galeel, Islamic Research Academy, Cairo, 1401 AQH(1981 AD), p. 18.

59 See: Al- Wazeer ibn al-Khateeb: *konasat ad-dokkan ba'da intiqaal as-sokkan-hawla al-'ilaqat as-siyasiyya bayn mamlakatay Ghirnatah wal-maghrīb fil-Qarn a-thamin al-hijri*, al-Kitab al-Arabi House, Cairo, 1386 AH (1966 AD), verified by Dr. Kamal Shabanah, pp. 22-24.

60 See also Article 3.1 of the Declaration on Territorial Asylum, 1967.

against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 states,

“No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁶¹

Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance (2006) stipulates,

“No State Party shall expel, return (“refouler”), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.”⁶²

The non-refoulement principle is governed by five rules in contemporary international law:

No reservations may be made to legal text(s) providing it⁶³, given the grave consequences that may result from such reservations.⁶⁴

61 The term «other State» means that to which a person is to be expelled, returned or extradited. See: General Comment No.»1» adopted by the Committee against Torture, 1997 in:»Collection of International Instruments and Legal Texts concerning Refugees and Others of concern to UNHCR, op. cit., Volume 1, P. 587.

62 See United Nations General Assembly Resolution (RES) 61/177, December 20, 2006; Human Rights Council Resolution No. 1/1, June 29, 2006.

63 See, for example, Article 42 of the 1951 Convention providing for the inadmissibility of making reservations to Article 33.

64 One of the best provisions in this connection is the General Recommendation No. 30 (Discrimination against non-citizens) adopted by the Committee on the Elimination of Racial Discrimination on October 1, 2006 stating that non-citizens shall not be returned to a country or territory» where they are in danger of being subjected to serious human rights abuses, including torture and other cruel, inhuman or degrading

Under no circumstances the principle of non-refoulement may be subject to derogation.⁶⁵

It is deemed as part of customary international law and consequently a state shall abide by it irrespective of being bound by a conventional text ⁶⁶.

Being of a *jus cogens* nature ⁶⁷, no agreement shall be made derogating therefrom, and such an agreement shall be nul and void.⁶⁸

treatment or punishment.” See text in:»Collection of International Instruments and Legal Texts concerning Refugees and Others of Concern to UNHCR, op. cit., Volume 1, P. 592.

See also: General Comment No. 6 adopted by the Committee on Child Rights stating the inadmissibility of returning a child where there are serious grounds for his being subjected to»a real danger of being exposed to irreparable harm.” Ibid p. 599, par. 27.

65 It is also stressed that»*The fundamental importance of the observance of the principle of non-refoulement-both at the border and within the territory of a state – of persons who may be subjected to persecution if returned to their country of origin irrespective of whether they have been formally recognized as refugees*” Conclusions on The International Protection of Refugees adopted by the executive committee of the UNHCR Programme, Geneva, 1996, p. 14, N°. 6 (28). It is also stated that” The principle of non-refoulement is not subject to derogation”, Ibid, p. 214, N°. 79 (47).

66 The Declaration by the States Parties to the 1951 Convention and 1967 Protocol relating to the Status of Refugees, adopted on December 12, 2001, on the fiftieth anniversary of the 1951 Convention states,» *The application of the non-refoulement principle has become part of common international law.*” (Paragraph 4 of the Preamble). See:»Collection of International Instruments and Legal Texts concerning Refugees and Others of Concern to UNHCR, op. cit., Vo I, P. 51.

67 The preamble of the Mexico Declaration and Action Plan on Strengthening International Protection of Refugees in Latin America described the principle of non-refoulement as being of a *jus cogens* nature. Ibid, Vol. 3, p. 1221.

68 Article 53 of the 1969 Vienna Convention on the Law of Treaties.

It serves as a mandatory ground for refusing extradition.⁶⁹

As regards the expulsion of refugees, Article 32 of the 1951 Convention stipulates,

“ The Contracting States shall not expel a refugee lawfully in their territories save on grounds of national security or public order.

The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.”

Violations of the non-refoulement principle can take place in many cases, including the following:

- Rejecting asylum-seekers at the borders, while they have possibility for seeking asylum elsewhere.
- Expelling or returning of a refugee to a place where he may be

⁶⁹ In cases where a person has fears of being subjected to torture and other cruel, inhuman or degrading treatment or punishment, non-refoulement can serve as a mandatory ground for refusing extradition:
South African Development Community Protocol on Extradition (2002), Ibid, Vol. 3, p. 1096 (art. 4/F).

subjected to persecution, whether it is his state of origin or any other state.

- Denying the refugee's possibility to look for a safer place elsewhere, by not giving him appropriate time to do that.

Exceptions to this principle are limited to those provided for in Article 33/2 of the 1951 Convention, namely:

- If there are reasonable grounds for regarding a refugee as a danger to the security of the country in which he is living, to safeguard population, as in the case of mass influx,⁷⁰ or should a State decide in any case that exception to the principle stated in paragraph I of this article would be justified, it shall consider the possibility of granting to the persons concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State.⁷¹
- If a refugee, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. However, he shall not be expelled to a country, where he may be subjected to the risk of torture or other cruel, inhumane or degrading treatment or punishment or violation of his basic rights.

70 Article 3/2 of the Declaration on Territorial Asylum, 1967. Article 3/3 of the Declaration on Territorial Asylum, 1967). See also Recommendation no. 22 (97), issued by the Ministerial Council of the Council of Europe on Guidelines for Applying the Safe Third Country Concept in» Collection of International Instruments and Legal Texts Concerning Refugees and Others of Concern to the UNHCR”, op. cit., Vol. 4, p 1403.

71 Article 3/3 of the Declaration on Territorial Asylum, 1967).

2.2.2 Principle of the prohibition of imposing penalties on a refugee who illegally enters into or are present on the state territory.

2.2.2.1 In Islamic Shari'ah:

It is universally acknowledged that states now recognize the need for aliens to obtain entry visa or prior permission before arrival in their territories and so had been the Muslim jurists. Suffice it to quote Imam ibn Qudamah: “None of them (non-Muslims) shall enter into our territory without permission, even though he is a messenger or a merchant ⁷²”.

According to Muslim jurists, some categories of persons were exempted from the requirement to obtain permission or entry visa, including:

1. An ambassador, messenger or trader who has evidence indicating his/her capacity as such:

In this connection, Ibn Muflih Al-Hanbali says, “None of them shall be allowed entry (into our territory) without permission. But

72 See : ibn Qudamah: *al-iqna' fi fiqh Imam Ahmad ibn Hanbal*, Vo.2 al_Ma'rifah House, Beirut, p.38; Imam al-Bahouti : *kashf al-qina' 'an matn al-iqna'*, Vol.3, p.108. Imam al- Boghwi (concerning a non-Muslim who enters into Muslim land as a fighter),” A non-Muslim who enters into Muslim land without being granted asylum may be lawfully killed.” (Imam al- Boghwi: *sharh as-sunnah*, verified by Shu'aib al-Arna'out and Zuhair ash-Shaweesh, Badr House, Cairo, Hadith no. 2709, Vol. p.71.. See also: Majd-iddeen abul-Barakat: *al-moharrar fil fiqh 'ala mazhab Imam Ahmad ibn Hanbal*, as-Sunnah al-Mohammadiyya Press, Cairo, 1369 AH (1950 AD), Vol. 2, p. 181; al-Muradi: *al-insaf fi ma'rifat ar-rijih mina al-khlifa 'ala mazhab Imam al-mubajjal Ahmad ibn Hanbal*, Dar Ihya' at-Torath al-Arabi House, Beirut, 1400 AH (1980 AD), Vol. 4, p.208

a messenger or trader particularly may be allowed in”⁷³. Imam Al-Baidhawi says, “An ambassador or an incomer to listen to the Qur’an shall be secured by Shari’ah, unlike a trader who shall not be secured until he becomes a believer”⁷⁴.

2. If a person is habitually safe:

One of the best opinions in this respect is the one occurring in “hashiat ibn abedeen”: “A person who was vulnerable at the time when he was seeking protection is habitually safe. Habit generates a rule unless expressly stated otherwise. If we find a non-Muslim in Muslim land, who says, I’ve come in looking for aman, we would not believe him. Similarly, we would not do so if he claims he is their king’s messenger to the Caliph, unless he produces a letter that looks like their king’s, even if it is potentially fabricated, because a messenger is kept safe as established by Islamic as well as pre-Islamic practice and he would find no Muslims in their own land to testify in his favour.”⁷⁵

Al-Bahouti says, “He who enters into Muslim land without aman, claiming he is a messenger or a trader, who has goods for sale, would be admitted, if such claim is corroborated by custom, such as the entry of non-Muslim trade and the like into our land.” Since his claim may

73 See: Ibn Miflih: *kitab al-frou’ fi fiq Imam Ahmad ibn Hanbal*, al-Manar Press, Cairo, 1354 AH, Vol. 3, p. 627. See also *al-mobdi’ fi sharh al-moqni’*, Vol. 3, p. 394.

74 Chief Judge al-Baydhawi: *al-ghayah al-quswa fi dirayat al-fatwa*, verified by ‘Ali Mohyiddeen Daghi, an-Nasr Islamic Printing House, Cairo, 1982, Vol.2, p. 953.

75 Ibn Abedeem: *ha’shiyat rudd al-muhtar*, Mustafa al-Babi al-Halabi Press, Cairo, 1386 AH-(1966 AD), Vol. 4, p.135. See also *al-mabsut* by as-Sarkhasi, al-Ma’rifah House, Beirut, Vol. 10, pp. 92-93.

be possible, he may be given the benefit of doubt justifying that he would not be killed. Since it is impossible to provide evidence to that claim and since custom can commonly serve as a rule, he would be kept safe. Should there be no such custom, he would be kept as vulnerable as he was. Similarly, if he comes in with no merchandise, saying, “I’ve come in as a *musta’min*, he would not be admitted, because he is not truthful. In such case, he would be treated as a prisoner of war for whom the Imam (ruler) has the options of having him killed, enslaved or returned against ransom.”⁷⁶ (It is worth recalling that those measures were applicable in time of war.)

Imam Ali ibn Abi-Talib (may Allah be pleased with him) was reported as saying, “If you seize a non-Muslim, who claims and provides evidence that he is a messenger to you and you get to know that, keep him safe until he has conveyed his message and returned to his folk, Should you find no evidence to support his claim, do not admit him.”⁷⁷

3- Claims supported by prima facie (circumstantial) evidence:

In this respect, Imam Al-Shafi’ie says, “...If a non-Muslim is found on the open road unarmed and says that he came in as a messenger, he should be admitted and left unharmed. Should there be suspicions over him, he should be sworn and if he does, he should be left unharmed. So is the case if he is armed but alone and

⁷⁶ Imam al-Bahouti : *kashf al-qina’ ‘an matn al-iqna’*, Ibid, Vol.3, p.108.

⁷⁷ Al-Qadhi an-Nuḥman ibn Mohammad: *da’ a’im al-islam*, al-Ma’arif House, Cairo, Vol. 1., verified by Asif Faidhi, 1370 AH(1951 AD), p. 440.

unaccompanied by a group. In both cases, their real status corresponds to their stated claims. He who claims something similar to what he says and cannot be otherwise known, his statement should be taken per se if he swears it is true”.⁷⁸

Indisputably, the argument by Muslim jurists regarding the need to accept asylum-seeker’s claims that are corroborated by prima facie evidence is almost similar to an established rule in international law of asylum providing for the need by asylum –seeker to be given the benefit of doubt.⁷⁹

4- Entry for the purpose of seeking aman:

Adopting this approach, Imam Abul-Wafa’ ibn ‘Oqail maintains that it is required for entry into Muslim land to have permission. “No non-Muslim shall enter into Muslim land without permission, because he may be suspected to enter as a spy to obtain information on conditions of Muslims or to gather with others somewhere to cause harm to Muslim land.” Moreover, he adds, “If he enters with a message for Muslims or for some other benefit or interest for Muslims, he may be admitted unimpeded.”⁸⁰

Ibn ‘Oqail further argues,” Any one who enters without permission, or without seeking aman or trade, he shall be treated as a

78 Imam ash-Shafi’ie: *al-umm*, Dar ash-Sha’b, Cairo, Vol. 3, p.201

79 See this rule in the Manual of Applicable Procedures and Standards in Refugee Status Determination under the 1951 Convention and 1967 Protocol relating to Refugee Status, UNHCR, Geneva, 1992, P. 62. (in Arabic).

80 Dr. Salih ar-Rasheed: abul-Wafa’ ibn’Oqail: *hayatuh wa ikhitiyyarat uh al-fiqhiyyah*, a Ph. D. thesis, Faculty of Shari’ah and Law, al-Azhar University , Cairo, Vol. 3, pp. 343-344.

prisoner of war. In such case, the Imam (ruler) has the option either to have him killed, graciously treated, returned against ransom or enslaved.”⁸¹ (This option is applicable in time of war.)

5- Summary of arguments supporting the aman and protection to be accorded to the refugee entering without permission:

It is clear from the foregoing, according to Muslim jurists’ opinion, that he whoever seeks, without permission, asylum in Muslim land shall be granted aman and shall not be punished. This is based on the following arguments:

This is a common practice or custom, which is an established rule in contemporary international law as well as in the customs and noble manners of Arabs and Muslims that provide protection and security for a refugee, being a protection and aman-seeker.

This is supported by prima facie evidence as demonstrated in the state of panic gripping a refugee as a result of fear of persecution. This is also considered as a kind of relief to people in distress.

A refugee usually seeks aman and safety. In this connection, Islam is unique in that it grants aman to whoever solicits it, and allows it, as indicated later, to be granted even by plain individuals.

2.2.2.2 In International Law:

According to Paragraph 1 of Article 31 of the 1951 Convention relating to the Status of Refugees, “The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or

81 Ibid, p. 444.

freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”

This means that the non-application of penalties for illegal entry or presence is governed by four conditions:

The refugees’ entry or presence is owing, as stated by Article 1, to “ well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”;

- They should present themselves without delay to the authorities;
- They should show good cause for their illegal entry or presence; and
- They should be coming directly from a territory where their life or freedom was threatened. This means that the asylum-seeker arrived directly from his/her home country, from another country where his/her protection, safety and security could not be assured, or from a transit country where he/she was present for a short period of time without having applied for or received asylum there.”⁸²

Paragraph 2 of the same Article adds, “The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow

82 A Guide to International Refugee Law No. II, 2001, UNHCR/ Inter-Parliamentary Union, p. 84.

such refugees a reasonable period and all the necessary facilities to obtain admission into another country.”⁸³

2.2.3 Principle of non-discrimination:

2.2.3.1 In Islamic Shari’ah:

According to Islam, asylum is granted to whoever solicits it, regardless of religion, race, colour or fortune. This is premised on a well-known Islamic principle, i.e. “Before the world’s calamities, all sons of Adam (human beings) are equal”.⁸⁴

This is based on the fact that Islam protects human rights for all humans without discrimination.⁸⁵

Therefore, Article 9 of the Universal Islamic Declaration on Human Rights (1981) provides,” Every persecuted or tyrannized person shall have the right to seek refuge and asylum. This right shall be guaranteed for each human being, regardless of race, religion, color or gender.”

The right to equality for all human beings is one of the most

83 See text in»Collection of International Instruments and Legal Texts concerning Refugees and Others of Concern to the UNHCR, UNHCR Regional Office, Egypt, Cairo, April 2006, p 20.

See also Article 5 of the Convention on Territorial Asylum (Caracas, 1954).

84 See: Shaykh Othman ibn Foudi: *bayan wajoub al-hijrah a’ala al-’ibad wa bayan wajoub nasb imam wa iqamat al-jihad*, verified by Fat-hi al-Misri, University of Khartoum publishing House, 1977, p. 124.

85 «L>islam a bien protégé les droits de l’homme de toutes les personnes, musulmans ou non musulmans, hommes et femmes, enfants ou adultes, en temps de paix ou en temps de guerre, dans des situations normales ou exceptionnelles», See: «La nouvelle charte arabe des droits de l’homme», op. cit., reponses d’Ahmed Abou-el-Wafa, p. 609.

significant grounds on which Islam is based; there is no distinction between human beings on grounds of race, might or fortune but only on account of piety.

There are many references in the Holy Qur'an to the question of equality, including the following Ayahs:

“ O ye who believe! avoid suspicion as much (as possible): for suspicion in some cases is a sin: and spy not on each other behind their backs. Would any of you like to eat the flesh of his dead brother? Nay, ye would abhor it...But fear Allah. For Allah is Oft-Returning, Most Merciful.” (Surat Al-Hujurat, 12)

“We have honoured the descendants of Adam; provided them with transport on land and sea; given them for sustenance things good and pure; and conferred on them special favours, above a great part of Our creation. “Al-Israa’, 70)

And their Lord hath accepted of them, and answered them: “Never will I suffer to be lost the work of any of you, be He male or female: ye are members, one of another...” (Surat Al-”Imran, 195) (Surat An-Nisaa’, 1)

“ O mankind! reverence your Guardian-Lord, who created you from a single Person, created, of like nature, his mate, and from them twain scattered (like seeds) countless men and women; fear Allah, through Whom ye demand your mutual (rights), and (reverence) the wombs (that bore you): for Allah

ever watches over you.” (Surat An-Nisaa’ , 1)

“ It is He Who created you from a single person, and made his mate of like nature, in order that he might dwell with her (in love).” (Surat Al-A’raf, 189)

“ He created you (all) from a single person: then created, of like nature, his mate.” (Surat Az-Zumar, 6)

The Honorable Prophetic Sunnah also reiterated equality between human beings. According to a narrative by Abi Zarr, he said that he was engaged in a vituperative with a man, during which he vilified the man’s mother. “Did you rail at his mother?” asked the Prophet PBUH, “You are a man where the Jahilian spirit still persists, your servants and slaves are your brothers, whom Allah has placed at your disposal. Those of you who have brothers (servants and slaves) at their disposal should give him of his food and his own dress. Do not over task them beyond their capacity and should you do so, assist them with the work.”⁸⁶

“It is also reported that the Prophet (PBUH) said to Abi-Zharr al-Ghaffari when he railed at a man by calling him ‘son of a black woman’⁸⁷ “Do you rail at him for his mother? You are a man in whom Jahilian spirit (traditions of the pre-Islamic era) still persists.”⁸⁸

86 Abu-Dawood Sulaiman ibn al-Ash’ath: *sunnan abi-Dawood*, verified by ‘Izzat abdu-d-Da’ ‘as and ‘Adilas-Sayyid, Beirut, Dar ibn Hazm, 1418AH (1997 AD) ; *kitab al-adab*, bab fil-’asabiyyah No. 5121, Vol.5, p. 215.

87 This may be the Hadith on which the following opinion relied: «Shari’ah contains many prohibitions against racism, labeling it as Jahiliyah (injustice).” Human rights practices in the Arab states, the modern impact of Shari’ah values, the Georgia Journal of International and Comparative Law, Vol. 12, 1982, p. 62-63.

88 Al-Bukhari, Abu-Abdullah Mohammad ibn Isma’il: *saheeh al-bukhari*, op.cit

The Holy Qur'an explains the rationale behind the discarding of colour or physique- based racial discrimination by stating that these are beyond man's control.⁸⁹ This is clear in the following Ayahs:

*" O man! what has seduced thee from thy Lord Most Beneficent?
It is Him Who created thee, fashioned thee in due proportion,
and gave thee a just bias; in whatever form He wills, does
He put thee together. (Surat al-Infitar, 6-8)*

*" And among His Signs is the creation of the heavens and the
earth, and the variations in your languages and your colours;
verily in that are Signs for those who know. (Surat ar-Roum, 22)*

*"Seest thou not that Allah sends down rain from the sky? With
it We then bring out produce of various colours. And in the
mountains are tracts white and red, of various shades of
colour, and black intense in hue. And so amongst men and
crawling creatures and cattle, are they of various colours.
Those truly fear Allah, among His Servants, who have
knowledge: for Allah is Exalted in Might, Oft-Forgiving"*

, kitab al-eeman , bab al-ma'asi min amr al-jahihyyah, No.30, Vol. 3, p.20;
Muslim: saheeh muslim, op.cit. kitab al-eeman , bab ahkam al-molouk mimma
yu'mal, No. 1661, Vol. 3 , p 1661.

89 Dr. <Abdel-Aziz Kamil stresses that the problem of racial discrimination could be resolved through two different means: science and religion. Since Islam, as a religion, has accorded great attention to science since the first Ayah was revealed> Iqra» (Read), it has known since the beginning how to tackle the said problem. See: A. Kamil: L'Islam et la question raciale, UNESCO, Paris, 1970, p. ii. He adds in Page 30, «L'Islam voit l'humanité comme un immense jardin, dont les fleurs sont de couleurs multiples, mais aucune couleur n'a priorité sur l'autre». See also: Mahmoud Shaltout: al-islam 'aqeedah wa Shari'ah, ash-Shorouq House, Cairo, 1400 AH(1980 AD), p. 452.

(Surat Fatir, 27-28).

The foregoing texts show how far Islam towers over many positive legal systems that adopted colour or race-based discrimination against people, as happened in the United States of America and elsewhere (for example in South Africa) in spite of the fact that neither their colour nor race is of their making. This is corroborated by the recognition by many Western thinkers of Islam's honourable attitude against racial discrimination⁹⁰. Some even argued that the prohibition in Islam of race or colour-based discrimination was one of the reasons for its wide spread as well as a factor of regulating international relations between its followers and non-followers.⁹¹

In this connection, the Organization of the Islamic Conference resolutions called for non-discrimination in human rights:

In its Resolution No. 37/20 –S, there is reference to “the unity of Islamic value regarding human rights and the substantial attention Islamic Shari’ah accords to human rights and basic freedoms for all humans without distinction.” The Resolution also refers to the need to facilitate

90 Thus, comparing the Islamic and American attitudes towards slaves, Dunnant says,» Quelle différence entre cette conduite de la plupart des américains, et celle si humaine des sectateurs du koran envers les hommes de couleur! Chez les Musulmans les lois ont été faites en faveur de l’esclave, tandis qu’en Amérique, dictées par l’avarice et l’égoïsme, elles l’enserrent, de toutes parts, comme une prison aux murs de fer. Chez les premiers, non seulement le noir ou le mulâtre est traité avec ménagement et bonté, mais il est considéré par les moeurs et par la loi comme l’égal de l’homme blanc; aucun mépris ne pèse sur lui: en un mot, c’est un frère.» H. Dunant: L’esclavage chez les musulmans et aux Etats – Unis d’Amérique, Genève, imprimerie Jules – Guillaume Fick, 1863, p. 43-44

91 An author says, «No doubt part of its wide appeal is because the Moslem religion makes no distinction of race or color» Wormser: The legal system of Islam, American Bar Association Journal, 1978, p. 1361.

the championing of “all Islamic values in the realm of human rights.”

Resolution No. 6/6 –S by the Ministerial Conference , Jeddah, 1975 AD (1395 AH) on apartheid and racial discrimination in South Africa, Rhodesia, Namibia and Palestine states that the conference is “committed to the Islamic principle that makes no distinction between different races and colours...”⁹²

2.2.3.2 In International Law:

Non-discrimination is a basic principle of international human rights law, in general⁹³, and with regard the right to asylum, in particular. According to Article 3 of the 1951 Convention relating to the Status of Refugees, “Non-discrimination,” The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.”

2.2.4 Principle of the Humanitarian Character of the Right to Asylum:

Since the right to asylum warrants that a person at risk of persecution is granted aman, its humanitarian character is intrinsic and can never be missed. It lies at the fons et origo of the right.

2.2.4.1 In Islamic Shari’ah:

Islam and international law are in agreement on the humanitarian

⁹² Resolution No. 3/7 –S by the Ministerial Conference, Istanbul, 1976 on the same theme refers to the commitment to» Islamic principles requiring Muslims to resist racial discrimination in all its forms» Statements and resolutions by Summit and Foreign Ministers Conferences, 1969- 1981, OIC, Jeddah, p.182 (in Arabic).

⁹³ Dr. Ahmed Abou El-Wafa: *al-himayah ad-dawliyya li-hoqooq al-insan.*, op. cit., pp.138-139.

character of the right to asylum. This right is justified, as earlier discussed, by the need to rescue people in distress and need; hence its humanitarian character⁹⁴. Asylum is itself a touch of mercy to a man at risk of violation of his basic rights and freedoms.

Therefore, we agree with the opinion that the regulation of refugee status falls under the scope of “dealings”, where provisions are based on the plausibility of realizing interests and warding off causes of harm.⁹⁵ It can be added that, since the granting of asylum falls under the scope of “dealings”, it is also subject to the following two rules:

Change of provisions with the change of time rule⁹⁶: Since texts are definite and incidents indefinite as ash-Shahrastani says, it follows that the indefinite cannot be controlled by the definite. Therefore, *ijtihad* should be exercised to develop solutions to new or renewable incidents of the right to asylum, particularly taking into consideration its humanitarian character.

The “You know better the affairs of your world” rule, as mentioned in a hadith by the Prophet (PBUH).⁹⁷ Necessitates that refugee

94 It was also said that «La conception de l'asile dans la théorie musulmane est une conception humanitaire qui prend en considération le bien être de l'individu et non les intérêts de leurs gouvernants» Cf, «l'asile et les réfugiés dans la tradition musulmane», International law association, Report of the Sixty-ninth conference (2000), p. 321.

95 Ahmad al-Khamlishi: *Compatibility between Shari'ah and International Refugee Conventions*, a study published by ISESCO as part of the organization's action plan for 2004-06, p. 38.

96 Qa'idat « la yunkar taghayyor al-ahkam bi-taghayyor az-man », issue No. of al-Majalla al-Adliyyah Journal of Justice) , al-madkhal al-fiqhi al-ʿam, Damascus, Darul-Qalalm , 1418 AH (1998 AD) , vo. 2, pp.941-942.

97 «A'sha and Tabit reported after Thabit that once the Prophet (PBUH), passing ed

problems should be addressed in light of the surrounding humanitarian considerations.

2.2.4.2 In International Law:

Several international conventions provide for the humanitarian and peaceful character of the right to asylum. Consequently, it may not be considered as an unfriendly or a hostile act⁹⁸.

by some people who were pollinating palm- trees, said to them , « Hadn't you done so, it would have riped.» Then the product was unripe dates. Later passing by the same people, the the Prophet (PBUH) asked them how were their palm-trees, they said, « They were so and so .» You know better the affairs of your world., « he said.

98 Including Paragraph 5 of the 1951 Convention Relating to the Status of Refugees; Preamble of the Declaration on Territorial Asylum adopted by the United Nations General Assembly res. 2312 (XXII) (1967); Paragraph No. 2 of The Declaration by the States- Parties to the 1951 Convention and 1967 Protocol on Refugee Status, adopted on December 12, 2001, on the fiftieth anniversary of the 1951 Convention; Resolution No. 50\ 152 issued by the United Nations General Assembly, 1995 (Paragraph No. 13); Article No. 2\2 of the Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969; Article No. 6 of the Arab Convention on Regulating Status of Refugees in Arab Countries, 1994; Article No. 3 of the Declaration on Territorial Asylum (Council of Europe, 1977). Article No. 2 of the latter Declaration provides that asylum shall be granted to any person satisfying the requirements established by the 1951 Convention Relating to the Status of Refugees as well as any other person deserving to be granted asylum on» humanitarian grounds».

Chapter III

Types of asylum in international law and in Islamic Shari'ah

Chapter III

Types of Asylum in Islamic Shari'ah and International Law

There are three types of asylum: religious, territorial and diplomatic.

3.1 Religious asylum:

3.1.1 In Islamic Shari'ah:

Religious asylum in Islam is granted in two forms:

3.1.1.1 Asylum for the purpose of hearing the Words of Allah:

Allah the Almighty says in the Holy Qur'an:

“ If one amongst the Pagans ask thee for asylum, grant it to him, so that he may hear the word of Allah; and then escort him to where he can be secure. “ (Surat At-Taubah, 6).

It is clear from its words and context that this Ayah ⁹⁹applies if:

- The incoming person is a non-Muslim (ratione personae condition of applicability);
- He is coming in to hear the Words of Allah (teleological condition of applicability);

⁹⁹ Az - Zarkashi says that this Ayah indicates the generality of the indefinite in the context of a rule (Imam az- Zarkashi : *al- borhan fi ' oloum al- qura'n*, Issa al-Badi al- Halabi, Cairo, 2nd edition, Vol. 2, p. 6. In fact, "what is general encompasses whatever is good for it without restriction." See al- Imam as- Soyoutti : *al- itqan fi ' oloum al- qura'n*, verified by Mohammad abul-Fadhl Ibrahim, at- Turath House, Cairo, Vol. 3, pp. 23 – 24).

- He is seeking protection (ratione materiae aspect of applicability);
- Then, he should be granted protection (the consequential effect of applicability); and
- Finally, he should be taken to a place, where he feels safe (the ultimate purpose of application).

3.1.1.2 Asylum to al-Haram (the holy sanctuary in Makkah) :

If a refugee is coming from outside Muslim land, asylum to al-Haram¹⁰⁰ is considered also as some kind of territorial asylum. It is the Will of Allah the Almighty, in order to glorify and sanctify al-Haram, that whoever takes refuge there must be secured safety and peace. The following Ayahs give evidence to this fact:

“ The first House (of worship) appointed for men was that at Bakka; full of blessing and of guidance for all kinds of being. In it are Signs manifest; (for example), the Station of Abraham; whoever enters it attains security...” (Surat Al-’Imran, 96-97)

*“Do they not then see that We have made a Sanctuary secure, and that men are being snatched away from all around them.”
(Surat al-Ankabout, 67)*

“Let them adore the Lord of this House, Who provides them

100 Some jurists consider Asylum to al-Haram as a kind of « religious asylum in Islamic Shari’ah», Dr. Burhan Amrallah: *an-nathariyyah al-’aamah li-haq al-lojou’ fi al-qanooun ad-dawli al-mo’asir*, Ph. D. thesis, Faculty of Law, Cairo University, Cairo, 1983, pp. 40-41.

with food against hunger and with security against fear (of danger)”. (Surat Quraysh, 3-4)

“Remember We made the House a place of assembly for men and a place of safety...” (Surat al-Baqarah, 125)¹⁰¹

Prophet Mohammad (PBUH) said , after entering Makkah as a victor, “He who enters the Haram Mosque shall be safe; he who enters abu-Sofyan’s house shall be safe; he who lays down his arms shall be safe and he who keeps to his home shall be safe.”¹⁰²

Imam al-Kasani maintains that fighting is prohibited on three grounds: faith, safety and refuge to al-Haram.

101 In interpreting the phrase» *We made the House a place of assembly for men and a place of safety*”, in the above –mentioned Ayah, Imam abus-Sa’oud explains that by entering into al-Haram to perform pilgrimage, a Muslim seeks immunity from torment in the after world, as pilgrimage brings absolution from earlier sins or,as abu-Haneefa says, even if the person entering it was an offender, he would remain immune from punishment until he has gone out. By analogy, safety can cover every thing, including security of people upon initial entry. See: (Tafseer abi- as – Saoud : *irshad al- aql as- saleem ila mazaya al- qura’n al- kareem*, Vol. 1, al- Moshaf House, cairo, p.. 157; see also Ibn al- ‘Arabi : *ahkam al- qura’n*, Ibid, Vol. 1, pp. 37-39).

102 Produced by Muslim: *bab fateh makkah, kitab al-jihad was-siyar saheeh muslim*, 3, 14008, No. 1870; *kitab al-maghazi*, op.cit, pp.318-319. As regards the saying of the Prophet Mohammad (PBUH) upon leaving Tabouk” None was left of them, but a man, who, staying within Al-Haram, was protected from Allah’s torment”, ash-Shareef ar-Radhi says,” In fact, al-Haram is no impediment to the torment Allah wills to inflict on those who deserve it, but It is Allah the Almighty’s will to make al-Haram a place of refuge for His creatures, as a sign of glorification and high appreciation of its status. If a man commits a sin and then takes refuge in al-Haram, Heavenly castigation for him shall be deferred as long as he remains there.” See: (Ash- Shareef ar-Radhi: *al-magazat an- nabawiyya*, al- Halabi edition, Cairo, 1387 AH– (1967 AD), pp. 132 – 133).

As regards refuge to al-Haram, he maintains, “If a military enemy takes refuge in al-Haram, he shall not be killed, but he should not be given food, water or shelter, nor should he be vowed allegiance until he has left al-Haram. According to ash-Shafi’ e (Allah may bestow His mercy on him), he shall be killed in al-Haram. However, jurists are at variance on this question. While Abu-Haneefah and Mohammad (Allah may bestow His mercy on both), argued that he should not be killed nor ousted out of al-Haram, abu-Yusuf (Allah may bestow His mercy on him) maintained that he shall not be killed but may be ousted from al-Haram. ¹⁰³

Scholars were in agreement that if a person commits an offence exacting retaliation (qasas) in the limbs and then takes refuge in al-Haram, he shall be inflicted with the punishment of qasas and that he who commits within al-Haram an offense against life or less exacting a prescribed punishment (hadd) qasas shall be inflicted with the punishment of qasas there. However, they were at variance on whether an offender who commits the act outside al-Haram and takes refuge in al-Haram may be inflicted with that punishment.

The Hanafites maintain that such offender shall not be inflicted with that punishment within al-Haram, but shall be forced out by denying him food, water or any other dealings. Based on the generality of the Ayah “ ... *and he who enters into it shall be safe.*” (Surat ala-”Imran, 97) he should be punished only after he has left.

103 See : al- Kassani : *badae’ as- sana’e fi tarteeb ash- shara’e*, al- Kitab al- Arabi House, Beirut, 1402 – 1982, Vol. 7, p. 114.

There is consensus among the majority of Muslim scholars, including ash-Shafi'e and Malik, that if anyone commits an offence against life exacting a hadd, then takes refuge in al-Haram, he shall be inflicted with that punishment. Analogy was made to the case of an offender who, within al-Haram,¹⁰⁴ kills someone or commits an offence requiring hadd and be punished there accordingly.¹⁰⁵

There was controversy over whether the entry by a non-Muslim into al-Haram does not prevent a Muslim from granting him aman. Abu-Haneefa maintains that a Muslim is not allowed to do so if the non-Muslim is present within al-Haram or after he leaves and before he is denied aman, while abu-Yusuf and Mohammad approve the act and call for the non-Muslim to be returned to a place where he feels safe.¹⁰⁶

Imam ash-Shibani maintains that, originally, a person whose blood is shed with impunity outside al-Haram, shall enjoy aman if he enters it, should he have entered for a purpose other than to fight as were as the opposing. Ash-Shibani goes further to argue that while it

104 See: *tafseer al- qourtobi*, Vol. 4, p. 130, *Tafseer at- Tabari*, Vol. 7, pp.. 29-34, see also Dr. Mustafa al- Khonn: *athar al- ikhtitaf fil qawa'ed al- osoliyya fi ikhtilaf al- foqaha'*, a Ph. D thesis at the Faculty of Shari'ah and Law, al- Azhar University, Cairo, pp. 165- 166. Al-Qurtobi says that if abu- Haneefa maintains that such offender shall be pressurized until he exits al-Haram or dies, this means that while we call for having him killed by the sword, he calls for having starved death. Is there any more severe way of killing! (See also al-Qurtobi: *al- jami'e li ahkam al-qura'n al-kareem*, Vol. 2, p.111).

105 See: Ibn Qudama: *al-moghni*, Vol. 10, pp. 236-238, *al-umm* by al-Shafie'. Vol. 4, pp.201-202

106 See al-Kasani: *badae' as-sanae'*, Ibid, Vol. 7, p. 117.

is allowed to restrain or pressurize him and deny him good treatment, he shall not be denied food and public water, given that these are his rights, given that Prophet Mohammad (PBUH) has established that people are partners to three things: pasture (symbolizing food), water and fire.”¹⁰⁷

We believe that if a refugee comes in, basically fleeing persecution, he may enjoy the aman (security) bestowed on him by the Safe Sanctuary (al-Haram) of Allah, even if he was a non-Muslim fighter. This is supported by the following statement by judge Ibn al-Arabi:

“I came to Baitul-Maqdis (may Allah purify it) to the school (madrrasah) of abi-’Oqbah al-Hanafi where judge ar-Rihani was delivering a lesson on Friday, when a good-looking man, dressed in a shepherd ‘s loose gown with rags on his back, came in and greeted us in a scholarly style and seated himself at the chair of the meeting. Ar-Rihani asked him,” Who is as-Sayed (gentleman?) A man that was robbed by thieves yesterday,” the man answered,” My destination was this sacred sanctuary and I’m a knowledge-seeking scholar from Saghan.” The judge addressed the present,” Ask him, in line with the common practice of honouring scholars by asking them questions.” A lot was made and the question of the case of a non-believer who seeks refuge in al-Haram; whether or not he should be killed. He opined that he should not. Asked about evidence, he said,” The words of Allah

107 Ibn Majah: Abu-Abdullah Mohammad: *sunnan ibn majah*, verified by Mohammad Fu’ad Abdul Baqi, Cairo, undated, Darul-Hadeeth, kitab ar-rohoun, bab al-muslimoun shoraka fi thalath, No. 2473, Vol. 2, p.2473; *sharh as-siyar al-kabeer* by ash-Shibani, Haydar Abad., Vol. 1, p 247-250.

the Almighty ‘ ..And do not fight them at al-Haram Mosque until they have fought you there.’ Here the Ayah reads ‘ do not kill them and do not fight them’. If it reads ‘ do not kill them’ this is a matter of text, but If it reads ‘ do not fight them’, it is a warning, because the prohibition of fight, which is a cause for killing, is in itself a clear and obvious evidence to the prohibition of killing.”

Judge ar-Rihani protested, upholding ash-Shaif’e and Malik’s opinion, although he did not usually agree with them,” This Ayah was superseded by Words of Allah,” Then thou shalt kill polytheist wherever you find them”” This becomes not the position or the erudition of a judge. The Ayah you used to protest against me is general for all places and the one you used to support your argument is specific and no one can claim that the general can supersede the specific, replied the man from Saghan. Judge ar-Rihani was stunned. And this was one of the most splendid statements.¹⁰⁸ Accordingly, al-Haram has been always “a place of assembly for men and a place of safety”¹⁰⁹.

Thus, Muslim jurists differentiate between two types of refuge to Al-Haram:

The first gives aman to a refugee who enters into it to avail himself of its protection and safety from persecution, etc. This is undoubtedly in accordance with the essence and concept of the asylum system in international law, i.e. granting protection and safety to an asylum-seeker.

108 Ibn al-Arabi: *ahkam al-Qur’an*, op. cit., Vol. 1, pp. 106- 107.

109 For all human beings.

The second denies protection to the one who enters to fight or to cause sedition. In this case, a refugee obviously is not seeking safety but the reverse and logically should not be given aman and consequently should be denied the protection and safety implied in the right to asylum.

The Prophet's Sunnah asserts the need to respect any person seeking refuge in al-Haram, on the strength of the his hadith : “ A few things are interdicted by Allah but not by people and none who believe in Allah and the Day After is allowed to shed blood with them .¹¹⁰

In his speech on the second day after the conquest of Makkah, Prophet Mohammad (PBUH) said, “It is Allah not people that declared Makkah as sacrosanct.” According to Ibn-Qayyim al-Jawziyyah, “This is a legal, divinely pre-ordained prohibition.”

In differentiating between a refugee and a person committing an offence within al-Haram, Ibn-Qayyim al-Jawzi says, “Allah the Almighty says in the Holy Qur'an, “... But fight them not at the Sacred Mosque, unless they (first) fight you there; but if they fight you, slay them.” There are many differences between a refugee and an offender (a person who commits disgraceful acts). One is that the former, by committing such offence inside al-Haram, is infringing on its sanctity. On the other hand, an offender, who commits an offence outside the walls of al-Haram and then seeks refuge into it, is, by

110 Al-Bukhari, saheeh al-al-bukhari, kitab al-maghazi , bab manzil an-nabiy (salla Allah ‘alyhi wa sallam yaumal-fateh , No. 4044, Vol.4, p. 1563; Muslim: saheeh muslim, kitab al-hajj, bab tahreem makkah, No. 1354, Vol. 2, p. 987.

so doing, cognizant of its sanctity. Here the analogy is invalid. The second is that an offender inside al-Haram resembles one who commits an offence within a king's court and palace, while the offender who commits a foul act outside the king's court and palace and then seeks refuge there. The third is that, unlike others, an offender inside al-Haram, by infringing on the sanctity of both Allah and His Sacred Mosque, has violated two sanctities. The fourth is that unless the prescribed punishment is carried out offenders, anarchy and corruption would prevail in al-Haram, for the lives, property and honor of its visitors, like other people, need to be kept safe and unless punishment for offenders inside al-Haram is legislated, the penalties prescribed by Allah would be disrupted and thus harm to al-Haram and its visitors would be ubiquitous. The fifth is that a person taking refuge in al-Haram resembles a penitent refugee to al-Haram clinging to its protection, therefore it is not appropriate for him nor for the sanctity of al-Haram to fight him, unlike the one who dares to infringe on its sanctity. Here lies the difference.

He adds, «In the Jahilian (pre-Islamic) period, usually when a man saw his father's or son's killer within al-Haram, he would not fight him. That was the case before Islam and that was later asserted by Islam.»¹¹¹

Therefore, respect for a refugee to al-Haram, within the limits shown above is an established practice in Islam.

111 Ibn Qayyim al-Jawzeiyh, *zad al-me'ad fi haddi khair al-'ibad*, al-Kitab al-Arabi House, Beirut, Vol. 2, p. 177-179.

3.1.2. In international relations:¹¹²

The granting of religious asylum consists in the provision of protection to whoever enters religious or sacred places. This is one of the oldest forms of asylum seeking and was allowed by most religions, nations and peoples since olden times.

The right to asylum had been conferred a sacred meaning when refugees were seeking refuge in a religious or a sacred place, i.e. a sanctuary.

3.2 Territorial asylum:

3.2.1 In Islamic Shari'ah:

Islamic Shari'ah does not overlook nor ignore territorial asylum, simply because it was known even in pre-Islamic eras. Hospitality to and protection of a refugee had been an outstanding trait of Arabs. They called this type of asylum "intervention" (dikhalah) or "succor" (najda). The Islamic theory has adopted this same approach by recognizing the granting of asylum to Muslims and non-Muslims alike, according to the general principle providing that "Before the world's

112 It is worthy of note that, unlike Islamic Shari'ah that adopts Islam as a focus of interest, even on the global level and in relations with other states, contemporary international law is not based on religions in terms of rules and systems. As far as international law is concerned, our above statement is supported by the following quotations:

- «*Cuius region eius religio* was the substantive formula for the peace of Westphalia that satisfied the parties» Zartman and Berman: *The Practical Negotiator*, Yale Univ. Press, 1982, p. 103.:

calamities, all sons of Adam (human beings) are equal”.¹¹³

There are several types and forms of territorial asylum in Islamic Shari’ah, salient of which, we believe, are the following:

3.2.1.1 The grant of territorial asylum by state authorities:

It is established that decision-makers in any state, including Islamic states, have the authority to grant asylum on their own territory. Examples in the history of Islamic states are numerous.¹¹⁴

113 See Dr. Mohammad Tal’at al-Ghoneimi, *al-ahkam al-’ammah fi qanoun al-omam*- a study of Western, socialist and Islamic thought, Monsha’t al-Ma’reef, Alexandria, 1970, p. 720. At-Tahtawi says”Man is civil by nature and local by residence” (Rifa’ah Rafi’ at-Tahtawi, *ad-dawla al-islamiyyah wa nuzhumha wa ’amalatiha*, which is a complementary book of *nahayat al-ijaz fi sirat saken al-hijaz*, al ‘Adab Bookshop, Cairo, 1410-1991, p. 47).

114 One is that during the reign of Caliph ‘Umar ibn al-Khattab Zauraba ibn Barzag the Persian, sought asylum with to Sa’d ibn abi-Waqqas. According to biographers, the former was a governor of a Roman area appointed by Khosrau (the Persian king), who brought arms into their territory. Terrified by the Persian kings, he had felt unsafe until Sa’d came to Kufa. Then Zauraba came to him and had his palace and a Jum’ah (Friday) mosque built for him, Sa’d wrote to ‘Umar ibn al-Khattab (may Allah be pleased with him) about his status. When Zauraba embraced Islam, ‘Umar gave him money and sent him to Sa’d. (See Mohammad Hameedullah : *majmo’at al-wathayeq as-seyaseyah lil ‘ahdd an-nabawi wal khilafa ar-rashidah*, an-Nafa’ess House, Beirut 1403-1983, p. 417.)

Another example is that of the defection, during the reign of ‘Udhodh ad-Daulah, by the so-called«Ward» to the Islamic state and the request by the Roman king to him to extradite Ward. See: Minister abu-Shoga – also known as Thahrudin ar-Rotherawi: *tha’il tajarib al-umam*, al-Mothanna Bookshop, at-Tamaddon Industrial Company Printing Press, 1334 AH- (1916 AD), pp. 28-39 and p. 111.

A third example is the refuge by Alfonso X to Sultan abi-Yusof al-Mansour when his son Prince Don Sanchez rebelled against and dethroned him. (Dr. Abdul Hadi at-Tazi, *at-tareekh ad-diplomasy lil maghrib men aqdam al ossour ilal youm*, Fadala printing presses, al-Mohamaddeyya, 1407-1987, Vol. 7, p. 63)

Sultan al-Mansour abu-Ya’qoub Yusof welcomed Castilian political refugees, including princes and military commanders (Ibid, p..65). Two Moroccan princes defected to Portugal in 1578(Ibid, Vol. 8 p.146)

A fourth example is the defection by Ferdnande of Tergale and brother –in-law of

An example of the grant of territorial asylum by state authorities is a message sent by Sultan Barqouq to Timorlane regarding a man who was granted refuge by the former and the latter requested his extradition. The message reads:

“Do you think that what you have so far done to bondsman Ahmad, referred to, is still not enough so that you are requesting us to extradite him? Know you that bondsman Ahmad, referred to, has sought our protection, came to us and became our guest. He who asks for our help, shall be given his right (to refuge). Allah the Almighty says to Prophet Mohammad (PBUH) , the Master of all Creatures in the Holy Quran,” If one amongst the Pagans ask thee for asylum, grant it to him, so that he may hear the word of Allah; and then escort him to where he can be secure.”

How about Muslims seeking protection and aman with Muslims? Even if otherwise, is it permissible in the tradition of chivalry, generosity and fulfillment of promise to extradite our guest and or mustajeer (protection–seeker)? It is the custom, tradition and manners of our race to refrain from surrendering our guest, inmate or mustajeer

Advonce in 563 AH to Seville then to Marrakesh where he took refuge for five months. (See: Ibn Sahib as- Salah; *al-mann bel imamah*, verified by Dr. ‘Abdul Hadi at-Tazi, al-Gharb al-Islami House, Beirut, 1987, pp.. 284-295.

According to Adisicia, the tolerance with which Greek scientists who fled their land out of persecution by the church, in Muslim land had encouraged many more to immigrate, where they could work in peace. Conversely, there has been currently increasing reverse immigration from Muslim territories to non-Muslim countries for political, economic, social, academic, educational or other reasons. See more details in: (Dr. Mohammad Abdul-Aleem Morsi: *hijirat al- ‘olama’ men al- ‘alam al-islami*, Imam Mohammad Ibn Sa’ud Islamic University, Research Center, Riyadh, 1404-1984, pp. 134-245).

(protection –seeker) to any one. If you believe not this, ask our kinsfolk at your territory and they will tell you. None of our guest will be treated unjustly but favorably and hospitably. ¹¹⁵

It is clear that the above-mentioned message is based on the Ayah quoted above, i.e. ,” If one amongst the Pagans ask thee for asylum, grant it to him, so that he may hear the word of Allah; and then escort him to where he can be secure.”¹¹⁶ to institute the right to asylum in Islam.

3.2.1.2 The granting of territorial asylum by individuals:

It is said that “All Muslims are equal in granting private aman and protection, without distinction in this right between a Sultan and

115 See: al-Qalqashandi, *sobeh al- ‘a’sha*, Dar al-Kotoub, Cairo, Vol. 7, pp. 308-319.

116 I. Shehata interprets this Ayah as an evidence to the right to asylum, saying,» «No more liberal rule could perhaps be advocated for the future development of international law with respect to the question of Asylum» (I. Shihata: Islamic law and the World Community, the Harvard International Law Club Journal, Dec. 1962, p. 108).

Shaykh Zakaria adopts the same view. See also Shaykh Zakaria al-Berri in»Z. El-Berry: Immunity of Members of Diplomatic Missions in Islamic Law, R. Eyp. DI, 1985, p. 180.

E. Stavraki maintains that this Ayah endorses the enshrined right among Arabs as regards the right to asylum. (Emmanuel Stavraki : Humanitarian Concept in Humanitarian International Law, International Review of the Red Cross, Issue 17, 1991, p. 38. The same approach is adopted by Dr. al-Ghonaimi,» As to asylum, it is governed by an express Qur’anic provision, i.e.” *If one amongst the Pagans ask thee for asylum, grant it to him, so that he may hear the word of Allah; and then escort him to where he can be secure.*” See: Dr. Mohammad Tal’at al-Ghoneimy : *nathrah ‘ama fil qanoun ad-dawli al-insani al-islami*, 1st Egyptian Symposium on International Humanitarian Law, Cairo, 1982, pp. 36-37;

Based also on this Ayah, S. Tabandah says,»In no country nor law is the same consideration shown to the refugee as to convey him back to his own place and guard him from peril on the way» (S. Tabandah: A Muslim Commentary on the Universal Declaration of Human Rights, Goulding Comp., London, 1970, p. 34).

a bondsman, a woman and a boy. Should either of them grant aman, all (including the Sultan) should respect it.”¹¹⁷

It was the custom of ancient Arabs that if a dignitary from among them grants refuge to some one, no one else, particularly an inferior may grant him protection, otherwise it is deemed a violation of applicable traditions and customs.

In Islam, an individual may grant refuge.¹¹⁸ This is supported by two considerations:

Islam gives every one the right to grant aman based on the hadith of Prophet Mohammad (PBUH), “Muslims are equal in blood; the lowest-ranking among them can give aman and observe zimma (aman) given by other Muslims and they are united against others.”¹¹⁹ Therefore, on the strength of this hadith, every individual is entitled to give aman to another person, i.e. to grant him asylum.

The *istijarah*, *ijarah* or *jiwar* (seeking and granting asylum) system in inter-personal relations had been actually in practice in the Islamic

117 See.: Dr. al-Qotb Tabliyyah: *al-islam wa hoqoq al-insan*, al-Fikr al-'Arabi House, Cairo, 1396 AH – 1976 AD, p. 369.

118 M. Hamidullah stresses the same view, saying» A notre époque, accepter la naturalization de quelqu'un est un privilège, qui ressort de la prérogative du gouvernement central. Mais dans la constitution de l'Etat de Médine.. ce droit donné à chaque citoyen de l'Etat, et même le plus humble parmi les habitants aura le droit de *jiwar* (donner asile), à qui il voudra, après quoi le bénéficiaire, *jâr*, sera traité comme tous les membres de la tribu».M. Hamidullah: La tolérance dans l'œuvre du prophète à Médine, in L'Islam, la philosophie et les sciences, les presses de l'UNESCO, Paris, 1981, p. 23.

119 Abu-Dawood: *sunnan abi-dawood, kitab al-jihad, bab fi-issirriyya* No. 2751, Vol.3, pp. 126-127.

state since the epoch of Prophet Mohammad (PBUH) and the ensuing epochs. Examples are numerous. Suffice to mention the following :

Ibn Abdul-Barr says, Prophet Mohammad (PBUH) was granted asylum and protection by his uncle Abu-Talib.¹²⁰ When his uncle, his protector and supporter, died in the year 10 AH, Quraysh's aversion and molestation grew more acute and so he headed for Taif seeking asylum and refuge from harm with Thaqeef tribe. Ten days later, he returned unrelieved. Then he re-entered Makkah under the protection of al-Mot'am ibn 'Udayy, who granted him asylum.¹²¹

It is reported that before being granted asylum by al-Mot'am, Prophet Mohammad (PBUH) had retreated to Hara' and sent to al-Ahnaf ibn Shuraiq requesting him for asylum. But the latter answered, "I'm an ally and an ally may not grant asylum."¹²² Then Prophet Mohammad (PBUH) sent to al-Mot'am ibn 'Udayy, who granted him asylum.

Prophet Mohammad (PBUH) said to Umm-Hani, "We grant asylum to those whom you had granted, Umm Hani."¹²³ According to Imam Ibn Hajar al-Asqalani, the Arabic word "jiwar" and "mujawarah"

120 See: Ibn Abdul Barr: *ad-dorar fi ikhtisar al-maghazi wa-s-seyyar*, Supreme Council for Islamic Affairs, Cairo, 1415 AH – 1995 AD, p. 43.

121 See also: Ameen Sa'ied: *nash'at ad-dawla al-islamia*, Issa al-Babi al-Halabi printing press, Cairo, 1353 AH – 1934 AD, p. 8.

122 See: Ibn Hisham: *as-seerha an-nabawiyyah*, Issa al-Babi al-Halabi Printing Press, Cairo, 1375 AH – 1955 AD Vol. 1, p. 381.

123 Al-Bukari: *saheeh al-bukhari, kitab as-salah, bab : assalah fi-thawab alwahid mutalaffan bihi*, No. 350, Vol.1, p.141.

are synonymous with “ijaharah” that is giving aman and protection.¹²⁴

Also when Abu-Bakr was about to immigrate to Abyssinia (Ethiopia), he took asylum with ibn ad-Daghinah. The latter took him in his company and got out to the dignitaries of Quraysh, accosting them, “A man like Abu-Bakr must not exit nor must he be ousted. Will you oust a man who provides livelihood for the indigent poor, maintains close contact with his kin, endures the feeble, hospitably entertains guests and helps people endure calamities of fate?” Thus, Quraysh endorsed ibn ad-Daghinah’s covenant of protection (jiwar) and ensured his safety, provided he would worship his God indoors rather than in public. Later, when Abu-Bakr made a mosque in his house, Quraysh feared that their sons and women might be infatuated and asked ibn-ad-Daghina to stop Abu-Bakr from so doing.” You know on which conditions I gave you my covenant, so either you commit to this or give me back my jiwar, for I do not like Arabs to hear that I reneged on a covenant I gave to a man” , Ibn-ad-Daghina said to Abu-Bakr.

“Here I give you back your jiwar, and I’m satisfied with the protection of Allah,” Abu –Bakr replied.¹²⁵

During the reign of Caliph ‘Umar ibn-al-Khattab, the wife of a

124 Ibn Hajar al-Asqalani: *fateh al-bari bi sharh saheeh al-bukhari*, Al- Manar House, Cairo, 1419 AH -1999 AD, Vol. 6, p. 209.

125 See al-Bukhari: *saheeh al-boukhari*, Vol. 3, pp. 126 – 128; Ibn Katheer:, *as-seerah an-nabawiyyah*, Al-Ma’rifah House, Beirut, 1396 – 1976, Vol. 2, pp. 63 – 64, 153. *fateh al-bari bi sharh saheeh al-boukhari*, opt.cit., Vol. 4, pp. 543 – 544.

man called Lohjiyah ibn- al-Madhrib, a Christian, embraced Islam. The man came to al-Madinah, where he was hosted by Az-Zubair ibn al-'Awwam and requested his wife to be returned to him. When he told the story to Ibn al-'Awwam, he cautioned him against 'Umar getting to know about the story, in which case he would be subjected to harm. The story circulated al-Madinah until it reached 'Umar. "I've heard about the story of your guest, and I was about to assault him had he not taken refuge with you," 'Umar said to Az-Zubair. When the latter went back to Lohjiyah and having conveyed to him 'Umar's statement, he returned home. ¹²⁶

Ibn Ishaq, reporting on 'Umar's son talking about his father, says, "They took arms against him, but he engaged in fight with them until sunrise. When he got tired, he sat down. They stood above his head

126 See: Abu- Faraj al-Asfahani: *kitab al-aghani*, Vol. 20, General Egyptian Book Organization, Cairo, pp. 318 – 319.

As an evidence to the respect by Muslims for the right to asylum it is reported that when the Caliphate was wielded by Bani Abbas (the Abbassids), the Umayyads were hiding out. One of those was Ibrahim ibn Sulaiman ibn Abdul-Malik, who went to the house of a good-looking man." Who are you?," the man asked him." I'm a hiding man who is afraid for his life and is seeking asylum at your house," Ibrahim replied. The man welcomed him in and used to give him food and drink. Noting that the man used to go out once a day, Ibrahim inquired,"I see you are fond of horse-riding, what for?" "Ibrahim ibn Sulaiman locked in my father to death and I was informed that he is hiding out and I'm looking for him to avenge myself," the man said. Ibrahim said,"I'm Ibrahim ibn Sulaiman, your father's killer." Then the man said,» As for you, you'll meet my father in the After-Life and he'll take his revenge from you and as for me, I'm not renegeing on my covenant of asylum. Get out, I don't trust myself (acting wrongly against you).» Then the man gave Ibrahim one thousand dinar which he took and left. See: Al-Amir Osama Ibn Monqith, *lobab al-aadab*, as- Sunnah Bookshop, Cairo 1407 – 1987, pp. 128 – 129; At – Tanoukhi; *al-mostajad men fa'lat al-ajwad*, Dar al-Arab of al-Boustani, Cairo, 1985, pp. 22 – 23.

as he was saying, “Do whatever you like, I swear by Allah had we been three hundred men, we would have lost it (the fight) to you or you to us.” As they stood there, an old man from Quraysh, dressed in an ornamented suit and embroidered shirt came by and stood near him. “What is up?” he inquired.

They replied, “‘Umar has gone astray.”

“Stop it!” The old man retorted, “A man opted for something by himself! What do you want? Do you think Bani ‘Udayy would surrender this guy to you? Let go the man.”

“By Allah,” he said,” they went off so quickly as if a robe was stripped off me.”

“I asked my father after migrating to al-Madinah, ‘Father, who was the man who had drove people away from you in Makkah on the day you embraced Islam as they were fighting you?’ , he said.”

“Ay son, he’s al-’As ibn Wa’il as-Sahmi.”¹²⁷ There was already an alliance between al-’As and Bani ‘Udayy, Omar’s folk. So al-’As said to ‘Umar, “They can’t touch you, I’m your protector.” That is how al-’As granted asylum to ‘Umar.¹²⁸

It was also reported that once the tribe of Quraysh set out in pursuit of a group of Muslims and caught up Sa’d ibn ‘Obadah at

127 See: Ibn Katheer : *safwat as-seerah an-nabawiyah*, Supreme Council for Islamic Affairs, Cairo, 1422 AH – 2002 AD, Vol. 2, p 22.

128 See: Dr. Ali Ahmed al-Khatib, *moqadimmah qabla hijrat an-nabiyy – al-jihar*, op.cit., p. 93.

a place called Ba'zhakher and al-Munzhir ibn Amr, brother to Bani Sa'idah ibn Ka'b ibn al-Khazrag, both dignitaries of their folk. They could not overpower al-Munzhir, but they caught Sa'd ibn 'Ubadah, tied his hands to his neck with his luggage band and then transported him to Makkah, beating and grabbing him from his thick forehead hair. "Sa'd related," By Allah, as I fell into their hands, a group of people from Quraysh, amongst whom there was a nice-looking man with a starry face, intercepted us. I told myself, ' If there was ever a good man among those guys, he must be this man!' But when he drew nearer to me, he raised his hand and gave me a strong blow. Then, I told myself, ' By Allah, after that there isn't yet any good man among them.' As I was still in their grip and they were dragging me, one of them leaned to me, saying, ' Woe unto thee! Don't you have a covenant of jiwar with any man from Quraysh?' I said, ' Yes, by Allah, I used to grant asylum and protection (aman) to Jubair ibn Mut'am's traders against those who sought to oppress them in my country. And so did me to al-Harith ibn Harb ibn Umayyah ibn abd-Shams. 'Woe unto thee, speak out the names of both men and tell them about your covenant with them.' I so did,' he said. That man went out to them (the protectors) and, finding them in the mosque at al-Ka'bah, told them that a man from al-Khazraj (tribe) was being beaten at a place called al-Abtah and was speaking out your names as his protectors. 'Who's he? 'they asked. 'Sa'd ibn 'Obadah,' he said. "He's true, by Allah. He used to grant asylum and protection to our traders against those who sought to oppress them in his country, ' they said. "They came," he said, "and unhanded Sa'd. The man who knocked Sa'd

was Suhail ibn Amr.

Ibn Hisham argues that the man who leaned to Sa'd ibn 'Obadah was abul-Bahktari ibn Hisham.¹²⁹

Another evidence is demonstrated by the pact of fraternity between Umayyah ibn Khalaf ibn abu- Safwan from Quraysh and Sa'd ibn Mo'azh (may Allah be pleased with him) from al-Madinah. The pact that had been long-standing even before Sa'd (may Allah be pleased with him) embraced Islam provided that each party grants protection to the other. So, whenever Umayyah traveled north via al-Madinah, he used to stay as guest with Sa'd and so did Sa'd with Umayyah when he traveled south up to Makkah. When Prophet Mohammad (PBUH) migrated to al-Madinah, Sa'd set out towards Makkah to perform 'Umrah (lesser pilgrimage) and stayed as guest with Umayyah. Being aware of the indignation and anger in the heart of Makkans (Meccans), and wishing to spare Umayyah any embarrassment, said to him, "Will you give me some time to circumambulate around al-Ka'bah?" "Will you wait until mid-day?" Umayyah asked him. So, they went out almost on mid-day and as Sa'd (may Allah be pleased with him) was starting the circumambulation, they ran up against Abu-Jahl, who asked Abu-Safwan, "Who is that with you, Abu-Safwan?" "This is Sa'd," Umayyah replied. Addressing Sa'd, he said, "I see you're moving about safely in Makkah, although you have given shelter to the Sabeans, claiming you're supporting

129 See: Ibn Katheer : *safwat as-seerah an-nabawiyyah*, Ibid, Vol. 2, pp. 107-108.

and assisting them. By God, hadn't you been in the company of Abi-Safwan, you'd have never returned safely home.¹³⁰

Further evidence is demonstrated by the story related by Aslam, the slave of 'Umar ibn al-Khattab where they were traveling on a trading trip with Quraysh. When they set out, 'Umar stayed behind for some affair of his own. While in town, a Roman commander took him by the neck and started fighting him. Unable to overpower 'Umar, the commander pushed him in a house where there were some earth, an axe, a shovel and a palm-leave basket, told him to move that from here to there, locked him in and left. He did not return until noon. 'Umar did nothing of what he was told to do and sat there pensively. Back into the house, the commander asked 'Umar, "Why didn't you do anything?" and knocked him on the head. Infuriated, 'Umar picked up the axe and hit and killed him. Going out on his own way, he came across a monk's monastery and sat down there until nightfall. The monk looked at him from his place, and then came down, admitted me into the monastery and gave me food, water and niceties. Casting a scrutinizing look at him, he asked what was the matter with him? "I've lost trace of my companions," said 'Umar. The monk commented, "But you have a scared look." Trying to recognize me, he said, "Christian clergy know that I'm the most knowledgeable about their Book. I can see you are the one who will oust us from this country of ours. Will you write me a covenant of aman for my monastery?" I replied, "You've gone a different way." The monk pressed me until I gave him

130 See: Al-Bukhari: *saheeh al-boukhari: kitab al-maghazi* bab zikr an-nabiy salla Allah alayhi wa sallam man uqtal bi badr , No. 3734, Vol. 4, p.1453.

a sheet containing what he requested. When it was time to leave, he gave me a she-camel, saying, “ Ride it, and as soon as you reach your companions, send it back to me unescorted, for it will be honored at every monastery it passes by. “ I did what he told me, “said ‘Umar. When ‘Umar came to Baitul-Maqdis (Jerusalem) as a conqueror, that monk came to him at the water basin with that sheet (the covenant of aman) “Omar accepted it on condition that the monk would host and guide Muslims passing by him to the right road.

Moreover, it so happened that Khalid ibn ‘Itab insulted al-Hajjaj and the latter wrote to Caliph ‘abdul-Malik ibn Marwan about the incident. Coming to the Levant (ash-Sham), Khaled asked about who was ‘abdul-Malik’s confidant. He was told that was Rauh ibn Zinba’. Coming to his house at sunrise, he said, “ Here I come seeking asylum.” “I would have done so unless you’re Khalid,” Rauh said. “ I’m Khalid,” he said. Changing his tone, Rauh said, “ For the sake of Allah, please get away from me; I don’t trust ‘abdul-Malik.” Khalid asked him, “Will you give me leave until sunset?” Rauh sat awaiting sunset, until Khalid left. Then, he came to Zafr ibn al-Harith al-Kolabi saying, “ Here I come seeking asylum.” “And so I give you, “the man replied.” I’m Khalid,” the man said. Rauh stressed, “And even if you were so.” In the morning, almost fainting and leaning on two sons of his, ibn Zafr was admitted to the Caliph’s audience. As he saw him, he ordered a chair to be brought for him and placed by his seat. Having taken his seat, he said to the Caliph, “I’ve granted asylum from you to

131 *See: Ibn Katheer: al-bidayah wan nahayah, Ibid, pp. 56-57.*

someone, will you give it to him?” The caliph replied, “I’ll unless he is Khalid.” Zafr said, “He’s.” “No, there’s no exception,” the Caliph snapped. Then Zafr turned to his sons, saying, “Get me up.” On his way out, he said to the Caliph, “ ‘abdul-Malik, by Allah, if you know that my hands can endure to handle the arrow and horse rein, you would grant asylum to whoever I did.” Laughing, the Caliph said, “Yes, abal-Huzhayl, we hereby grant him asylum.’”¹³²

3.2.1.3 The grant of territorial asylum to hostages if they embrace (convert to) Islam or become zimmi:

Offering hostages (for example a certain number of persons) has been used since time immemorial as a means to guarantee the implementation of an international treaty. Islam has been so tolerant that it gave a non-Muslim hostage the right to residence rather than returning him against his will, if he embraces Islam while on Muslim territory. For by so doing, his life becomes as inviolable as that of a Muslim hostage. In this connection, Imam ash-Shibani says, “ If their (non-Muslim) hostages embrace Islam, non-Muslims tell Muslims that unless you surrender our hostages, we will kill or enslave yours and the former show unwillingness to be returned to non-Muslims, the imam (ruler) should not do so , even though he knows that they would kill Muslim hostages. That is because the lives of both are

132 Abu- Faraj al-Asfahani: *kitab al-aghani*, opt. cit., Vol. 17, pp. 10-11, pp. 318 – 319.

In the year 633 AH, an-Naser Daoud moved from al-Kark to Baghdad, seeking asylum with Caliph al-Mustansir, when he feared his uncle al-Kamil. See: (Mohammad Kurd Ali; *khetat ash-sham*, Al-Hadeetha Printing Press, Damascus, 1343 AH– 1925 AD, Vol. 2, p 96.)

equally inviolable. Should their hostages, after converting to Islam ask Muslims to return them and take back Muslim hostages and if the Imam tends to believe that they would be killed upon return, he should not return them either. In the case of giving legitimacy for a person to be killed or put at risk of being killed, no consideration is to be given to his own permission. However, if we know not how they are going to handle him (if his fate is unknown to us), there is no objection returning him back. It is no injustice repatriating him voluntarily, knowing that such repatriation is no reason for his perdition. Apparently a person in such a case would not agree to be repatriated unless he feels safe.”¹³³

It is clear from the foregoing that, in Islam, the golden rule is the mandatory need to maintain safety and security of a refugee in two cases:

133 See: Ash-Shaybani: *sharh as-seyar al-kabeer*, Hyderabad ed., opt. cit., Vol. 4, p. 43.

The foregoing applies also to the case where a hostage has acquired a” *zimmi*” status (given if a person stays for more than one year or so requests).

According to” *as-siar al-kabeer*”,” if a the Imam gives them (non-Muslim hostages) a covenant of *aman* (zimma) and then asks non-Muslims to return Muslim hostages and they refuse unless he has returned theirs, the Imam shall not renege on his covenant not to return non-Muslim hostages against their will. Once they have been in our custody and trust, non –Muslim hostages would be as inviolable for their lives as Muslims. If non –Muslim hostages willingly accept to be repatriated, there is no objection to that. However, if the Imam tends to believe that they would be killed upon return, he should not return them, in analogy to the above-mentioned case of non-Muslim hostages embracing Islam. This is similar to the case of exchanging Muslim hostages in return for zimmi hostages. As earlier pointed out, this is permissible, subject = = to acceptance by *zimmis* and impermissible without it. Ibid, pp. 45-46.

To us, this means that the grant of asylum in such cases constitutes some kind of”involuntary territorial asylum”, should converts to Islam or *zimmis* wish to return home, in case they are potentially at risk of being killed there.

A hostage shall not be returned to authorities of the other state, in case he would be killed there. Nor shall a non-Muslim hostage be returned even if those authorities threaten to kill Muslim hostages, because, as Imam ash-Shibani says, “The lives of both are equally inviolable”.

Should a hostage agree to be repatriated, in which case he would be at risk of being killed, he shall not be returned. This is based on an Islamic premise that “in cases where a person may be killed or exposed to death no consideration is to be given to his own permission.”

3.2.1.4 Migration as a type of territorial asylum:

According to al-Mawardi, immigration (hijrah) during the time of Prophet Mohammad (PBUH) was allowed for those who had fears of incurring harm or being tempted away from their faith. An example can be seen in the following Ayah, “And why should ye not fight in the cause of Allah and of those who, being weak, are ill-treated (and oppressed)? Men, women, and children, whose cry is, “Our Lord! Rescue us from this town, whose people are oppressors; and raise for us from thee one who will protect; and raise for us from thee one who will help!”(Surat An-Nissa’, 75).

Allah the Almighty responds to their request for migration, saying, “ *He who emigrates from his home in the cause of Allah, finds in the earth many a refuge (moraghem), wide and spacious: should he die as a refugee from home for Allah and His Messenger, his reward becomes due and sure with*

*Allah: and Allah is Oft-Forgiving, Most Merciful.” (Surat An-Nisa’, 100).*¹³⁴

In fact, when Islam emerged and believers started to speak out their religion, Quraysh targeted them with torture and mischief, with a view to dissuading them away from their faith. Prophet Mohammad (PBUH) said to them, “Disperse you out into the Earth.” “Where shall we go?” They inquired. “Up there,” he said, pointing towards the land of Abyssinia. So, a number of them immigrated, some on their own, others in company of their families. According to ibn Abdul-Barr, “When those landed in Abyssinia, they felt safe with their faith and stayed in the best homes and enjoyed the best protection.”¹³⁵

Exercising the right to asylum to Abyssinia implied three rules, which form part of contemporary international law on asylum, namely:

134 Al-Mawardi provides two interpretations for the «refuge» (*moraghem and si’ah*) mentioned in the Ayah: One is that “*moraghem*” means to move from one place to another while “*si’ah*” means money. The second is that “*moraghem*” means to seek means of livelihood while “*si’ah*” means decent living. Imam al-Mawardi, *al-hawi al-kabir*, al-Firk House, Beirut, 1414 – 1994, Vol. 18, pp... 110 – 111. In reply to a trend in Islamic jurisprudence that maintains that migration from “land of contamination” (darul-fisq) in analogy to “land of disbelief (darul-kufr), ash-Sahaukani says,” This is a wrong inference or paralogism, but the truth is immigration from darul-fisq is not an obligation, because after all it is Muslim land. It becomes not the science of reporting nor erudition to associate Muslim land with land of disbelief on ground of apparent incidence of sins.” (Ash – Shawkani : *nail al-awtar*, Al-Kotoub al- ‘Ilmiya House, Beirut, 1403 – 1983, Vol. 8, p 27.)

135 *sirat ibn hisham*, Vol.1, p. 334; Ibn Abdul- Barr : *ad-dorar fi ikhtisar al-maghazi was- seyar*, verified by Dr. Shawqi Dhaif, al-Ma’arif House, Cairo, 3rd ed., pp. 36 – 37, 52.

It is worth recalling that immigration to Abyssinia was the first in Islam. See also, Ibn Hisham: *as-seeraha an-nabawiyyah*, op. cit., Vol. 1, pp. 321 – 322. See also: *fateh al-bari bi sharh saheeh al-bukhari*, op. cit., Vol. 7, pp. 206- 209.

The goal of asylum: i.e, to ensure safety for refugees. In this connection, Umm-Salamah, an immigrant, said, “In Abyssinia, we safely maintained our faith.”¹³⁶

The cause of migration: i.e, that refugees are undergoing persecution prompting or pushing them to immigrate. That was the case of Muslims who were molested and harmed by Quraysh. So Prophet Mohammad (PBUH) advised them to immigrate.

Inadmissibility of extraditing a refugee, if such an act would put him at risk of being persecuted in the requesting country. In fact, Quraysh, their oppressors, sent ‘Abdullah ibn abi-Rabee’ah and ‘Amr ibn al-’As, laden with gifts and precious object to Negus, Emperor of Abyssinia, requesting him to extradite Muslim immigrant to them. In response, Negus said, “No, by God, I won’t surrender them. Never shall I allow harm to be caused to those people, who had sought my protection, come to my country and given me preference over others until I call them and ask them about what this man says about them. If it proves true, I would surrender them to them and send them back to their folk. Even if not I’ll defend and protect them well as long as they stay with me.”¹³⁷

Having heard from Muslims and realized the truth of their argument, Negus refused Quraysh’s request, addressing Quraysh’s emissaries, and “If even you give a mountain of gold, I won’t surrender

136 *sirat ibn hisham*, Vol.,1, p. 358, Ibn Abdul -Barr: *ad-dorar fi ikhtisar al-maghazi was- seyar*, op. cit., p. 134-137.

137 *sirat ibn hisham*, Vol.,1, p. 359; Ibn Abdul -Barr, p.137.

them to you.” He then ordered their gifts to be returned, upon which they left back home disappointed.¹³⁸

In addition to the migration by some Muslims to Abyssinia¹³⁹ (twice in 615 AD) , one can mention the migration to al-Madinah in 622 AD by Prophet Mohammad (PBUH), together with abi-Bakr as-Siddeeq (May Allah be pleased with him) and a number of early Muslims.¹⁴⁰

Additionally, many Ayahs in the Holy Qur’an enjoin migration, including the following:

138 Ibn Qayyîm al-Jawziyyah, *zad al-me’ad fi hadie khair al-’ibad*, Al-Kitab al-Arabi House, Beirut, Vol. 2, p 46.

139 Prophet Mohammad (PBUH) had sent a letter to Negus saying,» I <m sending you my cousin Ja’far and a group of Muslims. When they come to you, let them settle down and do not tyrannize them.” Commenting on this letter, some stress that Prophet Mohammad (PBUH) asked the just king to take care of» alien refugees in his kingdom.” See:

(Mahmoud Sheeth Khattab : *ja’far ibn abi talib awal safir fel islam*, Islamic Research Magazine, General Presidency of Scientific Reasearches and Ifta’ Departments, General Secretariat of the Board of Grand Ulema, Riyadh, 1410 AH, pp. 193 – 194).

One scholar (Malik) considers Muslim immigration to Abyssinia as some kind of” political asylum”:

«Early Muslims migrated to Abyssinia, a Christian state which granted them political asylum» Malik: *The Concept of Human Rights In Islamic Jurisprudence*, Human Rights Quarterly, the Johns Hopkins Univ. Press, no. 3, 1981, p. 6.

Some orientalist attribute Muslim immigration to Abyssinia to either of the following five reasons: to flee persecution; to keep away from the risk of apostasy; to do trading business; to seek military assistance from the Abyssinians; to avoid disputes arising between Muslims, by sending one group away. See more details and counter arguments in :

Dr. Tawfiq ar-Ra’ie : *derasat fi fahm al-mostashriqeen lil islam*, Shari’ah and Islamic Studies Magazine, Kuwait University, Issue 18, 1412 – 1992, pp. 174 – 179.

140 Ibn Hisham: *as-seerha an-nabawiyyah*, op.cit, Vol. 1, pp. 480 – 485.

“Those who believed, and adopted exile, and fought for the Faith, with their property and their persons, in the cause of Allah, as well as those who gave (them) asylum and aid, these are (all) friends and protectors, one of another. As to those who believed but did not immigrate; ye owe no duty of protection to them until they immigrate; but if they seek your aid in religion, it is your duty to help them, except against a people with whom ye are bound by treaty. And (remember) Allah Seeth all that ye do.” (Surat al-Anfal, 72)

“Call to mind when ye were a small (band), oppressed through the land, and afraid that men might despoil and kidnap you; but He provided a safe asylum for you, strengthened you with His aid, and gave you good things for sustenance: that ye might be grateful.” (Surat al-Anfal, 26)

“The vanguard (of Islam), the first of those who forsook (their homes) and of those who gave them aid, and (also) those who follow them in (all) good deeds, well-pleased is Allah with them, as are they with Him: for them hath He prepared Gardens under which rivers flow, to dwell therein forever: that is the supreme Felicity.” (Surat at-Taubah, 100)

“(Some part is due) to the indigent Muhajirs, those who were expelled from their homes and their property, while seeking Grace from Allah and (His) Good Pleasure, and aiding Allah and His Messenger: such are indeed the sincere ones. But those who, before them, had homes (in Medina) and had

adopted the Faith, show their affection to such as came to them for refuge, and entertain no desire in their hearts for things given to the (latter), but give them preference over themselves, even though poverty was their (own lot). And those saved from the covetousness of their own souls; they are the ones that achieve prosperity.”(Surat al-Hashr, 8-9)

“When angels take the souls of those who die in sin against their souls, they say: “In what (plight) were ye?” They reply: “Weak and oppressed were we in the earth.” They say: “Was not the earth of Allah spacious enough for you to move yourselves away (from evil)?” Such men will find their abode in Hell, what an evil refuge!” . (Surat an-Nisa ‘97)¹⁴¹

Moreover, it was the habit of Prophet Mohammad (PBUH) upon appointing a commander to an army or battalion, to enjoin him to fear Allah with respect to himself as well as his fellow-Muslims under him. On one of these occasions, he said, “In the name of Allah wage war;

141 According to Shaykh Mahmoud Shaloot, this Ayah applies at present to the following cases:

Muslim individuals living in countries, where their sultan (ruler) persecutes Muslims. Those have an obligation to immigrate, otherwise they would exact the punishment the Ayah warns against.

In Islamic countries, where enemy forces colonized the land, usurped power and authority from natives and prevented them from performing their religious rites and denied them freedom of disposing their property, Muslims are under obligation to immigrate morally and physical (through their hearts and efforts) and join forces with their compatriots to expel the colonialist enemy.

In a divided Islamic country, where each faction is controlled by an enemy group and all of them succumb to the colonialist powers and remain divided rather than reunite their country, by so doing Muslims would be supporting their enemies and are thus considered as sinners against themselves. See: Shaykh M. Shaloot: al-fatwa, Ash-Shorouq House, Cairo, 1400 AH (1980 AD), pp. 430-434.

in the name of Allah fight disbelievers. Whenever you confront your disbeliever enemies, call them to adopt three traits. Accept whichever they respond to and keep your hands off them. Ask them to move from their land to that of Muhajireen (immigrants) and tell them that they will be equally treated. Should they refuse and opt for their own land, tell them that they will be treated like Muslim Bedouins and will be subjected to the Divine judgment applicable to believers. Exceptionally, they will have no share in booty, unless they fight with Muslims. Should they still refuse, ask them to pay non-Muslim tax (jizya). If they accept, take it and keep your hands off them. Should they further refuse, seek Allah’s assistance and fight them.”¹⁴²

Finally, there is a strong tendency among Muslim scholars to consider hijrah to Muslim land as obligatory.¹⁴³ Hence, Ibn-Foudi maintains that hijra is obligatory as stipulated in the Holy Qur’an: “Except those who are (really) weak and oppressed, men, women, and

142 *Saheeh muslim, kitab al-jihad was-siyar, bab ta’meer al-imam al-omara’ ala al-bo’outh*, No. 1731 , Vol.3, pp.1356-1357; see also: Imam al-Harmayn al-Jowayni: *al-kafyat fil-jadal*, ‘Issa al-Babi al-Halabi Bookshop, cairo , 1399AH (1979 AD) , p. 477.

143 Jurists who hold Hijra as obligatory base their argument on the premise that a non-Muslim shall in no case have jurisdiction, mandate or political or legislative authority or control over a Muslim. See: *mawqif al-malekiyyah fi redwan as-sayyid*, Darul-Islam, International System and the Arab Nation, Future of Islamic World, a magazine issued by the Islamic World Studies Center, Malta, Issue 1, Fall 1991, pp.. 41 – 42.

Ibn al-Arabi also says, addressing any Muslim,” You must immigrate and never stay among unbelievers, because by so doing, you are insulting the religion of Islam and upholding the banner of disbelievers over that of Allah. Never, as far as you can, enter under the custody of an unbeliever. Know you that a person who stays among unbelievers, while being able to exit them, shall hve no share in Islam.” See: Ibn al-’Arabi: *al-wassaya*, al-Motannabi Book-shop, Cairo, p. 41.

children who have no means in their power, or (a guide-post) to direct their way.” (Surat an-Nisa’, 98) and the Prophet’s hadith, “ I disown (wash my hands off) any Muslim who resides amidst disbelievers.” “ Why, Messenger of Allah?, “ they inquired. “ Because their fires should not within each other’s sight,” he said¹⁴⁴. There is also unanimity on the obligation to migrate. ¹⁴⁵

According to al-Bhouti in “ kashaf al-qina’ ‘an matn al-iqna’ ”, “It is mandatory for a Muslim who cannot pronounce his faith in non-Muslim land, where law of disbelievers prevail, based on the Ayah: “ Except those who are (really) weak and oppressed, men, women, and children who have no means in their power, nor (a guide-post) to direct their way.” and the Prophet’s hadith (reported by abu-Daoud, an-Nissa’ie and at-Tirmizi): “I wash my hands off (disown) any Muslim who resides amidst disbelievers. Both sides’ fire should not be within each other’s sight.” This means the a believer should not

144 Sunan abi dawood: *kitab al-jihad, bab an-nahyi ‘an qatl man f’atasam bis-sojoud*. No. 2645. Vol. 3, pp. 73-74; *sunan at-tirmizi, bab ma ja’a fi karahiyat al-moqam bayn azhor al-moshrikeen*, No. 1604, Vol. 4, pp.132-133.

145 Ibn-Foudi excludes vulnerable people from the obligation to immigrate in accordance with the Quarnic Ayah» *Except those who are (really) weak and oppressed, men, women, and children who have no means in their power, nor (a guide-post) to direct their way.*” As regards the Prophet’s hadith” No immigration after the Conquest” Ibn Foudi concurs with the interpretation adopted by a school of jurists that this means there is no immigration after the Conquest and conversion of Makkah into a Muslim territory. Immigration is an unceasing process, but it remains an obligation should non Muslims convert but fail to immigrate, they would be regarded as disobedient to Allah and His Messenger, although their Islam remains valid. See: (Shaykh Othman Ibn Fodi, *bayan wogoub al-hijra ala al-’ibad wa bayan wogoub nasb al-imam wa iqamat al-jihad*, op. cit., pp. 12 – 13, 16 – 20).

reside in a place where believers' and non-believers' fires can be within each other's sight. " A Muslim is obligated to perform his religious duties, including immigration. It is understood that the essential requirements in the absence of which a duty cannot be consummated are themselves a duty.¹⁴⁶

Another school advocates an opposite view and holds migration as non-obligatory, on the basis of the Prophet's hadith: "No migration after the Conquest (the opening of Makkah by Muslims), but diligence (jihad) and intention."¹⁴⁷

146 See: Al-Bahhouthi, *kashaf al-qena' 'an matn al-iqna'*, op. cit., Vol. 3, pp. 43 – 44.

147 One of the best arguments on compromising this hadith with the advice by Prophet Mohammad (PBUH) to the commander is provided by Imam al-Hazimi,» At the dawn of Islam, immigration was mandatory as shown in the hadith but was later viewed as a recommended rather than obligatory act as shown in the Qur'anic Ayah»*He who forsakes his home in the cause of Allah, finds in the earth many a refuge, wide and spacious..*" This Ayah was revealed as pagans escalated their molestation of Muslims after the immigration of Prophet Mohammad (PBUH) to al-Madinah. Muslims were then ordered to move there to cooperate and support each other, whenever matters become serious and to learn more deeply religious matters. At that time, members of the Quraysh tribe (residents of Makkah) were immensely dreaded. But when Makkah was conquered and turned into a wholesome place through obedience, it no longer harbored any risk. So immigration was no longer an obligation, but rather a recommended and desirable act. See: Imam Mohammad Ibn Moussa al-Hazimi al-Hamathani: *al-i'tibar fil nasikh wal- mansoukh min al-athar*, verified by Dr. Abdul-Mo'eti Qal'ajy, Al-Wa'ie House, Aleppo, 1403 – 1982, pp.. 303 – 309. See also *kitab ma'lim as-sunan* by Imam Abu Solaiman Ahmad Ibn Mohammad al-Khatibi, which is an explanation of *sunan abu dawoud*, Vol. 2, Al-'Ilmiyyah Bookshop 2nd ed., Beirut, 1401AH – 1981 AD, pp. 234 – 235. According to Yazeed ibn abi- Ziyad, " There is no obligation to immigrate from a territory whose residents have embraced Islam." As confirmed = = by Salmah ibn al-Akwa', Prophet Mohammad (PBUH) says, " You are immigrants wherever you are." (Ibid, pp. 310-312). Imam an-Nawawi says, " If a Muslim is weak in non-Muslim land and is unable to pronounce his faith, it is forbidden for him to stay there and should immigrate to

In fact, it is advisable, in our opinion, to differentiate between two hypotheses:

If a Muslim can pronounce his religion in a non-Muslim country, he shall have no obligation to emigrate to Muslim land due to absence of the reason justifying migration, i.e. risk of being persecuted on ground of religion.

If a Muslim cannot pronounce his religion or perform his religious duties in a non-Muslim country, he shall be under an obligation to emigrate, in accordance with the Qur'anic Ayah: "When angels take the souls of those who die in sin against their souls, they say: "In what (plight) were ye?" They reply: "Weak and oppressed were we in the earth." They say: "Was not the earth of Allah spacious

Muslim land. If unable to do so, he is excused until he has afforded to. If the land where he lives was opened to Islam before he has immigrated, the obligation to do so is forfeited. If, because he has a pull in his folk and a clan to protect him, he can afford to pronounce his faith and has no fears of being enticed against his religion, for him immigration shall be desirable rather than obligatory, lest the majority might out of malice target and intrigue against him. Immigration, says Imam, is obligatory and the former opinion is valid.

Al-Mawardi, author of "al-hawi al-kabeer" says, "If a Muslim has hopes of seeing Islam emerges where he lives, he should better stay there. If a Muslim can afford to stay protected and secluded in non-Muslim land, he should do so, because his location is a Muslim land, which would otherwise (should he leave) become non-Muslim. Therefore, he is forbidden to leave. If he can fight non-believers and call them to Islam, he should stay on, otherwise he should leave. Allah is the Most Knowing. See : Imam an-Nawawi: *rawdhat at-talibin*, op.cit., Vol. 10, p. 82.; Imam al-Mawardi: *al-hawi al-kabir*, op.cit., Vol. 18, p. 111; al-Mirdawi: *al-insaf fi ma'rifat ar-rajih mina al-khilaf 'ala mathhab Imam Ahmad ibn hanbal*, Ihya' at-Turath al-Arabi House, Beirut, 2nd ed., Vol. 4, p. 121; al-Mazeri: *kitab al-mu'allim bi fawa'id muslim*, Supreme Council for Islamic Affairs, Cairo, 1416 AH -1996 AD, Vol.2 p. 166; Imam ash-Shawkani: *as-sayl al-jarrar al-mutadaffiq 'ala hada'q al-ahar*, Supreme Council for Islamic Affairs, Cairo, 1415 AH- 1994 AD, Vol. 4, p. 576.

enough for you to move yourselves away (from evil)?” Such men will find their abode in Hell, what an evil refuge!”(Surat an-Nisa ‘97).

As an exception, there is no obligation to emigrate in the case of compelling reasons such as illness, coercion, etc, in conformity with the Qur’anic Ayah: “ “ Except those who are (really) weak and oppressed, men, women, and children who have no means in their power, nor (a guide-post) to direct their way.” (Surat an-Nisa’, 98) ¹⁴⁸

3.2.1.5 Conventional (contractual) right to territorial asylum in Islam:

Arrangements for regulating asylum by nationals of a certain state to the territory of another state may be made under an international treaty that provides for the conditions of asylum and the manner in which refugees may be treated and extradited, etc.

Islam did not miss the regulation of the right to asylum under

148 Naturally, a Muslim immigrant to a Muslim land enjoys the same rights as those of native citizens as stressed by the following legal opinion:

« It is necessary for a Muslim to migrate to a Muslim country to attain the rights of citizenship. These will be available to him as soon as he enters the territory, whether for settling permanently or for a visit. This is exactly the case with common citizenship in the British Commonwealth.

The legal basis of the rights of citizenship is ideological unity; therefore the mere entrance into the territory should suffice for attaining these rights», (R. Kemal: Concept of Constitutional Law in Islam, Faise brothers, India, 1955, pp. 95-96).

Another scholar argues that it is not right to generalize as negative or positive the consideration of residence in non-Muslim countries today. There is mandatory and required residence (by Do’ah (callers for Islam) who come in for the purpose of da’wah (call), and there is the forbidden residence (such as voluntary residence in non-Muslim countries. There is also permissible or authorized residence (by those compelled to stay for some reason such as students). See: Dr. Mohammad abul-Futouh al-Bayanouni : *al-usoul ash-shari’iyyah lil-’laqaat bayn al-muslimmeen wa ghayrihim fi al-mugtama’t ghayr al-muslimah*, Imam Mohammad ibn Sa’oud Islamic University Journal, Issue 6, 1413 AH-1993 AD, pp. 164- 167.

international treaties and conventions with non-Islamic states.

An example can be seen in the treaty concluded between Prophet Mohammad (PBUH) and the residents of Jarba' and Azrah:

“This is a letter from Muhammad the Prophet to residents of Azrah (telling them) that they are safe with the Aman of Allah and Muhammad and they have to pay one hundred dinars each Rajab (the seventh month of the hijrah (Muslim) calendar year). Allah is their guarantor in giving advice to and good treatment of Muslims (living with them) those seeking refuge out of fear of danger or punishment. They shall remain safe until Muhammad will talk to them before he leaves.”¹⁴⁹

Another well-known example for regulating the right to territorial asylum is al-Hodaibiyah treaty, which will be discussed later.¹⁵⁰

It is worthy of note that the right to diplomatic asylum- rather than territorial asylum in its technical sense- may be regulated through an international treaty. This does not conflict with the principles and provisions of Islam.

3.2.1.6 Asylum as a stratagem to achieve military or other objectives:

149 See: ibn Saʿd: *at-tabaqat al-kobra*, Beirut Printing and Publishing House, 1400 AH- 1980 AD, Vol. 1, p. 290; ibn Katheer, *as-seerah an-nabawiyah*, Al-Maʿrifah House, Beirut, 1395 AH – 1976 AD, Vol. 4, p. 30.

A treaty between King az-Zahir Baibars and Ispitar provided that” If a man from either party flees to the other carrying money owned by others, the money taken shall be returned and the fugitive himself shall be offered the choice either to stay on or return. If a slaveman runs away and foresakes his religion, his price as a slave shall be returned and if he adheres to his faith, he shall be returned”. See al-Qalqashandi: *sobhul a'sha*, op.cit. Vol. 14, p. 38.

150 *Vide infra*.

This type of asylum constitutes an infraction from the purpose of the right to asylum, i.e. to take into consideration the humanitarian conditions of a person at risk of being persecuted by providing a safe haven for him. However, an observer of relations between Islamic and other states would note that the right to asylum, in some cases, oversteps this purpose. In such case, we are not having a case of “asylum” in the strict sense of the word but rather an act of “espionage”¹⁵¹ or the like; acts that are prohibited for a refugee, but

151 An example can be shown by the following incidence: It was reported that when Aba-Jaʿfar came to know about the treatment of Muslims by al-Isbahbaz, he dispatched Khazim ibn Khozaimah and Rauh ibn Hatim together with Marzouq ibn abul-Khaseeb (abu-Jaʿfar’s slaveman) who besieged and fought him and his followers in his fortress. As the fighting drew out, abul-Khaseeb, scheming a strategem, asked his companions to beat him, shave out his head and beard and so they did. He then went to al-Isbahbaz wailing,» I was badly treated; I was beaten and my head and beard shaved out. They did so to me because they accused me of sympathizing with you.» He told him that he was really so and that this gives him evidence to the deficiency of their troops. Having believed him al-Isbahbaz chose him as one of his most trusted men. The city gate, made up of rock blocks, was opened by throwing down the blocks and locked by raising them back. Responsibility for the gate was entrusted by al-Isbahbaz, on an alternate basis, to his most trusted men.» I see you still don’t trust me and you haven’t taken my advice!,» abul-Khaseeb once said to him.» Al-Isbahbaz replied,» How do you think so?» He answered,» Because you don’t use me in matters of concern to you and do not authorize me in matters in which you trust only your confidants.» Al-Isbahbaz then enlisted the services of abul-Kaseeb, who performed the assigned job to the former’s satisfaction so that he fully trusted him and thus put him, on an alternate basis, in charge of opening and closing the city gate. He performed the job so well that he fully trusted him. Then, abul-Khaseeb sent to Khazim ibn Khozaimah and Rauh ibn Hatim a message, tied to an arrow, telling them that his stratagem worked and designated a certain night for opening the gate. Upon the fixed night, he opened up the gate and they came in and killed the fighters and captured their women.» See: Al-Tabari, *tareekh ar-rossol wal molouk*, Al-Ma’arif House, Cairo, 2nd edition, Vol. 7, pp. 512 – 513.

may be practiced by soldiers during war.¹⁵²

3.2.1.7 Asylum by a Muslim to a non-Muslim state:

Criteria have now turned topsy-turvy; some Muslims, being relentlessly chased by executive authorities in their home countries, are forced to seek asylum in non-Muslim states for protection against potential persecution. This happens in spite of the fact that Islam unites rather than disperses and accepts and grants aman to a refugee even if by signal or in an unintelligible language. Undoubtedly, it is necessity that impelled those Muslim refugees to follow this course. While in earlier times no Muslims were evicted out of Muslim land, conversely now- in some states- some Muslims quit their home countries to seek protection (or earn a living) in other countries. This type of asylum takes another form, i.e. acquisition by a Muslim of the nationality of the foreign state of asylum. Is this permissible in Islam? This question will be discussed later.¹⁵³

152 A further example is a letter of appointment to a ruler of Sicily saying,» Since Allah has bestowed on us the kingdom of the earth and kings of all states stretched their hand with peace to us, we made a vow to Allah, Exalted He be, not to turn down any seeker of our generosity, disappoint any seeker of our charity nor remove from our territory any refugee. In so doing, we are expressing our thanks for the power Allah has given us to do so, unless such refugee harbors malice against us and persists in enmity to Islam. In this case, he will be doing himself wrong, forestalling his death and risking his present and future.» See : al-Qalqashandi: *sobul a'sha*, op. cit., Vol. 13, p. 267; See also: Request by Aragon's ruler from Andalus to seek asylum in the land of Islamic Caliphate, to the dissatisfaction of his subjects until the right opportunity has come for retaliation (Ibid, pp.534-535).

153 Vide infra: Local integration (permanent solutions).

3.2.1.8 *Clandestine or unauthorized asylum:*

Muslim jurists have examined also the case of clandestine asylum or asylum by individuals not authorized by a Muslim state to enter its territory and later seized on its mainland or other territory affiliated to a Muslim state.

Malikite jurists argue that if refugees in such case accept to be treated as zimmi (non-Muslims living in Muslim territory), they shall be admitted; otherwise the Imam (ruler) shall return them to a place where they feel safe.¹⁵⁴

154 According to ibn Rushd (Avicenna) in « *al- bayan wat-tahseel* », Said Yahya, ‘ I asked ibn al- Qasem if some louts (uncouth fellows) from enemy ranks entered into Muslim territory without covenant (authorization) and were seized within Muslim territory or within a no-man’s land in-between Muslim and enemy territory, heading towards Muslim land, but not in the shape of warriors or as adventurers looking for an opportunity to seize, claiming that they intended to reside in Muslim land would they be treated as freemen and exempted from jizya (non-Muslim head tax) ? If they accept, should they be admitted and if they refuse, should they be returned to a place where they feel safe and secure? ‘ He said, ‘ If upon entry they were called upon to pay jizyah, the sultan should admit them, but must abstain from selling them (as slaves) or sending them back to a place where they feel safe.’ Then he added, ‘ In the case of persons from enemy ranks entering without authorization the *imam* shall decide at his own discretion. If some of them had their ship wrecked on Muslim shores and thus entered into Muslim territory without authorization and were taken by Muslim as prisoners of war, and if they were proved to have no intention of entering Muslim land, the *imam* shall decide at his own discretion either to sell them (as slaves) or assign them to any public utility of common interest to the public.’ I asked him, ‘ May he kill them at his own will?’ ‘ I do not recommend that he kills them. I asked (Imam) Malik if prisoners of war may be killed, upon which he said no, unless there are grounds for fear from them. In this case they shall be killed. Should there be from among them one who is feared such as a man of the enemy that is renowned for his chivalry and succor and (the ruler) decides to kill him, he may do so,’ he said.” See: ibn Rushd: *al- bayan wat-tahseel wash-sharh wat-tawjeeh wat-ta’leel fi masa’il al-mustakhrajah*, Dar al-Gharb Islamic House, 1408 AH- 1988 AD, Vol. 3, pp.20-21. It is clear from the foregoing that a “refugee” and “a prisoner of war who has not acquired refugee status” shall be treated differently and that the fate reserved to prisoners of war supposes that there is war with the other state.

It is worthy of note that, by adopting this approach, Islamic jurisprudence conflicts with the common practice, followed at present by some countries, of inflicting severe punishment for unauthorized entry.

3.2.1.9 Involuntary asylum:

Asylum may involuntarily take place. For example, a ship may be driven by rough wind to and wrecked on the coast of a state other than that of destination; individuals may lose their way and unintentionally enter into the territory of another state. How does Islamic jurisprudence view such case? In this respect, Imam ibn-Qudamah says,

“If a non-Muslim loses his way and enters by mistake into a Muslim land or arrives on Muslim coast after their ship had been drifted by rough wind or after losing their riding animals and falls into our hands, there are two opinions. The first is that such persons shall be taken as booty because they are regarded as a common property acquired without fighting or abandoned and left behind out of panic. The second is that they shall become the property of those who seize them, because, being a property acquired without fighting, they are regarded as lawful to acquire as any other allowable objects in Muslim land”¹⁵⁵

It is clear that this type is asylum only in name rather than in the proper sense of the word, because it takes place in war time and

155 See: Imam Ibn Qudamah al-Maqdisi; *al-kafi fil fiqh ‘ ala mathhab imam al-mubajjal ahmed ibn hanbal, ihya’* al-Kotoub al-Arabiyya House, Cairo, 1993, Vol. 3, p 219.

consequently is subject to rules of war. Therefore persons involved are treated as “combatants” rather than “refugees.”¹⁵⁶

3.2.1.10 Asylum resulting from military operations:

In this respect, we refer to four considerations:

Armed conflict results in many refugee situations:¹⁵⁷

The Holy Qur’an contains visible evidence to the problem of refugees, particularly those who are forced by enemy to flee their home to another territory:

“They said: “How could we refuse to fight in the cause of Allah, seeing that we were turned out of our homes and our families?” But when they were commanded to fight, they turned back, except a small band among them. But Allah has full knowledge of those who do wrong.” (Surat al-Baqarah, 246)

156 Another example can be seen in» *kitab al-kharaj*” by Imam abu-Yusuf,” If a ship carrying non-Muslims was driven by wind to the coast of a Muslim town, and the latter seize the ship, cargo and passengers, the governor (wali) who has seized them shall send them all to the Imam (ruler). Then, the Imam shall at his own discretion, decide either to retain or kill them. If the ship passengers claim they are traders bringing merchandise to Muslim land, they should not be admitted but taken as booty to the community of Muslims and their claim of being traders shall be denied. See: Imam Abu Yussuf, *kitab al-kharaj*, As-Salafiyah Printing Press, Cairo, 1397 AH, p. 205.

157 See as regards persons who evade military service or refuse to engage in combat operation and how far they are entitled to asylum in» Manual of Applicable Procedure and Criteria in Refugee Status Determination under the 1951 Convention and 1967 Protocol on Refugee Status, UNHCR, Geneva, 1992, pp. 52-5.

“If We had ordered them to sacrifice their lives or to leave their homes, very few of them would have done it: but if they had done what they were (actually) told, it would have been best for them, and would have gone farthest to strengthen their (faith)...” (Surat an-Nissa’, 66)

“Allah only forbids you, with regard to those who fight you for (your) Faith, and drive you out, of your homes, and support (others) in driving you out, from turning to them (for friendship and protection).” (Surat al-Mumtahanah, 9)

“And had it not been that Allah had decreed banishment for them, He would certainly have punished them in this world.” (Surat al-Hashr, 3)

Inadmissibility of granting asylum to combatants:

The right to asylum has a basically “peaceful, civil and humanitarian” character.¹⁵⁸ Therefore, “combatants shall not be recognized as asylum-seekers¹⁵⁹” until authorities have been reassured, within a reasonable time-frame, that they have truly and permanently discarded military activities. As soon as this has been ascertained, specific measures shall be taken to determine the status of refugees on a case-by case basis, in order to ensure that asylum-

158 See: The 1967 Declaration on Territorial Asylum adopted by the United Nations General Assembly. See also: Introduction to International Protection of Refugees, August 2005, UNHCR, Geneva, P. 71

159 See: Conclusions on International Protection of Refugees adopted by UNHCR Executive Committee, Cairo, 2004, P. 265, No. 94(53).

seekers satisfy necessary criteria for refugee status recognition.¹⁶⁰

Since a refugee is a civilian, it follows that a person who engages in military hostilities shall neither seek nor be granted asylum.¹⁶¹ Likewise, a person staging hostilities against his home country from his state of asylum shall not be granted a refugee status.

Islam concurs with the foregoing facts. For by performing combat acts, such person is conflicting with the essence of the concept of “safety”, which is the core and crux of seeking and granting asylum (istijarah and ijarah) in Islamic Shari’ah.

Migration of a prisoner of war:

Some Muslim jurists argue that a prisoner of war has an obligation to flee to Muslim land. Al-Mawardi maintains that a prisoner of war has an obligation, if possible, to emigrate; even if they force him to give an oath, because his oath in this case is a forced one (i.e. taken under duress).¹⁶²

160 Ibid, P.268

161 Article 44 of the 1949 Fourth Geneva Convention relative to the Protection of Civilians in Time of War stipulates,» *In application of the monitoring measures herein stipulated, a custodian State shall not treat refugees who do not avail themselves of the protection of any government as enemy aliens merely on account of being legally belonging to a hostile State.*»

162 «A prisoner of war is a vulnerable person», says al-Mawardi,» If he can he shall be under obligation to immigrate. If he is caught in flight, he should fight against them and (even) kill them and ravage their property. If they release him and elicit an oath out of him to stay with them, he should exit their land as an immigrant. The (forced) oath must not prevent him from the required exit. This is corroborated by = the Prophetic hadith,» If a person is made to give an oath and he finds out a better one, let him take up the latter and renege on the former». See: Imam al-Mawardi, *al-hawi al-kabeer*, op. cit., Vol. 18, pp. 312 – 313.

The granting of territorial asylum to prisoners of war:

This question arose basically following the Korean War (1950-1953), when a large number of prisoners of war detained by the states involved in war against the People’s Republic of Korea (North Korea) refused to return home and the Western States Allied Command granted them the right to asylum. This act raised conflicting interpretations of the provisions of the Geneva Convention relative to the Treatment of Prisoners of War, 1949, particularly Article 118-1, providing, “Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.” and Article 7 stating, “Prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention.”¹⁶³

Some legists, drawing on the explicit terms of the text, held that the grant of asylum to prisoners of war as inadmissible, while others, drawing on the fact that asylum was a human right for all, including prisoners of war held it as admissible.¹⁶⁴

Regardless of this controversy, where does Islam stand on this problem?

We believe that this problem can be solved by analogy to the

163 See: Dr. Ahmed Abou -el- Wafa; *an-nathariyyah a-l’ama lil qanoun ad-dawli al-insani*, An Nahdah Al-Arabiyyah House, Cairo, 2006 p. 71.

164 See a detailed review of both parties arguments in : Dr. Abdul -Wahid al-Far; *asra al-harb*: an applied jurisprudence study in the context of public Islamic Shari’ah and international law- Cairo, ‘Alam al-Kotoub, 1975, pp. 390 – 397; B. Amrollah: General Theory of the right to asylum in contemporary international law, thesis, Faculty of Law- Cairo University, 1983, pp. 239-255.

provisions applicable to hostages. in the sense that prisoners of war should not be returned (refouled) and consequently may be granted the right to territorial asylum if they convert to Islam, or become zimmi or if there are fears of losing their lives if refouled.

3.2.1.11 Respect for asylum by third parties to a state with whom Muslims concluded a treaty:

In this respect, the Holy Qur'an says, "Why should ye be divided into two parties about the Hypocrites? Allah hath upset them for their (evil) deeds. Would ye guide those whom Allah hath thrown out of the way? For those whom Allah hath thrown out of the way, never shalt thou find the Way. They but wish that ye should reject Faith, as they do, and thus be on the same footing (as they): so take not friends from their ranks until they flee in the way of Allah (from what is forbidden). But if they turn renegades, seize them and slay them wherever ye find them; and (in any case) take no friends or helpers from their ranks. Except those who join a group between whom and you there is a treaty (of peace), or those who approach you with hearts restraining them from fighting you as well as fighting their own people. If Allah had pleased, He could have given them power over you, and they would have fought you: therefore if they withdraw from you but fight you not, and (instead) send you (guarantees of) peace, then Allah hath opened no way for you (to war against them)." (Surat an-Nisa', 88-90).

In this study, we are concerned with the Divine Statement " those who join a group between whom and you there is a treaty (of peace)..."

In this connection, Imam al-Farra' says, "If Prophet Mohammad

(PBUH) enters into a covenant with some people not to fight or help others to fight against him and then they conclude a peace it is forbidden to fight those people or those who join them.¹⁶⁵

We believe that the exception stated in the Qur’anic Ayah” Except those who join a group between whom and you there is a treaty (of peace)...” involves several applicable international rules. It in fact establishes three basic rules: extended effect of a treaty to refugees belonging to a third party, respect for the right to asylum and non-intervention and abstention from assault against refugees. This is explained in the following;

Extended effect of an international treaty to refugees appertaining to third parties. The Holy Ayah provides an exception from the provision concerning “seizing and slaying” stipulated in the previous Ayah, under which it is to be applied to “those who join a group between whom and you there is a treaty (of peace)”. The limits of exception are quite clear. It applies even in the absence of any express provision in the treaty to this effect, but automatically applies merely upon joining a group who maintains a treaty (of peace) with Muslims. In other words, it applies on a de facto basis. It also applies to others even without having to express their intention or approval to avail themselves of such treatment (as required by the 1969 Vienna

165 See: Imam Al-Farra (Abu Zakaria Yahia Ibn Zeyad) : *ma’ani al-qura’n*, ‘Alam al-Kotoub, Beirut 1980, pp. 281 – 282. =
= Ibn al-’Arabi says,” This means ‘ except those who join a group, with whom you have a pact and those, being as such you should not interfere with them. See: Ibn al-Arabi : *ahkam al-qura’n*, op.cit., Vol. 1, pp. 469 – 470.

Convention on the effect of treaties on third parties). However, such persons shall not enjoy the benefits of this provision if they stage an act of aggression against or threaten the security of the Islamic state. In such a case, they shall be regarded as aggressors against Muslims rather joining a group who maintains a treaty (of peace) with Muslims.

Respect for the right to territorial asylum : The above-mentioned Ayah introduces a case of territorial asylum by pointing out that a person who joins, i.e. takes refuge with, a group who maintains an international treaty (of peace) with Muslims shall enjoy the benefits of such treaty and therefore his right to asylum shall be respected.¹⁶⁶ Consequently, this pact or treaty is some kind of covenant of *aman* that must be respected by Muslims,¹⁶⁷ no matter who the beneficiary of asylum may be or how closely related he may be¹⁶⁸ and even if he

166 Al-Khazen says,»to join» means to belong or affiliate to or enter into = the pact or covenant of protection.» According to ibn «Abbas, this means that a person who joins treaty or covenant with people who maintain a pact or treaty with Muslims is himself deemed to have entered into a pact with Muslims. See: (*tafseer al-khazeen*, known as '*lobab at-ta'weel fi ma'ani at-tanzeel*, Mustafa al-Babi al-Halabi Printing Press, Cairo, 1370 AH – (1955 AD), Vol. 1, p 571.)

167 This means, as some said, that it is not allowed to kill a person who joins a group of people who maintains a covenant or pact with Muslims, because the former shall enjoy the same *aman* as the latter. He should be given equal treatment as a *zimmi*. See: *tafseer at-tabari: jami' al-bayan 'an ta'weel al-qur'an*, verified by Mohammad Shaker, Dar al-Ma'arif, Egypt, 1957, Vol. 9, p. 19.

168 At-Tabari criticizes the opinion that confines the Ayah so as to mean only those who affiliate in lineage to a group having a pact with Muslims. See: *tafseer at-tabari, jami'e al-bayan 'an ta'weel aay al-qura'n*, Ibid, Vol. 9, p 201. See also: Az-Zamakhshari, *al-kashshaf 'an haqa'eq at-tanzeel wa 'oyoun al-aqaweel fi wojouh at-ta'weel*, Mustafa al-Babi al-Halabi Bookshop, Cairo, 1392 – 1972, Vol. 1, verified by Mohammad as-Sadiq Qamhawi, p 551; Ash-Shawkani, *Fateh al-Qadeer*, published by Mahfouz al-'Ali, Beirut, Vol. 1, pp. 495 – 496 and Imam

is not a party to the treaty with Muslims, but provided he resides or enters into the territory of that state. It is our opinion that extension of legal effect to third parties is contingent on a physical or spatial constraint (criterion), i.e. presence and residence on the territory of that state.

It follows that if such person is not present or has left the territory, evidently he will not enjoy the benefit of extension, unless covered by another treaty or provision.

Non-intervention, abstention from fighting and peaceful coexistence are recommended: Undoubtedly, the corollary of the exception stated in Ayah 9 of Surat an-Nisa', referred to above, is the following: to abstain from fighting or assaulting any group of people who join another group that maintains a treaty or a convention (of aman) with Muslims because they are refugees to them.

3.2.1.12 Migration upon occupation of a Muslim territory by an enemy:

Malikite scholars maintain that, in case a territory is occupied by enemy, it is obligatory to leave rather than stay amidst enemies. In view of the significance of this opinion, we will outline it in the following. In this respect, a question was posed:

What if a non-Muslim enemy attacked, seized and occupied a Muslim territory. On the outskirts of that territory, some mountains remained inaccessible to the enemy and were well-guarded by local

al-Jassass : *ahkam al-qura'n*, Vol. 2 p 220.

residents. Some residents of the occupied territory, together with their families, children and property, took refuge in the mountains, while some others stayed on under the rule and custody of non-Muslims, who imposed on them a head tax similar to the fixed jizya. From among both emigrants and overstayers, there are (religious) scholars. Controversy arose between both groups of scholars. Those who emigrated with Muslim to the mountains claimed migration was obligatory and issued a fatwa (legal opinion) proscribing the lives, property, families and slave women of Muslims who, in spite of their ability to emigrate, chose to stay on under enemy control. To corroborate this opinion they argued that, by staying on, a Muslim was thus assisting in the fighting and plundering of property of and the overpowering of Muslims by disbelievers, etc. On the other hand, scholars who stayed under enemy control maintained migration was not obligatory, quoting as evidence the following Ayah, inter alia:

“Let not the Believers take for friends or helpers Unbelievers rather than Believers: if any do that, in nothing will there be help from Allah: except by way of precaution, that ye may guard yourselves from them.” (Surat Al-i - ‘Imran, 28) and the Prophetic hadith: “There shall be no migration after the Conquest (the opening of Makkah).¹⁶⁹” Additional evidence was provided.¹⁷⁰

169 Sunan abi dawood: *kitab al-jihad, bab an-nahyi ‘an qatl man Itasam bis-sojoud*. No. 2645. Vol. 3, pp. 73-74; *sunan at-tirmizi, bab ma ja’a = fi karahiyat al-moqam bayn azhor al-moshrikeen*, No. 1604, Vol. 4, pp.132-133

170 See: Abu ‘Abdullah ash-Shaykh Mohammad Ahmad ‘Ileish: *fateh al-‘alii al-malik fil fatwa ‘ala mathhab Imam malik*, Mustafa al-Babi al-Halabi printing Press, Cairo, 1378 AH – 1958 AD, pp. 375 – 385.

This question was answered as follows:

«Migration from non-Muslim land to Muslim land remains a duty until the Day of Judgment and so is migration from a land where forbidden or wrongful acts prevail, coupled with injustice and temptations. Prophet Mohammad (PBUH) says, «Probably, the most profitable property a Muslim might seek in mountain trails and other places is to flee with his faith from seditions.»¹⁷¹ Reporting Imam Malik, Ashhab say,” No man shall reside in a place where wrongful rules are applied. If it is claimed that no other country is better (all countries are as bad as this one), we say let a Muslim choose the least. A country where injustice reigns is better than one where disbelief does ; a country where injustice and permissible (halal) acts reign is better than one where justice and forbidden (haram) acts do; a country where sinning against Rights of Allah prevails is better than one where sinning against human grievances does. “

The fatwa further says, “Should they (Muslims staying back amidst disbelievers) fight us on their custodians’ side, their lives may be proscribed and should they assist them in the fight with money, their property may be proscribed.”

It concludes, “As such, none of those mentioned before shall in no case have license to return or to refrain from migration, but it is a duty to flee from a territory dominated by polytheists and self-losers to one where safety and faith prevail. For this reason, when those

171 *Sahehl al-bukari*, kitab aliman, bab al-firar mina ad-deen al-firarmina al-fitan, No.19, Vol. 15, p. 15.

people who failed to emigrate made excuses, Allah the Almighty told them, “Was not the earth of Allah spacious enough for you to move yourselves away (from evil)?” “(Surat an-Nisa’, 97) ¹⁷²

From the foregoing fatwa, we observe that :

In letter, it holds exodus from a Muslim territory occupied by enemy as an inevitable obligation on each capable Muslim. Only vulnerable persons may be exempted from the obligation to emigrate.

In spirit and meaning, it holds migration as a duty in case a Muslim has fears of being persecuted on ground of his religion or prevented from freely practicing his religious rites. Consequently, in the absence of persecution, migration is not obligatory.

3.2.2 In international law:

Territorial asylum means that a refugee moves from a territory where he is present to another territory where he finds safe refuge. The state of such territory shall grant such type of asylum as a sign of its sovereignty over the territory, i.e. asylum is therefore given within the territory of the granting state.

3.3 Diplomatic asylum:

3.3.1 In Islamic Shari’ah:

In the following, we will address diplomatic asylum in the strict sense of the term as well as problems of territorial asylum related to diplomats.

¹⁷² See details in: as-Shaykh \langle Ileish: Ibid, pp. 375 – 385 and see also pp. 385 – 387.

3.3.1.1 The grant of diplomatic asylum allowed in Islam

Since diplomatic relations between states on the emergence of Islam were conducted through ad hoc diplomacy, this type of asylum had not seen many applications in Islam. This is because diplomatic asylum is closely associated with permanent diplomacy, represented in the establishment of embassies, the provision of permanent premises and residencies for members of diplomatic missions in countries where they are accredited, while diplomatic representation on the advent of Islam was conducted on a temporary or ad hoc basis.

The question is whether the grant of diplomatic asylum at present, with the existence of permanent diplomatic missions, conflicts with Islam?

We believe that the grant of diplomatic asylum is permissible in Islam on the following grounds:

Custom and circumstances have changed. Accordingly, diplomatic asylum may be granted under the rule: “When circumstances change, provisions must also change.”

When an Islamic state is engaged in an international treaty that sanctions the grant of such type of asylum, it should honor its obligations under the treaty, given that fulfillment of promise is a non-derogable rule in Islam, being grounded on the following Ayas: “*O you who believe! Fulfil (all) obligations.*” (*Surat al-Ma'idah, 1*) and “*...and fulfil (every) engagement (covenant), for (every) engagement, will be enquired into (on the Day of Reckoning.)*” (*Surat al-Isra', 34*)

Muslim ambassadors of Islamic states may grant such asylum, in application of the hadith by Prophet Mohammad (PBUH) saying, “Muslims are equal in blood; the lowest-ranking among them can grant aman and observe zimma (aman) given by other Muslims and they are all united against others.”¹⁷³

Although Islamic state authorities may, for these reasons, grant diplomatic asylum, they are not necessarily under obligation to grant it in all cases, for this depends on the circumstances of each case and the extent of interests resulting from the grant of asylum. It can be said that the right to diplomatic asylum was granted only in a very few cases compared to territorial asylum.¹⁷⁴

It is still worth mentioning that Muslims had exercised another

173 Produced and verified supra.

174 Following is a famous incident in this connection: A Muslim woman from Mussawa>, married to a Muslim from the same town had apostated and converted to Christianity in the Ethiopian capital. The woman had two daughters. To prevent the mother from converting = the daughters to Christianity, their aunt escaped with them and sought protection with the head of the Yemeni delegation to Ethiopia, who deposited them in the house of a member of the delegation. When the mother came to know that, she went to the house of the head of delegation, accompanied by twelve Christian dignitaries and noblemen, requesting the surrender of both girls, but he categorically refused. The attitude of the Yemeni delegation became the focus of Christians' attention and every body was waiting for the orders of the Emperor. However, neither the Emperor nor any of his ministers made any comment. Seizing a favorable opportunity, the delegation managed to send the girls back to Mussawa>, where their father lived. See: Dr. Abdullal Ibn Hamid al-Hayyeed, *safarat al-imam al-motawakil aliullah ismail ibn al-qassim ila al-balat al-malaki fi 'asimat al-habasha Jondar, 1057 AH- 1647 AD*, Faculty of Shari'ah and Islamic Studies Journal, Ummul-Qura University Makkah al-Mukarramah+, Issue 3, 1397 – 1398 AH, pp. 34 – 35.

type of diplomatic asylum, i.e. granting aman and safety in army camps.

In this connection, Imam abu-Yusof says, “I asked the Prince of Believers (Muslim sovereign) about a non-Muslim who leaves his home country and wants to enter into Muslim territory. On his way, as he passes by a Muslim garrison, he is seized. Questioned, he says that he had set out with intention of going to Muslim land in search for aman and protection for himself, family and children, or claims that he is a messenger. Should we believe him or not?

Abu-Yusof says, “If this non-Muslim fighter, on passing by the garrison, was too invulnerable for them, he should not be believed nor his claim accepted. But if he was not, he should be believed and his claim accepted.¹⁷⁵

In our opinion, this demonstrates that:

If prima facie evidence indicates that the asylum-seeker is eligible, he shall be granted asylum, even by armed forces.

If prima facie evidence indicates otherwise (such as being armed and accompanied by many personnel like him), he shall not be granted asylum.

3.3.1.2 Territorial asylum for members of a diplomatic mission:

A head (or a member) of an accredited diplomatic mission might seek territorial asylum in an Islamic country. May he be granted asylum?

175 See: Imam Abu Youssouf; *kitab al-kharaj*, op.cit., pp. 203 – 205.

Indeed, Islam goes as far as to reject a request for asylum by an ambassador, because any message needs to be answered via the incoming messenger. In support of this view, we cite *aba-Rafi*, a bondsman of Prophet Mohammad (PBUH) as saying, “Quraysh sent me to Prophet Mohammad (PBUH). As soon as I saw him, my heart was immediately overtaken by Islam. ‘Messenger of Allah,’ I said, ‘I’m not going back to them.’ ‘No,’ replied Prophet Mohammad (PBUH), ‘ I never renege on my promise, I won’t retain a messenger. But do return to them and if, when you have reached home, you will still nurture the feeling you have now, come back.’ “¹⁷⁶

It is clear from the hadith that Prophet Mohammad (PBUH) requested the messenger to first go back to his home country and deliver the reply to the message, and then come back to Muslim land if he willed.

Regarding this hadith, Imam al-Khattabi says, “I do not retain messengers’ might mean that every message needs a reply, which should be sent only through the messenger. It follows that a messenger looks like a *musta’min* for the duration of his mission back and forth”¹⁷⁷

176 Abu-Dawood: *sunnan abi-dawood, kitab al-jihad, bab fil-imam yustajon bihi fil-’ohood*, No. 2758 Vol. 3, p. 123; *musnad al-imam ibn hanbal* No. 23857. Vol. 39, p. 282; an-Nasa’ie : *as-sunan al-kobra, kitab as-siyar, bab ar-rosolwal-borod*, No. 8621, Vol. 8, p.52

177 See: Imam al-Khattabi : *ma’alim as-sunnah*, which is an explanation of *sunan Imam abi Daoud*, Vol. 2, Al-Ilmiyyah Bookshop, Beirut 1401 AH – 1981 AD, p 317.

As-Sana’ani says,» The *hadith* provides evidence to the practice of the fulfillment of promise, even to a disbeliever; a messenger becomes safe as soon as he arrives and shall be returned rather than retained.” =

The Prophet's saying to abi-Rafi' 'I do not retain messengers' means that he does not prevent them from returning, because the messenger is assigned a dual mission; to carry a message and bring back a reply. Refusal to perform any part of his duty is deemed as treachery; a trait that Prophet Mohammad (PBUH) would have never accepted."¹⁷⁸

We believe that the above-mentioned practice was adopted at a time when diplomatic representation was conducted only on an ad hoc or temporary basis and no permanent diplomatic missions were in existence. Since the above-mentioned practice is exceptional (the rule being that a person who adopts Islam may not be returned to non-Muslims), in our opinion, it does not apply to members of permanent diplomatic missions resident in Islamic countries. It might be applicable in the case of emissaries or envoys sent to perform an ad hoc mission and to obtain a reply or solution to a problem.¹⁷⁹

= See: As-San'ani, *sobol as-salam*, Imam Mohammad Ibn Sa'ud Islamic University, Riyadh, 1408 AH, Vol. 4, p. 133; Ahmed Hassan ad-Dahlawi, *hashiyat ad-dahlawi 'ala bolough al-maram men adelat al-ahkam*, Al-Maktab al-Islami, Damascus, 1392 AH– 1972 AD, Vol. 2 pp. 292 – 293; Abdur-Rahman Ibn Qassim al-Hanbali an-Najdi, *ahkam sharh osoul al-ahkam*, At-Taraqqi Printing Press, Damascus, 1375 AH – 1957 AD, Vol. 2, p. 403.

178 See: *al-fateh ar-rabbani, tarteeb mosnad al-imam Ahmed ibn hanbal ash-shaybani*, with its explanatory book "*bolough al-amani min asrar al-fateh ar-rabbani* arranged and written by Ahmad abdur-Rahman al-Banna, ash-Shehab House, Cairo, Vol. 14, p. 118.

179 According to Abi-Dawood,» That was the practice in the past, but now it is no longer valid. Accordingly, if a messenger now comes from the disbelievers to a Muslim ruler and does not want to return home, the ruler should respond to his request. However, the abstention by Prophet Mohammad (PBUH) from retaining Abi-Rafie' is an exclusivel prerogative of the Messenger of Allah for the following reasons: Prophet Mohammad (PBUH) was sure that the man would come back as a Muslim.

In addition to the above-mentioned argument (exclusive applicability of the said hadith to members of temporary diplomatic missions), we further support our opinion on its inapplicability in the case of permanent diplomatic representation with another argument. Muslim jurists maintain that the application of the said hadith is justified by the keenness to ensure that a messenger conveys the reply to the matter he was sent for. There is no doubt now that such job can be done without having to send the envoy back to the territory of his state, i.e. by sending reply via modern communication media such as telephone, telex, fax, radio, e-mail, etc. These media are, indisputably recognized by contemporary Muslim jurists as valid for use.¹⁸⁰

3.3.1.3 Intervention by diplomatic envoys to solve problems related to territorial asylum granted to individuals in another state:

In certain cases, it may happen that a state instructs its accredited ambassador to the recipient state to intervene with the authorities of the latter regarding asylum by certain individuals to its territory, expressing interest by the former in either having such asylum

Additionally, the retention by the Prophet of an emmissary, should it have happened, could have resulted in many unhidden evils; providing reasons for giving him a reputation for retaining messengers, even though he was not the cause, thus blocking = the exchange of correspondence and messages, as an essential channel for spreading out Islam. However this practice was not permissible for the Prophet's successors. (as-Seharnafouri: *bathl al-majhoud fi hall abi daoud*, Vol. 12, pp. 379 – 380).

180 This was endorsed by Resolution No. 54/3/6 issued by the Islamic Fiqh (Jurisprudence) Academy of the Organization of the Islamic Conference at its session held in Jeddah, March 14-20, 1990. The resolution authorized the execution of contracts via modern communication media such as cable, telex, fax, or computer. See text in Contemporary Fiqh Research Magazine, Fifth Issue, 1410 AH, pp. 200-201.

terminated or the refugees in question extradited thereto. Undoubtedly, this is what happens particularly in important and critical cases of a political nature. Examples of such cases can be traced in the practices of the Islamic state.

In 360 (AH) (976 AD), a Byzantine rebel named Ward, who was scheming to seize power, was defeated by the Byzantine army and subsequently took refuge to the 'Abbasid State. Many envoys and emissaries, particularly on the part of the Byzantines, were exchanged regarding the extradition of the said refugee. The 'Abbasids finally agreed to the Byzantines' request for extradition only after conducting negotiations and consultations on means of ensuring the safety, good treatment and redress of the rebel leader and his followers. In the meantime, Ward stayed with the 'Abbasids for five years, during which he was accorded good treatment and care.¹⁸¹

181 See more details in Dr. Soliman Dofayda ar-Rahili : *As-sefarat al-islamia ila ad-dawlah al-bezanteyya*, a Ph.D thesis, Faculty of Social Sciences, History and Civilization Department, Imam Mohammad Ibn Sa'ud Islamic University, Riyadh, 1406 AH–1986 AD, pp. 63– 75.

It is worthy of note that this could happen with regard to the extradition of a diplomat to another state:

One famous case in this connection is that of al-Mo'izz ibn Badees, who was appointed by the Fatimids as ruler of Africa. In 433 AH he dissented from them and proclaimed allegiance to the »Abbasids. Then the «Abbasid Caliph sent his representative abu-Ghalib ash-Shairazi to invest ibn Badees with the «Abbasid office. En route, the «Abbasid envoy had to transit Byzantine territory so as to travel on by sea to Africa. But it so happened that a Fatimid envoy was present at the Byzantines, who maintained good relations with the Fatimids. So the Byzantine emperor extradited the «Abbaside envoy to his Fatimid counterpart. Taken back to Cairo, the «Abbasid envoy, was severely humiliated and defamed on camelback across Cairo streets. However, being informed of the incident, the Fatimid Caliph ordered the «Abbasid envoy to be returned in a gesture to spare the Emperor the embarrassment. Thus, the «Abbasid envoy was honourably repatriated to

3.3.1.4 Inadmissibility of the extradition of an ambassador who comes in to discuss refugee affairs:

The originator or champion of this rule is Negus, Emperor of Abyssinia. Prophet Mohammad (PBUH) had sent ‘Amr ibn Umayyah ad-Dhamari to Negus with regard to Ja’far ibn abi-Talib and his companions who had immigrated there. ‘Amr ibn al-’As (then acting as Quraysh’s ambassador) said, “He (ad-Dhamari) entered into Negus’s audience and then got out. I told my companions, ‘Here comes ‘Amr ibn Umayyah ad-Dhamari. How much I wish if I can get to Negus and ask him and he agrees to surrender ‘Amr; so that I cut his throat. If I could do that, Quraysh would feel I had rewarded them by killing Muhammad’s messenger.’ Getting into his audience, ‘ added ibn al-As, ‘ I prostrated before him as I used to.’

‘Welcome, friend,’ Negus said, ‘Have you brought some present from your country?’ I replied, ‘Yes, your Majesty, I brought much “idam” (spicy sauce or cooked food eaten with bread) As I held it closer to him, it appealed to him and aroused his appetite. Then, I said, “Your Majesty, I saw a man coming out of your throne room, who is a messenger of an enemy of ours. Will you surrender him to me to kill him? For he had caused harm to our noblemen and gentry.’ “Highly incensed, the Emperor categorically refused,” ‘Amr said.¹⁸²

Baghdad. See also: Dr. Sabir Mohammad Diyab: *siyasatad-dowal al-islamiyyah fi hawdh al-bahr al-moutawassit min awai'l al-qarn ath-thani al-miladi hatta nahayat al-'asr al-fatimi*, ‘Alam al-Kotob, Cairo, 1973, pp. 225- 226.

182 Musnad al-imam ibn hanbal, hadith ‘amr ibn al-’as ‘an an-nabiy (salla Allah ‘alyhi wa sallam No. 17776. Vol. 29, pp. 313-314. See the full story in: Ibn Hisham: *as-seerha an-nabawiyyah*, op.cit. Vol. 2,p.277.

3.3.2. *In international law:*

Diplomatic asylum¹⁸³ is the type of asylum that is granted by a state outside its territory in places or premises over which it exercises its authority or jurisdiction, such as embassies, consulates, military vessels and aircraft and its own armed forces camps “ during military occupation of the territory of another state or as a result of the presence of its troops on such territory in accordance with a bilateral agreement”.

183 See for example the Convention on Diplomatic Asylum, Caracas, 1954) which provides for the following :
The state of the territory shall respect asylum granted on board military vessels, in military camps or embassies (Art.1).
A state shall have the right to grant asylum, but shall be under no obligation to refuse or give reasons for refusal (Art. 2).
Asylum may not be granted to criminals, that it shall be granted = only in urgent cases and for such time period as may required to allow a refugee to leave the state under guarantee by the territory state government(Art. 5).
During transfer, refugee shall remain under the protection of the state granting asylum (Art. 15).
The state of the territory shall respect asylum even in case of severance of diplomatic and consular relations (Art. 19).
See also: F. Morgenstern: Extra-territorial asylum, BYIL, 1948, p. 236 et ss; E. Young: The development of the law of diplomatic relations, BYIL, 1964, pp... 146; Ahmed Abou-el-wafa: The law of diplomatic and consular relations, Dar annahda alarabia, Cairo, 2003, pp. 139-144.

Chapter IV
Legal status of refugees in Islamic Shari'ah
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Legal Status of Refugees in Islamic Shari'ah and International law

It is understood that “legal status” is a vague term with unexpected limits. Here, we mean specifically a refugee’s obligations and rights during his presence in his \ her state of asylum.

4.1 In Islam

A refugee in Islam enjoys a no less important legal status than that established in international law. Islam even does not allow a person’s rights to be violated on account of embracing a different religion. Following are examples of evidence from the Holy Qur’an:

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

The main rights of a refugee in Islam are as follows:

4.1.1 Ensuring that refugee’s physical needs are met:

These needs concern, in particular, food, drinkables and clothing. This may be inferred from the following Ayahs:

“And they feed, for the love of Allah, the indigent, the orphan, and the captive, (Saying), “We feed you for the sake of Allah alone: no reward do we desire from you, nor thanks.” (Surat al-Insan, 8-9)

“But he hath made no haste on the path that is steep. And what will explain to thee the path that is steep? (It is :) freeing the bondman; or the giving of food in a day of privation. To the orphan with claims of relationship, To the orphan with claims of relationship, or to the indigent (down) in the dust.” (Surat al-Balad, 11-16)

- “A man asked Prophet Mohammad (PBUH), “What is best to do in Islam?” The prophet said, “ To give food, to greet whoever you know or know not with the greeting of Islam (Peace be unto thee).¹⁸⁴

Prophet Mohammad (PBUH) also said, “ Worship Allah the Most Compassionate; give food, spread out peace, you enter Paradise in peace.”¹⁸⁵

Muslims had most marvelously applied the orders contained in this Ayah: “And they feed, for the love of Allah, the indigent, the orphan, and the captive”.¹⁸⁶

184 *Saheeh al-bukhari al-iman, kitab al-iman, bab it'am at-ta'am mina al-islam*No. 12, p. 13; , *Muslim fi-l-iman bab tafadhol al-islam wa ayy al-omoor afdahal.*, No. 39, Vol. 1, p. 65.

185 *Sunan at-tirmizi, kitab al-at'imah, bab maja' fi fadl it'am al-at'imah,* No.1855, No. 39, Vol. 4, p. 253.

186 As rgards this Ayah, ibn-al-Arabi says, “Giving food to a captive, even if he is a disbeliever, is highly rewarded, for it is Allah that gives him sustenance.

Provisions were not restricted to food only, but were extended to all essential needs of captives (prisoners of war), necessary to maintain their physical, health and moral safety and integrity. This would apply a fortiori to refugees, who did not fight against Muslims.

Examples of this practice are numerous.

When non-Muslim captives taken in Badr battle, were brought in, Prophet Mohammad (PBUH) distributed them to his companions, telling them to take good care of them. Abu-Azeez, one of those captives, who was brought in from Badr escorted by a group of Ansars (Madinite supporters (partisans) of the Prophet) said, “Whenever they had their lunch or dinner, they favored me with the bread and they themselves ate the dates, acting on the recommendation of Prophet Mohammad (PBUH). Whenever a crumb of bread happened to fall into the hand of any one of them, he would present it to me. Bashful, I would give it back to one of them, but he would turn back my hand without touching the food¹⁸⁷.

By covenant, he must be fed out of surplus alms rather out of original *zakat* (prescribed tax)”. See: Ibn-al-Arabi: *ahkam al-Qur’an*, authenticated by ‘Ali al-Bijawi, al-Jeel House, Beirut, 1407 AH (1987 AD), Vol. 4, p.1898.

187 See: Ibn-Hisham: *as-sira an-nabawiya*, op. cit., Vol. 1, p. 645; al-Qandihlawi: *hayat as-sahaba*, Vol.2, p. 337. See also other examples in: Dr. Ahmed abou-El-Wafa: *kitab al-i’lam bi’qawaid al-qanoun ad-dawali wa al-ilaqat ad-dawalia fi Shari’ah al-islam*, Ibid, Vol. 10, pp. 208-210.

4.1.2 Providing care and assistance to refugees (displaced persons or wayfarers):

Displaced persons or wayfarers ¹⁸⁸ constitute a large portion of refugees. The Holy Qur'an contains several rules relating to their status:

a. Material assistance is to be voluntarily and willingly offered to wayfarers, as the Ayah says, " ..But it is righteousness to ... spend of your substance, out of love for Him, for your kin, for orphans, for the needy, for the wayfarer," Surat al-Baqarah, 177)

b. The best of spending is to be made on him as the Ayah says, " Say: Whatever ye spend that is good, is for parents and kindred and orphans and those in want and for wayfarers." (Surat al-Baqara, 215)

c. A wayfarer has an established right to Muslim property resulting from war spoils, booty and discretionary alms (sadaqah) as the following Ayahs say:

- *" And know that out of all the booty that ye may acquire (in war), a fifth share is assigned to Allah, and to the Messenger, and to near relatives, orphans, the needy, and the wayfarer."(Surat al-Anfal, 41).*

188 Ibn as-sabeel (a wayfarer) is a stranded traveler who has not sufficient money to travel to his destination. See: *mu'jam mustalahat al-Qur'an al-kareem*, Academy of Arabic Language, Cairo, 1409 AH (1989 AD), Vol. 1, p. 553. A wayfarer is also defined as a traveler away from home. See: Ar-Raghib al-Asfahani: *al-mufradat fi ghareeb al-qur'an*, Mustafa al-Babi al-Halabi Bookshop, Cairo, p. 223.

- “ *Alms are for the poor and the needy, and those employed to administer the (funds); for those whose hearts have been (recently) reconciled (to the truth); for those in bondage and in debt; in the cause of Allah; and for the wayfarer: (thus is it) ordained by Allah.*” (*Surat at-Taubah, 60*)¹⁸⁹.
- *What Allah has bestowed on His Messenger (and taken away) from the people of the townships, belongs to Allah, to His Messenger and to kindred and orphans, the needy and the wayfarer; in order that it may not (merely) make a circuit between the wealthy among you.*”(*Surat al-Hashr, 7*).

189 One legist maintains that, if this Ayah is fully applied, there will be no problems with regard to refugees. Accordingly, he says that” under the Islamic system, evidently the problem of refugees and stateless persons would not come to existence, because they are judged according to Shari’ah as *zimmis* who have no home but Muslim land and enjoy civil rights under the provisions of the Qur’anic Ayah IX/ 60. As long as they have no state or authorities to take care of their rights, they enjoy the protection of the Islamic state. Both Muslims and *zimmis* are covered by the pension and insurance schemes in cases of unemployment or disability, because the Islamic state is based on comprehensive humanitarian rather than racist, religious or factional grounds. Wayfarers are those deprived of their families or, for one reason or another, are unable to return home. In this case, the Islamic state is under obligation by dint of Shari’ah to protect them and apportion a share of its revenues to be paid as social aid, as stipulated stated in the Qur’anic Ayah IX/ 60. The term wayfarer covers refugees, immigrants and displaced persons rendered homeless for any reason, regardless of their belief or race. The text is absolute and non-discriminatory.” See: Mohammad Kamil Yaqout: *ash-shakhsiyya ad-dawliyya fil qanoun ad-dawli al-’am*, Ph. D. thesis, Faculty of Law, Cairo University, p. 441. Another legist maintains that one reason for the creation of the fiefdoms in the Islamic state was to cater for the needs of descent life for refugees of high standing and prestige in their home countries seeking asylum in the Islamic state. It was a customary practice to assign fiefdoms to those high-profile refugees, in the spirit of chivalry and fraternity in authority. See: Ibrahim ‘Ali Tarkhan: *an-nozhom al-iqta’iyya fish-sharq al-awsat fil-osour al-wotsta*, al-Kitab al-Arabi House, Cairo, 1388 AH (1968), p. 6.

Thus, satisfying the wayfarer's right is an imperative duty in the full sense of the word, as the Ayah says:

“And render to the kindred their due rights, as (also) to those in want, and to the wayfarer.” (Surat al-Isra', 26)

“So give what is due to kindred, the needy, and the wayfarer.”
(Surat ar-Roum, 38).

Since it is a right or a “duty”, it may not be withheld and the authorities of the Islamic state have no discretionary power to grant or deny it.¹⁹⁰

According to Shaykh Yousof al-Qaradawi, “Allah the Almighty thus gives a real wayfarer the right to have a share of expended Zakat money and distributed booty out of the state revenues as well as rights due to money after payment of zakat¹⁹¹

This is closer to the concept of “hospitality to and the hosting of guests”¹⁹².

190 According to J. Krafess, «Humanitarianism is one of the fundamental principles of Muslim religion. The act of giving money or helping someone in distress is not left to the free choice of the believer, but instead an obligation in the same way as is prayer.» He adds that the Islamic religion views aid given to a refugee as a right as ordained by the Qur'anic Ayah»» *And render to the kindred their due rights, as (also) to those in want, and to the wayfarer.*” (Surat al-Isra', 26) See: J. Krafess: The Influence of Muslim Religion in Humanitarian Aid, IRRC, Vol. 87, June 2005, pp. 327 and 334.

191 See: Dr. Yousof al-Qaradhawi: *usoul al-amal al-kheiri fi al-islam fi dhaw annusous wa al-makasid ash-shar'iya*, Qatar Red Crescent, 1428 AH (2007 AD), p. 35.

192 «A guest is a stranger who finds himself in a town or somewhere else, where he has neither kin nor home. Islam enjoins Muslims to warmly welcome and offer

According to an authentic hadith, abi- Shuraih al-Ka’bi reports Prophet Mohammad (PUBH) as having said, “ He who believes in Allah and the Hereafter must bestow reward (hospitable reception) on his guest. “ What is his reward, Messenger of Allah? “ they inquired. “ “ One day and one night and the hosting due shall be for three days and any longer period shall be deemed as sadaqah (discretionary alms), the Prophet (PBUH) said. “. ¹⁹³ The Heavenly command to bestow hospitable reception on a guest indicates that it is an obligation as evidenced by making faith contingent on this act and by judging any longer period as sadaqah. ¹⁹⁴

This is also supported by the statement of Prophet Mohammad (PBUH) addressing ‘Abdullah ibn ‘Amr (May Allah be pleased with them both), “You owe a right to your body; a right to your eyes; to your visitors and guests and a right to your wife.”¹⁹⁵

food to such person, both as a duty and a desirable act; particularly if he is left without shelter. This was the case with many villages and town in earlier times. Even if he finds an inn or hotel, but cannot pay for it, he must not be left in the open without shelter.»; Ibid, p. 44.

193 Al-Bukhari: *saheeh al-Bukhari: kitab al-adab, bab man kan yo’minu bi-Illahi wal-yaum al-akher fala yo’zi jarah.* , No. 5673, Vol. 5. p. 2240; produced by Muslim: *kitab al-iman, bab al-hath ‘ala ikram al-jar wad-dhayf*, No. 48, Vol.1, p. 69.

194 Dr. Yousof al Qaradhawi: *usoul al-amal al-kheiri fi al-islam fi dhaw anusous wa al-makasid ash-shar’iya*, op.cit.,p. 44.

195 Al-Bukhari: *saheeh al-Bukhari: kitab as-saum,, bab haqq al-jism fis-saum*, No. 1874, Vol. 2, p. 697; produced by Muslim : *kitab as-saum , bab an-nahyi ‘an saum ad-dahrliman tadharrar bihi*, No. 1159, Vol.2, p. 813.

Al-Bukhari: *saheeh al-Bukhari: kitab al-adab, bab man kan yo’minu bi-Illahi wal-yaum al-akher fala yo’zi jarah.* , No. 5673, Vol. 5. p. 2240; produced by Muslim: *kitab al-iman , bab al-hath ‘ala ikram al-jar wad-dhayf*, No. 48, Vol.1, p. 69.

4.1.3 Family reunification:

4.1.3.1 In Islamic Shari'ah :

In the interest of safeguarding the right of relatives and reunifying family, honorable Prophetic traditions (Sunnah) as well as Islamic state practices had stressed the need to keep them united, as shown by the following examples:

As reported by abi-Ayyoub al-Ansari (May Allah be pleased with him), Prophet Mohammad (PBUH) said, “He who ever separates a mother from her child, Allah will have him separated from his beloved on the Day of Judgment.”¹⁹⁶ This hadith explicitly prohibit separation between a mother and her child, but the prohibition extends by analogy to all relatives by virtue of kinship.”¹⁹⁷

‘Ali ibn abi-Talib (May Allah be pleased with him) was reported as having said, “I was ordered by Prophet Mohammad (PBUH) to sell two boy brothers and by so doing I separated between them. When I told him, he said, ‘ Go immediately, get them back and do not sell them but together.’ ”¹⁹⁸ (reported by Ahmad under trusted References

196 *Al-jami'e as-saheeh, i.e. sunan at-tirmizi, kitab al-biyou>. bab maja> fi karahiyat al-farq bayna al-walidah wa waladiha fil-baay>*, No. 1283, Vol. 3, p. 580, verified by Mohammad Fu'ad Abdul-Baqi. See also *Musnad al-Imam Ahmad* No. 23499, Vol. 38, pp. 485- 486, supervised by Shu'ayb al-Arna'ut.

197 *As-San'anni: subul as-salam*, ibid, v2, pp 494-495, ch. *shurout al-bay' wa ma nuhiya anhu*, Hadith No. 30.

198 *Musnad al-Imam Ahmad ibn Hhanbal; musnad 'Ali ibn Abi-Talib*, 9 (May Allah be pleased with him) , No. 760, Vol. 2, p. 756.

and verified by ibn- Khozaimah.)¹⁹⁹ .

Abu- Musa was reported as saying, “Prophet Mohammad (PBUH) and his household cursed he whoever separates between a mother and her child, between a brother and his brother . “ (reported by ibn Majah and ad-Darqotni)²⁰⁰ .

It was reported that once some captives (prisoners of war) were brought before Prophet Mohammad (PBUH), he looked at a woman among them that was weeping. “What makes you weep?” he asked the woman. She replied, “My son was sold to the ‘Abses.” Turning to the Companion who sold the son, Prophet Mohammad (PBUH) said, “You have separated between them. You go and fetch back the son.” And so did the Prophet’s Companion.

«Umar ibn al-Khattab (May Allah be pleased with him) was reported to have ordered that no brother should be separated from his brother, nor a mother from her sons even if one was young and the other older.²⁰¹

199 As-San'anni says, «This hadith provides evidence to the invalidity of sale. Like the former hadith, it also indicates to the prohibition of separation. While the former indicated to the absolute prohibition by any means whatsoever, the latter explicitly prohibits separation by sale. Attached thereto was the prohibition by all discretionary acts such as donation and vow to Allah, being made at the discretion and choice of separator. As to separation by allotment through inheritance, separator has no choice since the reason of possession is involuntary, i.e., inheritance. See: *subul as-salam*, ibid, Vol. 4 p.486, Hadith No. 31.

200 Ibn Majah: *as-sunan, kitab atijarat, bab an-nayi ‘an at-tafreeq bayn as-soba*, No. 2250, Vol. 2, p.756.

201 Imam al-Sarkhasi: *Sharh Kitab as-siyar al-kabir lil-imam ash-shibani*, Cairo ed, Ibid, Vol. 5, p. 2073; Ibid, Vol. 3, p.1040.

It was also reported that when Prophet Mohammad (PBUH) saw a woman among the captive who looked grief-stricken, he inquired what the matter with her was. "Her son was sold," they said. "No mother should be afflicted by the loss of her son," He said.²⁰²

From the foregoing the following conclusions can be made:

1. The honorable Prophetic tradition abounds in evidence to the prohibition of separating between a mother and her child or between minor relatives. Respect by Muslims of this tradition indeed goes even farther. According to Imam Ash-Shibani, if a mother and her child cannot be moved together and if the child cannot be fed in isolation from his mother, both should be either left together or moved together.²⁰³

202 According to *as-siyar al-kabeer*," In the case of a mother, a young son or two, an adult and a minor, an under- age boy, a young or adult paternal or maternal aunt, none should be separated from each others in allotment or sale." (Ibid, Vol. 5, p. 2073).

According to al-Bahouti," It is prohibited and inadmissible to separate between kindred through sale or other means such as allotment, donation or the like, even though at their own will, because they might accept something to their own detriment at some time and when some time later (for example they come of age) they change their mind and repent. This is confirmed by abi-Ayyoub's report,"I heard Prophet Mohammad (PBUH) say, ' If someone separates a mother from her child, Allah will have him separated from his beloved ones on the Day of Judgment.'" 'Ali ibn abi-Talib said," Prophet Mohammad (PBUH) once donated me another two boys of whom I sold one. Later, when The Prophet asked me how the boys were doing, I told him what I did."Get him back," he replied. See: Imam al-Bahouti: *kashaf al-qina' 'an matn al-iqna'*, Vol. 3, pp. 57-58.

203 According to *as-siyar al-kabeer*, if they can move them both, I do not recommend they move either, because to separate a mother from her child would mean to deny Muslims access to a benefit, while being able to allow it. In the case of moving mother and child to a place, it is not permissible to leave either of them alone if the person left behind would be thus lost, unless it not possible to move them together. If both were found at that location, there is no objection

2. The effect resulting from violating the rule of non-separation between mother and child or between minors is quite clear in the Prophetic tradition, i.e. the imperative of uniting them.
3. While the prohibition reported to have been voiced by Prophet Mohammad (PBUH) relates only to small children, it is our opinion that, bearing in mind humanitarian consideration, it is plausible not to separate between adult family members. This opinion is supported by the two following incidents during the Prophet's life time ²⁰⁴:

At the head of a battalion, Zayd ibn Harithah once captured a woman from Mazianah named Haleemah, who guided them to an area where Bani-Saleems lived. They seized many cattle, sheep and captives, including the woman's husband. When Prophet Mohammad (PBUH) knew, ibn al-Atheer says, he released her together with her husband.

Before the advent of Islam, az-Zubair ibn Bata al-Qorazhi one day released his slave Thabit ibn Qais ibn Shammas. During Khyber battle Thabit came to az-Zubair, saying, ' Do you know me? ""Can one like me fail to recognize one like you!" the latter replied. "I want

taking either at their own discretion. This is deemed as well-grounded separation. If in case of moving a child, people think they are able to sustain it based on their resources, let them take it. Otherwise they should either take them both, if they can, or leave them both. To take the child alone is deemed as futile separation. See *sharh kitab as-siyar al-kabir* by ash-Shibani, op. cit., Vol. 4., p. 1559.

204 Ibn Saad: *at-tabaqat al-kobra* 2: 85; az-Zahabi, Mohammad ibn Ahmad, *as-seerah an-nabawiyyah*, Vol. 2, p. 21 verified by Bashar 'Awwwad, Beirut, Mu'assat Ar-Risalah, 2nd ed. 1422 AH (2001 AD); Ibn al-Athir: *al-kamil fi at-tarikh*, Dar Sadir, Beirut, 1399-1979, Vol. 2, pp. 140-141.

to reward you for the favor you gave me.” “That’s how noblemen reward their peers.” Thabit came to Prophet Mohammad (PBUH), saying, “I owe az-Zubair a favor and I want to reward him for it. So, please donate him to me, so that I can release him.” When the Prophet agreed, Thabit came to az-Zubair saying, “The Prophet donated you to me; so you are now free.” “I have also an old man with no kin, nor kids,” Az-Zubair said. Thabit then went to the Prophet and asked him to donate him the man’s kin and children and the Prophet also agreed. But az-Zubair added, “I have kindred in al-Hijaz, with no money to sustain them”. Again, Thabit asked the Prophet to donate him the man’s property and he bestowed all on him.²⁰⁵

4. The rationale for non-separation of relatives is quite clear, i.e. to cater for people’s moral and psychological needs as human beings. In this respect, Imam Ahmad says, “Do not separate a mother from her child, even if she accepts, because she might at some time accept something to the detriment of the child and she might some time later change their mind and repent.”²⁰⁶
5. It can be said that the honorable Prophetic tradition had overrun contemporary international law. While it makes non-separation

205 Ibn al-Athir: *al-kamil fi at-tarikh*, op.cit.Vol. 2P. 148.

206 Ibn Qudamah: *al-mughni*, al-Katib al-Arabi House, Beirut 1403 AH (1983 AD), Vol. 10, p 468- 471; al-Bahouti: *kashshaf al-kin’a an matan al-iqn’a*, Vol.3, pp. 57- 58. In case both are minors, *as-siyar al-kabeer* states, “To separate two minors, who normally get on intimate terms is to deprive either of this intimacy or friendly company, which is too hard for a small heart to bear, possibly causing his perdition. This would not be the case if they were adults. See: *sharh kitab as siyra al-kabir* by Imam ash-Shibani, op. cit., Vol. 5, p. 2071

an obligatory duty on Muslims, international law merely provides for a dispersed family to be as far as possible reunified. This could give space for discretionary powers that may be abused by states and individuals.

6. An important aspect of the Islamic Shari'ah consists in the sympathetic consideration it gives to the child. This looks normal, because a child is by nature vulnerable and powerless; a consideration which has never been overlooked by the Islamic state. It suffices to cite the following examples:

- Citing *abi-Ja'far, ibn abi-Sheebah* said that *aba-Aseed* came to Prophet Mohammad (PBUH) with captives from Bahrain. The Prophet looked at a woman among them weeping, asking her, "What is the matter?" "This man sold my son," the woman replied, pointing to *abi-Aseed*. Turning to him, the Prophet asked, "Did you sell her son?" "Yes," he said. The prophet asked, "To who?" "To *bani-Abs*," he replied. "Now ride you yourself and bring him back," ordered Prophet Mohammad (PBUH) ²⁰⁷ .

- Also during the siege of 'Akka (Acre), Muslims had thieves to sneak into Crusaders tents and steal various things and even men. Once they stole a three-month-old baby. Deeply grieved for it, his mother complained to their kings. They said to her, "The Muslim Sultan is a kind-hearted man. We give you permission to go and request him to give back your baby, and he will." "So she went to the sultan and, explaining her plight to him, he took so much pity on her that

207 Al-Kindihlawi: *hayat as-sahaba*, al-Ma'rifa House, Beirut, Vol. 2, p 79

he almost burst into tears. Then he ordered the baby to be fetched. When he was told that the baby was sold in the market, he ordered the baby to be bought back and returned from the buyer. He stayed until the baby was brought back and breast-fed by its mother for an hour, during which time she was crying with great joy and yearning. She was later moved together with her baby to her tent on the back of a decorated horse. Commenting on this incident, ibn Shaddad says, “Look at this all-embracing mercy for human kind.”²⁰⁸

4.1.3.2 In international law:

In view of its humanitarian character, reunification of separated refugee families is of paramount importance in the context of the right to asylum.²⁰⁹

According to the Universal Declaration on Human Rights, “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” This is also referred

208 Ibn Kathir: *al-bidayah wa an-nihayah*, al-Ma’arif Bookshop, Beirut 1977, Vol. 12, p 342; Ibn Shaddad: *an-nawadir as-sultanyia wa al-mahasin al-yousifiya aw sirat salah ud-din*, Egyptian Authorship and Translation House, Cairo, 1964, p 159.

209 This was stressed also in the «Conclusions on the International Protection of Refugees adopted by The Executive Committee of the UNHCR Programme, Geneva, 1996», p. 19, N° 9 (28), pp. 55 – 56, N° 24 (32).

See also: “Conclusions on the International Protection of Refugees by The Executive Committee of the UNHCR Programme, Cairo, 2003, pp. 245-246 No. 88.

The unity of family principle is stipulated in Annex B to the Final Instrument of the 1951 United Nations Conference on the status of refugees and stateless persons. See Collection on International Instruments and Legal Texts concerning Refugees and Others of Concern to UNHCR, op. cit., Vol. I, p. 30.

to in the rules of humanitarian international law:

Article 26 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of Wars provides that “Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible.

Article 74 of the 1977 First Additional Protocol to the 1949 Geneva Conventions (Article 74) stipulates that “The High Contracting Parties and Parties to conflict shall facilitate, by every possible means, the reunification of families dispersed owing to armed conflict.”

The Prophet’s tradition had accorded greater protection than that provided under contemporary international law which only consists of:

- Mere renewal of contact or meeting; and
- Facilitation, by every possible means, of the reunification of families dispersed owing to armed conflict.

In the context of the right to asylum, it is understood that family unity is invoked, for instance, in the case of “derivative status”, namely when the refugee status granted to a given asylum-seeker meeting the refugee criteria is extended to his/her dependent family members (e.g. spouse and children under the age of 18). It is worthy of note that dependents, who qualify as refugees, may be granted the refugee status on their own, rather than derivative refugee status.²¹⁰

210 See: Information for Asylum-Seekers and Refugees in Egypt, UNHCR, Regional Representation in Egypt, Cairo, November 2005, p. 38.

See also: EU Directive No. 86/ 2003 on family reunification in: Collection of

4.1.4 Refugee property and funds:

4.1.4.1 In Islamic Shari'ah:

According to Islamic Shari'ah, a refugee's property shall be secure and consequently should not be seized or confiscated against his will. In respect of a non-Muslim under aman (musta'min) , Imam an-Nawawi says, "If a disbeliever enters under a covenant of aman or zimma into a Muslim land, he shall enjoy security for the property, children and relatives in his company. However, he shall have no security for his property, children and relatives left behind in a non-Muslim land. It follows then that the property left behind may be taken as booty and children left behind taken into captivity. The author of "al-hawi" maintains that if a non-Muslim is given aman (in general) he shall enjoy security for himself, his siblings and his property. But, if he is given aman (in particular) he shall not enjoy security for his siblings and his property. The majority of jurists maintain that aman given to an owner is different from that given to the property he owns. Therefore, if a Muslim enters into a non-Muslim land under aman and a non-Muslim sends back with him money to buy goods, this money shall remain secure until he has refunded it, even if the owner of this money was not granted amam. The same applies in the case of a zimmi who had entered into Muslim land under aman. According to another opinion, "A covenant of aman granted by a zimmi is invalid, but the

International Instruments And Legal Texts concerning Refugees and others of Concern to UNHCR, op. cit., Vol. 4, PP. 1682-1690.

See also ibid (p. 1409) Recommendation No. 23 (99) issued by the Council of Europe Ministerial Committee.

former opinion is preponderant because since the zimmi is deemed to be believed it was so, the money should be refunded to him.”²¹¹

Chief Judge al-Baidhawi maintains that aman granted to a non-Muslim “extends to the property and relatives in his company, even when pronounced in general terms, for this means that he had left behind things that are harmful to him and because they are deemed as his appurtenances”.²¹²

It necessarily follows from the foregoing that immunity does not apply to objects, property, relatives not accompanied by a refugee nor does it apply to relatives or children left behind by a refugee in a non-Muslim land, until they have come to Muslim land. Therefore, here applies the rule established by Imam al-Qurtobi: “A non-Muslim seeking asylum in a Muslim territory (musta’min) shall not be granted aman for objects, property, relatives or children left behind in non-Muslim land.”²¹³

211 Imam an-Nawawi: *rawdhat at-talibin*, op. cit., Vol. 10, p 281.

According to the Malikite School, if a non-Muslim who had entered Muslim land under *aman*, dies, leaving behind property, it shall not be treated as booty but shall be returned to his inheritors. Asked what if such a man was murdered by a Muslim, Imam Malik said, “His blood-money shall be paid to his inheritors in non-Muslim land.” Commenting, ibn al-Qassem said, this indicates that his property shall accrue to his inheritors. I really know that Malik even said that the murderer shall also release a slave and pay his money and blood-money to his rulers or competent authorities in his country as if he was murdered on their territory.” See: Imam Malik: *al-modawwanah al-kobra*, Sadir House, Beirut, as-Sa’adah Press, Egypt, 1323 AH, Vol. 2. p. 24. It is also said that Muslims have no right to a non-Muslim’s property, in case of death, or to his blood-money, in case of murder, but all this shall be sent to his home country. See: Imam al-Hattab: *mawahib al-Jallel bi-sharh mokhstasar khaleel*, al-Fikr House, Cairo, 1398 AH (1978 AD), Vol. 3, p. 363.

212 Imam al-Baydhawi: *al-ghayah al-qoswa fi drayaht al-fatwa*, verified by Mohyeddeen Daghî, an-Nasr Islamic Printing House, Cairo, 1982, Vol. 2, p. 953.

213 Imam al-Qurtubi: »Abu «Umar Ibn Abdulbar an-Nimri»: *al-kaffi fiqh mazhab ahl al-madina al-maliki*, Riyadh Modern Bookshop, Riyadh, 1400 AH (1980 AD), Vol. 1, p. 481.

Accordingly, the limits of immunity for a refugee's property consists in three aspects:

- a. A positive aspect: A refugee's accompanied private property shall be secured, given that this constitutes a common practice and that such property is treated, as Imam al-Baidhawi maintains, as appurtenances.
- b. A negative aspect: Aman evidently does not apply to objects and property left behind by a refugee in a non-Muslim land, given that national laws and legislation are applied on a territorial basis and that Muslim state jurisdiction does not extend to other states.
- c. A practical aspect: Aman applies to refugee's accompanied relatives because they are his dependents (which also applies to their property) rather than to those left behind on the territory of another state.

4.1.4.2 In international law:

Article 30 of the 1951 Convention relating to the Status of Refugees provides, "Contracting State should, in conformity with its laws and regulations, permit refugees to transfer assets which they have brought into its territory, to another country where they have been admitted for the purposes of resettlement. Contracting State shall give sympathetic consideration to the application of refugees for permission to transfer assets wherever they may be and which are necessary for their resettlement in another country to which they have been admitted."

4.1.5 Diplomatic protection:

4.1.5.1 In Islamic Shari'ah:

An Islamic state may exercise diplomatic protection in respect of refugees present on its territory. This can be inferred by a fortiori analogy to the rescue theory (*istinqazh*) endorsed by Muslim jurists as a means to rescue and salvage Muslims persecuted on ground of their religion or falling into captivity. This is the Islamic equivalent to the theory of humanitarian intervention in Western jurisprudence. This theory is premised on the following Qur'anic Ayah:

“And why should ye not fight in the cause of Allah and of those who, being weak, are ill-treated (and oppressed)? Men, women, and children, whose cry is, «Our Lord! Rescue us from this town, whose people are oppressors; and raise for us from thee one who will protect; and raise for us from thee one who will help!» (Surat an-Nisa',75).

Muslim jurists extended the application of this theory to *zimmis* and *musta'mineen*. In this context, it is stated in “*as-siyar al-kabeer*”, “We have a duty to rescue *zimmis* whenever they are oppressed and whenever we can afford to. But we are under no obligation to do so in respect of *musta'mineen*, if they go out to non-Muslim land. By residing on our territory, *zimmis* are deemed as affiliated to Muslims.”²¹⁴

It adds, “Originally, a Muslim ruler has a duty to rescue and salvage from injustice *musta'mineen* as long as they stay in our land.

214 *Sharh kitab as siyra al-kabir* by Imam ash-Shibani, op. cit, Vol. 2, p 688.

So he has a similar duty towards zimmi, because as long as they stay in Muslim land, they will remain under his jurisdiction. So, musta'mineen shall be given the same treatment as zimmi."215

In light of the foregoing, an Islamic state has a duty to rescue refugees musta'ameen as well as zimmi from the hands of enemies, even by using armed force and to exercise, a fortiori, diplomatic protection to defend their usurped rights, thus doing them justice.

4.1.5.2 In international law:

According to international law, diplomatic protection is a system under which a state intervenes to protect its nationals abroad, in case their rights are violated. It is a means by which a state defends a victim, by ensuring its right to respect international law in the person of the latter216.

According to Article 8-2 of the Draft Articles on Diplomatic Protection adopted in 2006 by the International Law Commission, "A State may exercise diplomatic protection in respect of a person recognized as a refugee in accordance with acceptable international rules who, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State."217

However, Article 8, para.3 adds that this does not apply in respect

215 Ibid, Vol. 5, P. 1853.

216 Dr. Ahmed abou-El-Wafa: *al-waseet fil-qanoun ad-dawali al-'aam*, an-Nahdha al-Arabiya House, Cairo, 5th Ed, 1428 AH-(2007 AD), p 641.

217 See also: United Nations General Assembly Resolution No A/61/10 (2006).

of “an internationally wrongful act committed by the state of refugee’s nationality.”

4.1.6 Refugee children rights:

4.1.6.1 In Islamic Shari’ah:

There is no doubt that in Islam, the rights of the child are respected, be it refugee or not. The Covenant of the Rights of the Child in Islam adopted by the Organization of the Islamic Conference expressly provides for these rights, including to equality, family cohesion, personal freedoms, upbringing, education, culture, rest and activity times, health, protection, justice, etc. As regards refugee children, the Covenant provides that “States parties to this Covenant shall ensure, as much as possible, that refugee children, or those legally assimilated to this status, enjoy the rights provided for in this Covenant within their national legislation.” (Art. 21) ²¹⁸

For children temporarily or permanently deprived of their families, the Convention on the Rights of the Child, 1989 adopted the kafala system established by Islamic Shari’ah. According to Article 20, para.3, “ Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children.” It is clear from the foregoing that this Convention has endorsed one of the long-standing and established systems of Islamic Shari’ah, i.e. kafala (guardianship) system.

The honorable Sunna (prophet’s tradition) establishes for the

218 See: Document No. OIC/9 – IGGE/HRI/2004/Rep. Final.

child many actions, including ²¹⁹ urging the marriage of reproductive women, thus increasing the proliferation of Muslims, careful selection of wife, celebrating child birth (aqeeqah), the right of the child to a good name, proving lineage (on basis of matrimonial bed , evidence or admission), the right of the child to nursery, playing with the child, protection of women and children in time of war, protection of motherhood and childhood in Islamic criminal law, the right to education and upbringing, liberation of a slave woman when she gives birth to a child. Other rights were developed for the child based on diligence (ijtihad) by Muslim jurists, including the right of the child to maintenance (nafaqah) supervision or guardianship on the child's person or property, rights of a foundling, the right of a newborn to donation from the public treasury (baitul-mal), and due will. Islamic Shari'ah also addressed the right of the embryo.²²⁰

Most indicative of the attention Islam accords to a child is a

219 See also: Dr. Mohammad Abdul-Gawwad Mohammad: *himayat at-tofoulah in ash-shari'ah al-islamiyyah wal-qanoun ad-dawlial-'am was-Sudani was-saudi*, Munsha'at al-Ma'arif, Alexandria, pp. 29, 80. Some jurists divide children's rights owed by parents into: physical rights: proof of lineage, breast-feeding, nursing, guardianship, the right to maintenance; and moral rights: good upbringing, moral care, giving the best of names, fair and equal treatment of children. Rights of parents include: filial gratitude, the right to be sustained by children in old age, the right to be honoured in their life time and in death. See: Dr. Abdullah Mohammad Sa'ied: *al-hoqouq al-mutabadalah bayn al-aba' wal-abna' in ash-shari'ah al-islamiyya*, a Ph. D. thesis, Faculty of Shar'iah and Law, Cairo, 1402 AH (1982 AD), p. 466.

220 Including capacity and patrimony, negation of and claim to conception, right to inheritance (if borne alive), the making of a will or endowment (waqf) to an embryo and abstention from assault against it by abortion., etc. See: Dr Mohammad Sallam Madkour: *al-janeen wal-ahkam al-muta'aliqatu bihi fil-fiqh al-islami*, an-Nadha al-Arabiya House, Cairo, 1389 AH-(1969 AD), pp. 271-328.

well-known episode involving Caliph ‘Umar ibn al-Khattab. Once a group of merchants came in and stayed in the prayer area. ‘Umar asked ‘abdur-Rahman ibn Auf to join him in guarding the merchants that night against theft. So they spent the night guarding them and praying. During the night ‘Umar heard a baby crying, so he went up to his mother, saying, ” Fear Allah and take care of your child.” Back to his station, he once more heard the baby crying and so he went back and forth for three times. In reply, the woman said that she had prematurely weaned the baby because ‘Umar ordered that babies would be given an allowance or a gratuity only after being weaned. Immediately, ‘Umar ordered a town crier to make a public announcement: “Do not prematurely wean your babies, because we will grant gratuity for each newborn in Islam.” He also dispatched the same orders to all parts of the Islamic state. The same practice was followed by ensuing Well-guided Caliphs ‘Othman, “Ali and ‘Umar ibn Abdul-Azeez.²²¹

4.1.6.2 In international law:

The 1989 Convention on the Rights of the Child, 1989 provides that a child shall enjoy several rights: the right to have his best interest taken into consideration in taking any action or making any decision affecting him, the right to life, the right to have a name and a nationality and the right to compulsory education. Moreover, capital punishment shall not be imposed for offences committed by persons

221 See: Ibn Sallam: *kitab al-amwal*, Azhar Faculties Bookshop, Cairo 1388 AH (1968 AD), pp. 337-341.

below eighteen of age. Children below fifteen years of age shall not be allowed to engage in armed conflict. The Convention also provides for the need to provide appropriate protection for refugee children and to ensure that they enjoy applicable rights (Art. 22).²²²

Article 5, para. 4 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, November 25, 1981., provides, “ In the case of a child who is not under the care either of his parents or of legal guardians, due account shall be taken of their expressed wishes or of any other proof of their wishes in the matter of religion or belief, the best interests of the child being the guiding principle” ²²³.

4.1.7 Financial rights:

Islam stresses the need to preserve non-Muslim property, movable or immovable, during lifetime or after death. Muslims have shown such tolerance that, in 310 AH (923 AD), Caliph al-Muqtadir issued

222 See: Declaration of the Rights of the Child (1959); Convention on the Rights of the Child, 1989; African Charter on the Right and Welfare of the Child, 1990; Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No. 182), (1999); Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, (2000), Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, (2000), General Comment No. 5 by the Child Rights Committee on unaccompanied children outside their country of origin, 2005; UN Security Council Resolution No. 1612 on children in armed conflicts (2205) in “Collection of International Instruments and Legal Texts concerning Refugees and Others of Concern to UNHCR”, op. cit., Vol. 1, p. 469, 405, 465, 419, 423, 594, 474; Vol. 3, p. 1058. See also Dr Ahmed abou-El- Wafa: *al-himayah ad-dawaliya lihuqouq al-insan*, op. cit., p 54-56.

223 General Assembly Res. 36/55, November 25, 1981.

a decree on legacies that «the estate of a deceased zimmi who has no apparent heirs shall be returned to his co-religionists”, while the estate of a deceased Muslim under the same circumstances was returned to the public treasury (baitul-mal).”²²⁴

This practice is premised on the rule that in Islam “ No Muslim shall inherit a non-Muslim and that “ Difference in religion is a hindrance to inheritance”²²⁵, that according to the observed Sunna (Prophet’s tradition) only the followers of each religion shall inherit their co-religionists, if they leave behind no heirs of their kin.²²⁶

4.1.8 Dealing with non-Muslims:

Islam enjoins Muslims to greet non-Muslims, visit them when they fall sick, attend their funerals, give them condolences or congratulations as the case may be, or other forms of dealings.²²⁷

4.1.9 The general rule In Islam is that “ a refugee, even if a non-Muslim, is honored by the Shari’ah : ”²²⁸

This rule is premised on the fact that Allah the Almighty equally

224 Adam Mitz: *al-hadhara al-islamiya fi al-qarn ar-rabi al-hijri aw asr an-nahdha fil-islam*, al-Kitabal-Arabi House, Beirut, Vol.1, 1387 AH-(1967 AD), arabicized by Mohammad Abu Reidah, p.77.

225 *al-fatawi al-islamiya min dar al-ifta al-masriya*, Supereme Council for Islamic Affairs, Cairo, 1409 AH (1980 AD), Vol. 16, pp. 6064, 6070.

226 Ahmed Ameen: *zuhour al-islam*, an-Nahdha al-Arabiya Bookshop, Cairo, 1962, pp. 81-82.

227 Ibn Qayim al-Jouziya: *ahkam ahl az-zimma*, op. cit., pp. 191-206.

228 Ibn Abedeen: *ha’shiyat rudd al-muhtar*, Mustafa al-Babi al-Halabi Bookshop, Cairo, 1386 AH (1966 AD), Vol. 5, p. 58.

treated all humans in the origin of creation, making them all out of one father and one mother. This is clear from the following Ayah: “ We have honoured the sons (descendants) of Adam; provided them with transport on land and sea; given them for sustenance things good and pure; and conferred on them special favours, above a great part of Our creation.” (Surat al-Isra’, 70).

The term” sons (descendants) of Adam” occurs as a generic rather than a specific term for human beings, covering Muslims and non-Muslims alike without distinction as to an exclusive nation, race or religion, regardless of being refugees or otherwise.

4.1.10 It is established in Islam that non-Muslims should not be forced to change their beliefs:

This is based on the following Ayah: “ Let there be no compulsion In religion: truth stands out Clear from error.”(Surat al-Baqarah, 256)

In his interpretation of the Holy Qur’an, Imam ar-Razi says that, Allah the Almighty, having demonstrated conclusive and peremptory evidence to monotheism, “there is no excuse left for a disbeliever to hold on to disbelief.” The alternative is to have him forced into belief, which is not permissible in this world of trial. Compulsion and coercion into religion is itself a negation of the meaning of trial. This can be seen in the following Ayahs:

“Say, “The truth is from your Lord”: let Him who will believe, and let Him who will, reject (it)...” (Surat al-Kahf, 29)

“If it had been Thy Lord’s will, They would all have believed,- all

who are on earth! wilt Thou then compel mankind, against their will, to believe!: (Surat Younos, 99)

“It may be thou frettest thy soul with grief, that they do not become Believers. If (such) were Our Will, We could send down to them from the sky a Sign, to which they would bend their necks in humility. (Surat Ash-Sho’ara’, 3-4)

Al-Qasemi hold that Allah the Almighty has based the question of belief on capacity and discretion rather than on compulsion and coercion.²²⁹

According to “as-siyar al-kabeer,” Although disbelief is one of the most heinous felonies, yet it remains confined between man and his Creator, Exalted He may be but the punishment for it is deferred to the Day of Judgment. However, the legitimate fight against disbelievers is advanced in this world because it yields benefit to men.²³⁰ This means that there is no compulsion in religion, but fighting is called for because it yields benefit to people, such countering impending aggression or persecution on ground of religion.

The Holy Qur’an itself asserts that men may stick to their respective religions but they will be judged on the Day of Judgment as shown in the following Ayahs:

“ Those who believe (in the Qur’an), those who follow the

229 *Tafsir Imam ar-Razi*, Vol.2, p. 319; Imam al-Kiya al-Harras: *ahkam al-Qur’an*, al-Kutub al-Haditha House, Cairo, 1974, Vol. 1, p. 339, fn 1.

230 As-Shibani: *sharh kitab as-siyar al-kabi*, op.cit, Hyderabad ad-Dokon ed., Vol.3, p. 182.

Jewish (scriptures), and the Sabians, Christians, Magians, and Pagans,- Allah will judge between them on the Day of Judgment: for Allah is witness of all things.” (Surat al-Hajj. 17)

“It is He who has created you; and of you are some that are Unbelievers, and some that are believers: and Allah sees well all that ye do.” (Surat at-Taghabun, 2)

“If Allah had so willed, succeeding generations would not have fought among each other, after Clear (Signs) had come to them but they (chose) to wrangle, some believing and others rejecting” . (Surat al-Baqarah, 253)

This also applies to refugees as shown by the following episodes:

Musa ibn Maimoun, a Jew who was living in Andalusia, being forced to covert to Islam, posed as a Muslim in public but remained a Jew in private. After fleeing to Egypt and settling in al-Fustat amidst his co-religionists, he pronounced his Judaism. When the Muslim jurist abul-Arab al-Andalusi arrived into Egypt, he questioned him about his conversion to Islam, with the intention to hurt him. But al-Qadhi al-Fadhil prevented him, saying , “ A man who was forced into Islam shall not be considered a legally valid Muslim.”²³¹

231 Ibn al-’Ibri: *tarikh mukhtasar ad-duwal*, al-Masira House, Beirut, p. 239. Therefore it is said.»If someone who may not be coerced like a *zimmi* or a *musta’min* is forced to convert to Islam, he shall not be judged as a Muslim unless he has shown signs of voluntarily embracing Islam, such as adhering to Isalm after being freed from coercion. Should he die before, he shall be regarded as a disbeliever. However, ibn Qodamah maintains that < such a person was forced into something that cannot be subject to coercion. He shall be treated as a Muslim who was forced

In a message to the Roman emperor Constantine, Caliph al-Ma'moun said, "By Allah, had it come to the knowledge of people before; indigent, poor and vulnerable people, peasants and manual worker what the Prince of Believers had in store for them, they would have rushed headlong towards him. He would give them shelter, let them settle in spacious lands, put them in possession of sources of flowing water, do them justice to such limits that you can never reach or even approach. He would treat them compassionately and fairly, never interfere with their religion or force them to convert to another religion. Had they known that, they would have fain opted for proximity to me rather than to you and for my protection rather yours." ²³²

As regards zimmi, al-Qarafi says, " He who assaults or assist in assaulting them even with a libel, calumny against their honor or any other form of injury, would be undermining the trust of Allah the Almighty, Prophet Mohammad (PBUH) and the religion of Islam." ²³³

into disbelief. The evidence to the prohibition of coercion is given by the words of Allah in the Holy Qur'an:» *There is no coercion in religion.*" Jurists are at one on the the question that if a zimmi or a *musta'min*. maintains his covenant, it shall not be renounced nor shall he be otherwise forced into acts beyond his covenant. (Ibn Qodamah: *al-moghni wa ash-sharh al-kabeer*, op.cit., Vol. 10, pp.104-105)

William as-Souri also mentions that after seizing Jerusalem, Muslims gave permission to its Christian residents to renovate the destroyed churches and to perform their religious rites. They allowed their archbishop to stay on and permitted them to practice Christian religion unrestricted. (William as-Souri : *al-horoub as-salibiyyah*, translated by Hasan Habashi, Darul-Kotob Printing Press, Vol. 1, 1991, pp. 65-66.

232 Dr. Ahmed Farid Rifa'i: *asr al-ma'moun*,Matbaat Darul-Kotob Printing Press,Cairo, 1346 AH-(1928 AD),Vol.2, p. 235-236.

233 *Al-Furouq* by al-Qarafi, Alam al-Kutub House, Beirut, Vol.3, farq 119,

4.1.11 Islamic judiciary respects the rights of non-Muslim refugees:

The scale of justice is one for all, without distinction between a Muslim and a non-Muslim. This rule does not change even if the adversary is a refugee.

Ibn Abdul-Hakam reports that speaking to Muslims, the Well-guided Caliph ‘Umar ibn al-Khattab said, “ I do send my governors in order to teach you your religion and the Sunna of your Prophet rather than torment you or seize your property. He who encounters something of this sort, let him report to me. By Allah, who commands my soul, I will have the victim avenge himself from the offending governor. ‘Amr ibn al-’As rose, inquiring, “O Prince of Believers, if one of governors reproaches or disciplines one of his subjects, will you do that to him?” ‘Umar replied, “ Why shouldn’t do I after I have seen the Messenger of Allah himself do it? Nay, never shall you beat Muslims, thus humiliating them, never shall you deny their rights, driving them into disbelief, never shall you molest them, thus seducing them nor shall you push them into jungles, thus wasting them away.”

Then there came a man from Egypt saying, “ O Prince of Believers, I hereby seek your protection against injustice.”

p.14, See also what should be done to treat them well and satisfy their needs (p. 15). One of the gross sins is” to cause harm to a neighbor, even if a zimmi’ and injustice done by sultans, princes or judges etc, to a Muslim or a zimmi, by unlawfully seizing property, beating, name-calling etc, (P. 522). See: Imam ibn Hajar al-Haytami: *az-wajir ‘aniqtraf al-kaba’r, as-Sha’b Hous*, Cairo. 1400 AH- (1980) P.246. This also includes beating a protected Muslim or *zimmi* intentionally or unintentionally (p. 482) and beating a protected Muslim or *zimmi* without legal reason (p.495).

“And here I grant you protection, ‘Umar answered.

The man related, “In a race with the son of ‘Amr ibn al-’As, I outran him. But he kept whipping me, saying, ‘I’m the son of the noblest. “Then ‘Umar summoned ‘Amr ibn al-’As from Egypt .When ‘Amr ibn al-’As and his son came to al-Madinah, ‘Umar ordered the Egyptian to whip ‘Amr’s son, saying, “ Whip the son of the most ignoble !” Anas (the reporter) commented, “ (The Egyptian) kept whipping him to our satisfaction so incessantly that we wished he would stop.” Then ‘Umar said to the Egyptian, “Turn to ‘Amr’s bald head.”

“ O Prince of Believers, it was his son that beat me and I took it out on him,” the Egyptian said. ‘Umar then turned to ‘Amr ibn al-’As, saying, “Since when have you enslaved people, who were born free!”

“O Prince of Believers, I did not know and the man didn’t come to me,” ‘Amr said.²³⁴

4.1.12. Protection of non-Muslim lives:

Islamic Shari’ah also protects the lives of non-Muslims who do not engage in war against Muslims. In certain cases, it may not be permissible to target non-Muslim lives under the pretext of necessity. In this respect, Imam ash-Shibani says, “ If some Muslims sailing on a ship have in their company some zimmi or musta’mineen, those shall be treated as Muslims and shall not be thrown into the sea, even if Muslims have fears for their own lives, because zimmi and

234 Ibn Abdul-Hakam: *futouh misr wa ash-sham*, verified by Abdul-Muni’im Ammir, at-Ta’awun House, Cairo, 1961, pp. 224-226.

musta'mineen should be as secure by dint of their respective covenants as Muslims are secure by dint of their faith.”²³⁵

According to Islamic Shari'ah, man's life, shall be respected, regardless of being a Muslim, non-Muslim or even a refugee.²³⁶

4.1.13 Refugees right to fair treatment :

According to “as-sair al-kabeer”, “Originally, a Muslim Imam has a duty to rescue, protect and do justice to any musta'min as long as they stay on our territory. The same treatment shall be accorded to zimmi.” As an interpretation of this statement, Imam as-Sarkhasi maintains that as long as a musta'min stays within Muslim territory, he shall remain under the jurisdiction of the Muslim Imam and thus shall be equally treated as zimmi.²³⁷

Therefore, it is a duty to have justice done in respect of non-Muslims under aman, even if they are refugees.²³⁸ This involves two actions:

235 Ash-Shibani: *sharh kitab as-siyar al-kabir*, Arab League's Institute of Manuscripts, Ibid, Vol.4, p. 1562-1563.

236 It is said that» the right to life and the right to access to means of livelihood are one and the same and equality in both is better than discrimination. Therefore, it is a duty to assist people in need, even if they were non-Muslims.» See: Dr.Mohammad ash-Shahat al-Gindi: *qwa'id al-at-tanmiyah al-iqtisadiyyah fil-qanoun ad-dawli wal-fiqh al-islami*, Dar an-Nahdhah al-Arabiyya,Cairo, 1985, p. 62

237 Ash-Shaibani: *sharh kitab as-siyar al-kabir*, ibid, Cairo, 1972, p. 1853.

238 The Holy Qur'an contains 396 References to matters related to protection and assistance, including 170 related to vulnerable persons, 20 to immigration and safety, 12 to asylum and 68 to zakat and charity. Moreover, there are 850 hadiths Prophet Mohammad (PBUH) related to protection and safety. Based on the foregoing facts Kirsten Zaat says,»»The right of all humanity to enjoy protection and assistance, and the concomitant obligation to protect and assist those in need,

To do justice to them against their oppressors within Muslim territory; and To do justice to them against their non-Muslim oppressors (by repulsing any military aggression against them or exercising diplomatic protection in defense of their rights).

This is supported by the Qur’anic Ayah: “*Allah forbids you not, with regard to those who fight you not for (your) faith nor drive you out of your homes, from dealing kindly and justly with them: for Allah loveth those who are just.*” (*Surat al-Mumtahanah*, 8)

Undoubtedly, this provision applies also to a refugee, since he is ,by definition, “ a non-combatant, and has not taken part in expelling Muslims from their land.”

4.2 In international law:

The 1951 Convention relating to the Status of Refugees provides for the following obligations and rights of refugees:

4.2.1 Refugee’s obligations:

Every refugee has duties to the country in which he finds himself, which require in particular that he conforms to its laws and regulations as well as to measures taken for the maintenance of public order (Art. 2)

including forced migrants, is one of the pre-eminent institutions of Islamic Law which can be distilled both through literal interpretations of the language of Sharia and by *qiyas* (analogy)”. He adds, (pp. 9-11)” Islamic Shari’ah establishes an obligation to grant protection and assistance to persons in need”.See: Kirsten Zaat : The Protection of Forced Migrants in Islamic Law, New Issues in Refugee Research, Research Paper N^o 146, UNHCR, December 2007, p. 6, See: 30; pp. 7-8 See: 32 .

4.2.2 Refugee's rights:

These rights are:

Non- discrimination (Art. 3); freedom to practice their religion (Art. 4); exemption from reciprocity (Art. 7); exemption from exceptional measures (Art. 8); personal status shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence (Art. 12); movable and immovable property rights (Art. 13); artistic rights and industrial property rights (Art. 14); right of association (Art. 15); access to courts(Art. 16) ; right to wage-earning employment (Art.17); self-employment (Art. 18);liberal professions (Art. 18); rationing(Art. 20); housing (Art 21); public education (Art. 22); public relief (Art. 23); labor legislation and social security (Art. 24); administrative assistance(Art .25); freedom of movement (Art. 26) ; identity papers (Art. 27) ; travel documents (Art. 28); fiscal charges(Art. 29); transfer of assets (Art. 30) ; prohibition of imposing penalties on refugees, on account of their illegal entry or presence on refugees (Art. 31); expulsion (Art. 32); prohibition of expulsion or return (“refoulement”) (Art. 32).²³⁹

239 The 1951 Convention also states in Article 9,»*Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from provisionally taking measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.*”

See also: Guidelines on the Reception Of Asylum Seekers, International Federation of Red Cross and Red Crescent Societies, Geneva, 2001, 34pp.

Chapter V

Impediments to the right to asylum in Islamic Shari'ah and international law

Chapter V

Impediments to the right to asylum in Islamic Shari'ah and international law

By Impediments²⁴⁰ we mean considerations affecting the initiation, perpetuation and cessation of the right to asylum, i.e. constraints to the initial granting of this right (categories of persons who have no right to the refugee status), those leading to the timing of asylum granted (temporary protection) or those resulting in a permanent solution and the end of asylum (durable solutions and cessation of asylum).

5.1 Ab initio Impediments: Persons not eligible to refugee status:

Some categories of persons are not eligible to refugee status because they do not qualify for that. These are:

5.1.1 In Islamic Shari'ah:

Evidently, the latter third case provided by article 1/f of the 1950 convention relating to the status of refugees was not in existence on the advent of Islam, as the United Nations came to existence only in 1945, i.e. 14 centuries after the rise of Islam. However, as Islamic states are members of the United Nations and consequently parties to the organizations constituent Charter, this provision applies to them and as such must be observed.

²⁴⁰ The word »impediments» is used here as an equivalent of the Arabic word »*awaridh*».

The other two provisions, in one way or another relates to the perpetration of serious crimes. This will be discussed as follows:

5.1.1.1 Inadmissibility of granting asylum to non-political criminals:

It is well-established in Islam that asylum may not be granted to criminals, particularly those who have committed acts warranting prescribed penalties (hodoud, e.g. willful murder). Since the early beginnings of the Islamic state and in later eras, this had been applied by Muslims. The following two examples demonstrate this fact:

5.1.1.1.1 Non-granting of asylum to criminals in accordance with an international treaty:

If an Islamic state is prohibited, under a treaty, from granting asylum to specific persons, provided that such treaty does not conflict with the provisions of Shari'ah, the Islamic state shall be under obligation to honor it, mainly because the Islamic rule of inviolable sanctity of contracts and the fulfillment of promise (pacta sunt servanda) are among the basic rules of Islamic Shari'ah.

An example can be given by the following quotation from a letter by Prophet Mohammad (PBUH) , wherein he made peace with the Jews, “ It is not permissible for a believer, who agrees to the content of this document and has faith in Allah and the After Day , to rescue or shelter a criminal. He who does so will invoke the curse and wrath of Allah on the Day of Judgment”²⁴¹.

241 Refer in the text of document: *majmoo'at al-wathaiq as-siyasiya. Item No. 22, Al-'Omari, Dhiya':as-seerah an-nabawiyyah ; al-'Ali, Ibrahim: saheeh as-sirah an-nabawiyyah, Jordan, Dar an-Nafa'is, 6th , 1423 AH (2002 AD); Ibn*

Other examples include the following:

A letter sent by Musa ibn Nussair to Tadmir king of Oreole, northern Andalusia says, “In the name of Allah, the Most Compassionate, the Most Merciful. This is to tell you we have agreed the peace (between us), you shall have the protection (aman) of Prophet Mohammad (PBUH). You shall not give shelter to a fugitive from us, nor an enemy to us nor shall you intimidate any of our secured men nor shall you keep secret any news coming to your knowledge about our enemy.”²⁴²

Another letter sent by ‘Umar ibn al-Kattab to the Roman Emperor when the tribe of Iyad ibn Nizar fled to a Roman territory during the conquest of the Peninsula says, “ I was informed that an Arab tribal community left our territory for yours. By Allah, unless you send them back, I will expel all Christians (in our country) and send them to you.” The Roman Emperor did what he was told.²⁴³

It is worth mentioning that the grant of asylum to a specific person

Hisahm: *as-sirah an-nabawiyah*, Vol. 1, p. 301.

One of these examples is that during the reign of ‘Umar uibn al-Khattab, Swaid ibn Muqrin wrote to the ruler of Tabarstan,” In the name of Allah, the Most Compassionate, the Most Merciful. You are secure by the *Aman* of Allah, Extalted He be, provided you keep off the residents of the frontiers of your territory and give no shelter to people wanted by us...” See: Sheik Mohammad al-Khodhari: *itmam al-wafa’ fi sirat al-kholafa’*, pp. 88-89.

242 See: *al-wathaiq as-siyasiya wa al-idariya fi al-andolis wa shamaliya afriqiya*, compiled by Dr. Mohammad Hamada, Muassasat ar-Risala, Beirut, 1400 AH (1980 AD), p 120.

243 See: Ahmed Zaki Safawat: *jamharat rasa’il a-arab*, al-Maktab al-Ilmya,Beirut, Vol 1, p 234..

may be coupled with an agreement concluded with him. In such a case that person shall abide by that agreement, whereby he was granted asylum. In some cases, grave consequences may arise as a result of failure to abide by it. In this respect, Muslim practices are indicative.

When Secularus was dethroned following a struggle for power with an opponent, he fled to Muslim land and concluded an agreement with Simam ad-Daulah, including the following”

“You requested (asylum) through the mediation of our brother and our army commander abi-Harb Rabar ibn Shahrakoub. Think of your own situation; your prolonged stay and your long exile away from home. Therefore, when you will have been released and given leave to go back home to your seat of power, let yourself be a supporter to our supporters, an enemy to our enemy, be at peace, when we are at peace and at war when we are at war. You shall desist from assaulting our port towns and other territories under our control and those subservient to us. Never shall you mobilize an army against them, never try to invade them, never launch a dispute or conflict against them, never do them any mischief or harm, open or covert.²⁴⁴

In receiving a refugee, consideration should be given inter alia to any international treaty concluded with his state of origin.²⁴⁵

244 Cited in Mohammad Mahir Hamada: *al-wathaiq as-siyasiya wa al-idariya al- a'ida lil-usuor al-abasiya al-mutatabi'a*, Muassat ar-Risalah, Beirut 144 AH (1980 AD).

245 For example, being excommunicated as a renegade by the Pope, with permission to the King of Portugal to fight him by the Pope, the king of Lyon headed for Seville and sought refuge on his own to al-Mansour, requesting his assistance with troops and money. Although the Caliph gave him the reception

5.1.1.1.2 Non-granting of asylum to a refugee on account of having committed grievances in his country of origin:

The main purpose of granting the right to asylum is to protect a person against persecution that may befall him should he stay over in his home country or anywhere else. Therefore, he should not have committed grievances, from which he wants, by seeking asylum to pass unpunished (i.e., enjoy impunity). In this regard, Imam al-Haytami considers as a cardinal sin the act of “sheltering offenders”, i.e. protecting them against those who seek to redeem their rights from them. This means those who commit an offence punishable according to Shariah.”This is corroborated by the hadith of Prophet Mohammad (PBUH) reported by ‘Ali ibn abi-Talib, “Accursed by Allah is he who slays other than for the sake of Allah; accursed by Allah is he who curses his parents and accursed by Allah is he who changes the benchmarks of the earth.”²⁴⁶ Since Islam does not allow injustice in any

normally given to a king, he did not acquiesce to his request, because there was a truce and a treaty of peace between al-Muwahhideen and the king of Castile. See: Dr. Abdul-Hadi at-Tazi: *at-tarkh ad-diplomasi il-maghrab min aqdam al-'osour ila al-yawm*, Fadhala Press, al-Mohammadiyah, 1407 AH (1987 AD), p.66. In the absence of an international treaty that prohibits the grant of asylum, the applicable rule is that “Originally all acts are permissible (*mubahat*), i.e. what is not expressly prohibited is permissible. Therefore, asylum may be granted in such case. Thus, abu-Shamah says,” (It is reported that) The ruler of Tripoli took refuge to Sultan Salahuddeen al-Ayyoubi (Saladin) and supported him against his own co-religionists” See: abu-Shamah: *'oyoun ar-rawdhatayn fi akhbar ad-dawlatayn an-nouriyyah wa as-salahiyyah*, Ministry of Culture, Damascus, 1992, Vol. 2, p. 131.

246 Saheeh muslim , kitab al-adhahi, bab tahreem az-zabh lighayr Allah; musnad al-imam Ahmad ; musnad 'Ali ibn Abi Talib. No.855, Vol. 2, p. 212.

form, asylum may not be granted to such person,²⁴⁷ particularly if the refugee is a chief of state, ruler, decision-maker or dangerous criminal.

In the same vein, ibn Taymiyyah says,²⁴⁸ “It so happens that many chiefs from Bedouin or urban areas are sought for asylum by someone who is in distress or who is a relative or a friend of his. Driven by Jahilian (pre-Islamic) heat and cant (hamiyyah), wrongful arrogance, and pursuit of fame among the mobs, they think it wise to help him, even if he were a wrongful oppressor, against a rightful victim, particularly if the oppressed chief was considered an enemy to them. In this case they think that it would be a sign of humiliation and incapacity to extradite an asylum-seeker to a foe. This is an absolutely Jahilian attitude; one of the largest harms to religion and this world. It was said that this was a cause that had triggered inter-fighting (civil wars) in pre-Islamic Arabia, such as al-Basos war between Bani Bakr and Taghlib, etc., as well as a cause for intervention into

247 In his interpretation of the hadith by Prophet Mohammad (PBUH):»Muslims are equal in blood; the lowest-ranking among them can give *aman* and observe zimma (*aman*) given by other Muslims and they are united against others.”. Never shall a believer killed for a disbeliever nor shall a covenantee (a person under *aman*) be killed as long as he abides by it. He who commits an offence shall be liable for it. He who commits an offence or shelters an offender shall incur the curse of Allah, the angels and all men”, Imam al-Khattabi says,” ‘He who shelters an offender shall incur the curse of Allah’ means he who shelters an offender, grants him *aman* and protection against his foe or prevents him from being subjected to retribution (*qasas*) shall incur the curse of Allah, the angels and all men”. (Imam al-Khattabi: *ma’alim as-sonan*, op. cit, Vol. 4, pp. 16-19.. For the meaning of <he whoever shelters a sinner», See: Imam ibn Hajar al-Asqalani: *fat-h al-bari bi sharh saheeh al-bukari*, op. cit, Vol. 13, pp. 239-240.

248 *Majmou fatawa ibn Taymiyyah*, compiled and arranged by Ibn Qasim an-Najdi, Government Press, Riyagh, 1381 AH, Vol. 28, pp. 326-327.

Muslim land by Turks and Mongols and their seizure of the kingdoms of Mesopotamia and Khurasan. ”

Ibn Taymiyyah adds, in confirmation of the foregoing, “It is the duty of every one to grant assistance and protection to a person seeking them, if he proves to be really oppressed. A man shall not be judged as oppressed only upon his own claim; for it so often happens that a man may complain though he may be himself the oppressor. But the truth must be verified against his adversary or other sources. Should he prove to be an oppressor, he shall be repelled from injustice by lenient means if possible; by conciliation or a fair judgment, or otherwise by force.”²⁴⁹

249 The following episode shows how much embarrassed an asylum- seeker may be in case he had committed grievances in his home country before losing power. One of the Marwans (an Umayyad) fled to Abyssinia when the Abbasids took over. The Emperor of Abyssinia accosted him,» What brought you here?»» The ruler changed us, so I sought asylum with you.» he replied. -Then the Emperor said,»You claim your prophet prohibited wine, why did you drink it?»»It is the dissolute mobs from among us that do.» -» You say he prohibited you from dressing in silk, why did you do so?» -»Only some of our followers do.»»And when you set out to hunt a sparrow, you clamped down on villages, seizing their property and damaging their plantations.» -»Only ignorant people do.»» No, by God. With your wrongdoing, you engaged into duel with God, so He stripped you of power.» See: Ibn al-Jawzi: *mawa'zih al-molouk wal-kholafa'*, verified by Dr. Fou'ad Abdul-Mon'im, Mu'assasat Shabab al-Gami'ah, 1398 AH (1978 AD), p. 60.

In this respect, Ibn Shaheen says that a king should not bring closer to him any fugitives from a peer king, nor divulge to him the man's secret to the king, but must honor and keep him away. Should the fugitive have fled from a hostile king, he must in be cautious that such a fugitive might be acting ungratefully to his master or scheming mischievous machinations in order to obtain information about the state of affairs in the country of asylum and then report to his king. The fugitive's talk may have a demoralizing effect on soldiers. If the fugitive had fled from a friendly king, abstention by the receiving king from bringing the fugitive closer to him would be a gesture of comfort for a friend. In the event a fugitive, who is sentenced to death, seeks refuge to the king of state of asylum, we have earlier

5.1.1.2 Admissibility of extraditing refugees:

According to Islamic jurisprudence a refugee may be extradited in two cases, then we will refer to the possibility of extraditing prisoners of war:²⁵⁰

5.1.1.2.1 Extradition in application of an international treaty:

If an Islamic state is engaged in an international treaty allowing the extradition of persons, it should indisputably honor its obligation, given that the fulfillment of promise is a basic rule of Islamic Shari'ah.²⁵¹

referred to the statement by the Prince of Believers "Never disrupt the enforcement of Divine prescribed penalties (*hodoud*).” In the case of a penitent sinner If the fugitive had sin and later repented, efforts should be made to intercede in his favor so that he might be returned to his master.” See: Ghars-Uddeen ibn Shaheen-Zhaheri: *kitab zobdat kashf al-mamalik wa bayan at-toroq wal-masalik*, verified by Bolos Rawees, al-Bustani's Darul-Arab, Cairo, 1988-1989. pp. 60-61. This means that ibn Shaheen sets three rules for refugees:

Need for full caution: A fugitive to an Islamic state may have been sent to for another purpose; for example information gathering. Thus, ibn Shaheen had predicted the practice used by modern intelligence services of deploying in other states persons under cover as political refugees, dissenters, absconders or defendants at large wanted for trial for crimes committed.

If a fugitive had committed an offence warranting a prescribed penalty (*had*), the king shall repatriate him, given that he is required not to disrupt the enforcement of Divine prescribed penalties (*hodoud*). (Apparently ibn Shaheen restricts this provision to relations between Islamic states that adopt the concept of *hodoud*.)

If the culprit repents and rescind the acts he had committed (for example, by abstaining from attacking the regime in his home country and cease to call for overthrowing the government), an Islamic state may intervene and request amnesty for him or repatriate him subject to assurances that he would not be punished in this case. See: Dr. Ahmed Abou El-Wafa: *kitab al-"ilam bi qawa'id al-qanoon ad-dawli wal-"ilaaqat ad-dawliyya fi shari'ah al-islam*, op.cit., vol. 14, pp. 555-556.

250 See also» Extradition Problems Affecting Refugees» in»Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme, Cairo, 2004, 39, N°. 17 (XXXI).

251 See also: Imam al-Mawardi: *al-hawi al-kabir*, op. cit, Vol. 18, pp 412, 426.

This can be inferred from an incident that took place following al-Hodaybiyya peace. When abu-Baseer came to Prophet Mohammad (PBUH), Quraysh sent two men to request his extradition. Prophet Mohammad (PBUH) said to abu-Baseer, “Abu-Baseer, we had given those people what you know (a treaty) ²⁵² and in our religion treachery is not good for us. Allah the Almighty will willingly give you and the vulnerable people with you relief and release from suffering. So set out for your folk.” “O Messenger of Allah, will you return me to the disbelievers to tempt me out of faith?” the man said. The Prophet Mohammad (PBUH) reiterated, “Abu-Baseer, set out for your folk for Allah will willingly give you and the vulnerable people with you relief and release from suffering. So abu-Baseer returned to his folk. Back home, they started waylaying every caravan carrying provisions or travelers for Quraysh. Then, afflicted by the harm they had done them, Quraysh wrote to Prophet Mohammad (PBUH) requesting to take them to al-Madinah. Later, when the Qur’anic Ayah superseding the said proviso in respect of repatriating women²⁵³, Prophet Mohammad

252 The proviso agreed upon by both parties was that»If ever any one of us, even he were your co-religionist, comes to you, you shall repatriate him.»

253 The Ayah reads as follows:»O ye who Believe! When there come to you believing women refugees, examine (and test) them: Allah knows best as to their Faith: if ye ascertain that they are Believers, then send them not back to the Unbelievers. They are not lawful (wives) for the Unbelievers, nor are the (Unbelievers) lawful (husbands) for them. But pay the Unbelievers what they have spent (on their dower). And there will be no blame on you if ye marry them. (Surat al-Mumtahanah, 10). Commenting ibn- Hisham says,»Had it been for this Divine judgment, Prophet Mohammad (PBUH) would have repatriated women as he had done with men. And had it not been for the truce and treaty of peace with Quraysh on the day of al-Hodaybiyya battle, he would have retained women and would have denied their dowery. This was the attitude towards those Muslim women

(PBUH) discontinued this practice with regard to women.

However, can we say that there is conflict between the above-mentioned principle, pointed out earlier, of the inadmissibility of extraditing refugees and the incidents taking place during al-Hodaybiyya peace, when Muslims undertook to repatriate refugees from Makkah, even if they were Muslims, while Quraysh would not repatriate incoming Muslims to Muslim land?

Although, upon prima facie examination, conflict seems to exist, it would prove, upon close scrutiny, that there is no conflict for the two following reasons:

*According to Islamic Shari'ah, fulfillment of promise is an established requirement.

*However, this should not conflict with the fundamental principle of Islam, providing for the need to ensure the safety and security of the life and property of a *musta'min*. This leads us to say that it is admissible in Islam to extradite a person to his state only after and not before a treaty in this respect has been concluded between that state and the Islamic state. In the absence of such treaty, extradition of such person will be deemed as treachery and breach of *aman*,

who came in before the treaty of peace was made.” See: Ibn Hisham *as-sirah an-nabawiyah*, op. cit, Vol. 2, pp 326-327.

Imam al-Hazimii says about the inadmissibility of repatriating women,» There is evidence that if the contract contains provisions conflicting with religion, these shall be deemed as invalid. according to the hadith of Prophet Mohammad (PBUH):» Any provision not contained in the Book of Allah shall be nul and void.» See: Imam Mohammad ibn Musa al-Hazemi: *al-I'tibar fin-nasekh wal-mansoukh min al-athhar*, op. cit, p 332.

given that his continued residence in spite of the treaty is a sign of agreement on his part to be subjected to its provisions.

In our opinion, the head of an Islamic state should set for a *musta'min* an appointed date to return to his home country or any other place of his choice, thus maintaining the *aman* granted him, in application of the principle of non-refoulement to a place where he has fears of being persecuted ²⁵⁴and in order to preclude any treachery.

The precedent of al-Hodaybiyya shows two considerations:

If an Islamic state is engaged in an international treaty, it should extradite a Muslim, provided he had entered the Islamic territory after the conclusion of the treaty.

254 Some jurists argue that extradition by a state of nationals of a foreign state to their state constitutes no violation of the conditions of *aman* or of Shari'ah, because the *aman* granted to a *musta'min*, in case extradition treaties exist, is qualified by an implicit condition providing for repatriating him to his state, whenever it so requests and he satisfies conditions for extradition. See: Dr. 'abdu'l Kareem Zaydan: *ahkam az-zimmiyeen wal- musta'amaneen fi dar il-islam*, al-Quds Bookshop, Baghdad; Mu'assasat ar-Risala, Beirut, 1402 AH (1982 AD), p. 121

In fact we believe that this can take place only if the extradition treaty was concluded before granting *aman*. In such case, extradition shall be effected under an express condition and based on prior knowledge by the *musta'min*. On the other hand, if the extradition treaty was concluded after granting *aman*, the person under protection may in no case be extradited, but he shall be offered the choice of being escorted to the place where he feels secure. In this case, it cannot be argued that there is an "implicit condition" for extradition. In our view, this is a purely visionary rather than a real hypothesis.

Imam ash-Shaukani says, "Know you that the returning of disbelievers who flee to Muslim land and want to embrace Islam clearly contradicts with the provisions of Shari'ah and the requirements of Islamic prestige. This can be done only when the ruler tends to believe that unless he does this, much greater and more dilapidating harm would be caused by disbelievers to Muslim power that is bestowed by Allah, Exalted He be. See: Imam ash-Shawkani: *as-sayl al-jarrar al-mutadaffiq 'ala hada'q al-azhar*, Supreme Council for Islamic Affairs, Cairo, 1415 AH (1994 AD), p. 537.

He who had entered prior to the conclusion of the international treaty shall not be subject to extradition owing to the absence of any conventional condition providing for it.²⁵⁵

Apart from al-Hodaybiyyah peace, which stands as a live example of an international agreement signed by an Islamic state to extradite a specific person, many others can be traced in the practices of Islamic states.²⁵⁶

255 On the day of al-Hodaybiyyah battle, two slave men came to Prophet Mohammad (PBUH) before the peace was signed. Their masters wrote to him saying, »O Mohammad, those came to you not out of love for your religion, but in flight of slavery.« Some Muslims said, »They are right, Messenger of Allah.« Angered, the Prophet retorted, » You folk of Quraysh, you won't be deterred until Allah has sent to you some people to cut your throats for this.« He refused to return both slavemen, saying, »They are the feedmen of Allah.« See: Al-Khattabi: *ma'alim as-sonan*, al-Ilmiyya Bookshop, Beirut, 1401 AH (1981 AD), Vol. 2, p. 295.

256 One example is a treaty between Muslims and Nubians, stating: «We hereby come into contract and covenant with you to furnish us with three hundred heads (of cattle) every year. You shall enter into our land on a transit rather than a resident basis and so shall we enter your country. However, should you murder a Muslim, the truce will be terminated and so will it be if you give shelter to a slave owned by Muslims. You shall repatriate fugitive Muslims and zimmi taking refuge to you. See: Ibn Abdul-Hakam: *futouh misr wal-maghrub*, verified by Abdul-Muni'im Ammir, al-Bayan Al-Arabi Committee Cairo., al-qism at-tarikhi p.254. Another example can be seen in a treaty between the Sultan and the governor of Acre providing that " Whenever any person whosoever voluntarily flees from the territory under the Sultan and his son to Acre, all objects carried thereby shall be returned and he shall be left bare. If he has no intention of converting to Christianity, he shall be returned, together with all objects carried thereby to their high portes, subject to intercession by trustworthy people after being granted *aman*. Likewise, if any one from Acre or the coastal towns parties to this truce comes in with the intention of embracing Islam and willingly does so, all objects carried thereby shall be returned and he shall be left bare. If he has no intention of converting to Islam and does not actually convert, he shall be returned, together with all objects carried thereby to the rulers = = and high officers in Acre, subject to intercession after being granted *aman*" See: Al-Qalqashandi: *sobh al-a'sha*, op. cit, Vol. 14, pp.56-57. The truce concluded between King Levon of Cise and Sultan Qalawoon provided that"

In the absence of such agreement, the matter shall be left to the discretion of the authority of the state on the territory of which the refugee is present.²⁵⁷

“Whenever any person whosoever flees from the country of the Sultan, King Levon and his vice-regents undertaketo seize and bring him to the Sultan’s Porte ... If any of King Levon’s subjects, pages or soldiers flees and adheres to his religion, the Sultan’s deputies undertake to repatriate him. But if he embraces Islam, the money he had carried with him shall be returned. See: Mohyudden ibn ‘abduz-Zhahir : *tashreef al-ayyam wal-’osour fi sirat al-malik al-mansour*, verified by Murad Kamil, Ministry of Culture and National Guidance, Cairo, 1961, p.100 See also(p. 101):»Whenever something is taken or someone from either party Killed, the offender shall be extradited for retribution.»

A further example can be seen in the truce concluded between al-Mansour Qalawoon and Rodrigon of Barcelona and his brother the ruler of Sicily» Whenever someone from the countries of the Sultan parties to this truce flees to territory under King Rodrigon and his brothers or carries merchandise to other parties and resides in those countries, Rodrigon shall reurn the fugitive and the property carried thereby to the territory under the Sultan as long as he remains a Muslim. Should he convert to Christianity, the money carried thereby, including his own, and that owed by the kingdoms of Rodrigon and his brother, shall be returned, as well as those who fled from their country to the territory under the Sultan.» See text in: Dr. Mohammad Hamada: *Al-wathaiq as-siyasiya wa al-idariya fi al-andolis wa shamaliya afriqiya*., Muassasat ar-Risala, Beirut, 1403 AH-(1983 Ad), p 490.

257 In his description of Dobays ibn Sadaqah, ruler of al-Hillah, by way of narrating the story of asylum by prince abul-Hasan, Caliph al-Mustarshid’s brother, ibn Tabatiba says,» Dobays was the master of the house, the protector, the refuge and bastion. Under him, al-Hillah was the hub of travelers, the refuge for aspirants and outcasts, the bastion for the fearing fugitive» the Caliph has asked him to proclaim allegiance to him and extradite his brother. He agreed to declare allegiance, but refused to extradire the Caliph’s brother, saying,» By Allah, I won’t surrender him to you and he will remain my = = protégé and my guest even if I was killed in his defense.» See: Ibn Tabatiba: *al-fakhri fili-al-adab as-sultaniyyah wad-dowal al-islamiyyah*, Sadir House, Beirut, p. 302. Poet al-’Adeel ibn al-Farkh wrote a poem that infuriated al-Hajjaj, who sought to seize him. But the poet fled to Roman territory, upon which al-Hajjaj wrote to Caesar, warning,» By Allah, unless you send him back to me, I will dispatch to you an army that starts at your end and ends at me !” The man was summoned and taken back to al-Hajjaj (But al-Hajjaj later released him after the poet wrote him a poem of eulogy.) See: Ar-Raqqam al-Basri: *kitab al-’afw wal-I’tizar*, Imam

The foregoing does not conflict with Islamic Shari'ah.

5.1.1.2.2 Extradition of refugee- criminal: The extent to which the extradition of criminals is admissible in Islam:

There is no doubt that it is ideal to have an offender tried in the country where he committed the crime, since it is easy to provide evidence and proof, to hear witnesses, to inspect the scene of crime and to examine traces and circumstances. This gives preference to the extradition of a criminal to the country where the crime was committed. However, most countries of the world prefer not to extradite their own nationals to other states and to have them tried under their own laws. Where does Islamic Shari'ah stand from this issue?

Generally, there are two trends in Islamic jurisprudence in respect of a Muslim who commits a crime in a non-Muslim land then flees to a Muslim land. :

*First: The *ratione personae* trend maintains that punishment may be inflicted in this case, since a Muslim is required to abide by the provisions of Islam wherever he is. This is the opinion of the majority of jurists.

*Second: The territorial (*ratione loci*) trend maintains that punishment for a crime is contingent upon the establishment of proof of Islamic jurisdiction at the time of perpetrating the act. Since such

Mohammad ibn Saud Islamic University, al-Madinah, 1401 AH (1981 AD), pp. 353- 356.

See also the episode of asylum by ibn al-Ash'ath to Kabul, Afghanistan, also during the reign of al-Hajjaj, where he was granted asylum by the Shah of Kabul, Ibid, p. 368.

jurisdiction is non-existent in non-Muslim land, a Muslim shall not be punished for crimes committed there. This trend is adopted by Hanfite jurisprudence.

However, under this hypothesis, is it admissible to extradite a Muslim or a zimmi to a non-Muslim state to be tried for a crime committed there, even by way of application of an international treaty? ²⁵⁸

However, Shaykh Mohammad abu-Zahrah maintains that this is inadmissible due to the following reasons:

-There is consensus among Muslim jurists that it is inadmissible for a Muslim to be tried by a non-Muslim judge.

258 The former Mufti of the Arab Republic of Egypt supported the admissibility of extraditing Osama bin Laden subject to the following conditions: Prof. Dr. Nasr Fareed Wasel argues, "The war against Afghanistan now targets innocent and vulnerable people and claims hundreds of lives. Therefore, there is no objection, from a Shari'ah perspective, under these circumstances, for Osama bin Laden, whom the United States of America considers as the prime defendant accused of the terrorist acts perpetrated in New York and Washington, to give himself up for trial in order to preserve world peace and the safety of the Afghani people. As an alternative, the Taliban regime that give him shelter can put him to trial by an Islamic international or a neutral body under international supervision to ensure that he will be given fair trial, particularly as it is the Afghani vulnerable and peaceful civilians that fall victim to oppression and aggression. So, if the cessation of war against Afghanistan and the restoration of international peace require the extradition of bin Laden, he must be surrendered to an international body where justice can be done and fair trial, as enshrined by Heavenly laws and universally acknowledged international legitimacy, can be ensured. What matters is that fair trial must be ensured and that bin Laden must have chance to defend himself and submit evidence to rebut accusations against him. Should it be necessary or should it prove that truth cannot be established or justice done, unless trial is made before a Muslim judge, in this case bin Laden must be tried before an Islamic court..." See: Dr. Nasr Fareed Wasil: *mufaj'ah yufajjirah mufti al-gomhouriy: tasleem bin laden li-amrica wajib bi-shrout*, article, Sawt al-Azhar Magaize, Sha'ban 23, 1422 AH (November 9, 2001 AD) p3.

-There is consensus among Muslim jurists that it is inadmissible for a Muslim to be tried under a legal system that is not derived from the Holy Qur'an and the Sunnah²⁵⁹

5.1.1.3 How far it is admissible to extradite a refugee prisoner of war:

5.1.1.3.1 In Islamic Shari'ah:

As stated earlier, the right to territorial asylum may be granted to prisoners of war who are nationals of non-Muslim states, if they embrace Islam or became zimmi. However, is it admissible to extradite a Muslim prisoner of war who flees from the enemy and thus saves himself?

It can be said that Muslim jurists are almost unanimous on the

259 See: Shaykh Mohammad Abu Zahra: *al-jarima*, Dar al-Fikr al-Arabi, Cairo, pp 382, 383. For a similar meaning see Dr. Mahmoud Ibrahim ad-Deek; *al-mu'ahadat fi ash-sharia al-islamiya wa al-qanoun ad-dawali al-am*, al-Bayan Commercial Printing Press, Dubai, pp. 352-354.

Alegiwt maintains that Islam was the first to lay down the principle of criminal extradition, based on the Qur'anic Ayah,».

If anyone 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. '» (Surat al-Ma'idah, 32)

This means that justice is indivisible and criminals must be punished. He adds, «L'islam a posé, le premier, le principe de l'extradition, en indiquant de la façon la plus rationnelle et la plus concise, la base sur laquelle elle est fondée. En effet, il est dit dans le Koran (S. V. v. 32): «Celui qui aura tué un homme sera regardé meurtrier du genre humain», N'est – ce pas la proclamation de l'indivisibilité de la justice et de la nécessité de punir les coupables, nonobstant les frontières politiques et les théories basées sur la notion de la souveraineté des Etats et la territorialité, des lois pénales». (A. Rechid: L'Islam et le droit des gens, RCADI, 1937, II, p. 434).

According to Hamidullah, «If subjects of a Muslim State commit highway robbery in a foreign country even against Muslim subjects, their case may not be heard in a Muslim court though they may be extradited if there is a treaty to that effect» (Hamidullah: Muslim conduct of State, Sh. M. Ashraf, Lahore, 1945, p. 178).

inadmissibility of returning a prisoner of war in such case, even if there was an international treaty that provides for return or extradition, because, if any, such treaty is associated by an invalid condition, which is inadmissible.²⁶⁰

According to ibn Hazm, “ If a Muslim prisoner of war held by disbelievers was given a vow to be released and was actually released, he shall not return to them or give them anything , nor shall the Imam force him to do so”²⁶¹

Moreover, a non-Muslim prisoner of war who falls into the hands of Muslims shall not be extradited and shall be granted aman and asylum in some cases, including if he requests to hear the Words of Allah as Allah the Almighty says in the Holy Qur’an,” ,” If one amongst the Pagans ask thee for asylum, grant it to him, so that he may hear the word of Allah; and then escort him to where he can be secure,” or a fortiori, if he embraces Islam, the grant of asylum in such case shall be an inescapable obligation on the Islamic state.

260 It is reported that <Umar ibn Abdul-Azeez said,» If a Muslim prisoner of war runs away for his life, he shall be ransomed by Muslims and shall not be returned to non-Muslims, as Allah the Almighty says in the Holy Qoran: “ *And if they come to you as captives, ye ransom them, though it was not lawful for you to banish them.*” (Surat al-Baqarah, 85).

See: Imam Hameed ibn Zanjawaih: *Kitrab al-amwal*, King Faisal Islamic Research and Studies Center, Riyadh, 1406 Ah (1986 AD), Vol. 1, p. 323.

261 Ibn Hazm: *al-muhali*, Vol. 7, pp. 308-309. See also: ash-Shafi’ie: *al-umm*, Dar ash-Shab, Cairo, Vol. 5, p. 194, Imam an-Nawawi: *Rawdhat at-talibin*, Vol. 10, p. 283.

5.1.1.3.2 In international law:

It is clear from the foregoing that Islam had forerun current international practice in this respect. For example, the 1956 U.S. Army Field Manual provides that the detaining power may, at its discretion, grant asylum to prisoners of war.²⁶²

5.1.2 In international law:

Article 1- F of the 1951 Convention (See also: Article 1-5 of the 1969 Organization of African Unity Convention Governing Specific Aspect of Refugee Problems in Africa, Article 2 of the 1994 Arab Convention) refers to persons ineligible to international protection²⁶³ and are consequently excluded from its scope of applicability. These are persons “with respect to whom there are serious reasons for considering that:

262 The said manual states,»A detaining Power may, in its discretion, lawfully grant asylum to prisoners of war who do not desire to be repatriated» See: Whiteman: Digest of IL, Vol. 10, p. 260. On July 27, 1952, the US Secretary of State made a statement regarding the grant = = of asylum to Korean and Chinese prisoners of war:

“The second principle of great importance that was established was the principle of political asylum, which never before has been applied to prisoners of war. Many of the North Korean and Chinese communist prisoners who surrendered do not want to be returned to captivity but to stay in a land of freedom.” He added that the communists insisted on their request for the forcible return of the prisoners of war. As the US vehemently refused, this request, they gave it up». See Whiteman: Digest of IL, Vol. 10, p. 262–263. The foregoing shows that Muslims addressed this issue several centuries ago.

263 In addition, two categories of persons are excluded:»a. *persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance (Art. 1-D) and b. persons who are recognized by the competent authorities of the country in which they have taken residence as having the rights and obligations which are attached to the possession of the nationality of that country” (Art. 1- E).*

- (a) He has committed a crime against peace, a war crime, or a crime against humanity²⁶⁴, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) He has been guilty of acts contrary to the purposes and principles of the United Nations “.”²⁶⁵

It is clear that the rationale for the above-mentioned provisions is to prevent persons responsible for human rights violations from acquiring a refugee status; thus enjoying impunity, i.e., escaping prosecution and punishment.²⁶⁶

264 See: Ahmed Abou El-Wafa: Criminal International Law, Dar an-Nahdha al-Arabiyya, Cairo, 2007, pp. 167 – 189.

See also Recommendation No. 6 by the Council of Europe Ministerial Committee to Member -States on the interpretation and application of that text in” Collection of International Instruments and Legal Texts Concerning Refugees and Others of Concern to UNHCR, op. cit., Vol. 4, pp. 1419-1420.”

265 Concerning the purposes and principles of the United Nations, See: Dr. Ahmed abou-El- Wafa: *Al-waseet fi qanounal-monzhamat ad-dawalyya*, an-Nahdha al-Arabiya House, Cairo, 5th ed, 1427 AH (2007 AD), p 641.

266 This is stressed in several UN instruments:

Article 14 of the Universal Declaration on Human Rights provides that» *the right to seek and to enjoy in other countries asylum from persecution may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.*”

The Declaration on Territorial Asylum (adopted by the General Assembly under Resolution No. 2312 of 1967) states that,” *the right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity...*” (Art. 1-2)

Resolution No. 3074 issued in 1973 by the General Assembly on principles of international cooperation in the tracing, extradition and punishment of perpetrators of crimes against peace,war crimes or crimes against humanity stipulates that”

It is also noteworthy that, apart from the persons mentioned above, who are not eligible to a refugee status, there are persons who are not in need of the protection of the United Nations High Commissioner for Refugees, because they are already in receipt of protection or assistance from organs or agencies of the United Nations (e.g., Palestinians under the mandate of the United Nations Relief and Works Agency for Palestine Refugees In the Near East (UNRWA). This is clear from Article 1-D of the 1951 Convention providing that “This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.”

“When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.”

This means that the application of this provision is governed by two rules:

The person involved will not enjoy the benefits of this Convention, if he is already receiving protection or assistance from organs or

States may not grant asylum for any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity.” (Art.7).

Article 15 of the Declaration on the Protection of All Persons against Compulsory Disappearance (1992) provides that “in taking a decision to grant or deny a person asylum, State authorities concerned shall take into account whether there are reasons to believe that the person involved has participated in high-risk acts of compulsory disappearance.”

agencies of the United Nations other than the United Nations High Commissioner for Refugees.

The person involved will enjoy the benefits of this Convention, on two conditions:

If such protection or assistance has ceased for any reason; and

If the position of such persons has not been definitively settled.

On the other hand, there is another category of persons who are not considered to be in need of international protection. This applies to persons who might otherwise qualify for refugee status and who have been received in a country where they have been granted most of the rights normally enjoyed by nationals, but not granted formal citizenship (They are frequently referred to as “national refugees”.) The country that has received them is frequently one, whose population is of the same ethnic origin as the refugees.²⁶⁷

267 Article 1-E of the 1951 Convention provides that “*This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.*” See this rule in : UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, UNHCR, Geneva, p. 28..

5.2 Impediments to the continuation (perpetuation) of asylum: Temporary protection:

5.2.1 In Islamic Shari'ah:

Temporary protection system corresponds to the aman-granting system in Islam, under which a refugee is recognized as a *musta'min* (a person under temporary protection) for a period of up to one year.²⁶⁸ If he wishes to stay longer, he will be recognized as a *zimmi* (a non-Muslim residing permanently in Muslim land). The aman system is predicated on the words of Allah the Almighty:” If one amongst the

268 It is said that»for jurists, a»*musta'min*” is a person who enters into Muslim land under a temporary covenant of *aman* granted by ruler or a Muslim individual. The difference between a *zimmi* and a *musta'man* is that *aman* is permanent or everlasting for the former and temporary for the latter.

The rule in Islam is that a non-Muslim who was not recognized as a *zimmi* shall not be granted permanent residence in Muslim land but will be granted short-term residence under temporary *aman*. There is consensus among the majority of Hanafite, Shafi'ite and Hanbalite jurists that residence by a *musta'min* in Muslim land shall be for less than one year. If he completes one full year or more, he will be required to pay *jizya* and is then recognized as a *zimmi*. The length of residence by a non-Muslim is an evidence of his acceptance of permanent residence as well as the conditions imposed on *zimmis*.

Most of the Hanafite jurists maintain that unless a non-Muslim is given a specific period, he shall be recognized as a *zimmi* on the strength of residence for one year. If a *musta'min* stays long and even overstays for one year after being ordered to leave, he will be required to pay *jizya*. The one-year period shall be counted from the date of warning by ruler to leave. If he overstays for years without being ordered by ruler to leave, he may return to non-Muslim land and accordingly will not be recognized as *zimmi*. See: *al-mawsou'ah al-islamiyya al-'aammah*, Supreme Council for Islamic Affairs, Cairo, p. 1288.

It is established that a *musta'min* is a person who seeks *aman* or enters into other land, be he a Muslim or a non-Muslim. See: Mohammad 'Ala'eddin al-Hasskafi: *sharh ad-durr al-mokhtar*, Vol. 2, al-Wa'izh Bookshop, Egypt, p. 98.

A *musta'min* is an alien to Muslim land. See: Dr. Abdul-Kareem Zaydan: *ahkam az-zimmiyeen wal-musta'mineen fi dar al-islam*, op. cit, pp. 66-67.

Pagans ask thee for asylum, grant it to him, so that he may hear the word of Allah; and then escort him to where he can be secure..”Surat At-Taubah, 6) and the hadith by Prophet Mohammad (PBUH), “Muslims are equal in blood; the lowest-ranking among them can give aman and observe zimma (aman) given by other Muslims and they are united against others.”

This means that an individual: man , woman or even a slave can grant aman.²⁶⁹

Once aman is granted, it shall be honored, given that fulfillment of covenant is an obligation in Islam. As a result, a *musta'min* shall be inviolable for himself, his property and kin, if covered by the aman.²⁷⁰

In this connection, Imam an-Nawawi says, “Once aman is granted to a *musta'min*, he shall not be killed nor shall his property be looted. What if he is killed? Imam says that a *musta'min* shall be as secured as a *zimmi*. Aman is a duty on Muslims and may not be disavowed by

269 I. Shehata, commenting on the grant of *aman* by individuals says, «Allowing foreigners to enter the country and accrediting them the protection of Muslim State simply on the basis of an invitation of a Muslim citizen of this State, was a unique system and one that has no equivalent in present international law». (I. Shehata: Islamic law and the world community, op. cit, p.108).

270 The rule in Islamic jurisprudence is that it is unlawful to enslave a *musta'min*, even when he breaches his covenant. If he commits an act that is deemed to as a breach of *aman*, he shall be escorted to a place where he feels safe, after having satisfied his obligations. See: *mausou'at gamal abdun-nasser fil-fiqh al-islami*, Supreme Council for Islamic Affairs, Cairo, 1391AH, pp. 24-25. It is also argued that aliens (non-citizens) in non-Muslim land, including tourists, merchants or refugees are deemed as *musta'mins* that enjoy protection in Muslim land. See: the intervention by M. Abdel Rahim: *Asylum and sanctuary in Islam*, Séminaire de Khartoum sur les réfugiés, Khartoum, 11-14 September 1982, Khartoum University Press, Khartoum, 1984, p. 5.

the ruler. Should he feel treachery on the part of a *musta'min*, he may repudiate it, for in this case, it is allowed to repudiate a truce. So is, a fortiori, the *aman* granted by an individual, but it may be repudiated by a non-Muslim, whenever he wills. "Aman does not extend to a *musta'min*'s relatives or property left behind in non-Muslim land. However, if his accompanying relatives or property are targeted, the specific conditions of *aman* shall be applied. Otherwise, *aman* shall not apply, in view of the specific nature of the text."²⁷¹

This means that a *musta'min* is secure and inviolable in Muslim land and may not be subjected to assault or insult.

In this respect, Imam ibn Yahya al-Morthadha says, "If, before a prohibition had been imposed by the ruler, a legally capable Muslim grants *aman*, even by a signal, to a *musta'min*, who enjoyed safety for less than one year, such *aman* shall not be violated. If a *musta'min* violates *aman*, he shall be escorted to where he feels safe, but shall not be assaulted, for this would be considered as treachery."²⁷²

271 Imam an-Nawawi: *Rawdhat at-talibin*, ibid, Vol. 10, p. 281.

272 Imam Ahmad ibn Yahya al-Morthadha: *kitab al-azhaar fi fiqh al-a'immah al-athaar*, Mussasat Ghamdhan, San'a', pp. 320-321. Imam an-Nawawi says, "The purpose of leading a disbeliever to a place where he feels safe is to protect him against Muslims and *musta'mins* and to send him to non-Muslim land. According to ibn Kojj, he shall be taken only to the borders of non-Muslim land not necessarily his home town or village, unless, en route, he has transited through a Muslim territory that lies in between the boundary of non-Muslim land and his home town. According to another opinion, if the person involved has two places where he can feel safe, he shall be taken to his domicile there, = even in two countries. The choice shall be at the discretion of ruler. See: an-Nawawi: *Rawdhat at-talibin*, ibid, Vol. 10, pp. 338-339.

5.2.2 *In international law:*

Temporary protection system²⁷³ refers to the protection granted by states, particularly when faced with abrupt large-scale mass influx, thus providing safe asylum to persons. As such it is a short-term instant response, when large numbers of population flock in, fleeing armed conflict, mass human rights violations and other forms of persecution. Temporary protection should not last for long periods of time, even in case basic conditions show no improvement, because people should not be left to live indefinitely under a minimum level of protection. States should either apply their normal asylum procedures to the beneficiaries or grant them the right to legal residence.²⁷⁴

273 Temporary protection is defined as» *an arrangement or mechanism introduced by states to provide protection of a temporary character to persons incoming en masse from generalized conflict or conflict situations, before the refugee status determination process has been conducted on an individual basis.*” See: Handbook on International Law for Refugees, No. 2, 2001, op.cit., p.133.

274 Ibid, p. 53.

Recommendation No. 9 (2001) by the Council of Europe Ministerial Committee provide that” *persons granted temporary protection shall be provided with at least adequate means of livelihood, including housing, appropriate health care, education for children and employment under national legislation.*” See also: Directive issued in 2001 by European communities in :

“Collection of International Instruments and Legal Texts concerning Refugees and Others of Concern to UNHCR”, op. cit., Vol. 4, pp. 1410, 1620 – 1632.

It is worthy of note that Recommendation No. 18 (2001) by the same Committee adopts”*the concept of”subsidiary protection” to be applied to persons not satisfying criteria required for refugee status under the 1951 Convention and 1967 Protocol, but, being at risk of persecution or forced to leave their home country, they are in need of international protection*”. Ibid, p. 1412.

The Executive Committee of the UNHCR Programme in its Conclusion No. 19 (XXXI) stressed”*the exceptional character of temporary refuge and the essential need for persons to whom temporary refuge has been granted to enjoy basic humanitarian standards of treatment.*”

See:” Conclusions on the International Protection of Refugees adopted by the

5.3 In fine Impediments to asylum: Permanent solutions and reasons for cessation of asylum:

5.3.1 Permanent (durable) solutions:

It is understood that, in relation to the problem of refugees, as in all other matters, prevention is better than cure. Therefore, the final purpose of international protection is to reach a permanent solution to the problem of refugees.

There are three types of permanent solutions to refugee status.²⁷⁵

Voluntary repatriation to his country of origin; a decision that is to be taken by a refugee on his own choice, based on information available to him on current conditions in his country of origin;

Local integration in country of asylum; and

Resettlement in a country other than his country of origin and country of first asylum.

Additionally, there are other reasons that may lead to the cessation of asylum in Islam.

Executive Committee of the UNHCR Programme., op.cit. .p. 41.

In its Conclusion No. 22 (XXXII) the Committee set forth the minimum rights to be enjoyed by refugees who are temporarily admitted. Ibid, pp. 50-51.

275 See also: Article 1-4 of the Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969 and Article 4 of the Arab Convention, 1994.

5.3.1.1 Voluntary repatriation:

5.3.1.1.1 In Islamic Shari'ah:

The Cairo Declaration on Human Rights in Islam, 1990 provides that every person “if subjected to persecution, has the right to seek asylum in another country. The state of asylum shall ensure his protection until he has reached a place where he is safe, unless asylum is motivated by an act considered as a crime according to Shari’ah.” (Article 12).

There are numerous examples of voluntary repatriation of refugees:

Ibn Hisham relates that Muslim refugees in Abyssinia, having heard that Makkans embraced Islam, decided to return to Makkah. But when they drew closer, they found out the news about the conversion of Mekkans were not true, none of them entered the city except under a covenant of protection (jiwar) or under cover.²⁷⁶

Prophet Mohammad (PBUH) dispatched ‘Amr ibn Umayyah ad-Dhimari to Negus requesting him to send back the Muslims who had taken refuge with him. The sixteen men, including Ja’far ibn abi-Talib, were carried aboard two boats and brought to the Prophet at Kaybar following al Hodaibiyah truce.²⁷⁷

276 Ibn Hisham: *As-sira an-nabawiya, op. cit*, Vol.1, p.. 364

277 Ibn Ishaq, Abdullah Mohammad: *as-siyar*, 2, 359. See also al-Khoza’ie, ‘Ali ibn Mas’ood, produced by ad-Dalalat as-Samiyyah, Beirut, Dar al-Gharb al-Islami House, 2nd ed., 1416 AH (1999 AD), verified by Ihsan ‘Abbas, p. 210.

In a similar context, Howaytib ibn abud-’Izzi relates, “When Prophet Mohammad (PBUH) entered into Makkah in the Year of the Conquest, I was so scared that I dispersed my children to different places where they felt safe. My heels took me to the house of ‘Awf, where I found myself face to face with abi-Zarr al-Ghaffari (May Allah be pleased with him), who was a friend of mine. As I caught sight of him, I took to my heels, but he called out at me, asking what the matter with me was. I told him I was scared, upon which he said, “You have no fear; you’re safe under the Security of Allah, Exalted He be.” I came back and shook hands with him and he told me to go home” Can I?, “I inquired. “I’m afraid no sooner I’d reach home alive than I’d be found and killed, or may be assaulted there and killed! My children are dispersed in several places,” I added. He told me to collect my children and he would escort me to my house. On our way, he kept calling out that Howaytib was safe and should not be attacked. Then abi-Zarr went to Prophet Mohammad (PBUH) and told him about the incident, upon which he said, “Aren’t all, except those ordered to be killed, safe now?”²⁷⁸ Howaytib said, “I felt safe and took my children back home.”

When Hatim at-Ta’ie’s daughter was captured in battle, she petitioned Prophet Mohammad (PBUH) to release her and let her return home. “Do not be in a hurry to go home until some trusted kin of yours come and take you home then tell me,” said the Prophet. When a group of her folk came, she went to Prophet Mohammad

278 Al-Kandihlwi: *hayat as-sahaba, op. cit.*, Vol. 1, pp. 136-137.

(PBUH) and informed him. “The Messenger of Allah offered me clothing, transport and money, so they set out with them to the Levant (as-Sham),” she related.²⁷⁹

5.3.1.1.2 In international law:

Voluntary repatriation, whenever possible, is the ideal solution for refugee problems, because it means the return by a refugee to his country of origin in safety and dignity. It also helps him reintegrate quickly with others. The principle of voluntary repatriation (principle of voluntariness) implies that the concerned person expresses his/her own choice to return home freely.²⁸⁰

5.3.1.2 Local integration:

279 At-Tabari: *tareekh ar-rusul wal-molouk*, Dar al-Ma’arif, Cairo, Vol. 3, pp. 309-310. Ibn Hisham: *As-sira an-nabawiya*, op. cit, Vol. 2, pp. 579- 581

280 Voluntary repatriation means respect for a refugee’s wish, i.e.» *No refugee may be repatriated against his own will.*” Article 5-1 of the Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969. According to Principles of Housing and Property Restitution to Refugees and Displaced Persons (2005), Paragraph 10, “*All refugees and displaced persons have the right to return voluntarily to their former homes, lands or places of habitual residence, in safety and dignity. Voluntary return in safety and dignity must be based on a free, informed, individual choice.*

States shall allow refugees and displaced persons who wish to return voluntarily to their former homes, lands or places of habitual residence to do so.

Refugees and displaced persons shall not be forced, or otherwise coerced, either directly or indirectly, to return to their former homes, lands or places of habitual residence.

States should, when necessary, request from other States or international organizations the financial and/or technical assistance required to facilitate the effective voluntary return, in safety and dignity, of refugees and displaced persons”.

Collection of International Instruments and Legal Texts concerning Refugees and Others of Concern to UNHCR, op. cit., Vol. 1, p. 568.

5.3.1.2.1 In Islamic Shari'ah:

This question will be discussed from two perspectives:

a. Local integration of a non-Muslim in Muslim land (covenant of *zimmi*):

We believe that acquisition by a refugee of a “*zimmi* status” in Islam is equivalent to “local integration” in contemporary international law,²⁸¹. A refugee under a *zimma* covenant, shall be granted nationality of the Islamic state, and shall have the same rights and obligations as Muslims. Thus, he is considered to be fully integrated into Muslim land and almost equally treated as Muslims. To make this clearer, we stress that the engagement in a *zimma* covenant immediately results in the following:

Inviolability of a *zimmi*'s life;

Inviolability of a *zimmi*'s property; this being a consequential effect of the above mentioned right, since inviolability of property is contingent on that of life. In this respect, ‘Ali ibn abi-Talib (May Allah be pleased with him) reportedly said,” “ They accepted *zimma* covenant so that their property might be as (safe as) ours and their lives as (safe as) ours. “ Therefore, it is argued that a *zimma* covenant

281 There is a trend in jurisprudence (*fiqh*) that maintains the *zimma* covenant is in a way an asylum granted to a non-Muslim. Therefore there is an opinion that hold that the protection granted under a *zimma* covenant or a temporary covenant of protection (*aman*) makes Muslim land for the alien who admitted under either a” land of asylum”.

- Gh. Arnaout: Asylum in the Arab-Islamic tradition, UNHCR, Geneva, 1987, p. 23.

- L. Gardet: La cité musulmane, vie sociale et politique, Librairie philosophique, Vrin, Paris, 1954, p. 78.

for Muslims provides for “the obligation to keep our hands off them and ensure inviolability of their lives and property.”²⁸²

May a zimmi acquire the nationality of an Islamic state?

The rule is that Islamic nationality may not be imposed on a non-Muslim, in application of the Words of Allah: “*Let there be no compulsion in religion: truth stands out Clear from error.*” (*Surat al-Baqarah, 256*).

A non-Muslim acquires nationality either by conversion to Islam or by an explicit or implicit zimma covenant (for example by residence in Muslim land). As regards zimma covenant, some argue that it does not impart Islamic nationality on zimmis, since the latter do not enjoy the same rights (such as political rights) nor the same obligation as Muslims (for example, while zimmis have to pay jizia, Muslims have to pay zakat (prescribed tax for Muslims)).²⁸³ Others described this opinion as feeble, because Islamic Shari’ah adopts, with some exceptions, the rule of equal rights and obligations for both Muslims and non-Muslims.

Moreover, some other jurists adopted an opposite opinion, arguing that since zimmis pay jizia, it is established that they will have the same rights and obligations as Muslims. According to ibn ‘Abideen, “If they accept to pay jizia, they shall have the same rights and obligations as

282 al-Ghazali: *Al-wajiz fi fiqh mazhab Imam ash-shafa’i*, Vol. 2 p. 21; Ibn Jowzi: *Qawanin al-ahkam ash-shariya*, Aalam al-Fikr, Cairo, 1415-1986, p. 151.

283 Dr. Mohammad al-Lafi: *nazarat fi ahkam al-harb wa as-silm: dirasa muqaran*, Dar Iqra, Tripoli- Libya, p. 342.

Muslims, including the right to being equitably treated (*insaf*) and the right to seek justice (*intisaf*)²⁸⁴. Proponents of this tendency were at variance on the grounds on which a *zimmi* acquires the nationality of an Islamic state. Some argued that such acquisition is predicated on his compliance with the provisions of Islam,²⁸⁵ while others attributed it to unspecified-term residence in Muslim land.²⁸⁶ A third opinion attributed it to *zimma* covenant for those who were not covered by protection under an express covenant, on account of the fact that, as *Sarkhasi* says, “by entering into a *zimma* covenant, a non-Muslim shall be deemed as a resident of Muslim land”. However, in the absence of an express covenant, the ground of Islamic nationality for a *zimmi* shall be the will of the Islamic state. This happens in cases where a *zimmi* acquires the Islamic nationality on grounds of presumptions indicating his acceptance, subordination to a third party or as a result of conquest of territory. In such cases, an Islamic state grants *zimma* (nationality) on its own will and discretion.²⁸⁷

Indeed, we believe that *zimmis* may enjoy the nationality of an Islamic state rather Islamic nationality, because nationality in Islam

284 Ibn Abidin: *rad al-muhtar ala ad-dur al-mukhtar*, *op. cit*, Vol.3, p. 307.

285 <Abdul-Qadir <Oadah: *At-tashri' aj-jina'i al-islami*, Judges Club, Cairo, 1984, Vol. 1, p. 307; Dr Mohammad 'Atif al-Banna: *al-waseet fin-nuzhum as-siyasiya*, al-Fikr al-Arabi House, Cairo, 1414-1994,p. 30.

286 Dr. Ahmad Musllam: *al-qanoun ad-dawali al-khas*, Vol.2, Cairo, 1956,p. 326.

287 Dr.> Abdul- Ghani <Abdul- Hameed: *a'thar al-istikhlaf ad-dawali fi al-qanoun ad-dawali al-am wa ash-Shari'ah al-islamiya*, a Ph.D. thesis, Faculty of Shari'ah and Law, al-Azhar University, Cairo, 1400 AH (1980 AD), p. 357.

is based on the presence of a “personal bond”, i.e the adoption of Islamic religion rather than on a “physical bond”, i.e. presence on a specific territory. A Muslim enjoys Islamic nationality, wherever he resides, in Muslim or non-Muslim land. However, non-Muslims, as nationals of an Islamic state are governed by the Shari’ah rule of “equal rights and obligations for both Muslims and non-Muslims “, together with the consequential rights such as the right to obtain a passport, unimpeded access to and residence in Islamic state territory and access to all rights save for those excluded by rules and basic principles of Islamic Shari’ah.

This means that they enjoy the nationality of an Islamic state rather than an Islamic nationality.²⁸⁸ In other words, this is a “nationality of state” rather than a” nationality of religion”.

Islamic Shari’ah lays down a constitution for treating zimmi, which is summed up in a letter by Imam abu-Yusuf to Caliph Haroun ar-Rasheed:

“ Prince of Believers, may Allah support you, you might have to show lenience to zimmi who enjoy the protection (zimma) of your Prophet and cousin Mohammad (PBUH) and to see that they are not oppressed, injured, overtasked beyond their capacity or stripped of any of their property save for a right owed by them. Prophet Mohammad (PBUH) was reported as having said,” He who oppresses

288 Another opinion says:»It is argued that zimmi are associated with the Islamic state rather than nation (ummah). Islam, as a belief, considers all Muslims as brethren in religion, but, as a nationality, it holds both Muslims and zimmi as compatriots (fellow-citizens). See: Dr. Mohammad Sallam Madkour: ma’alim ad-dawlah al-islamiyya, al-falah Bookshop, Kuwait, 1403 AH (1983 AD), pp. 106-107.

or over tasks a zimmi, will have me as his opponent (on the Day of Judgment)”. On his death bed, Caliph ‘Umar ibn al-Khattab, enjoined his successors, inter alia, “ to take care of zimmis under the protection of Prophet Mohammad (PBUH) , to honor the covenant of aman granted to them, to fight in defense of them and not to over task them.”²⁸⁹

Islam honors and enjoins good treatment of zimmis , in application of the words of Allah the Almighty:” Allah forbids you not, with regard to those who Fight you not for (your) Faith nor drive you out of your homes, from dealing kindly and justly with them: for Allah loveth those who are just.” (Surat al-Mumtahanah, 8). Breach of the obligation to give them just treatment is forbidden on the strength of the Prophets’ hadith: “ He whoever talks (harshly) to, detracts from, over tasks or takes out something from a zimmi against his will, will have me as his adversary on the Day of Judgment.”²⁹⁰

In another hadith, he says, “If someone grants aman to a man and then kills him, I shall disown the killer, even if the victim is a disbeliever.” Ibn Hazm argues, “If a zimmi is attacked by enemy in our land, (Muslims) should fight them to death. It is a duty to keep safe zimmis under the protection of Allah and His Messenger Prophet (PBUH), because surrendering a zimmi is a breach of covenant.”²⁹¹

The general rule in respect of zimmis is “they have what we

289 Abu-Yusof: al-kharaj, op. cit, p. 125

290 Abu-Dawood: as-sunan, kitab al-kharaj wal-imarahwal-fay’, bab taqsheer al-az-zimmah iza ikhtalafou bit-titajarat. No. 3052, Vol. 3, p. 288.

291 Ibn al-Azraq al-Andalusi: bada’i as-solk fi taba’i al-mulk, al- Arabiya Book House, Tunisia – Libya, 1980, verified by Dr Mohammad bin Aabdul-Kareem, Vol.2, p. 688.

have, and owe what we owe”, i. e., the rule is that of “equal rights and obligations for both Muslims and non-Muslims”, since they accepted the zimma covenant so that “their property might be as (safe as) ours and their blood (as inviolable) as ours “²⁹² or they accepted the zimma covenant so that their property and rights might be as safe as ours “²⁹³.

However, there are some differences between zimmi and Muslims, attributed to difference in religion; a zimmi pays jizya, while a Muslim pays zakat; a Muslim is obligated to fight in defense of Islamic territory, while a zimmi is under no such obligation. A zimmi is barred from certain positions such as those of caliphate or army command, which are exclusively reserved for Muslims.

Many non-Muslim scholars have given credit to the zimma system. B.F. Gohson maintains that within the Islamic realm, co-existence was possible.²⁹⁴ L. Massignon says that Islam had forerun Christianity by recognizing the full human personality for zimmi, on an equal footing.²⁹⁵

292 Al-Kasani: bada'i as-sana'i, op. cit., Vol. 7, p. 111.

293 Sharh as-siyar al-kabeer by ash-Shibani, Vol. 3, Hyderabad ed., op. cit., p. 250.

294 In this connection, B. Gohnson, legal advisor at the Swedish Ministry of Foreign Affairs says, »Co-existence was possible: One could here, e.g. mention the Islamic principles regulating the positions of the zimmi - believers in another faith - within the Islamic realm. Other faiths were accepted within Islam. Something that has been forgotten in world politics for quite a while». (B. F. Gohnson: Changes in the norms guiding the international legal system, R. Egypt, DI, 1980, p. 7).

295 Massignon says, » « Et, pour les deux catégories d'exclus, les barbares étrangers (les dhimmis) et les barbares esclaves, l'Islam, quoi qu'on en pense ordinairement en Occident, a précédé la chrétienté (qui lui était antérieure) dans un effort juridique destiné à leur restituer la personnalité humaine.

M. Boisard maintains that the protection of non-Muslims in Muslim land proved to be an original legal channel at a time when the West was getting out of the Middle Ages to realize the necessity of setting rules for governing relation with foreigners.²⁹⁶

Another opinion holds that the treatment of zimmi sometimes implied that they enjoyed completely equal rights as Muslims²⁹⁷

C'est que l'islam ne séparant pas le spirituel du temporel, est tenu de se faire une philosophie originale des «fondements du droit» (usul al - fiqh), du Droit des gens, dont il n'existe pas d'analogue dans le droit canon chrétien...

Dès l'époque du prophète, Muhammad, on avait tendu à accorder aux Dhimmiyûn la pleine personnalité humaine, à égalité» (L. Massignon: Le respect de la personne humaine en Islam et la priorité du droit d'asile sur le droit de la juste guerre, RICR, 1952, pp. 353-354.)

296 Boisard says,» «La protection des non - musulmans en terre d'islam mérite une analyse, car elle s'est affirmé comme une voie originale, au moment même où l'Occident allait sortir du Moyen Age et prendre conscience de la nécessité de fixer des règles régissant les rapports avec les étrangers». He adds, «Le respect dans la différence fut la plus belle expression de la tolérance musulmane. Il serait faux et injuste de dénoncer le fanatisme de l'islam en considérant certains abus peu nombreux qui ont marqué, par intermittance, l'histoire de l'Etat musulman».

M. Boisard, L'islam et la morale internationale, Droz, Genève, 1980, p. 176, 188.

297 See: Turtone: Zimmi in Islam, al-Fikr al-Arabi House, translated by Hasan Habashi, p. 153. A British ex-consul in Tunisai says,» It is understood that zimmi have the same rights and obligations as Muslims, if their national goal proves to correspond with Muslims» and, like Muslims, they give preference to the interest of the homeland and the common weal.» He adds that many Christian sects remained secure and prosperous under Muslim rule and sometimes their social status was even higher than that of the Muslim local community.» See: Sir Richard Wood: Islam and Reform, al-Azhar Magazine supplement, May 1986 (Sha'aban 1406 AH) issue, pp. 21, 32.

Stavraki says, "Muslims are interdicted from forcing others to convert to Islam." Moreover, "proselyting wars are prohibited." See: Dr. Emmanuel Stavraki: The Humanitarian Concept in Humanitarian International Law, International Review of the Red Cross, Issue No. 17, 1991, p. 36.

R. Caspar maintains that the zimma system was the equivalent of “jiwar” system commonly adopted before the emergence of Islam among Arabian tribes, whereby one individual or a group of people were placed under the protection of a certain tribe.²⁹⁸

b. Local integration of a Muslim in a non-Muslim land :

Muslim jurists have examined this question, particularly the legality, from an Islamic perspective, of acquisition by a Muslim of the nationality of a non-Muslim state. In this connection, a number of questions were submitted to the Islamic Fiqh (jurisprudence) Academy of the Organization of the Islamic Conference by the World Institute of Islamic Thought, Washington.

One of these questions was what is the judgment for the acquisition by a Muslim of a foreign nationality, American or European, bearing in mind that most of those who have acquired or intend to acquire such nationalities did so only because they were subjected to injury, persecution in their countries of origin through imprisonment, threats, confiscation of property, etc.

298 R. Caspar: *Entre les déclarations universelles des droits de l'homme et le statut de la Dimma – un essai de F. Huwaidi.*, published in the Third Islamic-Christian Colloquium :»Human Rights», Tunisian University, Center for Economic and Social Studies and research, Official Tunisian Government Printing Press, 1985, pp. 210-211.

Another opinion holds that” Islam recognizes certain other religions and tolerates their co – existence with Islam”.

Reisman: *Islamic fundamentalism and its impact on international law and politics*, in «The Influence of Religion on The Development of International Law» ed. by M.W. Janis, M. Nijhoff, Dordrecht, 1991, p. 123.

Some jurists maintained that as long as Shari'ah laws and hodoud (Islamic prescribed penalties) are disrupted or suspended in their countries of origin, it makes no difference for such person to bear the nationality of the state, where he was persecuted or that of the state, where he chose to settle. In both cases, Shari'ah laws are not put into effect and hodoud are not applied. In the state of asylum, his personal rights, life, property and honor are safeguarded. Nor he may be imprisoned or threatened unless he commits an act warranting punishment.²⁹⁹

Member of the Academy Hajj 'Abdullah Bah stated, "Acquisition by a Muslim of a foreign nationality, American, European or otherwise may be permissible if driven by necessity, rather than by a wish to imitate disbelievers in lifestyle, names or characteristics, provided that such naturalization would not lead to disruption or detraction from his religious duties or allying himself with enemies of Allah. This opinion is supported by the words of Allah the Almighty: "Anyone who, after accepting Faith in Allah, utters Unbelief, - except under compulsion, his heart remaining firm in Faith - but such as open their breast to Unbelief, on them is Wrath from Allah, and theirs will be a

299 OIC, Islamic Fiqh Magazine, Session three, Issue No. 3, 1408 AH9 1987 AD), p. 1095.

Shaykh Ahmad ibn Hamad al-Khalili replied,"Shari'ah opinion (fatwa) on the acquisition of a nationality of a non-Muslim state depends on the examination of various aspects of the case. Naturalization means equal treatment in citizenship rights and obligations with native citizens of the state granting nationality. Should the need arise for this state to obligate its citizens to resist an Islamic state, the Muslim bearing its nationality will be under obligation to engage in this act. Therefore we believe that acquisition of the nationality of a non-Muslim state may be resorted to only in cases of necessity, such as those where a Muslim is at risk of being chased or his life, honor or children are endangered, etc, and where he has no access to asylum in an Islamic state." Ibid, p.1103.

dreadful Penalty.” (Surat an-Nahl,106).³⁰⁰

Sheik Mohammad Taqiyud-Deen said, “Judgment on the acquisition by a Muslim of the nationality of a non-Muslim state may vary by circumstances, cases or purpose of naturalization. If a Muslim is compelled, on grounds of being injured or persecuted in his home country, through imprisonment or confiscation of property, without having committed any guilt or crime and having found no other refuge but such land, a Muslim, to seek to acquire such nationality, he may willingly do so, provided he will avow to himself to keep his faith during his career and to keep away from common abominations there.

In corroboration of this opinion, the example of the immigration by the Prophet’s Companions to Abyssinia after being persecuted by Makkans is cited. Although Abyssinia at that time was dominated by disbelievers, the Prophet’s Companions lived there and some of them stayed on even after the immigration of Prophet Mohammad (PBUH) to al-Madinah. Abu-Musa al-Ash’ari (may Allah be pleased with him), returned from there only during the Khybar battle, i.e. in the seventh year of Hijrah.

It is the duty of any Muslim to protect his own life against all grievances. So if a man finds no safe haven but in non-Muslim land, there is no objection for him to immigrate there, provided he adheres to his religious duties and keeps away from forbidden abominations.

If a Muslim acquires such nationality in order to call their people to Islam, this act, apart from being permissible, will be also rewarded. So many are the Companions and Followers who settled in non-Muslim land for this commendable purpose and these acts were added

300 Loc.cit.

to their record of virtues and noble traits.”³⁰¹

It can be concluded from the foregoing that asylum by a Muslim to a non-Muslim state and his integration into local population are governed by two rules:

Refuge may be sought only in case of necessity and in the event of an imminent and impending danger that threatens that person’s physical safety, life, family or property.

Asylum should not result in a breach of sublime Islamic rules, such as involvement in war, machinations, plotting or scheming against an Islamic state.

In this connection, the following incident may be cited: When Caliph al-Mansour’s army was defeated, he thought of entering the territory of the Roman Empire. One of his men said to him, “Will you go with your young children and your family, seeking refuge with a disbeliever who has established a stable kingdom. Probably the state of affairs in his kingdom might appeal to your children, possibly seducing them into Christianity. If you go further until you enter into Egypt, you will find there men, horses, weapons and money. Let it be your choice. And so did al-Mansour he changed his destination and headed for Egypt.”³⁰²

301 Ibid, pp. 1129-1130. See also: Islamic Fiq Magazine, Issue 4, 14010 AH(1989 AD) pp. 165-166, Islamic Research Magazine, Riyadh, Issue 32, 1412 AH (1991 AD) pp. 98, 101-103

302 See: Ibn ad-Dayah: kitab al-mokafa’ah wa hosn al-’oqba, al-Baz publishing house, Makkah, p. 85.

Another example is the letter by Prophet Mohammad (PBUH) to residents of Jarba and Azrah (telling them) Allah is their surety in giving advice to and good treatment of Muslims (living with them) and those seeking refuge out of fear of danger or punishment. See: ‘Ali bin Hussain ‘Ali al-Ahmedi: makateeb ar-rasoul, Dar Sa’b, Beirut, Vol. 2, pp. 294-295.

5.3.1.2.2 In international law:

Article 1-F of the 1951 Convention provides that “persons who are not in need of international protection” are excluded from the application of the convention. This refers to any “person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.”³⁰³ This means that the person concerned is supposed to have integrated with and have acquired a similar status as that of nationals of the state of asylum. Those persons are often referred to as “national refugees”, since they are locally integrated with the inhabitants of the asylum-granting state.

5.3.1.3 Resettlement:

5.3.1.3.1 In Islamic Shari’ah:

Nothing in Islam precludes resettlement by a refugee in another state, should he so wish. This is part of the individual’s freedom of movement and residence in the place of his choice, corroborated by

303 Cotunou Action Program states,»Where refugees have developed strong family, social and economic links with host communities, it may be in the interest of the host country to facilitate their local integration, through granting of permanent residence and ultimately naturalization”. See:”Collection of International Instruments and Legal Texts concerning Refugees and Others of Concern to UNHCR, op. cit., Vol. 3, p. 1027.

It must be pointed out that the zimma covenant in Islam is better because : It is granted upon request, without waiting,

It results in the acquisition by the person involved of the nationality of the Islamic state.

the following Ayahs:

“ It is He Who has made the earth manageable for you, so traverse ye through its tracts and enjoy of the Sustenance which He furnishes: but unto Him is the Resurrection.”
(*Surat al-Mulk, 15*).

“(Yea, the same that) has made for you the earth (like a carpet) spread out, and has made for you roads (and channels) therein, in order that ye may find guidance (on the way).”
(*Surat az-Zokhrof, 10*).

5.3.1.3.2 In international law:

Resettlement in a third country is a conceivable permanent solution. It is understood that resettlement is neither a right nor an automatic arrangement, but it is contingent on a decision to be taken by the authorities of the state of resettlement. In this regard, several requirements are supposed to be satisfied:

- The person concerned should be a refugee in the current country;
- He should have been faced with such legal or physical impediments that cannot be locally resolved locally or by any other means; or
- He has members of his immediate household legally resident in the intended country of resettlement.³⁰⁴

³⁰⁴ See: Information for Asylum-seekers and Refugees in Egypt, op. cit., p. 58, 76.

5.3.2 Cessation of asylum:

5.3.2.1 In Islamic Shari'ah:

According to Islam, a refugee status may be ceased in several cases, including:

5.3.2.1.1 Conversion to Islam:

This reason is exclusive to Islam. It is our belief that conversion of a refugee is a good ground for the cessation of his refugee status owing to the following reasons:

Unity of Muslim land, in spite of diverse and multiple states.

Equality between all Muslims is guaranteed, given that it is not fair for an asylum-seeker (mustajeer) who converts to Islam to remain a refugee, while his fellow-Muslims in Muslim land are as full-fledged citizens who enjoy all citizenship rights.

It is established in Islam that, as Prophet Mohammad (PBUH) says” The Muslim to another Muslim is (like) a brother and therefore should not oppress or betray him. He who assists his brother will be assisted by Allah.³⁰⁵ “To continue to treat an asylum-seeker who converts to Islam as a refugee is tantamount to oppression and betrayal.

The rule is that “Islam supersedes sins committed earlier.”³⁰⁶. In other words, a person who converts to Islam shall not be accountable

305 Saheeh Muslim: kitab al-birr wa as-silah, bab tahreem az-zolm, No. 2580 Vol. 4, p. 1996.

306 Musnad al-Imam Ahmad ibn Hanbal, musnad <Amr ibn al->As, No. 17775 , Vol. 29, p.315.

for his acts perpetrated before conversion. This is corroborated: 1) by the words of Allah the Almighty: “Say to the Unbelievers, if (now) they desist (from Unbelief), their past would be forgiven them; but if they persist, the punishment of those before them is already (a matter of warning for them) (Surat al-Anfal, 38); 2) by a Hadith by Prophet Mohammad (PBUH): “ Conversion to Islam supersedes sins committed earlier.”; and His statement to ‘Amr ibn al-’As “ Don’t you know that Islam repeals prior faiths and Hijrah (immigration) repeals preceding acts” ³⁰⁷

5.3.2.1.2 Dangerous activities by the refugee:

i) In Islamic Shari’ah:

If a non-Muslim commits dangerous acts that particularly threatens the security of the Islamic state, asylum shall cease. In this connection Allah the Almighty says in the Holy Qur’an,

“(But the treaties are) not dissolved with those Pagans with whom ye have entered into alliance and who have not subsequently failed you in aught, nor aided anyone against you. So fulfill your engagements with them to the end of their term: for Allah loveth the righteous “(Surat at-Taubah, 4)

“But if they violate their oaths after their covenant, and taunt you for your Faith, fight ye the chiefs of Unfaith: for their oaths are nothing to them: that thus they may be restrained.”(Surat at-Taubah, 12)

³⁰⁷ Saheeh Muslim: kitab al-iman, bab kaun al-islam yahdimu ma qablah, No. 121, Vol.1, p.112.

“If Thou fearest treachery from any group, throw back (their covenant) to them, (so As to be) on equal terms: for Allah loveth not the treacherous.” (Surat al-Anfal, 58)

The latter Ayah means, in the context of the right to asylum, that should there be fears of betrayal on the part of a refugee, he should be notified, on equal footing with Muslims, of the revocation and cessation of asylum, so as to be on equal terms (he and the Muslims). Consequently, asylum shall not be abruptly ceased without advance notice or giving reasons. The refugee shall be given a reasonable period to allow him to arrange for relocating to another place.

ii) In international law:

Article 3 of the Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969 provides that:

1. Every refugee has duties to the country in which he finds himself, which require in particular that he conforms with its laws and regulations as well as with measures taken for the maintenance of public order. He shall also abstain from any subversive activities against any Member State of the OAU.
2. Signatory States undertake to prohibit refugees residing in their respective territories from attacking any State Member of the OAU, by any activity likely to cause tension between Member States, and in particular by use of arms, through the press, or by radio.

5.3.2.1.3 Repudiation of asylum:

i) In Islamic Shari'ah:

A person seeking protection (mustajeer) may repudiate his protector's (mujeer's) covenant of protection (jiwar), thus ceasing to avail himself of that protection. Two examples can be cited in this connection:

First, when abu-Bakr as-Siddeeq entered into a covenant of jiwar with ibn ad-Daghinah, Quraysh had fears that children and women might be infatuated by his recital of the Qur'an. Thereupon, ibn ad-Daghinah walked to abu-Bakr, saying, "Abu-Bakr, I have granted you jiwar not to cause harm to your folk; they loathe and feel offended by what you are doing. So get into your house and do whatever you like." "Shall I repudiate your jiwar and be satisfied with the jiwar of Allah?" abu-Bakr wondered. "Repudiate my jiwar," the man said. "Here I do," replied abu-Bakr. Then, ibn ad-Daghinah rose up calling out, "You people of Quraysh, the son of abi-Qohafah (abu-Bakr) has repudiated my jiwar, so it is up to you to handle him the way you like."³⁰⁸

The second example is the repudiation by 'Othman ibn Mazh'oon of al- Waleed ibn al-Mughirah's covenant of protection.³⁰⁹

308 Ibn Hisham: *as-sira an-nabawiya*, op. cit. Vol.1, pp. 373 – 374.

309 Ibn Hisahm relates,» When <Othman ibn Mazh>oon saw the plight of the Companions of Prophet Mohammad (PBUH), while he was enjoying protection under the jiwar of al-Waleed ibn al-Mughirah, he felt it a shame for him to be faring well under a disbeliever's protection, while his companions and brethren in

ii) In international law:

This ground for the cessation of asylum is similar to voluntary repatriation.

5.3.2.1.4 Cessation of circumstances motivating asylum (by means of amnesty to or apology by the refugee):

i) In Islamic Shari'ah:

Since there is no effect without a cause (*cessante razione legis, cessat lex ipsa*): when the reason for a law ceases, the law itself ceases), asylum may cease if the causes that had motivated it cease to exist. This can take place either through amnesty by state authorities for the acts committed by a refugee or through an apology submitted by a refugee and approved by the authorities. As an example, it is reported that Jahilian poet Ka'b ibn Zuhayr had written a poem lampooning Prophet Mohammad (PBUH) and fled. In his flight, he felt guilty to such a degree that the earth seemed constrained to him for all its spaciousness and wanted to repent. Back home, he went to abu-Bakr who, after performing his dawn prayers, took him to Prophet

religion are sustaining such harm and tribulations that he does not. So, he walked to al-Waleed ibn al-Mughirah and accosted him saying, "O aba-'Abd-Shams, your *jiwar* is over and I hereby repudiate it." "What for, nephew?," al-Waleed wondered. "Probably some of my folk wrong you!"

"No, but I'm satisfied with the *Jiwar* of Allah, and I won't seek protection but from Him," Othman replied. "So go the mosque and repudiate it in public as I granted it to you in public. Then, both men walked to the mosque, where al-Waleed said, "Here is ' Othman coming to repudiate my *jiwar*." "He is right," 'Othman said, "I've found him a faithful and generous protector, but I want to seek the exclusive protection of Allah. That's why I 'm now repudiating his *jiwar*." Op. cit, p. 370.

Mohammad (PBUH). Abu-Bakr said, “O Messenger of Allah, here is a man who wants to give you an oath of allegiance to Islam.” As Prophet Mohammad (PBUH) stretched out his hands, Ka’b, being veiled by his turban, unveiled his face, saying, “O Messenger of Allah, I sacrifice father and mother for you! I do seek refuge with you. I’m Ka’b ibn Zuahayr.” The ansars (Medinite supporters of the Prophet) frowned and spoke harshly to him for his words against the Prophet Mohammad (PBUH). Quraysh sympathized with him and wanted him to embrace Islam. Thereupon, Prophet Mohammad (PBUH) reassured him. Thereafter, Ka’b recited his famous eulogy in praise of Prophet Mohammad (PBUH), starting as follows: ³¹⁰⁾

بَأْتَتْ سَعَادٌ فِقَلْبِي الْيَوْمَ مَتَّبِعُول
مَتِيمٍ إِثْرَهَا لَمْ يَشْفِ مَكْبُول

Today, as So’ad departed, my heart is love-sick,
love-enthralled and shackled, beyond cure.

(Traditionally, Arab poets used to start their eulogies with a few verses, expressing their love for even a visionary beloved.)

In conclusion, he said:

وقال كل خليل كنت أمله لا ألهيئك إني عنك مشغول
فقلت: خلوا سبيلي لا أبا لكم فكل ما قدر الرحمن مفعول
كل ابن أنثى وإن طالت سلامته يوماً على آلة حدياء محمول
نبئت أن رسول الله أوعدنسي والعفو عند رسول الله مأمول

Then every confidant I had trusted said,

“Give me a break; I’m busy.”

310 See: Ar-Raqqam al-Basri: kitab al-’afw wal-I’tizar, op. cit., Vol. 2, pp.447-451. See other examples in pp. 455- 461.

“Leave me alone, you unfathered,” I said,

“Whatever the Compassionate (Allah) wills will be.

No matter how long he stays safe, every son of a woman

Will be some day in a coffin borne.

I was informed that the Messenger of Allah had threatened me,

But pardon by the Messenger of Allah is aspired for.

Talking about “amnesty and repatriation of fugitives and exiles through intercession in their favor and apology on their part” ar-Raqam al-Basri relates that the wife of ‘Ikrimah ibn abi-Jahl, who had fled to Yemen, embraced Islam. She came to Prophet Mohammad (PBUH) soliciting security (aman) for her husband. Then, she traveled to Yemen and brought him back and the Prophet then endorsed her first marriage.³¹¹

ii) In international law:

This cessation ground is similar to the cessations clauses 1 and 4 of Article 1 (C) of the 1951 Convention.

5.3.2.1.5 Entry into negotiations with the state of origin to ascertain safe repatriation of refugees:

In Islam, asylum may cease, for a refugee, upon obtaining

311 Kitab al-’afw wal-i’tizar, Ibid, Vol. 1 pp. 290-291. See other examples: in p. 291 et ss; sunan ibn majah, kitan an-nikah, bab az-zaujain yuslim ahadohoma qabla al-akhar, No. 2008, vol. 1, p.647. The Messenger of Allah (PBUH) was reported by ‘Ikrimah after ibn ‘Abbas as having returned his daughter to Abi al-As ibn ar-Rabee’ two years after her first marriage.

assurances from the authorities of the state of origin, wherefrom he had fled, to ensure that the refugee will not be persecuted or prosecuted. In this regard, we refer to the negotiations between ‘Odhodh ad-Dawlah and the Roman emperor in 372 AH. The subject of negotiations was the refuge to the Islamic state by a Roman subject called Ward. During negotiations, the Roman emperor made a request for extraditing Ward, which was rejected by the Muslim negotiator ibn Shahram, saying, “This I have never heard of or seen and I won’t do.” Nevertheless, the negotiations were successfully completed. In order to avoid a breach of the covenant of aman granted to the refugee, the Muslims requested the Roman emperor for assurances of safety and good treatment for Ward and his brother and for reinstatement to their earlier positions. Ward was made to give covenants not to threaten Roman security.³¹²

5.3.2.2 In international law:

There are some cases in which asylum comes to an end in a certain state, e. g., through resettlement (in case the person acquires asylum in another state). Moreover, Article 1 (C) of the 1951 Convention provides cases in which a person ceases to enjoy refugee status (usually known as the “cessation clauses), as follows³¹³:

312 See: Miskawaih: kitab tajarib al-umam, al-Muthanna Bookshop, Baghdad, at-Tamadun Industrial Company Press, Egypt, 1333 AH (1915 AD), Vol. 2, pp. 396-397; al-Wazir Abu Shuja’ nicknamed Zhaheer-uddeen ar-Rozdrawi: Appendix to tajarib al-umam, al-Muthanna Bookshop, Baghdad, at-Tamadun Industrial Company Press, Egypt, 1334 AH (1916 AD), pp 28-39, p.111 et ss.
See also: minutes and outcomes of those negotiations in Dr Ahmad Abu al-Wafa: kitab al-i’lam be qowa’id al-qanoun ad-duwali wa al-ilaqat ad-duwaliya fi shari’ah al-islam, op. cit., Vol. 9, pp 478-499:

313 See also: other cases mentioned in Article 1-4 of the Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969.

“This Convention shall cease to apply to any person falling under the terms of section A if:

- (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
- (2) Having lost his nationality, he has voluntarily reacquired it; or
- (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
- (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
- (5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A (I) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;
- (6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his

former habitual residence.”³¹⁴.

314 In its Conclusion No. 69 on cessation of refugee status, the Executive Committee stresses that, »in taking any decision on application of the cessation clauses based on »ceased circumstances», States must carefully assess the fundamental character of the changes in the country of nationality or origin, including the general human rights situation, as well as the particular cause of fear of persecution, in order to make sure in an objective and verifiable way that the situation which justified the granting of refugee status has ceased to exist.” It emphasizes that the »ceased circumstances» cessation clauses shall not apply to refugees who continue to have a well-founded fear of persecution.” See: »Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme, Geneva, 1996, op. cit., Conclusion No. 69 (IVIII) pp. 170 - 170.

Chapter VI

A Comparison between Islamic Shari'ah and international law in the context of the right to asylum

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A Comparison between Islamic Shari'ah and international law in the context of the right to asylum

First, we will address points of agreement and then points of disagreement between Islamic Shari'ah and international law as for as the right to asylum is concerned.

6.1 Points of agreement (similarities) between Islamic Shari'ah and international law concerning the right to asylum:

- a. Inadmissibility of returning a refugee to a country, where he may be at risk of being persecuted;
- b. Prohibition of imposing penalties on a refugee on account of illegal entry into or presence on a state territory;
- c. The principle of non- discrimination;
- d. The humanitarian character of the right to asylum;
- e. Inadmissibility of granting asylum to combatant refugees;
- f. Admissibility of granting asylum to prisoners of war;
- g. The requirement to satisfy refugees' basic needs;
- h. The requirement for family reunification;
- i. The protection of the refugee's funds and property;
- j. Ensuring that a refugee enjoys his essential rights and freedoms as

- a human being and a legal person;
- k. Inadmissibility of granting asylum to (non-political) criminals;
- l. Admissibility for an asylum-seeker to avail himself of temporary protection; and
- m. Cessation of asylum when conducive circumstances have ceased to exist.

6.2 Points of disagreement (differences) between Islam and international law in respect of the right to asylum:

While asylum in contemporary international law means the protection provided by one state vis-à-vis another state to the benefit of a specific person or group of persons (refugee(s)), in Islam it is different in many respects, chief of which are the following:

Who grants asylum?

Who benefits from asylum?

Where it is granted?

Nature of asylum: What is it like?

What is involuntary asylum?

Can a refugee be extradited?

How should he be treated?

How about asylum obtained by fraudulent means?

Can a refugee be granted the nationality of the state of asylum?; and

What are the types of asylum?

Effect of sovereignty on the granting of the right to asylum.

6.2.1 Asylum- granting party/ authority:

According to Islamic Shari'ah, asylum may be granted by state authorities as well as ordinary individuals. This practice is based on the following hadith by Prophet Mohammad (PBUH) "Muslims are equal in blood; the lowest-ranking among them can give aman and observe zimma (covenant of safty) given by other Muslims and they are united against others."³¹⁵

It is also based on the concept of "jiwar" (granting refuge and protection) adopted by Prophet Mohammad (PBUH), when he accepted jiwar granted by al-Mot'am ibn 'Udayy and the practice was followed by Muslims in general. The following hadiths provide more evidence to this practice:

"If a man entrusts you with his life, do not kill him."(reported by ibn Majah)³¹⁶

Abu-Horayrah (May Allah be pleased with him) reported Prophet Mohammad (PBUH) as having said, "Aman provides immunity against killing; a person granted such covenant (mu'amman)³¹⁷ shall

315 Produced and verified supra.

316 Sunan ibnm Majah: kitab ad-diiyat, bab man amman rajolan faqataloh, No. 2689, vol. 2, p. 869

317 See: Ibn Qayyim al-Jawziyyah: ahkam ahl az-zimmah, Darul-Ilm Lil Malayeen, Beirut,1983, verified by Dr. Sobhi as-Saleh, Vol. 2,p.858.

not be killed.”“(reported by the authors of Sunan)³¹⁸. The rule in Islam, as in all other states, is that a state has the exclusive right to administer its own external affairs, in application of the Prophetic hadith:

“Every one of you is a guardian and is accountable for his subjects; an imam (ruler) is a guardian and is accountable for his subjects.”³¹⁹

Accordingly, the ruler has the exclusive right to administer the internal and external affairs of his country, and any one else may not do so, unless so authorized thereby.³²⁰ It follows that the right to asylum is an exception to the rule; thus allowing plain individuals also the right to grant asylum.

6.2.2 The beneficiaries of asylum:

Muslims, zimmi and non-Muslims may benefit from asylum. While Islam makes no exclusions from this right³²¹, in contemporary international law restrictions are imposed on

318 Sunan Abi Dawood. Kitab al-jihad, bab fil al-*adaww yu'ta ala ghirrah*, No. 2769. vol. 1, p. 145.

319 Saheeh al-Bukhari: kitab al-jum'ah, bab al-*jum'ah fil-qura wal-modon*, No.857, vol 1., p. 304.

320 See also:Dr.Ahmed Abou El-Wafa: kitab al-*'ilam bi qawa'wid al-qanoon ad-dawli wal-'ilaaqat ad-dawliyya fi shari'ah al-islam*, op. cit., Vol. 4, p.61.

321 Roger C. Glase admits that the right to asylum was granted even to enemies of the Islamic state. One essential principle of the Islamic international law was respect for non-Muslim rights. He added that this respect is clear from»... the right of asylum granted to foreigners, even enemy foreigners.» See: Roger C. Glase: Protection of civilian lives in warfare See: Roger C. Glase: Protection of Civilian Lives in Warfare – A Comparaisn between Islamic Law and Modern International Law concerning the Conduct of Hostilities, *Revue de droit pénal militaire et de droit de la guerre*, 1977, p. 249.

the grant of asylum by a number of states, particularly in recent times.³²²

Moreover, in international law, the term “refugee”, under Article 1 of the 1951 Convention, shall apply to a person, who has well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. In Islam, the right to asylum may be granted, in addition to the above-mentioned grounds, to persons seeking refuge in order to hear the Words of Allah (religious asylum), or as non-Muslims, to avail themselves of temporary protection (musta’mins) or to reside permanently (zimmis).

6.2.3 The extritorial aspect of the asylum granted:

In view of the common character of applicable Islamic provisions and the unity of Islamic state, once a refugee has obtained the right to asylum in any Islamic territory, he shall enjoy it in all Muslim territories.³²³ However, at the present time where Muslims are

322 To restrict the number of refugee candidates (asylum seekers), European states resorted to laying several restrictions, such as imposing penalties on air carriers transporting passengers bearing no travel documents valid for admission, imposing restrictions on admission of refugees by identifying cases of denial of entry and creating refugees status determination organs, Ibid, Vol. 4, p. 61. . See for example: the situation in Belgium in: Johnson: Refugee Law Reform in Europe – the Belgian example, Col. J. of trans. L., Vol. 27, 1989, pp. 589 – 613.

323 According to the Egyptian House of Ifta’ (religious opinion),»All Muslim countries are considered a domicile for every Muslim.» al-fatawa al-islamiyya min dar al-ifta’ al-islamiyya, Supreme Council for Islamic Affairs, Cairo, 1402 AH (1989 AD), Vol. 7, p. 2645. This Islamic principle is now applicable within the European Union. In fact, Protocol No. 29 concerning right to asylum for citizens of the European Union (1997) provides that the constitutive treaty of the European community establishes a space (une espace) without internal boundaries and gives

dispersed in several states, it is impossible apply these provisions. On the other hand, under contemporary international law states are divided into separate political entities living within specified borders. Accordingly, the right to asylum is granted by the state concerned and shall not necessarily apply vis-à-vis other states.

It is noteworthy that the Executive Committee of the UNHCR Programme, in its Conclusion No. 12 (XXIX), “ Noted that several provisions of the 1951 Convention enable a refugee residing in one Contracting State to exercise certain rights- as a refugee- in another Contracting State and that the exercise of such rights is not subject to a new determination of his refugee status.”³²⁴

While it is clear from the above text that only “certain right” may be exercised by a refugee, in Islam a refugee may exercise “all his rights” on any Islamic territory.

6.2.4 The nature of the right to asylum:

It should be noted that difference among scholars hinges on the question whether asylum is a right of the state or a right of individuals. In other words, does an individual has the right versus a state to

every citizen in the Union the right to freely move and reside in the territory of member states (See, L. Dubois et C. Gueydan: Les grands textes du droit de l'Union Europeenne, Dalloz, Paris, 2002, t. 1, p. 195).

The Maghrib town of al-'Adwa was the main safe haven for political refugees or rebels exiled by the government of Cordova ('abdul-Azeez= = al-Filali: al-'ilaqat as-siyasiyyah bayn ad-dawlah al-umawwiyyah fi al-andalus wa duwal al-maghrib, Organization National de Livre, Algiers, 1983, p. 86).

324 See:»Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme, Geneva», op. cit, p. 27.

enjoy asylum even for a short time; thus precluding the possibility of refoulement at the border, expulsion or extradition of a refugee to his state of origin? It can be said that, in Islam, asylum is an inalienable right for individuals in terms of grant and enjoyment.

In this vein, Article 9 of the Universal Islamic Declaration on Human Rights issued by the Islamic Council, London, 1981,³²⁵ states, “Every persecuted or tyrannized person shall have the right to seek refuge and asylum. This right shall be guaranteed for each human being, regardless of race, religion, color or gender.”

Additionally, according to Article 13 of the Document of Human Rights in Islam (OIC, Dhaka, 1983): “Everyone has the right to move freely and select his place of residence within or outside his country. If he faces persecution, he shall have the right to seek refuge in a country other than his country of origin. The country to which he makes an application to this effect shall protect and grant him political asylum, unless political asylum is sought for reasons conflicting with Islamic Shari’ah.”³²⁶

325 It is said that the right to asylum is a real human right. See: *Asylum and Refugees in Islamic Tradition» L’asile et les réfugiés dans la tradition musulmane», International Law Association, Report of the Sixty-ninth Conference, op. cit., p. 308.*

326 Some jurists maintain that Islamic Shari’ah holds asylum as a right for a refugee and as an obligation on an Islamic state. Asylum may be granted to Muslims and non-Muslims alike, without distinction, based on the general principle purporting that «Before the world’s calamities, all Muslims and non-Muslim are equal». It is however possible to agree to deny the right to asylum as was the case with al-Hodaybiyya peace, where it was agreed that refugees coming from Quraysh to Muslims were to be returned, while those coming from the opposite side were not. See: Dr. Mohammad Tabat al-Ghonaimi: *al-ahkam al-’ammah fi qanoun al-Umam*, op. cit., p. 720; Dr. Hamdi al-Ghonaimi: *al-malga’ fil- qanoun ad-dawli*, a PH.D. thesis, Faculty of Law, Alexandria University, 1976, p. 132.

On the other hand, Article 14 of the Universal Declaration of Human Rights, (1948) stipulates that “Everyone has the right to seek and to enjoy in other countries asylum from persecution. This right may not be invoked in certain cases.” It is clear from this text that the Declaration makes no mention of an asylum-seeker’s right to have it. Moreover, the 1951 Convention does not grant automatic or permanent protection to whoever seeks it. Article 1-2 of the 1969 Organization of African Unity Convention Governing Specific Aspect of Refugee Problems in Africa only calls upon Member States of the OAU to “use their best endeavors to receive refugees and to secure the settlement of those refugees...”.

6.2.5 Involuntary or compulsory asylum and refugee extradition:

As discussed earlier, a refugee shall not be returned against his will to his country of origin, if he has acquired a zimmi status, has converted to Islam, or a musta’min status (temporary protection). If, in the case of agreement by a refugee to be repatriated, there are fears that he may thus lose his right to life, he shall not be repatriated, given that a person is not licensed to put his own life at risk. Otherwise, the Islamic state would be held as collaborating in breaching this essential human right. Evidently, this practice is not applicable in contemporary international law, unless the refugee himself has refused to repatriate in fear for his life.³²⁷

³²⁷ Compare, in respect of the protection of the right to life in contemporary international law, our article: «Le devoir de respecter le droit à la vie en droit international Public», R. Egypt. DI, 1984, pp.9 –70.

The concept of compulsory asylum system in Islam manifests itself also in the Islamic state's obligation to grant asylum to a person who seeks it in order to hear the words of Allah, in accordance with the Qur'anic Ayah: *"If one amongst the Pagans ask thee for asylum, grant it to him, so that he may hear the word of Allah; and then escort him to where he can be secure."*³²⁸ (Surat at-Taubah, 6)

The obligation to respect asylum as a human right is well-established in Islam, being an integral part of faith and Shari'ah. In this regard, the Covenant of the Rights of the Child in Islam adopted by the Organization of the Islamic Conference in 2005 stipulates

328 Regarding the phrase in the Ayah», grant it (asylum) to him, so that he may hear the word of Allah", ibn al-Arabi says it means that if someone seeks asylum or protection (jiwar, aman or zimma) from you, grant it to him so that he may hear the Qur'an. This Ayah relates to those who want to hear the Qur'an and ponder into Islam. However, asylum (ijarah) for other purposes may be granted in the interest and for the benefit of Muslims. Therefore, it may be granted by the emir, ruler or the ruled. The authority of the ruler to grant asylum is undisputed, being authorized by all to look for interest and ward off harms. As regards the authority of a subject to grant asylum, the Prophetic hadith "Muslims are equal in blood; the lowest-ranking among them can give aman and the highest-ranking from among them may decline aman granted to them" See : Ibn al-Arabi: ahkam al-qur'an, op. cit., Vol. 2, p. 891; al-Qurtobi : al-jami'e li ahkam al-qur'an, Vol. 8, p. 76. In the same vein ibn Qodamah says, "If someone seeks asylum in order to hear the word of Allah and know about Shari'ah, he shall be granted it and escorted to where he can feel safe." See: Ibn Qodamah al-Maqdisi: al-kafi fi fiqh Imam al-mobajjal Ahmad ibn Hanbal, al-Maktab al-Islami, Damascus- Beirut, 1399 AH (1979AD), Vol. 4, p. 332, On the other hand, Imam at-Tabari says, "The phrase in the Ayah", grant it (asylum) to him" indicates a obligatory order restricted only to this purpose, which has nothing to do with the aman known in Shari'ah. Aman is an asylum granted at the discretion and the free will of a Muslim. But if a man seeks asylum for purpose of hearing the word of Allah, he shall be granted it and his life shall be inviolable and secure, immediately upon request, no matter whether asylum was granted or not". See: Imam 'Imaduddeen ibn Mohammad at-Tabari: ahkam al-qur'an, verified by Musa Mohammad and Dr. 'Ezzat Attiyya, Dar al-Kotob al-Hadeetha, Cairo, Vol. 4, p. 26.

that "... basic rights and public freedoms in Islam are an integral part thereof that no one has the right to disrupt, violate or disregard"³²⁹ The Shari'ah system is an indivisible whole.³³⁰ According to contemporary international law, failure by a state to meet its obligations to grant asylum can be attributed to two reasons:

According to Article 1 para.3 of the 1967 Declaration on Territorial Asylum, "It shall rest with the State granting asylum to evaluate the grounds for the grant of asylum."

According to Article 12, para. 3 of the 1981 African Charter of Human and Peoples' Rights, " a person's right to seek and to obtain asylum shall be granted in accordance with the laws of such countries and international conventions."

On the other hand, as explained before, the grant of asylum, in Islam, shall be an obligation and in some cases an inevitable choice.

6.2.6 The treatment accorded to refugees:

In this respect, Islamic history abounds in bright examples. It is established that refugees, Muslim or non-Muslim, were accorded a treatment that was no less, if not better than that accorded to nationals. Such treatment was justified, first by humanitarian considerations, the need to re-assure a refugee coming under circumstances where his

329 See text in: Collection of International Instruments and Legal Texts concerning Refugees and Others of Concern to UNHCR, op. cit., Vol. 3, p. 1171 (par. 6).

330 See: abu-al-A'la al-Mawdoudi: nazhariyyat al-islam wa hadiyih fi as-siyasah wal-qanoun wa ad-dostour, Mu'assasat ar-Risalah, Beirut, 1400 AH (1980 AD) p.159.

life was at risk ³³¹ and the characteristic practice of according warm welcome, magnanimity and hospitality to guests for which Arabs and Muslims were renowned.

On the other hand, United Nations General Assembly Resolution No. 50\ 152 notes that “in many situations refugee protection was at risk as a result of their rejection, illegitimate expulsion, removal and unjustified arrest, other threats to their physical safety, integrity and welfare, disregard for and failure to guarantee their basic freedoms and human rights. “ ³³².

In short, it can be said that international protection of refugees is currently at stake ³³³.

331 It is said that» Refugees in Maghreb, Muslims or Christians, Arabs or non-Arabs were not distinct from the rest of citizens. Foreigners coming to Maghreb were bewildered to see no difference between refugees and nationals. See: Dr. Abdul-Hadi at-Tazi: *at-tarkh ad-diblohasilil-maghrib min aqdam al-'osour ila al-yawm*, op. cit., Vol. 2, pp.80-82.

332 See: Collection of International Instruments and Legal Texts concerning Refugees and others of Concern to UNHCR, op. cit., Vol. I, p. 102.

333 Handbook on International Law for Refugees, UNHCR-IPU, No. 2-2001, op. cit., p.6. It is worthy of note that should circumstances so make it inevitable, a refugee may be detained only in four cases; where it is required to verify asylum-seekers identity; where it is required to determine grounds for seeking asylum; where asylum-seekers have destroyed their travel documents or used counterfeit documents and where it is required to protect national security = and public order, Ibid, p. 82.

The UNHCR Executive Committee also noted that»a large number of refugees and asylum-seekers in different parts of the world have been detained on account of their illegal entry or presence in search of asylum” See: Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme, Conclusion No.42, op. cit., p. 100.

6.2.7 Asylum obtained by fraudulent means:

In Islam, the asylum granted to a refugee is respected even if it is obtained through fraudulent means. In this context, the following episode involving Caliph ‘Umar ibn al-Khattab and King Hormozan of al-Ahwaz is self-explanatory. Having fallen into captivity, the latter was brought before ‘Umar. “What makes you dishonor your covenant several times?”, “ ‘Umar asked him.

“I’m afraid you’ll kill me before I tell you,” Hormozan replied. “Don’t be afraid,” ‘Umar reassured him. Then Hormozan asked for water and when it was brought to him, he said, “I’m afraid you’ll kill me before I drink it.”

Once again re-assured by ‘Umar, Hormozan spilled the water saying, “ I don’t need water, I wanted only to seek refuge by it.” “I’ll be killing you,” ‘Umar said.

“But you reassured me,” Hormozan said. Present on the scene, Anas ibn Malik intervened in favor of Hormozan saying to ‘Umar, “You’ve reassured him, saying, ‘ you have no fear until you drink’ .” Then ‘Umar turned to Hormozan, saying, “You deceived me! By Allah I won’t be deceived but to a Muslim!” So Hormozan embraced Islam, upon which ‘Umar granted him the equivalent of one thousand dirham and gave him a house in al-Madinah.

It is clear from the above-mentioned episode that the Muslim Caliph ‘Umar honored the covenant of aman although it was elicited

from him by fraudulent means rather than willingly.³³⁴

On the other hand, according to international law, refugee status, and accordingly all consequences resulting therefrom, may be cancelled only in two situations:

- When it becomes known that the individual had intentionally misrepresented or concealed material facts in order to obtain refugee status; and
- When new evidence emerges revealing that the individual ought not to have qualified as a refugee, for example, because he/she was excludable³³⁵.

6.2.8 The grant of the nationality of the state of asylum:

According to Article 34 of the 1951 Convention, the “Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.”

Thus, under contemporary international law, States have wide

334 See: Ibn al-Jouzi: *sirat wa manaqib amir al-mu'minin umar ibn al-Khatib; al-Maktaba al-Qayima*, Cairo, verified by Dr. Hamza an-Nasharti et al., p. 150.

335 See: *A Guide to International Refugee Law: A Handbook for Parliamentarians* No. 2 - 2001, op. cit., p. 60. Moreover the Concluding Instrument of the Amended Bangkok Principles on Refugee Status and Treatment, New Delhi, 2001 provides that «a refugee may lose his refugee status if he is found to have acquired such status on the basis of misrepresented information, untrue evidence or by fraudulent means, thus influencing the decision of the national asylum-granting authority.” See: “Collection of International Instruments and Legal Texts concerning Refugees and Others of Concern to UNHCR, op. cit., Vol. III, p. 1182.

discretionary power to decide or not on the naturalization of refugees, whereas in Islam the acquisition of a zimmi status automatically results in acquiring the nationality of an Islamic state, in which case the latter has no discretionary power. Moreover, under Article 34 of the 1951 Convention, a state has wide discretionary power on whether or not to naturalize a refugee. This is clear from the phrase “as far as possible” in the English text (The French text of the same article uses the expression “dans toute la mesure du possible” (by all possible means)).

It is worthy of note that the 2004 Cotunou Declaration provides that it may be in the interest of the host country to facilitate local integration of refugees through the grant of permanent residence and ultimately naturalization.³³⁶

Meanwhile, in Islam once a zimmi is granted a zimma covenant, he shall have the same rights and obligations as a Muslim. This means that he is granted much more than the right to permanent residence or the facilitation of naturalization process.

6.2.9 Family reunification:

As mentioned earlier, family reunification is provided by the rules of both Islamic Shari’ah and international law. However, there is a difference between both legal systems:

In international law, “a state shall facilitate in every possible way family re-unification” (Article 74 of the 1977 First Additional

336 Ibid, p. 1027.

Protocol to the 1949 Geneva Conventions).

In Islam, it is religiously forbidden (haram) to separate family members and this implies an obligation to abstain from such act. Commenting on the hadith by Prophet Mohammad (PBUH): “He who ever separates a mother from her child, Allah will have him separated from his beloved ones on the Day of Judgment.” Al- Imam as-San’ani says, “This hadith explicitly prohibits separation between a mother and her child, but the prohibition extends by analogy to all relatives by virtue of kinship.”³³⁷

6.2.10 Types of asylum:

In both Islam and international law, territorial and diplomatic asylum may be granted. But while Islam provides for the possibility of granting religious asylum (to hear the word of Allah) or enter into the Sanctuary (Haram), international law, as discussed earlier³³⁸, does derive its rules from religion.

6.2.11 Effect of sovereignty on the grant of the right to asylum:

Given the essential effects related thereto, the concept of sovereignty institutes a basic underpinning of contemporary international law. Sovereignty is manifested in:

The imperium, that is, the supreme authority and power over objects and persons present on state territory (personal sovereignty

337 As-Sana’ani: sobol as-salam, op.cit, pp.494- 495.

338 Vide supra.

element); and

The dominium, i.e., the state jurisdiction over objects found on a state territory (territorial sovereignty element). Accordingly, all persons and objects present on a state territory are subject to its sovereignty and jurisdiction³³⁹, in application of the rule of “ qui quid est in territorio est etiam de territorio “.

In fact, the presence and interaction of a state within an organized international community somehow imposes certain restrictions on its sovereignty. In earlier times, the presence of an individual within an

339 Sovereignty manifests itself into two aspects:

A positive aspect, i.e. exercise by a state of all signs of sovereignty over its own land, sea and air territory;

A negative aspect, i.e. abstention by other states from infringing on = such sovereignty. (See more details in our comment on the case of military and para-military activities in and against Nicaragua, *Revue Egyptienne de Droit International*, 1986, p. 364).

The International Court of Justice had judged since the 1949 *Corvú Channel* case (p. 35) that «Between independent States respect for territorial sovereignty is an essential foundation of international relations”. See also on the sovereignty concept: *Ahmed Abou El-Wafa: Arbitration and adjudication of international land boundary disputes*, *R. Egyp. DI*, 1986, pp. 145–147.

- Descamps : *Le droit international nouveau*, RCADI, 1930, p 439.

- Van Kleffens : *Sovereignty in International Law*, RCADI, 1953, 1, p 8.

- *L' Etat souverain à l' aube du XXe siècle» SFDI, colloque de Nancy*, Pedone, Paris, 1994, 318 pp.

Constitutive instruments of international organizations generally stress the principle of sovereignty. The Charter of the United Nations (Article 2-1) stipulates that “the Organization is based on the principle of the sovereign equality of all its Members.” The Charter of the Organization of inter-American States (Article 5-B) stipulates that “the international order is essentially based on respect for the personality, sovereignty and independence of states.” The Charter of the Organization of = African Unity (Article 2-1) stipulated that “one of the functions of the Organization is to defend the sovereignty, territorial integrity and independence of African states.” In the same vein, the International Court of Justice (the 1986 Reports, paragraphs 258, 263) referred to “the fundamental principle of sovereignty on which rest all the international law.”

organized community (a state) laid restrictions and sometimes fetters on his freedom of action; it was common for an individual to use his own personal means in order to redeem his right, and tribes had to wage battles against each others in order to settle their disputes. With states spreading out their sovereignty and jurisdiction over their respective territories, this practice was abandoned. Similarly, the presence of a state within an organized community (the current international community) or its accession to organized global communities (contemporary international organizations) has laid certain restrictions on its sovereignty.³⁴⁰ Manifestations of restrictions to state sovereignty, as far as the right to asylum is concerned, can be seen in the need for a state to comply with some basic principles, particularly the principle of non-refoulement.³⁴¹

It is also imperative that “states develop measures to deal responsibly and effectively with rejected asylum-seekers”.³⁴² Nevertheless, it is established that, in practice , states fail, as said before³⁴³, to duly meet their obligations in this respect and tend to

340 Dr. Ahmed Abou El-Wafa : *al-waseet fil qanoon ad-dawli*, op. ci.t, p. 414

341 Therefore it is said,»Refugee protection is basically the responsibility of states. The States signatory to the 1951 Convention has a legal obligation under the terms of the Convention and are required to apply these terms without discrimination on grounds of race, religion or country of origin and to respect basic protection principles, such as non-refoulement and non-expulsion (which are also observed by non-signatory states).” See:” *Refugee Protection: A Field Guide for NGOs*, published in collaboration between UNHCR and NGO partners, Cairo, 2000, p. 22.

342 See *Conclusions on the International Protection of Refugees* adopted by the Executive Committee of the UNHCR Programme, op. cit., N°. 62, p. 151

343 *Vide supra*.

impose many restrictions on admission of refugees and even to refole them at the borders.

On the other hand, it appears from the foregoing that in Islam the sovereignty of an Islamic state is bound by certain restrictions, in respect of refugee admission and treatment, including the following:

The obligation to grant asylum to any person in distress or at risk of persecution or injustice;

Inevitability of admitting a refugee who comes in order to hear the Words of Allah;

Inevitability of escorting a refugee to a place, where he can be secure, in case his right to asylum has ceased (for any of the above-mentioned reasons). Consequently, it is inadmissible to return him to a place, where he may at risk of being persecuted;³⁴⁴ and

344 An opinion distinguishes between »ijara” or granted protection against=the”risk of assault of which the”mustajeer” (protection–seeker) has fears at his place of actual residence, permanent or transient” and asylum out of fear of persecution at his original domicile which he had already left. As to the place of his actual residence, it is safe and that is why he chose it for asylum and temporary living (Ahmad al-Khamlishi: mada tawafiq as-shari’ah ma’a at-tashree’at ad-dawliyya al-khassah bil-lagi’een,op. cit., p. 12.)

The same opinion holds that it is not valid to take the Qur’anic Ayah:” If one amongst the Pagans ask thee for asylum, grant it to him, so that he may hear the word of Allah; and then escort him to where he can be secure.”(Surat at-Taubah, 6) as the source for the right to asylum in Islamic Shari’ah. It argues that a disbeliever seeks protection against an impending danger at the place of his accidental presence, i.e. the territory of the protection–grantor, while in his original domicile (non-Muslim land) he feels secure. This concept is expressly confirmed by the Ayah by ordering that the disbeliever should be escorted to where he can be secure, i.e. his domicile. So, while a refugee is at risk in his home country, he avails himself of the protection in the country of asylum. The Ayah then deals with the grant of protection rather than with asylum as commonly recognized in current terminology.” Ibid, pp. 12-13.

In fact, we do not agree with this opinion for the following reasons:

a) The Ayah is couched in generalized terms rather than exclusively dedicated to the movement of a person from a place where he is not secure to another where he is. It

Respect by the authorities of the Islamic state for asylum granted by plain individuals.³⁴⁵

can apply to both hypotheses. According to Imam az-Zarkashi, "Absolute generality within the context of clause can be inferred from the Ayah." (Imam az-Zarkashi: *al-borhan fi 'oloun al-quraan*, Eesa al-Babi al-Halabi Bookshop, Cairo, 2nd ed. Vol.2, p.6) The rule is that "A general clause encompasses all that comes under it, without restriction". See: Imam as-Siuoti: *al-itqan fi 'oloun al-quraan*, ed. By Mohammad aboul-Fadhl Ibrahim, at-Torath House, Cairo, Vol. 3, pp. 22-23.

- b) The order to have the disbeliever escorted to where he can be secure, is also so generalized that it can encompass both the place where the protection-seeker came from and any other place, where he can feel secure.

As the Ayah enjoins, if a refugee wants to return home, he shall be escorted to where he can be secure. If he wants to stay in Muslim land, he shall be admitted and shall not be forced to repatriate. Similarly, if he wants to go somewhere other than his home country, he shall be also escorted to where he can be secure.

Muslim jurists have often used the term "istijarah" in the generic sense of the word, rather than restricting it exclusively to a specific duty or a specific place. In this respect al- Imam al-Baydhawi says, "It is the habit of a protection-seeker (mostajer) to grab the tail or the collar of a protector's dress or gown, as a sign of excessive need for protection. See: *al-ahadeeth al-qodsiyyah*, Vols. 1-2, Supreme Council for Islamic Affairs, Cairo, 1402 AH (1981 AD), p. 117.

- 345 One opinion holds that»There is therefore clear difference between the past and the present on the question of the authority to grant asylum. It is no longer acceptable, both within and outside Islamic fiqh, to claim the right of an individual to grant asylum, since this conflicts with the principles governing political community.» Ahmad al-Khamlishi: *mada tawafiq as-shari'ah ma'a at-tashree'at ad-dawliyya al-khassah bil-lagi'een*, Ibid, p. 23.)

In fact we do not agree with this opinion for the following reasons:

In terms of "content", this opinion is incompatible with the Prophetic hadith: "Muslims are equal in blood; the lowest-ranking among them can give aman and observe zimma (aman) given by other Muslims and they are united against others." This means that any Muslim even when he belongs to the lowest ranks is entitled to grant asylum.

In terms of "reasoning", the argument used to justify inadmissibility, i.e. that such practice" conflicts with the principles governing political community" is in itself also unacceptable, since this cause had been in existence since the rise of the Islamic State during the lifetime of Prophet Mohammad (PBUH) and thereafter, where an individual was allowed to grant asylum, in spite of the presence of principles governing political community.

Conclusion:

1- Concluding remarks:

Islamic Shari'ah has laid applicable rules and acceptable grounds for exercising the right to asylum, in form and content, in letter and spirit and in words and deeds. Observance of this right as enshrined by Islam is a duty for every zealous Muslim.³⁴⁶

The importance of the right to asylum is quite evident and unmistakable. It is the right that, if granted, would complement all human rights and, if in some cases denied, would obliterate all human rights.³⁴⁷

The Holy Qur'an expressly states that those who give shelter to those who immigrated (sought asylum) to their land are "(all) in very truth the Believers". In this connection, the Holy Qur'an says,

- *"Those who believed, and adopted exile, and fought for the Faith, with their property and their persons, in the cause of Allah, as well as those who gave (them) asylum and aid, these are (all) friends and protectors, one of another. (Surat al-Anfal, 72).*

346 It is therefore said that «Dans l'islam, l'asile est un devoir tout d'abord du persécuté, qui est obligé de fuir dans le cas où il ne peut résister à l'oppression, puis ensuite, une obligation pour tous les musulmans de protéger la personne qui cherche asile» («L'asile et les réfugiés dans la tradition musulmane», op. cit., p. 322).

347 In this context, the Cotonou Declaration, Benin, 2004 states, «No country is immune from the risk of generating and receiving refugee flows, and that therefore protecting refugees is a shared duty of all states and is a matter of respect for basic human rights.» See text in :Collection of International Instruments and Legal Texts concerning Refugees and others of Concern to UNHCR, op. cit., Vol. 3, p. 102.

- *“ Those who believe, and adopt exile, and fight for the Faith, in the cause of Allah, as well as those who give (them) asylum and aid, these are (all) in very truth the Believers: for them is the forgiveness of sins and a provision most generous. “ (Surat al-Anfal, 74)*

Migration (hijra) in contemporary international legal terminology is equivalent to “territorial asylum”, i.e. the relocation from one place, where one has fears for his life, family and property to a place, where he avails himself of protection and security. A Muslim who shelters or gives asylum to a refugee or migrant is judged as a true believer, because he applies the prescribed rules and principles of Islamic Shari’ah. The Arabic infinitive “hajar” means to emigrate , to leave one’s country or homeland and the Arabic expression “ tuhajiro feeha” means to relocate from “Darul-Fitna (the land of sedition to “ Darul Aman” (the land of security) ³⁴⁸ . This is shown in the following Ayah:

“When angels take the souls of those who die in sin against their souls, they say: “In what (plight) were ye?” They reply: “Weak and oppressed were we in the earth.” They say: “Was not the earth of Allah spacious enough for you to move yourselves away (from evil)?” (Surat an-Nisa’, 97), (Surat al-Anfal, 74)

2- Views of non-Muslim jurists:

Non-Muslim jurists have generally shown fair judgment of

348 See : Mo’jam alfazh al-Qur’an al-kareem, op. cit, Vol. 2, p. 1141.

Islam's attitude towards the right to asylum as a basic human right.

An opinion in Western jurisprudence tends to attribute the origins of this right in Islam to the tradition of hospitality and the fact that, in Muslim land, a refugee's right to asylum is sacred. Massignon, for example, argues that while Islam estimated that it is just to take arms against those who do not recognize the right of Allah to human society, it tempers and offsets this (sacred war) with the right to asylum, and hospitality to be given to anyone who seeks it.³⁴⁹

The same writer is concerned that Western tradition that prevailed after the liquidation of the Ottoman Empire might result in denial by Islamic states of the right to asylum.³⁵⁰

349 «L'Islam... estime qu'il est juste de tirer l'épée contre ceux qui ne reconnaissent pas le droit de Dieu sur la Société humaine. Mais il tempère cette (guerre sainte) par le Droit d'asile, l'hospitalité. Ce n'est pas seulement en temps de paix, ... que les Dhimmis ont été traités à égalité par l'Etat musulman..., C'est en temps de guerre que l'Etat musulman fait combattre pour protéger la vie et les biens de Dhimmis comme ceux des Musulmans: leurs prisonniers aussi, le Bayt al-Mal musulman doit payer équivalentement la rançon des Dhimmis et celle des Musulmans... Il y a plus: Si un étranger réside en temps de paix en territoire islamique devient un ennemi du fait d'une déclaration de guerre contre son pays d'origine, ses droits acquis persistent en temps de guerre: cet étranger «ennemi» peut continuer paisiblement son séjour jusqu' à la date prévue dans le visa». L. Massignon: *Le respect de la personne humaine en Islam et la priorité du droit d'asile sur le devoir de juste guerre*, Rev. Inter. De la Croix Rouge, 1952, pp. 458 – 9, 460, 467.

350 «La liquidation de cet Empire par l'Europe en 1923, ou le traité de Lausanne, aboutit à une régression du droit international en consacrant le principe raciste (assyrien) des transferts massifs de population, d'échanges, pour (incompatibilité d'humeur avec leurs voisins), des personnes déplacées: échange entre les Musulmans turcs de Macédoine et les Chrétiens grecs.. cet échange qui a déterminé, des deux côtés, une situation misérable... a servi de type et de modèle à d'autres échanges= =diplomatiques, à commencer par certains replis raciaux hitlériens... pour aboutir à l'expulsion massive, par l'Etat d'arabes musulmans des Juifs... Nous avons ainsi amené les Musulmans à nous imiter en expulsant les minorités... Et l'on peut se demander si les Etats musulmans, pour nous combattre avec nos armes, ne vont pas renier comme nous le Droit d'asile, qui est, pourtant, dans leur tradition et leur droit international fondamental» Loc. cit.

Another scholar, Hoy Eduardo admits, “Perhaps the most generous right to asylum (is) found in the Arab–Islamic tradition.”³⁵¹

Kristen Zaat maintains that there is need to “draw from ancient Arabo-Islamic traditions an appropriate approach to the protection and assistance of forced migrants. The boorish days of simply condemning the Shari’ah as a cause for the abuse of the rights and livelihoods of forced migrants must end.”³⁵²

S. Akram refers to revisiting oriental tradition with regard to asylum and refuge.³⁵³

One of these traditions is the respect for jiwār (asylum). Therefore, an Arab poet would not hesitate to dispraise those who showed no such respect it, by intimating and humiliating a mustajeer (asylum- seeker). In this context, the Arab poet al-Borj ibn Mos-har at-Ta’ie says:

فنعم الحى كلب غير أنا رأينا فى جوارهم هناتِ
ونعم الحى كلب غير أنا رزينا من بنين وبناتِ
فإن الغدر قد أمسى وأضحى مقيما بين خبت إلى المساتِ
تركنا قومنا من حرب عام ألا يا قوم للأمر الشتاتِ

351 Eduardo; Hoy: Convention Refugee Definition in the West : Disharmony of Interpretation and Application, I. J. of Refugee Law, 5, 1993, p. 69.

352 Zaat says,»Those concerned with the wellbeing of refugees and IDPs within the international community should approach Islamic Law with much good will and an inquisitive spirit, which seeks to draw from ancient Arabo-Islamic traditions complimentary, indigenous and culturally appropriate approaches to the protection and assistance of forced migrants. The boorish days of simply condemning the Shari’ah as a cause for the abuse of the rights and livelihoods of forced migrants must end.» Kirsten Zaat : The protection of forced migrants in Islamic law, op. cit., p. 35.

353 S. Akram: Orientalism revisited in asylum and refugee claims, I. J. of refugee law, 12 (I), 2000, pp. 7-40.

وأخرجنا الأيامى من حصون بها دار الإقامة والنبات
فإن نرجع إلى الجبلين يوما نصالح قومنا حتى الممات

How wonderful are the people of Kalb,
But, under their jiwār, we have seen some flaws.
How wonderful are the people of Kalb,
But we were afflicted in our sons and daughters.
Treachery prevailed day and night,
Well-settled in land low and high.
From a one year's war, we've fled our people,
How awful, our folk, is the Diaspora!
We had taken women out of bastions,
Where they resided in safety and stability.
Should we, one day, return to both mounts,
We'll for ever live in peace with our folk.³⁵⁴

Commenting on the saying of Prophet Mohammad (PBUH), «In fact, I was sent with the Message in order to consummate good manners,» an author holds that the Arab good manners and virtues include generosity in the broad sense of the word, courage, chivalry and valor, protection of asylum-seeker and leniency to aliens.³⁵⁵

354 Cited by Dr. Marzouq ibn Tinbak: *al-jiwar fi as-shi'r al-arabi hatta al-'asr al-amawi*, *Hawliyyat kulliyat al-Adaab* (Annals of the Faculty of Arts, Kuwait city, 1410—11 AH (1989-90 AD), Annal No. XI, p. 93.

355 Ibid, p.11.

Finally, the Kuala Lumpur conclusions of the UN conference on asylum and Islam (2007) states: «the Quran and Sunnah embody positive messages of compassion and practice towards asylum-seekers and refugees irrespective of origin/ faith». The same declaration highlights «the strong parallels between Islamic tradition, law and practice, and modern asylum frameworks are positive indications of shared common values».³⁵⁶

3- Our personal view:

It is worthy of note that the right to asylum corresponds with three principles of Islam,³⁵⁷ i.e.:

1. The obligation to protect the oppressed and persecuted.³⁵⁸ The grant of asylum constitutes the least form of such protection or relief. This is supported by the following Ayah:

“(Some part is due) to the indigent Muhajirs, those who were expelled from their homes and their property, while seeking Grace from Allah and (His) Good Pleasure, and aiding Allah

356 See text in: Refugee survey quarterly, Vol.27, November 2008, Oxford Journals, Oxford university press, pp.64-65. See as well six articles on asylum and Islam, in Ibid, pp. 7-63.

357 One jurist argues that «Dans le monde musulman d’aujourd’hui, les pratiques et les législations relatives à l’asile et aux réfugiés sont loin d’être musulmanes. Elles s’alignent très souvent sur la pratique internationale moderne, très souvent restrictive et assez peu généreuse». See: «L’asile et les réfugiés dans la tradition musulmane», op. cit., pp. 333, 337.

358 It is argued that «jiwar” has become now a landmark of foreign policy in Islam”, being a combination of many noble traits as it means the protection of the lives, families, property and honour of individuals or groups” (Dr. ‘Ali Ahmad al-Khateeb: moqaddimah fi hijrat ar-rasoul, final volume,(jiwar), op. cit., p. 164

and His Messenger: such are indeed the sincere ones.” (Surat al-Hashr, 8)

2. The Holy Qur’an urges and encourages mobility rather than sticking to a specific territory, should there be compelling reasons to do so, in observance of the following Ayahs: ³⁵⁹

“Said Moses to his people: “Pray for help from Allah,” and (wait) in patience and constancy: for the earth is Allah’s, to give as a heritage to such of His servants as He pleaseth; and the end is (best) for the righteous.” (Surat al-A’raf, 128)

“Before this We wrote in the Psalms, after the Message (given to Moses): “My servants, the righteous, shall inherit the earth.” (Surat al-Anbiya’, 105)

“It is He who has made the earth manageable for you, so traverse you through its tracts and enjoy of the Sustenance which He furnishes: but unto Him is the Resurrection.” (Surat al-Molk, 15)

“(Yea, the same that) has made for you the earth (like a carpet) spread out, and has made for you roads (and channels) therein, in order that ye may find guidance (on the way).” (Surat az-Zokhrof, 10)

“And when the Prayer is finished, then may ye disperse through the land, and seek of the Bounty of Allah: and celebrate

³⁵⁹ This is also established by international law. See: C. Mubanga-Chipoya: The right to everyone to leave any country, including his own and to return to his country, UN doc. E/C4/Sba.2, 1988/35, June 1988, final report.

the Praises of Allah often (and without stint): that ye may prosper.” (Surat al-Jum’ah, 10)

*“He knoweth that there may be (some) among you in ill-health;
others traveling through the land, seeking of Allah’s bounty;
yet others fighting in Allah’s Cause. (Surat al-Muzzamil, 20)*

3- It is absolutely inadmissible in Islam to breach a covenant of asylum granted to a refugee.³⁶⁰ It is also established that “Respect for migrants and asylum-seekers has been a permanent feature of the Islamic faith”.³⁶¹

The right to asylum is a genuine Arab right such that many persons have called for reviving it even in Arabic poetry.³⁶²

360 It is also established that» Any violation, by a Muslim, of the conditions of aman is punished under Islamic law.” Ahmed Abou el-Wafa: Islam and the West: Co-existence or clash? Dar Al – Nahda Al – Arabia, Cairo, 1427 – 2006, p. 79. “Asylum has deep- rooted origins in Arab and Muslim traditions.”, Ibid, p. 194.

361 See: OIC:Enhancing refugee protection in the Muslim world, Ministerial Conference on the problems of refugees in the Muslim world, 28 - 30, November 2005 ([www.oic – ioc. org](http://www.oic-ioc.org)).

362 For example, when Hind daughter of an-No’man sought asylum with Safiyyah bint Thālab of Shiban tribe against Khosrau of Persia and the former granted her asylum, she set out to notify her people of the asylum granted to her against Khosrau of Persia and his army, saying:

أحيوا الجوار فقد أماتته معا	كل الأعراب يا بني شيبان
ما العذر؟ قد لفت ثيابي حرة	مغروسة في الصدر والمرجان
وعلى الأكاسرة قد أجرت لحرة	بكهول معشرنا وبالشبان
شيبان قومي هل قبيل مثلهم؟	عند الكفاح وكرة الفرسان
قوم يجيرون اللهيف من العدا	ويحاط عمري من صروف زماني

In this connection, Article 12 of the Cairo Declaration on Human Rights in Islam adopted by the 19th OIC Foreign Ministers Conference, Cairo, 1411 AH (1990 AD) states, “ Every one has the right, within the framework of Shari’ah to freedom of movement and selection of place of residence within and outside his country. The country to which he has taken asylum shall grant him protection until he has reached a place where he feels secure, unless the reason for

Revive you sons of Shaiban (the tradition of) jiwār	that all Arabs together have wiped out
What excuse? A freewoman all adorned	with pearls and corals sought my help.
Against the khosraus have I granted asylum to a freewoman	with the help of the old and young people of my folk.
. Shaiban are my folk, are there any tribe like them	in times of strife and attack by horsemen
. A folk that rescue people in distress against enemy	and my life is protected against fortitudes of time

Then the Shaibans stood out by her side and fought against and vanquished Persian troops. Safiyyah said,

قولسوا لكسرى أجرنا جارة فشوت	في شامخ العز يا كسرى على الرغم
نحن الذين إذا قمنا لداهية	لم نتدع عندها شيئاً من الندم
نحوط جارتنا من كل نائبة	ونرفد الجار ما يرضى من النعم

Tell Khosrau we have given asylum to a seeker neighbor	and she thus lived in high honor against your will, Khosrau
We are the people, who, in standing out to a calamity	would then have remorse
and bestow on him all pleasing bounties.	We would protect our protégé against all calamities

See: Dr. Mohammad ‘Anani: al-mokhtar min ash’ar al-mar’ati al-‘arabiyya fil jahiliyyaati wal-islam, General Book Organization, Cairo, 1997, pp. 27-42.

seeking asylum is motivated by an act considered as a crime according to Shari'ah .”³⁶³

4- An important fatwa (Shari'ah opinion) by Imam ibn an-Nabulsi the Hanafite:

In conclusion, we would like to cite a daring opinion by one Muslim Imam on the rights to free movement, residence and asylum. In a message entitled” Granting people the choice to take residence in the country”, the Imam says,

363 <Abdul-Qadir <Oadah argues that expulsion of a Muslim from Muslim land puts him at risk of falling into temptation, leads him to perdition and prevnts him from performing his religious rites in public. He adds,»No Islamic state is entitled to deny access to its territory by subjects of other Islamic states, because every state has such security measures and Shari'ah provisions that can meet every need = and necessity.If all these are available and in place in the state, the rules of Shari'ah would not disrupt. In this case, a state may not derogate from this right under the pretext of necessity in favor of an act that would disrupt an important rule of Shari'ah. This opinion corresponds with the purposes and intent of Islamic Shari'ah for uniting Muslim land and turning it into a haven of security and peace for every Muslim and zimmi. On the other hand, the opposite opinion would lead, apart from the deficiencies, refered to above, to inequality and nationalistic and racial bias; trends which are resented and repulsed by Islam.”Abdul-Qadir ‘Oudah: at-tashree’ al-jina’ie al-islami, op. cit., Vol. 1, pp. 304-305.

In his reply to a message from Caliph al-Mansour regarding some Muslims, who took refuge with Turks and were killed and severely punished by them, Shaykh ibn Soudah says,” There is no doubt that the perpetrators of the acts, already reported, of killing and severely punishing some Muslims who sought refuge with Allah and aligned themselves with a group of Mujahideen (fighters for a sacred cause) should not be counted as brethren in religion. For their acts indicated lean faith and deficient fidelity and thus they should be punished by being exposed and disgraced and severely chastised in public and then killed. This would be a retribution (qasas) for their mischievous and heinous acts. Allah knows best their real intent and purpose; if he had meant by killing Mujahideen to support enemies of Allah, out of love= =and zeal for their religion, they would be excluded from the religion of Islam and would be treated as pagans.” Dr. Abdul-Hadi at-Tazi: at-tareekh ad-diplomasi lil-maghrib min aqdam al-'osour ila al-yawm, op. cit., Vol. 1, p.139.

“To force someone to reside in a specific place and obligate him by coercion and compulsion to stick to it is indeed an unjust act and an aggression. These acts should not be inflicted on Muslims. It is a mandatory duty on Muslims, particularly rulers and competent people to prevent, deter and restrain perpetrators of this unjust act by all possible means, including advice, admonition or verbal reprimand or by other means of removing abominations”.

He adds, “According to tradition, “patriotism (love of one’s home land) is part of faith”. So, a man cannot leave or renounce his home country except in cases, where he encounters severe hardships and tribulations, including oppression by rulers, aggressions by false accusers or other reasons that make it easy for him quit his home country and abandon his compatriots and neighbors. Allah the Almighty says in the Holy Qur’an, “If We had ordered them to sacrifice their lives or to leave their homes,”(Surat an- Nisa’, 66) Allah, Exalted He be, holds leaving one’s home as tantamount to killing one’s self and so is the causing of hardship to a man.”

He also says,” Exit by dwellers out of their villages (and any other places); fleeing their homes and property owing to excessive oppression and injustice inflicted on them by sanctioning forbidden act and interdicting permissible acts and incapacity by the oppressed to endure these tribulations are all signs of profligacy and aggression of the oppressors. Dwellers of villages (population generally) are to be rewarded for leaving their homes. This is clear from the words of Allah the Almighty,” O My servants who believe! Truly, spacious is My

Earth: therefore serve ye Me, (and Me alone)!” (Surat al-’Ankabout, 56) Interpreting this Ayah, Imam an-Nasafi says, “ If a believer finds that it is easy for him to worship Allah and perform his religious duties where he lives, let him immigrate to another place where he can worship and better perform his religious duties.”³⁶⁴

364 Institut français de Damas: Bulletin d'études orientales, Tome XXXIX – XL, Années 1987 – 1988, pp. 28 – 37.

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