

# **NEW ISSUES IN REFUGEE RESEARCH**

**Research Paper No. 146**

## **The protection of forced migrants in Islamic law**

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December 2007



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ISSN 1020-7473

## Justice, kindness and charity\*

Despite Muslim States hosting large numbers of refugees<sup>1</sup> and internally displaced persons (IDPs)<sup>2</sup>, the inherent protection and assistance afforded to forced migrants at Islamic Law<sup>3</sup> has largely been overlooked. There is no readily available particularised *fiqh* (Islamic jurisprudence) on the matter, and it was not until the early 1990s that a few Islamic scholars began delving into the *Shariah* in the interests of finding Islamic modes of protection. Since that time, with the exception of a few recent *fatwas*, little academic scholarship has persisted despite the fact that the *Sharia* presents as a rich source of protection and assistance for forced migrants.

This article seeks to lay the ground work for establishing an Islamic protection framework by consolidating and expanding existing efforts which have identify various yet incomplete modes of protection at Islamic Law.<sup>4</sup> The author seeks to support the development of an indigenous, culturally viable Islamic protection framework which draws heavily upon long-held<sup>5</sup> norms<sup>6</sup> prevalent throughout the

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\* Q16:90, “God enjoins justice, kindness and charity to one’s kindred [humanity], and forbids indecency, reprehensible conduct and oppression.” See Dawood, N.J. (trans.); *The Koran: With Parallel Arabic Text*, (London: Penguin Books, 1956), sura 16:90, p. 276.

1 Article 1(A) of the Convention relating to the Status of Refugees (1951) states that “... the term 'refugee' shall apply to any 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 ...” The Protocol relating to the Status of Refugees (1967)<sup>1</sup> broadens this definition by removing special and temporal limitations. See Convention relating to the Status of Refugees, 28 July, 1951, 189 UNTS 137 and The Protocol relating to the Status of Refugees, 31 January, 1967, 606 UNTS 267 see also Statute of the Office of the United Nations High Commissioner for Refugees, United Nations General Assembly Resolution 428, 5th Session, Supplementary No. 20, at p.48 (paragraph 8) UN Doc. A/1775 (1950).

<sup>2</sup> “... persons or groups of persons who have been forced or obliged to flee or leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or man-made disasters, and who have not crossed an international recognised State border. See Guidelines on Internal Displacement (1998).

3 The term ‘Islamic Law’ is used here to refer to a combination of the *Shariah* – the ‘path to be followed’, or ‘right path’ (Q45:18), that is the Quran and Sunnah the sources of Islamic Law, and *fiqh* ‘understanding’ (According to the Prophet Mohammed, ‘To whomsoever God wishes good, He gives the understanding (*fiqh*) of the faith’), that is the methods by which Islamic Law is determined. See Kamali, M.H; ‘Law and Society: The Interplay of Revelation and Reason in the *Shariah*’, in Esposito, J.L; *The Oxford History of Islam* (1999), p.107 and Doi, A.R; *Shari’ah: The Islamic Law*, (1984), p.2. Thus the approach used in this paper does not assume the sources of Islamic Law to be the Quran, Sunnah, *Ijma*, *Qiyas*, *Ijtihad* and other types of legal reasoning. Rather we seek to distinguish between the Quran and Sunnah as immutable texts and *fiqh* as a human product which can change both temporally and spacially but is nonetheless important for interpretive purposes. Ramadan notes that including *fiqh* as part of the *Shariah* is ‘by no means a decisive or authoritative’ decision. See Ramadan, S; *Islamic Law: Its Scope and Equity*, (1970);

4 See Arnaout, G.M.; *Asylum in the Arab-Islamic Tradition*, UNHCR/International Institute of Humanitarian Law, Geneva, 1987; Elmadmad, K.; ‘An Arab Convention on Forced Migration: Desirability and Possibilities,’ 3 *International Journal of Refugee Law* 461, 1991; Eickelman, D.F, and Piscatori, J (eds.); *Muslim Travelers: Pilgrimage, Migration, and the Religious Imagination*, (New York: Routledge Press, 1990); Suhrke, A; ‘Refugees and Asylum in the Muslim World’, in Cohen, R (ed); *The Cambridge Survey of World Migration* (Cambridge: Cambridge University Press, 1995); and Muzzafar; ‘Practicable Ideas? A Proposal for Revitalising the Rights of Forced Migrants in Islam’, *Journal of Refugee Studies*, vol 14, No.3, 2001.

<sup>5</sup> See Lauren, P.G; *The Evolution of International Human Rights, Visions Seen*, 1998, p.5 where it is recognized that many of the existing norms in international law were devised elsewhere, long ago.

*Quran*<sup>7</sup> and *Sunnah*<sup>8</sup> - the primary sources<sup>9</sup> of Islamic Law - while incorporating some general principles of *fiqh*.

The author seeks to review Islamic Law protection mechanisms in and of themselves,<sup>10</sup> and dispel ‘Orientalist *problematique*’ myths based on ‘Islamophobia’<sup>11</sup> which purport Islamic Law to be defective, particularly as it relates to international law.<sup>12</sup> The paper is thus framed within the context of post-colonialism and self-determination discourses which recognise amongst other things, that “[h]umanitarianism which remains the sole preserve of the West and fails to enlist the involvement of local peoples and governments as well as to establish resonance with

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<sup>6</sup> Unfortunately, Islam is frequently stereotyped by human rights advocates, academics and others as a result of refugee rights advocacy. Akram asserts that this amounts to a form of ‘neo-Orientalism’ during the asylum process which has a particularly negative impact on women and has obvious longer term implications for Muslim communities in general such stereotypes. See Akram, Susan Musarrat; ‘Orientalism Revisited in Asylum and Refugee Claims’, *International Journal of Refugee Law* 2000 12(1), pp.7-40. See generally, Said, Edward; *Orientalism, Western Conceptions of the Orient*, (London: Penguin, 1978)

<sup>7</sup> While an English translation has been used here, it should be noted that “the Quran is spirit and light, both of which are not amenable to translation, and that translation, therefore, is a dissipation of it”, “in a translation it loses some of the original meaning.” See Mahmassani, S; (trans. Farhat J. Ziadeh) *The Philosophy of Jurisprudence in Islam (Falsafat Al-Tashri fi Al-Islam)*, (Leiden: E.J. Brill, 1961), pp.64-65 citing Sulayman, Hadith, at p.62.

<sup>8</sup> The Sunnah of the Prophet Mohammed incorporates his words, actions, appearance, and tacit approvals and according to Imam al-Shafi’i, contains instruction which is threefold: (1) that which prescribes in accordance with what God has declared through the Quran; (2) that which explains the general principles contained in the Quran; and (3) Prophetic rulings on matters which can not be found in the Quran. See Hallaq, W.B; *Islamic Law: History and Practice*, Irwing, R (ed.); *The New Cambridge History of Islamic Civilisation*, vol.4, (Cambridge: Cambridge University Press, 2005), pp.14-16; and Shafi’I, M; *al-Risalah*, pp.52-53, as cited in Kamali, M.H; ‘Law and Society: The Interplay of Revelation and Reason in the Shariah’, in Esposito, J.L; *The Oxford History of Islam* (1999), p.63.

<sup>9</sup> The Prophet Mohammed is reported to have asked a companion named Muadh ibn Jabal what he would use as a source of law upon his deployment as a qadi (judge and administrator) to Yemen. Ibn Jabal is believed to have answered “I will judge with what is in the book of God”. He was then asked by the Prophet ‘If you do not find a clue in the book of God?’, Ibn Jabal answered, ‘Then with the Sunnah of the Messenger of God?’ The Prophet then asked, ‘If you do not find a clue there in?’ Ibn Jabal responded: ‘I will exercise my own legal reasoning’. The Prophet was believed to be perfectly satisfied with this response. See Sunan Abu-Dawud, Book 14 Kitab Al-Jihad, Number 3585, at [www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/abudawud](http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/abudawud).

<sup>10</sup> Mayer notes for example how little Islamic Law is referred to in existing human rights discourses and how when it is referred to it is typically only for comparisons sake. See Mayer, A.E; *Islam and Human Rights, Traditions and Politics*, (3rd edition 1999), p.41.

<sup>11</sup> See for example, Bannerman, P; *Islam in Perspective, A Guide to Islamic Society, Politics and Law*, (1988), p.25; Robertson, B.A; ‘Islam and Europe: An Enigma or a Myth’, (1994) 48 *Middle East Journal*, No.2, pp.288-307; Tash, A.Q; ‘Islamaphobia in the West’, (1996) *Washington Report on Middle East Affairs*, November/December p.28.

<sup>12</sup> The view is proposed by Strawson, who views a limited number of Islamic legal treaties – mostly written by ‘Occidental’ scholars and then determines Islamic Law’s flaws accordingly. See Strawson, J; ‘Encountering Islamic Law’, *University of East London Law Department Research Publications Series*, No.1, p.1 as cited in Baderin, Mashood A; *International Human Rights and Islamic Law*, (Oxford: Oxford University Press, 2005), p.11.

the rich resources of non-Judaeo-Christian religious traditions, will remain unnecessarily foreign and interventionist in nature.”<sup>13</sup>

### **Forced migration in the Muslim world**

A statistical survey of the situation of forced migrants in the Muslim world<sup>14</sup> (see *Table 1: Forced Migrants in the Muslim World*) reveals that while almost half - that is 4.9 million – of the world’s 10 million refugees originate from Muslim States, approximately 4 million of those same persons are being hosted by the Muslim world.<sup>15</sup> Of the world’s 26 million internally displaced persons, a further 15 million are displaced inside the Muslim world. The Muslim world thereby hosts a total of 19 million forced migrants out of a world population of 36 million - that is 53 per cent of the world’s refugee and IDP population. Further, a review of the commitment of the Muslim world to legal protection and assistance instruments at international law shows that of the fifty-seven Member States of the Organisation of Islamic Conference (OIC), 35 – that is 61 per cent of States have signed both the Refugee Convention and the Optional Protocol.<sup>16</sup>

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<sup>13</sup> Minear, Larry and Weiss, Thomas; ‘Do International Ethics Matter? Humanitarian Politics in the Sudan’, this article draws upon findings in Larry Minear’s *Humanitarianism Under Siege: A Critical Review of Operation Lifeline Sudan* (Trenton, NJ: Red Sea Press, 1991), [http://hwproject.tufts.edu/publications/electronic/e\\_diem.html](http://hwproject.tufts.edu/publications/electronic/e_diem.html)

<sup>14</sup> The term ‘Muslim world’ is used here in a simplistic fashion to refer to those nation states who host sizeable Muslim communities on their soil and are thus Members and Observers of the Organisation for Islamic Conference. The Preamble and Article II(A)(1) of the OIC Charter place the first objective of all its Member States as promoting Islamic spiritual, ethical, social, and economic values among its Members.

<sup>15</sup> The Muslim World is used herein a legal as opposed to cultural, social, political or economic sense to refer to United Nations Member States which are also members of the Organisation of Islamic Conference and enjoy legal personality as such in accordance with the OIC Charter. States and other entities with Observer Status only, including Bosnia and Herzegovina, Turkish Occupied Cyprus, the Russian Federation and the Kingdom of Thailand have not been included here although these states and entities do host significant Muslim populations. See *Table: The Status of Forced Migrants in Organisation of Islamic Conference Member States* annexed here.

<sup>16</sup> The concerns of the remaining 39 per cent of Muslim states with the 1951 Refugee Convention by Muslim States are worthy of close consideration. The Convention, first established to assist European refugees following from World War II is undeniably eurocentric. Article 1(B) makes it clear that "the words 'events occurring before 1 January 1951' in Article 1 (A) (The Definition), shall be understood to mean either a) 'events occurring in Europe before 1 January 1951'; or b) 'events occurring in Europe or elsewhere before 1 January 1951'." State parties had to specify which meaning they intended to apply. Until the 1967 Protocol, the 1951 Refugee Convention's scope was thus limited both temporally and spatially. Article 1 (2) of the 1967 Protocol, however, extends the term refugee beyond those persons fleeing persecution as a result of events occurring before January 1, 1951 and Article 1 (3) states that, "the present Protocol shall be applied by the State Parties hereto without any geographical limitation." As Professor Khadija Elmadmad has opined the Convention, "...very few Moslem (sic) States participated in the drafting." [See Khadija Elmadmad, *An Arab Convention on Forced Migration: Desirability and Possibilities*, 3 *Int'l J. Refugee L.* 461, 473 (1991).] Perhaps most alarming for Muslim States is the fact that as a result of Article 1(d), the 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." Since Palestinians were at the time and continue to receive until the present assistance from the United Nations Relief and Works Agency (UNRWA) more than 3.5 million Palestinian refugees – the largest refugee population in the world falls out of the scope and protection of the 1951 Refugee Convention. UNRWA does not have a protection mandate, yet the exclusion of the Palestinians continues with the adoption of the 1967 Protocol which was

Formal modes of protection for forced migrants in the Muslim world, implemented by Muslim States, non-governmental organizations, civil society and forced migrant communities themselves are typically borrowed from (national) social welfare protection systems, complemented by protections afforded in international treaties, conventions (where the relevant State party is a signatory), soft law agreements;<sup>17</sup> and other protection models such as those provided by UNHCR, the International Committee of the Red Cross, the SPHERE Project, and the Active Learning Network for Accountability and Performance in Humanitarian Action.<sup>18</sup>

However, “[m]any regimes in the Muslim world today seek their legitimacy through portraying an adherence to Islamic law and traditions. Thus any attempt to enforce international or universal norms within Muslim societies in oblivion of established Islamic law and traditions creates tension and reactions against the secular nature of the international regime no matter how humane or lofty such international norms may be.”<sup>19</sup> What is then needed is an exposition of modes of Islamic protection for forced migrants, which as it turns out, advantageously sustain and supplement the international protection order.

In November 2005, the enhancement of the protection of forced migrants in the Muslim World was placed squarely on the agenda of Organisation of Islamic Conference (OIC). Since at least 1982, the OIC has remained “[d]eeply concerned over the aggravation of the problem of refugees in many parts of the world, most of whom are members of the Islamic community.”<sup>20</sup> Treaties such as the *Universal Islamic Declaration on Human Rights (1981)*, the *African Charter on Human and Peoples’ Rights (1981)*, the *Cairo Declaration on Human Rights in Islam (1990)*, and the *Arab Charter on Human Rights (1994)* all contain clauses pertaining to the rights and livelihoods of forced migrants. Until now, however, an Islamic protection

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nonetheless drafted with the express intent of widening the temporal and special scope of the 1951 Refugee Convention in order to extend protection to other persons in need of protection. Muslim States continue to be significantly frustrated with the international community for failing to implement a multitude of United Nations General Assembly resolutions on the right of return for Palestinian refugees. For example, the Cairo Declaration on the Protection of Refugees and Displaced Persons in the Arab World (1992) recalls the rights of Palestinian refugees, “[e]mphasizing the need for the effective implementation of Paragraph 11 of United Nations General Assembly Resolution 194 (III) of 11 December 1948, calling for the right of return or compensation for Palestinian refugees.” See UNHCR; Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons, 116 (Vol. II, 1995) It is therefore, not surprising that many Muslim States have been unwilling to sign the Convention.

<sup>17</sup> See for example the International Bill of Human Rights (1948 onwards), the Refugee Convention (1951) and Optional Protocol (1967); the Convention on the Elimination of Discrimination Against Women (1997), the Convention on the Rights of the Child (1990); the Guiding Principles on Internal Displacement (1998).

<sup>18</sup> See for example, UNHCR; Return, Reintegration and Resettlement Handbook (2004), at [www.unhcr.org](http://www.unhcr.org), The SPHERE Handbook: Minimum Standards in Disaster Relief (2001); and Slim, H and Bonwick, Andrew; Protection: An ALNAP Guide for Humanitarian Agencies, 2005, [www.alnap.org](http://www.alnap.org). See also [www.icrc.org](http://www.icrc.org) generally.

<sup>19</sup> See Baderin, Mashood A.; *International Human Rights and Islamic Law*, (Oxford: Oxford University Press, 2005), p.30.

<sup>20</sup> Concerns are also consistently expressed over the national security implications forced migrants allegedly have for Muslim States - “... the far-reaching repercussions of the presence of millions of refugees in Muslim countries, particularly on these countries security, stability and infrastructure, which adversely affect their economic and social development.” See for example Resolution No. 34/21-P on the Problem of Refugees in the Muslim World at [www.oic-ioc.org](http://www.oic-ioc.org).

framework, that might better alleviate the OIC's ongoing concerns, has gone unrealised.<sup>21</sup>

Yet many of the modes of protection offered in the *Shariah* and at *fiqh* convincingly establish local means to protect and assist forced migrants in the Muslim world.<sup>22</sup> This is important given that “the positive means to promote any concept within a particular culture is through evidential support from within its legitimizing principles.”<sup>23</sup> In the Muslim world, although it is true that Islamic law is not applied across all States<sup>24</sup>, “Islamic principles and norms constitute a principle legitimizing factor for cultural-legal norms in most parts of the Muslim world.”<sup>25</sup> Developing an understanding of Islamic modes of protection for forced migrants is also important given that Muslim States on occasion use the *Shariah* as an excuse for not abiding by international protection standards typically without establishing any particularly convincing argument for doing so.<sup>26</sup>

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<sup>21</sup> The United Nations High Commissioner for Refugees (UNHCR) is currently playing an important role in building the capacity of the OIC to develop an Islamic protection framework that might be used for awareness raising and advocacy purposes with the ultimate goal being its application throughout the Muslim World. In November 2006, the OIC Foreign Ministers will convene in Islamabad to further debate the adoption of such a framework the beginnings of which have been in draft format since March 2006. They are available at [www.oic-ioc.org](http://www.oic-ioc.org).

<sup>22</sup> As Baderin notes, “whatever definition or understanding we ascribe to human rights, the bottom line is the protection of human dignity. There is perhaps no civilization or philosophy in today’s world that would not subscribe to that notion. This ut may only be difficult but not impossible to evolve a universally acceptable conception in that respect. There is need for sincere and justificatory cross-cultural evaluations of human dignity with a view to evolving international moral values which no repressive regime may find easy to circumvent in the business of State governance.” See Baderin, Mashood A.; *International Human Rights and Islamic Law*, (Oxford: Oxford University Press, 2005), p.29. Similarly, Mayer opines that “The Islamic Heritage offers many philosophical concepts, humanistic values, and moral principles that are well adapted for use in constructing human rights principles. Such values and principles abound enve in the premodern Islamic intellectual heritage.” See Mayer, A.E; *Islam and Human Rights, Traditions and Politics*, (3rd edition 1999), p.43.

<sup>23</sup> Baderin, Mashood A.; *International Human Rights and Islamic Law*, (Oxford: Oxford University Press, 2005), p.6.

<sup>24</sup> In the Muslim world, 5 States are Islamic States, 15 States declare Islam as the State religion in their constitutions, and 46 states have a majority Muslim population. Fifty-Seven of these States are Members of the IOC.

<sup>25</sup> Baderin, Mashood A.; *International Human Rights and Islamic Law*, (Oxford: Oxford University Press, 2005), p.6.

<sup>26</sup> According to the International Commission of Jurists, “It is unfair to judge Islamic Law (Shari’a) by the political systems which prevailed in various periods of Islamic history. It ought to be judged by the general principles which are derived from its sources ... Regrettably enough, contemporary Islamic practices cannot be said to conform in many aspects with the true principles of Islam. Further it is wrong to abuse Islam by seeking to justify certain political systems in the face of obvious contradictions between those systems and Islamic Law.” In International Commission of Jurists; *Human Rights in Islam: Report of a Seminar held in Kuwait in December 1980, 1982*, p.7.

## Towards an Islamic protection framework

A survey of the Quran bears witness to the importance of protection<sup>27</sup> and assistance to the maintenance of the greater welfare of humanity.<sup>28</sup> No contradiction appears between the norms presented<sup>29</sup> in this regard, despite references to various forms of protection and assistance, appearing no less than 395 times.<sup>30</sup> Similarly, a review of

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<sup>27</sup> The international definition of protection used here as “all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law, ie human rights law, international humanitarian law and refugee law” (consensus on definition reached amongst international humanitarian community in 1999, International Committee of the Red Cross, Geneva) is fairly recent and very much evolving. The concept focuses on “... the whole human being ... It recognizes that we are more than flesh and blood. When we are cut we bleed and when we cannot drink we thirst, but beyond our material needs, we also feel and care – about ourselves and others. This sense of self-worth, and the deep value of being together in family and community of some kind, are as important to protect and assist as are our physical needs. We live emotionally, socially, and spiritually as well as physically, and so we suffer emotionally, socially and spiritually too.” The emphasis is on the safety, dignity and integrity of human beings and seeks to empower persons to protect themselves. See Slim, Hugo and Bonwick, Andrew; *Protection: An ALNAP Guide for Humanitarian Agencies*, (London: August 2005), pp.30-33. With the notable exception of, for example, definitions of family, homosexuality, blasphemy, and abortion nothing in this definition contradicts the rights and obligations to protect and assist at Islamic Law. As Baderin notes, with the application of the ‘margin of appreciation’ doctrine to international human rights law as it pertains to these issues could be a useful tool “implemented in good faith and backed with political and humanitarian will, [and thereby] capable of providing the flexibility needed to avoid confrontation between Islamic law and international human rights law and create “breathing space” or “elbow room” for a closer rapport that will gradually and ultimately lead to the realization of a common standard of universalism in human rights between international human rights law and Islamic law in the Muslim world.” See Baderin, Mashood; *International Human Rights and Islamic Law*, (Oxford: Oxford University Press, 2005), p.235.

<sup>28</sup> Throughout this paper the author uses the Islamic legal principles of *istidal* (deduction) and *istishab* (presumption of continuity) to determine basic rules on the protection and assistance of forced migrants at Islamic Law. This principle, espoused by Imam Al-Shafi’i, Imam Hanbal, and the Imamiyah Shi’ah supposes that: (1) there is a presumption on the part of all actors associated with forced migration that they are free from liability until it is proven otherwise by the Sharia; (2) general provisions made in the Sharia are applicable to forced migration until special provisions become textually evident; (3) All Islamic legal texts containing rules on forced migration must be respected until repelled or supplanted by another text (but not the Quran or Sunnah which can not be repelled); (4) the continuity of a legally established (historically evinced) fact of forced migration until it is proved false; and (5) the reverse continuity method, that is the projection of current concerns associated with forced migration into the past which assumes an element of continuity of experience of forced migrants along the space-time continuum. See Mahmassani, S; (trans. Farhat J. Ziadeh) *The Philosophy of Jurisprudence in Islam (Falsafat Al-Tashri fi Al-Islam*, (Leiden: E.J. Brill, 1961), p.p.90-91.

<sup>29</sup> Thus only a mention of the principle of *naskh* (supersession or abrogation) is required here. If contradiction is to occur, the Quran supersedes the Sunnah dependent on the chronological order of events presented (later verses over rule the former), the Quran supersedes the Sunnah; and the Sunnah supersedes the Sunnah according to chronology also. Although some jurists have proposed that the Sunnah does actually supersede the Quran on occasion this is highly controversial and has been rejected by some of the greatest Islamic jurists including Imam Al-Shafi’i. See Mahmassani, S; (trans. Farhat J. Ziadeh) *The Philosophy of Jurisprudence in Islam (Falsafat Al-Tashri fi Al-Islam*, (Leiden: E.J. Brill, 1961), pp.64-65.

<sup>30</sup> There are at least 396 Quranic references to protection and assistance matters; 170 refer to the special needs of vulnerables; 20 cover hijra and aman; 12 refer to sanctuary; and at least 68 others cover almsgiving and charity; more than 100 other hadith cover matters associated with persecution, oppression and other related matters. While the Quran is believed to have around 350 to 500 verses in total containing legal consequences, much of the moral elements detailed, as will be seen below, also, as Baderin notes, ‘constitute the basis for every Islamic legal principle’ and as Kamali notes, “there is often ... a relationship between strict compliance to a legal duty and the Islamic concept of moral excellence” and as such can not be ignored when developing an Islamic framework for Islamic Law.



the Sunnah of the Prophet Mohammed through authentic *ahadith*<sup>31</sup> collections establish that there are more than 850 *hadith* specifically dealing with protection and assistance matters.<sup>32</sup> The right of all humanity to enjoy protection and assistance, and the concomitant obligation to protect and assist those in need,<sup>33</sup> including forced migrants, is one of the preeminent institutions of Islamic Law which can be distilled

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See Baderin, Mashood, A; *International Human Rights and Islamic Law*, (Oxford: Oxford University Press, 2005), p.35. See also Kamali, M.H; 'Law and Society: The Interplay of Revelation and Reason in the Shariah', in Esposito, J.L; *The Oxford History of Islam* (1999), pp.107-109 and Coulson, N.J; *A History of Islamic Law*, 1964, p.12 who is of the opinion that only 80 Quranic verses deal with strictly legal matters. It is contended here that attempts to make arbitrary distinctions between what is 'moral' and what is 'legal' in the Quran fail to accept that each moral command entails a legal consequence, if not in this world then the world after. The idea that verses pertaining to protection and assistance might not be legal are not unlike the claims of some jurists that international law is not law at all.

<sup>31</sup> (plural) *hadith* (singular). For a detailed expose of the complex science of *hadith*. See Mahmassani, S; (trans. Farhat J. Ziadeh) *The Philosophy of Jursiprudence in Islam (Falsafat Al-Tashri fi Al-Islam*, (Leiden: E.J. Brill, 1961), pp.71-76. "According to Muhaddithiin (*hadith* scholars) [*hadith*] stands for 'what was transmitted on the authority of the Prophet, his deeds, sayings, tacit approval, or description of his sifaat (features) meaning his physical appearance. However, physical appearance of the Prophet is not included in the definition used by the jurists.' Thus *hadith* literature means the literature which consists of the narrations of the life of the Prophet and the things approved by him. However, the term was used sometimes in a much broader sense to cover the narrations about the Companions and Successors as well." Azimi., M.M; *Studies in Hadith Methodology and Literature*, as quoted at <http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh>. *Ahadith* are collated either according to *masanid* (authority of the source) or *musannafit* (according to topics of jurisprudence). Al-Bukhari and Muslim's works are deemed to be authentic by Muslims. A scrutiny of *ahadith* has been undertaken (*mustalah al-hadith*) arranging *hadith* according to categories of, for example, *sahih* (authentic), *hasan* (good), *gharib* (strange). *Ahadith* appearing in a *Sahih* collection trump those presented in a *Sunan* collection. There are three groups of traditions arranged according to their narration, these are *mutawatir* (those with consecutive testimony), *mashhur* (those well known) and *ahadi* (one-man narratives). The quality of each tradition is also weighted according to this categorization and some Islamic jurists are of the opinion that one-man narratives are inferior while the *Zahiri* school of Islamic jurisprudence accepts them. Narrations by all persons with the exception of "a minor of imperfect understanding, a lunatic, and infidel or a libertine is not accepted." See Mahmassani, S; (trans. Farhat J. Ziadeh) *The Philosophy of Jursiprudence in Islam (Falsafat Al-Tashri fi Al-Islam*, (Leiden: E.J. Brill, 1961), pp.72-74. According to Muslim and others, the Prophet Mohammed is thought to have said "do not write down my sayings. He who has quoted me in writing in other than the Quran should delete what he has written. You are free to quote me orally." This has not stopped the development of an 'ahadith industry' attesting to the pervasive nature of the importance of the concept of Sunnah, including that of the Prophet Mohammed to early and later Muslim communities alike. *Ahadith* is thus quoted here although with some unease. See for example *Sahih Muslim*, VIII, no.229. See Mahmassani, S; (trans. Farhat J. Ziadeh) *The Philosophy of Jursiprudence in Islam (Falsafat Al-Tashri fi Al-Islam*, (Leiden: E.J. Brill, 1961), p.67.

<sup>32</sup> 776 *hadith* dealing with almsgiving and charity; 18 on peacemaking; 23 on Medina; and 42 on oppression. At least 80 *hadith* on oaths and vows (including the law on concluding agreements and treaties) also exist. See <http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh>. Although the actual words 'protection' and 'assistance' are infrequently used, the author applies the Islamic jurisprudential principle of connotation here throughout. Although this principle is not without controversy, "the prevalent view is that it is permissible for a person who is well-versed in the connotations of expressions to expound the meaning without the text, provided he makes no additions or subtractions." See Mahmassani, S; (trans. Farhat J. Ziadeh) *The Philosophy of Jursiprudence in Islam (Falsafat Al-Tashri fi Al-Islam*, (Leiden: E.J. Brill, 1961), pp.74-75 citing Amid; *Ikham*, p.193; and *Shafi'i*; *Risalah*, p.75.

<sup>33</sup> The Islamic Law understanding of the right to protection compliments existing international understandings of protection. As Slim and Bonwick note, "It is internationally recognized that people have rights to protection, while authorities and individuals have legal obligations to respect the law and ensure protection." See Slim, Hugo and Bonwick, Andrew; *Protection: An ALNAP Guide for Humanitarian Agencies*, (London: August 2005), p. 33.

both through literal interpretations of the language of the Sharia and by *qiyas* (analogy).<sup>34</sup>

The Islamic Law principle of legality or permissibility - which ensures that all actions are legal and therefore permitted except those that are clearly prohibited by the *Shariah*<sup>35</sup> - is important in determining protection and assistance rights and obligations here. Human beings have inherent rights to all but that which is prohibited in the *Quran* and *Sunnah*. The Hanafi jurisprudential view is quite different, however, and privileges a principle of illegality which holds that human beings have no rights but only obligations to God. The latter view considerably restricts and makes difficult not only life in general but also every day interactions for protection and assistance purposes.<sup>36</sup> It is therefore hard to imagine that the acting out of this view conforms with express Quranic precepts demonstrating that “God desires [our] wellbeing, not [our] discomfort<sup>37</sup> ... God wishes to lighten [our] burdens<sup>38</sup> ... God does not charge a soul with more than it can bear,<sup>39</sup> ... [f]or every soul there is a guardian watching it<sup>40</sup> ... [and] He gave you shelter when you were ... persecuted in the land.”<sup>41</sup>

The subject(s) and object(s) of the Islamic concept of protection are human beings (‘mankind’). Protection is thus both a right to be enjoyed and an obligation to be provided by virtue of our humanity alone.<sup>42</sup> The Quran - decrees an all-embracing

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<sup>34</sup> All rules presented in the Sharia are based on and are the causes of objectives and interests associated with promoting the wellbeing of humankind. From the rules we might then readily understand their causes and apply the same rule to a similar problem where the cause is found to be identical. The cause of forced migration prevalent in the Quran is oppression and persecution requiring sanctuary and succour. Forced migrants today flee persecution and require protection and assistance, thus the analogy or *qiyas* is established. The application used throughout this paper where the Quran and Sunnah is not expressly instructive on forced migration is the analogy of similarities (of both circumstance and need) based on an understanding that a compelling reason for this use of *qiyas* exists and is apparent, not hidden or ambiguous; the subject matter is identical; and the rules established especially on the relevance of *zakat* to assistance, are general, not specific. According to Ahmad ibn Hanbal analogy should only be used when necessary. While anti-analogists claim that the Quran suffices in and of itself to relate to all circumstances directly based on a rigid interpretation of “We have revealed the truth with manifests the truth about all things.” (Q16:89) and other literal interpretations of Quranic verse and Sunnah, the pro-analogist movement at Islamic Law “We have coined these similies for the instruction of men; but none will grasp their meaning except the wise.” (Q29:43) and other, more persuasive in this author’s opinion Quranic and Sunnaic evidence. It should be noted that the principle of preference (*istihsan*) is not relied on here as it is not needed here as this author takes the view that there is nothing in the Sharia contrary to *qiyas*. See Mahmassani, S; (trans. Farhat J. Ziadeh) *The Philosophy of Jursiprudence in Islam (Falsafat Al-Tashri fi Al-Islam, (Leiden: E.J. Brill, 1961), pp.79-83.*

<sup>35</sup> See Ramadan, S; *Islamic Law: Its Scope and Equity, (1970)*; Qadri, A.A; *Islamic Jurisprudence in the Modern World (1986)*; Hallaq, W.B; *A History of Islamic Legal Theories (1997)*; Nyazee, I.A.K; *Theories of Islamic Law*; Nyazee, I.A.K; *Outlines of Islamic Jurisprudence (2000)*. It should be noted that there also exists the opposing legal position in Hanafi jurisprudence.

<sup>36</sup> This view is also contradictory to the overall purpose and objective of the Shariahh, the *maqasid al-Shariahh*, which will be discussed further on.

<sup>37</sup> Q2:185.

<sup>38</sup> Q4:27.

<sup>39</sup> Q2:286.

<sup>40</sup> Q86:1.

<sup>41</sup> Q8:26.

<sup>42</sup> This is not unlike the concept of the right to enjoy human rights and to fulfill, respect and protect human rights as understood at international human rights law.

Islamic protection norm in the repetition of the key phrase “[e]very hardship is followed by ease. Every hardship is followed by ease.”<sup>43</sup> This suggests both a recognition that persecution and oppression (“hardship”) are self evident, human experiences and that a general rule of protection (“ease”) exists in order to alleviate such hardship which each suffer has the right to enjoy. Further, the concept of protection offered in the form of the word “ease” constitutes both a supportive element (for those persons entitled to be protected) and a directive element (towards the whole of humanity who is obliged to do the protecting).

### *An Islamic obligation to provide protection and assistance*

Islamic Law establishes an obligation to provide protection and assistance to persons in need. The Quran, replete with references to the earliest Muslim community and the Jews and Christians (People of the Book) that came before them as “the persecuted people<sup>44</sup> ... oppressed in the land”<sup>45</sup> ... those who have been unjustly driven from their homes<sup>46</sup> ... those that fled their homes or were expelled from them, and those that suffered persecution ...”<sup>47</sup> The oppression suffered by a number of peoples including the Israelites at the hands of the Egyptian Pharaohs<sup>48</sup> is presented both as historical fact and allegory, serving to remind humanity of the profoundly negative effects persecution and forced migration can have on the rights and livelihoods of a given community.

Central to Islamic Law is the principle that all human acts can be categorised into five norms regulated by the Shariah.<sup>49</sup> The Quran expressly indicates that passive protection and assistance by virtue of non-intervention, is a legal obligation. We are told: “You shall not shed your kinsmen’s blood, or turn them out of their dwellings ... Surely their expulsion [is] unlawful”<sup>50</sup> ... Do not devour one another’s property by unjust means ... nor wrongfully and knowingly usurp the possessions of other men<sup>51</sup> ... Great is the guilt of those who oppress their fellow men and conduct themselves with wickedness and injustice in the land. They shall be sternly punished<sup>52</sup> ... [and] ... “Leave her to graze at will in God’s own land, and do not molest her lest an instant scourge should fall upon you.”<sup>53</sup>

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<sup>43</sup> 94:1.

<sup>44</sup> Q7:137.

<sup>45</sup> Q4:97, Q7:127.

<sup>46</sup> Q22:39, Q2:246, Q17:76, Q60:90.

<sup>47</sup> Q3:195.

<sup>48</sup> Q2:49.

<sup>49</sup> In Islamic Law, all actions, including those pertaining to the protection and assistance of forced migrants, are sort into legal injunctions (ahkam) and valued by five categories of assessment which are wajib (obligatory); haram (prohibited), mandub (recommended), makruh (disapproved), and mubah (permissible). For a detailed explanation of these concepts see for example, Hasan, Ahmed; Principles of Islamic Jurisprudence. (1993).

<sup>50</sup> Q2:84.

<sup>51</sup> Q2:188, Q7:85, Q11:45.

<sup>52</sup> Q44:43. See also “Believers, do not enter the dwellings of other men until you have asked their owners’ permission and wished them peace. If you find no one in them, do not go in till you are given leave. If you are refused admission, it is but right that you should go away.” Q24:27 - 28.

<sup>53</sup> Q11:64.

Similarly the Sunnah states that “I heard Al-Bara’ bin ‘Azib saying, “The Prophet orders us to do seven things and prohibited us from doing seven other things.” [Including:] (5) to help the oppressed.”<sup>54</sup> The Prophet Mohammed is also said to, “Help your brother, whether he is an oppressor or he is an oppressed one. People asked, “O God's Apostle! It is all right to help him if he is oppressed, but how should we help him if he is an oppressor?” The Prophet said, “By preventing him from oppressing others.”<sup>55</sup>

The nature of punishment for not obliging protection or assistance is revealed in the verse “... Those who persecute believers, men and women, and never repent shall be rewarded with the scourge of Hell, the scourge of the Conflagration.”<sup>56</sup> The right to punish those who do not protect or assist others is thereby a right of God. Indeed, the Prophet Mohammed thought to have said that, “Whoever usurps the land of somebody unjustly, his neck will be encircled with it down the seven earths (on the Day of Resurrection).”<sup>57</sup>

The obligation to protect and assist forced migrants in Islamic Law is not just negative but also a positive norm. The Quranic verse “... give aid and comfort to each other. If you fail to do [so], there will be disorder in the land and great corruption”<sup>58</sup> suggests that there are worldly implications for not providing protection and assistance actively, which nonetheless probably fall short of worldly punishment in accordance with the ‘right of man’ principle at Islamic Law.<sup>59</sup>

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<sup>54</sup> (See Hadith No. 753, Vol. 7). Narrated by Muawiya bin Suwald, Sahih Al Bukhari, Volume 3, Book 43, Number 625, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at <http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>

<sup>55</sup> Narrated by Anas, Sahih Al-Bukhari, Volume 3, Book 43, Number 624, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at <http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>. According to Sheikh Hamid Al-‘Ali, instructor of Islamic Heritage at the Faculty of Education, Kuwait and Imam of Dahiat As-Sabahiyya Mosque, “It is reported that when the Prophet ... received the wahy or the Divine Revelation ... his wife Khadijah ... said to him: “Fear not, be calm and relax. God will not let you suffer any humiliation, because you are kind to your relatives, you speak the truth, you assist anyone in need, you are hospitable to your guests and you help in every just cause.” The Sunnahh of the Prophet Mohammed thereby places an active obligation on humanity to not only engage in direct activities which protect and assist those suffering persecution, including forced migrants, but also to engage in conduct which enables or builds an environment by which those in positions of authority are less likely to be able to oppress and persecute. Such activities might include awareness raising, training of government officials and advocacy.

<sup>56</sup> Q85:10.

<sup>57</sup> Narrated by Said bin Zaid, Sahih Al-Bukhari, Volume 3, Book 43, Number 632, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at <http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>

<sup>58</sup> Q8:73.

<sup>59</sup> The norm of an obligation to protect at Islamic law is reiterated throughout relevant fatawa. For example, Sheikh Hamid Al-‘Ali notes in a fatwa on the matter that “Islam exhorts people to defend the oppressed, advocate the rights of the weak and rush to the rescue of people whose life is jeopardized,” Al-‘Ali, Hamid and Al-‘Alawani, Taha Jabir; Isma’s Stance on Refugees (Fatwa) 1 January 2006, at [www.islamonline.net](http://www.islamonline.net). While Sheikh Faysal Mawlawi, deputy chairman of the European Council for Fatwa and Research, states in a relevant fatwa that “Islam lends a helping hand to the needy and the oppressed.”

<sup>59</sup> Similarly, in another relevant fatwa, Taha Jaber Al-‘Alawani former president of the Fiqh Council of North America makes reference to the Quranic verse, “The Believers, men and women, are protectors one of another. Q49:71. See Al-‘Ali, Hamid and Al-‘Alawani, Taha Jabir; Isma’s Stance on Refugees (Fatwa) 1 January 2006, at [www.islamonline.net](http://www.islamonline.net). Fatawa (pl) in Islamic Law, is a non-binding advisory

Further Islamic law elevates the standing of those who provide protection and assistance to persons in need, including forced migrants, noting that “[w]homever saves a human life shall be deemed as though he had saved all mankind.”<sup>60</sup> Similarly, The Prophet Mohammed has been noted to have said, “Whoever fulfilled the needs of his brother, God will fulfill his needs; whoever brought his brother out of a discomfort, God will bring him out of the discomforts of the Day of Resurrection, and whoever screened [provided sanctuary to] a Muslim, God will screen [provide sanctuary to] him on the Day of Resurrection.”<sup>61</sup>

This suggests that humanitarian personnel, aid, social and welfare workers enjoy a special legal status at Islamic Law which, given the blanket coverage of circumstances suggestive in these pronouncements, guarantees their safety and security in situations of complex emergency and natural disaster alike. Muslim states and non-state actors alike thereby have an obligation to guarantee the safety, security and unfettered access of those offering protection and assistance.

### *The legal status of forced migrants (Muhajarin)*

“Respect for migrants and those seeking refuge has been a permanent feature of the Islamic faith.”<sup>62</sup> The Quran, is replete with references to the earliest Muslim community and the Jews and Christians (People of the Book) that came before them as “the persecuted people<sup>63</sup> ... oppressed in the land”<sup>64</sup> ... those who have been unjustly driven from their homes<sup>65</sup> ... those that fled their homes or were expelled from them, and those that suffered persecution ...”<sup>66</sup> The oppression suffered by a number of peoples including the Israelites at the hands of the Egyptian Pharaohs<sup>67</sup> is presented as both historical fact and allegory, serving to remind humanity of the

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opinion issued to an individual questioner (be it a person or a State) by a jurisconsult (mufti). The importance of ifta (fatwa giving) to an understanding of matters arising in Islamic law is integral. The historical development of ifta is based on the Quranic verse “When they ask you (yas’alunaka) concerning ... Say ...” forming the basic features of how a fatwa is drafted and presented. Approaches made to the Prophet Mohammed to explain all manner of matters based on a ‘Q&A’ format further established to the ifta concept. The word used in the Quran for legal consultation (futura) based on the root f-t-y which insinuates question and response has been used to develop legal terminology including mufti, mustafti (questioner), ifta (fatwa giving), istifta (request for a fatwa). See Masud, Muhammad Khalid, Messick, Brinkley, and Powers, David; ‘Muftis, Fatwas and Islamic Legal Interpretation’, in Masud, Muhammad Khalid, Messick, Brinkley, and Powers, David (eds.); *Islamic Legal Interpretation: Muftis and their Fatwas*, (Cambridge Mass: Harvard University Press), pp.3-6.

<sup>60</sup> Q5:32.

<sup>61</sup> Narrated by 'Abdullah bin Umar, Sahih Al-Bukhari, Volume 3, Book 43, Number 622, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at <http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>

<sup>62</sup> Organisation of the Islamic Conference; ‘Enhancing Refugee Protection in the Muslim World’, OIC Ministerial Conference on the Problems of Refugees in the Muslim World, Draft: 18 March 2005: Working Document #1, 28-30 November 2005, [www.oic-ioc.org](http://www.oic-ioc.org)

<sup>63</sup> Q7:137.

<sup>64</sup> Q4:97, Q7:127.

<sup>65</sup> Q22:39, Q2:246, Q17:76, Q60:90.

<sup>66</sup> Q3:195.

<sup>67</sup> Q2:49.

profoundly negative effects persecution and forced migration can have on the rights and livelihoods of a given community.<sup>68</sup>

Forced migrants (*muhajarin*) enjoy a special status in Islamic Law. The Quran establishes them as a separate legal grouping, stating “[a]s for ... the *muhajirin* ... God is pleased with them ...”<sup>69</sup> *Shariah* recognizes the specificities of vulnerability associated with forced movement including injury to person, loss of property, and dispossession. God tells us to “[F]avour those who were oppressed in the land,”<sup>70</sup>

As such *muhajarin* form a privileged category enjoying a separate legal status by virtue of their special needs and are entitled to enjoy particularized types of protection and assistance in addition to those rights entitled to all persons.<sup>71</sup> Their existence as a separate legal entity entitled to enjoy those rights generally bestowed upon humanity and additionally, special rights by virtue of their circumstance, appears to elicit legal consensus (*ijma*) amongst contemporary Islamic legal practitioners.<sup>72</sup>

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<sup>68</sup> The recognition enjoyed by forced migrants in Islamic Law is core to current day Organisation of Islamic Conference resolutions on the matter. The OIC, for example, “[c]ondemns all acts of repression against ... refugees ... [and] urges non-member states from which Muslims escape or are driven out because of religious, ethnic or racial oppression, to work for the elimination of the real causes leading to the exodus of these refugees” See RESOLUTION NO. 34/21-P ON THE PROBLEM OF REFUGEES IN THE MUSLIM WORLD at [www.oic-ioc.org](http://www.oic-ioc.org). The Organization, however, falls short of calling upon OIC Member States to end the oppression and persecution of persons hence seeking asylum. Similarly, while the OIC is “[f]ully convinced that the lasting solution of the refugee problem consists in providing favourable conditions for their return to their homelands in safety and dignity,” see Resolutions No.34/21 – P and No. 24/9 - P ON THE PROBLEM OF REFUGEES IN THE MUSLIM WORLD at [www.oic-ioc.org](http://www.oic-ioc.org). It fails to precisely detail what those conditions are nor sets out how Member States and others are obliged to redress such persecution and what practical measures might be taken in this regard.

<sup>69</sup> Q9:100, Q9:117, Q33:7, Q33:27, Q33:31.

<sup>70</sup> Q28:4.

<sup>71</sup> The legal rules that “You shall not shed your kinsmen’s blood, or turn them out of their dwellings ... Surely their expulsion [is] unlawful” at Q2:84 and “... Do not devour one another’s property by unjust means ... nor wrongfully and knowingly usurp the possessions of other men” at Q2:188, Q7:85, and Q11:45, reveals that such acts were occurring at the time and made them unlawful as determined previously.

<sup>72</sup> For example, in a relevant fatwa, Sheikh Faysal Mawlawi, deputy chairman of the European Council for Fatwa and Research states that, “Islam views [forced migrants] as human beings who should be treated with due respect. Their rights, as far as Islam is concerned, ought to be preserved ...” Mawlawi, Sheikh Fasal; Rights of Refugees in Islam (Fatwa), 19 June 2003, at [www.islamonline.net](http://www.islamonline.net). Consensus of opinion (*ijma*) is regarded by the majority of Islamic jurists to constitute the third source of Islamic Law, after the Quran and Sunnah. *I. Ijma* can be achieved by overt expression or silent, thus not commenting on a legal position can be attributed as consensus. Imam Shafi’I, however, disagreed with this view. *Ijma* constitutes “the agreement of the Muslim juriconsults in any particular age on a juridical ruling” which is supported by the Quranic verse, “He that disobeys the Prophet after guidance has been revealed to him and follows a path other than that of the faithful shall be given what he has chosen” (Q4:15) and “Believers, obey God and obey the Apostle and those in authority among you. Should you disagree with anything refer it to God and the Apostle ...” (Q4:59), and “Cling one and all to the faith of God and let nothing divide you.” (Q3:103), “you are the noblest community ever raised up to mankind. You enjoin justice and forbid evil.” (Q3:110); “We have made you a just community, so that you may testify against mankind and that your own Apostle may testify against you.” (Q2:143). See also the ahadith narrated by Ibn Hazm; Munawi Suyuti and Masud as cited in See Mahmassani, S; (trans. Farhat J. Ziadeh) *The Philosophy of Jurisprudence in Islam (Falsafat Al-Tashri fi Al-Islam)*, (Leiden: E.J. Brill, 1961), p.77. It should be noted that Imam Hanbali and Daudal-Zahiri disagreed that

Unlike international law there is no difference in the rights and obligations of and towards the various categories of forced migrants at Islamic Law and thus refugees, internally displaced persons, stateless persons, and forced economic migrants, for example, enjoy the same legal status.<sup>73</sup> Given the lack of international borders existing at the time of the *Shariah's* development this is perhaps not surprising. But more importantly the lack of such a distinction belies the fact that at Islamic Law it is the sovereignty of God – “He who in His hand holds all sovereignty. He has power over all things”<sup>74</sup>, - not the sovereignty of nation states that matters.<sup>75</sup>

### *The special status of vulnerables*

The Quran and the *Sunnah* also recognize the capacity for forced migrants to suffer ‘double jeopardy’ or ancillary vulnerability where the chances of persecution or oppression are stacked against the forced migrant by virtue of their membership to a specific social or minority group.<sup>76</sup> It is no coincidence then that the Quran makes special provision for categories of persons including all women<sup>77</sup>; widows<sup>78</sup> and spinsters<sup>79</sup>; divorced women<sup>80</sup>; all children; orphans<sup>81</sup>; all people with disabilities; people with mental disabilities<sup>82</sup>; and the elderly.<sup>83</sup>

It is well documented that, as with today, such persons suffered greater oppression, persecution and discrimination during the *Jahilaya* (Pre-Islamic Era, literally *The Time of Ignorance*).<sup>84</sup> As with the general rule of protection provided by Islamic Law, such groups have the right to enjoy special protections and humanity has the positive obligation to provide special protection to them on the basis of their increased

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ijma could serve as a source of law where achieved amongst jurists or any epoch. Rather, they contend the only ijma which is legalis that of the Companions of the Prophet Mohammed.

<sup>73</sup> For example, Islamic Law does not privilege the sovereignty of the state over that of internally displaced persons. While IDPs are permitted to continue to enjoy the rights attributed by virtue of their humanity, they are also entitled to enjoy the same rights as, refugees ipso facto as opposed to by analogy.

<sup>74</sup> Q67:1.

<sup>75</sup> For an in depth analysis of the impact of the development of the nation-state concept on Islamic Law see Baderin, Mashood A; ‘The Evolution of the Islamic Law of Nations and the Modern International Order: Universal Peace through Mutuality and Cooperation’, 17 *The American Journal of Islamic Social Sciences*, No.2, pp.57-80.

<sup>76</sup> See for example, Mali, S; ‘Muslim Refugee, Returnees, and Displaced Women: Challenges and Dilemmas, in Afkham, M (ed.); *Faith and Freedom: Women’s Human Rights in the Muslim World* (Syracuse: Syracuse University Press, 1995).

<sup>77</sup> Q4:3 – 4:176, Q33:32 – 58, Q58:2 – 4.

<sup>78</sup> Q2:235, Q2:40.

<sup>79</sup> Q24:60.

<sup>80</sup> Q2:241.

<sup>81</sup> Q4:3, Q17:34.

<sup>82</sup> Q4:5.

<sup>83</sup> Q4:2.

<sup>84</sup> The debate as to the relevance of pre-Islamic law to Islamic Law is well-documented elsewhere. While some jurists believe that ‘the laws of our predecessors are laws unto us’, that is that all laws coming before the Sharia remain operative unless abrogated or supplanted by the Quran and Sunnah. Others, however, argue that the Shariah has supplanted all previously existing laws except what appears in textual form in the Quran and Sunnah. See Mahmassani, S; (trans. Farhat J. Ziadeh) *The Philosophy of Jurisprudence in Islam (Falsafat Al-Tashri fi Al-Islam, (Leiden: E.J. Brill, 1961), pp.91-92.*

vulnerability. In this way, the Quran asks: “how should you not fight for ... the helpless old men, women and children”<sup>85</sup> while simultaneously commanding all of humanity to “...relieve them of their burdens and of the shackles that weigh upon them.”<sup>86</sup>

### ***Shariah modes of protection***

The Quran states that “Your Lord encompasses mankind.”<sup>87</sup> As we have seen the rights enjoyed by forced migrants are therefore first and foremost as a result of their humanity and additionally as a result of their legal status as *muhajarin*. Further, no adverse distinction in protection and assistance can be made which negatively discriminates amongst forced migrants on the basis of race, gender, creed or any other categorisation.<sup>88</sup> Indeed, while the Quran does elevate the status of Muslims, Christians and Jews above polytheists, animists and idolaters, the Quran entreats tolerance towards all beliefs, beseeching humankind to imbibe the maxim “[y]ou have your own religion and I have mine.”<sup>89</sup> Importantly, the Quran also states that “[t]here shall be no compulsion in religion.”<sup>90</sup>

### *Hijra: flight or forced migration*

The Quran details numerous historic acts of seeking refuge and calls upon humanity to “[c]onsider those that fled their homes in their thousands for fear of death”<sup>91</sup> ... how

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<sup>85</sup> Q4:75.

<sup>86</sup> Q7:157.

<sup>87</sup> Q17:60.

<sup>88</sup> The special protection afforded to certain sub-sections of humanity by Islamic Law constitutes positive discrimination.

<sup>89</sup> Q109:6. Relevant fatawa display Islamic legal consensus (ijma) on this matter. For example, according to Sheikh Hamid Al-‘Ali instructor of Islamic Heritage at the Faculty of Education, Kuwait, and Imam of Dahiat As-Sabahiyya Mosque in a relevant fatwa, “... So long as the refugee commits no crime, it is the duty of Muslims to defend him on the basis of justice and showing kindness,” Islam does not make distinction between a Muslim and non-Muslim in this regard ...” Al-‘Ali, Hamid and Al-‘Alawani, Taha Jabir; Isma’s Stance on Refugees (Fatwa) 1 January 2006, at [www.islamonline.net](http://www.islamonline.net)

<sup>90</sup> Q2:256. According to Sheikh Faysal Mawlawi’s fatwa on the issue “[non-Jewish/Christian/Muslim] refugees, as far as Islam is concerned, are granted complete human rights in the same way as Muslims and the People of the Book are treated.” Mawlawi, Sheikh Fasal; Rights of Refugees in Islam (Fatwa), 19 June 2003, at [www.islamonline.net](http://www.islamonline.net) Similarly, in another relevant fatwa, Taha Jaber Al-‘Alawani former president of the Fiqh Council of North America states that “For non-Muslims, God says in Surat Al-Insan: And they feed, for the love of God, the indigent, the orphan, and the captive.” Q76:8. Al-‘Ali, Hamid and Al-‘Alawani, Taha Jabir; Isma’s Stance on Refugees (Fatwa) 1 January 2006. These fatawa are reinforced by Sheikh Faysal Mawlawi, deputy chairman of the European Council for Fatwa and Research, who states in another fatwa that “even if [forced migrants] happen to be non-Muslims ... Islam sees nothing wrong in giving them sadaqah if they are really in need of it ... Islam urges Muslims to treat refugees kindly, irrespective of whether those refugees are Muslims or not ...” Mawlawi, Sheikh Fasal; Rights of Refugees in Islam (Fatwa), 19 June 2003, at [www.islamonline.net](http://www.islamonline.net) Similarly, in his fatwa on the matter, Taha Jaber Al-‘Alawani, insists that “Islam teaches Muslims to host and accommodate grief-stricken Muslims who are forced to leave their home or country; we have to help them rebuild themselves in the new environment. It is part of the Muslim’s duties to help others regardless of whether these refugees are Muslims or non-Muslims.” Al-‘Ali, Hamid and Al-‘Alawani, Taha Jabir; Isma’s Stance on Refugees (Fatwa) 1 January 2006, at [www.islamonline.net](http://www.islamonline.net).

<sup>91</sup> Q2:244.



[they] fled in panic ...”<sup>92</sup> The first example of Muslim *hijra* took place in 615AD with the forced migration of a group of early Muslims, at the behest of the Prophet Mohammed, to the Christian Kingdom of Abyssinia (present day Ethiopia) seeking protection as a result of persecution by the ruling tribe of Mecca, the Quraish. The second and more important instance is that of the Prophet Muhammad’s flight to Medina. The forced migration of the Prophet Mohammed and his Companions and his subsequent seeking of refuge (*istijarak*) in Medina from “injustice in the land ...”<sup>93</sup> - an historical event evidenced through both oral history and archeological artifacts - forms the very foundation of Islamic history.<sup>94</sup>

As with all forced migrants, the forced migration from Mecca to Medina came at great personal loss and sacrifice to the Prophet Mohammed and his companions. The Prophet Mohammed is recorded as having said, “...they turned us out of our land to the land of epidemics ... Make us love Medina as we love Mecca or even more than that. ... Give blessings in our *sa* and our *mudd* (measures symbolizing food) and make the climate of Medina suitable for us, and divert its fever ...” Aisha added: “When we reached Medina, it was the most unhealthy of God's lands, and the valley of Bathan (the valley of Medina) used to flow with impure colored water.”<sup>95</sup> Further, “Addressing the city [Mecca], the Prophet said with tears in [his] eyes: “By God! You are the most pleasant city and the dearest place to me. Had my people not expelled me out of you [to Medina], I would not have lived elsewhere.”<sup>96</sup> This event, marred by oppression and persecution, marks both the beginning of the Islamic calendar

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<sup>92</sup> Q3:153. According to Sheikh Yusuf Al-Qaradawi, the rights of and obligations towards forced migrants are at the heart of Islamic Law and are embodied in no less than the experiences of the Prophets of (Judaism, Christianity and) Islam themselves. As Al-Qaradawi notes, “[m]ost of God’s Messengers, if not all, emigrated. ... Prophet Ibrahim (Abraham) ... emigrated, as related in the Quran: (And Lot believed him, and said: Lo! I am a fugitive unto my Lord). (Q29:26)... Prophet Musa (Moses) ... also emigrated ... He fled from Egypt after he had mistakenly killed an Egyptian (Q28:20-12)... [and] the Hijrah of Prophet Muhammad ... was not only to escape temptation and torture of his people. It was the starting point to establish the Muslim Ummah, a new Muslim community based on Islam, the universal divine message that calls for morality and human rights.” Al-Qaradawi, Yusuf; Did Other Prophets Make Hijrah? (Fatwa), 1 February 2006, at [www.islam-online.net](http://www.islam-online.net).

<sup>93</sup> 46:20.

<sup>94</sup> This act of seeking refuge had a significant impact on the development of Islam as “the Muslims moved from a position of subjugation to a position of control; from a period of developing inner strength to a period of outward expansion; and from a religious community to a religious state.” Yakoob, Nadia, and Mir, Aimen; ‘A Contextual Approach Towards Improving Asylum Law and Practices in the Middle East’, Speech at the Arab Legal Systems in Transition, 2001 Spring Symposium, Center for Contemporary Arab Studies, Edmund A. Walsh School of Foreign Service Georgetown University available at the JURA GENTIUM Centre for Philosophy of International Law and Global Politics at <http://www.tsd.unifi.it/juragentium/en/index.htm?surveys/islam/yakoob.htm>, p.18. According to Sheikh Usamah Al-Khayyat, the Imam of Al-Masjid Al-Haram (the Sacred Mosque) in Mecca, in a fatwa on the matter, “... there are in the life of the Messenger of [God] events that changed the course of human history and left great impacts on the history of mankind. Among these events, the Prophet’s Hijrah ([forced] migration) from Mecca to Medina occupied the highest position, for through this emigration Islam won a decisive victory, started its consolidation, and the disbelievers started suffering defeat and humiliation.” Al-Khayyat, Sheikh Usamah; Hijrah Event: Can It Pass Unnoticed? (Fatwa), 2 February 2006, at [www.islam-online.net](http://www.islam-online.net)

<sup>95</sup> Narrated by 'Aisha, Sahih Al-Bukhari, Volume 3, Book 30, Number 113, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at <http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>.

<sup>96</sup> Al-Khayyat, Sheikh Usamah; Hijrah Event: Can It Pass Unnoticed? (Fatwa), 2 February 2006, at [www.islam-online.net](http://www.islam-online.net)

(622AD) and serves as the nucleus around which orbits the Islamic protection framework proposed here.

*An Islamic right to seek asylum*

A study comparing the historical development of asylum laws the globe over determined that, “[p]erhaps the most generous right to asylum [is] found in the Arab-Islamic tradition.”<sup>97</sup> The right of forced migrants to seek protection in the form of asylum through *hijra* (flight or forced migration) and to enjoy refuge where forced migration occurs is embodied in the Quranic verse where upon the Prophet and his Companions being “... oppressed in the land [of Mecca]...”, God asks “Was not the earth ... spacious enough for you to fly for refuge?”<sup>98</sup> Similarly, the Quran declares that “he that flies his homeland for the cause of God shall find numerous places of refuge in the land and great abundance. He that leaves his dwelling ... shall be rewarded by God.”<sup>99</sup>

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<sup>97</sup> Eduardo; Hoy, Ian; ‘Convention Refugee Definition in the West: Disharmony of Interpretation and Application’, 5 International Journal of Refugee Law 69 (1993), p.69. According to Judge Weeramantry, Locke who is purported to have first spawned ‘Western’ human rights discourse, rarely attended his classes at Oxford University with the exception of his Arabic studies classes where he may have been exposed to “Arabic political theory including the idea of rights that no ruler could take away, subjection of the ruler to the law, and the notion of conditional rule ... When Locke proclaimed his theory of inalienable rights and conditional rulership, this was new to the West but could he have not had some glimmerings of this from his Arabic studies?” See Weeramantry, C.G; Justice without Frontiers: Furthering Human Rights, (1997), vol.1, oo.139-140.

<sup>98</sup> Q4:97.

<sup>99</sup> Q4:99.

There appears to exist a clear right to seek asylum<sup>100</sup> firmly entrenched in the customs and mores of the time which privileged hospitality and the welcoming of strangers. For example, 'Uqba bin 'Amir relates that "We said to the Prophet, "You send us out and it happens that we have to stay with such people as do not entertain us. What do you think about it? He said to us, "If you stay with some people and they entertain you as they should for a guest, accept their hospitality, but if they don't, take the right of the guest from them."<sup>101</sup> The seeking of asylum through *Hijra* is thus a right to be taken. It is also interpreted by some to be an obligation upon Muslims where they suffer religious persecution.<sup>102</sup>

Whether *hijra* is a right to be enjoyed or an obligation to be attended to is based upon the repeated command throughout the Quran for the early Muslim community to flee Mecca for Medina. This command is qualified only by the verse "[a]s for the helpless men, women, and children who have neither the strength nor the means to escape, God may pardon them ..."<sup>103</sup> The expectation to escape Mecca has been extrapolated overtime to suggest that while a right to flee persecution clearly exists, a general obligation to do so also exists at Islamic Law. This is an important distinction in

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<sup>100</sup> At international law, according to UNHCR "[t]he right to seek asylum also implicates the right to asylum itself and the right not to be returned to a place where one's life is threatened. An asylum-seeker can exercise the right to asylum if s/he meets the definition of refugee established by the host state - that is, he or she is recognized as worthy of protection. The right to asylum necessarily encompasses the right not to be returned to a place where one faces persecution or oppression. In certain situations, a State will resettle a recognised refugee in another country free from persecution. Resettlement provides protection for the refugee and also allows a State to exercise some measure of discretion in choosing who can stay within its borders." See Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428, U.N. GAOR, 5th Session, Supplementary No. 20, at 48 (paragraph 8) U.N. Doc. A/1775 (1950). While the right to seek asylum is not restricted, the right to asylum and the right to non-refoulement are subject to the national security and the public interest of the relevant State. Article 1 (f) of the 1951 Refugee Convention details categories of persons that are ipso facto not entitled to protection. These include war criminals and persons who have committed serious non-political crimes prior to seeking asylum. Article 33 (2) of the 1951 Refugee Convention makes it legal for a State to expel or refoule persons that have committed particularly serious crimes in the host country, or persons who constitute a danger to the community, even where the refugee's life or freedom would be threatened if refouled. States have the right, "as a matter of well-established international law and subject to their treaty obligations ... to control the entry, residence and expulsion of aliens."

<sup>100</sup> "Nonetheless, most states recognise some obligation to assist those fleeing persecution and have taken some measures to formalize such an obligation. Many states have chosen to bind themselves internationally, with the 1951 Refugee Convention being the primary instrument and the foundation of modern international refugee law." See Yakoob, Nadia, and Mir, Aimen; 'A Contextual Approach Towards Improving Asylum Law and Practices in the Middle East', Speech at the Arab Legal Systems in Transition, 2001 Spring Symposium, Center for Contemporary Arab Studies, Edmund A. Walsh School of Foreign Service Georgetown University available at the JURA GENTIUM Centre for Philosophy of International Law and Global Politics at:

<http://www.tsd.unifi.it/juragentium/en/index.htm?surveys/islam/yakoob.htm>, p.1.

<sup>101</sup> Narrated 'Uqba bin 'Amir, Sahih Al-Bukhari, Volume 3, Book 43, Number 641, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at:

<http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>

<sup>102</sup> See Yakoob, Nadia, and Mir, Aimen; 'A Contextual Approach Towards Improving Asylum Law and Practices in the Middle East', Speech at the Arab Legal Systems in Transition, 2001 Spring Symposium, Center for Contemporary Arab Studies, Edmund A. Walsh School of Foreign Service Georgetown University available at the JURA GENTIUM Centre for Philosophy of International Law and Global Politics at <http://www.tsd.unifi.it/juragentium/en/index.htm?surveys/islam/yakoob.htm>, p.17.

<sup>103</sup> Q4:98.

Islamic Law, as if an obligation is found it has implications of punishment for Muslims who do not flee persecution.

The assumption of an obligation might be assumed to be supported by a *hadith* in the *Sunan Abu Dawud* which, according to Mu'awiyah, the Prophet Mohammed is thought to have said “*hijra* (forced migration) will not end until repentance ends, and repentance will not end until the sun rises in the west.”<sup>104</sup> This *hadith* has been interpreted to suggest that regardless of temporal or spacial considerations, *hijra* is obligatory. However, rather than placing an obligation upon Muslims to flee persecution this *hadith* might better be interpreted simply as a recognition of the endless nature of persecution and oppression itself which when accepted, rather than placing an eternal obligation on flight, rather places an eternal obligation on humanity to recognise the existence of a right to flee wherever and whenever persecution or oppression arises.

Indeed, the Quranic obligation to flee is constantly made in reference to Mecca, and is clearly temporally situated within the socio-historical events at the time of revelation. Further, according to at least three other *ahadith* as detailed in the *Sahih Al-Bukhari*, the Prophet Mohammed himself had declared that, “There is no *hijra* (forced migration) (from Mecca to Medina) after the Conquest (of Mecca), but *Jihad* (struggle) and good intention remain ...”<sup>105</sup>

According to Sheikh Kutty, “*hijra* is obligatory on Muslims if they are unable to practice their religion in the country they are living in, and if they are facing serious persecutions (*sic*) and find themselves unable to overcome them. In such cases, if they are faced with the choice of renouncing their religion or going to a place where they can readily practice it, they are obligated to emigrate.”<sup>106</sup> While *hijra* is a right to be enjoyed by all persons fleeing all forms of persecution, it is an obligation placed upon Muslims where religious persecution so heinous as to require conversion arises.

Sheikh Hamid Al-'Ali in a relevant *fatwa*, finds that there is no such requirement, rather the enjoyment of the right to seek asylum in all situations of persecution is *mandub* (recommended) rather than obligatory: “... if the refugee is oppressed and prejudiced against in his land and he flees to [an]other place, seeking refuge, it is something very recommended and praiseworthy in Islam, unless it contradicts some agreements between Muslims and other nations or clashes with a general rule of *Shariah*.” This position is further supported by Article IX (a) of *The Universal Islamic*

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<sup>104</sup> Narrated by Mu'awiyah, *Sunan Abu-Dawud*, Book 14 Kitab Al-Jihad, Number 2473, at [www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/abudawud](http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/abudawud).

<sup>105</sup> Narrated by Ibn 'Abbas, *Sahih Al-Bukhari*, Volume 4, Book 52, Number 42, Khan, Muhsin M. (trans.); Translation of *Sahih Bukhari* at:

<http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>. See also “Mujashi (bin Mas'ud) took his brother Mujalid bin Musud to the Prophet and said, "This is Mujalid and he will give a pledge of allegiance to you for migration." The Prophet said, "There is no migration after the Conquest of Mecca, but I will take his pledge of allegiance for Islam.” Narrated by Abu Uthman An-Nahdi, Volume 4, Book 52, Number 312, Khan, Muhsin M. (trans.); Translation of *Sahih Bukhari* at <http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>. According to Sheikh Ahmad Kutty, a senior lecturer and Islamic scholar at the Islamic Institute of Toronto, Canada, in a relevant fatwa, therefore “[t]here is no *hijra* from Mecca to Medina or anywhere else after Mecca surrendered to the laws of Islam.” Kutty, Ahmed; Is Hijrah Still Obligatory? (Fatwa), 10 February 2005 at [www.islamonline.net](http://www.islamonline.net)

<sup>106</sup> Kutty, Ahmed; Is Hijrah Still Obligatory? (Fatwa), 10 February 2005 at [www.islam-online.net](http://www.islam-online.net).

*Declaration of Human Rights (1981)* which states that “[e]very persecuted or oppressed person has the right to seek refuge and asylum. This right is guaranteed to every human being irrespective of race, religion, colour and sex.”

*An Islamic obligation to provide asylum?*

No such reference obliging humanity to provide asylum to forced migrants exists in the *The Universal Islamic Declaration of Human Rights (1981)*, thus although the right to seek asylum is manifest, there is no international agreement amongst Muslim States that the *Shariah* legally obliges them to accept asylum seekers. Yet, according to Arnaout it is not permitted for “the asylum-seeker to be refused access or admission to the territory of the country where he has requested refuge.”<sup>107</sup>

Arnaout relies on customary (*urf*) conventions at the time of the development of the *Shariah* to suggest that the offering of asylum in even pre-Islamic times was exemplary. “Among the peoples of the eastern Mediterranean, especially the Egyptians, the Greeks and the Phoenicians, religious asylum was very widespread and had many of the characteristic features of today’s concept of territorial asylum ... [P]re-Islamic Arabia had practiced the tradition of *Istijara*, a form of territorial asylum ... maintained under Islam but also protected by its laws and its ethical rules”<sup>108</sup>

At the heart of finding an obligation to protect in the form of asylum in Islamic Law is the Quranic verse, “... the men who stayed in their own city ... love those who have sought refuge with them; they do not covet what they are given, but rather prize them above themselves, though they are in want.”<sup>109</sup> Here, we read a declaration which determines that Muslim States and the communities that comprise them should be devoted to protecting forced migrants fleeing oppression and persecution. The language used falls short of explicitly commanding humanity to grant access to all forced migrants fleeing persecution. However, once asylum is granted protection and assistance offered to forced migrants can not be resented, and hosting communities are obliged to privilege the needs of forced migrants above those of their own, even where they themselves are in need of protection and assistance. According to the Prophet Mohammed, “... The reward of one will not decrease the reward of the others.”<sup>110</sup>

Further, the Quran determines that hosting communities should ensure the safety and security of forced migrants by conducting themselves “... with caution and not disclos[ing their] whereabouts there.”<sup>111</sup> According to the Prophet Mohammed, “... the asylum granted by any Muslim is to be secured (respected) by all the other Muslims; and whoever betrays a Muslim in this respect incurs the curse of God, the

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<sup>107</sup> Arnaout, Ghassan Maarouf; *Asylum in the Arab-Islamic Tradition*, 45 (UNHCR, Geneva 1987), p.21.

<sup>108</sup> Arnaout, G.M.; *Asylum in the Arab-Islamic Tradition*, UNHCR/International Institute of Humanitarian Law, Geneva, 1987, pp.11-19.

<sup>109</sup> Q59:9.

<sup>110</sup> Narrated by 'Aisha, *Sahih Al-Bukhari*, Volume 2, Book 24, Number 506.

<sup>111</sup> Q18:20.

angels, and all the people ...”<sup>112</sup> The Prophet Mohammed is also deemed to have said, “A Muslim is a brother of another Muslim, so he should not oppress him, nor should he hand him over to an oppressor.”<sup>113</sup>

### *Aman (safeguard)*

The institution of *aman* (safeguard) is a subset of the concept of asylum in Islamic Law and involves the granting of refuge by a Muslim to a non-Muslim. The Quran states that “[i]f an idolater seeks asylum with you, give him protection ... and then convey him to safety.” *Aman* can be granted to anyone and is not dependent upon the political, civil, social, cultural, religious or economic characteristics of the person fleeing persecution. As Arnaut notes, “even an idolater fleeing persecution in time of war, who takes refuge in the territory of Islam (*Dar al-Islam*)”<sup>114</sup> is entitled to receive *aman*.

According to Sarakhsiy, *aman* is the “practice of refraining from opposing [belligerents] through killing or capturing, for the sake of God.”<sup>115</sup> The *Quran* requires securing the *mustamin* (those seeking safety), from any immediate threat and later returning them, but only to an alternative place of safety. The Islamic institution of *aman* has been used throughout Islamic history to provide protection to forced migrants throughout the Muslim World.<sup>116</sup>

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<sup>112</sup> Narrated 'Ali, Sahih Al-Bukhari, Volume 3, Book 30, Number 94, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at <http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>

<sup>113</sup> Narrated by 'Abdullah bin Umar, Sahih Al-Bukhari, Volume 3, Book 43, Number 622, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at :

<http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>. In a relevant fatwa, therefore, Sheikh Faysal Mawlawi determines that “Muslim countries who are keen on applying the Shariah should not hand over asylum seekers to their countries if those asylum seekers are likely to face prejudice and oppression in their homelands.” Mawlawi, Sheikh Fasal; Rights of Refugees in Islam (Fatwa), 19 June 2003, at [www.islamonline.net](http://www.islamonline.net) According to the Organisation of Islamic Council, “[t]he Islamic tradition therefore recognizes in its own precepts the principle of non-refoulement which represents the cornerstone of modern-day international refugee law.” Organisation of the Islamic Conference; ‘Enhancing Refugee Protection in the Muslim World’, OIC Ministerial Conference on the Problems of Refugees in the Muslim World, Draft: 18 March 2005: Working Document #1, 28-30 November 2005, [www.oic-ioc.org](http://www.oic-ioc.org).

<sup>114</sup> Arnaut, G.M.; Asylum in the Arab-Islamic Tradition, UNHCR/International Institute of Humanitarian Law, Geneva, 1987, pp.11-19.

<sup>115</sup> See Sarakhsiy; Sharh Al-Siyar Al-Kabir, as quoted in Hamidullah, Muhammad; Muslim Conduct of State (1987), p.209.

<sup>116</sup> Yacoob and Aimen. Go on to explain, “Aman could be granted by any sane and mature Muslim, male or female, including the poor, sick, blind, and, according to some jurists, even by slaves, and the grant would be binding upon the entire state. The grant could be official (ie the result of a peace treaty or general amnesty) or private. The grant could be the result of an individual request from a non-Muslim, or it could be given without request. Acceptance of a request for *aman* could be inferred from any sign of assent, even if non-verbal. A grant of *aman* entitled the *mustamin* to move safely in or through Muslim territory. While in Muslim territory, the *mustamin* was subject to the civil and criminal laws of the territory; he could, however, also avail himself of the judicial system. Commission of certain crimes could result in revocation of the grant. A grant of *aman* is theoretically temporary, with the time limits and other conditions established at the time of the grant. Permanent residency could only be established by accepting Islam or by accepting *dhimma* status, wherein a scriptuary could secure permanent residence in Muslim territory in return for paying the *jizya* polltax. The rights and obligations of *dhimmi*s differed from those of Muslims in several ways. For example, *dhimmi*s had to pay the *jizya* and sometimes a land tax, the *kharaj*; Muslims did not. Muslims had to pay alms, or *zakat*;

*Aman* is an extension of the pre-Islamic (*Jahilaya*) practice of *ijara*, a form of tribal hospitality ensuring the safety and security of foreigners whilst traveling.<sup>117</sup> Subsequently, the institution of *aman* was expanded to mean granting safe conduct, or protection generally for the purposes of trade or travel in Muslim territory. Among the few Islamic jurists who have written on the matter, there is legal consensus (*ijma*) that while the term is used extensively to mediate *jihad* activities, little differentiation exists in application between the rules of *aman* as a granting of clemency to belligerent opponents, and as a granting of safety to non-Muslim forced migrants in need of refuge.<sup>118</sup>

### *Sanctuary and safe havens*

The Islamic Law notion of material sanctuary is most manifest in the form of the *Ka'bah* (Sacred Mosque in Mecca). The Quran gives the *Ka'bah* an “eternal value for mankind”<sup>119</sup> and refers to it as a safe haven or zone of peace where the persecuted and oppressed may seek refuge. The Quran declares that God has “... given them a sanctuary of safety [at the *Ka'bah*], while all around them men are carried off by force ...”<sup>120</sup> Further, the *Quran* states that God “made the House [the *Ka'bah*] a resort and a sanctuary for mankind ...”<sup>121</sup> and “whoever enters it is safe.”<sup>122</sup> God will punish persons in the hereafter that “... have debarred persons from the Sacred Mosque [the *Ka'bah*], although they have no right to be its guardians.”<sup>123</sup>

The Prophet Mohammad was debarred from the *Ka'bah* by “the unbelievers” before his forced migration to Medina<sup>124</sup> and upon his return he was implored by God to “enter the Sacred Mosque secure and fearless”.<sup>125</sup> According to Yacoob and Aimen, once gaining access to the *Ka'bah*, “... every person is deemed safe, even those who have committed a crime, until they emerge from the sanctuary.”<sup>126</sup> No fighting is

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dhimmi did not. Fighting in *jihad* was a communal obligation for Muslims; dhimmis were not required to engage in fighting for any reason.”

<sup>117</sup> Arnaout, pp.14-16.

<sup>118</sup> See Hamidullah, pp.209-211 and p.256-258 and Khadduri, Majid; War and Peace in the Law of Islam (1955), pp.162-69.

<sup>119</sup> Q5:96.

<sup>120</sup> Q29:67.

<sup>121</sup> Q2:125.

<sup>122</sup> Q3:97.

<sup>123</sup> Q8:34. The Quran, however, seems to make some distinction with regard to idolators. At Q9:27 the Quran says “[l]et them [idolators] not approach the Sacred Mosque after this year is ended” thereby appearing to place some temporal limits on access to the sanctuary. It is not however clear as to whether an idolator managing to gain sanctuary after that time but in need of assistance would be turned away. Given the overriding objective and purpose of the Shar'ia, which includes showing justice, kindness and charity to those in need, and the customs at the time of the revelation which privileged hospitality and asylum for all it is unlikely that even idolators in need of protection and/or assistance could ever be turned away.

<sup>124</sup> Q48:25.

<sup>125</sup> Q48:27.

<sup>126</sup> See Yacoob, Nadia, and Mir, Aimen; ‘A Contextual Approach Towards Improving Asylum Law and Practices in the Middle East’, Speech at the Arab Legal Systems in Transition, 2001 Spring Symposium, Center for Contemporary Arab Studies, Edmund A. Walsh School of Foreign Service Georgetown University available at the JURA GENTIUM Centre for Philosophy of International Law and Global Politics at <http://www.tsd.unifi.it/juragentium/en/index.htm?surveys/islam/yakoob.htm>, p.15.

allowed inside the precincts of the *Ka'bah*, unless the sanctuary itself is attacked<sup>127</sup> and its impartial and protective qualities are also revealed in the fact that armistices were declared and treaties were negotiated on its premises between warring parties.<sup>128</sup>

The Prophet Muhammad also identified the city of Medina as a sanctuary in which he sought refuge upon his forced migration from Mecca.<sup>129</sup> The Prophet is recorded as having said "I was ordered to migrate to a town ... called Yathrib and that is Medina<sup>130</sup> ... [t]he terror ... will not enter Medina<sup>131</sup> ... Medina is a sanctuary<sup>132</sup> ... a sanctuary from that place to that."<sup>133</sup>

In a *hadith* narrated by Abu Huraira the Prophet is thought to have said "I have made Medina a sanctuary between its two mountains (*Harrat*)." The Prophet went to the tribe of Bani Haritha and said, "I see that you have gone out of the sanctuary," but looking around, he added, "No, you are inside the sanctuary."<sup>134</sup> The Prophet Mohammed thus actively promoted the use of Medina as a material sanctuary providing protection from harm to the earliest Muslim communities discouraging the *muhajarin* from leaving its safe grounds. Indeed, according to Abu Huraira also, "If I saw deer grazing in Medina, I would not chase them, for God's Apostle said, "(Medina) is a sanctuary between its two mountains."<sup>135</sup> This suggests at Islamic Law, an expansive approach to the concept of material sanctuary which in this fable-like reiteration provides protection not only to humanity but to all living beings and thereby metaphorically emphasising the gravity with which such sanctuary associated. Similarly, Sad tells us that "I heard the Prophet saying, "None plots against the people

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127 "... do not fight them within the Holy Mosque unless they attack you there." Q2:191.

128 See Q9:7, "... you have made treaties at the Sacred Mosque."

129 The Prophet Mohammed also compared the relative sanctuary of Medina to other locations in the expanding Muslim world of the day stating that "Yemen will be conquered and some people will migrate (from Medina) and will urge their families, and those who will obey them to migrate (to Yemen) although Medina will be better for them; if they but knew. Sham will also be conquered and some people will migrate (from Medina) and will urge their families and those who will obey them, to migrate (to Sham) although Medina will be better for them; if they but knew. 'Iraq will be conquered and some people will migrate (from Medina) and will urge their families and those who will obey them to migrate (to 'Iraq) although Medina will be better for them; if they but knew." Narrated by Abu Zuhair, Sahih Al Bukhari, Volume 3, Book 30, Number 99, Translation of Sahih Bukhari at <http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>

130 Narrated Abu Huraira, Sahih Al-Bukhari, Volume 3, Book 30, Number 95, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at:

<http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>

131 Narrated by Abu Bakra, Sahih Al-Bukhari, Volume 3, Book 30, Number 103, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at:

<http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>

132 Narrated 'Ali, Sahih Al-Bukhari, Volume 3, Book 30, Number 94, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at <http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>

133 Narrated by Anas, Sahih Al-Bukhari, Volume 3, Book 30, Number 91, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at <http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>

134 Narrated by Abu Huraira, Sahih Al-Bukhari, Volume 3, Book 30, Number 93, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at:

<http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>

135 Narrated by Abu Huraira, Sahih Al-Bukhari, Volume 3, Book 30, Number 97, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at:

<http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>



of Medina but that he will be dissolved (destroyed) like the salt is dissolved in water.”<sup>136</sup>

In the Quran, the *Ka’bah* is referred to as “... a blessed site, a beacon for the nations ... Whoever enters it is safe.”<sup>137</sup> The Islamic Law concept of the *Ka’bah* embodying ‘a beacon for all nations’ implies here that Muslim States and others should be guided by the material sanctuary provided at the *Ka’abah* in perpetuity - in accordance with its “eternal value”.<sup>138</sup> Such protection was also provided to the *muhajarin* in Medina for more than 10 years that is, beyond the Prophet’s death in 632AD.<sup>139</sup>

### *Zakat and Sadaqa: almsgiving and charity*

Providing assistance to forced migrants is a key component of the Islamic protection framework, not least because the provision of basic needs and social services, can guarantee rights to water, food, adequate housing, education and health. A rights-based approach to protection in its universal sense interprets assistance as a function or core component of protection, rather than as an independent mode of succor. In Islamic Law, the systems of *zakat* and *sadaqa* are the primary mode by which such assistance is legally guaranteed and delivered in the form of aid, welfare, charity and social services to all communities in need, including forced migrants.<sup>140</sup>

*Zakat*<sup>141</sup> is spent for the cause of God in order to curb accumulation of material wealth by humankind and encourage a sense of fraternity in which sacrifice for the common

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136 Narrated by Sad, Sahih Al-Bukhari, Volume 3, Book 30, Number 101, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at <http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>

137 Q3:97.

138 Q5:97.

139 Islam’s eventual victory over Mecca in 630AD saw the return of the Prophet Mohammed and many of his forced migrant companions from Medina, establishing the Ka’abah as the religious centre of the fledgling Islamic Empire. Such Quranic references suggest that an Islamic protection regime of forced migration which provides for material sanctuary is both legally and theologically at the very heart of the Muslim world. Something which is recognised by Article IX (b) of The Universal Islamic Declaration of Human Rights (1981) which states that “Al Masjid Al Haram (the sacred house of God) in Mecca is a sanctuary for all Muslims.” Muslim States keen to provide protection and assistance to forced migrants in accordance with the Shariah could thus replicate or model such protective manifestations in their own lands by designating sanctuaries, safe havens, zones of peace and ‘corridors of tranquility’ which provide refuge for forced migrants including refugees and IDPs.

140 An overview of the awqaf system and its implications for protecting forced migrants is beyond the scope of this paper. However, it should be noted that “According to Taha Jaber Al-‘Alawani “The awqaf or the endowments’ system in different parts of the Ummah includes refugees as part of the beneficiaries from that waqf.” See Al-‘Ali, Hamid and Al-‘Alawani, Taha Jabir; Isma’s Stance on Refugees (Fatwa) 1 January 2006, at [www.islamonline.net](http://www.islamonline.net). For a thorough understanding of this concept see Chapra, M; ‘The Islamic Welfare State and its Role in the Economy’, in Ahmed, K (ed); *Studies in Islamic Economics* (Leicester: Islamic Foundation, 1980).

141 “Zakat is paid on the surplus of wealth which is left over after the passage of a year. It is thus a payment on the accumulated wealth. Leaving aside animals and agricultural yield, zakat is paid at almost a uniform rate of two and a half %. The minimum standard of surplus wealth over which zakat is charged is known as Nisab. It differs with different kinds of property, the most important being 200 dirhams or 521 tolas (nearly 21 oz.) In case of silver, and 20 mithqals or 71 tolas (nearly 3 oz.) in case of gold. The nisab of cash is the same as that of gold and silver.” See Siddiqui, Abdul Hamid (trans.); Introduction to Translation of Sahih Muslim, Book 5, Sahih Muslim, Kitab Al-Zakat at <http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/muslim/smtintro.html>

good is paramount.<sup>142</sup> There are a multitude of Quranic references to *zakat* and *sadaqa*. Humanity is commanded to “Be charitable; God loves the charitable”<sup>143</sup> ... Paradise you shall inherit by your good deeds<sup>144</sup> ... Render the alms levy<sup>145</sup>... [and] vie with each other in charitable works. This is supreme virtue.”<sup>146</sup>

*Zakat* is more than simply a tax aimed at a fairer distribution of wealth, first and foremost it is an act of spiritual and religious devotion which also happens to have significant social and economic benefit. *Zakat* is not voluntary or an act of charity in the sense of giving of one’s own free will. Rather, *zakat* is an obligatory religious duty which each and every Muslim is required to fulfill and for which they will be rewarded in the Hereafter. The Prophet Mohammed said, “Every Muslim has to give in charity.’ The people asked, ‘O God’s Prophet! If someone has nothing to give, what will he do?’ He said, ‘He should work with his hands and benefit himself and also give in charity (from what he earns). ‘The people further asked, ‘If he cannot find even that?’ He replied, ‘He should help the needy who appeal for help.’ Then the people asked, ‘If he cannot do that?’ He replied, ‘Then he should perform good deeds and keep away from evil deeds and this will be regarded as charitable deeds.’”<sup>147</sup>

While the religious obligation for Muslims to give is express at Islamic Law, the reward for giving is not limited to Muslims alone. In a *hadith* narrated by Hakim bin Hazim, it is evident that all persons, regardless of their religion will be rewarded by God for good deeds done: “I said to God’s Apostle, “Before embracing Islam I used to do good deeds like giving in charity, slave-manumitting, and the keeping of good relations with Kith and kin. Shall I be rewarded for those deeds?” The Prophet replied, “You became Muslim with all those good deeds (Without losing their reward).”<sup>148</sup>

While the Quran provides a list of the Islamic Law recipients of *zakat* - “Alms shall be only for the poor and the destitute; for those that are engaged in the management of alms and those whose hearts are sympathetic to the Faith; for the freeing of slaves and debtors; for the advancement of God’s cause; and for the traveler in need,”<sup>149</sup> *sadaqa*

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142 For a thorough analysis of the concepts of *zakat* and *sadaqa* in Islam see Al-Qaradawi, Y; *Economic Security in Islam* (New Delhi: Islamic Book Service, 1992). See also McChesney, R; *Charity and Philanthropy in Islam: Institutionalising the Call to Do Good*, (Indianapolis: Indiana University Center for Philanthropy, 1995).

143 Q2:195, Q5:93, Q63:10, Q3:16, Q64:16.

144 Q43:73.

145 Q2:43, Q2:83, Q2:111, Q4:162, Q9:75, Q18:31, Q19:54, Q22:41, Q22:78, Q24:56, Q17:18, Q58:12, Q73:20, Q2:254.

146 Q35:32.

<sup>147</sup> Narrated by Abu Burda, *Sahih Al-Bukhari*, Volume 2, Book 24, Number 524, Khan, Muhsin M. (trans.); Translation of *Sahih Bukhari* at:

<http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>. As this *hadith* attests, giving in Islamic Law is not limited only to the giving of wealth in its crudest sense. The Prophet Mohammed said, “An honest Muslim store-keeper who carries out the orders of his master and pays fully what he has been ordered to give with a good heart and pays to that person to whom he was ordered to pay, is regarded as one of the two charitable persons.” Narrated by Abu Musa, *Sahih Al Bukhari*, Volume 2, Book 24, Number 519, Khan, Muhsin M. (trans.); Translation of *Sahih Bukhari* at <http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>.

148 Narrated by Hakim bin Hizam, *Sahih Al-Bukhari*, Volume 2, Book 24, Number 517, Khan, Muhsin M. (trans.); Translation of *Sahih Bukhari* at:

<http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>

149 Q9:60, Q4:36.

recipients appear to be limited only to the need demonstrated on a case-by-case basis. Humanity is encouraged to focus on those most vulnerable and most in need - “Show kindness to your parents, to your kinsfolk, to the orphans, and to the destitute ... and to the traveler in need.”<sup>150</sup> The Prophet Mohammed said, “Free the captives, feed the hungry and pay a visit to the sick.”<sup>151</sup> However, the Islamic Law obligation to provide succour to humanity appears to be in disregard of the relative morality, cultural mores, or social values of the given person in need.<sup>152</sup>

As for specific assistance to forced migrants, Islamic Law called upon the earliest Muslim communities at war to ensure “[a] share of the spoils shall also fall to the poor among the *muhajirin* who have been driven from their homes and their possessions ...”<sup>153</sup> and the Quran stipulates that forced migrants seeking sanctuary shall receive assistance by the rights of God: “As for those who after persecution fled their homes ... bearing ills with patience ... We will provide them with a good abode in their life<sup>154</sup> ... have We not given them sanctuary of safety to which fruits of every kind are brought as a provision from Ourselves?”<sup>155</sup>

The assistance provided by God to forced migrants, however, is to be replicated by humankind which as we have seen is obliged to provide to the ‘destitute’ and ‘traveler in need’, including forced migrants. This expectation has cultural roots in hospitality mores of the time. For example, the Quran when relating the story of Moses’ forced migration from Egypt, chastises communities unwilling to assist during his flight - “They traveled on until they came to a city. They asked its people for some food, but they declined to receive them as guests.”<sup>156</sup> Such lack of generosity is forbidden in Islamic Law. According to the Prophet Mohammed, “Help and recommend [the beggars and destitute] and you will receive the reward for it<sup>157</sup> ... Every day two

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150 Q2:83., Q2:215, Q4:36, Q8:41, Q17:27, Q30:38, Q42:22, Q59:7, Q89:20, Q92:2, Q93:5 – 11, Q107:1, Q74:32, Q76:6, Q69:34, Q70:22, Q2:177 Q24:22.

<sup>151</sup> Narrated Abu Musa, Sahih Al-Bukhari, Volume 4, Book 52, Number 282, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at:

<http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>

<sup>152</sup> As such Muslims have an obligation to assist any person requiring their help. This norm is best illustrated in a hadith narrated by Abu Huraira, whereby the Prophet Mohammad is believed to have said A man said that he would give something in charity. He went out with his object of charity and unknowingly gave it to a thief. Next morning the people said that he had given his object of charity to a thief. (On hearing that) he said, ‘O God! All the praises are for you. I will give alms again.’ And so he again went out with his alms and (unknowingly) gave it to an adulteress. Next morning the people said that he had given his alms to an adulteress last night. The man said, ‘O God! All the praises are for you. (I gave my alms) to an adulteress. I will give alms again.’ So he went out with his alms again and (unknowingly) gave it to a rich person. (The people) next morning said that he had given his alms to a wealthy person. He said, ‘O God! All the praises are for you. (I had given alms) to a thief, to an adulteress and to a wealthy man.’ Then someone came and said to him, ‘The alms which you gave to the thief, might make him abstain from stealing, and that given to the adulteress might make her abstain from illegal sexual intercourse (adultery), and that given to the wealthy man might make him take a lesson from it and spend his wealth which God has given him, in God’s cause.’ Narrated by Abu Huraira, Sahih Al-Bukhari, Volume 2, Book 24, Number 502, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at <http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>

<sup>153</sup> Q59:8.

<sup>154</sup> Q16:42, Q16:110, Q22:57.

<sup>155</sup> Q28:56.

<sup>156</sup> Q18:76.

<sup>157</sup> Narrated by Abu Burda bin Abu Musa, Sahih Al-Bukhari, Volume 2, Book 24, Number 512, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at:

<http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>

angels come down from Heaven and one of them says, ‘O God! Compensate every person who spends in Your Cause,’ and the other (angel) says, ‘O God! Destroy every miser.’”<sup>158</sup> The obligation to assist is a right of God and punishable in the Hereafter. Indeed, while “[b]lessed is the reward of those that do good works”<sup>159</sup> those who fail to assist, according to the Prophet Mohammed will need to “[s]ave [themselves] from Hell-fire ...”<sup>160</sup>

Nothing is too small to give in assistance and the Quran makes this explicit, requiring as little as ‘What you can spare’<sup>161</sup> ... [e]ach sum ... be it small or large ... shall be noted down.”<sup>162</sup> The relative wealth of a person is of no consequence - “... give alms alike in prosperity and in adversity ...”<sup>163</sup> – and the *Sunnahh* of the Prophet Mohammed supports this – “When the verses of charity were revealed, we used to work as porters. A man came and distributed objects of charity in abundance. And they (the people) said, “He is showing off.” And another man came and gave a *sa* (a small measure of food grains); they said, “God is not in need of this small amount of charity.” And then the Divine Inspiration came: “[Do not criticize those] of the believers who give in charity voluntarily and those who could not find to give in

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158 Narrated by Abu Huraira, Sahih Al Bukhari, Volume 2, Book 24, Number 522, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at: <http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>

159 Q3:136, Q2:263.

<sup>160</sup> Narrated by 'Adi bin Hatim, Sahih al-Bukhari, Volume 2, Book 24, Number 498, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at:

<http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>. According to Muslim, “there is no burden of obligation on one who receives zakat, but a sense of thankfulness and gratitude on the part of the giver, since he has been enabled by the recipient to discharge his obligation that he owes to God and society.” See Siddiqui, Abdul Hamid (trans.); Introduction to Translation of Sahih Muslim, Book 5, Sahih Muslim, Kitab Al-Zakat at:

<http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/muslim/smtintro.html> The Quran stipulates that those giving assistance “... feed ... for God’s sake only; [and] seek ... neither recompense nor thanks ...” (Q76:7) This Islamic Law norm is best illustrated in a hadith related by Um ‘Atiyya which is repeated in several ahadith collections by various narrators – “A sheep was sent to me (Nusaiba Al-Ansariya) (in charity) and I sent some of it to ‘Aisha. The Prophet asked ‘Aisha for something to eat. ‘Aisha replied that there was nothing except what Nusaiba Al-Ansariya had sent of that sheep. The Prophet said to her, “Bring it as it has reached its place.” Narrated by Um 'Atiyya, Sahih Al-Bukhari, Volume 2, Book 24, Number 525, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at <http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari> This hadith shows that the receipt of almsgiving and charity are without expectation. Similarly, that which is given can not be taken back – The Prophet Mohammed said, “Do not take back what you have given in charity.” (See Narrated by 'Abdullah bin 'Umar, Sahih Al-Bukhari, Volume 2, Book 24, Number 566, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at <http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>) - and must be given in kindness - “... do not follow ... almsgiving with taunts and insults ...” ... A kind word with forgiveness is better than charity followed by insult.” Q2:263 and Q2:264. In the giving of alms and charity no form of public recognition should be sort. While the Quran requires Muslims to “... give to the cause in private and in public ...” (Q35:30). and that “[t]hose that give alms in night and in day, in private and in public, shall be rewarded ...” (Q2:274) we are told that “[t]o be charitable in public is good, but to give alms to the poor in private is better ...” (Q2:71 – 72) The importance of this verse is supported by a hadith narrated by Abu Huraira in which the Prophet Mohammad is reported as having said: “Seven people will be shaded by God under His shade on the day when there will be no shade except His.” [including] ... a person who practices charity so secretly that his left hand does not know what his right hand has given.” Narrated by Abu Huraira, Sahih Al-Bukhari, Volume 2, Book 24, Number 504, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at: <http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>.

161 Q2:220.

162 Q9:121.

163 Q3:133.

charity except what is available to them.”<sup>164</sup> The only limitation in this regard is that what is given in assistance must be of some worth to the recipient - “Give in alms ... not worthless things which you yourselves would but reluctantly accept.”<sup>165</sup>

Importantly, self-sufficiency and self-help characterise assistance in Islamic Law, including for forced migrants. While the *Shariah* expects humanity to “... feed the uncomplaining beggar ...”<sup>166</sup> [and] shar[e our] goods with the beggars and the deprived ...”<sup>167</sup> the Sunnah of the Prophet Mohammed provides important instruction on how such assistance should be negotiated. Firstly, the expectation of self-sufficiency takes primary over seeking and receiving assistance - “... whoever abstains from asking others for financial help, God will give him and save him from asking others, God will make him self-sufficient.”<sup>168</sup>

Secondly, the status of the person who engages in self-help activities is privileged over those who become welfare dependent - “By Him in Whose Hand my life is, it is better for anyone of you to take a rope and cut the wood (from the forest) and carry it over his back and sell it (as a means of earning his living) rather than to ask a person for something and that person may give him or not.”<sup>169</sup> Thirdly, begging is strongly discouraged - “The poor person is not the one who goes round the people and ask them for a mouthful or two (of meals) or a date or two but the poor is that who has not enough (money) to satisfy his needs and whose condition is not known to others, that others may give him something in charity, and who does not beg of people.”<sup>170</sup>

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164 Narrated by Abu Masud, Sahih Al-Bukhari, Volume 2, Book 24, Number 496, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at :

<http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>

165 Q2:267.

166 Q22:36.

167 Q53:22.

168 Narrated by Hakim bin Hizam, Sahih Al-Bukhari, Volume 2, Book 24, Number 508, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at:

<http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>

169 Narrated by Abu Huraira, Sahih Al-Bukhari, Volume 2, Book 24, Number 549, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at:

<http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>

170 Narrated by Abu Huraira, Sahih Al-Bukhari, Volume 2, Book 24, Number 557, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at:

<http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>. Basic rules on the management of assistance to people in need, including forced migrants, is aparent at Islamic Law. This is evident in a number of ahadith on the matter. The following norms apply: (1) The timely delivery of assistance in order to meet the needs of the beneficiary community is recommended: “Once the Prophet offered the 'Asr prayer and then hurriedly went to his house and returned immediately. I (or somebody else) asked him (as to what was the matter) and he said, "I left at home a piece of gold which was from the charity and I disliked to let it remain a night in my house, so I got it distributed.”; Narrated by 'Uqba bin Al-Harith, Volume 2, Book 24, Number 510, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at <http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>. (2) Accountability and transparency is recommended: “God’s Apostle appointed a man called Ibn Al-Lutbiya, from the tribe of Al-Asd to collect Zakat from Bani Sulaim. When he returned, (after collecting the Zakat) the Prophet checked the account with him (Narrated by Abu Humaid Al-Sa’idi, Sahih Al-Bukhari, Volume 2, Book 24, Number 576, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at <http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>) ... I saw the Prophet and he had an instrument for branding in his hands and was branding the camels of Zakat.”; (Narrated by Anas bin Malik, Sahih Al-Bukhari, Volume 2, Book 24, Number 578, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at <http://www.usc.edu/dept/MSA/fundamentals/hadithSunnahh/bukhari>) and (3) Misappropriation of goods, services and funds is prohibited: “Al-Hasan bin ‘Ali took a date from the

## ***Fiqh* modes of protection**

Protection of and assistance to forced migrants is part and parcel of the temporal laws regulating *mu'amalat* (inter-human relations) which are divinely contrived and humanly interpreted in the interests of promoting *ma'ruf* (the common good of humanity). This area of the law is seen to be ever developing,<sup>171</sup> unlike, for example, the laws which govern matters of *ibadat* (religious observance and acts of worship) which are seen to be fully reconciled. According to Baderin, in interpreting rules of *mu'amalat*, including the protection of and assistance of forced migrants, "research shows that the earliest Islamic jurists had utilized the methods of Islamic law within the scope of the *Sharia* in an evolutionary and constructive manner that prevented any unwarranted circumscription upon humans living during their times."<sup>172</sup>

The lack of specific references to forced migration appears to suggest that the dynamism of human existence has accelerated beyond what is available in traditional *fiqh* and thereby something of a lacunae exists which has required a recent 'rediscovery' of relevant norms in *Shariah* sources.<sup>173</sup> This is not unlike the process which took place from the 1960s onwards in terms of the legal development of Islamic law as it embodies human rights norms more generally.<sup>174</sup> This process was somewhat stunted by *taqlid* (legal conformism) based on the erroneous understanding that *ijtihad* (interpretation)<sup>175</sup> was 'dead'.<sup>176</sup> However, many have since accepted that

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dates given in charity and put it in his mouth. The Prophet said, "Expel it from your mouth. Don't you know that we do not eat a thing which is given in charity?" (Narrated by Abu Huraira, Sahih Al-Bukhari, Volume 2, Book 24, Number 568, Khan, Muhsin M. (trans.); Translation of Sahih Bukhari at <http://www.usc.edu/dept/MSA/fundamentals/hadithSunnah/bukhari>).

<sup>171</sup> Contrary to the stereotype commonly held by both Muslims and non-Muslims, legal verdicts in Islam are subject to adaptability. Moreover, the Islamic legal system is mutable and dynamic. However, change merely for the sake of change or for expediency is simply unacceptable." Moghul, Umar F; 'Approximating certainty in ratiocination: how to ascertain the 'illah (effective cause) in the Islamic legal system and how to determine the ratio decidendi in the Anglo-American common law', at <http://www.failaka.com/Library/Articles/Islamic%20Legal%20System%20-%20illah.pdf>, p.2 and John Makdisi, 'Legal Logic and Equity in Islamic Law', 33 American Journal of Comparative Law, 63, (1985).

<sup>172</sup> See Baderin, Mashood A; International Human Rights and Islamic Law, (Oxford: Oxford University Press, 2005), p.40.

<sup>173</sup> See Elmadmad, K.; 'An Arab Convention on Forced Migration: Desirability and Possibilities,' 3 International Journal of Refugee Law 461, 1991, pp.467-74. According to Qadri, "the jurists are emphatic in saying that though God has given us a revelation He also gave us brains to understand it; and He did not intend to be understood without careful consideration and prolonged study." See Qadri, A.A; Islamic Jurisprudence in the Modern World (1986), p.199.

<sup>174</sup> As Baderin observes, "The need to rejuvenate the methods of Islamic law to generate a more encompassing and realist jurisprudence to meet contemporary challenges became evident from the nineteenth century with the intimate interaction between the East and the West [not least of all due to colonization]. That urge continues today." See Baderin, Mashood A; International Human Rights and Islamic Law, (Oxford: Oxford University Press, 2005), p.40.

<sup>175</sup> "The expending of effort in seeking and arriving at rules from the various sources of law." The growth of the *Sharia* depended upon the use of *ijtihad* and it should be remembered that while Islamic jurisprudence flourished during its application, this was to end only as a result of oppression arising with the invasion of Iraq by Hulagu Khan in the mid-1300sAD. It was upon this event, fearing the oppression of the occupiers upon the fall of Baghdad that Islamic jurists reached consensus to 'close the doors' on *ijtihad* out of fear of persecution. The fact that the doors closed due to fear makes the criticisms by Orientalists of a floundering, 'backwardness' of Islamic jurisprudence particularly cruel, and attempts to revive the use of interpretation by reformists such as Abduh and Rida (in response to colonialism) in the 1900s (AD) all the more explicable. See Mahmassani, S; (trans. Farhat J. Ziadeh)

a serious reappraisal of the *Sharia* and any early views held by Islamic jurists would prove prudent if the Muslim world was to be able to successfully develop and progress on its own terms.<sup>177</sup>

### *Maqasid al-Shariah and Ma'ruf*

Al-Shatabi's (Maliki school of jurisprudence) theory of utilising the object and purpose of the *Shariah* when determining *Shariah* norms is worthy of consideration when determining the protection and assistance secured by forced migrants at Islamic Law. The principle of *maqasid al-Shariah* holds that the main objective of the *Sharia* is to promote human welfare and prevent harm (*maslahah*).<sup>178</sup> This holistic approach provides a secure mantle in which an Islamic protection framework could confidently reside. Indeed, according to Hallaq, "the original intention of God in revealing the law was to protect the interests of man (both mundane and religious)."<sup>179</sup> Given that there is no literal references to the "protection and assistance" of forced migrants in the *Sharia*, it is legitimate to inquire about such precise matters and make interpretations about how existing norms pertaining to the treatment of *muhajarin* might be extrapolated to cover current day forced migration events.<sup>180</sup>

The Quranic verse stating that God has "... ordained a law (*shir'ah*) and assigned a path (*minhaj*) for each of you"<sup>181</sup> supports this theory, the path being the approach (purpose and objective) of how to interpret all norms presented in the *Sharia*. For example, the overarching and consistent message presented throughout the Quran is that human beings should enjoin "justice ... charity, kindness and peace among

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The Philosophy of Jurisprudence in Islam (Falsafat Al-Tashri fi Al-Islam, (Leiden: E.J. Brill, 1961), pp.93.

176 Taqlid (legal conformitism) has been interpreted by Nyazee to be a method that ensures judges not qualified to do so are able to rely on precedents set down by mujtahids (independent jurists). See Nyazee, I.A.K (trans.) The Distinguished Jurist's Primer (Bidayat al-Mujtahid wa Nihayat al-Muqasid) by Ibn Rushd, (2000), vol.1, pxxxv.

177 See for example, Kerr, M; Islamic Reform: The Political and Legal Theories of Muhammad 'Abduh and Rashid Rida, (1966); Donohue, J.J and Esposito, J.L (eds); Islam in Transition: Muslim Perspectives (1982), Hallaq, W.B; 'Crisis of Modernity: Towards a New Theory of Law, A History of Islamic Legal Theories, (Cambridge: Cambridge University Press), pp.207 – 254; and Zubaiba, Sami; 'The Age of Reform: The Etatization of Law', Law and Power in the Islamic World, (New York: IB Tauria), pp.121-157.

178 See Hallaq, W.B; A History of Islamic Legal Theories (1997), p.180 – 187; Masud, M.K.; Shatibi's Philosophy of Islamic Law, (1995), p.151.

179 Hallaq, W.B; A History of Islamic Legal Theories (1997), p.181.

180 Although the public interests associated with protecting and assisting force migrants are frequently referred to in the *Sharia*, as detailed in the previous sections, there are still specific areas such as freedom of movement, right of return, durable solutions, resettlement, reintegration, and the establishment of regional Islamic court system ensuring the enforcement of Muslim State obligations towards forced migrants that could be developed with the use of this principle. This is doable given that forced migration is: (1) an issue of inter-human transactions and not literally related to religious observance (simplistically put, hijra unlike hajj is not a pillar of Islam); (2) the protection and assistance to forced migrants is in harmony with the letter and spirit of the *Sharia*; and (3) the benefit of protection and assistance is not a luxury but a necessity resulting in the protection of life, religion, kin and property. Although the majority of legal jurists have rejected this concept as a principle of Islamic Law, esteemed jurists such as Imam Al-Hanbali and Imam Al-Shafi'i have accepted it. Al-Shafi'i referred to the concept as seeking the better (*istislah*). See Mahmassani, S; (trans. Farhat J. Ziadeh) The Philosophy of Jurisprudence in Islam (Falsafat Al-Tashri fi Al-Islam, (Leiden: E.J. Brill, 1961), p.88.

181 Q5:48.

men<sup>182</sup> ... do what is right<sup>183</sup> ... [h]elp one another<sup>184</sup> ... [and] do good works.”<sup>185</sup> According to Sheikh Hamid Al-‘Ali instructor of Islamic Heritage at the Faculty of Education, Kuwait, and Imam of Dahiat As-Sabahiyya Mosque relates that “...God enjoins justice and kindness, and giving to kinsfolk ...”<sup>186</sup> Thus the maqasid al-Shariah of the Sharia includes upholding the protection of and providing assistance to all humankind, including forced migrants in the interests of promoting *ma'ruf* - the common good of humanity.

The *Sharia* deals with historic events, including as we shall see below those pertaining to forced migration. According to Ramadan, the norms of the *Sharia* are thus intentionally presented as responses to specific instances in order to exclude presupposition and thereby open the way to interpretation, including with the use of *qiyas* (analogy)<sup>187</sup> and *takhayyur* (eclectic choice) which allow for the broad prescription of legal opinions from a variety of schools of jurisprudence.<sup>188</sup>

As such, the Islamic maxim, ‘the blessing of the Muslim community lies in the jurists’ differences of opinion’ (*Rahmah al-Ummah fi Ikhtilaf al-A’immah*) shows that a

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182 Q4:114, Q2:195, Q5:93, Q63:10, Q3:16, Q64:16.

183 Q7:142, Q2:237.

184 Q5:3.

185 Q2:112, Q3:115, Q3:136, Q4:37, Q4:124, Q5:9, Q7:42, Q10:4, Q10:8, Q10:26, Q11:11, Q11:22, Q13:29, Q18:4, Q18:30, Q18:88, Q22:14, Q22:23, Q22:51, Q22:56, Q22:75, Q23:50, Q23:97, Q26:227, Q27:89, Q28:55, Q28:80, Q29:7, Q29:9, Q29:59, Q30:45, Q32:19, Q34:4, Q37:113, Q38:28, Q39:10, Q40:40, Q45:31, Q46:16, Q52:22.

186 Q16:10. See Al-‘Ali, Hamid and Al-‘Alawani, Taha Jabir; Isma’s Stance on Refugees (Fatwa) 1 January 2006, at [www.islamonline.net](http://www.islamonline.net).

187 The frequent need for the use of *qiyas* when developing an understanding of all manner of inter-human relations including forced migration in the Sharia is justified in the Quran itself. We are told that “God speaks in metaphors to men ... We have given mankind in this Quran in all manner of parables ... Some of its verses are precise in meaning – they are the foundations of the Book – and others are ambiguous ... Will they not ponder on the Quran? If it had not come from God, they could have surely found in it many contradictions ... If all the trees of the earth were pens, and the seas were ink, the words of God could not be finished still.” See Q24:35, Q19:27, Q3:7, Q4:82, and Q31:27.

188 See Coulson, N.J.; *Conflicts and Tensions in Islamic Jurisprudence* (1969), pp.20-39. The four schools of Sunni Islamic jurisprudence that exist until today are the Hanafi school (Turkey, Syria, Lebanon, Jordan, Pakistan, Afghanistan, Iraq, and Libya); Shafi’i school (southern Egypt, southern Arabia, East Africa, Indonesia, and Malaysia); Hanbali school (Saudi Arabia and Qatar); and Maliki school (North Africa, West Africa, and Kuwait). The main Shi’ite schools of Islamic jurisprudence are the Ithna ‘Ashari (the Twelvers) (Iran and southern Iraq); and the Zaydi school (Yemen); the Ismaili school (India) and the Ibadi school (Oman and parts of North Africa). These schools have practice *taqlid* (legal conformism) since the 13th century ‘closing of the gate’, or the end of *ijtihad* (independent legal reasoning) when it was assumed that the use of *ra’y* (legal opinion) and its consequential *qiyas* ... was no longer required as legal materials were all but fully formed. As Baderin notes, “While legal conformism (*taqlid*) is not in itself an undesirable practice, it must be distinguished from blind conservatism that does not allow for a reflective and contextual application of classical precedents.” (p.39) While some argue that this led to a stagnation of legal development, others argue that the ‘closing of the gate’ never really occurred. Even if legal reasoning was subsumed at that time into the main schools of Islamic jurisprudence the act of deciphering the law from the original sources and commentaries is still an act of human intellect and thus, it may be argued, never truly free of analysis and reasoning. See Makdasi, G.; *The Rise of Colleges: Institutions of Learning in Islam and the West*, (1981), p.2 for more information on Islamic schools of jurisprudence. Baderin, Mashood, A; *International Human Rights and Islamic Law*, (Oxford: Oxford University Press, 2005), p.39 on *taqlid*; and Iqbal, M.; *The Reconstruction of Religious Thought in Islam*, (1951), p. 148 and Hallaq, W.B; ‘Was the Gate on *Ijtihad* Closed?’ in Hallaq, W.B (ed); *Law and Legal Theory in Classical and Medieval Islam*, (1995), pp.3-41 for alternative opinions on *ijtihad*.



wide scope of legal interpretations - a 'diversity within unity'<sup>189</sup> - exists from which Islamic jurists may choose to develop an Islamic protection framework for forced migrants only limited by the most compassionate and merciful interpretation of Islamic Law sources as demanded by the principles of *Maqasid al-Shariah and Ma'ruf*. As such, as Sheikh Hamid Al-'Ali argues, "[a]nother basis for defending the rights of the refugee is that Islam is a religion of justice and kindness. ... So long as the refugee commits no crime, it is the duty of Muslims to defend him on the basis of justice and showing kindness."<sup>190</sup>

#### *Maslahah (al-'ummah weh shakhsiyyah)*

The *maslahah* (promotion of benefit or welfare and prevention of harm to the Muslim community and individuals alike) doctrine is the work of Imam Malik the namesake of the Maliki school of jurisprudence. The doctrine was expanded by Al-Ghazali and Al-Tufi of the Shafi'i and Hanbali schools respectively. Al-Shatibi further developed the principle to meet ever changing circumstance in a way that attends to the universality and certainty of Islamic Law.<sup>191</sup> *Maslahah* is understood by many of today's Islamic jurists to contain "the seeds of the future of the Sharia and its viability as a living force in society."<sup>192</sup> In the Maliki application of the term, the benefit is seen to refer to public welfare or public benefit (*maslahah mursalah*) implying the benefit of the Muslim community (*maslahah al-ummah*).

However, according to Baderin, "the utilization of *maslahah* to achieve collective/communal benefit or welfare does not necessarily preclude its broader application to protect the rights and welfare of individuals."<sup>193</sup> And thus Baderin asserts the concept also includes *maslahah shakhsiyyah* – the benefit or welfare of the individual in the interests of protecting their human rights, including the rights of forced migrants. Kamali is of the opinion that "[t]he doctrine of *maslahah* (benefit or welfare) is broad enough to encompass within its fold a variety of objectives, both idealist and pragmatic, to nurture the standards of good government and to help develop the much needed public confidence in the authority of statutory legislation in Muslim societies. The doctrine of *maslahah* can strike balance between the highly idealistic levels of expectation from the government on the part of the public and the efforts of the latter to identify more meaningfully with Islam."<sup>194</sup>

Al-Shatibi's expose of the doctrine of *maslahah* relates it to the *maqasid al-Sharia* and develops a three tier approach to an understanding of how the doctrine should apply in practice to the negotiation of inter-human relations, including as they relate to the protection of and assistance to refugees and IDPs. The highest level of benefits

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189 Kamali, H.M; Principles in Islamic Jurisprudence, 1991, p.169 and Hallaq, W.B.; A History of Islamic Legal Theory, 1997, p.202. See also Afshari, R; 'An Essay on Islamic Cultural Relativism in the Discourse of Human Rights', 16 Human Rights Quarterly, 1994, p.271.

190 Al-'Ali, Hamid and Al-'Alawani, Taha Jabir; Isma's Stance on Refugees (Fatwa) 1 January 2006, at [www.islamonline.net](http://www.islamonline.net)

191 Masud, M.K.; Shatibi's Philosophy of Islamic Law, (1995), p.viii.

192 Kamali, Kamali, M.H; 'Have We Neglected the Sharia Law Doctrine of Maslahah?', 27 Islamic Studies, No.4, 1988, p.288.

193 Baderin, Mashood A.; International Human Rights and Islamic Law, (Oxford: Oxford University Press, 2005), p.43.

194 See Kamali, M.H; 'Have We Neglected the Sharia Law Doctrine of Maslahah?', 27 Islamic Studies, No.4, 1988, pp.287-288.

are those pertaining to the protection of life, religion, intellect, family, and property. These benefits, all of which are typically systematically abused as a result of forced migration, must not only be promoted but protected at Islamic Law.<sup>195</sup> The second tier are necessary benefits (*hajiyyat*) which make life tolerable but if neglected will cause hardship to life. These ‘benefits’ will not lead to the collapse of society if upheld. The third tier pertains to those benefits that improve life (*tahsiniyyat*) and therefore compliment the purpose and objective of the Sharia. All such ‘benefits’ have relevance in situations of forced displacement and migration and as such might readily be drawn upon to better protect refugees and IDPs in Muslim States.

### *The justificatory principle*

At Islamic Law, State and political authorities have a responsibility to both the human beings they are required to protect and assist and to God to ensure that the rights and obligations prescribed in the *Sharia* are not violated without justification. This is self-evident in the fact that in the *Quran* almost every prohibition pertaining to the regulation of inter-human relations (*mu’amalat*) is accompanied by a justifying clause. As Ramadan states, “[t]he door is wide-open to the adoption of anything of utility, of whatever origin, so long as it does not go against the texts of the *Quran* and the *Sunnah*.”<sup>196</sup>

Muslim States seeking to apply the Islamic Law justificatory clause when seeking to restrict the protection of and assistance to forced migrants, should closely consider the principle of permissibility which ensures that Islam does not ‘paralyze people’, rather humankind is “... repeatedly called upon by the Quran to consider the whole universe as a Divine grace meant for him[/her], and to exhaust all his[/her] means of wisdom and energy to get the best out of it.”<sup>197</sup> Indeed, the Quran stipulates that God will “... enjoin righteousness upon them and forbid them to do evil. He will make good things lawful to them and prohibit all that is foul. He will relieve them of their shackles that weigh upon them”<sup>198</sup> and “God enjoins justice, kindness and charity to one’s kindred [humanity], and forbids indecency, reprehensible conduct and oppression.”<sup>199</sup>

Thus, each rule may be interpreted both in light of social change and hence the principle of *tadrij* (gradualism) which sees the gradual upgrading of legislation in response to societal needs which is also grounded in the Quran which ‘even in the field of prohibition, ... [is] sometimes used [as] a method which could gradually meet the growing readiness in the society where the revealed enjoinders were to be implemented.’<sup>200</sup> In this way, justification to, for example, limit protection and assistance to forced migrants, can be undertaken by Muslim States in accordance with the maxim ‘*tatagayyar al-akham bi tagayur al-zaman*’ (legal rulings may change with the change of time) and *darurah* (necessity) - “All that the *Quran* and the *Sunnah*

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195 Kamali has equated these ‘benefits’ with fundamental rights found in Islam. See Kamali, M.H; ‘Fundamental Rights of the Individual: An Analysis of Haqq (Rights) in Islamic Law, 10 American Journal of Islamic Social Sciences, No.3, 1993, p.362.

196 Ramadan, S; *Islamic Law: Its Scope and Equity*, (1970), pp.64-73.

<sup>197</sup> Ramadan, S; *Islamic Law: Its Scope and Equity*, (1970), pp.64-73.

<sup>198</sup> Q7:157.

<sup>199</sup> Q16:90.

<sup>200</sup> Ramadan, S; *Islamic Law: Its Scope and Equity*, (1970), pp.64-73.

have prohibited becomes permissible whenever a pressing necessity arises.”<sup>201</sup> - but only to the extent that any such justification upholds the principles of *Maqasid al-Shariah* (purpose and objective of the *Sharia*), *ma'ruf* (the common good of humanity) and *maslahah* (the promotion of welfare and prevention of harm).<sup>202</sup>

Muslim States seeking to implement the justificatory principle should be cautious to ensure they readily attend to the words contained in the Quran and Sunnah<sup>203</sup> which according to Ramadan, ‘spring from the very conception of legality.’<sup>204</sup> Quranic guidance is provided as much for individuals as it is for Muslim States which are required to acknowledge that “[t]his book is revealed by God, the Mighty One, the All Knowing<sup>205</sup> ... This book is not to be doubted. It is a guide for the righteous”<sup>206</sup> ... This is surely revealed by the Lord of the Universe.”<sup>207</sup> ... [God] makes plain His revelations to mankind, so that they may take heed”<sup>208</sup> ... In this Quran We have set forth all manner of arguments<sup>209</sup> ... This is a discerning utterance, no flippant jest<sup>210</sup> ... “This is a declaration to mankind: a guide<sup>211</sup> and an admonition ...”<sup>212</sup> and act accordingly. States should also thus be mindful to abide by Sunnaic prescripts given that God says “Whatever the Apostle gives you, accept it; and whatever he forbids you, forbear from it”<sup>213</sup> ... Obey God and the Apostle.<sup>214</sup> ... There is good example in God’s Apostle ...”<sup>215</sup>

In applying the Sunnah of the Prophet Muslim States may only limit the application of traditions based on their relative authenticity and a determination of the extent to which they make the protection of and assistance to forced migrants obligatory. This must also be determined according to the context and language used in the case of each *hadith*.<sup>216</sup> Applying the justificatory principle within the limits of the *Sharia* will better ensure than Muslim States “[h]elp ... in what is good and pious, not what is wicked and sinful”<sup>217</sup>

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<sup>201</sup> Ramadan, S; *Islamic Law: Its Scope and Equity*, (1970), pp.64-73.

<sup>202</sup> Al-Ghunaimi, M.T; *The Muslim Conception of International Law and the Western Approach*, (1968), p.101.

<sup>203</sup> Where a Quranic verse and the Sunnah appear to contradict each other, the general rule is that the Quran prevails. See Kamali, M.H; ‘Law and Society: The Interplay of Revelation and Reason in the Shariah’, in Esposito, J.L; *The Oxford History of Islam* (1999), p.59.

<sup>204</sup> Ramadan, S; *Islamic Law: Its Scope and Equity*, (1970); pp.42-43.

<sup>205</sup> Q45:2.

<sup>206</sup> Q2:2.

<sup>207</sup> Q26:192.

<sup>208</sup> Q2:221.

<sup>209</sup> Q30:59.

<sup>210</sup> Q86:11.

<sup>211</sup> Q2:97.

<sup>212</sup> Q3:339.

<sup>213</sup> Q59:7.

<sup>214</sup> Q3:31.

<sup>215</sup> Q33:21.

<sup>216</sup> See Baderin, Mashood, A; *International Human Rights Law and Islamic Law*, (Oxford: Oxford University Press, 2005), pp.36-37.

<sup>217</sup> Q5:2.

## Conclusion

The "... notion of asylum received little attention, if any at all, for the major part of Muslim history."<sup>218</sup> With the sometimes contradictory yet ever increasing shift towards the privileging of human rights over state sovereignty at international law;<sup>219</sup> the greater international emphasis on providing protection in 'regions of origin';<sup>220</sup> an ever increasing unwillingness on the part of developed countries to grant asylum; and the climate of fear created by the 'war on terror'<sup>221</sup> resuscitating, furthering and advocating for the application of Islamic norms in tandem with international legal protections is throughout the Muslim world is, at this time, crucial.

The existence of Islamic Law protection and assistance mechanisms are little known to Islamic scholars, let alone Muslim States, the international humanitarian community, host communities, and forced migrants themselves. Enhanced domestic protection and assistance mechanisms which acknowledge Islamic Law obligations, raise the awareness of all relevant target audiences as to Islamic modes of protection and their systematic application in situations of forced migration are needed at this time.

Muslim States should work closely with UNHCR through the OIC to establish an expansive Islamic Protection Framework, the beginnings of which are provided here. National Human Rights Commissions should be empowered to monitor and report on the application of Islamic Law protection and assistance currently afforded to forced migrants and ensure that any such future application takes place in a way that both conforms with and informs international protection regimes.

The OIC should take the lead in ensuring *A Declaration on the Protection of Forced Migrants in Muslim States* is drafted and a Regional Islamic Court (RIC) (*Mazalim*) is established to enforce its application. National legislation must confirm to any such Declaration and where national court systems are unable to call abuses of Islamic rights to account, the RIC should be empowered by Muslim States through the OIC to hear such cases.

Local mediation, arbitration and conciliation mechanisms throughout the Muslim World such as *jirgas* and other tribal councils should be monitored by Muslim States

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<sup>218</sup> See Yakoob, Nadia, and Mir, Aimen; 'A Contextual Approach Towards Improving Asylum Law and Practices in the Middle East', Speech at the Arab Legal Systems in Transition, 2001 Spring Symposium, Center for Contemporary Arab Studies, Edmund A. Walsh School of Foreign Service Georgetown University available at the JURA GENTIUM Centre for Philosophy of International Law and Global Politics at <http://www.tsd.unifi.it/juragentium/en/index.htm?surveys/islam/yakoob.htm>, p.1.

<sup>219</sup> Sohn, L.B; 'The New International Law: Protection of the Rights of Individuals Rather than States', 32 American University Law Journal, 1982, pp.1-64.

<sup>220</sup> According to Goodwin-Gill, "The local connection – physical presence – can not be denied but the necessary solution for those so present – nonrefoulement plus – has to be linked to a strengthening of regional options." See Goodwin-Gill, Guy S.; 'International Law and the Influx of Aliens: Sanctuary and the Right to Exclude', 80, American Society of International Legal Procedures, 96, (1986), p.96.

<sup>221</sup> As UNHCR notes, "[t]he post-11 September 2001 global 'war on terror' has introduced a new dynamic into a number of conflicts and refugee crises around the world particularly where it has been used to justify new or intensified military offensives in Aceh, Afghanistan, Chechnya (Russian Federation), Georgia, Iraq, Pakistan and Palestine. People forcibly displaced by these conflicts have faced closed borders, extremely hostile and insecure conditions in exile and/or accelerated or involuntary returns due to 'anti-terror' measures in asylum states." UNHCR; State of the World's Refugees, 19 April 2006, at [www.unhcr.org](http://www.unhcr.org).

and the international humanitarian community alike. There must be a collective effort to ensure that the procedures and decisions of such bodies conform with Islamic modes of protection and assistance for forced migrants.

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 *Sharia* as a cause for the abuse of the rights and livelihoods of forced migrants must end.

The duplicitous use of the *Sharia* by many Muslim States and others for the purposes of perpetrating, legitimizing and condoning human rights violations and abuses against forced migrants is cause for great concern. At all times, the application of the *Sharia* must be approached in accordance with the spirit of 'justice, kindness and charity' which God through the *Quran* has called for and the Prophet Mohammed (PBUH) through his actions, sayings and demeanor upheld throughout his life at all times.

TABLE 1: Forced Migrants in the Muslim World

Organisation of Islamic Conference Member State	Number of Persons Currently Seeking Refuge in another State <sup>222</sup>	Number of Internally Displaced Persons <sup>223</sup>	Number of Refugees Currently Hosted <sup>224</sup>	Number of Asylum Seekers <sup>225</sup>	State Party to Refugee Convention (1951)	State Party to Optional Protocol (1967)	OIC Joining Date
Islamic State of <b>AFGHANISTAN</b>	2,085,522	153,000 <sup>226</sup>	30	29	-	-	1969
Republic of <b>ALBANIA</b>	10,470	Unknown	51	36	1992	1992	1992
People's Democratic Republic of <b>ALGERIA</b>	10,691	1,000,000 <sup>227</sup>	169,048	6	1963	1967	1969
Republic of <b>AZERBAIJAN</b>	250,581	558,387 <sup>228</sup>	8,606	1,231	1993	1993	1992
Kingdom of <b>BAHRAIN</b>	52	-	-	6	-	-	1972
People's Republic of <b>BANGLADESH</b>	5,731	500,000 <sup>229</sup>	20,449	10	-	-	1974
Republic of <b>BENIN</b>	309	Unknown	4,802	1,053	1962	1970	1983
<b>BRUNEI-DARUSSALAM</b>	1	Unknown	-	-	-	-	1984
<b>BURKINA-FASO</b> (formerly Upper Volta)	582	Unknown	492	518	1980	1980	1974
Republic of <b>CAMEROON</b>	7,629	Unknown	58,861	6,123	1961	1967	1974
Republic of <b>CHAD</b>	52,663	65,000 <sup>230</sup>	259,880	-	1981	1981	1969
Union of <b>Comoros</b>	50	Unknown	-	-	-	-	1976
Republic of <b>Cote d'Ivoire</b>	23,655	700,000 <sup>231</sup>	72,088	2,111	1961	1970	2001
Republic of <b>DJIBOUTI</b>	495	-	18,035	-	1977	1977	1978
Arab Republic of <b>EGYPT</b>	5,376	Unknown	90,343	8,752	1981	1981	1969
Republic of <b>GABON</b>	53	Unknown	13,787	4,839	1964	1973	1974
Republic of The <b>GAMBIA</b>	684	Unknown	7,343	602	1966	1967	1974
Republic of <b>GUINEA</b>	4,782	82,000 <sup>232</sup>	139,252	6,317	1965	1968	1969
Republic of <b>GUINEA-BISSAU</b>	1,018	Unknown	7,836	141	1976	1976	1974
Republic of <b>GUYANA</b>	194	Unknown	-	-	-	-	1998
Republic of <b>INDONESIA</b>	27,919	300,000 <sup>233</sup>	169	59	-	-	1969
Islamic Republic of <b>IRAN</b>	115,149	Unknown	1,045,976	48	1976	1976	1969
Republic of <b>IRAQ</b>	311,878	1,300,000 <sup>234</sup>	46,053	1,353	-	-	1975
Hashemite Kingdom of <b>JORDAN</b>	1,169	Unknown	1,100	12,456	-	-	1969
Republic of <b>KAZAKHSTAN</b>	6,121	Unknown	15,844	9	1999	1999	1995
State of <b>KUWAIT</b>	398	-	1,519	157	-	-	1969
<b>KYRGHYZ</b> Republic	3,292	Unknown	3,753	453	1996	1996	1992

<sup>222</sup> United Nations Office of the High Commissioner for Refugees, 17 April 2006, (as of 1 January 2005) at [www.unhcr.org](http://www.unhcr.org).

<sup>223</sup> Internal Displacement Monitoring Centre (as of 24 July 2006) at [www.globalidproject.org](http://www.globalidproject.org).

<sup>224</sup> United Nations Office of the High Commissioner for Refugees, 17 April 2006, (as of 1 January 2005) at [www.unhcr.org](http://www.unhcr.org).

<sup>225</sup> United Nations Office of the High Commissioner for Refugees, 17 April 2006, (as of 1 January 2005) at [www.unhcr.org](http://www.unhcr.org).

<sup>226</sup> United Nations Office of the High Commissioner for Refugees, September 2005.

<sup>227</sup> European Union, 2002.

<sup>228</sup> Norwegian Refugee Council, December 2005.

<sup>229</sup> Norwegian Refugee Council, 2002.

<sup>230</sup> United Nations, March 2006.

<sup>231</sup> United Nations Humanitarian Coordinator, 27 April 2006.

<sup>232</sup> Norwegian Refugee Council, April 2002.

<sup>233</sup> Internal Displacement Monitoring Centre, July 2006.

<sup>234</sup> United Nations Assistance Mission for Iraq, June 2006 based on a 2001 UNHABITAT survey.

Republic of <b>LEBANON</b>	19,866	1,100,000 <sup>235</sup>	1,753	681	-	-	1969
Socialist People's <b>LIBYAN ARAB JAMAHIRIYA</b>	1,720	Unknown	12,166	200	-	-	1969
<b>MALAYSIA</b>	292	Unknown	24,905	10,322	-	-	1969
Republic of <b>MALDIVES</b>	3	-	-	-	-	-	1976
Republic of <b>MALI</b>	483	Unknown	11,256	1,085	1973	1973	1969
Islamic Republic of <b>MAURITANIA</b>	31,131	Unknown	473	117	1987	1987	1969
Kingdom of <b>MOROCCO</b>	1,319	Unknown	2,121	177	1956	1971	1969
Republic of <b>MOZAMBIQUE</b>	104	Unknown	623	4,892	1983	1989	1994
Republic of <b>NIGER</b>	689	Unknown	344	41	1961	1970	1969
Federal Republic of <b>NIGERIA</b>	23,890	Unknown	8,395	1,086	1967	1968	1986
Sultanate of <b>OMAN</b>	18	-	7	24	-	-	1972
Islamic Republic of <b>PAKISTAN</b>	25,949	20,000 <sup>236</sup>	960,617	8,157	-	-	1969
State of <b>PALESTINE</b> (Occupied Palestinian Territory)	350,617	57,000 <sup>237</sup>	N/A	N/A	N/A	N/A	1969
State of <b>QATAR</b>	18	-	46	24	-	-	1972
Kingdom of <b>SAUDI ARABIA</b>	214	-	240,552	170	-	-	1969
Republic of <b>SENEGAL</b>	8,332	64,000 <sup>238</sup>	20,804	2,412	1963	1967	1969
Republic of <b>SIERRA LEONE</b>	41,801	Unknown	65,437	138	1981	1981	1972
Republic of <b>SOMALIA</b>	389,314	400,000 <sup>239</sup>	357	334	1978	1978	1969
Republic of <b>SUDAN</b>	730,650	5,355,000 <sup>240</sup>	141,588	4,271	1974	1974	1969
Republic of <b>SURINAME</b>	51	Unknown	-	-	1978	1978	1996
<b>SYRIAN</b> Arab Republic	21,439	305,000 <sup>241</sup>	15,604	785	-	-	1972
Republic of <b>TAJIKISTAN</b>	56,780	Unknown	3,306	458	1993	1993	1992
Republic of <b>TOGO</b>	10,819	3,000 <sup>242</sup>	11,285	390	1962	1969	1997
Republic of <b>TUNISIA</b>	2,518	-	90	12	1957	1968	1969
Republic of <b>TURKEY</b>	174,574	1,000,000 <sup>243</sup>	3,033	3,929	1962	1968	1969
<b>TURKMENISTAN</b>	812	Unknown	13,253	3	1998	1998	1992
Republic of <b>UGANDA</b>	31,963	2,000,000 <sup>244</sup>	250,482	1,809	1976	1976	1974
State of the <b>UNITED ARAB EMIRATES</b>	71	-	105	52	-	-	1972
Republic of <b>UZBEKISTAN</b>	7,288	3,400 <sup>245</sup>	44,455	477	-	-	1996
Republic of <b>YEMEN</b>	1,606	-	66,384	39	1980	1980	1969
<b>TOTALS</b>	<b>4,860,795</b>	<b>14,965,787</b>	<b>3,884,758</b>	<b>88,394</b>	<b>35 State Parties</b>	<b>35 State Parties</b>	<b>57 State Parties</b>

<sup>235</sup> This figure is a combination of the up to 600,000 IDPs displaced during the Lebanese Civil War and the 500,000 displaced as a result of Israeli incursions from 12 July 2006.

<sup>236</sup> According to IDMC, this “[e]stimate relates to Balochistan and does not include an unknown number of people displaced in Waziristan.

<sup>237</sup> Cumulative estimate since 1967. United Nations Relief and Works Agency current estimate at 21,142 based on receive house demolitions by the Government of Israel, including the Israeli Defense Forces.

<sup>238</sup> International Organisation for Migration, June 2003.

<sup>239</sup> United Nations Office for the Coordination of Humanitarian Affairs, August 2005.

<sup>240</sup> Internal Displacement Monitoring Centre from various sources, August 2005.

<sup>241</sup> Norwegian Refugee Council, October 2004.

<sup>242</sup> United Nations Office for the Coordination of Humanitarian Affairs, October 2005.

<sup>243</sup> Non-Governmental Organisations, August 2005. Government of Turkey estimate at 355,807 as of August 2005 which according to IDMC, “only includes persons evacuated by security forces”.

<sup>244</sup> United Nations Office for the Coordination of Humanitarian Affairs, May 2005.

<sup>245</sup> International Federation of the Red Cross, June 2003.

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