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The Legality Of "War" In Al-Shari'a  
Al-Islamiya (The Islamic Law) And  
Contemporary International Law

Comparative Study

By

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A Thesis For The Ph, D, Degree

In

Public International Law

To Be Presented To

The University of Glasgow

Department of Public International Law,  
Faculty of Law

(OCTOBER) 1987

TO THE MEMORY OF MY MOTHER  
WITH PROFOUND ESTEEM AND LOVE

THE "LEGALITY OF "WAR" IN AL-SHARI'A  
AL-ISLAMIYA (THE ISLAMIC LAW) AND  
INTERNATIONAL LAW

COMPARATIVE STUDY

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## Acknowledgement

I wish to express my sincere appreciation and gratitude to Dr. Anthony Carty, Professor of Public International Law, at the Faculty of Law, Glasgow University, who supervised this thesis and made it possible for me to commence and continue my research work to meet its final goal by his continuous concern and encouragement.

Sincere appreciation and gratitude should also be extended to Mr. J.P. Grant, Professor of Public International Law and the Dean of the Faculty of Law, Glasgow University, who was generous enough to give me a great deal of his time to discuss different matters relating to this thesis.

I wish to acknowledge with warm appreciation the assistance extended to me by Dr. Landrum R. Bolling, of the University of Notre Dame, Indiana, U.S.A. He closely followed up the progress of my research work and the finalisation of this thesis in due time.

It is very hard to find the exact words to express my deep gratitude and warm appreciation for the valuable assistance extended to me by Mrs. Nuha Badawi.

I greatly acknowledge value the comments on the plan of this thesis made by Dr. Abdul Aziz Sarhan, Professor and Head of the Public International Law Department, the Faculty of Law, Ain Shams University, Cairo (Egypt), Dr. Muhammad Talaat Al-Ghunaimi, Professor and Head of the Public International Law Department, the Faculty of Law, University of Alexandria (Egypt), Dr. Mufeed Shihab, Professor and Head of the Public International Law Department, the Faculty of Law, University of Cairo (Egypt), Dr. Wahba Az-Zihili, Professor of Islamic Law, at the University of Damascus (Syria), Dr. Badriya Al-Awadi, the former Dean of the Faculty of Law, Kuwait University, and Dr. Gamal Eddin Mahmud, the Secretary General of the Supreme Council of Islamic Affairs, Cairo (Egypt),

I wish to express gratitude to all those who gave various forms of assistance to complete this thesis, especially Dr. Badriya Al-Awadi, former Dean of the Faculty of Law, Kuwait University who gave me free access to the materials of the library of the Faculty of Law. Also, I am indebted to Dr. Al-Hussainy Hashem the former Secretary General of the Islamic Researches Academy, who provided me with some important researches published under the auspices of the Academy. I am equally indebted to Mrs. Kawsar Al-Jaw'an at the Ministry of Foreign Affairs of the Government of Kuwait, who provided me with copies of some documents of the League of Arab States and of the Organization Of The Islamic Conference especially the Draft Statute of an Islamic Court of Justice, proposed by His Highness Sheikh Jaber Al-Ahmad As-Sabah, the Amir of Kuwait.

Special thanks must be extended to the staff members of the libraries of the Faculty of Law, Kuwait University; of the Faculty of Law, Cairo University; of the Egyptian Society of International Law; and of the Glasgow University.

My deep and Sincere gratitude goes to Mrs. A. Elizabeth Wilson, the Clerk at the Faculty of Law, Glasgow University, who helped me overcome each and every problem I met during my study. Without her assistance, I could not have possibly complete of this work.

Finally, I wish to express my thanks to all who assisted me in one way or another to finalise my work, whether or not I mentioned their names. Any errors or misinterpretations which may be found in this thesis, shall be my own responsibility.

Mohamed Mokbel M. Elbakry

SUMMARY

Summary

This thesis is a comparative study in Al-Shari'a Al-Islamiya (The Islamic Law) and contemporary international law on the subject of the legality of "War".

It must be pointed out at the outset that the term "War" is not the precise term to apply to the subject of this thesis, and we often put this term between quotation marks. Other terms have been used in the United Nations Charter; and the meaning of Jihad in Al-Shari'a Al-Islamiya is not compatible with the term "war" in international law.

This thesis is divided into a Prologue, four Parts preceded by an Introductory Part and followed by an Epilogue.

The Prologue deals with generalities relating to the topic presented as a necessary background for the Introductory Part.

The Introductory Part entitled "Al-Shari'a Al-Islamiya And International Law" is divided into Six Chapters. The main purpose of this Part is to explain the distinction between the principles of international law in Al-Shari'a Al-Islamiya and public international law, including the different sources and the basis of the obligatory nature of the two systems of law.

Part I entitled "War And Legality" aims to distinguish between certain conceptions in Al-Shari'a Al-Islamiya and public international law. It is divided into Five Chapters dealing with Jihad and legality in Al-Shari'a; and "War" and legality in international law.

Part II entitled "The Limitations Of The Legality Of War" is divided into Three Chapters. The First Chapter deals with the limitations of Jihad in Al-Shari'a Al-Islamiya, and explains, inter alia, the nature of relations between the Islamic State and non-Islamic States; and the legality of certain aspects of the use of force in Al-Shari'a. The Second Chapter deals with the limitations of the legality of "War" in international law. In this Chapter, we traced the evolution of international law under the League of Nations and the United Nations, and the legality of certain aspects of the use of force in international law. The Third Chapter covers the study of the consequences of the unlawful use of force in Al-Shari'a Al-Islamiya and international law.

Part III is entitled "The Legality Of "War" Within The Framework Of Regional Organization". This Part is subdivided into Two Chapters. The First Chapter deals with Universalism and Regionalism in Al-Shari'a Al-Islamiya and international law. A new division of regional organizations is suggested in the Second Chapter to cope with the subject of this thesis. Thus, we divide regional organizations into

three categories, regional organizations of Muslim Member States; regional Organizations of Muslim and non-Muslim Member States; and regional Organizations of non-Muslim Member States.

Part IV entitled "The Judicial Approach To The Legality Of War" is divided into Two Chapters. The First Chapter deals with the judicial approach to Muslim States. Thus, we studied the different projects to establish an Arab Court of Justice and an Islamic Court of Justice. In the Second Chapter, we studied the evolution in punishment of war crimes before the First World War, and after the First and Second World Wars.

The Epilogue deals with the Conclusions of this comparative study.

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Generalities<sup>(1)</sup>

Religion And Man

The term "religion" is derived from the word "religio" which means "to bind", thus religion is that which binds man to the truth. Man is, as described by Gilani,<sup>(2)</sup> visible and also invisible. The body has a constitution and the soul too has a constitution. The two constitutions are radically different. Body is finite in space and time; while the soul is infinite, free from the limitations of both.

Nasr<sup>(3)</sup> says, man needs revelation, because although a theomorphic being he is by nature negligent and forgetful, he is by nature imperfect. Therefore he needs to be reminded. The aim of religion is, says Gilani, the development of man. The development of each of the body and the soul must be on the lines of its own constitution, in the Holy Qur'an ALLAH says, "He said : Our LORD is He Who gave Unto everything its nature, then guided it aright".<sup>(4)</sup> There is a climax for the body. The soul is free from such limitations. Its capacities are vaster than one can imagine. Potentialities once awakened in it through progressive actions propel it on the path of eternal progress which crosses the barriers of death and scales heights our imagination cannot measure.

Shalaby<sup>(5)</sup> notices that all revealed religions have been dawned in the Middle East, as this area witnessed the most advanced civilizations since the oldest times, such as the Pharaonic, Phoenician, Babylonian and Assyrian civilizations. However, according to the same authority, the prophetic missions sent to humankind may be divided into the following stages :

First: The first stage is the early childhood of the human race, and this includes the period humanity underwent from Adam to Nuh (Noah) until Ibrahim (Abraham). The main features of this stage are as follows :

1. The Call is confined to a small group in which the prophet lives, such as the community of the prophet Ibrahim, with the possible existence of two prophets for two groups of people simultaneously, such as Ibrahim and Lutt (Loat).
2. The Call means monotheism and abandonment of the worship of idols and images without any other details, except in case of a widespread social malady, in which cases the Call had to forbid and fight.
3. The Call consisted of some pieces of advice, and there may have been some sheets or pages, but there was no distinct book.
4. It is not possible, even approximately, to determine which of the religions came first.

Second: The second stage is the late childhood of the human race at the time of the prophets of the Israelites, especially Musa (Moses) and Isa (Jesus). The main features of this stage are as follows :

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1. The extent of the Call increased and involved a Tribe of many branches such as the "Sons of Israel".
2. The Call involved some details and legislations. <sup>(6)</sup>
3. Some of the Calls at this stage had scriptures such as the Old and New Testament. But only their meaning was revealed, and man expressed them in words.
4. At this stage, dates appeared, but they are not entirely accurate.

Third: The third stage is that of the prime age of the human race at which the mission of the Holy Prophet Muhammad (peace be upon him) was revealed. The main features of this stage are as follows :

1. Through Al-Islam, by which the Oneness of ALLAH (GOD) became evident, a new era dawned, that objected to polytheism in any form. The idea of ALLAH in Al-Islam is that nobody is equal unto Him in senses or conscience. The Holy Qur'an states, "Naught is as His likeness; and He is the Hearer, the Seer". <sup>(7)</sup>
2. The Call of the Holy Prophet Muhammad (peace be upon him) has a Scripture, the "Holy Qur'an", the guardian of which is ALLAH Himself. In the Holy Qur'an ALLAH says, "Lo! We, even We, reveal the Reminder, and Lo ! We verily are its gaurdian". <sup>(8)</sup>
3. The Call to Al-Islam was addressed to all mankind. In the Holy Qur'an ALLAH says, "Say [O Muhammad]: O mankind ! Lo ! I am the Messenger of ALLAH to you all", <sup>(9)</sup> and he also says, "And We have not sent thee [O Muhammad] save as a bringer of good tidings and a warner unto all mankind; but most of mankind know not". <sup>(10)</sup>
4. Al-Islam is the last of the divine messages, and the Holy Prophet Muhammad (peace be upon him) is the seal of the prophets. In the Holy Qur'an ALLAH says, "Muhammad is not the father of any man among you, but he is the Messenger of ALLAH and the Seal of the Prophets; and ALLAH is ever Aware of All things". <sup>(11)</sup>
5. Al-Islam is a comprehensive religion comprising both spiritual and secular affairs.

According to Nasr, every religion, including Al-Islam, possesses ultimately two essential elements which are its basis and foundation, a doctrine which distinguishes the Absolute and the relative, and a method of attaching oneself to the Absolute and living according to the Will of ALLAH in accordance with the purpose and meaning of human existence.

Due to the achievement of science during the 18<sup>(th)</sup> and 19<sup>(th)</sup> Centuries, many Westerners thought that religion had exhausted its usefulness and surrendered to science. The eminent psychologist Freud, for instance, showing the futility of any advocacy of what religion stood for in modern times says that the human life passes through distinct psychological phases, superstition, religion and science. <sup>(12)</sup> On the other hand, the eminent astronomer James Jeans, who started his intellectual career as a Godless sceptic, was led finally by his scientific exploration to the conclusion that the greatest problems of science could not be resolved without believing in God. <sup>(13)</sup> It is possible to find, at the present time, attitudes similar to the extreme attitudes referred to above concerning religion and science.

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(Since the beginning of life on earth, the history of man may be confined to one word "Contest", whether between man and nature, or man and man. Whatever the change in time and place, and in the terminology used to describe this contest, the basic fact will never change. The first crime on earth committed by man against man was murder, when Cain slew his brother Abel.<sup>'14'</sup> Man continued to commit this crime until the present time whether individually or collectively. The political forms changed but were always accompanied by this contest known as "War". Thus, the story of mankind is, in fact, the story of "War And Peace", which is also a title of the masterpiece by Leo Tolstoy.)<sup>'15'</sup>

As regards the moral justification of war, extreme pacifists believe that war is morally wrong because they believe all forms of violence are morally wrong. Some philosophers think this view is incoherent since it appears to entail that violence cannot be used even when it would prevent further or greater violence. But not all pacifists are extreme pacifists. Some readily admit that the use of violence as a means to defend oneself or some other innocent person against aggression is morally right. However, in the opinion of others, wars fought in defence of abstract ideas, such as territory, freedom, etc., are far less clearly instances of self-defence. Wars fought in defence of "freedom", "democracy", "nationalism", etc., must be viewed in the light of their costs. The pain, death, misery and destruction of war are so great that only those losses (of freedom, territory, etc.) make life more painful, miserable, etc.; a large number of people justify war on the grounds of self-defence, but what kind of self-defence is it where the defence is worse than the situation being defended?

There are several and complicated causes for war,<sup>'16'</sup> as a result of different factors including political, economic, social and religious factors. As an example, the basic causes of the First World War include the growth of nationalism, the system of military alliances that created a balance of power, the competition for colonies and other territories, and the use of secret diplomacy. Apart from the problems left unsolved by the First World War, the main causes of the Second World War were the rise of dictatorships and the desire of Germany, Italy and Japan for more territories.

(As mentioned before, war is very ancient in human history; Likewise, the efforts to achieve peace are very ancient. Several Greek City States assembled and formed an Organization called the Amphictyonic League which prohibited any member from destroying another or cutting off another's water supply. A temporary truce for one month created temporary peace throughout Greece so that the Olympic Games, held once every four years, could take place. The Roman Empire maintained peace during a period known as the Pax Romana which lasted more than two hundred years, from 27 B.C. to 180 A.D. After the Roman Empire weakened during the A.D. 400's, small wars were waged throughout Europe. The Christian Church became the greatest force for peace.) A Church

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ruling called "The Truce Of God" prohibited warfare on sundays and holy days. Another church ruling known as "The Peace Of God" prohibited men from entering Churches by force or plundering them, forbade the usurpation of a peasant's property, and upheld the rights of non-combatants. It was later extended to guarantee protection to merchants. "The Peace Of God" was first declared in the year 989 at a Council held at Charroux near Poitiers, France.

Several thinkers also proposed various plans to achieve lasting peace, such as that of the Duke of Sully, a French statesman, who developed in the early 1600 a "Grand Design" for peace in Europe; and the "Project For Perpetual Peace" written by the Abbé de Saint Pierre, a French clergyman, and was published in 1713.

In the Soviet ideology, we find the principle of "Peaceful Coexistence". According to the Dictionary of International Law,<sup>'17'</sup> this principle is the central principle (general standard) of modern international law, which obligates states of different socio-economic systems to maintain international peace and security and develop mutually beneficial cooperation between them.

We may also add to the peace efforts the civic action or the non-military use of the military, a matter which is so ancient that it can be traced in the Old Testament,<sup>'18'</sup> when the King Artaxerxes allowed the Israelites to return and rebuild the Holy City.<sup>'19'</sup> According to Glick, Israel has, in fact, the most highly developed civic action program in the world.<sup>'20'</sup> Except for the United States, Israel is the biggest "exporter" of civic action help abroad and the biggest "importer" of foreign civic action trainees.

According to the same authority, any discussion of Israel's socio-economic use of its military forces must dwell upon Gadna<sup>'21'</sup> and Nahal,<sup>'22'</sup> the most important civic actions institutions in the country. Actually, Gadna is not new as it existed before the establishment of Israel. Its aim is to train young people for pioneering and the study of specialized military and technical skills.

Glick refers to the Israeli Military Service Law as it legitimized and institutionalized as Nahal;<sup>'23'</sup> which is permitted its special kind of organization and recruitment.<sup>'24'</sup> In the early years, all army recruits were given farm training and socialist indoctrination in the ways of the Kibbutz and Kvutza, Israel's co-operative and collective settlements. Nahal is also involved in the development of industry. Representatives of several states came to Israel to study Nahal, and Israelis have gone to their states to advise them in the establishment of Nahal-like units and programs.

Al-Islam Or Muhammadanism

On the analogy of such names as Christianity, Buddhism, Confucianism and the like, some Western writers such as Hamilton Gibb and even some Eastern writers such as the Indian writer Chama Churun Sircar innovate the name "Muhammadanism". Such name is not to be found in the Holy

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Qur'an or in the sayings of the Holy Prophet Muhammad (peace be upon him). The name "Muhammadanism" was also absolutely unknown to the Muslims as an alternative or even as a synonym of the word "Al-Islam".

The name given to the system is, as clearly stated in the Holy Qur'an, Al-Islam, ALLAH says, "This day have I perfected your religion for you and completed my favour unto you, and have chosen for you as religion Al-Islam";<sup>(25)</sup> the name given to the follower of the system is Muslim, in the Holy Qur'an ALLAH says, "He named you Muslims",<sup>(26)</sup> and the Holy Prophet Muhammad (peace be upon him) called himself a Muslim, ALLAH says, "And I am first of those who surrender [unto Him]".<sup>(27)</sup> Thus, the Holy Prophet Muhammad (peace be upon him) is the prophet of Al-Islam, and the Islamic system may be called, as proposed by Nasr, "ALLAHISM" rather than Muhammadanism prevalent among some writers. Thomas Carlyle,<sup>(28)</sup> in his article on the "Life of Muhammad" says, "He made us at first, sustains us yet; we and all things are but the shadow of Him, a transitory garment veiling, the Eternal Splendour - "ALLAH-O-Akbar, God is Great"; - and then also "Islam", that we must submit to God. That our whole strength, lies in submission to Him. - "If this be Islam", says Goethe, "do we not all live in Islam?" Yes, all of us that have any moral life; we all live so".

According to Calverley,<sup>(29)</sup> the West distinguished between "Christendom" and "Christianity". "Christendom" originally meant the Christian religious, cultural and political world. Now, it means the secular civilization of lands where Christians form the majority of the population. The term "Christianity" to distinguish its religious beliefs and practices began to be used four centuries after the word "Christendom". The term "Islamdom" is the appropriate parallel to "Christendom". We believe that both terms "Al-Islam" and "Islamdom" can be used interchangeably to describe all the religious, cultural and political aspects of the Muslim World. As noted by Sayyid Qutb, Western writers are anxious to call "Islamic civilization" by the name of "Arab Civilization". This is done purposely, for the name of "Al-Islam" is distasteful to them, and they also wish to restrict Al-Islam to the Arabs.

Al-Islam, The Primordial And Last Religion

As noted by Gibb,<sup>(30)</sup> the originality of Al-Islam is real, in that it represents a further step in the logical (if not philosophical) evolution of monotheistic religion. Its monotheism, like that of the Hebrew Prophets, is absolute and unconditioned, but with this it combines the universalism of Christianity. On the one hand, it rejects the nationalist taint from which Judaism as a religion did not succeed in freeing itself, for Al-Islam never identified itself with the Arabs, although at times the Arabs have identified themselves with it. On the other hand, it is distinguished from Christianity, by its repudiation of the trinitarian concept of the Oneness of God, as by its rejection of the soteriology of Christian doctrine and the relics of the old nature cults which survived in the rites and practices of the Christian Church.

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In the opinion of Darraz,<sup>(31)</sup> Al-Islam is the generic term applicable to every revealed religion as long as that religion is not altered by men. In fact, every prophet of ALLAH is spoken in the Holy Qur'an as being a Muslim, this includes Nuh,<sup>(32)</sup> Ibrahim and Isma'il,<sup>(33)</sup> Ya'aqub (Jacob),<sup>(34)</sup> Ishaq (Isaac),<sup>(35)</sup> and Musa,<sup>(36)</sup> and the disciples of Isa (Jesus).<sup>(37)</sup> The essence of Al-Islam and other religions is the same, in the Holy Qur'an ALLAH says, "He hath ordained for you that religion which He commended unto Nuh, and that which We inspire in thee [Muhammad], and that which We commended unto Ibrahim and Musa and Isa, saying : Establish the religion, and be not divided therein".<sup>(38)</sup>

We referred before to the fact that Al-Islam is the last of the Heavenly revealed messages,<sup>(39)</sup> and that the Holy Prophet Muhammad (peace be upon him) is the Seal of the prophets.<sup>(40)</sup> Thus, Al-Islam is the primordial religion, and also the last religion, and through this particularity, Calverley says, it becomes not just a religion as such, but a particular religion to be accepted and followed.

Al-Islam And Originality

(The Middle Ages witnessed the Crusades between Europe and the Islamic World. Furious battles were fought between the two camps which were followed by a period that saw a suspension of hostilities between them, but their hostility towards each other never ended as is well borne out by what Lord Allenby said in clear terms on the occasion of the British occupation of Jerusalem in the First World War: "Now have the Crusades come to an end".)

This hatred also extended to comprise some eminent Western jurists who studied Al-Islam. But to be fair, it must be acknowledged that some of them were objective and neutral. Was Muhammad (peace be upon him) a false Prophet? Is the Qur'an a false book?

Thomas Carlyle answered these two questions.<sup>(41)</sup> He says, "A false man found a religion? Why, a false man cannot build a brick house! If he does not know and follow truly the properties of mortar, burnt clay and what else he works in, it is no house that he makes, but a rubbish heap. It will not stand for twelve centuries, to lodge a hundred-and-eighty millions;<sup>(42)</sup> it will fall straightaway. A man must conform with Nature's laws, be verily in communication with Nature and the turn of things, or Nature will answer him, no, not at all". Carlyle continues, "The message he delivered was a real one; an earnest voice from the unknown Deep. The man's words were not false, nor his workings here below; no Inanity, no simulacrum, a fiery mass of Life cast up from the great bosom of nature herself. To kindle the world, the world's Maker has ordered it so".

Carlyle says about the Qur'an, "If a book come from the heart, it will contrive to reach other hearts; all art and autocraft are of small amount to that. One would say the primary character of the Qur'an is that of its genuineness, of its being a bona fide book. Sincerely, in all senses, seems to me the merit of the Qur'an; what had rendered it

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precious to the wild Arab men. It is after all the first and last merit of all kinds, - nay, at bottom, it alone can give rise to merit of any kind".

On the other hand, we find some writers such as Clair-Tisdall, who raise some doubts about the originality of Al-Islam.<sup>(43)</sup> Clair-Tisdall pretends that some verses of the Holy Qur'an have been taken from poems by Imru'al Qais, a poet who lived before the Holy Prophet's assumption of the prophetic office. He also claims that the first source of the Holy Qur'an and Tradition of the Holy Prophet Muhammad (peace be upon him) consist of notions, customs and religious beliefs, existing around the Holy Prophet Muhammad (peace be upon him). Some writers also try to veil the originality of Al-Islam by blurring its basic principles. For instance, we find Calverley<sup>(44)</sup> warning the Western reader from the mistaken beliefs about Al-Islam, and giving some examples of these beliefs such as the idea that the Muslims worship Muhammad. This idea was included in Marco Polo's book of Travel<sup>(45)</sup> and widespread among many Westerners. But, it is very astonishing to find Calverley himself falling in the same mistake and referring to mistaken beliefs about Al-Islam such as "the religious elements of Al-Islam never crystallized into a hard and fast set of rules and regulations for all Muslims"; and such as "Muhammad established no constitutional theory or plan of rulership for the future members of his religious community".

Since the discussion of these claims falls beyond the purpose of this prologue, we only want to emphasize that the literary style and contents of the Holy Qur'an are conclusive of its Divine origin.<sup>(46)</sup> The literary form of the Holy Qur'an is distinguished clearly from all other forms, whether they be poetry, rhythmic or non-rhythmic prose, the style of common people, or that of the Prophet Muhammad himself (peace be upon him).

In addition to the above we share Professor Nasr his opinion that coming at the end of the prophetic cycle, Al-Islam considered all the wisdom of traditions before it as, in a sense, its own, and has never been shy of borrowing from them and transforming them into elements of its own view, such a characteristic of Al-Islam does not mean that it is unoriginal or does not possess its own spiritual genius, which is displayed in every manifestation of Islamic civilization.

The Increase Of War Hazards

War is ancient but its recent hazards are not the same as before. In general, weapons are of two types, shock weapons and missile weapons. Shock weapons are held in the hands, in their primitive form, like pieces of wood and stone used as clubs in critical situations. Missile weapons are thrown with either muscle power or by a delivery system of some sort. Stones have been used as primitive missile weapons. A missile offered two advantages, it could wound at a distance, and it could overtake even a fleet-footed animal.

Weapons, through their development, took distinctive forms, such as artillery, small arms, and rocketry. In addition, specialized types

appeared, associated with land, naval, aerial warfare. Among these specialized types are "weapons of mass destruction".<sup>(47)</sup> The development in weapons was accompanied by other developments in the delivery systems such as missile throwing engines, or in the military sciences and techniques of war. The idea of throwing heavy missiles by means of engines is old. In the Old Testament, Uzziah, who reigned in the Eighth Century B.C., "made in Jerusalem engines, invented by cunning men, to be on the towers and upon the bulwarks, to shoot arrows and great stones withal".<sup>(48)</sup> It is not our intention to trace the development of different types of weapons in their different stages. It may be sufficient to refer, to some aspects of the basic developments achieved in the two World Wars. During the First World War, the British, in September 1916, first used the tank. Trench warfare forced the fighting nations to develop grenades, trench mortars and heavy artillery. The Germans introduced the first "Big Bertha", one of two long range guns having the same name. The submarine came into use during the First World War, on a large scale. The German submarine fleet threatened British naval supremacy. Air warfare also developed during the war. At the outbreak of the war, the planes used had no fixed guns, and were intended mainly for the reconnaissance. During the War, planes directed shellfire, photographed enemy bases, shot at troops, dropped leaflets, and fought each other. The Germans used airships called Zeppelins for observation, and for bombing raids. In 1915, Germany first used poison gas, and the Allies soon began to use it. Due to its serious effects, both sides developed protective measures and reduced the danger. During the Second World War, the United States Office Of Scientific Research And Development invented or improved radar, flame-throwers, rocket launchers, jet engines, amphibious assault boats, long-range navigational aids, devices for detecting submarines, and radar bombsights. Scientists from the United States, Canada and Britain co-operated to build the first atomic bomb. On the other side, the Germans introduced V-I and V-II, the first guided missiles used in wartime. The Germans also developed the first successful jet-propelled fighter planes. Other important Axis weapons included the antitank rifle, the heavy Tiger and Panther tanks, and smokeless and flashless gunpowder.

The impact of the development of weapons on the increase of the total number of casualties in the two World Wars may be ascertained from the following comparison :

The total number of military casualties in the First World War was 33,624,917, among them 20,007,667 casualties in the Allies side, and 13,617,250 casualties in the Central Powers side. In the Second World War, it is not possible to have an accurate estimation due to the incomplete or unavailable information about the number of military casualties in some states such as Belgium, including colonials, and the Soviet Union (among the Allies); and such as Austria, Bulgaria, Hungary, Italy and Romania (among the Axis States).

In the First World War, the total number of military deaths was 9,112,351, among them 5,164,856 deaths in the Allies side, and 3,947,495 deaths among the Central Powers side. In the Second World War, the

total number of military deaths was 15,883,614 deaths, among them 10,014,342 deaths in the Allies side, and 5,869,272 deaths in the Axis Powers side.

In the First World War, the number of civilian deaths in areas of actual war totalled about five millions. Starvation, disease, and exposure accounted for about 80 of every 100 of these civilian deaths. In the Second World War, the number of civilian deaths was more than any other war in the history. It has been established that civilian and military deaths totalled fifty five million.

The First World War cost was over 337 billion U.S. Dollars. About \$8 of every \$10 spent for the war came from borrowed funds. The warring countries sold bonds to individuals and firms. According to historians it is difficult to measure the costs of the Second World War, but they can only estimate. It has been estimated that the cost of this War totalled 1,154,000,000,000 U.S. Dollar; and the cost of property damage amounted to more than 239 billion U.S. Dollar.

It is to be noted that due to the continuous great advance in weapons and delivery systems, wide-spread, long-term and severe damage may affect the natural environment and thereby prejudice the health or survival of the population.

During the decades of the 1980's and 1990's (and beyond), there are two hundred major weapon systems under development or entering service including strategic systems, tactical nuclear weapons, aircraft weapons, surface-to-air weapons, land-based surface-to-air weapons, naval air defence, naval weapons, anti-tank weapons, armoured fighting vehicles, aircraft and fighting ships. We must also refer to systems which require large-scale funding and research and development programmes such as radar systems, reconnaissance and electronic surveillance, electronic counter-measures, laser weapons, chemical-biological systems, electro-optical guidance systems, air defence, and fire control. With this continuous advance, it is possible to reach a point where the effects of the use of certain weapons become beyond human control.

### The Basic Dimensions Of Al-Islam, The Doctrine And The Practice

Al-Islam is based on the universal relation between ALLAH and man. Al-Islam was revealed to bring about a complete change, lift mankind from the abyss of moral degradation, give human life a lofty purpose, dynamism, movement and infuse into it a spirit to strive hard in the way of truth and goodness. This does not, however, mean that Al-Islam is a mere spiritual creed, or a plea for morality. It has sought to establish equilibrium in life by channelling all of man's natural needs and inclinations through Al-Shari'a Al-Islamiya (The Islamic Law). Al-Islam lays down, in Al-Shari'a, rules not only for individual progress, but also for the advancement of society as a whole which means in final analysis all mankind. It is to be noted that the Islamic system of life did not originate as a result of any economic pressure, nor was it an

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outcome of some mutually conflicting interests of antagonistic groups of people, it is simply a revelation of ALLAH.)

Thus, Al-Islam is a faith in action. In the Holy Qur'an ALLAH says, "It is most hateful in the sight of ALLAH that ye say that which ye do not".<sup>(49)</sup> That is why the Holy Prophet Muhammad (peace be upon him) says, "There is no monasticism in Al-Islam". The Islamic point of view on this matter is, as expressed by Amin,<sup>(50)</sup> that Al-Islam does not renounce the blessings of monasticism in betaking us to a life of asceticism. The mischief lies in the misuse of ALLAH's gifts and not in their use. For ALLAH has not created anything in vain. In action, and trying to meet the genuine requirements of man, Al-Islam effects a perfect balance as far as the limitations of human nature would allow. It starts with the individual, maintaining a balance between his requirements of body and soul, reason and spirit, and in no case allows one side to predominate over the other. On the other hand, it makes them both meet on a single higher plane doing away with all the internal psychological conflicts that threaten the unity of human soul or set a part of it against the others. Thence, it proceeds to achieve an equilibrium between the needs of the individual and those of the community. On the social level, Al-Islam strikes a balance between different factors of society, between spiritual and temporal, economic and human factors.

Al-Islam in action, politically speaking, is subject to the supervision and control of the Muslim Community. In other words, the action of the Muslim ruler towards his Muslim community is not entirely up to him, but he is subject to the control and supervision of his community.

After being the first Khalifa (a title of the Muslim ruler) after the death of the Holy Prophet Muhammad (peace be upon him) Abu Bakr said, "I have been made ruler over you, but am not the best of you. If I act well, then help me. If I act badly, then correct me. Obey me as long as I obey ALLAH and the Prophet. If I disobey them, I cannot claim your obedience".

Sayyid Qutb noticed that there are those who expect Al-Islam, as Divine revelation, to operate in human life in a magical, extraordinary and incomprehensible manner. They expect it to operate without any regard for human nature, for the innate capacities and material realities of human life, in varying stages of human development and environments.

To respond to such a notion, he explains that the application of the Islamic system of life depends on the exertions of men themselves, within the limits of their human capacities and the material realities of human existence in a given environment. The fact that it is brought into being within the limits of human capacities, rectifies the human soul and reforms human life. However, the said fact does not imply the final and definite independence of man in this matter, or his isolation from the Divine Will and planning, the aid and assistance of ALLAH. To regard the matter in this manner would be in fundamental contradiction

with the Islamic way of thinking.

### Jihad For The Unity Of Mankind

Among the wrong beliefs about Al-Islam is that it was spread by the sword, such claim is basically contradicted by the essential principles of Al-Islam. Thomas Carlyle decides that Christianity may be criticized for the same reason, he says, "We do not find of the Christian Religion either, that it always disdained the sword, when once it had got one. Charlemagne's conversion of the Saxons was not by preaching". Also, in the opinion of Professor Nasr, the Christian warriors were not more gentle or generous than Muslims on the field of battle. Spain and Anatolia changed hands between Al-Islam and Christianity about the same time. In Spain, all the Muslims were either killed or driven off and no Muslims remain there today, whereas the seat of the Orthodox Church is still located in Turkey.]

The true attitude of Al-Islam in this regard was acknowledged by some writers in the West. Calverley says that wherever and whenever Al-Islam as a religion was spread by the sword over Jews and Christians it was done in opposition to the principles of Al-Islam. Such peoples were not forced to change their religion under threat of death by the "Muslim Law" and by law-abiding Muslim Rulers. Such action was always contrary to the Qur'an and Muhammad tradition. But Calverley makes a distinction between Al-Islam as a system of government, as a religion, and as a civilization. In his opinion Al-Islam in its character as a system of government could be spread by the sword in accordance with its own principles. Al-Islam as a religion could not legally be spread by force in monotheistic communities. Al-Islam as a civilization throughout its history had, Calverley adds, advanced geographically and increased numerically by all the means and motives known to man. We do not agree with Calverley in the distinction he makes. All we can say in this Prologue is that Al-Islam wants to extend the mercy of ALLAH, represented in Al-Shari'a Al-Islamiya which covers all aspects of life, to all mankind, aiming at securing the unity of mankind under one legal system without forcing Al-Islam over non-Muslims. It is very essential to note that because of the religious type of Al-Shari'a, it is not very easy to put a demarcation line between theology and this Divine law.]

(Carlyle allows the use of the Sword, he says, "I care little about the sword. I will allow a thing to struggle for itself in this world. With any sword or tongue or implement it has, or can lay hold of. We will let it preach, and pamphleteer, and fight, and to the uttermost bestir itself, and do, beak and claws, whatsoever is in it; very sure that it will, in the long run, conquer nothing which does not deserve to be conquered. What is better than itself, it cannot put away, but only what is worse. In this great Duel, Nature herself is umpire, and can do no wrong; the thing which is deepest - rooted in Nature, what we call truest, that thing and not the other will be found growing at last")

[ALLAH has enjoined the duty of Jihad on Muslims not so that they might force people to embrace Al-Islam, but rather so that they might erect on earth its righteous, just and sublime system. People might



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origin, in the Holy Qur'an ALLAH says, "Verily We have honoured the Children of Adam. We carry them on the land and the sea, and have made provision of good things for them, and have preferred them above many of those whom We created with a marked preferment."<sup>(53)</sup>

Being the religion of preceded unity, Al-Islam contains within itself all religions which went before it. Al-Islam is the only religion which requires its followers to believe that all the great religions of the world that preceded it have been revealed by ALLAH Who says in the Holy Qur'an, "Say [O Muhammad] : We believe in ALLAH and that which is revealed unto us and that which was revealed unto Ibrahim and Isma'il and Ishaq and Ya'aqub and the tribes, and that which was vouchsafed unto Musa and Isa and the prophets from their LORD. We make no distinction between any of them, and unto Him we have surrendered".<sup>(54)</sup>

It is clear from all the above, that Al-Islam is a universal religion seeking the unity of mankind under one system of life. The curse of nationalism which has been and is responsible for the troubles of the ancient and modern times can be swept away; and the equality of all races of mankind can be established. Al-Islam united man with man as such. It proved to be not only the greatest but the only force unifying man, because, whereas other religions have merely succeeded in unifying the different elements of a single race, Al-Islam had actually achieved the unification of many races, and harmonized the jarring and discordant elements of humanity. It is noteworthy that the Mamluks who repulsed the Tatars and drove them from the Islamic countries were not Arabs, but belonged to the same race as the Tatars. However, they stood against their kinsmen in defence of Al-Islam, because they themselves were Muslims, inspired by the Islamic ideal and fighting under the spiritual leadership of the great Muslim scholar Imam Ibn Taymiya who led the campaign of spiritual mobilization and who was at the forefront of the battle. The instrument of Al-Islam to realize the unity of mankind under the Islamic system of life represented in Al-Shari'a Al-Islamiya, is Jihad. Thus, Jihad is the Islamic instrument to establish the genuine peace; and it is not the "holy war" to impose Al-Islam on non-Muslims as some writers imagine.)

In this comparative study, we would like to crystallize the attitude of the Islamic jurisprudence towards Jihad as compared with the conception of war in international law. We also have studied the Islamic State in extensive detail because the principles of international law in Al-Shari'a Al-Islamiya revolve around the Islamic conception of state. We have concentrated on the main aspects of comparison between Al-Shari'a Al-Islamiya and international law in Chapter I of the Introductory Part. The same thorough comparison was made between the conception of Jihad in Al-Shari'a Al-Islamiya and the conception of "war" in international law in Chapter I of Part I. It goes without saying that the conclusions of this study is given in the Epilogue.

THE PROLOGUEFootnotes Of The Prologue(1) See In English:

The New Encyclopaedia Britannica, Volumes VII and XIX, passim; The World Book Encyclopaedia, Volumes XV and XXI, passim; H.A.R. Gibb and J.H. Kramers, Shorter Encyclopaedia Of Islam, passim; John R. Hinnells, Dictionary Of Religions, passim; Thomas Patric Hughes, A Dictionary Of Islam, passim; Murad Saifulin (Editor), A Dictionary Of International Law, passim; W.F. Collier, The Great Events Of History, passim; Maulana Muhammad Ali, The Religion Of Islam, passim; Thomas Carlyle, Life Of Mohammad, pp. 9-32, and Mohammad Amin, Islam, The Religion Of Success, pp. 113-141, in Mohammad Amin, Wisdom Of The Prophet Muhammad; Sir Thomas Arnold and Alfred Guillaum, The Legacy Of Islam, passim; E.E. Calverley, Islam : An Introduction, passim; The Rev. W. St. Clair-Tisdall, The Sources Of Islam, passim; Francesco Gabrieli, Muhammad And The Conquests Of Islam, passim; Muhammad Talaat Al-Ghunaimi, The Muslim Conception Of International Law And The Western Approach, passim; H.A.R. Gibb, Mohammedanism, passim; Majid Khadduri, War And Peace In The Law Of Islam, passim; Henri Massé, Islam, passim; Kenneth W. Morgan (Editor), The Straight Path, passim; Abul A'ala Al-Maududi, Towards Understanding Islam, pp. 1-19; Seyyed Hosein Nasr, Ideals And Realities Of Islam, passim; Muhammad Qutb, Islam, The Misunderstood Religion, passim; Sayyid Qutb, Milestones, passim; Sayyid Qutb, The Religion Of Islam, passim; Sayyid Qutb, Islam, The Religion Of The Future, passim; Ahmad Shalaby, Islam, Belief, Legislation, Morals, passim; A.N. Kaliadin, O.V. Bogdanov and G.A. Vorontsov, Prevention Of Nuclear War, passim; Morton A. Kaplan and Nicholas DeB Katzenbach, The Political Foundations Of International Law, passim; Ann Van Wynen Thomas and A.J. Thomas, Legal Limits On The Use Of Chemical And Biological Weapons, passim; Christy Campbell, War Facts Now, passim; Edward Bernard Glick, Peaceful Conflict, passim; Sobhi Mahmassani, The Principles Of International Law In The Light Of Islamic Doctrine, pp. 205-328.

See In Arabic:

As-Sayyed Hafez Abd-Rabbuh, Falsafat Al-Jihad Fi Al-Islam, passim; Sha'aban Muhammad Isma'il, Nazariyat An-Naskh Fi Ash-Shara'i As-Samawiya, passim; Mer'ei Ibn Yusuf Al-Karmi, Qala'id Al-Marjan Fi Bian An-Nasekh Wa Al-Mansukh Fi Al-Qur'an, passim; Muhammad Abdul Aziz Mansur, Fi A'alam Al-Harb, passim; Abul A'la Al-Maududi, Mabadi'i Al-Islam (Arabic Translation), passim; Abul A'la Al-Maududi, Al-Hukuma Al-Islamiya (Arabic Translation), passim; Sayyid Qutb, Khasaes At-Tasawur Al-Islami, passim; Sayyid Qutb, Hadha Ad-Din, passim; Sayyid Qutb, Al-Mustaqbal Li Hadha Ad-Din, passim; Sayyid Qutb, Maa'lem Fi At-Tariq, passim; Muhammad Qutb, Shubuhat Hawla Al-Islam, passim; Muhammad Abd ALLAH As-Samman, Al-Islam Wa Al-Amn Ad-Dawli, passim; Fouad Shibat, Al-Huquq Ad-Dawliya Al-A'ama, passim; Muhammad Abu Zahra, Muqaranat Ad-Diyanat, passim; Muhammad Abu Zahra, Muhadarat Fi An-Nasraniya, passim; Abbas Mahmud Al-Aqqad, Hitler Fi Al-Mizan,

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passim; Nur Eddin Hattum, *Tarikh Assruna from 1945*, passim; "Bishop" Ibrahim Luqa, *Al-Masihiya Fi Al-Islam*, passim; Sheikh Abdul Halim Mahmud, *Orobba Wa Al-Islam*, passim; Pierre Rénouvin, *Tarikh Al-Qarn Al-Eshreen 1900-1945 (Arabic Translation)*, passim; Abdul Rahman Sidqy, *Ash-Sharq Wa Al-Islam Fi Adab Gothe*, passim; Abdul Rahman Ibn Khaldun, *Al-Muqaddimah*, passim; Muhammad Abd ALLAH Darraz, *Dirasat Islamiya Fi Al-Alaqat Al-Ijtimaiya Wa Ad-Dawliya*, passim.

- (2) F. Gilani, *The Message Of Muhammad*, pp. 133-141, in *Mohammad Amin, Wisdom Of The Prophet Muhammad*.
- (3) Seyyed Hossein Nasr, *Ideals And Realities Of Islam*.
- (4) *The Holy Qur'an, Sura XX: 50.*  
Each Chapter Of the Holy Qur'an is called a Sura, which means a degree or step, by which we mount up. Sometimes whole Suras were revealed, and sometimes portions, which were arranged together according to the subject-matter under the direction of the Holy Prophet Muhammad. Each verse of the Sura is called an Aya. The Roman numerals refer to the number of the Sura, and the English numerals refer to that of the Aya.
- (5) Ahmad Shalaby, *Islam, Belief, Legislation, Morals*.
- (6) *Deuteronomy XXIV : 16; XXV : 2, 5-6, 13-15.*
- (7) *Sura XLII : 11.*
- (8) *Sura XV : 9.*
- (9) *Sura VII : 158.*
- (10) *Sura XXXIV : 28.*
- (11) *Sura XXXIII : 40. This point will later be explained.*
- (12) Referred to in Muhammad Qutb, *Islam, The Misunderstood Religion*, p. 1.
- (13) *Op. Cit. p. 2.*
- (14) *Genesis IV : 1-16.*
- (15) "War And Peace" was published in instalments from 1865 to 1869. This novel centers around the war in 1812 between Russia and France. Tolstoy's theory in this novel is that it is not heroes who make history, but destiny that produces heroes.
- (16) Some writers distinguish between causes of war and so-called reasons of war. They give an example for this when the Government of the United States pointed to the British interference with

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American shipping and impressment of American Seamen as reasons for the war of 1812. A cause which was not stated, was the desire on the part of some Americans to extend the United States into lands held by the British and their Spanish allies in North America. This was one of the important causes of the war, but it was not stated as a reason. The causes of war may be selfish, base, or even wicked, but the reasons stated are usually lofty and noble. Both sides in a war may show reasons which they consider to be valid.

(17) Murad Saifulin (Editor), *A Dictionary Of International Law*.

(18) See especially *Nehemiah IV : 11-23*.

(19) Jerusalem, the Arabic name of which is Al-Quds. According to Gibb and Kramers, the older writers call it "Bait Al-Maqdis", or according to some "Muqqadas". They also call it "Iliya'a", from Colonia Aslia Capitolina, the Roman name given to it after 135 A.D. Also, some writers used the name "Al-Balat", which probably means "Royal Residence".

Al-Quds represents great importance for the Muslim. The Muslims turned at prayer in the direction of Al-Quds before changing this direction. The Holy Qur'an to the Holy City with the expression "Al-Masjid Al-Aqsa" (Sura XVII : 1) as the goal of the Holy Prophet Muhammad's nocturnal journey. According to the traditions of the Holy Prophet Muhammad (peace be upon him), Al-Quds is among the three most holy places of prayer in the world.

(20) Edward Bernard Glick, *Peaceful Conflict, The Non-Military Use Of The Military*.

(21) Gadna is an abbreviation of the Hebrew words "Ge 'dudei Noar" (Youth Batillions).

(22) Nahal is an abbreviation of the Hebrew words "Noar Halutzi Lohem" (Fighting Pioneer Youth).

(23) The Military Service Law provides that "Agricultural training will be an integral part of military service (but the Ministry of Defence has the right to exclude certain units from this training in accordance with its program)".

(24) The Military Service Law provides that "Special kinds of equipment and of service will be established so that groups of young people who are organized in one of the youth movements with the goal of establishing themselves on the land can maintain maximum unity during their period of military service and can realize their objective, namely, establishing themselves on the soil".

(25) Sura V : 3; see also Sura III : 19.

- (26.) Sura XXII : 78.
- (27.) Sura VI : 163.
- (28.) Thomas Carlyle, *Life Of Mohammad*, pp. 9-32, in Mohammad Amin, *Wisdom Of The Prophet Muhammad*.
- (29.) E. E. Calverley, *Islam : An Introduction*.
- (30.) H. A. R. Gibb, *Mohammedanism - An Historical Survey*.
- (31.) Muhammad Abd ALLAH Darraz, *Dirasat Fi Al-Alaqat Al-Ijtimaiya Wa Ad-Dawliya*.
- (32.) Sura X : 72.
- (33.) Sura II : 128.
- (34.) Sura II : 132.
- (35.) Sura II : 133.
- (36.) Sura X : 84.
- (37.) Sura V : 111.
- (38.) Sura XLII : 13.
- (39.) Sura V : 3.
- (40.) Sura XXXIII : 40.
- (41.) Thomas Carlyle, *op. cit.*
- (42.) This is the information at the time when Carlyle wrote this article.
- (43.) E. E. Calverley, *op. cit.*
- (44.) The Rev. W. St. Clair-Tisdall, *The Sources Of Islam*.
- (45.) Sir Henry Yule, *The Book of Ser Marco Polo*, London, 1921, Book I, Chapter V, I, 60; referred to in E. E. Calverley, *Islam : An Introduction*, p. 3.
- (46.) In his article, Thomas Carlyle refers to the fact that at the time of the Holy Prophet Muhammad (peace be upon him), the art of writing was but just introduced into Arabia; and it seems to be the true opinion that Muhammad could never write. Life in the Desert with its experiences, was all his education. Now, how could the illiterate Prophet Muhammad (peace be upon him) be able to invent the scientific facts included in the Holy Qur'an such as the

sphericity of earth (XXXIX : 5); the formation of rain (XXX : 48); fertilization by wind (XV : 22); the aquatic origin of all living creatures (XXI : 30); the duality of the sex of plants and other creatures (XXXVI : 36); the successive phases of the child in his mother's womb (XXII : 5 ; XXIII : 14); etc.

- (47) The expression "mass destruction" was used for the first time in the Truman-Athlee-King Statement of November 1945, which recommended that the United Nations prepare regulations for the control of atomic energy as well as for other "major weapons adaptable to mass destruction". In subsequent disarmament negotiations the terms was eventually shortened to "weapons of mass destruction".
- (48) 2 Chronicles, XXXVI : 15.
- (49) Sura LXI : 3.
- (50) Mohammad Amin, *Monasticism*, pp. 164-166, in Mohammad Amin, *Wisdom Of The Prophet Muhammad*.
- (51) Sura XVI : 89.
- (52) Sura LVIII : 22; see also Sura XLIX : 13.
- (53) Sura XVII : 70.
- (54) Sura III : 84.

INTRODUCTORY PART: AL-SHARI'A  
AL-ISLAMIYA AND INTERNATIONAL LAW

Chapter I: General Distinction  
Between Al-Shari'a Al-Islamiya  
And International Law

General

37 The meaning of Al-Islam is the voluntary submission to or surrender to the Will of ALLAH, and the voluntary obedience to the law He has enacted for the world. Al-Islam is distinct from other religions in that the application of ALLAH's legislation (Al-Shari'a), has to occur within a political system constituted according to Al-Islam, namely, Al-Khilafa. The structure of the Islamic community is based upon Al-Shari'a, in which both political and religious conduct find sanction. The First Islamic State was centered around the Khalifa who was the defender of the faith, the preserver of Al-Shari'a and the leader in Salat (Prayer).

Faith (in Arabic Aqida) is the theoretical part of Al-Islam. Al-Shari'a Al-Islamiya or the code of laws in Al-Islam is the practical course which the Muslim must conform his life. Faith is the basis of the code of laws, and the code of laws is the result of faith. Faith, according to Al-Islam, is not only a conviction of the truth of a given proposition, but is essentially the acceptance of a proposition as a basis of action. Al-Shari'a means the "way to be followed".

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of international law in Al-Shari'a reflected, mainly, in the conventions and treaties concluded between Muslims and non-Muslims; the messages of the Holy Prophet Muhammad (peace be upon him) to the leaders of other countries and his instructions to military leaders; the messages of the Khalifas to the leaders of other countries and their instructions to military leaders; history and Siyar books. (2)

### Universalism In Al Islam And In International Law

Al-Islam revolves around the idea of unity, the unity of ALLAH, the unity of mankind, the unity of state, the unity of the legal system, and the government of one ruler. Thus, dar Al-Islam is the place where the Islamic State is established, Al-Shari'a is the authority and ALLAH's injunctions are observed, and which is under the rule of a Muslim sovereign. The eventual objective of Al-Islam to establish a World State articulates the Islamic conception of universality.

Therefore, it is clear that the Islamic conception of universalism is distinct from that conception in international law. Universalism in international law presupposes the existence of an "international society" comprising several states legally equal to each other; while universalism in Al-Islam is the unity of mankind in one state. In other words, universalism in international law is the division of legally equal states within an international society, and universalism in Al-Islam is an Islamic World State.

### The Differences Between The Nature Of Al-Shari'a Al-Islamiya And That Of International Law

Al-Islam as a legal system, represented in Al-Shari'a Al-Islamiya, has kept a prominent social character and a profound humane feature due mainly to the interrelation and reciprocal influence between its legal, religious and ethical aspects. All these aspects have a Divine nature which is distinct from the nature of man-made law.

International law is an independent branch of positive law or man-made law. It may be considered a relatively modern branch of law, if compared with other branches. Its evolution has passed through different stages and it has expanded both in terms of its subjects and its contents. The international legal system is decentralized and founded essentially on consent.

Having reviewed the institution of both Al-Shari'a Al-Islamiya and man-made laws, which include, inter alia, international law, we can

rightfully say that the nature of the two is quite different, especially in the following aspects :

A. Al-Shari'a Al-Islamiya is inspired by ALLAH, while other laws are made by man. Each constituent of Al-Shari'a reflects with clarity the attributes of its Author. Man-made laws bear the limitations, weaknesses and shortcomings of human beings, and accordingly their laws are always susceptible to modifications and change, or to what we call legislative evolution in response to a certain degree of social evolution which had not been apprehended by those laws. Law is subject to change again when new incidents, not known beforehand, occur. Thus, man-made law is permanently defective, incomplete and never perfect and cannot predict the future though it may comprehend the past.

On the other hand, Al-Shari'a Al-Islamiya has a Divine source. It bears the mark of His Omnipotence, His Perfection, His Magnanimity, and His Limitless Knowledge of all that exists. It was compiled by the All-Knowing, All-Powerful ALLAH, in such a manner as suits present and future contingencies alike.

B. The objective of Al-Shari'a Al-Islamiya is to organize and direct society, rear the right kind of individual and to establish the ideal state and the ideal world. That is why its provisions were far more developed than the standard of societies at the time they were inspired. They are still ahead of our contemporary conditions.

Man-made laws were originally enacted to organize the functions of society, but not to guide or direct it. This explains why laws lag become become obsolete as societies develop. Only when states started adopting new doctrines and resorted to legal amendments as a means to orient their peoples towards specific ideas and the achievement of certain purposes, laws have finally come to acquire the determinant function assumed by Al-Shari'a Al-Islamiya fourteen centuries ago.

C. Man-made laws are temporary rules enacted by the society to administer its current affairs and meet its temporary needs. Thus, they are actually inadequate from the very moment they are passed. They have to be constantly ammended whenever conditions change, and become useless if they are not modified to keep up with the evolution of society.

Al-Shari'a Al-Islamiya, on the contrary, is a set of permanent rules enacted by ALLAH to organize the affairs of human societies. Both sets of laws have the same objectives, but Al-shari'a is not subject to change or substitution. Logically speaking, this distinct front implies :

a. that the principles of Al-Shari'a as well as the text of its provisions must be of such elasticity and universality that they can meet all the requirements of a human society regardless of the passage of time, evolution of society and the multiplicity and diversity of human needs.

b. that these principles and texts must be so perfect and comprehensive

that they would not fall short in keeping trace with the standards of society at any point in time.

This Shari'a has been in existence for over fourteen centuries, during which conditions have changed more than once, ideas and sciences greatly evolved, industries and discoveries developed beyond imagination and principles and rules of man-made laws frequently modified to adapt themselves to the novelties of progress with its diversified conditions and circumstances. This continuous modification has been ongoing for so long, that the present principles of human legislation are completely different from those prevailing when Al-Shari'a Al-Islamiya was enacted. Despite this great change, the Islamic principles of jurisprudence, owing to their excellence, are still applicable and have proved to be in advance of any social standard at any time. They are also most appropriate to man's instincts and most reliable in maintaining his security.

D. Man-made laws there is provided only for one worldly penalty for the violation of law, and it is possible in some cases to evade the application of this penalty.

On the other hand, Al-Shari'a Al-Islamiya is a Divine law provides for another penalty in the Hereafter in addition to worldly punishment. Moreover, ALLAH has promised to reward His righteous servants for their good deeds. This religious type of punishment and recompence in Shari'a creates in the conscience of Muslims an incentive to comply with Shari'a rules more effective than all the law-enforcement instruments of any state.

E. Due to the imperfection and non-comprehensiveness of man-made law, the existence of non-liquet must be admitted.

On the other hand, the rules of Al-Shari'a are perfect and comprehensive, and regulate all aspects of life. In the Holy Qur'an ALLAH says, "And We reveal the Scripture unto thee as an explanation of all things";<sup>(3)</sup> and He also says, "We have neglected nothing in the Book [of Our Decrees]".<sup>(4)</sup> Any matter is covered either by the Holy Qur'an or the Sunna of the Holy Prophet Muhammad (peace be upon him), in the Holy Qur'an ALLAH says, "And if ye have a dispute concerning any matter, refer it to ALLAH and the Messenger".<sup>(5)</sup> Therefore, there is no possibility to raise the problem of non-liquet in Al-Shari'a.

Thus, we may deduce from all the aforementioned that Al-Shari'a Al-Islamiya has three main characteristics that distinguish it from man-made legislation including international law.

### 1. Perfection

Al-Shari'a Al-Islamiya has the advantage of perfection over man-made laws. It means that it is a perfect and complete legislation that

provides what might be required in the way of juridical decisions and concepts necessary to meet the needs of human societies at present, and in the near as well as remote future.

## 2. Excellence

The principles of Al-Shari'a Al-Islamiya are always above the social standards of societies while, by virtue of their intrinsic contents, they maintain their excellence, however high human standards may develop.

## 3. Permanence

Al-Shari'a Al-Islamiya, unlike man-made laws, is immutable, as its fundamental provisions do not require modification. Nevertheless, these provisions remain peerlessly appropriate in every society and in every age.

## The Differences Between The Principles Of International Law In Al-Shari'a Al-Islamiya And Modern International Law

These differences can be summarised as follows :

First: Al-Islam is not only a religion, but a Shari'a as well; and the principles of international law in Al-Shari'a Al-Islamiya constitute an integral part of Al-Shari'a. Unlike positive law, there is no division between municipal and international law; consider for example what ALLAH says in the Holy Qur'an, "O ye who believe ! fulfil your undertakings",<sup>(6)</sup> this principle is applied in the domestic domain (contracts), and in external relations of the Islamic State (treaties). Thus, it might be said that, problems of the relationship between municipal law and international law, and the theories of monism and dualism cannot be raised in Al-Shari'a Al-Islamiya. There is no question of supremacy, because the nature and the binding character of the principles of international law in Al-Shari'a are the same of its other principles.

Second: Al-Shari'a Al-Islamiya is directed, essentially, to individuals; but international law presupposes the division of the world into territorial entities, each enjoying with sovereignty and all enjoying equality of status. Thus, the legal status of individuals is different in Al-Shari'a and in international law.

Third: Al-Shari'a Al-Islamiya has Divine sources, and practices must conform to Divine principles, to be regarded as a custom of obligatory character. On the other hand, international law has positive sources. Therefore, the distinction between lege ferenda and lex lata may be applicable to international law, but not to Al-Shari'a. The principles of Al-Shari'a represent absolute justice. Accordingly, if were some actual practices contradicted these principles, they cannot be described as Islamic, or representing Islamic principles.

**Fourth:** Since the ultimate objective of Al-Islam is the proselytization of all mankind, the regulation of the relationship between dar Al-Islam (the Islamic State) and dar al-harb (non-Islamic states) is by its very nature, a temporary institution. Unlike Al-Shari'a, relations among states must be subjected to a permanent institution, i.e., international law. Since law and society are inseparable, international law is indispensable for the regulation of international society.

**Fifth:** Muslims are under obligation to place dar al-harb under Muslim rule in order to accomplish the enforcement of Al-Shari'a Al-Islamiya throughout the world. The instrument by which the Islamic State is to carry out this objective is Jihad Fi Sabeel ALLAH (Jihad In The Way Of ALLAH). Jihad is usually defined as the war waged against infidels to call them to Al-Islam in order to enforce the tenets of Al-Shari'a on dar al-harb, but not to impose Al-Islam as a belief on non-Muslims. But Jihad does not always mean war, it has a wider connotation if the objective of Al-Islam can be achieved through other means. Legally, dar Al-Islam is in a permanent state of war with dar al-harb, but this must not be construed as a permanent state of actual hostilities. Jihad, in its wider connotation, is assured as long as dar al-harb exists. It will come to an end, when dar al-harb vanishes. In other words, Jihad is a continuous process during the existence of both dar Al-Islam and dar al-harb. Should the former overcome the latter, then Jihad will be discontinued as long as dar Al-Islam exists in its wider sense. In modern international law, peace is the normal state in relation among states. The difference between Al-Shari'a and international law in this regard must not be construed as if Al-Islam were against peace. It only means that peace, from an Islamic point of view, can only be achieved through the establishment of a world community bound by Al-Shari'a Al-Islamiya.

**Sixth:** In the Islamic State, sovereignty behoves Al-Shari'a Al-Islamiya, thus, it is considered a nomocratic, not a theocratic State. In secular states, sovereignty behoves the ruler, and after the spread of democratic ideas sovereignty became prerogative of peoples, '7' is because the principles of international law in Al-Shari'a Al-Islamiya are governed by the ideals of Al-Islam, and the conduct of the Islamic State is not based on a combination of Islamic and non-Islamic interests; while relations between states are based on their self-interests, which makes international the law of co-ordinating the interests of different states.

#### The Differences Between The Conception Of Legality In Al-Shari'a Al-Islamiya, And The Conception Of Legality In International Law

Islamic legality is the sovereignty of Al-Shari'a Al-Islamiya in the Islamic community. Islamic legality is linked with the belief in the Unity of ALLAH. This belief leads to the acknowledgement of ALLAH as the sole legislator. Therefore, to entrust the authority of legislation to other than ALLAH is considered a violation of Islamic legality and an

infringement of faith.

The violation of Islamic legality, in this sense, may occur in one of two ways :

1. The total non-application of Al-Shari'a Al-Islamiya, and its replacement by secular laws, which really means the replacement of ALLAH by other "gods". This is due to the fact that ALLAH is the sole legislator, and He did not delegate this authority to any man.
2. The partial application of Al-Shari'a Al-Islamiya, considering it as one of the original sources of positive law; or a mere subsidiary source, subordinate to the original sources.

These two cases are considered shirk (polytheism). In the first case, the legislator of positive law is made equal to ALLAH; and the second is more serious because ALLAH becomes "inferior" to the "legislator" of positive law.

In international relations, states are the lawgivers as well as subjects of international law. Legal rules are not the only rules which regulate state behaviour; but there are other rules which do not fall within the category of legal rules.

On the other hand, illegal acts does not necessarily produce illegal consequences. The admission of the principle "ex injuria jus oritur" (out of injustice, justice can arise) in international law, gives rise to new legal rights and duties. But it must be noted that a violation of law can give rise to new rights. Third states are under no obligation to recognize these situations - effective in fact - produced by unlawful acts.

Islamic legality is, as mentioned before, the sovereignty of Al-Shari'a Al-Islamiya. This is because Al-Shari'a stands for absolute justice, the justice of ALLAH. The nature of legality in international law is relative and not absolute. Illegal acts may produce legal consequences.

Islamic legality is ideological, in the sense that the restraints and orders included in Al-Shari'a are considered ideological. General restraints must be taken into account in all legal relations, whether internal or external, on the ground that ideological restraints are general and comprehensive. Therefore, there is no international Islamic legality distinct from the domestic legality in the Islamic State. In International law, at the universal level, it cannot be said that an ideological international legality exists, although it is possible to find ideological conceptions of international law, such as the Soviet conception, especially within relations between certain group of states.

The Difference Between The Basis Of The Obligatory Nature Of Al-Shari'a Al-Islamiya, And Of International Law

Since Al-Shari'a Al-Islamiya is a Divine Law, we believe that its obligatory nature lies in what we term it "self-censurship" which is a mental attitude urging the Muslim to comply, willingly, with the rules of Al-Shari'a without any interference by the State. The reason is that Al-Shari'a is distinct from man-made legislation in that it blends religion with secular deeds and promulgates precepts for this worldly life and for life in the Hereafter.

In international relations, we believe that the social need for a system of law and the consent of states are the basis of the obligatory nature of international law.

Footnotes Of Chapter I Of The  
Introductory Part

- (1) The technical meaning of the term "Sunna" in Al-Shari'a Al-Islamiya indicates the doings of the Holy Prophet Muhammad (peace be upon him). However, it covers the Prophet's actions, practices and sayings.
- (2) The principles of international law in Al-Shari'a Al-Islamiya were discussed by Muslim jurists under the name "Siyar" (plural of Sirat meaning course).
- (3) Sura XVI : 89.
- (4) Sura VI : 38.
- (5) Sura IV : 59.
- (6) Sura V : 1.
- (7) It is noticed that sometimes states, especially the underdeveloped have disguised autocratic regimes under democratic emblems.

Chapter II: Introduction To Al-Islam And Al-Shari'a Al-Islamiya<sup>(1)</sup>

Al-Islam comprises a number of rules and principles which may be, mainly, classified as follows :

1. A doctrinal part which includes faith in ALLAH (GOD), belief in Mala'ika (Angels), Jinn (Demons) and Ar-Ruh (The Soul), belief in Anbiya (Prophets), belief in Al-Akhira (The Hereafter), and belief in Qada and Qadar (predestination) whether good or bad as being ordained by ALLAH.
2. A devotional part which includes the performance of Salat (Prayers), Zakat (Almsgiving), Saum (Fasting), Haj (Pilgrimage) to the Sacred House in Macca, and Jihad.<sup>(2)</sup>
3. A part regarding the systemization of man's life on earth in every aspect, i.e., Al-Shari'a Al-Islamiya (The Islamic Law). This Chapter comprises the three following points, doctrines of Al-Islam, devotional rules of Al-Islam, and Al-Shari'a Al-Islamiya. These points will be preceded by a historical introduction.

First: A Historical Introduction

The human race emerged from one man : Adam. It was from him that the family of man grew and the human race multiplied. All human beings born in this world are descendants of that couple : Adam and Hauwa'a (Eve). History and all religions agreed on this point. Scientific investigations about the origin of man did not discover that, originally, different men came into being, simultaneously or at different points of time; in different parts of the world. Most scientists also concluded that one man might have been created first and that the entire race might have descended from the same one man.

Adam, the first man on this earth, was also the first prophet of ALLAH. He revealed His religion, Al-Islam, to him and enjoined him to convey and communicate it to his descendants, to teach them that ALLAH is One, the Creator, the Sustainer of the world; that He is the LORD of the universe and He alone should be worshipped and obeyed; that to Him they will have to return one day and to Him alone they should appeal for help; that they should live good, pious, and righteous life to gain ALLAH's pleasure and that, if they did so they would be blessed by ALLAH with goodly reward, but if they turned away from Him and disobeyed Him they would be losers here and in the Hereafter and would be severely punished for this disobedience and lack of faith.

Those of Adam's descendants who were good trod the right path shown to them by Him; but those who were bad abandoned their father's teachings, and gradually drifted away into devious ways. In this way, ignorance gave rise to many forms of polytheism and idolatry, and scores of religions were formulated. This was the age when Adam's progeny had spread fairly over the globe, and formed different races and nations. Every nation devised a religion for itself, as well as formalities and

rituals of its own. ALLAH, the One LORD and Creator of mankind and the universe, was entirely forgotten. Adam's descendants even forgot the way of life which ALLAH had revealed for them, and followed their own devices. Every kind of evil custom grew, and all sorts of ignorance spread among them. They began to err, failing to discern right from wrong; evil practice became rightful and rightful practice ignored and deemed wrong.

At this stage, ALLAH began to send prophets to each people, who preached Al-Islam to them. Each one reminded his people of the lesson they had forgotten. They taught them to worship ALLAH, put an end of idol-worship and the practice of shirk, i.e., associating other deities with ALLAH, did away with ignorance, taught them the right way of living to gain ALLAH's pleasure, and gave them laws to be followed and enforced in society. ALLAH's true prophets were sent to all countries; to every land and people. They preached the same religion, the religion of Al-Islam.

Man's attitude towards ALLAH's prophets was strange. They maltreated the prophets and refused to listen to them and accept their teaching. Some of the prophets were expelled from their lands; some were assassinated; some faced by the people's indifference, continued preaching all their life but hardly won over than a few followers. The erring tendencies of people, steeped in deviation, ignorance, and malpractice followed another course. During the life of their prophets they accepted and practised their teaching, but after death they introduced their old distorted notions into their religions, altering the prophet's teachings. They adopted novel method of worshipping ALLAH; even some worshipped their prophets. Others looked at their prophets the incarnations of ALLAH or the sons of ALLAH; and some associated their prophets with ALLAH in His Divinity. But, in spite of all interpretations and alterations, some traces of truth survived. The idea of ALLAH, and of life after death was definitely assimilated in some form or other. A few principles of goodness, truthfulness and morality were admitted throughout the world. The prophets, thus, shaped the mental attitude of their respective people in such a way that a universal religion could be safely introduced, a religion in consonance with the nature of man, which embodies all that was good in all other creeds and societies, and was naturally and commonly acceptable to all mankind.

As we said above, at the outset separate prophets were sent to different nations or groups of peoples, and the teachings of each prophet were meant specially and specifically for his people. The reason was that, at that stage of history, nations were dispersed and cut off from each other; each of them was confined within the geographical limits of its own territories and facilities for mutual intercourse were non-existent. In such circumstances, it was very difficult to propagate a Common World Faith with its accompanying system, a law for life in this world. Besides, the general conditions at that time greatly differed from one country to another. Their ignorance was great, and different forms of moral aberrations and distortions of faith prevailed.

With the progress and spread of commerce, industry and arts, intercourse was established between nations. From China and Japan, as far as the distant lands of Europe and Africa, regular routes by sea and land were opened both . People learned the art of writing; and knowledge began to spread. Ideas began to be communicated from one country to the other and methods of learning innovated. Great conquerors appeared, extending their conquests far and wide, establishing vast empires and linking different nations under one political system. Thus, nations come closer to one another, and their differences were no longer so marked.

It became possible under these circumstances that a single faith, providing a comprehensive and all-embracing way of life catering for the moral, spiritual, social, cultural, political, economic, and all other needs of men, and embodying both religious and secular elements could be revealed by ALLAH for all mankind. Over two thousand years ago mankind had attained a mental maturity and seemed to crave a universal religion.

At such a crucial stage of human civilization, when the mind of man was craving for a world religion, a Prophet was emerged in Arabia for the whole world and for all nations. The religion he was given to propagate was again Al-Islam, but now in the form of a complete and full fledged system, covering all aspects of the individual and material life of man. He was a Prophet for the entire human race and was enjoined to propagate his mission to the whole world. He was Muhammad, the Holy Prophet of Al-Islam (peace be upon him). He preached against idolatry and the worship of other beings besides ALLAH and had denounced their wrong ways of life. He uprooted of priestcraft, denounced all distinctions between human beings, and condemned the prejudices of clan and race as sheer ignorance; and sought to change the whole structure of society which dated back to time immemorial. His countrymen told him that the principles of his mission alienated their ancestral traditions and asked him either to give them up or bear the worst consequences.

However, before the Holy Prophet (peace be upon him) died, he and the religion Al-Islam inspired Arabia to lead other peoples. It suffices to say that the Holy Prophet's greatest service to the Arab Muslims, in the sense of most influential, was to put them in the stream of the life and history. He was the last of the prophets and all the instructions ALLAH wished to impart to mankind through direct revelation were revealed to the Holy Prophet Muhammad (peace be upon him),<sup>(3)</sup> and are enshrined in the Holy Qur'an<sup>(4)</sup> and the Sunna.<sup>(5)</sup>

The life and teachings of the prophet, any prophet, are the beacon that lead a people to the right path; as long as his teachings and his guidance steer the life of man, it is as if he himself were alive. The real death of a prophet lies not his physical demise; but in the mitigation of his teachings and the interpolation of his guidance. The earlier prophets died because their followers have adulterated their teachings, interpolated their instructions, and besmirched their examples by attaching fictitious events to them. None of the earlier books, Az-Zabur (Psalms of David), At-Tawrat (Torah), Al-Injil (Gospel of Jesus), etc., exists today in its original text. The life history of the

earlier prophets have been so mixed with fiction that an accurate and authentic account of their life has become impossible. Their life has become tales and legends and no trustworthy record is available anywhere. Not only were the records lost and their precepts forgotten but even it cannot be said with certainty, as to when and where a certain prophet was born and bred, how he lived and what code he gave to mankind. In fact, the real death of a prophet consists of the death of his teachings.

On the basis of this criterion, no one can deny that the Holy Prophet Muhammad (peace be upon him) and his teachings are still alive. His teachings stand uncorrupted and are uncorruptible. The Holy Qur'an, the book he gave to mankind, exists in its original text, without the slightest difference of letter, syllable, or title. The entire account of his life - his sayings, instructions and actions - is preserved with complete accuracy. The biography of no other human being is so preserved as that of the Holy Prophet of Al-Islam (peace be upon him). In each and every aspect of our life we can seek the guidance of Muhammad (peace be upon him) and take lesson from his life. That is why there is no need of any other prophet after Muhammad, the Seal of the prophet (peace be upon Him).

The death of the Holy Prophet (peace be upon him) was followed by the era of the four Khalifas of Al-Madina (9-40 A.H. / 632-661 A.D.). The rule of the Umayyads, the first dynasty in Al-Islam (41-132 A.H. / 661-750 A.D.), reflected in many respects, the tendencies which were inherent in the nature of the community of the Muslims under the Holy Prophet (peace be upon him). During their rule, the framework of a new Arab Muslim society was created, and in this society a new administration of justice and Islamic jurisprudence came into being. The Umayyads were overthrown by the Abbasids. This was followed by the gradual disintegration of the Islamic State, which it is in the nature of things; it is difficult to give definite dates but it was about the year 300 A.H. or about 900 A.D. The modern period, saw the rise of two great Islamic states on the ruins of the previous order, the Ottoman State in the Near East, and the Mogul State in India (the Sixteenth and the Seventeenth Century respectively). Finally, the introduction of Western political ideas in the Near East has brought about, in the present century, an unprecedented movement of modernist legislation. There is a new tendency, in some Middle East countries, to modify their legislation to be compatible with Al-Shari'a Al-Islamiya.

### Ali And The Rise Of Shi'a

The word Shi'a, meaning following, has become the designation for those Muslims who are followers of Ali who, in their opinion, should have succeeded Muhammad (peace be upon him). They believe in ALLAH's revelation in the Holy Qur'an, Muhammad (peace be upon him), who was the last of the prophets, and Ali who was, in their opinion, the Holy Prophet's choice for his successor.

It is the Shi'a's belief that the Holy Prophet (peace be upon him) had recommended his family to people in private and in public. For instance, at the Ghadir Qum meeting, the Holy Prophet (peace be upon him) indicated that Ali should be his successor and named him the master of the people. This was an indication that Ali should be his next Khalifa, that is successor to Muhammad (peace be upon him).

## Second: Al-Islam And Its Doctrines And Devotional Rules

### The Meaning Of Al-Islam

Modern religious studies have revealed that religiousness is a common tendency in all human beings, both ancient and recent; no nation has been without religion. The distinguished Scottish scholar Andrew Lyngé <sup>(6)</sup> adopted the view of the innateness of religion which can be summed up as follows :

- "Every one bears with himself the notion of causation, which in itself is sufficient to constitute his belief that there is a God who has originated the universe. Every person has a certain idea about a constructor producing them, which the person himself cannot do.
- All the ancient and primitive people had a belief in a Father, Master and Creator.
- The notion of religion of the primitive people emerged in a state of utmost purity and piety, and was followed by the appearance of the concept of legends".

Al-Islam is the religion of ALLAH revealed to the Holy Prophet Muhammad (peace be upon him). The meaning of Al-Islam is the voluntary submission or surrender to the Will of ALLAH and the voluntary obedience of all laws He has enacted for the world. Thus, he who willingly submitteth (in Arabic aslama) himself to ALLAH and obey all the laws enacted by Him, is called a Muslim. Because Al-Islam is the last religion, no other alternative shall be accepted by ALLAH. Al-Islam has abrogated all previous religions.

ALLAH revealed Al-Islam to Muhammad (peace be upon him) to proclaim it to all mankind. The true Prophet was sent by ALLAH himself to mankind to convey His message. He enjoins us to repose faith in the Prophet and to follow his directions. Thus, one who refuses to believe in ALLAH's Messenger actually refuses to follow ALLAH's commandments and becomes a rebel. ALLAH has terminated His religions with Al-Islam, ALLAH says, "And whoso seeketh as religion other than Al-Islam [the Surrender to ALLAH] it will not be accepted from him, and he will be a loser in the Hereafter";<sup>(7)</sup> He also says, "This day have I perfected your religion for you and completed My favour unto you, and have chosen for you as religion Al-Islam";<sup>(8)</sup> and He also says, "Lo ! religion with ALLAH [is] "Al-Islam" [the Surrender to His Will and Guidance]".<sup>(9)</sup>

It is noteworthy that the aforementioned Ayat (Verses) of the Holy Qur'an confirm the idea of the finality of prophethood by the Holy Prophet Muhammad (peace be upon him). In the Holy Qur'an, ALLAH says, "Muhammad is not the father of any man among you, but he is the Messenger of ALLAH and the Seal of the prophets; and ALLAH is even Aware of all things".<sup>(10)</sup>

Some writers try to question the exact meaning of this idea by giving several interpretations to sow uncertainty and suspicion. Among these interpretations is that Khatam An-Nabiyyin (the Seal of the Prophets) means the best of prophets in character and physical constitution.

It is also said that Muhammad (peace be upon him) is the Seal of Prophets "because his son died an infant and if his son has reached manhood, he would have been a prophet".

Friedman referred to the tradition attributed to A'isha, the Holy Prophet's wife, quote, "Say [that the Prophet is] the Seal of the Prophets and do not say that there is no prophet after him" as it seems, in his opinion irreconcilable with the dogma under discussion.

According to Friedman, the clear distinction between the legislative prophecy of Musa (Moses) and the prophetic tasks of his successors in the prophetic office enabled the Jewish tradition to accept prophethood as a legitimate means of communicating the divine will to man without infringing the immutability of the divine law or risking the integration of the community established in order to implement it. Friedman argues that the distinction of some commentators between rasul (a messenger) as a person to whom ALLAH revealed a book and a law; and a nabi (a prophet) as a person who was commanded by ALLAH to reaffirm and propagate a law brought by someone who had preceded him; or the distinction between legislative and non-legislative prophecy, this distinction could have, in theory, enabled the Muslims to accept the possibility that prophets (as distinguished from messengers) could appear after the Holy Prophet's death, not only would they not supersede his law, but could also reaffirm it.

We do not intend to discuss these interpretations in detail, but we want to emphasize that the idea of finality of prophethood with the Holy Prophet Muhammad (peace be upon him) is one of the important strongly established principles of the Islamic faith. The finality of prophethood in Al-Islam must be understood in the light of two main points :

**First:** Al-Islam is the last of the Divine religions as clearly stated in the aforementioned Ayat, and no religion other than Al-Islam will be accepted by ALLAH. Thus, there is no possibility of the advent of any messenger after Muhammad (peace be upon him). The facts of history do not contradict this Islamic principle. Fourteen centuries after the advent of Al-Islam, no religion was revealed to mankind and no messenger after the Holy Prophet Muhammad (peace be upon him) was sent to propagate different religions, or even to reaffirm Al-Islam.

Second: Because Al-Islam is the last Divine religions, it has brought about a radical change change in the function to call to belief in ALLAH. The Muslim community is entrusted with the duty to call to Al-Islam and the application of Al-Shari'a Al-Islamiya, this is clearly stated in the Holy Qur'an, ALLAH says, "Ye are the best community that hath been raised for mankind. Ye enjoin right conduct and forbid indecency; and ye believe in ALLAH",<sup>'11'</sup> the Holy Qur'an also confirms this change, ALLAH says, "Thus, We have appointed you a middle nation, that ye may be witness against mankind, and that the Messenger may be a witness against you".<sup>'12'</sup> This change made by Al-Islam signifies that there is no possibility of the advent of a new prophet even for the propagation of Al-Islam. The facts of history do not contradict this Islamic principle.

Al-Islam is suitable of all times in all places and can secure the progress of man if he puts its teachings and regulations into practice. ALLAH says, "Say [O Muhammad] : O Mankind ! Lo ! I am the Messenger of ALLAH to you all- [the Messenger of] His unto whom belongeth the sovereignty of the heavens and the earth. There is no GOD save Him. He quickeneth and He giveth death. So believe in ALLAH and His Messenger, the Prophet who can neither read nor write, who believeth in ALLAH and in His Words, and follow that haply you may led aright".<sup>'13'</sup> It is the individual responsibility<sup>'14'</sup> to accept the revelation of ALLAH - the Islamic faith and code of laws governing the conduct of man, regardless of sex, rank, race or any other difference. The faith (in Arabic Aqida)<sup>'15'</sup> is the theoretical part of Al-Islam, or what may be called articles of faith or its doctrines, it is also called "Usul" (lit. Roots) or principles. The code of laws in Al-Islam is the practical part which includes all that a Muslim is required to do, that is to say the practical course to which he must conform his life. It is also called "Furu" (lit. Branches) or Ahkam (sing. Hukm, lit. An Order, or A Rule). Faith is the basis of the code of laws, and the code of laws is incident to faith, because legislation without faith is a building without foundation, and faith without a code of laws to put it into effect would be merely theoretical and ineffective.

Al-Islam in the wider significance is a cultural complex, embracing specific political structures and legal and social traditions. Except in matters concerning its articles of faith and the principles of its code of laws, Al-Islam fits into all major cultures and constructive civilizations and will continue to do so forever. The sphere of knowledge is not limited to articles of faith, religious obligations, or laws about what is permissible and what is forbidden; its sphere is very wide. It includes all these elements and also the knowledge of natural laws and all matters concerning man's vicegerency from ALLAH. However, any knowledge, lacking the foundation of faith, is outside the definition of that knowledge to which the Holy Qur'an refers and whose possession is commendable. There is a strong relationship between faith and all those sciences which deal with the universe and natural laws, such as astronomy, biology, physics, chemistry and geology. All these sciences lead man toward ALLAH, unless they are accompanied by personal opinions and speculations, and lack of the concept of ALLAH. The attitude of Al-

Islam towards the present Western civilization is the same as that it manifested towards every past civilization. Al-Islam accepts all the goodness that such civilizations can yield, but rejects their evils. Al-Islam has never advocated any policy of scientific or materialistic isolationism. It does not fight against other civilization for personal or rational considerations because it believes in the unity of humanity and the close relationship among people of different races and trends. The Islamic faith has never opposed the adoption of scientific inventions achieved by humanity at large. Muslims should make use of all scientific achievements. The Holy Prophet (peace be upon him) says, "The study of science is an ordinance." It is needless to say that the study of science, as used above, includes all kinds of knowledge. The Holy Prophet (peace be upon him) called on people to study all branches of knowledge everywhere. In conclusion, it will be said that Al-Islam does not oppose civilization as long as it serves humanity.

It is said that seventy three sects have emerged out of Al-Islam at different times, and on various subjects, most of which have since disappeared. The Holy Prophet Muhammad (peace be upon him) predicted that his followers would be divided into numerous religious sects, every one of which would go to hell except one sect, "Al-Firqa An-Najiya" (the Saved Sect) which is said to be "Ahl As-Sunna" (the Sunni Sect). Nevertheless, adherents of different sects are still considered Muslims. The main Sunni dogmas on which they differ are :

1. The attributes of ALLAH and His Unity;
2. Predestination and ALLAH's justice;
3. ALLAH's promises and threats;
4. Revelation, reason; and
5. Al-Imama or Al-Khilafa.<sup>(16)</sup>

In the Holy Qur'an, ALLAH says, "In the case of those who say 'Our LORD is GOD'; and further stand straight and steadfast, the Angles descend on them [From time to time] : "Fear ye not [they suggested], "Nor grieve ! "But receive the glad tidings of the Garden [of Bliss] which ye promised!".<sup>(17)</sup> This Aya is explained in a Hadith<sup>(18)</sup> of the Holy Prophet Muhammad (peace be upon him), it is narrated on the authority of Sufyan Ibn Abdullah Ath-Thaqafi : that he had asked the Messenger of ALLAH to give the best advice so that he would not have to query anyone after him. He [the Holy Prophet] replied, "Say I affirm my faith and then remain steadfast". To remain steadfastness in Tawhid (Confession in ALLAH's Oneness) is a test of man's faith in the LORD. It means that the concept of Oneness of ALLAH has taken its roots firmly in the minds of men and no interest, however alluring, no pressure, however heavy, can deviate man from the right path. Thus, faith, according to Al-Islam, is not a conviction of the truth of a given fact, but essentially the acceptance of a fact as a basis of action.

It is reported on the authority of Ibn Abbas, that Muadh said : When the Messenger of ALLAH sent me [as governor to Yaman] and he told me [at the time of my departure] : "You will soon find yourself in a community among the People of the Book,<sup>(19)</sup> first call them to testify

that there is no god but ALLAH, and that Muhammad is the Messenger of ALLAH, and if they accept to do so, tell them that ALLAH has enjoined upon them five prayers a day; and the night, if they accept to do so, tell them that ALLAH has made Zakat obligatory and that it should be collected from the rich and distributed among the poor, and if they agree to so, do not take [as for Zakat] the best of their riches. Beware of the supplication of the oppressed for there is no barrier between him and ALLAH."

Imam Nawawi says that this narration clearly shows that mere faith in ALLAH is not enough, because the people of the Book never denied the existence of ALLAH, but their belief in ALLAH was so adulterated with so many wrong conceptions and mistaken notions, that the Holy Prophet (peace be upon him) asked Muadh to call the People of the Book to testify ALLAH as is directed in Al-Islam. It should be "Tawhid" pure and simple, and nothing should be associated with Him in His Divinity. Calling to belief in the prophethood of Muhammad (peace be upon him) is indicative of the fact that belief in his prophethood is an integral part of faith.

The term "Din"<sup>(20)</sup> may mean any religion but it is used particularly for Al-Islam, ALLAH says, "The religion before ALLAH is Al-Islam [submission to His Will]."<sup>(21)</sup>

The Holy Qur'an puts Al-Islam and Shirk (Polytheism) <sup>(22)</sup> in opposition, "Say : shall I choose for a protecting friend other than ALLAH, the Originator of the heavens and the earth. Who feedeth and never fed? Say I am ordered to be the first to surrender [unto Him]. And be not thou [O Muhammad] of the idolaters".<sup>(23)</sup> Shirk is considered to be the sin for which ALLAH has no forgiveness : "ALLAH forgiveth not that partners should be set with Him; but He forgiveth anything else, to whom He pleaseth; to set up, partners with ALLAH is to devise a sin Most heinous indeed".<sup>(24)</sup>

The Holy Qur'an puts Al-Islam and Kufr (Disbelief, also Infidelity) in opposition as well, "Nor would He instruct you to take angels and prophets for lords and patrons. What ! would He bid you to unbelief after ye have bowed your will [to ALLAH IN Al-Islam]?"<sup>(25)</sup> Kufr is the contrary of faith and consists in disbelieving anything the Holy Prophet Muhammad (peace be upon him) has taught as being an article of faith. The rejection of the truth or, the doing of an evil is called Kufr or part of Kufr. The rejection of an ordinance of Al-Islam, while called Kufr, is not Kufr in the technical sense, i.e., denial of Al-Islam itself. Jahiliyya (lit. Ignorance) in the terminology of Al-Islam, means "The Time Of Ignorance" before the advent of the Holy Prophet Muhammad (peace be upon him) and is thus synonymous with Kufr.

This division, on the basis of faith, is not a theoretical matter, but is of great practical and vital importance, because on the basis of this criterion that the fate of man is decided in the world and in the Hereafter.

The term "Kafir" is used for the unbeliever but the more precise term is "Mushrik". A man becomes a Muslim <sup>(27)</sup> or a believer by professing the Oneness of ALLAH and the prophethood of Muhammad, and as long as he does not abjure his faith in Al-Islam, he remains a Muslim or a believer in principle in spite of any evil committed, <sup>(28)</sup> a man who does not make this profession is a non-Muslim or unbeliever in principle, in spite of any good that he may do. This does not mean that the evil deeds of Muslims are not punished, or that the good deeds of non-Muslims are not rewarded. The Sunni doctrine on the subject is that a Muslim, though he may lead a wicked and ungodly life, and entertain many opinions opposed to the doctrines of Al-Islam, may never become a Kafir (An Infidel), but only becomes an infidel :

1. by denying the existence of Almighty ALLAH.
2. by associating other gods with the One and only ALLAH.
3. by denying the Divine mission of the Holy Prophet (peace be upon him).
4. by denying what has been accepted by general agreement, i.e., by declaring lawful what has been by common consent declared prohibited.

The one who abjure Al-Islam is called Murtadd (Apostate). According to the Hadith, the Holy Prophet Muhammad (peace be upon him) punished some apostates by cutting their hands, and their feet, blinding their eyes, <sup>(29)</sup> and he throw them in the stony ground until they died. This punishment is complying with the Holy Qur'an, "The punishment of those who wage war against ALLAH and His Apostle, and strive with might and main for mischief through the land : is execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land : that is their disgrace in this world, and a heavy punishment in theirs in the Hereafter." <sup>(30)</sup> Thus, the punishment of the apostates is not only in the Hereafter, but also in this world, ALLAH says, "And if any of you turn back from their faith and die in unbelief, their works will bear no fruit in this life and in the Hereafter; they will be companions of the Fire and will abide therein." <sup>(31)</sup> It is claimed that acceptance and abandonment of religion is a matter of one's own choice and should not, therefore, be made a cognizable offence. This whole argument is based on one wrong premise, that is why the punishment prescribed by Al-Islam for apostasy seems to be tyrannical. Al-Islam is not a mere religion in the sense this term is commonly used; but is also a State and a system of government. Thus, when a person rebels against Al-Islam as a religion, he is simultaneously guilty of high treason against the state and the political system. The betrayer is always severely treated in every political order. No clemency is shown to them who undermine the foundations of the state and disrupt the social order. A stern attitude is always adopted by all governments against rebels and disruptionists, and so is the case with Al-Islam.

Abdullah Ibn Mas'ud quoted ALLAH's Messenger (peace be upon him) as saying, "It is not permissible to take the life of a Muslim who bears testimony [to the fact] that there is no god but ALLAH, and I am the Messenger of ALLAH, but in one of three cases, the married adulterer, a life for life, and the deserter of his din [Al-Islam], abandoning the community." As far as apostasy (the deliberate abandonment of Al-Islam) is concerned, there is almost consensus of opinion amongst jurists that Irtidad (Apostasy) from Al-Islam must be punished by death. The apostate is given a fair chance to repent, before he is put into death. In fact, Al-Islam is not a matter of private relationship between man and ALLAH, but is interwoven with society. So, when he abandons Al-Islam, he in fact revolts against the authority of the Islamic State and society.<sup><32></sup>

In theology the term Iman (faith) means putting one's trust, and having faith, in ALLAH and His Prophet Muhammad (peace be upon him) and in his message.

There are various opinions concerning the exact meaning of Iman.

1. Some hold that it is "aqd bi'l qalb", i.e., intellectual conviction and acceptance of the truth of what the Holy Prophet Muhammad (peace be upon him) taught concerning religion.
2. Others add that it is an oral profession (shahada bi'l lisan).
3. Others also add a third element, mannely acting according to the fundamentals of the faith (amal bi'l arkan).

The term Iman as used in the Holy Qur'an, signifies either simply acceptance by heart, and a firm conviction of the truth brought by the Holy Prophet (peace be upon him);<sup><33></sup> or simply a confession of the an oral profession of faith;<sup><34></sup> or doing good deeds and putting into practice the principles accepted;<sup><35></sup> or it may signify a combination of the three.<sup><36></sup> In Hadith, Iman is used frequently in a wider sense as including good deeds, and sometimes simply meaning good deeds.

Abu Huraira related that one day the Messenger of ALLAH (peace be upon him) was standing among people a man came to him and said : Prophet of ALLAH tell me what is Al-Iman ? and the Holy Prophet replied: That you affirm your faith in ALLAH, His Angels, His Books, His Meeting, His Messengers and that you affirm your faith in the Resurrection hereafter. The man further asked : Messenger of ALLAH, tell me what does Al-Islam signify ? The Holy Prophet replied : Al-Islam means that you worship ALLAH and do not associate anything with Him, you perform the obligatory prayer, pay the obligatory Zakat, and observe the fast of Ramadan. The enquirer again said: Messenger of ALLAH, what does Al-Ihsan (Rightdoing) imply ? The Holy Prophet replied : That you worship ALLAH as if you are seeing Him, and in case you fail to see Him,.....

We can conclude the following :

1. Al-Iman (Faith) is conviction.
2. Al-Islam is the performance of obligatory duties.
3. Al-Ihsan (Right-Doing) is what achieved when we exercise "Self-Censorship".

Each of these elements can separately be distinguished, but they are integrated. Every Mu'min (Believer) is a Muslim, but not necessarily every Muslim is a Mu'min. The three elements must be blended in the perfect Muslim.

### Doctrines Of Al-Islam

Knowledge does not lead to atheism as some uneducated people believe. The English philosopher Francis Bacon says, "A little philosophy brings man to atheism, whereas diving deep into it brings him back to religion";<sup><37></sup> the famous physicist Albert Einstein says, "Faith is the strongest and noblest result of scientific research".<sup><38></sup> The Holy Qur'an established this fact fourteen centuries ago, confining absolute reverence for ALLAH to the learned, "Those truly fear ALLAH among His servants who have knowledge : for ALLAH is Exalted in Might, Oft-Forgiving".<sup><39></sup> ALLAH puts the testimony of the learned on His existence on the same level as that of the never distrusted mala'ika, ALLAH says, "There is no god but He, that the witness of ALLAH, His angels, and those endowed with knowledge, standing firm on justice. There is no god but He, The Exalted in Power, The Wise".<sup><40></sup> As mentioned, before, that Al-Islam's principles and rules may be classified into a doctrinal group, devotional group, and legislation. Al-Islam may also be divided into knowledge and obedience. Knowledge is the theoretical or dogmatical part which deals with the creed and articles of faith, and is called Usul (The Roots), Usul Ad-Din (The Foundations Of The Religion), Ilm At-Tawhid (The Science Of The Oneness Of ALLAH), Ilm Al-Aqa'id (The Science Of The Articles Of Faith), or Ilm Al-Kalam (The Science Of The Word). He who addresses knowledge and Oneness is a dogmatist. Obedience is the practical part which consists of precepts and commandments to be obeyed, rules and customs to be observed, and duties to be fulfilled. He who addresses obedience and the law is a jurist. Al-Islam has never had a council of theologians or representatives of institutions, schools, communities, or mosque congregations to propose, and discuss doctrines for adoption by Muslims. A man expresses his acceptance of the tenets of Al-Islam and his commitment to its code of laws, when he repeats the formula of the creed, "La ilaha illa ALLAH, and Muhammad-un Rasulu ALLAH" (There is no god but ALLAH, and Muhammad is the Messenger of ALLAH); all the doctrines of Al-Islam or the articles of faith are to be included in this formula. To bear witness that ALLAH is One means a perfect belief in Him as the source of knowledge and the object of worship. To bear witness that Muhammad is His Messenger includes a belief in the Angels, the Scriptures (the Holy Books), the Prophets, the Day of Resurrection, and the principles on which the code of laws is based. When it invites people to adopt its belief, Al-Islam

does not use compulsion, for faith cannot be created by force. ALLAH says, "Let there be no compulsion in religion : Truth stands out clear from Error: whoever rejects Evil and believe in ALLAH hath grasped the most trustworthy hand-holded that never breaks. And ALLAH heareth and knoweth all things".<sup><41></sup> The articles of faith are, belief in ALLAH, the Angels, the Holy Books, the Prophets, the Day of Resurrection. These are injunctions expressly stated in the Holy Qur'an. Predestination may also be added to these injunctions.

### 1. Belief In ALLAH

The basic faith in Al-Islam is the faith in ALLAH, His Existence, His Oneness, and His Perfection. The Holy Qur'an nowhere provides an Aristotelian or philosophical definition of ALLAH by stating His ultimate and all-embracing nature. It never states what ALLAH, in His essence, is. The Holy Prophet Muhammad (peace be upon him) did not claim to introduce a new ALLAH to the Arabs. He summoned his countrymen to the exclusive worship of the same ALLAH Who is the ALLAH of the Jews and the Christians.

Muslim theologians developed their description of ALLAH under three readings : His dhat (essence), His sifat (attributes), and His a'mal (works). Some theologians undertook to discuss the essence of ALLAH, but for the most part they heeded an admonition by Al-Ghazally,<sup><42></sup> "Meditate upon ALLAH's creation and do not meditate upon the Being of ALLAH". In the Holy Qur'an, ALLAH says, "Say: He is ALLAH, the One and Only; ALLAH, the Eternal, Absolute, He begetteth not, nor is He begotten; and there is none like unto Him".<sup><43></sup>

It is amazing that, of all the religions, Al-Islam alone rationalizes devotion, especially in giving evidence of the existence of the Creator. The Holy Qur'an draws people's attention to faith in ALLAH on base of reason, inner consciousness or intuition. The creation of the universe<sup><44></sup> is one of the most remarkable evidences of the existence of ALLAH.

The word "RABB" (LORD) is one of the usual names of ALLAH. It bear the meaning of fostering, rearing, nourishing, regulating, completing and accomplishing. Thus, the word "RABB" indicates that everything created by ALLAH bears the imprint of Divine creation. An Aya (Verse) of the Holy Qur'an revealed in the early days states : "Glorify thy Guardian LORD Most High, Who hath created, and further given order and proposition; Who hath ordained laws and granted guidance",<sup><45></sup> RABB means He creates things and brings them to perfection; He makes them according to measure and shows the ways whereby they may attain perfection.

### The Oneness Of ALLAH

The first principle of Al-Islam and the corner-stone of faith is

belief in Tawhid (the Oneness of ALLAH),<sup>(46)</sup> "La ilaha illa ALLAH" (there is no god but ALLAH). These words mean that nothing to be worshipped save ALLAH. Before Al-Islam, the Arabs worshipped of "idols",<sup>(47)</sup> "ancestors"<sup>(48)</sup> and "spirits" who according to those Arabs, could appear to people in different forms or resided within certain animals.<sup>(49)</sup> Totemism was equally favoured among the Arabs in the pre-Islamic age, as well as Magianism,<sup>(50)</sup> Sabianism,<sup>(51)</sup> Judaism, and Christianity. A group of Arabs, who were neither Jews nor Christians, believed in the existence of one god, but they were still polytheists because they ascribed partners to ALLAH, showed favour to idols, said that ALLAH had sons and daughters and believed in mediation and intercession.

In the Holy Qur'an, Shirk (Polytheism) means associating gods with ALLAH, whether with respect to the person of ALLAH, or His attributes, or His works; as regards the obedience. The Holy Qur'an refers as follows to Shirk, "He said shall I seek for you a god other than the true ALLAH, when it is ALLAH Who hath endowed you with gifts above the nations ?".<sup>(52)</sup>

The Holy Qur'an summed up in these words the various forms of Shirk, "That we worship none but ALLAH; that we associate no partner with Him; that we erect not from among ourselves lords and patrons other than ALLAH";<sup>(53)</sup> "Seest thou such a one as taketh for his god his own passion [or impulse] ? couldst thou be a disposer of affairs for him ?"<sup>(54)</sup>

Tawhid (The Oneness Of ALLAH), according to the Holy Qur'an, implies that ALLAH is One in His person (dhat), One in His attributes (sifat), and One in His works (af'al). His Oneness in person means that there is neither plurality of gods, nor plurality of persons of Divine nature. His Oneness in attributes implies that no other being possesses one or more of the Divine attributes in perfection. His Oneness in works implies that none can do the works which ALLAH has done, or which ALLAH may do. In the Holy Qur'an, ALLAH says, "If there were in the heavens and the earth, other gods than ALLAH, there would have been confusion in both ! but glory to ALLAH, the LORD of the Throne: [High is He] above what they attribute to Him".<sup>(55)</sup>

## B. The Attributes Of ALLAH

The doctrine of the Oneness of ALLAH means that ALLAH is One in His essence, that is, not composed of parts; One in His attributes, meaning an all-embracing or, in other terms, in sole control of the universe.

The word ALLAH is "Ism Dhat" (the Essential Name of the Essence) of the Divine Being as distinguished from all other names which are called "Asma' As-Sifat" (Names Designating Attributes of ALLAH) which are called the excellent names, "The most beautiful names belong to ALLAH :so call on Him by them".<sup>(56)</sup> Abu Huraira reports quotes the Holy Prophet Muhammad (peace be upon him) as saying, "Verily, there are ninety-nine names of ALLAH, and whosoever recites them shall enter paradise". ALLAH, as proper name does not carry any significance, but being the

name of the Divine Being, signifies the attributes which are contained in the attributive names.

Because man is ALLAH's Khalifa (Vicegerent) on earth,<sup>(57)</sup> he must try to imitate the Divine morals, i.e., the Divine attributes which are really meant to perfect the human character.

### C. The Works Of ALLAH

ALLAH's activity, as Creator, created the universe including man, and everything in existence. ALLAH is the Absolute Sovereign over all creatures and cannot, therefore, be accused of acting unjustly towards them, however He may deal, as every possessor of an object is entitled to deal with his own property as He likes. Injustice is a man's interference in the property of another person, but as long as he deals with his own property, no one can accuse him of cruelty and injustice. Abu Dhar Al-Ghifari relates that the Holy Prophet Muhammad (peace be upon him) quoted his LORD as follows: "O My servants, I have forbidden oppression for Myself and have made it forbidden amongst you, so do not oppress on another."<sup>(58)</sup>

The Muslim sect "Aj-Jabriyya" believes that man does not control his action, and therefore could not be held responsible. The other sect "Al-Qadariyya" believes that man has power over his actions and is therefore responsible for his acts. We believe that ALLAH, has Absolute Knowledge of the Fate of man; but man is fully responsible for his acts.

### 2. Belief In Mala'ika, Jinn And Ruh

ALLAH says, "The Apostle believeth in what hath been revealed to him from his LORD, as do the men of faith. Each one [of them] believeth in ALLAH, His angels, His books, His apostles."<sup>(59)</sup> The Arabic word for an angel is "malak", of which the plural form is mala'ika.<sup>(60)</sup> Belief in mala'ika implies the belief that man has a spiritual life, and that he has to respond to the motives of good which were given to him by ALLAH. The purpose is to exalt man to the highest degrees of perfection. That is why Al-Islam made belief in mala'ika one of the basic foundations of religion. Faith or belief in any doctrine, according to the Holy Qur'an, is essentially the acceptance of a fact as a basis for action. Faith in mala'ika, therefore, means that man must develop his spiritual life by acting in accordance with the promptings of the malak and by bringing into play the faculties which ALLAH has given him. To worship mala'ika and solicit their help is degrading and debasing for man, because when Adam was created ALLAH made them prostrate themselves before Adam, granted him greater knowledge than they possessed and bestowed upon Adam His Own Vicegerency on the earth. ALLAH says, "And when We said unto the angels: Prostrate yourselves before Adam, they fell prostrate, all save Iblis. He demurred through pride, and so became a disbeliever."<sup>(61)</sup> ALLAH also says, "And We created you, then fashioned you, then told the angels: all ye prostrate before Adam! and they fell prostrate, all save Iblis, who was not of these who make prostration."<sup>(62)</sup>

The most significant function of the mala'ika is the communication of Divine revelation to ALLAH's apostles.<sup>(63)</sup> The Holy Qur'an states that Jibril was the malak who conveyed the revelation of the Qur'an to the Holy Prophet Muhammad (peace be upon him).<sup>(64)</sup>

Among the other functions of mala'ika is strengthening ALLAH's apostles, supporting them and soothing their distress.<sup>(65)</sup>

ALLAH assists the righteous men with mala'ika while fighting their enemies, so that they may vanquish them.<sup>(66)</sup>

The jinn (the demons) and the mala'ika are two different classes of beings, and it is an obvious error to look upon the jinn as part of the angelic creation. The jinn are created from fire, while the mala'ika are created from light. Some of the jinn are virtuous, others are wicked;<sup>(67)</sup> while the mala'ika are honoured slaves.<sup>(68)</sup> The jinn share with mankind the duty to hear and believe in the Islamic teachings.<sup>(69)</sup> The Holy Prophet Muhammad (peace be upon him) is said to have been sent for the conversion of jinn as well as men alike.<sup>(70)</sup> On Judgment Day, men and jinn will be called by ALLAH and will be held responsible in the same degree,<sup>(71)</sup> but the mala'ika do not share with men the same responsibilities. Mala'ika are the messengers of ALLAH to His prophets and apostles, but jinn like men, receive revelations through his apostles.<sup>(72)</sup>

ALLAH has created man with two kinds of emotions, the higher which lead him to spiritual life, and the lower which relate to his physical life. The lower emotions are necessary for man's physical life, but they become a hindrance to him in his spiritual life, if they become out of control. Man is therefore required to keep his emotions under control. Faith in mala'ika, as we have mentioned before, means that man must develop his spiritual life by acting in accordance with the promptings of the malak and by bringing into play the faculties which ALLAH has given him. Faith in the existence of jinn means that man must develop his spiritual life by abstaining from responding to his lower instincts.

Ar-Ruh (the Soul, or Spirit) is the source of life,<sup>(73)</sup> and the vital force of existence without which beings are lifeless. To enquire of what consists the ruh of man,<sup>(74)</sup> and where it lies in the body, is useless. However, there is no Qur'anic text prohibiting the search of the precise nature of Ar-Ruh, but the Holy Qur'an indicates that the identification of Ar-Ruh is ALLAH's own concern, and the human mind is too limited to understand such a supernatural reality.<sup>(75)</sup> There are very little verses in the Holy Qur'an concerning Ar-Ruh.<sup>(76)</sup>

### 3. Belief In ALLAH's Kutub (Books)

<sup>Wahy</sup> Wahy (Revelation) in its technical sense is the word of ALLAH as conveyed to His anbiya (prophets) and auliya (other righteous servants, who have not been raised to the dignity of prophethood).<sup>(77)</sup> Wahy is communicated to anbiya through mala'ika.<sup>(78)</sup> Wahy, in accordance with

the Holy Qur'an, is a universal fact<sup>(79)</sup> intended for the development and perfection of everything within its ordained sphere. Wahy is not only universal but also progressive, attaining perfection in the last of the prophets, the Holy Prophet Muhammad (peace be upon him). The Islamic belief is that each wahy is Divine in its origin and permanently valid in its doctrine, each contains rules and regulations suitable for its own time and for the people who received it. But later laws and methods of worship and service are improvements on earlier systems of ethics and obedience. Al-Islam is the best and final wahy, and should therefore be heeded by the followers of former revelations.<sup>(80)</sup>

Every nation had a prophet,<sup>(81)</sup> and every prophet had a book.<sup>(82)</sup> Al-Islam, therefore, requires a belief, not only in the Holy Qur'an or in the particular books named in the Holy Qur'an, but in all sacred inspired scriptures of every nation. ALLAH says, "The Apostle believeth in what has been revealed to him from His LORD, as do the men of faith. Each one [of them] believeth in ALLAH, His mala'ika, His Kutub, and His Apostles".<sup>(83)</sup> From the Islamic point of view, no one who denies any of these scriptures is considered to be a believer.

The number of the revealed books is said to have been one hundred and four. Of these ten are believed to have been given to Adam, fifty to Seth, whose name is not mentioned in the Holy Qur'an, thirty to Idris (Enoch), ten to Ibrahim (Abraham). All these are lost. There are also Az-Zabur (The Psalms, The Book Of Dawood "David"), At-Tawrat (Torah, The Pentateuch, The Book Of Musa "Moses"), Al-Injil (the Gospel, The Book Of Isa "Jesus"), and Al-Qur'an (The Book Of Muhammad "peace be upon him"). The word Al-Kitab (the Book) has been used in the Holy Qur'an for the Qur'an itself,<sup>(84)</sup> for Chapters of the Holy Qur'an,<sup>(85)</sup> for all previous revelations taken together,<sup>(86)</sup> and for all revealed books including the Holy Qur'an.<sup>(87)</sup> Revealed books are also spoken as Suhuf, particularly the books of Ibrahim and Musa are so called,<sup>(88)</sup> and the Holy Qur'an itself is spoken as Suhuf.<sup>(89)</sup> The word Sahifa (singular of Suhuf) means anything spread out. Revealed books are also mentioned as Zubur,<sup>(90)</sup> (the singular form, Zabur)<sup>(91)</sup> means any writing or book, and particularly the book of the Psalms of Dawood.<sup>(92)</sup> Some writers state the coming of the Holy Prophet Muhammad had been prophesied in Az-Zabur (the Psalms).<sup>(93)</sup>

The Holy Qur'an states the basic beliefs, the basic principles of worship and of human dealings, and the ideals of morality. The Qur'anic texts do not give in detail the code of laws regulating dealings, but the general principles which guide people to perfection and to a life of harmony. The means of establishing harmony as revealed in the Holy Qur'an, are based on faith, justice and a wise understanding of the human nature. In general, the Holy Qur'an contains nothing that may be refuted by reason, and nothing that can be proved wrong. None of its injunctions is unjust; nothing in it is misleading. From the beginning to the end, the whole book is full of wisdom and truth. It contains the best and most appropriate law for human civilization. It points out the right path and guides man to happiness and salvation.

The Holy Qur'an says, "Nay, this A Glorious Qur'an, [inscribed] in A Tablet Preserved",<sup>(94)</sup> this means that th Holy Qur'an is protected against change and alteration. This meaning is exactly the same as is elsewhere stated, "We have, without doubt, sent the Message; and We will assuredly guard it [from corruption]".<sup>(95)</sup> The significance in both cases is that the text of the Holy Qur'an shall be preserved in full purity.

#### 4. Belief In Anbiya

Human reason is not sufficient to guide man to the knowledge of the truth, thus, ALLAH has, from time to time, sent His anbiya (prophets), and rusul (apostles) in order to guide and teach men. They all brought essentially that very religion, Al-Islam, which the Holy Prophet Muhammad (peace be upon him) propagated. The sending of anbiya is not, as philosophers and some sects pretend, incumbent on ALLAH; His sending them is an act of grace. According to some authorities (Abu Hafs Umar An-Nasafi) the sending of the apostles is an act of wisdom on the part of ALLAH. According to others (At-Taftazani), it is Wajib, not in the sense of an obligation resting upon ALLAH but a consequence arising from His Wisdom.

Since the very beginning of creation, the aim of the Divine Will was, to further the spiritual progress of man, thus in all ages, ALLAH has sent His messages to men through His anbiya. ALLAH says, "For We assuredly sent amongst every people an apostle".<sup>(96)</sup> Creatures unreached by anbiya are saved in a paradise of their own, ALLAH says, "Nor We visit with Our Wrath until We had sent an apostle [to give warning]".<sup>(97)</sup> Since faith in Divine revelation is one of the basis of Al-Islam, and since revelation must be communicated through a man, faith in anbiya is a natural sequence. Therefore, faith in ALLAH's anbiya is mentioned along with faith in the revealed books, the Holy Qur'an says, "It is not righteousness that ye turn your faces towards East or West; but it is righteousness to believe in ALLAH and the Last Day, and Angels, and the Book, and the Messengers".<sup>(98)</sup>

The reformation required for man can only be accomplished through a man-nabi (prophet), that is why the Holy Qur'an lays special stress on the fact that the nabi must be a man, "Say, if there were settled on earth angels walking about in peace and quiet, We should certainly have sent down from the heavens an angel for an apostle".<sup>(99)</sup> The nabi shows how the message is to be interpreted in practical life, a malak (an angel) belongs to a different class of beings and cannot serve as a model for man. We also add, that ALLAH Himself cannot serve that purpose, even it were possible that He should come in the flesh. The doctrine of incarnation is, therefore, rejected because ALLAH incarnate would serve no purpose in the reformation of man; seeing that man has to face temptations at every step, but there is no temptations for ALLAH.

The Holy Qur'an makes it incumbent on Muslim to believe in all anbiya, "Say ye : 'We believe in ALLAH, and the revelation given to us, and to Ibrahim, and to Isma'il, Ishak (Isaac), Ya'qub (Jacob), and the

CHAPTER II THE INTRODUCTORY PART

Tribes, and that given to Musa and Isa, and that given to [all] anbiya from their LORD : We make no difference between one and another of them: and we bow to ALLAH [in AL-Islam]".<sup><100></sup>

There is no difference between the Holy Prophet Muhammad (peace be upon him) and other anbiya (ALLAH's blessing upon them all), and the Muslims have been enjoined to believe in them all. But in spite of their equality in this respect, there are three differences between Muhammad and other anbiya :

- A. The anbiya of the past came to a certain people for certain periods of time, while Muhammad (peace be upon him) has been sent to the whole world and for all times.
- B. The teachings of those anbiya have either disappeared, or if they remain are adulterated, and intermingled with erroneous and fictitious statements. In contrast to this, the teachings of Muhammad (peace be upon him) have been communicated untouched, therefore, he is a living personality, in whose footsteps it is possible to follow correctly and confidently.
- C. The guidance imparted through the anbiya of the past was not complete and all-embracing. Every nabi was followed by another who effected alterations and additions to the teachings and injunctions of his predecessors and, in this way, the chain of reform and progress continued. That is why the teachings of the earlier anbiya, after the lapse of a certain period of time, were lost and forgotten.

At last, the perfect code of guidance was imparted to mankind through Muhammad (peace be upon him) and all previous codes were automatically abrogated. It is futile and imprudent to follow an incomplete code while the complete code exists. He who follows Muhammad (peace be upon him) follows all the anbiya for whatever was good and eternally workable in their teachings has been embodied in his teachings. The highest in rank among the anbiya and rusul is the Holy Prophet Muhammad (peace be upon him), who is considered not only the greatest nabi, but the most excellent among all created things.<sup><101></sup>

5. Belief In Al-Akhira (The Hereafter)

The word generally used in the Holy Qur'an to indicate life after death is Al-Akhira;<sup><102></sup> Al-Yaum Al-Akhir (The Last Day);<sup><103></sup> sometimes Ad-Dar Al-Akhira (the Last Abode);<sup><104></sup> and once An-Nash'at Al-Akhira (The Future or the Next Life)<sup><105></sup> which is the real meaning conveyed by all these terms. This idea of resurrection, called Qiyama in Arabic, meaning "the Rising" is not new. The pagan Arabs believed the dead to continue their life in a lesser degree in their graves. Generally speaking, every man from the run of history, whether residing in rural or urban areas, whether ignorant or educated, has hidden feeling that after this life, there is another life in which justice is

finally established, and man is credited for the things he did, good or evil.

We believe in the continuity of life; but in a different form in the Hereafter.<sup>(106)</sup> In the Holy Qur'an, ALLAH says, "On the day when the earth will be changed to other than the earth, and the heavens [also will be changed] and they will come forth unto ALLAH, the One, the Almighty".<sup>(107)</sup>

In the Holy Qur'an, there are many evidences of the certainty of resurrection. One of them is that ALLAH Who made this vast universe out of nothing can also bring about a new creation.<sup>(108)</sup> Another, lies in the creation of man from clay, in the stages of his embryonic development until he becomes a full human being, and finally in his death.<sup>(109)</sup> A third evidence lies in the barren and lifeless earth on which ALLAH sends down rain, which brings it to life again.<sup>(110)</sup>

## 6. Belief In Qada And Qadar

Belief in qada and qadar is one of the essential beliefs in Al-Islam, and the Holy Prophet Muhammad (peace be upon him) included it among the basic elements of Iman. Belief in qada and qadar is also confirmed by a Hadith of the Holy Prophet (peace be upon him), on the authority Abu-Abbas Abdullah Ibn Abbas quote, "One day I was behind the Holy Prophet (peace be upon him) and he said to me, 'Young man, I shall teach you some words [of advice] : Be mindful of ALLAH and you will find Him next to you. If you ask, ask of ALLAH; if you seek help, seek help of ALLAH. Know that if the Nation as a whole to benefit you, it can benefit you only with something that ALLAH had already prescribed for you, and if they gather to harm you, they will harm you only with something ALLAH had prescribed for you. The pens have been lifted, and the pages have dried". In the Holy Qur'an, however, qada and qadar are not considered on equal terms with other foundations of religion, but it does not indicate whether we should have faith in this doctrine or not.

Qada, according to some authorities,<sup>(111)</sup> means the deciding of an affair whether it by word or by deed, and it is of two kinds, either as relating to man or as relating to ALLAH. An example of the qada of ALLAH in words is what the Holy Qur'an says, "And We have decreed for the Children of Israel in the Scripture : Ye verily will work corruption in the earth twice, and ye will become great tyrants."<sup>(112)</sup> In this Aya qada means the making known of a Divine order by way prophecy. An example of the deciding of an affair by deed is what the Holy Qur'an says, "Then He ordained them seven heavens in two days and inspired in each heaven its mandate; and We decked the nether heaven with lamps and rendered it inviolable. That is measuring of the Mighty, the Knower."<sup>(113)</sup> Thus, qada is the ordering of a thing to come to pass. The meaning of qada, according to the sect of "Ashariyya" is the Will of ALLAH that wills things from eternity as they are. Its meaning, according to another sect "the Maturidiyya" is ALLAH's creating things with additional finishing and perfection. Also qada is of two kinds,

that decreed by ALLAH absolutely or irrevocably and the other decreed only conditionally, there is no difficulty in believing that He will in answer to the supplications of His servants not to send it down. As regards such calamities which He has irrevocably decreed, it is believed that He may lessen them. The Holy Qur'an command men to make supplications. <sup>(114)</sup>

Qadar (or taqdir), according to the same authorities, means the making manifest of the measure of a thing. ALLAH's taqdir of things is in two ways, by granting qudra (power), or by making them in particular manner, as wisdom requires. Taqdir is, therefore, the law or measure which is working throughout the whole of the creation; and this is exactly the sense in which the word is used in the Holy Qur'an. The Holy Qur'an says, "Lo ! We have created every thing by measure". <sup>(115)</sup>

There is no doubt that belief in qada and qadar is one of the fundamentals of Al-Islam, <sup>(116)</sup> although the Holy Qur'an does not specifically mention this belief. But several Ayat assert that nothing in this world has existed or can exist without the Will of ALLAH. The Holy Qur'an says, "No soul can ever die except by ALLAH's leave and a term appointed"; <sup>(117)</sup> "Say I have no power to hurt or benefit myself, save that which ALLAH willeth. For every nation there is an appointed time. When their time cometh, then they cannot put it off an hour, nor hasten [it]". <sup>(118)</sup> Also, sustenance is in the hands of ALLAH, not man, the Holy Qur'an says, "For ALLAH is He Who gives [all] the sustenance, LORD of Power, steadfast [for men]". <sup>(119)</sup> Guidance and delusion are, also, from ALLAH, the Holy Qur'an says, "Lo ! thou [O Muhammad] guidest not whom lovest, but ALLAH guideth whom He will, and He is Best Aware of those who walk aright". <sup>(120)</sup>

The significance of belief in qada and qadar is that whatever good or evil fortune befalls to man, it must be accepted as coming from ALLAH, the Holy Qur'an says, "Say : O ALLAH ! Owner of Sovereignty ! Thou givest sovereignty unto whom Thou wilt, and Thou withdrawest sovereignty unto whom Thou wilt. Thou exaltest whom Thou wilt, and Thou abasest whom Thou wilt. In Thy hand is the good. Lo ! Thou Art Able to do all things". <sup>(121)</sup>

### Third: The Devotional Rules Of Al-Islam

In the above-mentioned Hadith on Al-Islam, Iman and Ihsan, the Holy Prophet Muhammad (peace be upon him) said, "Al-Islam is to testify that there is no god but ALLAH and Muhammad is the Messenger of ALLAH, to perform the prayers, pay Zakat, fast in Ramadan, and make the pilgrimage to the House, <sup>(122)</sup> if you are able to do so". On the authority Ibn Umar, who said, "I heard the Messenger of ALLAH (peace be upon him) say, Al-Islam was built on five [pillars], testifying that there is no god but ALLAH, and that Muhammad is the Messenger of ALLAH, performing the prayers, paying the Zakat, making the pilgrimage to the House, and fasting in Ramadan". We have already dealt with the profession of Al-Islam and we will take now the other devotional rules of Al-Islam. Jihad, as we will explain later on, must be included among

the arkan (pillars) of Al-Islam.

### 1. Salat

People need a spiritual force that tunes their mentality to certain ideals, lest relations among individuals be limited to lustful desires which might lead to corruption. It is salat that provides the human community with the long-needed spiritual powers for the well-being of society.

The word "Salat" does not seem to occur in the pre-Qur'anic literature. It is derived from the Aramaic word meaning ritual worship or litany. It is a specific and technical word for a different series of actions and utterances, and therefore means something more and other than simply the word "Salat". Linguistically Salat in Al-Islam<sup>(123)</sup> is an appeal we perform to gain ALLAH's Favour, entreat forgiveness on a misdeed we have committed, express gratitude on a grace bestowed upon us, ward off a possible inequity, and perform a religious duty. It is also a manifestation of need and want for Deity by word and deed. ALLAH enjoined Salat on His worshippers to remind them of His commandments, and to help them to lessen the hardships and misfortunes they face in everyday life. Also among its objectives is the expression of praise and glorification which are worthy of ALLAH. Salat is nowhere described or exactly regulated in the Holy Qur'an. It is noted that the Arabic word "du'a" corresponds to the concept of Salat. The true meaning of Salat and its real worth and significance can be appreciated only when there is an adequate awareness of the innate character of the relation that obtains between ALLAH and man. This bond is absolutely unique. It is not possible to conclude about it on the basis of the ties we experience between any two persons around us, because it is much more sublime, strong and comprehensive relationship.

Every Muslim has to perform five Salawat (plural of Salat) every day.

### 2. Zakat

The goods of this world are impure, but one may acquire them and enjoy them on the condition that part is restored to ALLAH. The word Zakat (Legal Alms) originally meant purification. Sadaqa (Spontaneous Alms) is a voluntary practice, and is probably, in the opinion of Gibb and Kramers, derived from the Hebrews.<sup>(124)</sup>

Zakat (Legal Alms) is clearly prescribed in the Holy Qur'an. ALLAH orders Muslims to pay Zakat in different cases. Every time an Aya in the Holy Qur'an calls for the performance of Salat, there is a call for practising Zakat. Zakat and Salat are firm foundations on which Al-Islam is established. ALLAH's command is to "establish regular Salat [and] give regular Zakat".<sup>(125)</sup> Religious fraternity that ties the Muslim individual to other Muslims is established mainly through the performance of Salat and Zakat, "But if they repent and establish Salat and pay the Zakat, then they are your brethren in religion".<sup>(126)</sup> Al-

Islam made the practice of Zakat compulsory because it is the recognised right of poor people in the wealth that ALLAH has bestowed upon the rich, "And in whose wealth there is a right acknowledged for the beggar and the destitute".<sup>(127)</sup> It is the duty of the Imam to collect this right and distribute it among them in justice.

That is why the Holy Prophet Muhammad (peace be upon him) used to collect the Zakat in person and order his commissioners to collect such Zakat from the rich to be given to the needy. After the death of the Holy Prophet Muhammad (peace be upon him) and the recognition of Abu Bakr as the Khalifa it happened that some Arabs declared their intention to refrain from giving Zakat, assuming that the Khalifa would not like to fight them. Abu Bakr, however, gathered the notable companions of the Holy Prophet (peace be upon him), discussed the problem over with them, and come out with an agreement to fight the abstainers. Abu Bakr and the companions readied themselves and set out after the abstainers and dealt them a decisive blow that brought back to the Islamic community its unity and fixed its Divine teachings enshrined in the Holy Qur'an. Those who fought in the days of Abu Bakr were the high ranking companions of the Holy Prophet (peace be upon him) and the authoritative people; they fought under the command of the Khalifa himself who said on this day, "By ALLAH ! if they refrain from giving even a young she-goat which they used to give to the Holy Prophet, I will fight them for it".

Zakat can be classified into five kinds applied to five kinds of property. No Zakat applies to kinds of property other than these five. The different kinds of Zakat are :

- A. Zakat on Gold and Money.
- B. Zakat on Merchandise.
- C. Zakat on Agricultural Products.
- D. Zakat on Livestock.
- E. Zakat on Minerals and Treasures.

Al-Islam does not leave the question of Zakat to the personal estimation in whose trust its revenues are put. The Sunnis do not accept the Holy Prophet Muhammad family as having right to Zakat, but the Shi'is include them. However, Al-Islam assigns where the revenues of Zakat should go, the Holy Qur'an says, "The alms<sup>(128)</sup> are only for the poor and the needy, and those who collect them, and those whose hearts are to be reconciled, and to free the captives and debtors, and for the cause of ALLAH, and [for] the wayfarer; a duty imposed by ALLAH, ALLAH is knower, Wise".<sup>(129)</sup>

### 3. Saum

Saum or Siyam (Fasting) in Arabic means abstinence from doing something. Saum during the month of Ramadan is obligatory in Al-Islam for every sane, mature and able Muslim from before dawn until after sunset. Saum consists of two elements, intention to make abstinence from all physical refreshment and actual fasting. It is forbidden to take

anything during Saum, e.g., aliment, water, smoke, inhalation, bleeding, the application of leeches, and sexual excitation; but if through sheer forgetfulness one puts something into one's mouth, the Saum is not broken. The fundamental regulation of Saum were formulated in the Holy Qur'an, it says, "O ye who believe ! Siyam is prescribed for you, even as it was prescribed for those before you, that ye may ward off [evil]; [Siyam] a certain number of days; and [for] him who is sick among you, or in a journey, [the same] number of other days; and for those who cannot afford it there is a ransom : the feeding of a man in need - But whose doeth good of his own accord, it is better for him ; and that ye fast is better for you if ye did but know. The month of Ramadan in which was revealed the Qur'an, a guidance for mankind, and clear proofs of the guidance, and the Criterion [of right and wrong]. And wherever of you is present let him fast the month, and whosoever of you is sick or in a journey, [let him fast the same] number of days. ALLAH desireth for you ease; He desireth not hardship for you; and [He desireth] that ye should complete the period, and that ye should magnify ALLAH for having guided you, and that peradventure ye may be thankful".<sup>(130)</sup> There are other Ayat in the Holy Qur'an which prescribe expiatory fast.

Saum has a great benefit both physical and spiritual, on both the individual and social levels. Of these, we can mention the feeling of sympathy with the poor. When a faster feels hungry, he remembers such people who are always hungry, which leads him to sympathize with the poor. In Saum, there is also an equality among the rich and the poor. In way, it is a compulsory experience in poverty, as people share similar feeling and sympathize with one another through a collective sense of pain. Among the other virtues of Saum is that it moderates the power of habits, and teaches us to control our desires and passions, and sharpen our will power.

#### 4. Haj

There is no religious group or community does not have its holy shrines and places of Haj (Pilgrimage). In every faith there are some sacred places to which its followers travel at a certain time as an act of religious devotion. This is so because it fulfils a great human need and satisfies a basic spiritual urge. ALLAH says, "And for every nation We have appointed a ritual, that they mention the name of ALLAH over the beast of cattle that He hath given them for food; and your GOD is One GOD, therefore surrender unto Him. And give good tidings [O Muhammad] to the humble".<sup>(131)</sup>

The Jewish and Christian faiths are closer to Al-Islam in the matter of pilgrimage. They have both lived long stretches of history and enlightenment, and chroniclers too, have done full justice to them. Until now their adherents constitute two of the most advanced groups of the world, culturally, educationally and politically. Ancient monuments and their sacred places in Al-Quds (Jerusalem) are still the objects of veneration and they have been making a pilgrimage to that eternal city from older days.

Though Shahada, Salat, Zakat and Saum are absolute obligations, Haj is not so absolute, since it involves so much practical difficulty in certain cases. But every adult Muslim, man or woman, must make a Haj, at least once in his lifetime; that is, if he or she has the means to accomplish it; ALLAH says, "And Haj to the House is a duty unto ALLAH for mankind, for him who can find a way thither".<sup>(132)</sup> In Haj, it is permissible to send a representative. The following are exempted from Haj, the unfit; slaves; and women who have no relative to accompany them. Other just causes for exemption are lack of means and insecurity of the route.

The Sacred House of ALLAH (or what is called Al-Ka'ba),<sup>(133)</sup> was the first of its kind built as a place of Salat for people. ALLAH says, "Lo ! the first Sanctuary appointed for mankind was that at Bacca,<sup>(134)</sup> a blessed place, a guidance to the peoples, wherein are plain memorials [of ALLAH's guidance], the place where Ibrahim stood up to pray; and whosoever entereth it is safe".<sup>(135)</sup> The obligation of Haj to ALLAH's Sacred House, hence, goes back to the time of Ibrahim. A long time later, people started to introduce forbidden acts of polytheism and idolatry at Al-Ka'ba. ALLAH instructed the Holy Prophet Muhammad (peace be upon him) to put an end to such violations and purify the rites of Haj from innovations and acts of heresy.

The Shi'is visit the tombs of their Imams after their Haj. The sacred cities of the Shi'is are, Najaf, where Ali is buried and where every Shi'i desires to be buried; Karbela'a, where there is the tomb of Husain; Kazimiya, near Baghdad, where the 7<sup>th</sup> and the 9<sup>th</sup> Shi'i Imams are buried; Sammarra'a, where the 10<sup>th</sup> and the 11<sup>th</sup> Shi'i Imams are buried and where there is a catacomb in which the 12<sup>th</sup> is supposed to have disappeared. Besides these sacred towns of Mesopotamia, there are two other sanctuaries in Iran, Mash'had, where Imam Rida is buried; and Qum,<sup>(136)</sup> where there is the tomb of Fatima, the sister of Imam Rida.

The collective benefits ensuing from Haj are numerous, political, economic, and social. The meeting in haj of millions of Muslims from all over the world turns the Haj into an Islamic league, which meets every year, and affords the Muslims a golden opportunity to consult together and devise scheme for the welfare of Muslims. In the early days, before modern means of communication were available, the religious center was specially important, but even today it serves as a means by which Muslims learn to live together in unity and diversity. Haj, as such, is a firm establishment of Islamic fraternity among Islamic peoples, a call for co-operation among them, and a reminder to the Muslims of their duties toward one another.

#### 5. Jihad<sup>(137)</sup>

There is a difference of opinion on whether, or not, Jihad is among the devotional rules of Al-Islam. On one part, we believe that Jihad is one of the well-established devotional rules. Abu Sa'id Al-Khudri said he heard the Messenger of ALLAH (peace be upon him) say; "Whosoever of you sees an evil action, let him redress it with his hand;

and if, he is unable to do so, with his words; and if is still unable to do so, with his heart - and that is the weakest manifestation of faith". There is nothing much more evil than share ALLAH in His Sovereignty and establish human rules instead of the application of Al-Shari'a Al-Islamiya; thus, the establishment of the Islamic State, which applies Al-Shari'a Al-Islamiya, becomes an inevitable obligation for Muslims. It is supposed that this Islamic State must embrace the whole world. The Holy Prophet (peace be upon him) said, "I have been ordered to fight against people until they testify that there is no god but ALLAH and that Muhammad is the Messenger of ALLAH and until they perform the Salat and pay the Zakat, and if they do so they will have gained my protection for their lives and property, unless [they do acts that are punishable] in accordance with Al-Islam, and their reckoning will be with ALLAH the Almighty".<sup>(138)</sup>

The secular character of the Islamic system of life becomes most apparent in the place that Jihad holds in Muslim history. Al-Islam is increasingly emphasizes the spiritual conception of the term, which literally means "Struggle" applying it to the believer's struggle against his own lower nature.

#### Fourth: Al-Shari'a Al-Islamiya (The Islamic Law)

The tenets of Al-Islam, with their comprehensive nature, have no equal when compared with other divinely inspired rules.<sup>(139)</sup> All of the affairs of the society are regulated in such a way that they protect the piety of the body and spirit and promote the progress and happiness of the individual. The rules are stated so clearly that they are adaptable to any place and at any time.

#### 1. Conception Of The Divine Law In Judaism, Christianity, And Al-Islam

A Jew who believes in Talmudic Law can understand what it means to have a Divine Law, whereas for most Christians such an understanding comes with difficulty, precisely because in Christianity the Divine Will is expressed in terms of universal teaching such as being charitable, but not in concrete laws.

The Christian view concerning law which governs man socially and politically is indicated in the well-known saying of Isa "Render therefore unto Caesar the things which are Caesar's".<sup>(140)</sup> This phrase is commonly interpreted as leaving all things that are worldly and relate to political and social regulations to secular authorities of whom Caesar is the outstanding example. But more than that, it also means that because Christianity, being a spiritual way, had no Divine legislation of its own, it had to absorb Roman Law in order to become the religion of the civilization. The Law of Caesar, or the Roman Law, became providentially absorbed into the Christian perspective once this religion became dominant in the West, and it is to this fact the saying of Isa alludes. The dichotomy, however, always remained.

With regard to the Divine Law, however, the situation of Al-Islam and Christianity differ completely. Al-Islam never gave unto Caesar what was Caesar's. Rather, it tried to integrate the domain of Caesar itself namely, political, social and economic life, into an encompassing religious world view. Law in Al-Islam is therefore an integral aspect of the revelation and not an alien element.

The Western attitude toward law is totally determined by the character of Christianity as a spiritual way which did not bring a revealed law of its own. The Semitic notion of law which is universalised in both Judaism and Al-Islam is the opposite of the prevalent Western conception of law. It is a religious notion of law, one in which law is an integral aspect of religion. In fact, religion to a Muslim is essentially the Divine Law which includes not only universal moral principles, but details of how he should conduct his life and deal with ALLAH; how he should eat; procreate and sleep; how he should buy and sell at the market place; how he should pray and perform other acts of worship. It includes all aspects of human life and contains in its tenets the guide for a Muslim to conduct his life in harmony with the Divine Will.

The difference in the conception of the Divine Law in Al-Islam and Christianity can be seen in the way the word Canon (in Arabic Qanun) is used in the two traditions.<sup>(141)</sup>

In Al-Islam, it has come to denote a man-made law in contrast to Al-Shari'a Al-Islamiya or the divinely inspired law. In the West, the opposing meaning is given to this word in the sense that Canonical law refers to laws governing the ecclesiastical organization of the Catholic and Episcopal Churches, and has a definitely religious nature.

According to the Islamic concept, the whole universe has been created by ALLAH. The universe came into existence when ALLAH willed it, and then He ordained certain natural laws which it follows, and according to which all its various parts operate harmoniously. In the Holy Qur'an ALLAH says, "And Our word unto a thing, when We intend it, is only that We say unto it : Be and it is",<sup>(142)</sup> and He also says, "He hath created every-thing and hath meted it out for it a measure".<sup>(143)</sup>

Man is a part of the universe; the laws which govern human nature are no different from the laws governing the universe. ALLAH is the Creator of the universe as well as of man. Man's body is made of the earthly material, yet ALLAH has bestowed upon him certain characteristics which make him more than the earth from which he is made; ALLAH provides him according to measure. In his bodily functions, man involuntarily follows the same laws of nature as other creatures. In this respect, there is no difference between him and other inanimate or animate objects of the universe. All conditionally submit to the Will of ALLAH and to the laws of His Creation.

He Who has created the universe and man, and Who made man obedient to the laws which also govern the universe, has also prescribed a

Shari'a for his voluntary actions. If man follows this law, then his life is in harmony with his own nature. From this point of view, Al-Shari'a is also a part of that universal law which governs the entire universe including the physical and the biological aspects of man.

It becomes clear from the above discussion that the purpose of the establishment of ALLAH's law on earth is not merely for the sake of the next world. This world and the next world are not separate entities, but are stages complementary to each other. The law given by ALLAH not only harmonises these two stages, but also harmonises human life with the general law of the universe. Thus, when harmony between human life and universe ensues, its result are not postponed for the next world. However, they will reach their perfection in the Hereafter.

The sovereignty of ALLAH means merely that one should derive all legal injunctions from ALLAH and judge according to these injunctions, but includes the principles of administration, its systems and its modes. This narrow meaning (i.e., that Al-Shari'a is limited to legal injunctions) does not apply to it, nor does it correspond to the Islamic concept. By Al-Shari'a of ALLAH is everything legislated by ALLAH for ordinary man's life; it includes the principles of administration and justice, principles of morality and human relationship, and principles of knowledge.

The first part of the Islamic creed, i.e., La ilaha illa-ALLAH, is the constant theme of the Holy Qur'an, it means that "There is no god except ALLAH". The second part of the Islamic creed, i.e., Muhammad-un Rasulu ALLAH, which means that "Muhammad is the Apostle of ALLAH", is also a constant theme of the Holy Qur'an, and the very words in this Aya of the Holy Qur'an, "Muhammad is the Apostle of GOD; and those who are with him are strong against unbelievers, [but] Compassionate amongst each other".<sup>(144)</sup> The most important effect of La ilaha illa-ALLAH is that it makes man obey and observe ALLAH's law. One who has belief in it is sure that ALLAH knows everything hidden or open and is nearer to him than his own jugular vein. The firmer a man's belief in this respect, the more observant will he be of ALLAH's commands; he will shun what ALLAH has forbidden and he will carry out his behests even in a solitude and in darkness. It is for this reason that the first and the most important condition for being a Muslim is to have faith in La ilah illa ALLAH. "Muslim" means "one obedient to ALLAH" and obedience to ALLAH is impossible unless one firmly believes in La ilah illa ALLAH.

## 2. Meaning Of Al-Shari'a Al-Islamiya

To know how ALLAH remodelled the life of men, it is enough to remember the example of the people of Arabia. In the time of the Holy Prophet Muhammad (peace be upon him), the people of Macca and Arabia were known as the meanest of all in behaviour. They made statues of stone and wood, and then worshipped them asking for material things. Robbery, murder, plunder, burying their newborn daughters alive, fighting over tribal affairs, and doing cruel deeds to weak and harmless people. These were among their daily practices. Women were used for

making money in an immoral way, and they had no rights at all. Immoral deeds were part of their behaviour. The best illustration of the Arabs before Al-Islam is what was said by an Arab, Ja'afar Ibn Abi Taleb, one of the Muslims on the occasion of the first Ethiopian Hijra in 615 A.D., before the King of Ethiopia. (145)

The term Shari'a meaning "The Way To Be Followed". Al-Shari'a Al-Islamiya is concerned with the external manifestations of human action. Al-Shari'a was primarily based on the Holy Qur'an, added to by the Hadith (Tradition) of the Holy Prophet Muhammad (peace be upon him), gradually completed through the process of Fiqh (Jurisprudence), are diversified according to different Systems or Rites (Madhab). The fundamental tendency of Al-Shari'a was to approach the different circumstances of life from a religious point of view, the judicial implications were added later.

Al-Shari'a corresponds to a reality that transcends time and history. Each generation in Islamic society should seek to conform to its teachings and apply it anew to the conditions in which it finds itself. The creative process in each generation is not to remake the law but to reform men and human society to conform to the law. According to the Islamic view, religion should not be reformed to conform to the ever changing and imperfect nature of men, but men should reform so as to live according to the tenets of revelation. In accordance with the real nature of things, it is the human that must conform to the Divine and not the Divine to the human.

### 3. Al-Shari'a And The Modern Legislative Trends

A. Those modern movements which seek to "reform" the Divine law rather than human society are, from the Islamic point of view, in every way an anomaly. Such movements are brought about, to a great extent, not only through the weakening of religious faith among certain men but also because the modern mentality, which originated in the West within its Christian background, cannot conceive of an immutable law which is the guide of human society and upon which man should seek to model his individual and social life.

Al-Shari'a is for Al-Islam the means of integrating human society. It is the way by which man is able to give religious significance to his daily life and be able to integrate this life into a spiritual sphere. The Divine law is like a network of injunctions and attitudes which govern all human life, and in their totality and all-embracing nature, are able to integrate man and society according to the dominating principle of Al-Islam itself, namely unity or tawhid. Al-Shari'a is the means by which tawhid is realized in human life. On the surface it seems to contain law about how to marry, trade, divide inheritance or conduct the affairs of state. There are all acts performed. How can they then be integrated so as to reflect tawhid? The answer is that these actions are still actions whether they are performed according to Al-Shari'a or not. But the effect that such actions leave on the souls of men is completely different depending on

whether the act is performed simply according to man-made laws or whether it follows the teachings of Al-Shari'a. In the latter case the religious context in which the act is placed and the inner connection that the teachings of Al-Shari'a have to the spiritual life of man transform an otherwise secular act into religious one.

Under the guidance of its code of laws, Al-Islam preaches the One ALLAH and, by acknowledging the principle of equality, asserts the unity of the human race and denounces discrimination based on color, racial or regional differences. It aims at justice through the eradication of oppression and tyranny. In the Holy Qur'an, ALLAH says, "Be steadfast witness for ALLAH in equity, and let not hatred of any people seduce you that ye deal not justly, Deal justly, that is nearer to your duty".<sup>(146)</sup>

In calling upon the people to guide their lives according to ethical principles, Al-Islam insists that they should be moderate in all things sparing themselves misery. It praises moderation in all things. In the Holy Qur'an, ALLAH says, "And those who, when they spend, are neither prodigal nor grudging; and there is ever a firm station between the two".<sup>(147)</sup>

B. Some may object that accepting Al-Shari'a totally destroys human initiative. The law places before men paths according to his nature and needs within a universal pattern which concerns everyone. Human initiative comes in selecting what is in conformity with one's needs and living according to the Divine norm as indicated by Al-Shari'a. Initiative does not come only in rebelling against the truth which is an easy task. Initiative and creativity come most of all in seeking to live in conformity with the truth and in applying its principles to the conditions which destiny has placed before man. To integrate all of one's tendencies and activities within a divinely ordained pattern requires all the initiative and creative energy which man is capable of giving.

C. Certain modernists over the past century have tried to change Al-Shari'a, to reopen the gate of ijtihad (exercise of judgment), with the aim of incorporating modern practices into the law and limiting the functioning of Al-Shari'a to personal life. All these activities emanate from a particular attitude of spiritual weakness vis-à-vis the world and a surrender to the world. Those who are conquered by such a mentality want to make Al-Shari'a conform to "the times" which means the whims and fancies of men and the ever changing human nature which has made "the times". They do not realize that it is Al-Shari'a according to which society should be modelled not vice versa. They do not realize that those who practised ijtihad before were devout Muslims who put the interest of Al-Islam above the world and never surrendered its principles to expediency.

#### 4. Nature Of Al-Shari'a Al-Islamiya

The social order, with all its characteristics, is an offshoot of the ideological ideal. Growth and evolution, being phases of correlation

between the ideological ideal and social order, may be generalized to comprise principles for a complete system of life which would include man's emotions, morals, forms of worship, rituals, traditions and every terrestrial human activity. Now since revealed din (religion) comprises a system of life, it becomes a convincing concept that includes the social order which derives from it to administer all human activities. We may equally contend that each system of life is a din in the sense that din functions in society as the philosophical mooring that determines the fiber of life in that society. If people adopt the system which ALLAH has revealed, they would be following ALLAH's din; if they adopt another system they would be following someone else's din. Thus, one can say definitely that there has never been a Divine din which was meant to be confined to spiritual belief alone, separated from the realities of human experience in its manifold practical aspects. Nor has such an ALLAH-sent faith consisted of hollow ritual collectively or privately performed by its devotees. Such a din could never be a "personal affair", leaving the weighty matters of life subject to laws derived from sources contrived by human creeds.

The fundamental principle of the law is that man has the right, and in some cases it is his bounden duty, to fulfil all his genuine needs and desires and make every conceivable effort to promote his interests and achieve success and happiness, but he should do all this in such a way that not only the interests of other people are not jeopardised and no harm is caused to their strivings towards the fulfilment of their rights and duties, but their should be all possible social cohesion, mutual assistance, and co-operation among human beings in the achievements of their objectives. In respect of those things in which good and evil, gain and loss are inextricably mixed up, the tenet of this law is to choose little harm for the sake of greater harm. This is the basic approach of Al-Shari'a.

More essential than the process of codification of Al-Shari'a is its actual content and substance. Al-Shari'a possesses quality and totality and comprehensiveness. It encompasses the whole of man's life so that from the Islamic point of view there is no domain that lies outside it, even if such an ideal is not easy to realize completely in human society. The lack of words in Arabic, Persian and other languages of the Islamic people for temporal or secular matters is due to this total nature of Al-Shari'a.

Al-Shari'a Al-Islamiya is structured by ALLAH for the purpose of administering the activities of people in their different phases, and to be the arbiter in all their secular and spiritual affairs. However, Al-Shari'a Al-Islamiya did not include detailed provisions for partial and subsidiary matters as in the case with man-made laws, but achieved sufficiency by giving Divine statutes in elastic general terms and provisions. Even when a subsidiary provision was mentioned, it was because the issue in question was considered a principal one, entailing some other minor questions thereunder.

It was left to the jurists and legislators to build up the legal

structure on these foundations and in accordance with these broad regulations enacting legislation for the details and subsidiary issues within the circumference of the Islamic principles of jurisprudence. There was only one way of legislation open for Al-Shari'a Al-Islamiya to be consistent with itself and to preserve its characteristics of perfection, excellence and permanence, namely clear texts defining the principles and doctrines which enshrine prosperity and happiness for society, and which bring about justice, equality and benevolence among individuals, thus exhorting them to contend for progress and excellence. Permanence, by definition, requires that no provision would be set for a temporary case which would be adjudged differently whenever circumstances differed.

Though Al-Shari'a Al-Islamiya confers upon the ruler the right to legislate, this right is not absolute. In fact, it is a right restricted by the condition that whatever the ruler may legislate, it must be compatible with the text, spirit and general principles of Al-Shari'a Al-Islamiya. Consequently, such a restriction confines the right of legislation to two categories :

A. Executive Legislation, intended to guarantee the implementation of the provisions of Al-Shari'a Al-Islamiya. In this case, legislation takes the shape of rules and regulations similar to those presently issued by government officials in the course of their daily responsibilities, for the purpose of ascertaining the execution of the relevant rules.

B. Organizational Legislation, intended to organize the society, protect and meet its needs in accordance with Al-Shari'a Al-Islamiya. Generally, such legislation is not called for except in such cases where there are no relative provisions in jurisprudence administering them. In any circumstance, legislation by rulers must be in harmony and in agreement with general principles and the spirit of the original jurisprudence.

It is the consensus that all acts of the ruler are legitimate so long as they are within the framework of Al-Shari'a Al-Islamiya and compatible with its general principles and spirit. Then, and only then, would the ruler be acting within his rights and accordingly, should be obeyed. However, if he acts otherwise, issuing laws which contradict the jurisprudence, his act or laws become illegitimate and objectionable. In the Holy Qur'an, ALLAH says, "O ye who believe ! Obey ALLAH, and obey the Messenger and those of you who are in authority; and if ye have a dispute concerning any matter, refer it to ALLAH and the Messenger if ye are [in truth] believers in ALLAH and the Last Day. That is better and more seemly in the end";<sup>(146)</sup> and He also says, "And whatsoever ye differ, the verdict therein belongeth to ALLAH. Such is my LORD, in Whom I put my trust, and unto Whom I turn".<sup>(149)</sup>

Thus, ALLAH imposes on Muslims obedience to Him, His Apostle and their rulers. Such obedience is commanded by Him alone, not by the Apostle nor by rulers; and thus, if the rulers contravene the injunctions

of ALLAH, they cannot command any loyalty over them nor expect their obedience. Their rule and authority then become illegitimate.

The Holy Prophet Muhammad (peace be upon him) has confirmed this implication by saying, "No obedience shall be observed by created beings to those who command disobedience to ALLAH". And again, "He who commands you to sin, has no authority over you".

The Compatibility Of Al-Shari'a Al-Islamiya With Modern Ages And The Inevitability Of Its Application

(We agree with some writers, such as Abdul Qader Audah,<sup>(150)</sup> that Muslim governments<sup>(151)</sup> have the greatest share of responsibility for the abasement of Al-Islam, and for the inferiority complex and lowliness that afflict Muslims.

These governments have alienated Al-Islam from secular affairs, imposed on Muslims what ALLAH has forbidden, and ruled over them in defiance of what ALLAH has prescribed.

Muslim governments have violated Al-Islam in matters of sovereignty, politics and administration; transgressed Islamic principles by abolishing liberty, equality and justice; and renounced what is prescribed by Al-Islam. Muslim governments are barring Muslims from learning their religion, worshipping ALLAH and performing their sacred duties.

We also agree with some writers<sup>(152)</sup> that Muslim scholars are also sharing the responsibility for what has afflicted Al-Islam. They, for long, have disregarded their Islam. They have never censured any attitude violating Al-Islam, nor tried to repeal and revoke any injunction that ran contrary to Al-Islam. Adultery and lasciviousness have spread over, and people have publicly disobeyed Al-Islam. Rulers have committed felonies, allowed the forbidden, shed blood, raped women, spread mischief and transgressed the limits enjoined by ALLAH, while the scholars never so much as expressed indignation and oppositions to such actions. They uttered only the sounds of silence, as if Al-Islam did not require them to invite others to do good and forbid what is wrong, and did not make it incumbent upon them to give council to the rulers so that they might apply the laws of Al-Islam. Man-made laws have been enforced in Muslim states, though they contradicted Islamic provisions, nullified Islamic commands, allowed what ALLAH has prohibited and prohibited what ALLAH has allowed. Yet Muslim scholars were not disturbed by this violation of their religion nor were they perturbed about their own future, though they earned their living at the expense of Al-Islam.)

Al-Shari'a Al-Islamiya with its characteristics, i.e., perfection, excellence and permanence, is of inevitable application of all times and in all places.

THE LEGALITY OF WAR IN AL-SHARI'A AL-ISLAMIYA AND INTRODUCTORY PART  
CHAPTER II OF THE INTRODUCTORY PART

The Holy Prophet Muhammad (peace be upon him) said, "You shall be keen to withhold power and authority and shall regret it in the Hereafter"; and when Abu Zarr, one of the companions of the Holy Prophet (peace be upon him), requested him to be appointed as governor, the Holy Prophet said, "O Abu Zarr, you are meek, it [governorship] is a trust that will be regretted in the Hereafter, and he who takes it will fail unless he rightly assumes it and gives it its due obligations".

The first obligation upon rulers of Muslim peoples is to apply Al-Shari'a Al-Islamiya. In this regard they have to take into consideration the following fundamental principles :

First: Al-Islam prohibits every Muslim from adopting laws inconsistent with Al-Shari'a Al-Islamiya. Any provisions not in conformity with this Shari'a or its general principles and spirit, are categorically prohibited by those clear precepts. ALLAH has indicated but two alternatives : either people respond to ALLAH and His Prophet, i.e., follow what the Holy Prophet Muhammad (peace be upon him) has commanded, or follow their own desires. In the Holy Qur'an ALLAH says, "Follow that which is sent down unto you from your LORD, and follow no protecting friends beside Him, Little do ye recollect ! ".<sup>(153)</sup>

Second: ALLAH does not allow a believing Muslim to accept any law other than that of ALLAH, nor any commandment inconsistent with what He has prescribed. In fact, ALLAH has commanded the faithful Muslim to renounce any legal rules other than His. To consider the acceptance of the laws of the others is perdition and submission to Satan. In the Holy Qur'an ALLAH says, "Hast thou not seen those who pretend that they believe in that which was revealed unto thee and that which was revealed before thee, how they would go for judgment [in their disputes] to false deities when they have been ordered to abjure them ? Satan would mislead them far astray".<sup>(154)</sup>

Therefore, to seek judgment by means of legislation, apart from what ALLAH had revealed and what the Holy Prophet Muhammad (peace be upon him) has ordained, is to resort to the machinations of the Evil One and to accept his verdict. In such an instance, the "Evil One" becomes anybody upon whom man may confer a status beyond human limitations, whether by worshipping him, following his dictates, or paying allegiance to him.

Third: ALLAH does not allow the faithful Muslim to choose, or be satisfied with, anything other than what He and His Prophet have legislated. In the Holy Qur'an ALLAH says, "It is not permissible for a believer, man or woman, when a matter has been decided by ALLAH and His Prophet, to have any option about their decision".<sup>(155)</sup>

Fourth: ALLAH has commanded that all legal decisions and statutes should be in accordance with the revelation, and has characterized as no better than unbelievers those who do not comply with His judgments. In the Holy Qur'an, ALLAH says, "Whoso judgeth not by that which ALLAH has revealed : such are wrongdoers".<sup>(156)</sup>

Fifth: ALLAH made belief in Him conditional on accepting the judgment of His Prophet in all issues of difference that may arise among Muslims, provided that such acceptance is not accompanied by grudge and resentment, but is coupled with submission and conviction. In the Holy Qur'an ALLAH says, "But nay, by thy LORD, they will not believe [in truth] until they make judge of what is in dispute between them and find within themselves no dislike of that which thou decidest, and submit full submission".<sup>(157)</sup>

Sixth: All that contravenes Al-Shari'a Al-Islamiya is forbidden to Muslims, even it is commanded by the sovereign, whatever his authority may be. This is because the legislative right of the ruling authority is subject to the condition that its results must accord with the general principles and legislative spirit of Al-Shari'a Al-Islamiya. If the sovereign takes liberties by exceeding his limits, his judgment does not transmute Divinely-prohibited laws into permissible one, nor would it justify a Muslim in adopting these laws. On the contrary, it becomes incumbent upon every Muslim to disobey such laws that allow the prohibited and abstain from applying or executing them, because allegiance obedience to any human ruler is not absolute. Obedience is due only within the limits prescribed by ALLAH and His Holy Prophet Muhammad (peace be upon him). In the Holy Qur'an ALLAH says, "O ye who believe ! Obey ALLAH, and obey His Messenger and those of you who are in authority; and if ye have dispute concerning any matter, refer it to ALLAH and the Messenger if ye are [in truth] believers in ALLAH and the Last Day. That is better and more seemly in the end".<sup>(158)</sup>

The scope of obedience due to rulers is clearly determined in Hadith. The Holy Prophet Muhammad (peace be upon him) said, "No obedience shall be observed by created beings to those who command disobedience to ALLAH"; he said as well, "Obedience is due only in good deed"; and further, "You should not obey him who commands you to that which is prohibited".

The companions of the Holy Prophet Muhammad (peace be upon him), Muslim scholars and jurists are unanimously of the opinion that there is no claim of allegiance to the ruler unless his commands are issued for the purpose of promoting obedience to ALLAH; that the ruler is not entitled to any allegiance if he commands disobedience to ALLAH, that permitting what is unanimously considered to be prohibited - such as adultery, consumption of alcohol, foregoing Islamic penalties, blocking the execution of Al-Shari'a Al-Islamiya and authorizing what ALLAH forbids - makes such a ruler a disbeliever and a condemned apostate. Accordingly, revolting against an apostatizing ruler becomes a duty on Muslims, and the smallest degree of rebellion against him is to, at least, disobey those orders of his which are not compatible with Al-Shari'a Al-Islamiya.

Seventh: The provisions of Al-Shari'a Al-Islamiya are indivisible and inseparable. It is for this reason forbidden to Muslims to accept the application of some of its provisions while dropping others.

We agree with some writers<sup>(159)</sup> that Muslim masses are responsible for the deplorable condition of Al-Islam today. They have been accustomed to mischievous deeds, agnosticism and atheism that they hardly consider such practices as anti-Islamic. Or they believe that Al-Islam does not care nor concern itself with struggling to overcome such aberrations.

However, Al-Islam makes it incumbent on Muslims to learn its teachings, study deeply and choose some individuals from among themselves to teach others its principles. In the Holy Qur'an, ALLAH says, "And the believers should not all go out to fight. Of every troop of them, a party only should go forth, that they [who are left behind] may gain sound knowledge in religion, and that they may warn their folk when they return to them, so that they may beware".<sup>(160)</sup>

In fact, some devoted groups have devoted themselves to the task of warning their people and teaching their religion. But certain Muslim (not Islamic) governments then assumed the burden of fighting these groups and barring them from observing Islamic injunctions to comply with the whims of dictators. The masses meekly submitted to the attitude of their governments, when they should have strongly denounced them. In this way, the masses took part in suffocating the spirit of Al-Islam and destroying its advocates.

The Muslim masses have lost their high standing, their dignity and their power. They live at present as slaves to those irresponsible powerful, rulers, what despoil the vibrant fibre of life, exhaust their potentialities, debase their dignity and abolish their liberties. The defeat of Muslims has always been a consequence of relinquishing their religion and its jurisprudence. To restore power, repute and dignity, the Muslim masses are required to destroy the obstacles that impede the application of Al-Shari'a Al-Islamiya.

### The Main Four Sunni Law Schools

The Sunni schools are so called because they heed the authority of Sunna (the Tradition) of the Holy Prophet Muhammad (peace be upon him), and that of the four Sunni Khalifas to which complied the majority of Muslims after the Holy Prophet Muhammad's death. They were numerous, but many of them disappeared gradually, till only four remained and are still at present the recognized schools of the Sunnis. In their historical order they are, the Hanafi, Maliki, Shafi'i, and Hanbali schools.

### The Hanafi School<sup>(161)</sup>

This the oldest and prominent Sunni school. It flourished in Iraq. Its founder, Abu Hanifa,<sup>(162)</sup> known as the great Imam, possessed remarkable powers of thinking and deduction. He relied on Qiyas (Analogy) and Istihsan (Equity) and his school was called "Madrassat Ahl Ar-Ra'y" (School Of The People Of Opinion). He had many eminent disciples, the most famous being Abu Yusuf, the Chief of Justice of

Baghdad, and Muhammad Ibn Al-Hasan Ash-Shaybani.<sup>(163)</sup> To the latter is due the merit of compiling the original authoritative books on the Hanafi jurisprudence.

### The Maliki School<sup>(164)</sup>

The second Sunni school was founded in Al-Madina (Hejaz) by Malik Ibn Anas. Although Malik accepted a source of law based on Al-Masalih Al-Mursala (the Public Interest), he insisted more strongly on Hadith than on Qiyas and juristic opinion. Being thus more conservative than the Hanafi school, the Maliki school was called Madrassat Ahl Al-Hadith (School of the People of Tradition).

### The Shafi'i School<sup>(165)</sup>

This school was founded by Muhammad Ibn Idris Ash-Shafi'i,<sup>(166)</sup> who was born at Ghaza, but visited many lands, including Hejaz and Iraq, and finally settled in Egypt.

Ash-Shafi'i attended the lectures of both Malik, and Abu Hanifa's disciple Muhammad Ibn Al-Hasan Ash-Shaybani. For this reason, he was influenced by the first two schools and adopted in his new school a middle course between them. He was the first Sunni author on Ilm Al-Usul (the Science of Roots) of Islamic jurisprudence. His legal work, Al-Umm (the Mother) is very authoritative.

### The Hanbali School<sup>(167)</sup>

The fourth and the last of the Sunni schools is the Hanbali school, founded by Ahmad Ibn Muhammad Ibn Hanbal<sup>(168)</sup> of Baghdad. He travelled widely and studied under Ash-Shafi'i. His school is the most conservative among the Sunni schools. In his legal system, he adhered rigidly to the strict literal interpretation of the Holy Qur'an, the Holy Prophet's Sunna, and the unanimous practice of his companions, and admitted Qiyas as a source of law only in case of necessity.

This school represents now the smallest of the Islamic schools, but till the Eighth Hijri Century (14 A.D.) was more prevalent in the countries of Al-Islam. The Wahhabi school in the 18th A.D. Century gave the Hanbali school a new renaissance.

### The Admittance Of Al-Shari'a Al-Islamiya By The International Community

The International Conference On The Comparative Law held at the Hague in 1932 and 1937 confirmed that Al-Shari'a Al-Islamiya constitutes an original system, unborrowed or derived from any alien pattern, and hence totally independent from the Roman System.<sup>(169)</sup> This was held and amply proved by the delegates of the Muslim states in their memoranda presented in September 1939 to the League of Nations, and on April 17, 1945, to the United Nations Conference in San Francisco.<sup>(170)</sup>

In these Conferences, it was established that Al-Shari'a Al-Islamiya is an autonomous legal system, and that Islamic civilization and jurisprudence are considered to be among the main forms of civilizations and of the principal legal systems of the world, in the sense of Article 9 of the Statute of the Permanent International Court of Justice.

### Scope Of Application Of Al-Shari'a Al-Islamiya

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(In the Islamic system a person is subject, in principle, to his personal status laws. Consequently, Al-Shari'a Al-Islamiya govern Muslims wherever they reside, and not non-Muslims except when they choose to submit to it.)

In modern times, the principle is the territorial jurisdiction of law, i.e., all persons, whether nationals or aliens, residing in the territory are governed by the internal legal system of a state, especially in criminal cases and commercial transactions. To this principle, there are some exceptions. Certain states apply the national law for all cases of personal status, as is seen in most continental European systems.

According to the older principle, i.e., the personal system of laws, a person is governed not by the local law of the land where he resides, but by his national law. This system was applied in ancient Rome, where the jus civile governed Romans alone; while peregrini (foreigners) were governed by their own laws, or by jus gentium (law of nations)

Footnotes Of Chapter II Of The  
Introductory Part

(1) See In English:

Imam Muslim, *Sahih Muslim (English Translation)*, Volumes I, III and IV, *passim*; AnNawawi, *Forty Hadith Nawawi's (English Translation)*, *passim*; H.A.R. Gibb and J.H. Kramers, *Shorter Encyclopaedia Of Islam*, *passim*; John R. Hinnels (Editor), *Dictionary Of Religions*, *passim*; Thomas Patrick Hughes, *A Dictionary Of Islam*, *passim*; Maulana Muhammad Ali, *The Religion Of Islam*, *passim*; S. Abul Hasan Ali Nadawi, *The Four Pillars Of Islam*, *passim*; Mohammad Amin, *Wisdom Of The Prophet Muhammad*, *passim*; Abdul Qader Audah, *Islam Between Ignorant Followers And incapable Scholars*, pp. 11-115; Muhammad Mustafa Azmi, *Studies In The Early Hadith Literature*, pp. 248-268; E.B. Calverley, *Islam: An Introduction*, pp. 36-77; Helmut GATJE, *The Qur'an And Its Exegesis*, *passim*; Hamilton Gibb, *Mohammedanism*, pp. 73-85; Ahmed Hasan, *The Early Development Of Islamic Jurisprudence*, pp. 33-175; Majid Khadduri, *War And Peace In The Law Of Islam*, pp. 3-48; The Rev. F. Klein, *The Religion Of Islam*, *passim*; Shaukat Mahmood, *Principles And Digest Of Muslim Law*, pp. 1-14; Sayyid Fayyaz Mahmud, *A Short History Of Islam*, pp. 35-69; Abul A'la Maududi, *Towards Understanding Islam*, *passim*; Carl Brockelmann, *History Of Islamic Peoples*, *passim*; The Rev. W. St. Clair-Tisdall, *The Sources Of Islam*, *passim*; N.J. Coulson, *A History Of Islamic Law*, *passim*; G.E.U. Grünebaum, *Modern Islam*, *passim*; Muhammad Hussein Haykal, *The Life Of Muhammad*, *passim*; Sheikh Muhammad Ibn Abdul Wahhab, *Kitab At-Tawhid (English Translation)*, *passim*; Henri Massé, *Islam*, pp. 91-126; Abd Assamii Al-Misry, *Mohammad, The Prophet Of Islam*, *passim*; Kenneth W. Morgan, *The Straight Path*, *passim*; Seyyed Hussein Nasr, *Ideals And Realities Of Islam*, *passim*; Muhammad Qutb, *Islam-The Misunderstood Religion (English Translation)*, pp. 138-141; Sayyid Qutb, *The Religion Of Islam (English Translation)*, pp. 1-48; Maxime Rodinson, *Mohammed*, *passim*; Ahmad Shalaby, *Islam, Belief, Religion, Morals*, pp. 87-235; Chama Churun Sircar, *The Muhammadan Law*, pp. 1-77; Muhammad Ibn Al-Hasan Ash-Shaybani, *Shaybani's Siyar (English Translation)*, *passim*; Afif A. Tabbarah, *The Spirit Of Islam (English Translation)*, *passim*; William Montgomery Watt, *Muhammad: Prophet And Statesman*, *passim*; Yohannan Friedman, *Finality Of Prophethood In Sunni Islam*, pp. 177-215; Sobhi Mahmassani, *The Principles Of International Law In The Light Of The Islamic Doctrine*, pp. 205-328; Joseph Schacht, *An Introduction To Islamic Law*, *passim*.

See In Arabic

Imam Muslim, *Sahih Muslim*, Volumes I, XVI and XVIII, *passim*; AnNawawi, *Al-Arba'in Hadith AnNawawiya*, *passim*; Abbas Mahmud Al-Aqqad, *Al-Islam Da'awa A'lamiya*, pp. 127-214; Abbas Mahmud Al-Aqqad, *Haqa'iq Al-Islam Wa Abateel Khusumu*, pp. 35-114; Abdul Qader Audah, *Al-Islam Baina Jahl Abna'ih Wa Ajz Ulama'ih*,

Passim; Hamilton Gibb, *Dirasat Fi Hadaret Al-Islam* (Arabic Translation), passim; Sheikh Ahmad Ibrahim, *Ilm Usul Al-Fiqh Wayaleeh Tarikh At-Tashri'i Al-Islami*, passim; Sha'aban Muhammad Isma'il, *Nazariyyat An-Naskh Fi Ash-Shara'i As-Sama'wiya*, pp. 7-109; Sheikh Muhammad Al-Khudary, *Tarikh At-Tashri'i Al-Islami*, passim; Sheikh Hasanain Muhammad Makhluf, *Shadharat Min Mu'jizat Wa Khasa'is Ar-Rasul Salla ALLAH-u Alayhi Wa Sallam*, passim; Sheikh Muhammad Mustafa Al-Maraghi, *Al-Ijtihad Fi Al-Islam*, passim; Abul A'la Al-Maududi, *Mabadi'i Al-Islam* (Arabic Translation), pp. 126-188; Abul A'la Al-Maududi, *Al-Hukuma Al-Islamiya* (Arabic Translation), pp. 11-74; Sayyid Qutb, *Al-Mustaqbal Li Hadha Ad-Din*, pp. 12-69; Muhammad Qutb, *Shububat Hawla Al-Islam*, pp. 157-171; Sheikh Muhammad Al-Ghazaly, *Haqiqat Al-Qaumiya Al-Arabiya Wa Usturat Al-Baath Al-Arabi*, passim; Sheikh Mahmud Shaltout, *Al-Islam Aqida Wa Shari'a*, pp. 7-137; Sheikh Muhammad Abu Zahra, *Tanzim Al-Islam Li Al-Mujtama'a*, passim; Ibn Qayyim Al-Guziyya, *Zad Al-Ma'ad Fi Hady Khair Al-Ibad*, passim; Muhammad Hussain Haykal, *Hayat Muhammad*, passim; Muhammad Ibn Abd Al-Wahhab, *Mukhta'sar Zad Al-Ma'ad*, passim; Mustafa As-Siba'i, *Ishtrakiyat Al-Islam*, passim; Mustafa Kamal Wasfi, *Musannafat An-Nuzum Al-Islamiya Ad-Dusturiya Wa Ad-Dawliya Wa Al-Idariya Wa Al-Iqtisa'diya Wa Al-Ijtima'iyah*, passim.

- (2) The Meaning of Jihad will later be discussed.
- (3) The traditional biography of the Holy Prophet Muhammad (peace be upon him) is called "Sira" (plural Siyar). The term "Siyar" in many references related to the biography of the Holy Prophet (peace be upon him), is usually used with the term "Maghazi" (military expeditions). Among many compilations of the Sira, we can mention the following : "Sira Of Ibn Ishaq" by Muhammad Ibn Ishaq; "Kitab Al-Maghazi" by Muhammad Ibn Umar Al-Waqidi; "Uyun Al-Athar" by Ibn Sayyid An-Nas.
- (4) The Holy book of Al-Islam.
- (5) The meaning of the term "Sunna" will later be explained.
- (6) Referred to in Afif A. Tabbarah, *The Spirit Of Islam*.
- (7) Sura III : 85.
- (8) Sura V : 3.
- (9) Sura III : 19.
- (10) Sura XXXIII : 40.
- (11) Sura III : 110.
- (12) Sura II : 143.

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- (13) Sura VII : 158; see also Suras XXIV : 28; XXXIII : 40.
- (14) See for example Suras IV : 123-124; LXVI : 10; XXXI : 33.
- (15) Aqida is distinct from the confession of faith (in Arabic Shahada), and from the confession of ALLAH's Oneness (in Arabic Tawhid).
- (16) The meaning of Al-Khilafa will later be discussed.
- (17) Sura XLI : 30.
- (18) Tradition. The word Al-Hadith means primarily a communication or narrative in general, whether religious or profane, then it has the particular meaning of a record of actions or sayings of the Holy Prophet Muhammad (peace be upon him) and his companions. In the later sense the whole body of the sacred tradition of the Muslims is called Al-Hadith.
- (19) The Meaning of "The People Of The Book" will later be discussed.
- (20) Gibb and Kramers contest the existence of "din" as a genuine Arabic word and, showing that the Persian "din" (religion) was already in Arabic in pre-Islamic times, hold that the meaning "custom", "usage" was derived from it. Theologically, "din" is defined as "Wa'ad ilahi" (a Divine institution) which guides rational beings, by their choosing it, to salvation here and hereafter, and which covers both articles of faith and actions. It thus means "religion" in the broadest sense and is so vague that it was felt necessary to define its difference from "milla" (religious community), "madhab" (school of canon law), and "shari'a" (system of Divine law). It covers for Al-Islam three things, Al-Islam in its elements (which will later be explained), Iman (faith), and Ihsan (Right-Doing). These three make up the din of the Muslims, see Shorter Encyclopaedia Of Islam.
- (21) Sura III : 19.
- (22) Also "Ishrak" means Association, especially associating a companion with ALLAH, i.e., worshipping another besides ALLAH. The believers are to keep away from them and not to marry mushrikat (Sura II: 221) but they are not to revile the unbelievers, but to endure them unless the latter in their turn attack ALLAH (Sura VI : 108).
- (23) Sura VI : 14.
- (24) Sura IV : 48; see also Sura XXI : 22.

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- (25) Sura III : 80.
- (26) Sura XLVII : 1-2; see also Suras XLIV : 22; XLV : 30-31.
- (27) The adherent of Al-Islam. The term "Muslim" has become current in some European languages (also in the form of Moslim, Moslem), as a noun or as an adjective or as both, side by side with Muhammadan (in different forms). It has replaced Musulman (in different forms) except in the French, where the latter term is used as a noun or as an adjective. In the Arabic literature, the term Muslim is only and has always been used to denote the adherents of Al-Islam.
- (28) Those who describe faith as obedience, say that disbelief consists in disobedience to the Will of ALLAH. So, the saying of the Khariji and some of the Mu'tazila that every sin is disbelief, is deemed false.
- (29) The Holy Prophet (peace be upon him) did that due to the fact that mutilation by that time had not been forbidden. Some scholars are of the view that the Holy Prophet (peace be upon him) did this as a Qisas (requital) as those criminals had brutally blinded the eyes of the innocent Muslims who had accorded them hospitality during their stay in the outskirts of Al-Madina. However, the gouging of the eyes should not be inflicted according to some jurists, as this come under mutilation which is forbidden in Al-Islam.
- (30) Sura V : 33.
- (31) Sura II : 217.
- (32) It is noteworthy to mention that the term Zindiq (pl. Zanadiqa, abstract Zandaqa) which is used in Muslim criminal law to describe the heretic whose teaching becomes a danger to the state, this crime is subject to capital punishment by the application of Sura V : 33.
- (33) Sura XLIX : 14.
- (34) Sura IV : 136.
- (35) Sura LVII : 8, where belief in ALLAH means make sacrifices in the cause of the truth, as the context shows.
- (36) Sura LVII: 19.
- (37) Referred to in Muhammad Qutb, Shubuhah Hawla Al-Islam (in Arabic), pp. 157-171.
- (38) Loc. Cit.

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- (39) sura XXXV : 28.
- (40) Sura III : 18.
- (41) Sura II : 256; see also Sura X : 99.
- (42) Abu Hamed Al-Ghazally lived between 450-505 A.H. (1059-1111 A.D.).
- (43) Sura CXII. ALLAH was and is the proper name of GOD among Muslims. Gibb and Kramers contend that it corresponds to YAHWE among the Hebrews, not ELOHIM. No plural can be formed from it. To express "gods", the Muslim must fall back upon the plural of "ilah", the common noun from which ALLAH is derived. The word "ilah" would mean "god" or "deity". This word does not occur in the Holy Qur'an as a form, but there are cases where ALLAH has the same meaning. In the Holy Qur'an, the word "RABB" (LORD), especially with the possessive suffix, is one of the usual names of GOD. The abstract "RUBUBIYA" is not formed in neither the Holy Qur'an or Hadith, it is in common use in mystic theology, *op.cit.*
- (44) The earth is only a member of the solar system which is merely a member of galaxy constellations which in turn are nothing but a member of cities in space. The number of galaxies is estimated to be more than 100 million.
- (45) Sura LXXXVII : 1-3.
- (46) Sura XLIII : 9.
- (47) In idol is often a statue made of wood, stone or metal, carved into the figure of a living creature like man, animal, bird or a composite of them. Idols sometimes taking the form of stones or posts, have no special shape. An idol, in the opinion of idolaters, an idol stands for a higher force beyond the world of nature.
- (48) The worship of ancestors has surpassed other dogmas in spreading among nations. A living human being in full power is unable to accomplish many of life affairs; he cannot have full control over natural aspects from which his sustenanc, and he is equally incapable of keeping death away when it approaches him. If such is man's case in life, he is nothing after death.
- (49) Some ancient peoples adopted many "gods" as special representatives of the natural aspects. They had "gods" of heavens, of earth, air and seas. Some primitive peoples had also gods for clouds, fire and light.
- (50) Magianism, was the worship of fire as received down from the Persians.

- (51) *Sabianism was in two categories, Hanafite or Monotheist, and Polytheist Sabians; among the group of the polytheist Sabians were the worshippers of planets. It is said that they were called Sabians because they had departed from the religion of their people, trying to choose whatever that suited them from other religions.*
- (52) *Sura VII : 140.*
- (53) *Sura III : 64.*
- (54) *Sura XXV : 43.*
- (55) *Sura XXI : 22.*
- (56) *Sura VII : 180.*
- (57) *Sura II : 30.*
- (58) *This is a "Hadith Qudsi" (Sacred Hadith), i.e., one in which the Holy Prophet report has been revealed to him by ALLAH, though not necessarily in his actual words. A Hadith Qudsi is in no way regarded as part of the Holy Qur'an.*
- (59) *Sura II : 285.*
- (60) *Gibb and Kramers believe that "mala'ika" is a loan word coming into Arabic from Hebrew, and that the verb l'-'-'k occurs in Ethiopic, in the sense "to send", op. cit.*
- (61) *Sura II : 34.*
- (62) *Sura VII : 11.*
- (63) *Suras XXXV : 1; XVI : 2.*
- (64) *Sura II : 97.*
- (65) *Suras II : 87, 253; VIII : 12.*
- (66) *Sura VIII : 9-10.*
- (67) *Sura XLVI : 29-32.*
- (68) *Sura XXI : 26-27.*
- (69) *Sura LI : 56.*
- (70) *Sura LXXII : 1-5.*
- (71) *Sura VI : 128-130.*
- (72) *Sura XLVI : 29-31.*

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- (73) It is generally admitted that man has only one soul; but some are of the opinion that he has two, one is called the spirit of watchfulness which while it resides on the body, causes man to be awake and watchful and, when it departs from it, causes him to sleep and to have dreams; the other is the spirit of life which, while it abides in the body, cause man to live, and when it departs causes him to die.
- (74) Ar-Ruh, according to the Sunni school, is said to be a subtle body, intimately united the body of man, like the juice is united with the green branch of a tree.
- (75) Sura XVII : 85.
- (76) Suras XV : 28-29; XXXII : 7-9; XXXVII : 71-72; LVI : 83-84; concerning the creation of Isa Suras XXI : 91; LXVI : 12.
- (77) The mother of Musa (Moses) is said to have received a wahy (Sura XX: 38-39) though she was not undoubtedly a nabi (prophet).
- (78) There is also a wahy to mala'ika (Sura VIII : 12).
- (79) There is a kind of wahy to inanimate objects through which the Divine law are made to operate in the universe (Suras XLI : 11,12; XCIX : 1-5); there is also a wahy to lower creation (Sura XVI : 68,69), so that, that which by instinct is really a wahy.
- (80) But this does not mean they are forced to believe in Al-Islam, ALLAH says, "Let there be no compulsion in religion : Truth stand out clear from error : Whoever reject Evil and believes in ALLAH hath grasped the most trustworthy handhold, that never breaks. And ALLAH heareth and knoweth all things". (Sura II : 256).
- (81) Suras X : 47; XXXV : 24.
- (82) Suras II : 213; III : 184.
- (83) Sura II : 285; see also Suras II : 4; V : 48.
- (84) Sura II : 2.
- (85) Sura XCVIII : 3.
- (86) Sura XIII : 43.
- (87) Sura III : 119.
- (88) Sura LXXXVII : 18,19.

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- (89) Suras LXXX : 13; XCVIII : 2. The Holy Qur'an is also called a Mushaf which means a collection of written pages.
- (90) Suras XXVI : 196; III : 184; XVI : 44; XXXV : 25; LIV : 43,52.
- (91) Sura XXI : 105.
- (92) Suras IV : 163; XVII : 55; Gibb and Kramers maintain that this use of the word Zabur is based on its affinity in sound with Hebrew mizmor, Syriac mazmor, or Ethiopic mazmur, *op. cit.*
- (93) A fragment of an Arabic translation of Az-Zabur dating from the II<sup>nd</sup> A.H./VIII<sup>th</sup> A.D. Century, the oldest known specimen of Christian Arabic literature was discovered in Damascus (Syria).
- (94) Sura LXXXVI : 21-22.
- (95) Sura XV : 9.
- (96) Sura XVI : 36.
- (97) Sura XVII : 15.
- (98) Sura II : 177, 285.
- (99) Sura XVII : 95.
- (100) Sura II : 136; see also Aya 285.
- (101) After Muhammad comes Ibrahim, then Musa, then Isa, these four are distinguished by the title "Ulu Al-Azm" (Possessors of Constancy).
- (102) The word Al-Akhira is used to indicate the future condition in life as compared with the previous state, (e.g. Sura XCIII : 4)
- (103) Sura II : 8,62.
- (104) Suras XXVIII : 77; XXIX : 64; XXXIII : 29.
- (105) Sura XXIX : 20.
- (106) The continuity of life means its continuity in the here and hereafter; but with a radical change which will happen in the nature of life in the hereafter.
- (107) Sura XIV : 48.

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- (106) Suras XIV : 19-20; XVII : 98-99.
- (109) Suras XXII : 5; XVII : 49-51; L : 15.
- (110) Suras XXII : 5-7; L : 9-11.
- (111) Maulana Muhammad Ali, *The Religion Of Islam*.
- (112) Sura XVII : 4.
- (113) Sura XLI : 12.
- (114) Suras II : 182; XL : 65.
- (115) Sura LIV : 49; see also Sura XXV : 2.
- (116) *Some writers believe that this belief is not among the basic doctrines of Al-Islam, for :*
1. qadar or taqdir as mentioned in the Holy Qur'an, by no means carries the significance of a decree of good or evil for man;
  2. qadar or taqdir, of which the Holy Qur'an, speaks of general nature and has nothing to do with the good and evil deeds which are special to man;
  3. in the Holy Qur'an or reliable Hadith, there is no mention of faith in qadar; and
  4. it is never mentioned as one of the fundamentals of religion.
- (117) Sura VII : 34.
- (118) Sura X : 49; see also Suras III : 145; VI : 2.
- (119) Sura LI : 58; see also Suras III : 27; VI : 151; XIII : 26; XVII : 31; XXIX : 60.
- (120) Sura XXVIII : 56; see also Suras V : 16, 51; XVI : 93; XXXIX : 3; LXIV : 11.
- (121) Sura III : 26; see also Suras LXIV : 11; II : 216.
- (122) *The Ka'ba and the Holy Mosque are in Macca.*
- (123) *Gibb and Kramers claim that Salat in Al-Islam shows in its composition a great similarity to the Jewish and Christian services, op.cit. This is entirely not true.*
- (124) *Gibb and Kramers, op.cit.*
- (125) Sura XXII : 78.

(126) Sura IX : 11.

(127) Sura LXX : 24-25.

(128) The word used in the Holy Qur'an is "saddaqa", which means in the context Zakat.

(129) Sura IX : 60.

(130) Sura II : 183-185.

(131) Sura XXII : 34; see also Aya 67 of the same Sura.

(132) Sura III : 97.

(133) The name is derived from its shape—a thimble. It is, according to the description of some writers, a stone structure which sits in the middle of the vast courtyard of Macca's Sacred Mosque; its four corners more or less aligned with the cardinal points of the compass, these corners are called respectively, Iraqian, Syrian, Yemenite and the black Stone, the first three because of their direction and the last because of its colour. In reality, Al-Ka'ba is a rectangular building of grey colour with an area of 10 by 12 meters, and a height of 15 meters. Alongside the north-western wall of Al-ka'ba is an open areas (the Hijr), enclosed by a semi-circular wall and containing the traditional sites of the tombs of Hajar, wife of Ibrahim, and Isma'il, their son. In the southern corner of the exterior wall there is, embeded in the wall in a silver frame, a fragment of polished black stone. The door of Al-Ka'ba is two meters above the ground level. A wooden ladder is in place before it, when it is open. In the interior, three columns support the roof. There is no furniture except lamps and inscriptions. The floor is marble. A Mataf (a circular pavement) outside, serves for the ritual revolutions of the pilgrims around it. In front of the door is a depression in the pavement, which is regarded as the through-in which Ibrahim and his son Isma'il mixed the mortar when they built Al-Ka'ba. These lines are believed to allude to a stone in another small edifice in the same court where Al-Ka'ba is built. This stone is called Maqam Ibrahim (the place where Ibrahim stood). Near this stone is a Minbar (Pulpit) in white marble. A small Cupola shelters the well of Zamzam, probably the centre of the Sanctuary. After the rise of Al-Islam it become customary to cover Al-Ka'ba with a cloth, the colour of which is black, called Al-Kiswa.

(134) An older name of Macca.

(135) Sura III : 96-97.

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- <136> Imam Al-Khomeiny of Iran lives in this Holy city.
- <137> Jihad will, thoroughly, be discussed, in different parts of this thesis.
- <138> This Hadith was reported by the authority Ibn Umar.
- <139> This is also true when compared with man-made law.
- <140> Matthew XXII : 21.
- <141> This word was borrowed in both cases from the Greek.
- <142> Sura XVI : 40.
- <143> Sura XXV : 2.
- <144> Sura XLVIII : 29.
- <145> We shall later refer to the speech of Ja'afar, in detail.
- <146> Sura V : 8.
- <147> Sura XXV : 67.
- <148> Sura IV : 59.
- <149> Sura XLII : 10.
- <150> Abdul Qader Audah, Al-Islam Baina Jahl Abna'ihī Wa Ajz Ulama'ihī (in Arabic).
- <151> They are governments of Muslim peoples, but not Islamic governments.
- <152> Abdul Qader Audah, op. cit.
- <153> Sura VII : 3.
- <154> Sura IV : 60.
- <155> Sura XXXIII : 6.
- <156> Sura V : 45; see also in the same Sura Ayat 48, 49 and 50.
- <157> Sura IV : 65.
- <158> Sura IV : 59; see also Sura XLIII : 10.
- <159> Abdul Qader Audah, op. cit.

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- (160) Sura IX : 122.
- (161) This school is the most widely followed among Muslims to-day. It was the official rite followed by the Ottoman State and still adopted in many Arab and Muslim states, such as Egypt, Syria, Lebanon, Pakistan and Afghanistan. It has many followers in India, Central Asia, Albania and other countries.
- (162) Abu Hanifa An-Nu'man Ibn Thabit Al-Kuffi is said to have devoted the whole of his life (81-150 A.H.; 700-767 A.D.) to Al-Shari'a. He persistently refused to accept the office of qadi (judge), which the Umayyad governor in Kufa, Yazid Ibn Umar Ibn Hubaira, and later the Khalifa Al-Mansur wanted him to accept. By his refusal, he is said to have incurred corporal punishment and imprisonment, so that he died in prison.
- (163) He is the most distinguished Muslim scholar in the field of Islamic Law Of Nations" or what we call it "Principles Of International Law In Al-Shari'a Al-Islamiya".
- (164) This school is to-day predominant in Northern Africa, Libya, Tunis, Morocco and Mauritania. It is also widely followed in Upper Egypt, Sudan, Bahrain, Kuwait, Nigeria and other African and Muslim countries.
- (165) This school is to-day predominant in Indonesia. Other followers live in Africa, Pakistan, Syria, Lebanon, and more particularly in Egypt, where Al-Azhar university is considered as the stronghold of this school.
- (166) He was born in 150 A.H. (767 A.D.), and died in 204 A.H. (820 A.D.). He descended from Abd Al-Muttalib, the son of Abd Manaf the ancestor of the Holy Prophet Muhammad (peace be upon him). Ash-Shafi'i had the distinguished honour of being of the same root as the Holy Prophet Muhammad (peace be upon him) himself was.
- (167) This school is now followed more particularly in Saudi Arabia, where it is adopted as the only official legal system.
- (168) Ibn Hanbal was born at Baghdad in 164 A.H. (780 A.D.), and died on 241 A.H. (855 A.D.).
- (169) Bulletin Trimesteriel De La Société De Legislation Comparé 1937, pp. 346-347.
- (170) Document of the United Nations Conference On International Organization, Commission IV, Committee 1, Doc. 51, April 17, 1945, p. 222.

Chapter III: Principles  
Of International Law In Al-  
Shari'a Al-Islamiya<sup>(1)</sup>

AL-Islam Is A Religion And A State

In this Chapter, it must be taken into consideration, that a big gap sometimes existed between theory and practice. It is therefore necessary to distinguish between the precepts laid down by Al-Shari'a Al-Islamiya and the conduct of some Muslim rulers when that conduct violates these precepts.

Al-Islam brought about a social revolution in large areas of the world, and during a long period of the history of mankind. This was due to far-reaching Islamic activities, in the fields of religion, ethics and law.

As a religion, Al-Islam includes religious belief and acts of worship. It stresses constantly its original meaning of contentment and submission to the Supreme Will of the Creator of the universe.

Similarly, this form an integral part of Islamic cultural teachings. In this respect, Al-Islam imposes on a true believer the duty to comply, in all his dealings, with the Islamic code of ethics. It is chiefly on this basis that Muslim moralists have influenced medieval Western writers in spiritual philosophy and ethics.

As a legal system, Al-Islam maintained a prominent social character and a profound humane feature, due mainly to the interrelation and reciprocal influence of its legal, religious and ethical aspects. All these aspects emanate from the same sources, and their interaction is inevitable.

The authorities of Church and State correspond, in general, to the spiritual and temporal powers which have formed the basis of all traditional societies. The authorities, which have taken diverse form in each tradition, are represented in the Christian West by two autonomous hierarchies. The Church is the authority par excellence for the transmission of the purely spiritual message of Jesus, while the Christian state is an organization whose laws are not direct revelations from heaven but rather the result of human reason guided by religious principles. Such a division is the normal consequence of the exclusively spiritual role of Christ, who was not a lawgiver like the Holy Prophet Muhammad (peace be upon him).

The Ulama (Religious Erudites), can only function as interpreters, and the political authority can do no more than provide the conditions by which Al-Shari'a can be preserved, practised, and conveyed to men. By submitting himself to Al-Shari'a, which is revealed through the Holy Qur'an, a Muslim thereby becomes freed from all other authorities; his social and economic functions are as much part of his religious duties

as his Saum (Fasting) and Salat (Prayer).

The Muslim stands at the center of the universe, in the sense that he can communicate directly with ALLAH without the aid of an intermediary body. In Christianity, the layman occupies a peripheral position with respect to the clergy and depends upon the Church to be his intermediary between him and God.

In the early days of Al-Islam, society and the state meant the same thing; indeed the term state is not found in the Holy Qur'an, nor was it in vogue in the Holy Prophet's time. The Holy Qur'an merely refers to organized authority, which belongs to ALLAH (as the source of governing authority) forming part of the state; while society, whether it covered the state or constituted certain aspects of it, was the creation of man's needs to fulfil certain social functions.)

The structure of the Islamic community is based on Al-Shari'a, in which both political and religious conduct find sanction. In principle, in Al-Islam there is neither a Church nor a state in the Western sense, and the spiritual and temporal authorities have their function in interpreting and upholding Al-Shari'a and preparing man during his short journey on earth for his return to his Maker. Over and above contingencies, which are a metaphysical necessity of all creation, the principles of Al-Islam are based completely upon tawhid (unity) society. Consequently, man's allegiance is to one source : ALLAH, Whose Shari'a governs the entire life of man.

The early Islamic State was revolved around the Khalifa (Caliph), who was the defender of the faith, the protector of Al-Shari'a and Imam in Salat. The Holy Prophet Muhammad himself stated that Al-Khilafa (the Caliphate) was to last thirty years after his death and then would become a temporal rule. However, this does not mean that the Muslims are, or will be sidetracted from their duty to establish the Islamic State in accordance with Islamic principles. During the time of the first four Khalifas there was a nomocracy,<sup>(2)</sup> with only one Head of State and one law in which neither Church nor state could be discerned as a separate entity.)

It has been alleged that the Islamic system of rule is dictatorial because the state has vast powers. The worst aspct, as alleged, is that the state enjoys immense power and authority in the name of the faith which exercises a very great attraction over the people, who blindly subject themselves to its tyrannical rule. Thus, it was wrongly concluded, that these powers lead to dictatorship and the common people are turned into slaves with no right to think for themselves. The freedom of thought is lost for ever. None dared to challenge the ruler, and he who did was accused of rebellion against religion and ALLAH. These false accusations are best refuted by referring to the Holy Qur'an, ALLAH says, "And those who answer the call of their LORD and establish worship, and whose affairs are a matter of counsel, and who spend of what we have bestowed on them".<sup>(3)</sup> Abu Bakr, the first Khalifa said, "Obey me so long as I obey ALLAH and His Prophet. But if I disobey ALLAH or the Prophet I shall no longer be entitled to your

obedience". Umar the second Khalifa, addressed the Muslims saying, "Straighten me if you detect any deviousness in me". One of the audience said, "by ALLAH Almighty if we detected any deviousness in thee we would have set you right with our swords". It is true that oppression and tyranny ruled in the name of religion. It is also true that such oppression still prevails in some states in the name of religion. However, religion is not the only mask used by dictators. Tyranny is best fought by teaching people to believe in ALLAH and respect freedom which is defended and safeguarded by religion. Such people would not allow the ruler to commit injustice, but will keep him within the limits of his legal powers. No other system has ever aimed at the establishment of justice or opposition to tyranny as much as Al-Islam did. The Holy Prophet Muhammad (peace be upon him) says. "A word of justice uttered before an unjust ruler is the greatest of Jihad".<sup>(4)</sup>

Abu Bakr, the first Khalifa bore the title of "Khalifatu Rasul-ul-ALLAH" which means the "Vicegerent or The Immediate Successor Of The Apostle Of ALLAH". Umar, the second Khalifa, was the first to bear the title "Amir Al-Mu'Minin" which means the "Commander Of The Faithful". It became the main title of Muslim rulers during 636 years (i.e. from the first Hijri year "622" until the fall of Baghdad in 1258). The first open battle, among Muslims themselves (the Battle of the Camel) broke out during the reign of Ali, the fourth Khalifa. The first four Khalifas were known as Al-Khulafa'a Ar-Rashidun (the Rightly Directed Khalifas).

The evolution of Al-Khilafa under the first four Sunni Khalifas, underwent the following stages : stabilisation of Arabia and the preparation for the expansion of Al-Islam under Abu Bakr; triumphant expansion under Umar; consolidation of expansion, and the weakening of authority of Al-Khilafa under Uthman; civil wars, divisions and decadence under Ali; and finally in imitation of the Byzantine and Persian regimes, the founding of the Umayyad dynasty in place of an elected Khilafa in Al-Islam. Mu'awiyah established, for the first time in Al-Islam, a Kingdom in which temporal authority acquired a certain degree of secular character, although both temporal and spiritual powers were still invested in Al-Shari'a, whose protection was the duty of the Khalifa.

In applying the Western concepts of Church and state to Al-Islam, it becomes evident that in principle, the religious and temporal organisations which the Church and state represent, are united in Al-Islam under a single authority and a Divine Law, i.e., Al-Shari'a. The historical development of Al-Islam reveals that although a "state", in certain ways similar to the Western concept of this term, does gradually develop, there is at no time any Muslim organization which can properly be called a "Church". The decaying effect of time succeeded in separating the religious and political life of Al-Islam to a certain extent, and in rulling it away from its original unity to an ever greater multiplicity. The gradual separation of political and religious life resulting from the weakening of Al-Shari'a among men, was actually forseen by the Holy Prophet (peace be upon him) when he said, "Verily, ye are in an age in which if ye neglect one-tenth of what is ordered ye

will be ruined. There will come a time, when he who shall observe one-tenth of what is now ordained will be redeemed".

Thus, Al-Khilafa<sup>(5)</sup> (the Caliphate) or Al-Imama<sup>(6)</sup> (the Imamate) is the general leadership in religious and worldly affairs over the Muslim nation, or the succession of the Holy Prophet (peace be upon him) to uphold Al-Islam, and the interests of the Muslim nation. According to the Sunni Muslims, Al-Khilafa means the succession to the Holy Prophet (peace be upon him) in his community, and not the succession to ALLAH on earth. It thus differs from theocracy which was based on Divine right and was propounded and practised by some Western kings for many centuries. Confirming this view, the first Khalifa Abu Bakr, as mentioned before, said that he was not the successor to ALLAH, but the successor to ALLAH's Messenger (peace be upon him).

According to the Shi'is, Al-Imama is the cornerstone of the religion and the base of Al-Islam. It is not among the public interests to be delegated to the nation, but the Prophet has to appoint the Imam, and the Holy Prophet Muhammad (peace be upon him), according to their view, has appointed Ali as Imam.

(At the beginning of this century, the new Turkish regime led by Mustapha Kamal Ataturk, abolished the Ottoman Khilafa on the third of March 1924. The debate as to the validity of Turkey's unilateral abolition of Al-Khilafa was taken up by other Muslim countries in order to decide whether they should confirm the Turkish action or appoint a new Khalifa. Al-Khilafa Conference was held in Cairo in May, 1926, and a Resolution was passed declaring Al-Khilafa a necessity in Al-Islam, but failed to give effect to this decision. Two other Islamic Conferences were held in Macca (1926) and Al-Quds (1931), but failed to discuss the question of Al-Khilafa, an indication that it probably had become obsolete, although it by no means should be regarded as a dead issue.)

The abolition of Al-Khilafa raised the question as to whether the Islamic State should not be secularized. A book was published on this subject in 1925 entitled "Al-Islam Wa-Usul Al-Hukm" (Al-Islam And The Principles Of Rule) by Sheikh Ali Abd Ar-Raziq, one of the Ulama of the Azhar University and a judge of Shari'a court.<sup>(7)</sup> Abd Ar-Raziq argued that Al-Islam, like Christianity, is just a system of religion for the regulation of the spiritual life of Muslims. He rejected the view that Al-Khilafa had its bases in the Holy Qur'an, Hadith and Ijma'.<sup>(8)</sup> He argued also, that Al-Islam was not designed as a political institution, although the Holy Prophet Muhammad himself found it necessary to exercise military functions which were distinct from his primary religious functions as a prophet. Thus, he saw no reason why Al-Khilafa should be tied to a religion and could not be abolished, as indeed it had been instituted by temporal action. He denied "Jihad Fi Sabil-i-ALLAH" (Jihad In The Way Of ALLAH). He also argued that the rule of Abu Bakr and the other Khulafa'a Rashidun, who followed him, was temporal.

In 1926, two of the Ulama of Al-Azhar published two books to rebut Abd Ar-Raziq's theory. Sheikh Muhammad Bakhit Al-Mati'i, the author of

"Haqiqat Al-Islam Wa Usul Al-Hukm" (The Reality Of Al-Islam And The Principles Of Rule), and Sheikh Muhammad Al-Khadr Hussein, the author of "Naqd Kitab Al-Islam Wa - Usul Al-Hukm" (Annulment Of The Book Of Al-Islam And The Principles Of Rule). In the first book, Sheikh Al-Mati'i declared that he had been informed by many of those who had visited Abd Ar-Raziq, of the fact that the latter's book had been prepared by non-Muslim writers.

Abd Ar-Raziq's book was again studied and criticised after about half century by Dr. Muhammad Diya'a-Eddine Ar-Ray'yes.<sup>(9)</sup> Dr. Ar-Ray'yes confirmed that Al-Khilafa was proved by Ijma' (Consensus), and the strongest type of it is Ijma' "As-Sahaba" (the Companions of the Holy Prophet). The Holy Prophet Muhammad (peace be upon him) was not buried before the choice of Abu Bakr as the first Khalifa. This viewpoint has been adopted by many Muslim scholars such as Ibn Taymieh, Ibn Khaldun, Al-Mawardi, Ash-Shahristani, and Muhammad Abdou; and non-Muslim scholars such as Joseph Schacht, and Hamilton Gibb. Ijma' here means the Consensus of As-Sahaba and all Muslims on the establishment of Al-Khilafa, on the principle itself, and not on the person selected to be a Khalifa. The interesting point in Dr. Ar-Ray'yes' study is his belief that Abd Ar-Raziq's book was originally written by one of the British Orientalists, probably D.S. Margoliouth (or Thomas Arnold), at the request of British intelligence. Abd Ar-Raziq travelled to England in 1912 to study politics or economy, and it is possible that he had communicated with this Orientalist or at least read his book. It is astonishing to know that Abd Ar-Raziq himself, twenty years after the publication of his book, wrote another book on Ijma', in which he wrote that Ijma' has been proved by the Holy Qur'an, Ijma' As-Sahaba is peremptory as the Holy Qur'an, and Al-Khilafa had been proved by Ijma'.<sup>(10)</sup>

In the recent time, we still read the same viewpoint expressed by Abd Ar-Raziq in 1925, in some contemporary writings.<sup>(11)</sup> One writer argues that the State established by Al-Khilafa Ar-Rashidun was just a secular state, and Al-Khilafa is not among Islamic principles. He claims that the term "Hukm", or other terms derived from it, means "Judiciary". In the opinion of another writer, the tendency to introduce religious elements in politics, at international no less and domestic levels, can be very dangerous indeed. For religion, he added, or perhaps any form of ideology, would gravely disturb the operation of a system of law which is, in the main, the product of custom and convention rather than the crystallization of abstract doctrines.<sup>(12)</sup>

It is our opinion that Al-Khilafa, or the leadership of the Islamic State, is one of the most important obligations undertaken by Muslims. In fact, there is no standing for this religion without it. The Holy Prophet Muhammad (peace be upon him) says, "If three of you leave on a journey, you must choose one to take over"; and he also says, "It is not permissible for any three to be in a barren land without choosing one of them as leader". The Holy Prophet Muhammad (peace be upon him) enjoined the appointment of someone to preside over the few casual meetings that might take place during travelling, let alone other meetings. ALLAH enjoins doing good and interdicts the forbidden, and this can never be

ensured without power or leadership. By the same token there are Divine injunctions about Jihad, justice, and punishment. For example, there is no doubt that crimes and penalties in Al-Islam, are part of the machinery of statecraft and government affairs and not, as some believe, a purely religious matter.

Therefore, the government in Al-Islam is extremely essential. At the dawn of Al-Islam, the Holy Prophet (peace be upon him), beside proclaiming ALLAH's message, was also a ruler. A group of companions and leaders collaborated with him in his government. Thus, the Islamic State was established from the very beginning, and the Holy Prophet Muhammad (peace be upon him) was the first Imam. After the death of the Holy Prophet Muhammad, Al-Khulafa Ar-Rashidun were selected and they, together with their assistants, were the Islamic governments.

The full submission to the Will of ALLAH in Al-Islam, is also a trait in Judaism;<sup>'13'</sup> and Christianity;<sup>'14'</sup> and accordingly following His Commandments is a requirement of all the three religions. But in Al-Islam, the application of ALLAH's legislation (Al-Shari'a) has to be within a political system, which must be constituted according to Al-Islam. This political system is Al-Khilafa. The objective of the Islamic government is the enforcement of ALLAH's legislation and the achievement of justice, in the Holy Qur'an ALLAH says, "Those who, if We given them power in the land, established Salat and pay Zakat and enjoin kindness and forbid inequity. And ALLAH is the sequel of events";<sup>'15'</sup> and He also says, "Thus We have appointed you a middle nation, that ye may be witness against mankind".<sup>'16'</sup> ALLAH explains why the Islamic nation is considered the best among mankind, He says, "You are the best community that hath been raised among mankind. Ye enjoin right conduct and forbid indecency; and ye believe in ALLAH".<sup>'17'</sup> Because ALLAH is the Sole Sovereign, in the Holy Qur'an He says, "Lo ! ALLAH ordaineth that which pleased Him".<sup>'18'</sup> No reason other than ALLAH's Will is the source of the Islamic legality, ALLAH says, "And speak not, that which your tongue qualify [as clean or unclean], the falsehood : "This is lawful, and this forbidden", so that ye invent a lie against ALLAH. Lo ! those who invent a lie against ALLAH will not succeed".<sup>'19'</sup> It is the most important obligation of the Islamic nation to apply ALLAH's legislation, otherwise it will be considered disbeliever, wrong-doer, and evil-liver, in the Holy Qur'an ALLAH says, "Whoso judgeth not by that which ALLAH hath revealed : such are disbelievers";<sup>'20'</sup> He also says, "Whoso judgeth not by that which ALLAH hath revealed : such are wrong-doers";<sup>'21'</sup> and He also says, "Whoso judgeth not by that which ALLAH hath revealed : such are evil-livers".<sup>'22'</sup>

(The Muslim jurists and publicists divided the world into two big territories, dar Al-Islam (the abode of Al-Islam), and dar al-harb (the abode of war).

Dar Al-Islam is the only place where the Islamic State is

established, Al-Shari'a is the authority, ALLAH's Divine ordinances observed, and ruled by a Muslim sovereign. Dar Al-Islam is divided into three areas, namely, the Holy lands, Hejaz, and the remaining Islamic lands.

The Holy lands, according to the prevalent view, comprise the two Holy places "Al-Haramain Ash-Sharifain", namely Macca and Al-Madina. The holiness of Macca is based on a Qur'anic Aya (Verse), while Al-Madina is upheld by the Holy Prophet's Sunna.

These sacred places are governed by special religious and social regulations, which are justified by the sanctity of these places and the need to keep peace in them. Thus, non-Muslims are not allowed to pass through or reside in these Holy places, except in transit in Abu Hanifa's view alone. All warfare is prohibited in these places. Even enemies cannot be killed in them, unless they enter to kill Muslims. In these places, the cutting of trees not planted by man and the killing of non-domestic animals are also prohibited.

Hejaz, outside Macca and Al-Madina, constitutes another area of dar Al-Islam, which is governed by exceptional regulations. The most important of these regulations is the prohibition imposed on non-Muslims to reside in it.

Apart from these two exceptional areas of dar Al-Islam, all the rest of the Islamic territory may be inhabited by Muslims,<sup>(23)</sup> and non-Muslims who have the status of dhimmi<sup>(24)</sup> and who have submitted to Muslim rule. Those who enjoyed the status of dhimmi are granted protection and safety by the Islamic State.

Dar al-harb, or the enemy territory, is the opposite of dar Al-Islam. It comprises countries with which, actually or potentially, Al-Islam is at war, and which are outside the jurisdiction of Al-Shari'a and Muslim rule. In principle, to turn dar al-harb into dar Al-Islam is the object of Jihad. Theoretically, from the legal point of view, dar Al-Islam is in a constant state of war with dar al-harb, or the non-Islamic world. However, it is possible to establish temporary peace relations under contractual agreement between dar Al-Islam and dar al-harb.<sup>(25)</sup> Any of the territories of dar al-harb may be converted into dar Al-Islam whenever the practice of Islamic religion and the enforcement of Al-Shari'a can be secured in them. This may be brought about by conquest, by surrender, or by peaceful settlement. In the last-mentioned case, the land immediately becomes dar Al-Islam according to the Hanafi school.<sup>(26)</sup> Once a land becomes dar Al-Islam, it does not turn into dar al-harb except in three cases :

1. the legal decisions of unbelievers are upheld and those of Al-Islam are not;
2. if the country immediately adjoins dar al-harb; and
3. if Muslims and those who enjoy the status of dhimmi are no longer protected. However, we hold the view that as long as a

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single hukm (legal decision) is observed and maintained, a country cannot become dar al-harb.

Dar as-sulh or dar al-ahd (the abode of peace or of covenant) is a third area recognized by some Islamic law schools. Dar as-sulh is a country not under Muslim rule, yet is in a tributary relationship to Al-Islam, i.e., sulh or "by agreement".<sup>(27)</sup>

Some writers object to including the twofold<sup>22)</sup> division of the world in the Islamic legal theory as one of its principles as the terms of dar Al-Islam and dar al-harb are an innovation of the Abbasid legists. Their opinion is based on the presupposition that this idea of division of the world is dependent on the notion of constant or "aggressive" Jihad, and since this notion is not warranted, the division should also be dropped; moreover, the previous two terms never occurred in the Holy Qur'an or the Hadith. They also reject the tripartite division (by the addition of dar as-sulh) because it does not cover all the non-Muslim states which are not actually at war with the Islamic State.

We believe that this opinion cannot be accepted. Since Muslims are required to establish the Islamic State, the twofold division of the world will emerge automatically because the Islamic State will not extend to embrace the whole world immediately. The Islamic State is not just a theoretical idea, or a mere objective to be sought by the Muslims; but a historical fact, and the Holy Prophet Muhammad (peace be upon him) himself established the First Islamic State. The idea of this division can, also, be deduced from the Holy Qur'an, ALLAH says, "Lo ! those who believe and left their homes with their wealth and their lives for the cause of ALLAH, and those who took them in and helped them: these are protecting friends one of another. And those who believe but did not leave their homes, you have no duty to protect them till they leave their homes; but if they seek help from you in matter of religion then it is your duty to help [them] except against a folk between whom and you there is a treaty. ALLAH is Seer of what ye do. And those who disbelieve are protectors of one another. If ye do not so, there will be confusion in the land, and great corruption. Those who believed and left their homes and strove for the cause of ALLAH, and those who took them in and helped them, these are the believers in the truth. For them is pardon and a bountiful provision. And those who afterwards believed and left their homes and strove along with you, they are of you".<sup>(28)</sup> It goes without saying, that the non-use by the Holy Qur'an, the Holy Prophet Muhammad (peace be upon him), or Al-Khulafa'a Ar-Rashidun, of the same term, used by the Muslim legists, makes no difference, or has any impact. Also Jihad cannot be described as aggressive or defensive.<sup>(29)</sup> The tripartite division of the world may be concluded also from the above-mentioned Qur'anic verses. The advantage of this division is that treaty relations with the Jewish or Christian states may be based on it.

Other writers believe that the state twofold division of the world is not based on the difference in religion, but due to the existence of the state of war or the war itself between dar Al-Islam and non-

Islamic countries (dar al-harb), thus, it is a temporary division ending by the termination of its reasons.

We believe that, as long as Muslims are required to establish the Islamic State, and to call for belief in Al-Islam, this division shall be considered permanent. It must be understood that the aim of the establishment of the Islamic State is the total application of Al-Shari'a; and the objective of the call for belief in Al-Islam does not mean compelling others to believe in this religion.

In the First Islamic State, a new brotherhood of Muslims was established comprising Arabs and non-Arabs. Suhaib from Rome, and Bilal from Abyssinia, and Salman from Persia, were all brothers. There was no tribal partisanship among them. The pride of lineage was ended, the voice of nationalism was silenced, and the Holy Prophet Muhammad (peace be upon him) said: "Get rid of these partisanship; these are foul things"; and he also said, "He is not one of us who calls for partisanship", who fights for partisanship, and who dies for partisanship".<sup>(30)</sup>)

### The Constitution Of The Islamic State

The Islamic State<sup>(31)</sup> is based on Al-Shari'a Al-Islamiya, the Divine Law, in the sense that law takes precedence over the state and provides the basis of it. Since nomocracy means the system of government based on a legal code, it follows that the Islamic system may be called a Divine nomocracy. Thus, the Islamic State is not a type of theocratic state, in the sense that it claims God as the immediate ruler.

In the Holy Qur'an ALLAH says, "I created the jinn and humankind only that they might worship Me";<sup>(32)</sup> He also says, "And whoso seekth as religion other than the Surrender [to ALLAH] it will not be accepted from him";<sup>(33)</sup> He also says, "Lo ! religion with ALLAH [is] the Surrender [to His Will and Guidance]";<sup>(34)</sup> and He also says, "This day have I perfected your religion for you and completed My favour unto you, and have chosen for you as religion Al-Islam".<sup>(35)</sup> We may conclude from these verses that Al-Islam (the Surrender) is a religion for the mankind, and not just for the Arabs. Thus, the Islamic State must not necessarily Arab, it is a universal State that must embrace the entire mankind. Consequently, it is not inevitable that the Arabs have to lead the Islamic State. We agree with some writers that the universal nomocracy of Al-Islam assumed that mankind constituted one supra-national community, bound by one law and governed by one ruler.<sup>(36)</sup> The nature of such a state is entirely exclusive; it does not recognize, by definition, the co-existence of a second world state. Christians and Jews can live in the the Islamic State as enjoying the status of dhimmi, but Islamdom and Christendom,<sup>(37)</sup> as two universal states, cannot peacefully coexist.)

The two terms Khalifa<sup>(38)</sup> (Successor, Vicegerent), and Imam<sup>(39)</sup> (Leader), are usually used as synonymous as a title of the supreme head of the Islamic State. The appointment of the Khalifa is, according to

the Sunni opinion, dictated by Al-Shari'a,<sup>40</sup> Abu Bakr, the first Khalifa, after the death of the Holy Prophet (peace be upon him), said, "Muhammad certainly is dead, and it is necessary for this religion that someone should be appointed for its perfection". The Sunnis believe that the appointment of the Khalifa is not an article of faith, in the sense that he who does not accept it, is not to be considered an infidel. With the Shi'is it is an article of faith and of the first importance, while with the Sunnis, it comes under Al-fur'u (secondary doctrines).

Before the establishment of the Islamic State, the Islamic Community must be established. The distinctive feature of the Islamic Community is that, in all its affairs, it is based on the worship of ALLAH alone. The declaration of faith expresses this principle and determine its character, in beliefs, in devotional acts and in rules and regulations this declaration takes a concrete form. Anyone who performs devotional acts before someone other than ALLAH, in addition to Him or exclusively, does not worship ALLAH alone. Anyone who derives laws from a source other than ALLAH, in a way other than that He taught to the Holy Prophet Muhammad (peace be upon him) does not worship ALLAH alone. In the Holy Qur'an ALLAH says, "Or have they partners [of ALLAH] who have made lawful for them in religion that which ALLAH allowed not?"<sup>41</sup>

The Jahili community<sup>42</sup> is any community other than the Islamic Community, or more specifically a Jahili society is any society which does not dedicate itself to submission to ALLAH alone, in its beliefs and ideas, in its observance of worship, and its legal regulations. Accordingly, we concur with a great Muslim scholar<sup>43</sup> in his opinion that all the communities existing in the world today are Jahili.<sup>44</sup>

(All the existing so-called "Islamic communities" are also Jahili, not because they believe in deities other than ALLAH or because they worship anyone other than ALLAH; but because their way of life is not based on submission to ALLAH alone. Although they believe in the unity of ALLAH, they have relegated legislative attribute of ALLAH to others and submit to his authority, and from this authority they derive their systems, their traditions and customs, their laws and values and standards, and almost every practice of life. The attitude of Al-Islam towards them can be described in brief : these communities are un-Islamic. For this reason we call the states who accommodate these communities "Muslim states" instead of "Islamic states". However, some of these states are closer to the exact conception of the Islamic State. It is to be observed that any provision of constitution or any other similar supreme law in any of these Muslim states provides that "the religion of the state is Al-Islam", or that "Al-Shari'a Al-Islamiya is a secondary or even the main source of legislation", such provision does not confer the Islamic identity on this state. It is a state of Muslim peoples; but by no means can be considered an Islamic State.<sup>45</sup> The un-Islamic community is that community in which Al-Shari'a Al-Islamiya has no status, even though Salat, Saum and Haj are observed and the people call themselves Muslims.)

The Khalifa must possess certain qualifications. The Khalifa must be a Muslim, <sup>(46)</sup> of age, <sup>(47)</sup> just, <sup>(48)</sup> and a free man, <sup>(49)</sup> and not impious. <sup>(50)</sup> The Khalifa must possess these qualifications, <sup>(51)</sup> at the time of his election and appointment. Should he afterwards come back these qualifications, he is still to be considered the rightful Khalifa and obeyed in whatever he commands or forbids, even though he becomes unfit or unworthy.

We do not <sup>ادخل</sup> concur with the opinion that the Khalifa must be from the Quraish tribe, <sup>(52)</sup> or be a scion of the Hashimite family also. This is a false pretension and against one of the essential principles of Al-Islam, that is the principle of equality which constitutes one of the sacred and prominent axioms of Al-Islam. Al-Islam considers all mankind are equal without any distinction of race, color, family or social class. Piety alone is the measure of dignity in Al-Islam.

The touchstone is brought out in the following Qur'anic aya, "O mankind ! Lo ! We have created you male and female, and have made you nations and tribes that ye may know one another. Lo ! the noblest of you, in the sight of ALLAH, is the best in conduct, Lo ! ALLAH is Knower, Aware". <sup>(53)</sup>

Similarly, many ahadith (plural of Hadith, meaning traditions) of the Holy Prophet (peace be upon him) confirm this equalitarian principle. The following may be cited in this connection:

- "All of you are the descendants of Adam, and Adam was created from earth; so let no people boast of their forefathers".
- "I am the brother of every pious man, even if he were an Abyssinian slave and I disclaim every wicked man, even if he were a noble Quraishite".
- "No superiority has an Arab over an alien, nor a white man over a negro, save in piety".

These Divine texts suffice as evidence that equality is a basic principle in Al-Shari'a. Thus, it is not necessary that the Khalifa must be an Arab, but it is enough to be a pious Muslim possesses the required qualifications. The Arabs have no superiority over any other Muslims. <sup>(54)</sup>

The Kharijis <sup>(55)</sup> held the opinion that a man may be appointed Khalifa, though he was not of the tribe of Quraish, nor even a free man, provided he possessed the other necessary qualities. <sup>(56)</sup>

The Shi'is believe that the Imam relies on Ta'yid (the Miraculous Guide of ALLAH), therefore he is Ma'sum (Infallible), though occasionally his actions may appear wrong, because ordinary mortals are ignorant of the higher motives by which he acts. Many of the Shi'is carried their veneration for Ali and his descendants so far that they

transgressed all bounds of reason and decency, though some of them were less extravagant than others. The branch of Al-Ghalia (Extravagant) raised their Imams<sup>(57)</sup> above the degrees of created beings and attributed to them Divine properties.<sup>(58)</sup>

It is duty of every Muslim to obey the Khalifa overtly and covertly, as long as his commands and prohibitions are in harmony with the doctrines of Al-Islam. Should he give orders contrary to them, i.e., Haram (Positively Wrong) or Makruh (Objectionable), he is not to be obeyed. When he commands what is Mubah (Allowable), if his orders are such as tend to promote the interest of the Muslims, they are to be obeyed; if not there is no obligation on the Muslim to obey them. If he should command a thing which implies infidelity, Muslims are to give up their allegiance to him; if possible, publicly, if not then, at least, secretly. This is the only reason for which the allegiance may be given up, or for which he may be deposed.

The appointment of more than one Khalifa in different regions within dar Al-Islam, is considered an important legal problem. This was not due to the question of securing recognition by one of the non-Muslim rulers, since Al-Shari'a refuses to derive validity by the recognition of a non-Islamic state; but the problem was the legal status of one Khalifa vis-'a-vis another under Al-Shari'a. Some jurists stressed the rule that, since there was one GOD (ALLAH)<sup>(59)</sup> and law (Al-Shari'a), there must be one ruler (Khalifa or Imam). Other jurists, like Al-Baqillani, Ibn Rushd, and Ibn Khaldun held that, the regions of dar Al-Islam, having become very extensive, some of them widely separated by sea, two or more Imams might be appointed, and each was to enforce Al-Shari'a in his own dominion in a manner fulfilling the ultimate objectives of Al-Islam. But neither Ibn Rushd nor Ibn Khaldun carried the argument beyond justifying the existence of more than one Khalifa; both failed to define the legal obligations of one Imam towards another. We believe that, according to the recent situation, there is no Islamic State, *stricto jure* or even allegorically. The Islamic State, as defined by Al-Shari'a cannot be established suddenly. In order to revive the Islamic State, we have to admit that this can be accomplished through different stages. During these stages, several Islamic States may exist, and accordingly, different Imams or Khalifas may be appointed. The eventual objective must be the unification of these Islamic States, and the establishment of one Islamic State ruled by one Khalifa or Imam who will be represented by his deputies in the different regions of the Islamic State.

The jurisdiction of the Islamic State is essentially dependent on the individual's religion which entitles him both to membership in Muslim brotherhood, as well as to citizenship<sup>(60)</sup> of the Islamic State. It should be noted that Al-Islam requires the external submission of the person to the articles of the faith. Thus, Al-Islam represents both a religion, and a nationality<sup>(61)</sup> for the citizen<sup>(62)</sup> of its state. Some jurists have distinguished between Al-Islam, emphasizing external submission, and the Iman, the internal submission; although others have regarded the two as synonymous.

The Holy Qur'an affirms the brotherhood among Muslims, "The believers are naught else than brothers".<sup>(63)</sup> The same is confirmed by the Holy Prophet (peace be upon him) in the following sayings :

- "Dhimma (Pledge) of Muslims is one".
- "None of you is a [true] Believer unless he desires for his brother [Believer] that which he desires for himself".
- "Believers in their mutual affection, compassion and sympathy are comparable to one body which falls down whenever any of its members is affected as by wake or fever".
- "A Believer is to another Believer as parts of the same structure mutually consolidating each other".

Nationality, as a legal and political relationship between the state and the individual, is known in the political Islamic thought; but the term itself was never used in Islamic jurisprudence. Al-Shari'a makes the Muslims one community<sup>(64)</sup> based on the unity of belief, disregarding the differences in race, color, language, etc. Thus, brotherhood amongst Muslims is complete and it founded on the unity of religion and faith. Congregational Salat, Haj to Macca, and the duty of Zakat contribute to unite Muslims in the path of social cooperation, charitable and spiritual communion.

There are three Islamic terms used to refer to Muslims. The first term is Hizb (Party), Muslims are the party of ALLAH and unbelievers are the party of Shaitan (Devil), ALLAH says, "And whoso taketh ALLAH and His Messenger and those who believe for friends [will know that], Lo ! the party of ALLAH , they are the victorious";<sup>(65)</sup> and He says, "The devil hath engrossed them and so hath caused them to forget remembrance of ALLAH. They are the devil's party. Lo ! is it not the devil's party who will be the losers ?"<sup>(66)</sup> The term party indicates that the relationship among Muslims is based on principle and method, and not on race and blood relations.

The second term is Umma (Community), but the common origin of Al-Umma Al-Islamiya (the Islamic Community) is not race or common economic interests, it is again, principle and method, ALLAH says, "Ye are the best Community that hath been raised up for mankind. Ye enjoin right conduct and forbid indecency".<sup>(67)</sup>

The third term is Jama'a (Group). This term is particularly used by the Holy Prophet Muhammad (peace be upon him). It is similar to the term "Hizb" and thus indicates also the principle and method that constitute the base of relationship among the Islamic group.

Thus, Al-Islam constitutes a rational relationship among Muslims and contradicts the contemporary conception of nationality. However, if we have to apply the term of "nationality", we can say that Al-Islam is considered the nationality of the Islamic State, and Muslims are its

subjects. If a Muslim apostatizes, this nationality will be withdrawn automatically. In this regard, Al-Islam is not only a religion, but also a legal and political relationship between the Muslim individual and the Islamic State.

Al-Islam does not prevent Muslims to deal with non-Muslims, and also does not prevent these from residing in dar Al-Islam. Thus, dar Al-Islam does not, indeed, consist exclusively of Muslims, but also of the so-called Ahl Al-Kitab (People Of The Book, or Scripturaries), Abadat Al-Asnam (Idolaters) and Mushrikun (Polytheists).<sup>(68)</sup> Ahl Al-Kitab, according to the prevailing idea, are those whose religion was based on a book accepted by Al-Islam as originally inspired by ALLAH. They include Jews, Christians, and Magians (Zoroastrians or Fire-Worshippers People in Persia).<sup>(69)</sup> Also, according to the prevailing idea, they were granted the status of dhimmi.<sup>(70)</sup> However, we have a different opinion concerning Ahl Al-Kitab. In the Holy Qur'an, there are numerous Ayat referring to Ahl Al-Kitab.<sup>(71)</sup> The Holy Qur'an describes them as mushrikun, unbelievers and losers.<sup>(72)</sup> Christianity is a continuation of Judaism according to the Holy Qur'an and the Gospel. The Holy Qur'an says about Isa, "And will make him a messenger unto the Children of Israel".<sup>(73)</sup> The Gospel says, "And behold, a woman of Canaan came out of the same coasts, and cried unto him, saying, Have mercy on me, O Lord, thou Son of David; my daughter is grievously vexed with a devil. But he answered not a word. And his disciples came and besought him, saying, Send her away; for she crieth after us. But he answered and said, I am not sent but unto the lost sheep of the house of Israel".<sup>(74)</sup>

It is concluded from the Qur'anic Ayat that all the Holy Scriptures before the mission of the Holy Prophet Muhammad (peace be upon him) were abrogated, and were all replaced by the Holy Qur'an, ALLAH says, "Those who follow the Messenger, the Prophet who can neither read nor write, whom they will find described in the Torah and the Gospel which are with them. He will enjoin on them that which is right and forbid them that which is wrong. He will make lawful for them all good things and prohibit for them only the foul; and he will relieve them of their burden and the fetters that they used to wear. Then those who believe in him and honour him, and help him, and follow the light which is sent down with him : they are successful. Say [O Muhammad] : O Mankind ! Lo ! I am the Messenger of ALLAH to you all-[the Messenger of] Him unto whom belongeth the Sovereignty of the heavens and the earth. There is no GOD save Him. He quickeneth and He giveth death. So believe in ALLAH and His Messenger, the Prophet who can neither read nor write, who believeth in ALLAH and His words, and follow him that haply ye may be led aright".<sup>(75)</sup> Thus, mankind is required by the Holy Qur'an to embrace AL-Islam. Mankind includes those who had previous messengers with previous scriptures, the polytheists, the materialists and the average people who have no independent understanding especially in matters of belief. In brief, all peoples of all races, colours and languages, in all times and places, are required to believe in Al-Islam. It is not acceptable after the mission of the Holy Prophet Muhammad (peace be upon him) to embrace any religion other than Al-Islam, ALLAH says, "Lo ! religion with ALLAH [is] Al-Islam "the Surrender [to His Will and

Guidance!";<sup>(76)</sup> He also says, "And whoso seeketh as religion other than Al-Islam "the Surrender [to ALLAH]" it will not be accepted from him";<sup>(77)</sup> and He also says, "This day have I perfected your religion for you and completed My favour unto you, and have chosen for you as religion Al-Islam".<sup>(78)</sup> Thus, the meaning of Ahl Al-Kitab must be limited to those groups who believed in the Holy Scriptures, before the Holy Qur'an, and lived before the religion of Al-Islam. The existence of Ahl Al-Kitab completely ended with the advent of Al-Islam, ALLAH says, "And if they argue with thee, [O Muhammad], say : I have surrendered my purpose to ALLAH and [so have] those who follow me. And say unto those who have received the Scripture and those who read not : have ye [too] surrendered ? If they surrendered, then truly are rightly guided, and if they turn away, then it is thy duty only to convey the message [unto them]. ALLAH is Seer of [His] bondmen".<sup>(79)</sup> The so-called Ahl Al-Kitab of our recent times are, really, either mushrikun or kafirun. The so-called Ahl Al-Kitab of our recent times, may be admitted to the protection of the Islamic dhimma in the Islamic State if they choose to reside in it. Abu Hanifa<sup>(80)</sup> opines that all non-Muslims will be one category.

According to Professor Khadduri,<sup>(81)</sup> the word dhimma means literally a compact which the believer agrees to respect, the violation of which makes him liable to dhamm (blame). Legally, the term refers to a certain status, the acquisition of which entitles the person to certain rights which must be protected by the Islamic State. Dhimma involves temporal rights from Muslims and duties towards Muslims. Thus, Ahl Adh-dhimma<sup>(82)</sup> means the people of the covenant or obligation. As we have seen, the so-called Ahl Al-Kitab of our recent times may be entitled to enjoy with the status of Ahl Adh-dhimma.

Some writers believe that "Ahl Adh-dhimma" or "the dhimmis" do not enjoy the Islamic nationality on the basis that rights and obligations of the dhimmis differ from those of the Muslims. The dhimmis do not enjoy the political rights which are the Muslims alone. Zakat is obligatory on the Muslims only, whereas those who enjoy the status of dhimmi have to pay jizya.

Others believe that, although "the dhimmis" are provided with infinite aman (security), they are not entitled to a full citizenship because they failed to believe in the Holy Prophet (peace be upon him).<sup>(83)</sup> "The dhimmis" are described, by other writers, as second class citizens.

A third group of writers hold the view that "the dhimmis" are to enjoy with the nationality of the Islamic State, but there is a difference of opinion on the legal basis in such case. Some writers believe that this legal basis is the obligation of "the dhimmi" to accept Islamic rules, and therefore becomes entitled to the nationality of the Islamic State; others believe that the non-temporary residence in the Islamic State is the legal basis; and others believe that the dhimma covenant is the basis which entitles "the dhimmis" to enjoy the nationality of the Islamic State.

We believe that those who enjoy the status of "dhimmi", cannot be considered citizens of the Islamic State. They are not members of the Islamic brotherhood, and accordingly they are not eligible to be citizens as Muslims. They can only be considered as permanent residents of the Islamic State. This capacity entitles them to certain rights, and commits them to particular duties. This explains why they are not, legally, obliged, to defend the Islamic State and have to pay jizya against their protection. If they pronounce Ash-Shahada, they become Muslims and accordingly citizens of the Islamic State. This conversion to Al-Islam may be likened to naturalization,<sup>(84)</sup> as far as the conception of nationality in the Islamic State is concerned. Since conversion, they join to Islamic brotherhood, and are naturalized citizens<sup>(85)</sup> of the Islamic State. Their children, born after this naturalization, are citizens by birth of the Islamic State.

If any of those who enjoy with the status of dhimmi is proved to be a spy against the Islamic State, some jurists<sup>(86)</sup> are of the opinion that the dhimma covenant will be abrogated, while others<sup>(87)</sup> hold the contrary view. According to one opinion<sup>(88)</sup> the punishment will be the execution of the spy, but according to another<sup>(89)</sup> the punishment will be decided by the Imam.

We believe that the dhimma covenant will be abrogated, if the individual enjoys the dhimmi status is proved to be a spy. It is up to the Imam to decide on the suitable punishment. According to the authority Furat Ibn Hayan, the Holy Prophet (peace be upon him), ordered the killing of a dhimmi spy. Thus, it is concluded that the punishment decided by the Imam may be the spy's execution. However, if is not, he must be expelled from the Islamic State.

Any reason which may arise, and lead to the abrogation of dhimma covenant, such as final departure to dar al-harb, suffice to deprive the individual who enjoys the dhimmi status, the permanent residence in the Islamic State.

The rights and obligations of those who enjoy the status of dhimmi have developed since the rise of Al-Islam. Some of the rules which constituted the law governing relations of non-Muslim with Muslim subjects of the Islamic State, were derived from Qur'anic legislation, other from decrees issued by succeeding Khalifas from the time of Umar Ibn Al-Khattab thereafter.

In general, the Islamic State must guarantee the security of their life, property, churches, crosses, and other religious rites and practices, provided they do not build new churches,<sup>(90)</sup> or display their crosses or ring their church bells loudly. None of them is to be coerced into changing his religion nor restricted in his movement within dar Al-Islam, save as regards the sacred land.

The obligations they had to honour, otherwise the dhimma covenant

was revoked, are the following :<sup>(21)</sup>

1. Every one of them, male, adult, free, and sane, is under obligation to pay the jizya, the amount of which is to be fixed by Muslim authorities, the justification to pay the jizya, according to the Maliki and Shafi'i schools and the Zaidis, is the protection they received under Muslim rule. The opinion of the Hanafi school is that, since they were not required to take part in Jihad, the jizya might be construed as payment in lieu of military service.<sup>(22)</sup> The one who possesses land is also under obligation to pay the kharaj. The jizya is lifted if he renounces his religion and becomes a Muslim, but unlike the jizya, he has to pay his tax as a rental on land, unless he was exempted by the Khalifa.<sup>(23)</sup>
2. They should not attack the religion of Al-Islam, nor show any disrespect to Muslim practices.
3. They should not revile or show any disrespect to the Holy Prophet Muhammad (peace be upon him), or the Holy Qur'an.
4. They should not injure the life or the property of a Muslim, nor should they *make him abjure his belief or induce him to apostatize.*
5. None of them is permitted to marry a Muslim woman,<sup>(24)</sup> or to commit zena (adultery) with her.
6. They are not permitted to assist the enemy, nor give refuge to a harbi (foreigner), nor harbi spies. Nor are they allowed to disclose the secrets of the Islamic State to the enemy, or pass on intelligence to them.

## The Resurrection Of The Islamic State

### The Arabs And Al-Islam

The Arab Peninsula, which was the cradle of the Arabs, is situated between the Persian Gulf in the East, the Red Sea in the West, the Indian Ocean in the South, the frontiers of Ash-Sham in the North, but Ash-Sham itself, i.e. Syria, Lebanon, Palestine and Jordan, is not included in the Arab Peninsula.

According to Ibn Khaldun in Al-Muqademma (The Prolegomena), the Arabs are a savage nation because they are able to overcome and enslave other nations like a beast over a prey. It is of their very nature to plunder what others have, and they seek their livelihood under the shadows of their lances. There is no limit to their taking of other people's property, and they have little knowledge of politics. If they overcome other nations, the conquered territories would quickly be destructed. Because of their savage nature, the Arabs are the hardest of nations to lead each other, because of their roughness, dignity, lack of zeal and emulation for presidency. Only religion is a restraint for

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them, it alleviates their dignity and emulation, then they become easily led and associated. <sup>(95)</sup>

Before Al-Islam, the pride of some Arabs reached the extent of burying new-born girls alive because of their fear of poverty or disgrace. It was an era of cruelty which turned man into a beast. ALLAH says, "And when the girl-child that was buried alive is asked, For what sin she was slain". <sup>(96)</sup>

The Arabs, before Al-Islam, were not able to organise an army to face the aggression of the Abyssinians on Al-Ka'ba. Abyssinia (Ethiopia), at that time, was a satellite country if compared with the Roman and Persian empires. The Arabs left Al-Ka'ba to ALLAH to protect it, ALLAH says, "Hast thou not seen how thy LORD dealt with the owners of the Elephant, Did He not bring their stratagem to naught, And send against them swarm of flying creatures, which pelted them with stones and baked clay, And made them like green crops devoured [by cattle]". <sup>(97)</sup>

Before Al-Islam, the Arabs were known for their traits such as idolatry, barbarism, ignorance, corruption of men and even women, and they have been humiliated before the Abyssinian invaders. These traits could not give them any preference over other nations to receive the message of Al-Islam or to call to it. <sup>(98)</sup> Any attempt to reflect on any people special characteristics on the basis of race, is considered a sort of discrimination and unfounded.

A true witness who was a Muslim Arab, described the situation of the Arabs before Al-Islam and its effect upon the Arabs. The first Muslim Hijra (Emigration) to Abyssinia took place in 615 A.D. due to the attitude of Quraish tribe towards Al-Islam. The Chiefs of Quraish sent a delegation to the Najashi (King) of Abyssinia to demand the return of the refugees. The Najashi summoned the refugees to inquire about their dispute with Quraish, and Ja'far Ibn Abi Talib, their chief replied :

"O King, we were a nation in the days of jahiliya (ignorance) worshipping idols, eating carrion, committing shameful acts, killing our next of kin, violating our obligations towards our neighbours, the strong among us eating the weak. This continued until ALLAH sent an apostle for us, whose ancestry, honesty, trustworthiness, and chastity are known to us. He summoned us to ALLAH to believe in His Oneness, to worship Him, and abandon stones and idols which we and our forefathers had worshipped instead. He ordered us to speak the truth, to be faithful, to observe our obligations to our next of kin and neighbours, to refrain from forbidden acts and bloodshed, from committing shameful acts and telling the false, from dispossessing orphans and slandering virtuous women. He ordered us to worship ALLAH and associate no other with Him, to pray, give alms and fast... So we believed in him and followed what was brought to him from ALLAH. We, therefore, worshipped ALLAH alone, associating no one with Him, abandoning

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what was forbidden to us and doing what was allowed to us. This resulted in enmity of our people who persecuted us and tried to abjure us in our religion and go back to idolatry".<sup>(99)</sup>

Al-Islam was revealed in the Arab Peninsula for two main reasons, the sacredness of Macca, and the Holy Prophet Muhammad (peace be upon him) is the first of Muslims; ALLAH says, "Lo ! the first Sanctuary appointed for mankind was that at Bacca,<sup>(100)</sup> a blessed place, a guidance to the people";<sup>(101)</sup> and He also says, "And I am first of those who surrender [unto him]".<sup>(102)</sup>

In the Holy Qur'an, "ALLAH knoweth best with whom to place His Message".<sup>(103)</sup> This Qur'anic Aya refers to the apostles of ALLAH and not the peoples who receive their message.<sup>(104)</sup>

Arabic is the language of the Holy Qur'an, because it was the language of the Holy Prophet Muhammad (peace be upon him) and of the people who first received the message of Al-Islam. This can be easily concluded from different Ayat of the Holy Qur'an, ALLAH says, "And thus We have inspired in thee a Lecture in Arabic, that then mayst warn the Mother-Town<sup>(105)</sup> and those around it".<sup>(106)</sup>

All the messengers were sent with the languages of their own peoples; ALLAH says, "And We never sent a messenger save with the language of his folk, that he might make [the message] clear for them".<sup>(107)</sup> If the Holy Qur'an was revealed in a language other than the Arabic, it might be argued that its Ayat were not understood, ALLAH says, "And if We had appointed it in a foreign tongue they would assuredly have said : If only its verses were expounded [so that we might understand] ?"<sup>(108)</sup> The Arabic language of the Holy Qur'an was a challenge to the Arabs in their eloquence, ALLAH says, "And if ye are in doubt concerning that which We reveal unto Our slave [Muhammad], then produce a Sura of the like thereof, and call your witness beside ALLAH if ye are truthful. And if ye do it not - and ye can never do it - then guard yourselves against the Fire prepared for disbelievers, whose fuel is of men and stones".<sup>(109)</sup> It was the miracle of the Holy Qur'an at that time, but the permanent miracle is its contents, the evidence of which is the scientific facts revealed by the Holy Qur'an fourteen centuries ago.

The call to Al-Islam started in that area, and then the circle expanded gradually to embrace the whole mankind, ALLAH says, "He it was Who hath sent among the unlettered one a Messenger of their own, to recite unto them His revelations and to make them grow, and to teach them the Scripture and wisdom though heretofore were indeed in error, manifest";<sup>(110)</sup> and He also says, "And warn thy tribe of near kindred".<sup>(111)</sup> The universal character of Al-Islam is explained in the Holy Qur'an several times, ALLAH says, "This is a declaration for mankind, a guidance and an admonition unto those who ward off [evil]".<sup>(112)</sup>

The benefit of Al-Islam on the Arabic language is clear. As a result of the spread of Al-Islam, many peoples were attracted to learn

the language of the revelation. Due to the supremacy of the Arabic language in some countries, peoples of other religions preferred it more than other languages. Thus the Arabic language crossed the frontiers of the Arabs and expanded to different parts of the world, and Arabic letters were used in Turkish, Urdu, Persian and Indonesian languages. But this lofty standing of the Arabic language does not mean the obliteration of other languages, it only means that Arabic must be a universal language, this complies with the idea of the Islamic State.

One of the attempts to destroy Al-Islam is its replacement by the so-called Uruba (Pan Arabism) instead of Al-Islam. Some writers pretend that the Arab race before Al-Islam had inherent civilization. "This opinion raises astonishment and derision" of the eminent Muslim scholar Muhammad Al-Ghazally.<sup>(113)</sup> Al-Ghazally raises the question of whether or not, the civilizations of Pharaohs in Egypt, Assyrians and Babylonians in Asia, and Carthaginians in Africa were Arab civilizations, But the Pharaohs, Assyrians, Babylonians, and Carthaginians, were all non-Arabs, so the Arabs have no civilization unless you consider as Arabs the whole Semitic race, and in this case the Jews should be considered Arabs as well. The eminent scholar considers the presumption that the Arab Peninsula had a civilization before Egypt and Greece a mere raving.

Al-Ghazally also believes that the enemies of Al-Islam are behind these trivial presumptions. The enemies of Al-Islam are trying to mislead and convince that Al-Islam had nothing done for the Arabs. Al-Islam is a social, not just a personal religion. If Al-Islam is taken from the Arab society, the so-called Uruba will be a dead and voided conception, and will be nothing but jahiliya. The attempts of those enemies were predicted in the Holy Qur'an, "And they will not cease from fighting against you till they have made you renegades from your religion, if they can".<sup>(114)</sup>

It is the opinion of Muhammad Al-Ghazally that Al-Islam liberated the Arabs and made them a nation. Before Al-Islam, they had no weight in history, and were parasites living on the big countries or slaves in their colonies in Asia and Africa. Before Al-Islam, the Arabs had no existence in world politics or in the balance of military powers. Were it not for Al-Islam, the early Arabs would have remained errant tribes in the Arabian desert, and the books of history would not mention them, except for trivial lines in an abandoned corner.

The so-called "Pan-Arabism" is one of the new ideologies of Asian and African states such as modernization, industrialization, and nationalism. The word ideology was coined by the French Philosopher Destutt De Tracy<sup>(115)</sup> at the end of the 18th Century. He was trying to discover a "truth" other than faith and authority, the traditional methods encouraged by the Church and State. Under the influence of Francis Bacon, the aim was to "purify" ideas in order to achieve "objective" truth and "correct" thought.

Karl Mannheim, a sociologist, divides social thought into two fundamental styles, which he calls "ideological" and "utopian".<sup>(116)</sup>

Since all ideas serve interests, those who defended the existing order he called "ideological" and those who sought to change the social order he called "utopian".

According to Bell, the word ideology, in popular usage, seems to denote a world-view or belief-system or creeds held by a social group about the social arrangements in society, which is morally justified as being right. The particular conception of ideology indicates that individuals who profess certain values do have interests as well. The meaning of these values or beliefs, or the reasons why they come forth where they have, by linking them up with the interests they have though the interests may not always be economic but they may be political interests and the like.

As noted by Bell, the ideologies of the Nineteenth Century were universalistic, humanistic, and fashioned by intellectuals. The new ideologies of Asia and Africa are parochial, instrumental, and created by political leaders. The driving forces of the old ideologies were social equality and, in the larger sense, freedom. The impulsions of the new ideologies are economic development and national power.

The so-called "Pan-Arabism" is, as a new ideology, a misleading emblem seeking to blur the Islamic identity of peoples in the Arab states. This false emblem involves self-contradiction, because while it, superficially, calls for the unification of the Arab states, it factually, confirms the separation of these states.

Al-Islam is a total ideology. According to Bell, a total ideology is an all-inclusive system of comprehensive reality, it is a set of beliefs, infused with passion and seeks to transform the whole of a way of life. This commitment to ideology in the yearning for a "cause", or the satisfaction of deep moral feeling is not necessarily the reflection of interests in the shape of ideas. Ideology is, in this sense, a secular religion.

Al-Islam includes the theory and practice, or the principle and the method of application of these principles. It embraces every aspect of life and the real meaning of unity can only be realized under Al-Islam, the unity of mankind.

If we accept the division of social thought made by Mannheim, the Islamic principles may be described as "utopian" because Al-Islam seeks to change the social order, and remodel society according to its principles. The perfection of the Islamic system of life is due to its Divine source.

The Arab Muslims are only about twenty per cent of the whole Muslim population, and the rest are spread in different parts of the world. This fact is the living example which proves the universal nature of Al-Islam. As regards the relationship between Al-Islam and the Arabs, it is the opinion of Al-Ghazally that being an Arab must cover all Muslims who speak the Arabic language : he called the non-Arab Muslims, who spoke

Arabic, the new Arabs. This opinion is supported by the Hadith of the Holy Prophet (peace be upon him), who said, "O People ! the LORD is One, and the Religion is one, being an Arab is not begotten from neither an Arab father nor mother, that who speaks Arabic is an Arab". The Holy Prophet Muhammad (peace be upon him) considered some non-Arab Muslims, such as Salman (the Persian), Bilal (the Abyssinian), and Suhaib (the Roman), as members of Ahl Al-Baite (the Prophet's Family). It is a true expression of what ALLAH says, "O Mankind ! Lo ! We have created you male and female, and have made you nations and tribes that ye may know one another. Lo ! the noblest of you, in the sight of ALLAH, is the best in conduct. Lo ! ALLAH is Knower, Aware".<sup>(117)</sup> It has been narrated on the authority of Abu Huraira, who said, the Messenger of ALLAH (peace be upon him) said, "Be you, O servants of ALLAH, brothers. A Muslim is the brother of a Muslim, he neither oppresses him nor does he fail him, he neither lies to him nor does he hold him in contempt. Piety is right here (and pointed to his breast three times). It is evil enough for a man to hold his Muslim brother in contempt. A Muslim for another Muslim is inviolable, his blood, his property, and his honour".

Thus, the non-Arab Muslim erudites in jurisprudence, and in different branches of literature and science, are considered Arabs. Also, Jawhar the Sicilian, who built Al-Azhar mosque in Cairo (Egypt), and Salah Ad-Dean, who recovered Al-Quds from the Crusaders, are considered Arabs.

Al-Ghazally believes that the equality of Arab Muslims and non-Arab Muslims is a necessity in Al-Islam. Thus, Al-Khilafa cannot be restricted to the Arab Muslims, and must not be monopolised by them. The right of non-Arab Muslims to Al-Khilafa and to hold executive positions in the Islamic State must not be hindered by other Muslims, because it is an Islamic propensity. The Muslims at all ages are required to look for eligibility only in the ability to serve Al-Islam in an honest and honourable manner.

In fact, the Arab Muslims have no precedence over other Muslims. We must recall to the attitudes of the early Arabs towards Al-Islam and the Holy Prophet (peace be upon him). They were the first enemies of Al-Islam, the fact is proved by history. It was narrated on the authority of Ibn Mas'ud, quote : While the Messenger of ALLAH (peace be upon him) was praying his Salat near Al-Ka'ba and Abu Jahl with his companions was sitting [near by], Abu Jahl said, referring to the she-camel that had been slaughtered the previous day : Who will rise to fetch the foetus of the she-camel of so and so, and place it between the shoulders of Muhammad when he lies prostrate (a posture in Salat). The guilty man got up to bring the foetus, and when the Prophet (peace be upon him) lay in prostrate, he placed it between his shoulders. Then they laughed at him all. I stood looking wishing I had the power to remove it from the back of the Messenger of ALLAH (peace be upon him). The Prophet (peace be upon him) kept his head bent prostration and did not raise it, until a man went [to his house] and informed [his daughter] Fatima, who was a young girl [at that time] [about this ugly incident]. She came and

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removed [the filthy thing] from him. Then she turned towards them rebuking them [the mischief-mongers]. When the Prophet (peace be upon him) finished his Salat, he invoked ALLAH's imprecations upon them in a loud voice. When he prayed, he prayed thrice, and when he asked for ALLAH's blessings, he asked thrice. Then he said thrice : O ALLAH, it is for Thee to deal with Quraish. When they heard his voice, their laughter stopped and they feared his malediction. Then he said : O ALLAH, it is for Thee to deal with Abu Jahl Ibn Hisham, 'Utba Ibn Rabi'a, Shaiba Ibn Rabi'a, Walid Ibn 'Uqba, Umayya Ibn Khalaf, 'Uqba Ibn Mu'ait (and he mentioned the name of the seventh person, whom I do not remember). By One Who sent Muhammad with truth, I saw [all] those he had named lying slain the Day of Badr. Their dead bodies were dragged and thrown into a pit near the battlefield.

The Holy Prophet himself (peace be upon him) declared that the hardest treatment was meted to him by Arabs. It is narrated on the authority of Aisha, the wife of the Holy Prophet (peace be upon him), who said to the Messenger of ALLAH (peace be upon him) : Messenger of ALLAH, has there come upon you a day more terrible than the day of Uhud. He replied : I have experienced from thy people the hardest treatment on the day of 'Aqaba. I went to Ibn 'Abd Yalil Ibn Abd Kulal with the purpose to call him to Al-Islam, but he did not respond to call and I departed with signs of [deep] distress on my face. I did not recover until I reached Qarn Al-Tha'alib. When I raised my head, lo ! near me was a cloud which had cast its shadow on me. I looked and lo ! there was in it the angel Jibril who called out to me and said : ALLAH, the Honoured and Glorious, has heard what thy people have said to thee, and how they have reacted to thy call. And He has sent to thee the angel in charge of the mountains so that thou mayest order him what thou wishest [him to do] with regard to them. The angel in charge of mountains then called out to me, greeted me and said : Muhammad, ALLAH has listened to what thy people have said to thee. I am the angel in charge of the mountains, and thy LORD has sent me to thee so that thou mayest order me what thou wishest. If thou wishest that I should bring together the two mountains that stand opposite to each other at the extremities of Macca to crush them in between [I would do that]. But the Messenger of ALLAH (peace be upon him) replied : I rather hope that ALLAH will produce from their descendants such persons as will worship ALLAH, the One, and will not ascribe partners to Him. This event took place in the Arab month of Shawwal in the tenth year of Muhammad's advent as the Holy Prophet (peace be upon him) after the death of Abu Talib (his uncle) and Khadija (his wife). The Holy Prophet (peace be upon him) went to Ta'if and called the tribe of Banu Thaqif to Al-Islam but they not only refused to listen to him, but scoffed at him and put him in great torment. Stones were flung at him and he bled. It was at this juncture that the angel appeared and told him that these people could be crushed within the mountains. The Holy Prophet (peace be upon him) did not agree to this suggestion and asked the angel to spare their lives, as he did not despair of the destiny of man and hoped that, if not the people of the living generations, their descendants would come within the fold of Al-Islam as it was truth pure and simple and no sensible man could stand against it for long except a few obstinate men who had lost their

sanctity and whose hearts were buried under layers of prejudices. The place Qarn Al-Tha'alib referred to in this Hadith is situated at some distance from Macca. The two mountains are Abu Qubais and the one facing it, near Macca.

The Holy Prophet Muhammad (peace be upon him) was injured at the battle of Uhud. It is narrated on the authority of Anas that the front teeth of the Messenger of ALLAH (peace be upon him) was broken on the day of the battle of Uhud, and his head was wounded. He wiped the blood [from his face] and said : How will these people attain salvation who wound their Prophet and break his tooth while he called them to ALLAH ? At this time, ALLAH the Exalted and Glorious, revealed the Aya : "Thou hast no authority".<sup>(119)</sup> Also the wrath of ALLAH on those people who injured the Holy Prophet (peace be upon him) would be great. It was narrated by Hammam Ibn Munabbih who said : This is what has been related to us by Abu Huraira from the Messenger of ALLAH. He also narrated a number of ahadith. One of these was that the Messenger of ALLAH (peace be upon him) said : Great is the wrath of ALLAH upon a people who have done this to the Messenger of ALLAH, and he pointed at that time to his front teeth. The Messenger of ALLAH (peace be upon him) also said : "Great is the wrath of ALLAH upon a person who has been killed by the Messenger of ALLAH in the way of ALLAH, the Exalted and Glorious".

### Projects Of Muslim Thinkers For Islamic Unity

Apart from the establishment of the Islamic State, there are four conceptions of Islamic unity.

#### First : The Idealistic Conception

The Muslim scholar Muhammad Abu Zahra suggests a sort of unity among Muslims, that is the Muslim fraternity.<sup>(120)</sup> This Islamic unity must be established on the unity of religion, in the sense that Muslims follow Islamic ethics. In Salat, all Muslims direct their face towards Al-Ka'ba; in Saum, all Muslims fast at a certain time; and in Haj, Muslims meet at a certain time and in a certain place. Thus, Al-Islam unifies Muslims by unifying the place and time of worship. Abu Zahra believes that Muslim fraternity is based on the following principles :

1. Fraternal feeling among Muslims, ALLAH says, "The Believers are but a single Brotherhood : So make peace and Reconciliation between your Two [contending] brothers; And fear GOD, that ye may receive Mercy".<sup>(121)</sup>
2. Social, linguistic and cultural unity among Muslims.

No Islamic territory will wage war against another Islamic territory, irrespective of the methods of this war, such methods include economic measures and the participation in an alliance against other Muslims. According to Abu Zahra, Islamic Unity has not necessarily to be in the form of Al-Khilafa, because the purpose

of this unity, in his opinion, is not the establishment of one Islamic State. In case of the establishment of this state, Al-Khilafa must not be for a life Khalifa who may be a non-Arab. Although Abu Zahra believes that there is a big gap between Muslims and their rulers, he accepts any type of regimes whether royal or republican, but in all cases governments must be subjected to the people's will. Al-Khilafa, in the opinion of Abu Zahra may be accepted as the external feature of the Islamic unity without the establishment of an Islamic State.

The Muslim scholar **Abul A'la Al-Maududi**<sup>(122)</sup> believes that Al-Islam is the only religion which considers mankind as one family. The criterion of advantage of a man over another is the best conduct, in the Holy Qur'an ALLAH says, "O Mankind ! Lo ! We have created you male and female, and have made you nations and tribes that ye may know one another. Lo ! the noblest of you in the sight of ALLAH, is the best conduct. Lo ! ALLAH IS Knower, Aware".<sup>(123)</sup> The Arabs participated in the toppling of Ottoman Khilafa under the emblem of a national state. They forgot the Islamic links which bound all Muslims. *For a Muslim*, Islamic countries other than his own country, are foreign countries. Al-Maududi suggests a type of unity or solidarity among Muslim countries, but he gives *no definite form for this unity or solidarity*. Bearing in mind pacts, such as the Warsaw pact, Al-Maududi believes that solidarity among Muslim countries is more justifiable than that among aggressors. Al-Maududi lists the following issues as of common importance throughout the Islamic World:

1. the revival of the Islamic civilization;
2. the establishment of a common system of Islamic education;
3. the establishment of a military industry;
4. the spread of the Arabic language;
5. the prohibition of antagonistic propaganda;
6. the establishment of a system for the settlement of disputes;
7. the establishment of an Islamic news agency;
8. the facilitation of movement within the Islamic countries;
9. the support of Muslim African communities who live under Christian governments;
10. the promotion of commercial activities; and
11. the safeguarding of Muslim minorities in other countries.

Second : The Conception Of A Confederation Of States

The Muslim scholar Malek Ibn Nabi<sup>(124)</sup> suggests an Islamic Commonwealth, a type of unity similar to the British Commonwealth. The idea of the Islamic Commonwealth emerges, mainly from the unity of culture and civilization; and not only from the economic considerations. According to Ibn Nabi, there are some differences between the British Commonwealth and the suggested Islamic Commonwealth which are the following :

1. The British Commonwealth focuses on the King or the Queen, while the Islamic Commonwealth must focus on Al-Islam as a supreme idea. From an organizational point of view, the Islamic Commonwealth is an organization which may be called Al-Khilafa. This organization reflects the common will of the Islamic world and represents its public interests.
2. The British formula came into being under political and geographical circumstances imposed by the evolution of the concept; but the Islamic Commonwealth is an historical necessity. It is not only a mere economic, political or even strategic organization, but is also a moral and spiritual organization aimed at facing the social crisis in the Islamic countries.
3. The British formula is basically a "group of states"; but the Islamic Commonwealth will be a "group of peoples". This difference distinguishes the organizational role of each of them. The British Commonwealth is concerned with political problems; but the Islamic Commonwealth will be concerned over social problems and endeavor to reach a standard of development similar to that of the developed countries.

According to Ibn Nabi, the Islamic World consists of several units as follows :

1. the African Islamic world,
2. the Arab Islamic world,
3. the Iranian Islamic world (which includes Iran, Afghanistan, and Pakistan),
4. the Malayan Islamic world (which includes Indonesia and Malaysia),
5. the Mongol-Chinese Islamic world,
6. the European Islamic world.

These units must revolve around an organization as a central point which represents the common will of these units.

Ibn Nabi believes that his idea may be viewed by some Muslims as inapplicable, but he thinks the idea deserves to be tested and suggests its application, at least, in two ways :

- A. the unification of Islamic feasts in all the Islamic World, and
- B. the supervision of the publication of the Holy Qur'an must be entrusted to Al-Azhar in Egypt, to avoid any deviation from the original text in its different editions.

### Third : The Conception Of A Federation Of States

The Muslim scholar Abu Nasr Al-Farabi<sup>(125)</sup> in his book "Ara'a Ahl Al-Madina Al-Fadela" (Opinions Of Natives Of The Virtuous City), calls for a federation of the countries of the world. Al-Farabi believes that a human being cannot attain the perfection of which created by the nature without the association of many cooperated societies, each of them provides the other with some needs for living. Al-Farabi divides the human society into complete and incomplete societies. He divides the complete societies into major and minor societies. According to Al-Farabi, if nations co-operate to attain happiness, the universe will be virtuous. Al-Farabi defines the virtuous society, but neither explains the method of its constitution, nor defines the criteria for its regulation. All what concerns Al-Farabi, in the virtuous society, is its chief. He suggests the chief be the Imam. Al-Farabi does not explain the policy to be followed by this chief, but specifies only his qualifications. In veryrare cases can these qualifications be found in one man, and the chief must be the one who has most of these qualifications. Al-Farabi believes that wisdom is the most important quality of the chief, and if this quality is lacking, the virtuous city will remain without chief. This attitude will lead to the perdition of the virtuous city. If there is no one who has most of the required qualities, but there are two persons : one whom is wise and the other has the other qualities, then both of them will share the leadership to complete each other. If these qualities exist in more than two persons and all of them are in harmony with each other, all of them will be chiefs of the virtuous city. In the opinion of Al-Farabi, in the virtuous city ethics is more important than laws and regulations.

### Fourth : The Conception Of An Islamic International Organization

Under this conception, some Muslim thinkers try to achieve Islamic unity through the establishment of an international organizations, although some of them were not fully aware of the very concept of an international organization. Three projects were suggested.

The first project was suggested by Abd Ar-Rahman Al-Kawakby.<sup>(126)</sup> In his his book "Um Al-Qura" (Macca), Al-Kawakby imagined an Islamic Assembly held in Macca, and attended by representatives of Islamic countries.<sup>(127)</sup> The Assembly convened for the purpose of looking for a remedy to the weakness of all Islamic peoples. The Organization

suggested by Al-Kawakby comprises three organs, the General Assembly, the Active Organ, and the Consultative Organ. The main objective of the establishment of this Assembly (the Organization) is to constitute an Islamic Union. The official seat of the Assembly is Macca, with several branches in several suitable places. The Assembly must not be subjected to the authority of any government and must not be tied to a specific Islamic law school. The emblem of this Organization is "we do not worship other than ALLAH".

The second project was suggested by Abd Ar-Razaq As-Sanhoury.<sup>(128)</sup> His suggestion is to establish a "League Of Oriental Nations", an international religious organization comprising the following organs :

1. The Khalifa, who will be selected by a General Assembly, in accordance with a suggestion of a Supreme Council.
2. The General Assembly Of Al-Khilafa, in which every Islamic state and every Islamic group will be represented by a delegation, the number of the members of each delegation will be specified according to the importance of each state or group. There is an annual meeting of the Assembly, at the time of Haj, under the chairmanship of the Khalifa or his deputy.
3. The Supreme Council, in which every Islamic State and every Islamic group will be represented by one delegate or more. In all cases, the number of delegates at the Council must be less than that at the Assembly. The Council convenes several times at the seat of Al-Khilafa under the chairmanship of the Khalifa.

Five committees emanate from the Council :

- A. Committee Of The Administration Of Doctrines And Internal Regulations;
- B. Financial Committee;
- C. Committee Of Haj;
- D. Committee Of Education And Religious propaganda;
- E. Committee Of Foreign Relations.

This system of Al-Khilafa must be endowed with international and legal means, the Khalifa shall safeguard the religious interests of the Muslims who are citizens of foreign states.

The main evolution in this suggestion, as noted by some writers, is that the concept of Al-Khilafa is turned into a concept of international law. Such matter means the acceptance of the the existence of several independent Islamic states of different citizenships, subject to different sovereignties; but all of them observe the Islamic solidarity as an essential rule of international law.

The third project was suggested by Muhammad Diya-u-eddin Ar-Rayyes.<sup>(129)</sup> He accepts the opinion of some jurists who accept the existence of several Islamic states; but, in his opinion, the existing "Islamic states" must endeavor to really be Islamic by full compliance with Islamic principles. The number of the existing "Islamic states" must not be too numerous because Al-Islam calls for unification; besides, great states are much stronger than small states. Ar-Rayyes suggests that "Islamic states" constitute an organization to be called "Organization Of Islamic States" enjoying international personality and sovereignty (!!) in matters of common interest especially self-defence, but every Member State does not relinquish its sovereignty to the Organization. The existence of this Organization will put an end to the Arab League. This organization will serve the common interests of "Islamic states", draw up public polices; determine relations between the Islamic nation and foreign states; endeavor to ensure the internal policy complies with Islamic principles; settle disputes; and guarantee the relations among "Islamic states" are based on the principles of co-operation and fraternity.

Upon its establishment, the Organization must declare that it is not a religious Organization in the narrow sense, but a cultural and political Organization. The purposes of the organization are :

1. to maintain peace and relinquish war and aggression;
2. to co-operate with the United Nations and World Organizations in keeping just peace;
3. to defend Muslim territories and rights, and resist any aggression against them;
4. to stand as one strong front against the aggression of Zionism and colonialism specifically;
5. to apply Islamic principles and to make them the basis of the social life;
6. to raise the level of Islamic societies in all aspects of their life especially in science and ethics;
7. to propagate the message of Al-Islam throughout the world as well as its supreme principles in compliance with the objectives of Al-Islam;
8. to call for the unification of mankind race in a universal human society;
9. to resist against racism, fanaticism, and exploitation of one people to another; and
10. to endeavor set up a world government or a universal system to be obeyed by all, achieve justice, peace and fraternity.

The suggested Organization comprises two main organs : the General Assembly and the Executive Council; and five active permanent Committees.

The General Assembly holds a session every year for a period of three months, and holds an emergency session if circumstances so require. The presidency of the Assembly will be on a rotation basis among the representatives of the "Islamic states", a president for each session. The decisions of the Assembly are obligatory and binding, not only legally but also religiously. (!!!!)

The Executive Council has a limited number of Member States not exceeding ten, selected by the Assembly. The Council convenes once every month, and convenes immediately at the request, of any state. The competence of the Council is comprehensive and not restricted to matters of peace and security. The Member States of the Council do not enjoy a Veto right. The decisions of the Council are adopted consensus, or by a majority of votes in case of lack of consensus.

The five active permanent Committees are :

1. Committee Of Political Affairs; (130)
2. Legal Committee;
3. Military Committee;
4. Social And Cultural Committee; and
5. Committee Of The Call To Al-Islam.

The Member States of the Organization select the Secretary General, who may be called "the Director" or "the Controller", from among the most distinguished Muslims, scientifically, religiously and morally. He must be fully aware of the conditions of Muslims and the international affairs. He must also be protective of Al-Islam, and very much concerned over the destiny of the Islamic nation and the call to Al-Islam. (131) Ar-Rayyes believes that the establishment of this Organization is the formula of Al-Khilafa but in a decentralized modern form.

### Islamic Movements And Their Main Trends

The essential objective of most contemporary Islamic movements is to establish a real Islamic State. For different reasons, it is not easy to survey all the contemporary Islamic movements who endeavor to establish the Islamic State. There are numerous movements who work underground and Muslim governments stand against them. We must also take into consideration the possibility that some of these movements may have suspicious aims and may be financed by suspicious powers.

However, Islamic movements may be categorized according to four main trends :

### First: The Trend Of Preaching And Guidance

According to this trend, preaching and guidance may be practiced individually or collectively. Seeking to initiate an attitudinal revolution among the people through speech or writing is a form of Jihad. An example of this trend is the "Islamic Guidance Society" in Egypt. This society, incidentally, requires the complete and immediate implementation of Al-Shari'a Al-Islamiya.

This trend may be criticised on the basis that the material problems of the world cannot be solved by sheer preaching. The advantages of Al-Islam must be practically manifested by the establishment of the Islamic State as a factual model; theoretical principles alone will convince no one.

### Second: The Propagation Of Islamic Thoughts' Trend

This trend holds the view that the essential way to rescue the Islamic nation is to restore its confidence in the rightness of Islamic concepts through a political and intellectual revolution that will destroy false ideals and remove corrupted rule.

To this end, the organizations that represent this trend prepare books and pamphlets on various subjects, and also occasionally issue pamphlets either to explain the attitude of Al-Islam toward certain matters or to declare their own stance on such questions. These organizations have also been involved in some activities aimed at establishing an Islamic regime. This trend, it is clear, combines various forms of Jihad.

An example of this trend is "Hizb At-Tahrir Al-Islami" (the Islamic Liberation Party) which was first founded in some Arab states and later established in Egypt in 1955.

### Third: The Comprehensive Trend

The organizations that represent this trend are active in several states, and are intellectual movements that aim at instilling the Islamic mentality through their call for adherence to Al-Shari'a Al-Islamiya. They are also educational movements that call for the purification of the spirit by allegiance to the ethics of Al-Islam. These organizations call for struggle by all means as well. This trend combines all forms of Jihad.

An example of this trend is "Gama'at Al-Ikhwan Al-Muslimeen" (the Muslim Brothers Group). It was widely thought that this group would attain its goal, but various forces conspired against it. Hasan Al-Banna, the founder of the group, fell martyr in 1948. He was the first of numerous casualties in the following years. Its activities have been banned since 1954.

#### Fourth: The Revolutionary Trend

This trend aims at establishing an Islamic regime by the use of force, which is the main form of Jihad.

This trend is represented by an increasing number of organizations such as "Gund-U-ALLAH" (The Soldiers Of ALLAH), "Al-Jihad" (The Struggle), and "Gama'at At-Takfir Wa Al-Hijra" (The Repudiation And Renunciation Group). The last group emerged in 1971 in Egypt; as its name implies, it condemns society for its disbelief, and has therefore established its own society of believers. The members of this Group believe in seclusion and purification of the soul. The objective of this Group is to return to the Islamic teachings and the strict application of Al-Shari'a Al-Islamiya.

A classic example of this trend, it may be added, is the revolution of Ahmad Ibn Erfan to establish an Islamic State in the city of Peshawar. But conspiracies led to its end and Ibn Erfan fell martyr with his great disciples in 1246 A.H.

We believe that none of these trends is solely suffices to establish the Islamic State, but they all are complementary to each other. Solidarity, or at least co-ordination among the Islamic movements all over the world, will expedite the attainment of their objective.

#### Our Opinion On The Revival Of The Islamic State

The Islamic phenomenon is multi-dimensional, at least in three aspects, Al-Islam is a religion; a system for domestic behaviour; and a method to administer international struggle.

The Islamic area may be viewed as a belt extending from the Pacific to the Atlantic Ocean, which separates the north from the south. Thus, from the strategic point of view, it can function in three directions as follows :

1. to stem the human influx from the north who seeks the affluence of the south;
2. to dominate all air communications between Europe and other parts of the world; and
3. to stand ready to strike fatal blows against the two super powers, not only the Soviet Union at its southern frontiers, but also the United States, because the shortest point to reach the States is situated in West Africa.

In fact, Al-Islam has a number of enforceable elements which are of great significance for the future of the white civilization. Demographically, it accounts for one third of the world's population. It is known that, by the end of this century, there will be six coloured men

for every white man. Geographically, it is located at the center of the world. The most important resources for men, especially oil and mineral resources, are found in the Islamic territory.

Al-Islam in Asia is the real source of power, because the majority of the population is Muslim and can face their problems and introduce a clear formula to solve them. Idolatry prevails in Asia, and Al-Islam represents an attractive element to the idolaters. Some writers do not hesitate to confirm that the future of the Islamic political thought will come from Asia and never from the Arab area. Al-Islam in Asia represents the real force in the contemporary Islamic map, there is no Asiatic state does not include Muslims whether as a majority or as a minority.<sup>(132)</sup>

Al-Islam in the Arab area stands for the material riches whether oil or as liquidity, and the important geographic position which extends from the Indian Ocean to the Mediterranean Sea. In spite of these material riches, the difference in the standards of living is extensive.

No African state, but for a few exceptions, does not have an Islamic community. Al-Islam spreads in Africa with great strides. The number of Muslims in Africa doubled in less than twenty years. Even Ethiopia, deeply rooted in Christianity, admits that the number of Muslims is about forty per cent of the whole population. It is a fact that the black African considers himself much closer to Al-Islam than to any other civilization.

Al-Islam in the West, whether in Europe or America, has no important weight, and Muslims are just torn minorities, but could be more efficient in the decision-making process of these states.

During the Middle Ages, the hatred between the Catholics and Muslims grew for different reasons, and culminated with the Crusades. The effects of this hatred still exist to-day. The reconciliation of the two super powers is the reflection of their fear of Al-Islam emerging as a third power. If this happens, the equilibrium of international relations will change if the new super power sides one of them or adopts a neutral attitude toward them. The possibility that the new super power may stand against one or both of them is a valid reason to fear the emergence of the new super power, and accordingly to eliminate, or at least delay, its emergence. It is a wise policy for any power to encourage the establishment of the Islamic State, because the Muslim masses are determined to create their own state.

Our contemporary times may be described as "the end of ideologies", because the political conceptions, through which complete systems involving political authority were constituted, have failed.

Many writers have predicted the possibilities of the Islamic revolution. The Soviet writer Stragnovsky<sup>(133)</sup> concluded in 1918, on the basis of strategic and historical analyses, that the most likely area where a revolution as important as the French or the Bolshevik

revolutions could break out would be Iran. Every observer, has to confess that the waves of change are recently extending time to all parts of the Islamic world.

We concur the views of some writers<sup>(134)</sup> that, in general, Islamic leaderships in all underdeveloped communities are nothing but the worst elements who were appointed by foreign powers to lead these communities. Consequently, it was but natural that Muslims could not attain any remarkable progress in the international arena. It is regrettable that Arab communities are not capable to revolt in order to set up the Islamic State. We agree also that the Arab Islamic State as a framework for action at international level is incapable in our days. Since the fall of the Ottoman Khilafa, the Arabs have failed to establish a new Khilafa under their leadership. They failed, also, to create any form of unity on the basis of the so-called "Pan Arabism". However, Al-Islam is a universal religion, and the leadership of Muslims must not be restricted to any specific race, but must be entrusted to capable Muslims only.

The purpose of the establishment of the Islamic State is the application of Al-Shari'a Al-Islamiya and the safeguard of its principles which represent the justice of ALLAH. The Islamic civilization is the sole example where the relations among Muslims and non-Muslims were all governed by the same principles.

It is true that there is no Islamic State nowadays, in the strict sense of the term, but there are Muslim states. In this regard, we have to distinguish between states of Muslim majority; and others of Muslim minorities. This distinction leads us to three essential conclusions :

1. In the states of Muslim majority, the legality of the regime must be questioned by the Muslim people. Al-Islam must prevail in these states, not only as a religion, but also as a law and a system of government; otherwise the regime is illegal. The authority usurper must be uprooted and deposed. No state will be really Islamic without the establishment of Al-Khilafa and the complete application of Al-Shari'a Al-Islamiya.
2. The states of Muslim majority must reshape their government systems so as to fully comply with Al-Shari'a Al-Islamiya. This change in the states of Muslim majority must precede any other in the states of Muslim minorities.
3. These Islamic States, after the said change, are entrusted with the duty to propagate Al-Islam.

Contemporary trends tend to reject the conception of a "national state", and crystallize new conceptions. It is noted that religion have started to be a tangible element on the international arena.<sup>(135)</sup> The latest results demonstrate that religion is a very important variable in shaping political behaviour of individuals towards government authority. Other factors confirm that the evolution is essential, namely, failure of European ideologies, revolutions of the

third world, and coloured peoples' adherence to Al-Islam. Nowadays, religious movements may be considered among the pressure groups trying to remodel many of the political facts.

Thus, religion became much more dangerous to many rulers especially those of Muslim states. They limited jurists to study only the strict religious matters disregarding international variables. They also tried to confuse the facts by describing the members of the Islamic movements as terrorists. In fact, the Islamic movements in their endeavors to revive the Islamic State, do nothing but Jihad Fi Sabeel ALLAH which is complete submission to ALLAH. Terrorism has no religious feature, it is coloured by the type of civil life, and reflects the despair of reform by way of conviction. Those who strife "Mujahidun" are believers, but terrorists are desperate. Thus, Jihad and terrorism are two contradictory concepts, or at least differ from each other. The purpose of this deliberate confusion is self-explanatory.

In fact, the revival of the Islamic State will not be the sole example, in recent times, of the establishment of a State, on a religious basis. <sup>(136)</sup> *Our time are the age of huge political entities;* such as the Soviet Union, China, and the United States; therefore the sought Islamic State must also be extensive. It is presumed that the Islamic State will be a World State; but, practically speaking, it is not expected that Al-Islam will immediately prevail in the whole world. This means that the world society will remain divided, for a certain period, into Islamic and non-Islamic states.

Before the establishment of the sought Islamic State, it is necessary to accept, at an interim stage, the existence of several Islamic states. It is not necessary for these states be very extensive, but at the same time they must not be small to the extent of being a micro-state. <sup>(137)</sup>

### Principles Of International Law In Al-Shari'a Al-Islamiya

#### The Regulation Of The Inter-Relationships Of Ancient Communities

Generally speaking, the purpose of international law <sup>(138)</sup> is to regulate the activities of states, and certain other entities enjoying international personality, in their inter-relationships. It has been noticed that ancient nations had observed some form of law, customary or otherwise, in their relationship with one another, which may fall under the title "international law". According to some writers, the mere fact of neighbourly cohabitation creates moral and legal obligations, which in the course of time crystallize into a system of international law. Even among the primitive peoples, rules or precepts seem to have existed as a part of the morals before they were developed into a coherent system governing the relations of civilised nations. When a minimum of rules is

deemed necessary for the cohabitation of territorial groups, a society of nations is bound to develop, ubi jus ibi societas est. This notice is to be substantiated by the fact that there existed, or coexisted, several families of nations in such regional areas as the ancient Near East,<sup>'139'</sup> Greece and Rome,<sup>'140'</sup> China, and Western Christendom; in each of them at least one distinct civilization had flourished. Within each civilization a body of rules and practices developed for the purpose of regulating the conduct of each entity with the others in peace and war.

According to Al-Ghunaimi,<sup>'141'</sup> the pre-Islam Arabs were obsessed by asabiyah (chauvinism) and clannish individualism, consequently they failed to develop the principles of regional community with their circle. Misunderstanding between Arab tribes, as regards cattle, water, or pasturage, were often settled by war. The practice of resorting to war was tamed for religious reasons in order to enable the Arabs to go safely on pilgrimage. For this purpose war was prohibited during the months of truce, sacred months which were the date of pilgrimage and in the Holy abode of Al-Ka'ba which included Macca and a suburban area. According to the same writer, a treaty relations could be traced in the pre-Islamic Arab history, they were mainly, Hilf,<sup>'142'</sup> Musanadah,<sup>'143'</sup> and Muwada'ah.<sup>'144'</sup> Also, the traditional practice of the Arabs shows that they knew Tahkim (Arbitration) as an institution of conciliatory nature to settle inter-tribal wars and disputes.

However, former systems of "international law", in contrast with the modern one, were not universal in character, since each system was primarily concerned with regulating the relations of entities of nations within a limited area and within one, or more than one civilization. Further, each of these past systems, in contrast with modern international law, was entirely exclusive, since it did not recognize the principle of legal equality among nations which is the basis of modern international law. Consequently, each system disappeared with the disappearance of the civilization under which it flourished.

### Principles Of International Law In Al-Shari'a Al-Islamiya

Principles of international law in Al-Shari'a Al-Islamiya have always constituted an integral part of Al-Shari'a.<sup>'145'</sup> There has never been the least hesitation on its binding character. These principles were discussed under the name Siyar, plural of sirat, meaning course. In this field, as in other legal fields, there were agreements and disagreements among the various juristic schools both in emphasis and in detail, but the controversy was more apparent in this field. Sometimes, the subject is treated under the head of Jihad.<sup>'146'</sup>

Applied to the conduct of the state, these principles of international law in Al-Shari'a (or the Islamic Law of Nations as used by some writers) have been defined as "the rule of conduct laid down by the Sunna of the Holy Prophet (peace be upon him) or the traditions of his

companions concerning Maghazi (Military Campaigns or Expeditions)".<sup>(147)</sup>

Another definition was given, that is : "Muslim law is the fair regulation of the conduct of the faithful in this world and the world hereafter. Mutatis mutandis Muslim international law aims at the fair regulation of the Muslim state in its foreign relations as well as the individual Muslim in his relations with the non-Muslim citizen of another non-Muslim state and any non-Muslim state. That which sanctions the individual's private conduct, and by reason of a unified source of moral precepts prevents a duality of moral standards in national versus international affairs".

A third definition can be added : "The part of law and custom of land and treaty obligations which a Muslim de facto or de jure state observe in its dealings with other de facto or de jure states".

A fourth definition can also be added : "L'ensemble des règles dont l'usage est imposé exclusivement aux Musulmans pour régler leur rapports de guerre et de paix avec les non-Musulmans, individus ou Etats, dans le pays de l'Islam et en dehors de ce pays".

Another writer gives a fifth definition : "The sum total of rules and practices which Islam ordains or tolerates in international relations".

The sixth definition is as follows : "The sum total of rules and practices which govern Islam's intercourse with other peoples".

It is not our intention to discuss any of these definitions, the reason is our belief that the outcome of our study will clarify the boundaries and confine the domain of these principles especially that related to Jihad. However, we want to draw the attention to the fact that the conduct of the Islamic State is subject to principles and not rules. This means, in our opinion, that the principles must be dogmatic, but the rules derived from these principles may be adaptable to changing circumstances.<sup>(148)</sup>

The principles of international law in Al-Shari'a have the same legal sources of Al-Shari'a,<sup>(149)</sup> namely the revelation, which includes the Holy Qur'an and the Sunna of the Holy Prophet (peace be upon him), and the Ijma' (Consensus).

Al-Shari'a Al-Islamiya has preserved Greco-Roman legal concepts through its contacts with the Western World, and has made substantial contributions to international law. Western scholars such as Vitoria, Ayala, and Gentili came from parts of Spain and Italy where the influence of Al-Shari'a Al-Islamiya was great; great jurists and theologians like Martin Luther studied Arabic, the language of the Holy Qur'an; Western libraries carried the Muslim treaties; and even Grotius in his writings on the law of war recognized the humanitarian laws of those whom he called the "barbarians".

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The impact of Al-Islam on the development of international law is amply felt in the area of war. It set definite principles on war, booty, prisoners of war, protection of civilian populations, limitations of belligerent activities and reprisal, asylum, and diplomatic immunity.

Another contribution of Al-Islam in the development of international law was in the domain of commerce, and consequently the relevant legal institutions.

Another area in which Al-Shari'a has contributed is that of treaties. The Holy Prophet (peace be upon him) set forth that valid treaties are *pacta sunt servanda*. We mention as an example the Holy Prophet's pact with the people of Najran,<sup>(150)</sup> this pact states that :

"For the continuation of this compact, the guarantee of GOD, sanction what has been written until GOD manifests his authority so long as the people of Najran remain faithful and act in accordance with their obligations, giving no support to the oppression".<sup>(151)</sup> In Abu Bakr's renewal of the pact, the same principle was confirmed, this is clear from the following text :

"May the protection of GOD and the guarantee of Muhammad forever upon this document so long as [the people of Najran] remain faithful and act in accordance with their rightful obligation".

Some writers noted that, "Europe, obsessed by the fear of the Islamic expansion, for the first time since it embraced Christianity, was united under one banner to fight its common foe;...this unity marks the remote origin of the present notion of international organization". This means, in their opinion, that Al-Islam influenced international law in an indirect way.

Some writers consider that the first codification of international law, as a collection of cases and practices, was made by Ash-Shaybani in his *Siyar* in the Eighth Century, preceding similar Western works by centuries.

We believe that Abdul-ALLAH Ibn Al-Mubarak,<sup>(162)</sup> was the first Muslim to write about Jihad, the essential and the most important topic in the principles of international law in Al-Shari'a Al-Islamiya. But, Ash-Shaybani is still the brilliant Muslim jurisprudents in this field. The full name of Ash-Shaybani is Abu Abdul-ALLAH Muhammad Ibn Al-Hasan Ibn Farqad. He was born in Wasit (Iraq) in 132 A.H. / 749-50 A.D., and brought up in Al-Kufa. It is unknown whether his ancestors were Arabs or non-Arabs, because none of the authorities had referred to this matter. Contrary to the opinion of Abu Zahra, this silence means that his ancestors were likely to have been non-Arabs, as believed by Khadduri. Ash-Shaybani studied at the early age of fourteen under Abu Hanifa,<sup>(163)</sup> from whom he learned the principles of legal reasoning. At twenty he is said to have lectured in the mosque of Al-Kufa. He extended his knowledge of Hadith under Abu Sufyan Ath-Thawri, Al-Awza'i and others specially Malik Ibn Anas, whose lectures he attended for over

three years in Al-Madina.

The place of Ash-Shaybani is sufficiently known to Western scholars of comparative jurisprudence, Hans Kruse founded "the Shaybani Society Of International Law";<sup>(154)</sup> and Joseph Hammer von Purgstall called Ash-Shaybani "the Hugo Grotius of the Muslims".<sup>(155)</sup> Although Hugo Grotius is the most effulgent name among the jurists of modern international law, it is not acceptable to identify the name of Ash-Shaybani with Grotius. This identification is unfair at least because Ash-Shaybani is considered the pioneer in his field if compared with Grotius.<sup>(156)</sup>

Commenting on some Grotius' books, Sir Humphrey Waldock says, "Few books have won so great a reputation as the "De Juri Belli Ac Pacis", but to regard its author as the 'founder' of international law exaggerate its originality and to do less than justice to the writers who precede him; neither Grotius, nor any other single writer can properly be said to have 'founded' the system". Also, it may be added what is said by Julius Stone, "Hugo Grotius, the great thinker's title as "the father" of international law is not to be taken literally..... neither Vitoria, nor Suarez, and Grotius fathered a full-fledged modern system of international law".

### The Regulation Of The External Relations Of The Islamic State

After its establishment, the Islamic State will not reach to its ultimate scope at once; accordingly, the world will be divided into dar Al-Islam which applies Al-Shari'a Al-Islamiya; and dar al-harb, which consists of non-Muslim territories which apply non-Islamic laws.

Jihad Fi Sabeel ALLAH is enjoined by ALLAH upon all believers, "Then, when sacred months<sup>(157)</sup> have passed, slay the idolaters wherever ye find them each ambush".<sup>(158)</sup> The Holy Prophet Muhammad (peace be upon him) said, "Every nation has its monasticism, and the monasticism of this [Muslim] nation is Jihad"; he also said, "I have been ordered to fight against people until they testify that there is no god but ALLAH and that Muhammad is the Messenger of ALLAH and until they perform Salat, and pay Zakat, and if they do so they will gain my protection for their lives and property, unless [they do acts that are punishable] in accordance with Al-Islam, and their reckoning will be with ALLAH the Almighty". Nobody can deduce from the Qur'anic ayat or the ahadith (utterances) of the Holy Prophet Muhammad (peace be upon him) that the purpose of Jihad Fi Sabeel ALLAH is the imposition of Al-Islam upon the unbelievers. In the Holy Qur'an, ALLAH decides clearly, "There is no compulsion of religion. The right direction is henceforth distinct from the error".<sup>(159)</sup>

In the Holy Qur'an ALLAH says, "Ye should believe in ALLAH AND His Messenger, and should strive for the cause of ALLAH with your wealth and your lives. This is better for you, if ye did not know".<sup>(160)</sup> Thus,

Jihad, as an obligation for the believers; it may be fulfilled in their heart by their efforts to combat the devil and escape his persuasion to evil; with their tongue and hands in the attempt to support right and correct the wrong; and by the sword in taking part in actual fighting and by sacrificing their wealth and their lives; the latter type is Jihad in the technical sense. Jihad is the only lawful form of fighting in accordance with Al-Islam. The Khalifa is empowered to decide when Jihad will commence or stop. It may be concluded from the Holy Qur'an that Jihad is a continuous process,<sup>(161)</sup> ALLAH says, "And if thy LORD had willed, He verily would have made mankind one nation, yet they cease not differing, save him on whom thy LORD hath mercy; and for that He create them".<sup>(162)</sup>

Jihad, in the legal sense, does not necessarily maintain permanent fighting, even though the legal state of war exists between the Islamic State and non-Islamic states. Thus, the continuity of Jihad may be interrupted, according to the circumstances of the Muslims as considered by the Khalifa, for short intervals which are not war, these should not exceed ten years, but may be renewed. These brief spans of peace may result from a temporary peace treaty concluded between the Muslims and non-Muslims or by an Aman (Safe-Conduct). Accordingly, the principles of international law comprise Jihad and also the principles which regulate the intercourse of the Islamic State and non-Islamic states, or the law of war and peace in terms of public international law.

Since dar al-harb comprises all non-Muslim-states, they are all in a state of war with the Islamic State. Accordingly, none of them will be immuned from Jihad, or allowed to enjoy the privileges of a neutral position.<sup>(163)</sup> Thus, the relations between the Islamic State and non-Islamic states are confined to a legal status of war, and temporary intervals of peace.

Professor Al-Ghunaimi distinguishes between the so-called "Classical Muslim International Law Of Nations", and the so-called "Modern Muslim Law Of Nations".<sup>(164)</sup> The main thoughts behind this distinction may be summed up as follows :

1. In the Islamic theory, the law-making authority must be the sovereign; and the locus of sovereignty in Al-Islam is the person of ALLAH.

2. ALLAH does not rule directly, He exercises His political powers through human agency by delegation of His powers of earthly sovereignty to those who believe in Him and do good deeds. In support of this point, there are two verses of the Holy Qur'an, i.e., "And when thy LORD said unto the angels : Lo ! I am about to place a viceroy in the earth, they said: Wilt Thou place therein one who will do harm and will shed blood";<sup>(165)</sup> and He also says, "Lo ! We reveal unto thee the Scripture with the truth, that thou mayst judge between mankind by which ALLAH showeth thee".<sup>(166)</sup>

3. This delegation to the Imam resembles, according to this opinion, the prince in the Western theory.<sup>(167)</sup> It is believed that the Islamic legal theory could afford the interpretation that the delegation is invested with the people as, "ALLAH hath promised such of you as believe and do good works that He will surely make them to succeed [the present rulers] in earth even as He caused those who were before them to succeed [others]; and that He will surely establish from their religion which He hath approved for them".<sup>(168)</sup>

4. The new circumstances of life which produced the transformation of Al-Islam into a set of sovereign states brought about changes in the concept of Al-Shari'a; these changes are :

A. The acceptance of the principle that the control of religious doctrines should be separated from that of external relations.

B. The adoption of the principle of peaceful relations among nations of different religions, replacing the "classical" principle of permanent state of war between Islamic and non-Islamic territories.

C. The adoption of the principle of territorial sovereignty and territorial law necessitated by territorial segregation. The triumph of nationalism as the basis of the Muslim polity resulted in the destruction of the Ottoman Khilafa following the First World War and the abolition of Al-Khilafa in 1924.

In conclusion, it is believed, according to this opinion, that the Islamic "classical" theory represents an idealization that was never translated into full practical expression, a "fact" which deprives the "classical" doctrine of much of its pragmatic value. Al-Islam, according to this view, has been and should be adaptable to the circumstances of time and place.

Also, according to this opinion, not only has Jihad become an obsolete weapon, but that also since Al-Islam has in the past exhausted its powers, it was permissible, even necessary, "according to the principles of Al-Shari'a", that Al-Islam looks after its interests in accordance with the changed circumstances of life.

Generally speaking, the interpretation of Al-Shari'a by the application of the "fiction legale" innovated by non-Muslim jurists on its principles cannot be accepted. Thus, the comparison of the Islamic conception of sovereignty with Hobbes' theory on sovereignty would lead to absurd results. In the Islamic State, sovereignty resides in Al-Shari'a, thus Al-Shari'a Al-Islamiya is the sovereign if the modern terms are used. This is clearly explained in the Holy Qur'an, ALLAH says, "that thou mayst judge between mankind by which ALLAH showeth thee".<sup>(169)</sup> Thus, the role of man on earth, is to enforce Al-Shari'a, "judge by which ALLAH showeth thee". To say, according to the previous opinion, that man is invested with ALLAH's powers of earthly sovereignty, means that man is empowered to legislate on earth on behalf of ALLAH. The acceptance of this conclusion is equal to the acceptance of other

"gods" beside ALLAH. This vicegerency is to carry out Al-Shari'a on earth, and man must be subjected to its sovereignty.

All the main changes, referred to above, in the concept of Al-Shari'a were all produced by the mere course of historical incidents; by the Westernized trend attached to Al-Shari'a. All these changes represent a grave deviation from the pure principles of Al-Shari'a.

To intermingle alien elements, i.e., historical incidents, and man-made law; with Al-Shari'a Al-Islamiya, cannot be deemed as an evolution of this Shari'a. The call to discard the ideals of Al-Shari'a because they "never met with full practical expression", even if it were true, is a call to make Al-Shari'a comply with the human behaviour and the propensities of man and not comply with Al-Shari'a. The ideals of Al-Shari'a, or its principles, are dogmatic, but the rules derived from these principles may be adaptable to the changing circumstances. If these rules are completely separated from its origin, i.e. Al-Shari'a, they will constitute another system of law different from Al-Shari'a.

Lastly, we believe that this distinction between the so-called "classical" and "modern" Muslim law of nations cannot be substantiated. The veiling of the true essence of Al-Shari'a based on the profanation of its principles cannot stand as evidence of this distinction which is a mere juristic innovation completely disconnected from the nature of Al-Shari'a.

Now, we come to the conclusion that the term "Siyar" is used to express principles of international law in Al-Shari'a, although, in the time of the Holy Prophet (peace be upon him), it had not acquired its technical meaning, i.e., the conduct of the Islamic State in its external relations with non-Muslims communities. The main topic of Siyar is Jihad Fi Sabeel ALLAH; it also comprises the regulation of relations between the Muslims and non-Muslims during the temporary intervals of peace. Siyar is an integral part of Al-Shari'a, it has the same sources, and the same binding force; and maintained by the same sanctions of Al-Shari'a. Needless to say that Siyar, by its very nature is a temporary institution, since it is connected with the temporary existence of dar al-harb.

### The So-Called Arab International Law<sup>(170)</sup>

Influenced by certain trends of some international lawyers, a number of writers claim the existence of regional rules of international law in the relations of the Arab states with each other, based on the so-called "Pan Arabism". Mahmud Kamel, an Egyptian lawyer<sup>(171)</sup> wrote a treatise entitled "The Arab International Law".

Al-Ghunaimi holds the opinion that the relations of the Arab states with each other are governed by a specific set of rules based on the historical Arab unity, and the natural relations that bind different parts of the Arab nation. These rules have been admitted by

constitutions of some Arab states, and constitute the so-called "Arab Public Law". Two examples of these rules were given; first : Arab natural resources must promote the common Arab welfare, as an application of this rule, it is said that the assistance provided by the Arab petroleum states for the military effort of some other Arab states is not a complimentary grant, but a fulfilment of a legal obligation. Second : the obligation to pool Arab efforts against colonialism that threatens the Arab nation or any part of it. <sup>(172)</sup>

We believe that there is no evidence of any rule of the so-called Arab international law. However, it is noted in several cases relations between an Arab state and a non-Arab state are much better than its relations with another Arab state. It is our opinion that the role of Siyar, as an integral part of Al-Shari'a, must be revived within the framework of endeavours to revive the Islamic State.

We also believe that there is no evidence of the rules of the so-called Arab public law. It seems to us that this opinion is a sort of a lege ferenda more than a lex lata, although we believe that this type of rules cannot be justified even as a lege ferenda because it reinforces the existence of splinters of states and semi-states which must be unified as parts of the Islamic community. Besides, *this opinion seems* to contain some contradiction. It is said that the general philosophy of this Arab public law, is the accomplishment of Arab solidarity but with the preservation of the recent political divisions, i.e., the Arab states. This philosophy does not impose Arab unity, otherwise the role of this rule will be terminated. The preservation of these political divisions which emerged as a result of the former colonial presence in the area, voids of meaning to the call for solidarity. Some of these political entities are nothing but a fragmented entity lacking the substance of a state.

It must be referred that the endeavors to create an Arab movement in modern history had emerged in *vague circumstances*. *The essential*, or maybe the sole, objective of this movement was the separation from the Ottoman Khilafa. In other words, the objective was the constitution of secular activities instead of being part of an Islamic State.

According to some European historians, <sup>(173)</sup> the Americans played an important role in reviving the Arabic as a language of literature after the neglect of three centuries due to the preference of Turkish as the official language of the Ottoman Khilafa. They also inspired the first national hopes of the Arabs, hopes which were promoted and spread by students and some teachers selected to teach in American institutes. What was started as cultural societies, evolved to become a separatist movement from the Ottoman Khilafa.

It must be noted that Christian Arabs, who promoted the Arab movement, whether in the cultural or political fields, were the important and the effective elements of this trend. According to some writers, <sup>(174)</sup> Boutros Al-Boustani (1819-1893 A.D.) was the first to promote the cultural activities that preceded the Arab political trend.

Adib Ishaq (1856-1885 A.D.) was one of the pioneers who explained the notion of so-called "Pan Arabism".

Three examples may be given for these cultural societies; Jam'iyat Al-Funun Wa Al-Ulum (Society Of Arts And Science); Aj-Jam'iyah Ash-Sharqiya (The Oriental Society); and Aj-Jam'iyah Al-Ilmiyah As-Suriyah (The Syrian Scientific Society). The first society was established in 1847 in Beirut, the majority of its members were Americans. The second society was established in 1850 by some French religious men, in addition to some Christian Syrians and a number of foreigners. The third society was established in 1857 in Beirut. Its establishment was a turning point, because it comprised Muslims, Druz, and Christian Arabs.

Rabita't Al-Watan Al-Arabi (League Of The Arab Nation) was an example of political societies. It was established in 1904 in Paris by Naguib Azouri, a Christian Arab; *its purpose was to separate Syria and Iraq from the Ottoman Khilafa.* Attention must be drawn to the fact that some items on the program of the society expressed some colonial trends. Lebanon, Yemen, Iraq and Egypt were excluded from a projected Arab state. According to this program, the Egyptians were considered non-Arabs.

Regardless of any opinion on the notion of the so-called "Pan Arabism", when Al-Islam emerges any national link must fade away. Therefore, the ideas of the so-called Arab international law, or Arab public law cannot be accepted. (175)

Footnotes Of Chapter III Of The  
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<sup>1)</sup> See In English:

Imam Muslim, *Sahih Muslim (English Translation)*, Volumes I and III, passim; An-Nawawi, *Forty Hadith Nawawi's (English Translation)*, passim; H. A. R. Gibb and J. H. Kramers, *Shorter Encyclopaedia Of Islam*, passim; John R. Hinnels (Editor), *Dictionary Of Religions*, passim; Thomas Patric Hughes, *A Dictionary Of Islam*, passim; Abdul Qader Audah, *Islam Between Ignorant Followers And Incapable Scholars*, pp. 41-110; Francesco Gabrieli, *Muhammad And The Conquests Of Islam*, pp. 85- 115; Muhammad Talaat Al-Ghunaimi, *The Muslim Conception Of International Law And The Western Approach*, passim; Ahmad Hasan, *The Early Developments Of Islamic Jurisprudence*, pp. 1-11; Muhammad Hussien Haykal, *The Life Of Muhammad*, passim; Majid Khadduri, *War And Peace In The Law Of Islam*, passim; The Rev. F. Klein, *The Religion Of Islam*, pp. 111-116; Sayyid Fayyaz Mahmud, *A Short History Of Islam*, passim; Henri Massé, *Islam*, pp. 38-80; Abul A'la Al-Maududi, *Towards Understanding Islam*, pp. 48-51; Abul A'la Al-Maududi, *Jihad In Islam*, passim; Abd Assami Al-Misry, *Mohammad, The Prophet Of Islam*, passim; Daniel Pipes, *In The Path Of God*, passim; Sayyid Qutb, *Milestones*, passim; Muhammad Qutb, *Islam, The Misunderstood Religion*, pp. 156-161, 171-175; Maxime Rodinson, *Mohammed*, passim; Joseph Schacht, *An Introduction To Islamic Law*, passim; Sir Thomas Arnold and Alfred Guillaum, *The Legacy Of Islam*, passim; Abdul Rahman Ibn Khaldun, *Al-Muqaddima*, passim; Ahmad Shalaby, *Islam, Belief, Legislation, Morals*, pp. 375-396; Muhammad Ibn Al-Hasan Ash-Shaybani, *Shaybani's Siyar*, passim; Shama Churun Sircar, *The Muhammadan Law*, pp. 5-8; William Montgomery Watt, *Muhammad : Prophet And Statesman*, passim; Earl Waugh, *Peace As Seen In The Qur'an*, passim; Charles S. Rhyne, *International Law*, pp. 23-24; Daniel Bell, *The End Of Ideology*, pp. 355-407; Raphael Israeli, *The Muslim Minority In Traditional China*, pp. 101-126; Raphael Israeli, *Established Islam And Marginal Islam In China*, pp. 99-109; Majid Khadduri, *Islam And The Modern Law Of Nations*, pp. 358-372; Majid Khadduri, *International Law, Islamic*, pp. 227-233; Ahmed Al-Kosheri, *History Of The Law Of Nations*, pp. 222-230; Nehmia Levtzion, *Islam In West African Politics*, pp. 333-345; Nehmia Levtzion, *Islam And Religion Pluralism In West Africa (Special Narrative)*; Sobhi Mahmassani, *The Principles Of International Law In The Light Of Islamic Doctrine*, pp. 205-328; Abdullah Ahmed An-Naim, *Islamic Law, International Relations And Human Rights*, passim.

See In Arabic:

Imam Muslim, *Sahih Muslim*, Volumes II, XI, XII and XVI, passim; Sheikh Muhammad Ibn Al-Hasan Al-A'meli, *Wasa'il Ash-Shi'a Ela Tahsil Masa'il Al-Shari'a*, Volume VI, passim; Ala'a-u- Eddin Al-Mutaqi Ibn Husam Eddin Al-Hindi, *Kanz Al-Ummal Fi Sunnan Al-Aqal Wa Al-Af'al*, Volume VI, passim; An-Nawawi, *Al-Arba'in Hadith An Nawawiya*, passim; Gaafar Abd Assalam, *Qawa'id Al-Alaqat Ad-Dawliya*

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*Fi Al-Qanun Ad-Dawli Wa Fi Al-Shari'a Al-Islamiya*, pp. 14-32; Sheikh Muhammad Abu Zahra, *Tanzim Al-Islam Li Al-Mujtama'a*, passim; Sheikh Muhammad Abu Zahra, *Al-Alaqat Ad-Dawliya Fi Al-Islam*, passim; Sheikh Muhammad Abu Zahra, *Al-Wihda Al-Islamiya*, pp. 240-257; Sheikh Muhammad Abu Zahra, *Ad-Daawa Ela Al-Islam*, passim; Muhammad Abdul Hameed Abu Zaid, *As-Salam Fi Al-Islam*, passim; As-Sayyed Hafez Abd-Rabbuh, *Falsafat Al-Jihad Fi Al-Islam*, passim; Hasan Al-Banna, *Mudhakkirat Ad-Da'awa Wa Ad-Da'iyah*, passim; Muhammad Abd ALLAH Darraz, *Dirasat Islamiya Fi Al-Alaqat Al-Ijtima'iyah Wa Ad-Dawliya*, pp. 140-148; A'sem Ad-Desouky, *Mujtama'a Ulama'a Al-Azhar Fi Misr (1895-1961)*, passim; Muhammad Emara, *Al-Islam Wa As-Sulta Ad-Deeniya*, passim; Muhammad Emara, *Nazariyat Al-Khilafa Al-Islamiya*, passim; Boutrus Boutrus Ghali, *Al-Kawakby Wa Al-Jami'a Al-Islamiya*, passim; Abi An-Nasr Al-Faraby, *Ara'a Ahl Al-Madina Al-Fadila*, pp. 153-157; Mustafa Helmy, *Al-Khilafa Fi Al-Fikr Al-Islami*, passim; Hasan Al-Hodaiby, *Al-Islam Wa Ad-Da'iyah*, passim; Hassan Al-Hodaiby, *Da'awat Al-Islam*, passim; Sheikh Abdul Wahhab Khallaf, *As-Siyasa Ash-Shar'iyah Wa Nizam Ad-Dawla Al-Islamiya Fi Ash-Shuoun Ad-Dusturiya Wa Al-Kharigiya Wa Al-Maliya*, passim; Abul A'la Al-Maududi, *Al-Hukuma Al-Islamiya*, (Arabic Translation) passim; Abi Al-Hasan Muhammad Ibn Habib Al-Basri Al-Mawardi, *Al-Ahkam As-Sultaniya Wa Al-Wilayat Ad-Deeniya*, passim; Abdul Hamid Mutawally, *Mabadi'i Nizam Al-Hukm Fi Al-Islam Ma'a Al-Muqarana Bi Al-Mabadi'i Ad-Dusturiya Al-Haditha*, passim; Abdul Hamid Mutawally, *Azmat Al-Fikr As-Siyasi Al-Islami Fi Al-Asr Al-Hadith*, passim; Abdul Hamid Mutawally, *Al-Islam Wa Mabadi'i Nizam Al-Hukm Fi Al-Marxiya Wa Ad-Dimuqratiyat Al-Gharbiya*, passim; Sheikh Taquei Eddin An-Nabahani, *Nizam Al-Hukm Fi Al-Islam*, pp. 29-35; Sheikh Taquei Eddin An-Nabahani, *Ash-Shakhsiya Al-Islamiya*, Volume II, passim; Sheikh Taquei Eddin An-Nabahani, *Al-Khilafa*, passim; Hussain Fawzy An-Najjar, *Al-Islam Wa As-Siyasa*, passim; Abdul Khaleq An-Nawawi, *Al-Alaqat Ad-Dawliya Wa An-Nuzum Al-Qada'iyah Fi Al-Shari'a Al-Islamiya*, passim; Muhammad Diya'a Eddin Ar-Rayyes, *Al-Islam Wa Al-Khilafa Fi Al-Asr Al-Hadith*, passim; Ali Ahmad As-Sallos, *Al-Imama Inda Al-Ja'fariya Wa Al-Adilla Mina Al-Qur'an Al-Azeem*, passim; Ahmad Shalaby, *As-Siyasa Fi Al-Fikr Al-Islami*, passim; Sheikh Mutawally Yusuf Shalaby, *Adwa'a Ala Al-Masahiya*, pp. 143-148; Uthman As-Sa'id Ash-Sharqawi, *Shari'at Al-Qital Fi Al-Islam*, pp. 22-75; Hamed Sultan, *Ahkam Al-Qanun Ad-Dawli Fi Al-Islam*, passim; Sulayman Muhammad At-Tamawi, *As-Sultat Ath-Thalath Fi Ad-Dasateer Al-Arabiya Wa Fi Al-Fikr As-Siyasi Al-Islami*, passim; Fathi Yakan, *Nahwa Haraka Islamiya A'alamiya Wahida*, pp. 3-46; Abdul Karim Zeidan, *Ahkam Adh-Dhimmiyeen Wa Al-Musta'amineen Fi Dar Al-Islam*, pp. 18-67, 143-158; Wahba Az-Zihili, *Athar Al-Harb Fi Al-Fiqh Al-Islami*, pp. 170-196; Muhammad Hafez Ghanem, *Mabadi'i Al-Qanun Ad-Dawli Al-A'am*, pp. 44-64; Muhammad Talaat Al-Ghunaimi, *Baadd Al-Itijahat Al-Haditha Fi Al-Qanun Ad-Dawli Al-A'am*, pp. 309-312; Ali Ali Mansour, *Shari'at ALLAH Wa Shari'at Al-Insan*, passim; Ali Ali Mansour, *Al-Shari'a Al-Islamiya Wa Al-Qanun Ad-Dawli*, passim; Sayyid Qutb, *Maa'lem Fi At-Tariq*, pp. 83-96, 105-122; Muhammad Qutb, *Shubhat Hawla Al-Islam*, pp. 192-198, 210-216; Mustafa Kamal Wasfi, *Ad-Dustur Al-Islami*, passim; Mustafa Kamal Wasfi, *Musanafat An-Nuzum Al-Islamiya Wa Ad-Dawliya Wa Al-Idariya Wa Al-Iqtisadiya Wa Al-Ijtima'iyah*, passim; Mustafa Kamal Wasfi, *An-Nabi Salla ALLAH Alaihi Wa Sallam*

Wa As-Siyasa Ad-Dawliya, passim; Hamed Rabi'i, Al-Islam Wa Al-Quwa Ad-Dawliya, passim; Malek Ibn Nabi, Fikrat Al-Afriqiya Al-Asiawiya, passim; Malek Ibn Nabi, Fikrat Commonwealth Islami, passim; Abul A'la Al-Maududi, Adwa'a Ala Hara'kat At-Tadamun Al-Islami, passim; Mahmud Kamel, Al-Qanun Ad-Dawli Al-Arabi, passim; Majid Khadduri, Al-Harb Wa As-Silm Fi Shir'at Al-Islam, passim; Samih Atef Az-Zain, As-Siyasa Wa As-Siyasa Ad-Dawliya, pp. 1-13, 28-59; Abdul Rahman Ibn Khaldun, Al-Muqaddima, passim; Ahmad Suwailam Al-Imary, Usul An-Nuzum As-Siyasiya Al-Muqarana, passim; Mohsen Mohyee Eddin Ash-Shishkly, Al-Islam Wa Al-Alaqat Ad-Dawliya, pp. 458-505; Mohsen Qandil, Nazariyat Al-Harb Fi Al-Qur'an, passim; Sheikh Essayed Sabeq, Fiqh As-Sunna, Volume III (As-Silm Wa Al-Harb, Al-Mu'amalat), pp. 5-107; Sheikh Mahmud Shaltout, Al-Islam Aqida Wa Shari'a, pp. 451-459; Saber Tueima, Iradat At-Taghieer Fi Al-Islam, passim; Saber Tueima, Al-Islam Wa Mushkilat As-Siyasa, Passim; Muhammad Abd ALLAH Darraz, Al-Qanun Ad-Dawli Al-A'am Wa Al-Islam, pp. 1-15.

- (2) It was not a theocracy. According to Black's Law Dictionary, theocracy is a government of a state by the immediate direction of God (or by the assumed direction of a supposition's divinity), or the state thus governed.
- (3) Sura XLII : 38.
- (4) The meaning of Jihad will extensively be discussed in Chapter II of Part I of this thesis.
- (5) It derives from "Khalafa", which means to succeed, or to become a substitute.
- (6) It derives from "Amma", which means to proceed, have precedence or to lead.
- (7) Abd Ar-Raziq was submitted to a trial by a Disciplinary Council of the Supreme Ulama of Al-Azhar. He submitted a plea to jurisdiction, but it was rejected by the Council. He tried to deny his views or interpret them in a different way. His theory was officially repudiated by the Ulama and his name was dropped from their ranks.
- (8) Ijma' will be extensively explained in Chapter V of this Part.
- (9) Muhammad Diya'a Eddin Ar-Rayyes, Al-Islam Wa Al-Khilafa Fi Al-Asr Al-Hadith, Naqd Kitab Al-Islam Wa Usul Al-Hukm (in Arabic).
- (10) After publishing of Abd Ar-Raziq's first book, some Ulama, such as Muhammad Shaker, Yusuf AD-Digwi, Muhammad Bakhit Al-Mati'i and Muhammad Rasheed Rida considered him as an apostate.
- (11) See for example Muhammad Emara, Al-Islam Wa As-Sulta Ad-Deeniya (in Arabic); see also for the same author, Nazariyat Al-Khilafa Al-Islamiya (in Arabic).

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- 12) In 1961, a law (No. 103 of 1961) was promulgated in Egypt for the purpose of "developing" Al-Azhar University.
- 13) In Judaism, the love of one God "the Lord", and following His Commandments are of the main principles, "Hear, O Israel : the Lord our God is one Lord : and thou shalt love the Lord thy God with all thine heart, and with all thy soul, and with all the might"; (Deuteronomy, VI : 4-5) "Now these are the commandments, the statutes, and judgments, which the Lord your God commanded to teach you, that ye might do them in the land whether ye go to possess it". (Deuteronomy, VI : 1)
- 14) In Christianity, it is mentioned definitely to the reward of following the commandments of God, "Blessed are they which are persecuted for righteousness' sake : for theirs the kingdom of heaven"; (St. Mathew, V : 10) "He that findeth his life shall lose it : and he that loseth his life for my sake shall find"; (St. Mathew, X : 39) "And every one that hath forsaken houses, or brethren, or sisters, or father, or mother, or wife, or children, or lands, for my name's sake, shall receive an hundredfold, and shall inherit everlasting life". (St. Mathew XIX : 29) It seems that Judaism has a different conception about this reward, "That thou mightest fear the Lord thy God, to keep all his statutes and his commandments, which I command thee, thou, and thy son, and thy son's son, all days of thy life; and that thy days may be prolonged. Hear therefore; O Israel, and observe to do it; that it may be well with thee, and that ye may increase mightily, as the Lord God of thy fathers hath promised thee, in the land that floweth with milk and honey". (Deuteronomy, VI : 2-3). However, in the Holy Qur'an, ALLAH says, "Lo ! ALLAH hath bought from the believers their lives and their wealth because the Garden will be theirs : they shall fight in the way of ALLAH and shall slay and be slain. It is a promise which is binding on Him in the Torah and the Gospel and the Qur'an. Who fulfilleth His covenant better than ALLAH ? Rejoice then in your bargain that ye have made, for that is the supreme triumph". (Sura IX : 111)
- 15) Sura XXII : 41.
- 16) Sura II : 143.
- 17) Sura III : 110.
- 18) Sura V : 1. We find the same meaning in Christianity, "Thou shalt worship the Lord thy God, and him only shalt thou serve", (St. Mathew, IV : 10); "Thy kingdom. Thy will be done in earth, as it is in heaven. (St. Mathew, VI : 10).
- 19) Sura XVI : 116.

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- 20.) Sura V : 44.
- 21.) Sura V : 45.
- 22.) Sura V : 47.
- 23.) Some jurists believe that dar Al-Islam may not be inhibited by Muslims but the essential condition is to be under the rule of a Muslim sovereign, and accordingly, the ordinances of Al-Islam are established. ✓
- 24.) The status of dhimmi will later be explained extensively. ✓
- 25.) This topic will be studied in Chapter I of Part II of this thesis.
- 26.) According to Ash-Shafi'i school, it constitutes dar as-sulh. ✓
- 27.) The term "sulh" is used against the term "unwat" which means "by force". The two historical examples of such status, and the origin, apparently, of the whole conception, are Najran and Nuba (Nubia). The Holy Prophet Muhammad (peace be upon him) entered on treaty relationship with the Christians of Najran, guaranteeing their safety and laying on them a certain tribute regarded by some, afterwards, as kharaj (the tax paid on landed property), and by others as jizya (poll tax). As for the case of Nuba, the Nubians were able to hold of the Muslim attack and to maintain their independence for centuries. In consequence, Abd ALLAH Ibn Sa'ad entered into a treaty with them, not requiring jizya but only a certain tribute on slaves. Some writers maintained that this was not really a sulh, but only a hudna (truce) and an arrangement for an exchange of commodities, see in particular for details Khadduri, op. cit.)
- 28.) Sura VIII : 72-75.
- 29.) This will be explained in Chapter II of Part I of this thesis.
- 30.) The establishment of the relationship among the believers on the basis of faith only, is not only an Islamic conception, but is also the principles of the prophets before Muhammad (peace be upon him). In the Holy Qur'an, ALLAH says, "And Nuh cried unto his LORD and said, My LORD ! my son is of my household ! Surely Thy promise is the Truth and Thou art the Most Just of Judges. He said : O Nuh ! he is not of thy household; Lo ! he is of evil conduct, so ask not of Me that whereof thou hast no knowledge. I admonish thee lest be thou be among the ignorant. He said : My LORD ! Lo ! in Thee do I seek refuge [from the sin] that I should ask Thee that whereof I have no knowledge. Unless Thou forgive me and have mercy on me I shall be among the lost". (Sura XI : 45-47) When the prophet Ibrahim saw his father and his people persistent in their error, he turned away from them and

said : "I shall withdraw from you and that unto which ye pray beside ALLAH and I shall pray unto my LORD. It may be that, in prayer unto my LORD. I shall not be unblest". (Sura XIX : 48)

- <31> The Arabic term "dawla" (state) came into vogue in the early Abbasid period.
- <32> Sura LI : 56.
- <33> Sura III : 85.
- <34> Sura III : 19.
- <35> Sura V : 3.
- <36> This must be accepted as the final goal to be accomplished by the Muslims.
- <37> Or any other universal state.
- <38> In the Holy Qur'an, this term appears frequently both in the singular and the plural (Khalifa, Khulafa'a, such as Suras II : 30; XXXVIII : 26; VI : 165; and VII : 69, 74. In none of these Ayat (Verses) is there any clear indication that this was intended to serve as the title of the Holy Prophet Muhammad (peace be upon him).
- <39> In the Holy Qur'an, this word is used seven times in the singular, and five times in plural, but in different senses such as sign, indication, model, pattern, leader .....etc.
- <40> Some believe that the office of the Khalifa should not be filled during periods of civil war but only in times of peace; that no one could be Khalifa without the unanimous consensus of the whole Muslim community.
- <41> Sura XLII : 21.
- <42> The exact meaning of the term Jahiliya is "The Time Of Ignorance". It is the name given to the state of things which obtained in Arabia before the promulgation of Al-Islam, or in a narrower sense the period when there is no prophet between Isa and the Holy Prophet Muhammad (peace be upon him). The period before Christianity is also named "time of ignorance", "And the times of this ignorance God winked at; but now commandeth all men every where to repent". (Acts, XVII : 30)
- <43> Sayyid Qutb, *Maa'lem Fi At-Tariq* (In Arabic).
- <44> (This includes )  
(1) the communist communities;  
(2) the idolaters communities;

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(3) the Jewish and Christian communities; and  
(4) the so-called Islamic communities.)

- (45.) It is expected that many of these states have constituted or will constitute special organs of secret service or other organizations, for fighting those who are considered dangerous persons, according to martial laws or similar legislations enacted for this purpose.
- (46.) For a non-Muslim cannot care for the true interests of Al-Islam.
- (47.) For children and insane persons are not able to manage their own affairs, much less those of Al-Islam.
- (48.) For no one could have sufficient confidence in him.
- (49.) For a slave's mind is taken up with the concerns of his master, and a slave does not enjoy sufficient respect.
- (50.) If this is only outwardly.
- (51.) According to some authorities the Khalifa, in addition to the aforementioned qualifications, must also possess the following :
1. He must be a man of learning in theology and jurisprudence.
  2. He must understand the art of war and leading an army.
  3. He must be courageous.

But as these qualifications are rarely found united in the same individual, it is said they cannot be required as necessary qualifications of the Khalifa.

- (52.) The Holy Prophet (peace be upon him) is reported to have said, "The Imams must be from Quraish"; but the Holy Prophet have also said, "Obey the Imam, even if he be an Abyssinian slave". According to some writers, the last Hadith of Muhammad was explained as it refers to the commander appointed by, and under the order of the Khalifa. We believe that whole matter must be understood in the light of Islamic principles, which make no distinction between Arabs and non-Arabs.
- (53.) Sura XLIX : 13.
- (54.) The Shi'is hold that Ali was directly nominated by the Holy Prophet (peace be upon him) as his successor and that Ali's qualifications were inherited by his descendants, who were pre-ordained by ALLAH for the office of Imam.
- (55.) The twelve thousand men who revolted from Ali, after they fought under him in the battle of Siffin, for referring a matter of religion, i.e., his right to Khilafa, to arbitration, i.e., the judgment of man.

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- (56) But they hold that there were no absolute necessity for any Imama in the world.
- (57) The descendants of Ali.
- (58) Some affirmed that Ali was not dead, but would return again in the clouds and fill the earth with justice. They held the doctrine of metempsychosis and what they call Al-Hulul (the indwelling of God in man).
- (59) ALLAH says, "If there were therein gods beside ALLAH, then verily both [the heavens and the earth] had been disordered. Glorified be ALLAH, the LORD of the Throne, from all that they ascribe [unto Him]". (Sura XXI : 22)
- (60) According to Black's Law Dictionary, citizenship is the status of being a citizen.
- (61) A nationality is that quality or character which arises from the fact of person's belonging to the nation or state. Nationality determines the political status of the individual, especially with reference to allegiance; while domicile is his civil status. Nationality arises either by birth or by naturalization, *ibid*.
- (62) A citizen is one who, under the constitution and the laws...of a particular state, is a member of the political community, owing allegiance and being entitled to the enjoyment of full civil rights, *ibid*.
- (63) ALLAH says, "Lo ! this, your religion, is one religion, and I am your LORD, so worship Me"; (Sura XXI : 92) and He also says, "And Lo ! this your religion, is one religion and I am your LORD, so keep your duty unto Me". (Sura XXIII: 52)
- (64) Sura XLIX : 10.
- (65) Sura V : 56.
- (66) Sura LVIII : 19.
- (67) Sura III : 110.
- (68) Abadat Al-Asnam and Al-Mushrikun are included in the communities within dar Al-Islam, provided they have accepted residence in any Islamic territory except the Arabian Peninsula. Probably Abadat Al-Asnam were included after Muhammad's time as a matter of expediency.
- (69) On the authority of Ali, the Muslims accepted the view that the Magians at one time in a possession of a scripture which was lost. Abdul Rahman Ibn Awf, one of the Companions of the Holy Prophet

Muhammad (peace be upon him), said : (I testify that the Prophet said : "Treat them like Ahl Al-Kitab").

- (70) The meaning of dhimmis will later be explained extensively.
- (71) Suras III : 64,65,71; IV: 171; V : 15,19,68; XXIX : 46.
- (72) ALLAH says, "They have taken as lords beside ALLAH their rabbis and their monks and the Messiah son of Mary, when they were bidden to worship only One GOD. There is no GOD save Him. Be He Glorified from all that they ascribe as partner [unto Him] ! Fain would they put out the light of ALLAH with their mouths, but ALLAH disdaineth [laught] save that He shall perfect His light, however much the disbelievers are averse. He it is Who hath sent His Messenger with the guidance and the Religion of Truth, that He may cause it to prevail over all religion, however much idolaters may be averse". (Sura IX : 31-33); see also Sura II : 120-121.
- (73) Sura III : 49; see also Sura LXI : 6.
- (74) St. Matthew XV : 22-24.
- (75) Sura VII : 157-158; see also Suras XXV : 1; XLVIII : 28.
- (76) Sura III : 19.
- (77) Sura III : 85.
- (78) Sura V : 3.
- (79) Sura III : 20.
- (80) See in particular Majid Khadduri, *War And Peace In The Law Of Islam*; and for a detailed discussion of different opinions concerning Ahl Adh-Dhimma, see Abdul Karim Zeidan, *Ahkam Ahl Adh-Dhimmiyeen Wa Al-Musta'amineen Fi Dar Al-Islam* (in Arabic), pp. 18-67, and 143-158.
- (81) Majid Khadduri, *op.cit.*
- (82) An individual of Ahl Adh-Dhimma is called dhimmi.
- (83) They are considered believers in GOD in accordance with this opinion.
- (84) According to Black's Law Dictionary, the naturalization is the process by which a person acquires nationality after birth and becomes entitled to the provisions of citizenship.
- (85) The naturalized citizen is one who, being an alien by birth, has received citizenship under naturalization laws. But it must be noticed that a Muslim by naturalization is not necessary born

outside the Islamic State.

- (86.) This is the opinion of the Maliki school, and the prevailing opinion in the Hanbali school.
- (87.) This is the opinion of the Zaidis, and the Hanafi and the Shafi'i schools.
- (88.) This is the opinion of Abu Yusuf.
- (89.) This is the opinion of the Hanafi school, the Ibadis, and the Zaidis.
- (90.) But they can repair or renew the building of old ones.
- (91.) Other obligations are desirable, we specifically mention to their obligation instituted by the Khalifa Umar Ibn Abd Al-Aziz, to wear distinctive clothing such as the ghiyar, a yellow patch on their dress, the Zunnar (girdle), and a tall and colored qalansuwa. (headgear).
- (92.) The jizya is lifted if they take part in the defence of the Islamic State.
- (93.) According to some scholars such as Julius Wellhausen, and followed by Carl Becker and Prince Caetani, the jizya imposed at the time of conquest was in the form of a collective tribute, consisting of a fixed amount of agricultural products. This tribute included a tax on land (Kharaj), and a tax on the individual (jizya), but the Muslim authorities were not concerned with the way the taxes were collected. Thus, in the case of the adoption of Al-Islam, he was entitled to be free from all tribute not only jizya. The practice of preventing Muslims from buying land or converts from paying land or converts from paying land tax was introduced by the Khalifa Umar Ibn Abd Al-Aziz, and then formulated into a general rule to collect kharaj from all land, regardless of the person who owned it whether a Scripturary or a convert, see Majid Khadduri, *op. cit.*
- (94.) A Muslim can marry a Scripturary woman, but not a Magian or Polytheist.
- (95.) Abdul Rahman Ibn Khaldun, *Al-Muqaddima*.
- (96.) Sura LXXXI : 8-9; see also Sura VI : 151.
- (97.) Sura CV.
- (98.) It is the opinion of some writers that other peoples such as the Romans, Persians, Egyptians or Indians, at the time of the advent of Al-Islam were not qualified to receive its message or to call for it. We believe that this opinion contradicts the universality of the Islamic message.

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- (99) Translation adapted from J.S. Trimingham, *Islam In Ethiopia*, London, 1952, p. 45, referred to in Khadduri, *op. cit.*, p. 245.
- (100) It means Macca.
- (101) Sura III : 96.
- (102) Sura VI : 163.
- (103) Sura VI : 124.
- (104) This sense is clear in the Holy Qur'an, ALLAH says, "He sendeth down the angels with the Spirit of His Command unto He will of His bondmen [saying] : Warn mankind that there is no GOD save Me, so keep your duty unto Me". (Sura XVI : 2)
- (105) The expression "Mother-Town" refers to Macca.
- (106) Sura XLII : 7; see also XII : 2; XLIII : 3.
- (107) Sura XIV : 4.
- (108) Sura XLI : 44.
- (109) Sura II : 23-24.
- (110) Sura LXII : 2.
- (111) Sura XXVI : 214.
- (112) Sura III : 138; see also Sura II : 120, 185.
- (113) We refer here to Muhammad Al-Ghazally, an eminent contemporary scholar, and not to the great Muslim Scholar Abu Hamed Al-Ghazally who lived between 450-505 A.H. (1059-1111 A.D.), see his important book *Haqiqat Al-Qaumiya Al-Arabiya Wa Usturatt Al-Baath Al-Arabi* (in Arabic).
- (114) Sura II : 217.
- (115) Referred to in Daniel Bell, *The End of Ideology*, pp. 394-395.
- (116) *Op. Cit.*, p. 398.
- (117) Sura XLIX : 13.
- (118) Abu Ishaq said that the name of Walid Ibn 'Uqba has been wrongly mentioned in this Hadith.
- (119) Sura III : 127.

- (120) Muhammad Abu Zahra, *Al-Wihda Al-Islamiya* (in Arabic), pp. 240-257.
- (121) Sura XLIX : 10.
- (122) Abul A'la Al-Maududi, *Adwa'a Ala Hrakat At-Tadamun Al-Islami*.
- (123) Sura XLIX : 13.
- (124) Malek Ibn Nabi, *Fikrat Commonwealth Islami* (Arabic Translation), pp. 5-126.
- (125) Abu Nasr Al-Farabi was born in the city of Farab in Turkey, he settled in Iraq, then went to Halab, and died in Damascus (Syria) in 339 A.H. (950 A.D.), see his book, *Ara'a Ahl Al-Madina Al-Fadila* (in Arabic).
- (126) Al-Kawakby was born in 1848 A.D. in Halab (Syria); and died in 1902 in Egypt, see Boutrus Boutrus Ghali, *Al-Kawakby Wa Al-Jami'a Al-Islamiya* (in Arabic).
- (127) Dr. Ghali believes that the establishment of the Arab League is a result of the thoughts of Al-Kawakby. We do not agree with this opinion, because the Arab League is based on the conception of the so-called "Pan Arabism", and does not relate to the Islamic unity.
- (128) As-Sanhoury was born in Egypt.
- (129) A contemporary Muslim scholar born in Egypt, see his book referred to in footnote no. (9) of this Chapter.
- (130) Ar-Rayyes suggests that the "Executive Council" may be act as the Political Committee.
- (131) He also suggests that the Organization may select the most distinguished person from among the representatives of the Member States to represent the Islamic Nation before foreign states. He (the Selected Person) is not considered the Khalifa because Al-Khilafa is transferred to the Organization. He may be designated as "the Secretary", "Agent" or "Deputy" of the Islamic Nation. His office term will be for a limited duration, such as seven or ten years and then replaced with another. The Organization has the right to replace him with another during this period if there are reasons make this necessary.
- (132) The attitude of the Muslim minorities in some Asian states is not encouraging. According to Raphael Israeli, the behaviour of the Chinese Muslims has an adaptive significance in that they attempted to be Chinese outdoors and Muslims indoors, although the history of the Muslim Community in China can be traced back to the Eighth Century. Al-Islam came to China during the Tang Dynasty (7th - 10th Centuries) through Persian and Arab traders

who remained in constant contact until the end of the Mongol rule in China in the 14th Century, see Raphael Israeli, *The Muslim Minority In Traditional China*; also for the same author, *Established Islam And Marginal Islam In China : From Eclecticism To Syncretism*.

(133) Referred to in Hamed Rabi'i, *Al-Islam Wa Al-Quwa Ad-Dawliya* (in Arabic).

(134) Hamed Rabi'i, *op. cit.*

(135) In a Treaty and Concordat in 1929, Italy recognized "the sovereignty of the Holy See in the international domain" and its exclusive sovereignty and jurisdiction over the City of Vatican. A number of states recognize the Holy See, and have diplomatic relations with it and the Holy See has been a party to multilateral conventions. Some jurists regard the Vatican City as a state; while others regard its special functions make this doubtful, it has no population, apart from the resident functionaries, and its sole purpose is to support the Holy See as a religious entity. However, it is widely recognized as a legal person with treaty-making capacity. On February 18, 1984, a new Concordat was signed by Italy and the Vatican, for the regulation of mutual relations between them, the ratification documents were exchanged on June 3, 1985. The new Concordat includes, *inter alia*, the following :

- Roman Catholicism was no longer specified to be Italy's state religion, and Rome no longer enjoyed the "sacred character of eternal city".
- Religious instruction in state became optional.
- The annulment of marriages by the Vatican was made subject to review by an Italian Court if one of the parties requested it.

(136) The state of Israel claims this religious basis.

(137) A "micro-state" was defined by the Secretary-General of the United Nations in his introduction to his Annual Report of the work of the Organization, 1966-1967, as an entity "exceptionally small in area, population and human and economic resources", but which has emerged as an independent state. A "mini-state" is another term used currently but the corresponding term in the time of the League of Nations was a "Lilliputian State". As the Secretary-General pointed out, even the smallest territories are entitled through the exercise of the right of self-determination to attain independence.

(138) Some Muslim writers, such as Samih Atef Az-Zain, hold the opinion of denying the existence of international law, which they believe that it must not be existed, on the ground of three reasons :

first, law is the commandment of a sovereign; a world sovereign had

never been existed and it must not be existed;

second, law is enforced by the executive authority, world executive authority had never been existed and it must not be existed;  
and

third, law regulates relations, but international relations are established at the discretion of two or more states.

Thus, according to this opinion international relations are regulated by agreements and not by law. However, these writers recognised the existence of international custom and agreements, but they do not consider them constitute international law. To explain the existence of what they describe as "the so-called international law", these writers believe that the European countries had congregated on the basis of Christian liasion and constitute a family of nations to stand against the Ottoman State as an Islamic State, this situation led to the existence of this law, see *As-Siyasa Wa As-Siyasa Ad-Dawliya* (in Arabic) by the aforementioned writer.

- (140) It is known from the Old Testament that the ancient Israelites regulated their relations with their neighbours, in peace as in war. Both the ancient Egyptians and the Babylonians had concluded agreements with their neighbours dealing with problems such as the use of water, the settlement of frontier disputes and the exchange of prisoners.
- (140) The Greeks in their relations with Rome and other states, applied a system of law whether in the form of *jus naturale* or *jus gentium*.
- (141) Mohammad Talaat Al-Ghunaimi, *The Muslim Conception Of International Law And The Western Approach*.
- (142) According to Al-Ghunaimi, the *Hilf* was a treaty concluded between two equal and independent groups comprising all aspects of life, *op. cit.*
- (143) According to Al-Ghunaimi, the *Musanadah* is a *hilf* confined to military actions according to which both parties fight against a common enemy, but under separate commanders, and share the booty, *ibid.*
- (144) According to Al-Ghunaimi, the *Muwada'a* is a *hilf* of peace under which the contracting parties refrain from any act of aggression against each other as well as verbal provocation, *ibid.*
- (145) Some writers, such as Khadduri, use the expression "Islamic Law Of Nations" to describe the principles referred to in the text. Since *Al-Shari'a Al-Islamiya* is an integrated body of legal rules, such as the rules of contracts which may also be applied on treaties, we believe that the expression used in the text is

more accurate than the others. It is of interest to know that the external relations of the Islamic State have been studied from different points of view, i.e., international law, political sciences, history, etc., thus it is not impossible to determine the terms used as titles of these studies.

- (146) Jihad is usually defined by Western writers as a Holy war.
- (147) For definitions of principles of international law in Al-Shari'a Al-Islamiya, see in particular, Majid Khadduri, *op. cit.*, and Mohammad Talaat Al-Ghunaimi, *op. cit.*
- (148) For example, there is no specific rules in Al-Shari'a concerning nuclear weapons or chemical and biological weapons, although we can find a legal principle on the mass-destruction weapons.
- (149) There are different sources of the principles of international law in Al-Shari'a Al-Islamiya distinct from that of Al-Shari'a alone, such as the Islamic practices which constitute an obligatory custom, the judicial precedents laid down by judges and the fatwas (Legal Opinions) given by the jurists of different schools of Al-Shari'a Al-Islamiya.
- (150) The protection extended to the people of Najran comprised the following :
- "They shall have the protection of GOD and the guarantee of Muhammad, the Apostle of GOD, that they shall be secured their lives property, lands, creed, those absent and those present, their building, and their Churches. No bishop or monk shall be displaced from his parish or monastery and no priest shall be forced to abandon his priestly life. All their belongings, little or much, remain theirs. No hardships or humiliation shall be imposed on them nor shall they be pressed for pre-Islamic bloodshed. They shall not be called for military service, nor shall they pay tithe nor their land shall be traversed by [our] army. Those who seek justice shall have it ; there will be no oppressors nor oppressed at Najran. Those who practice usury in the future shall have no protection from me. No one shall be subject to reprisal for the fault of another", see Majid Khadduri's introduction to Shaybani's *Siyar*.
- (151) Translation by Majid Khadduri in *Shaybani's Siyar*.
- (152) Ibn Al-Mubarak was born in 118 A.H., and died in 181 A.H. His book on Jihad was based mainly on the Sunna of the Holy Prophet Muhammad (peace be upon him). Some writers like Ibrahim AN-Nakh'i (died in 95 A.H.; 714 A.D.) and Hammad Ibn Sulayman (died in 120 A.H.; 738 A.D.), whose opinions influenced the early studies of Al-Shari'a, paid little attention to the questions related to Jihad; but others like Ash-Shaa'bi (died in 104 A.H.; 723 A.D.) and Sufyan Ath-Thawri (died in 161 A.H.; 778 A.D.) seem to

have given greater attention to the subject. Abd Ar-Rahman Al-Awza'i (died in 157 A.H.; 774 A.D.) was one of the early jurists who wrote a work on As-Siyar, treating it as an independent subject.

- (153) Abu Hanifa was perhaps the first to develop a set of principles governing Al-Islam's external relations with other communities, as well as a coherent system of relationships between Islamic and non-Islamic communities. Abu Yusuf and Ash-Shaybani were Abu-Hanifa's principal disciples who paid special attention to As-Siyar. Another disciple of Abu Hanifa who wrote a work on As-Siyar was Abu-Ibrahim Ibn Muhammad Al-Fazari (died in 186 A.H.; 802 A.D.).
- (154) Hans Kruse, *The Foundation Of Islamic Jurisprudence*, *Journal of The Pakistan Historical Society*, Vol. III (1955), p. 238; "Die Begründung der Islamischen Völkerrechtslehre", *Saeculum*, Vol. V, heft 2, pp. 238-39; referred to in the aforementioned introduction by Khadduri.
- (155) Joseph Hammer von Purgstall, *Jahrbucher der Literatur*, (Wein, 1827), Vol. 40, p. 48; referred to in the same introduction by Khadduri.
- (156) Ash-Shaybani died in 804 A.D., and Grotius was born in 1583 and died in 1645.
- (157) War was prohibited in the Sacred Months, i.e., three successive, Schawwal, Zul-Qu'd, Zul-Haj, which are near the date of Haj, in the Holy abode of Al-Ka'ba. The fourth month is Rajab in the mid of the Hijri year. It is believed that the prohibition of war in these months includes all the Muslim territories and not restricted to Macca or the Arab Peninsula. In the Holy Qur'an, ALLAH says, "Lo ! the number of months with ALLAH is twelve months by ALLAH's ordinance, in the day that He created the Heavens and the earth, Four of them are sacred, that is the right religion. So wrong not yourselves in them". (Sura IX : 36) The Truce of God advocated in the Middle Ages by the Church may be assimilated with this prohibition.
- (158) Sura IX : 5.
- (159) Sura II : 256.
- (160) Sura LXI : 11.
- (161) Jihad is a continuous process as long as dar al-harb exists; or temporary until the disappearance of dar al-harb.
- (162) Sura XI : 118-119.
- (163) Abyssinia "Ethiopia" attained a special status in its relationship with Al-Islam and was declared immune from Jihad.

- (164) The name given by Al-Ghunaimi to the genuine principles of international law in Al-Shari'a Al-Islamiya is "Muslim Classical Conception Of International Law"; and according to Khadduri, the name given is "The Classical Theory Of The Islamic Law Of Nations", Khadduri also used the expression "Traditional Muslim Law Of Nations", see for example the Preface of his treatise "War And Peace In The Law Of Islam", op. cit.; see also Al-Ghunaimi, op. cit.
- (165) Sura II : 30.
- (166) Sura IV : 105.
- (167) In our opinion, it is not possible to find any similarity between, for example, Abu Bakr, the first Khalifa after the death of the Holy Prophet Muhammad (peace be upon him) and the prince as illustrated by Machiavelli (1469-1527 A.D.) who advocated putting expediency above political morality and the use of deceit in statecraft.
- (168) Sura XXIV : 55.
- (169) Sura IV : 105.
- (170) In spite of our opinion in this point, the participation of the Arab international lawyers in the evolution of international law cannot be denied.
- (171) Mahmud Kamel, Al-Qanun Ad-Dawli Al-Arabi (in Arabic).
- (172) Mohammad Talaat Al-Ghunaimi, Ba'ad Al-Itigahat Al-Haditha Fi Al-Qanun Ad-Dawli Al-A'am (in Arabic), pp. 309-312.
- (173) George E. Kirk, A Short History Of The Middle East, London, 1952; referred to in Mahmud Kamel, Al-Qanun Ad-Dawli Al-Arabi (in Arabic), p. 163.
- (174) Mahmud Kamel, op. cit.
- (175) History incidents make no doubt that religion is one of the important reasons of violence inside a society; or acts of hostility in the relations among nations and societies.

The monstrous attitude of Courts of Inquisition set up by the Christian Church toward Muslims had never been experienced before. People were burnt alive, their finger nails were pulled off, their eyes were put out, and their limbs were amputated. This torture were inflicted in order to force the people to change their religion and adopt a particular Christian creed.

In recent times, in some Asian countries acts of violence happen from time to time between followers of different religions whether of Divine source or other religions.

THE LEGALITY OF WAR IN AL-SHARI'A AL-ISLAMIYA AND INTERNATIONAL LAW  
CHAPTER III OF THE INTRODUCTORY PART

The military expeditions made by the Christian rulers and people of Europe during the Middle Ages known as the Crusades were, from the Christian point of view, to recover the Holy Land from the Muslims.

In modern times, many encounters may be interpreted as an indication of traditional hatred between followers of some religions. Usually this hatred originates from reciprocal feelings of self-superiority and of inferiority of the other part. This lack of mutual respect exaggerates and deepens the original hatred.

CHAPTER IV: HISTORY AND EVOLUTION OF  
INTERNATIONAL LAW<sup>(1)</sup>

Although this Chapter refers in its title to the "history" of international law,<sup>(2)</sup> we do not intend to follow up its evolution through a chronological sequence; but to present the main features of the Western European approach, bearing in mind that the genesis of contemporary international law originated in West Europe.

The Western Approach To International Law<sup>(3)</sup>

Contemporary international law<sup>(4)</sup> stemmed from European roots and was based on the Christian civilization. The questions of whether international law, is really international,<sup>(5)</sup> or really law,<sup>(6)</sup> are now out-dated and call for no further discussion or comment.

Four characteristics marked the evolution of international law :

1. At its emergence, international law was largely confined to the law of war, and the law of nature was instrumental in ameliorating the inhuman practices of primitive war. Although a considerable part of international law is not concerned with issues of peace or war, the theory of consent of states has simultaneously prevailed.
2. The Twentieth Century witnessed an immense evolution in international law due to the growing inter-dependence of states, and the vast increase of intercourse between them, as a result of the growing technical advance, namely various inventions and discoveries, and the progress in the different communication means.
3. In modern international law, the influence of jurists has tended to decline, and greater regard was paid to the practice and decisions of tribunals; although its landmarks were due to juristic efforts.
4. International law and its codification have progressively developed, consequently had an impact on several topics such as decolonization, human rights, and the legality of war.

Four main issues will be discussed in this Chapter, the naturalist and positivist schools of international law, the just war doctrine, the European principles of international law, and the problem of non-liquet.

First: Is International Law Natural Or Positive Law?

In this regard, the major schools of thought are school of naturalists, and school of positivists.<sup>(7)</sup>

### School Of Naturalists

In his treatise "De Jure Belli ac Pacis", which was published in 1652, Grotius<sup>(8)</sup> invoked what he called "the Common Law of Nations" to restrain brutal passions which inflame nations in war to guide and keep them in relations of peace. This common law of nations was founded on what Grotius termed "natural law". Grotius starts from the premise that the source of law of nature springs from the need of men for the establishment of a social order and its maintenance upon principles of right reason. The law of nature can be rightly attributed to divine origin, because the characteristic human traits have been implanted in man by his Creator. Grotius holds that the mutual relations of men in society arise out of bodies of municipal law whose source, consequently, may also be considered as the law of nature. He argues that, by mutual consent, it has become possible that certain laws should originate between all states, or a great many states; because the association that binds together the human race, or binds many nations together has need of law, just as the association of men can be maintained by law.

Samuel Pufendorf (1632-1694) in his work "De Jure Naturae et Gentium", which was published in 1672, asserts that the true basis for the law of nature is found in the condition of man, who cannot exist without leading a social life, and who was endowed by his Creator with a mind capable of grasping the ideas that lead to his end. The law of nature should, consequently, be deduced from the reason of man himself, and should flow from that source, provided it not be perverted. Pufendorf also asserts that the maintenance of peace has been instituted and sanctioned by nature herself without any human intervention, and that it rests, therefore, upon that obligation of natural law, by which all men are bound. He confesses, however, that this natural peace is but a weak and untrustworthy thing, and that it is without other safeguards, but a poor custodian of man's safety. He denies that there is any voluntarily or positive law of nations which the force of law, per se, such as binds nation as if it proceeded from a higher authority.

The eminent Scotch jurist James Lorimer expressed his view, in his work "Institutes Of The Law Of Nations", which was published in 1883, he defined international law as "the law of nature realized in the relations of separate nations".

### School Of Positivists

The other school, opposing the Naturalists, is that of the Positivists, constituted of a large and increasing school of writers. They defend the existence of a positive law of nations resulting from custom and treaties, and they also give such positive law precedence over any principles that may be derived from the natural law of nations.

Rachel published two dissertations in 1676, entitled "De Jure Naturae Et Gentium", in which he defines the law of nations as the law to which a plurality of free states are subjected, which comes into existence through the tacit or express consent of these states.

According to **Cornelius Van Bynkershoek** (1673-1743), the true basis of the law of nations is the common consent of nations expressed in international custom or in treaties.

**Richard Wildman**, in his work entitled "**Institutes Of International Law**", which was published in 1849, denied categorically that the law of nature forms any part of international law.

### Our Opinion

In fact, we agree with a midway trend between the Naturalists and the Positivists, which distinguishes between the natural and voluntary law of nations and considers both of equal importance.

**Christian Wolff** (1679-1754), a representative of this trend, published his "**Jus Gentium Methodo Scientifica Pertractatum**" in 1749. He distinguishes four different kinds of law of nations, the natural, the voluntary, the customary and that which is created by treaties. Customary and treaty law have force only between the states whose customs and treaties have created them and may be altered by these states; but the natural and voluntary law of nations are eternal, unchangeable and universally binding upon all states. According to Wolff, the totality of states forms a world state, the so-called *civitas gentium maxima*, above the component member states.

### Second: The Just War Doctrine<sup>(9)</sup>

The just war<sup>(10)</sup> doctrine evolved from a wholly religious source to a mixture of religious and secular sources, with a transitional stage between these two stages. The two secular sources were, the chivalric code and customary law (*jus gentium*). However, it must be noted that the secularization of the just war doctrine did not mean the adulteration and loss of moral intensity, as some secular writers proposed more stringent limits on the power to make war than their theological predecessors had conceived. In this century, there has been a revival of the just war thinking referred to as "Modern Just War Doctrine". Therefore, we can distinguish between four stages in the evolution of the just war doctrine.<sup>(11)</sup>

### The First Stage : The Theological Just War Doctrine

#### 1. St. Augustine

The theological just war doctrine goes back to **St. Augustine of Hippo** (334-430 A.D.) who based his position on evidence drawn from the Bible. He was the first Christian writer who formulated the early doctrine of *bellum justum*, according to which a war may be waged only to redress a wrong suffered in the sense that war is justified if it is the only means to justice. According to Augustine, "Those wars are customarily called just which have for their end the revenging of injuries, when it is necessary by war to constrain a city or a nation which has not wished to punish an evil action committed by its citizens or to restore that which has been taken unjustly". Maybe the most significant statement

made by Augustine is that, "the enemies of the Church are to be coerced even by war". Although it is not a requirement by Augustine's doctrine of war, "a formal declaration of war" is another element added by Isidore of Seville (560-636 A.D.). It is concluded from the writings of Augustine that three conditions are required for war to be just, i.e., competent authority, just cause, and right intention.

As regards the "competent authority", Augustine writes in his book "Contra Fustum", the natural order of men, to be peacefully disposed, requires that the power and decision to declare war should lie with the rulers". "The enemies of the Church are to be coerced by war", this statement by Augustine expresses his view about "Just Cause" that war is allowed for the sake of religion. As regards "right intention" Augustine says, "the desire to hurt, the cruelty of Vendetta, the stern implacable spirit, arrogance in victory, the lust for power, and all that is similar, all these are justly condemned in war".

## 2. St. Thomas Aquinas

St. Thomas Aquinas (1225-1274 A.D.) supported the efforts of the Church Councils to restrain Christian princes from fighting each other.<sup>(12)</sup> For Thomas, in a just war there has to be a just side, the vindicator, fighting against an unjust side, which has perpetrated some evil. Besides setting a clear distinction between the two sides, this also implies the condition that just war shall always be of a defensive or retributive nature alone. However, this does not mean that just war shall always be of a defensive or retributive nature alone. In his "Summa Theologica", Thomas made three conditions in order for a war to be just, that such war be fought on right authority, have a just cause, and be waged with a right intention.

As regards "the competent authority", Thomas says, "the authority of the ruler within whose competence it lies to declare war". "Just cause" says Thomas, exists where there is some fault to be punished. Thomas draws the third condition of "right intention" from Augustine, he concludes that there is required a right intention on the part of the belligerents either of achieving some good object or of avoiding some evil.

## The Second Stage : The Transitional Stage

This stage, which started in the late Middle Ages,<sup>(13)</sup> separates between two stages of the evolution of the just war doctrine, theological and secular. The just war was modified in the Middle Ages by ecclesiastical canonists, theologians, and others who wrote in the chivalric tradition. A new emphasis on the natural law fundamentally altered the meaning of just war doctrine, making it not primarily an assertion of God's judgment against evildoers; but a description of the right of princes to retaliate against troubles of their own domains.

According to some writers there were two factors contributing to the secularization of the power of the prince. The first factor allowed the prince to act in the name of his people rather than in the name of God; and the second allowed wrong to be defined not in terms of absolute

morality, but in terms of violation of customary or mutually agreed upon rights. The canonists were aided in their separation of "war for the Church" from "war for the prince" by a growing secularization in the concept of jus gentium as a body of custom and agreements among peoples and their sovereign princes. Since the Romans had not pursued to any distance the rational deduction of the jus gentium from the natural law, the medieval writers had a recourse to the Old Testament, using the Israelites' law and practices as their guides to the content of the jus gentium. The laws and practices of Israel, ordained in some immediate manner by God, became an authoritative statement for medieval lawyers of jus gentium, a concept inherited from Rome.

By the end of the Middle Ages, the modified three conditions of just war were as follows :

1. The authority of the Church to decide on the justice of wars tended to become increasingly limited to the matters of protection of religion;<sup>'14'</sup> and the proper authority had come largely to mean the authority of the secular sovereign prince, which was understood as deriving from the community he represented. According to some writers, this concept came about as a result of two principal developments, a practical distinction between wars for religion or Church and wars for protection of the rights of the community; and an increasing emphasis on jus gentium as a body of customs and agreements.
2. Punishment in the name of God of those who have done some wrong had, in the late Middle Ages, been reduced to worldly size.. Just cause had become bifurcated into the religious and political.
3. Right intention, which was in the Thirteenth Century almost exclusively a matter to be decided about prior to beginning a war, had, by the end of the Middle Ages, largely divided into its component parts into one pertaining to the jus ad bellum, i.e., the provision that aim of war should be peace, and the other to the emerging doctrines of jus in bello.

Therefore, at the end of the Middle Ages, we may distinguish between three types of just war :

A. War waged by the Church, against its enemies, such as blasphemers, idolaters, heretics, who would set up a new cult in place of that of Rome.

B. War declared and waged by the prince on his own authority, such as wars of restitution or punishment.

C. War waged on one's own authority, i.e., wars of self-defence which are generally regarded as involuntary.

Vitoria, Suarez, Ames,<sup>'15'</sup> Sutcliffe,<sup>'16'</sup> and Fulbecke<sup>'17'</sup> represent the trend of this transitional stage in the development of a secular theory of just war. Only the thoughts of the first two writers will be explained.

**A. Francisco De Vitoria** <sup>(18)</sup>

Vitoria depended heavily on concepts and conventions of thought inherited from the Middle Ages, though his use of these ideas made his just war theory no longer a medieval one, but a doctrine suited to the modern age. For Vitoria the central issue is that a prince must dispel all doubts about the justice of his cause before he may take the step of declaring war. The prince is not required to consult anyone other than himself in making his decision; yet his conclusion about his cause may be in error, and if he act wisely, Vitoria says, he ought to consult the good and wise and those who speak with freedom and without anger or bitterness or greed.

According to some writers, Vitoria's writings on the limitations of war shaped the thinking of subsequent theorists in three principal ways.

1. Vitoria drew together into a coherent whole the various stands of the just war doctrine that he had inherited from the Middle Ages. It was through him, that subsequent theorists knew the medieval just war doctrine in what has come to be regarded a *jus ad bellum*, and a *jus in bello*.

2. His focus upon natural law as the ultimate justification for the limits imposed by the just war tradition. This shows the significance of the transformation he effected, for now just war limits were perceived not just as binding Christians in their wars with one another, henceforth they could be invoked, in principle, in any conflict the world over. Vitoria's rejection of religious difference as a just cause of war, which was in effect a denial that ideological differences could ever justify a war, resulted in the strengthening not only the *jus ad bellum* but also the *jus in bello*.

3. Vitoria was not so certain that the just side in war could always be identified. Vitoria did not deny that before God only one side, at most, could have just cause.

**B. Francisco Suarez** <sup>(19)</sup>

Suarez rejects the possibility that religion may offer just cause for war. Internal divergence for religion provides the one possibility of legitimately taking arms for the cause of religion. Suarez affirms that the state may coerce unbelievers in matters of faith. The right of a prince to coerce belief among its own citizens does not, however, imply a similar right to force religion among non-citizens. He asserts that there is no ground for war so exclusively reserved to Christian prince that, it has not some basis in, or at least some due relation to natural law, being therefore also applicable to princes who are unbelievers.

Suarez allows a Christian prince to insist that an unbelieving state admit Christian missionaries to its domain, but in the following limits :

1. If the unbeliever king wishes to exclude missionaries and his subjects wish to hear them, he is doing them harm and is not validly exercising the right of government they have given him, and so he may be coerced.
2. If the king would have missionaries and the people would not, the king may justly coerce them, following the reasoning given for domestic religious dissent, accepting the aid of Christian princes in his action.
3. If both king and people would not admit missionaries, Suarez allows that they may be forced to permit the preachers of the Gospel to live in their territories; for this tolerance is obligatory under the jus gentium and cannot be impeded without cause.

### The Third Stage: The Secularized Just War Doctrine

In this stage reliance was definitely placed on natural law, and the jus gentium; not in religious sanctions. The doctrine was developed without reference to the theological base. Grotius, Locke, and Vattel represent the theorists of this stage.

#### A. Hugo Grotius

Grotius distinguishes between two sorts of war, public and private, depending on the authority that makes the war. His main concern is with public war, in which he again treats the dichotomy, dividing it into "solemn" (just) and "not unsolemn" (unjust) types. According to the law of nations, there are two requirements that a war be solemn: that it be on both sides made by the authority of those who in their respective cities are sovereign; and that it be waged with such rites and formalities the law of nations requires.

Grotius says, ".....because war is undertaken for the sake of peace, there is no dispute, which may not give rise to war, it will be proper to treat all such quarrels as commonly happen between nations, as an article in the right of war: and then war itself lead us to peace, as to its proper end". He insists that just wars are all defensive. But, to employ preemptive self-defence it is absolutely required that the enemy's intent must be manifested overtly. The limit Grotius imposes is thus not absolute; it depends to a certain degree upon the state of mind of those who judge themselves to be threatened. When Grotius allows preemptive self-defence, he is broadening the meaning of self-defence, which would thus appear to be inherently dangerous. According to Grotius, "The concept of self-defence is moreover limited in another way. Though the right of self-defence extends in nature to the death of the assailant, this full right should not be exercised if the danger or harm is relatively minor.....in the case of Christians".

Grotius sought to base the justification and limitation of war on natural law. Grotius says, "the Law of Nature is so unalterable, that it cannot be changed even by God himself. For although the power of God is infinite, yet there are some things to which it does not extend;.....

for as the substance of things in their nature and existence depends upon nothing but themselves; so there are qualities inseparably connected with their being and essence. Of this kind is the evil of certain actions, compared with the nature of reasonable being..... . Yet it sometimes happens that, in those cases which are decided by the Law of Nature, the undiscerning are imposed upon by an appearance of change. Whereas in reality there is no change in the unalterable Law of Nature, but only in the things appointed to it, and which are liable to variation". Grotius adds, "There are also somethings allowed by the Law of Nature, not absolutely, but according to a certain state of affairs. Thus, by the Law of Nature, before property was introduced, everyone had a right to the use of whatever he found unoccupied; and, before laws were enacted, to avenge his personal injuries by force". Grotius distinguishes between what is allowed by nature and what is permitted to Christians. His natural law doctrine on war applies to all men since it is knowable by reason. In war between non-Christian nations, natural law alone provides the rules by which war should be fought.

The cause of war should be made public, so that everyone may decide as to their justice and be (or not be) convinced by them. Subjects and citizens have deliberative authority and are not required to trust blindly. If the subject is induced to believe that the arguments are unjust, especially if that war be offensive, and not defensive; he is bound to abstain. According to some writers, Grotius' contribution to the development of the just war doctrine is represented in two significant features. First, he formulated a conception of the Natural Law and its relation to divine law that was just the opposite of Vitoria's. For Grotius, Christian doctrine on war, which he termed "the dictates of charity", represented a perfection of the Natural Law. The result was to complete the secularization of the just war doctrine. Second, Grotius' treatment of the jus ad bellum and the jus in bello deemphasized the former and added new weight to the latter. His substantive formalization of the jus ad bellum pointed directly to the development of the modern idea of competence de guerre. Far from restraining wars among nations, it might even seem to legitimize them, as in the frequent sovereigns' wars of the following century.

Some writers refer to the following differences between Grotius' position and earlier doctrine. First, Grotius grounds just war in the natural category of self-defense. For Grotius, the prince's prime concern is to protect his nation. For this reason, he (the prince) may make the first strike against one who is arming against him, though the wrong has not actually been done; for this reason he may refrain from pursuit and punishment if his subjects' weal be endangered. The prince here is not "minister of God";<sup>(20)</sup> but the guardian of his people's lives, property, and prosperity. Also, Grotius differs from the earlier just war doctrine in distinguishing between what is known by nature, which binds all men; and what is known by charity, which though good is binding only upon Christians".<sup>(21)</sup>

Some writers criticize Grotius as he did not understand that the implications of secularization of transcendent morality could run backwards as well as forwards, and that the absolute limits he sought to

impose on the prosecution of war could be eroded in the name of the criterion of proportionality, that he believed to be the base of "moderation" in Natural Law. The latter idea of limited war reveals such an erosion. Also, Grotius, as well as Vitoria, was criticized as he did not understand that dethroning religion as a just cause was not enough of a brake on war for causes held to be ultimate. The new nationalism of the modern era led eventually to the rebirth of the idea of total war, a sort of war made potentially more destructive than the old religious wars by technological and political changes.

**B. John Locke (22)**

The principle made by Locke, concerning war, is that every government is bound by the Law of Nature and the conditions of the original compact, to preserve its subjects and their properties. The individual's right to make war is given to the Commonwealth with the express limitation that it shall be employed "in the defence of the Commonwealth from foreign injury", which is to say only for "the public good". Two conclusions resulted from this principle. First, rulers can never legitimately use the public force in war against the people of another society for the purpose of subjugating them. Second, the public force of the Commonwealth can never legitimately be used to instigate a war on religious grounds, such as an attempt to stamp out heresy and idolatry.

Locke argues that the distinction between just and unjust conquest does not disappear as men approach the state of nature as a desperate situation created by war. Some writers criticized Locke that since the distinction between just and unjust conquest originates in the state of nature, it is extremely strange - and incorrect - argument that when governments dissolve into the state of nature as the result of war, the differences between just and unjust power over the losers disappear.

**C. Emmerich De Vattel (23)**

Vattel ascribes to states rights, when individuals contract to civil society, extend to self-preservation. These rights require one to live in peace with his neighbours, and whenever possible to help them. Vattel argues that a nation, which came together for the common welfare of all, has not only the right but the obligation to preserve itself and its members. This implies the right to "everything that can secure it from.... a threatening danger". For Vattel, as for Locke, it is the fact that all possess the same rights to self-preservation and self-protection that limits the extent to which these rights can be invoked. A state or an individual may enjoy the full value of his natural rights insofar as they do not transgress on another's enjoyment of the same rights, and vice versa. The attempt of one to usurp the rights of another gives the latter the right to punish the former and secure reparation from him, and even to put him out of condition to make the attempt again. These propositions define the limits of just war as conceived by Vattel.

For Vattel only the sovereign has the authority to decide whether

to go to war, and to raise the forces necessary to wage war. The right to make war is possessed by every individual by nature, is the right to restore the order of natural justice by force when it has been impaired. In society, this right of individuals has been transferred to the state and it is vested with the sovereign. This makes final the change begun in the late Middle Ages regarding the source of sovereignty.

### The Fourth Stage: The Modern Just War Doctrine

According to some writers, the just war tradition represents the fundamental way of thinking, in the West, about the justification and the limitation of violence. The Twentieth Century rediscovery of the just war tradition in systematic moral thought began with the early historical works.<sup>(24)</sup> Till the period between the two World Wars, the just war ideas were carried on and further developed largely in the spheres of international law and military thought. The military concept of limited war should be understood as an integral part of the developing tradition of just war.

Kelsen argues that it is easy to prove that the theory of bellum justum forms the basis of a number of highly important documents in positive international law.

#### 1. The Treaty Of Versailles

Article 231 of the Treaty Of Versailles which establishes the "war guilt" of Germany, justifies the reparation imposed on Germany by maintaining that she and her allies are responsible for an act of aggression. The Treaty of Versailles did not impose upon Germany a "war-indemnity" but duty to make "reparation" for illegally caused damages. This means that Germany and her Allies resorted to war without sufficient reason, that is, without having been wronged by the Allied and Associated Powers, or by any of them. Kelsen says that only on the basis of bellum justum doctrine is the idea of "war guilt" possible.

#### 2. The Covenant Of The League Of Nations

Article 15 paragraph 6 of the Covenant permits Members of the League, under certain conditions, to proceed to war against other League Members, but only "for the maintenance of right and justice". Kelsen comments, only a just war is permitted.

#### 3. The Pact Of Paris

A very important qualification of the prohibition of war included in the Pact, i.e., the prohibition of war as an instrument of national policy. The interpretation of the Pact given by Kelsen is that war is not forbidden as a means of international policy, especially not as a reaction against a violation of international law, as an instrument for the maintenance and realization of international law, which is exactly, Kelsen adds, the idea of bellum justum doctrine.

### Arguments Against The Just War Doctrine

Kelsen discusses some arguments which could be raised against the just war doctrine, two of these arguments are of specific importance. One, is that the distinction between war as a sanction and war as delict would become highly problematic. According to public international law, war cannot be interpreted either as a sanction or as a delict, since it has no tribunal to decide this matter. Therefore, it can only be decided through mutual agreement between the parties. But a state would hardly admit having violated the rights of another state. Besides, the states may decide the matter in different ways. If there is no uniform answer to the question whether in a given case there has, or has not, been a delict, then there is no uniform answer to the question whether the war waged as a reaction is, or is not, actually a "just war"; whether the character of this war is that of a sanction or of a delict.

As for the second argument, war of one state against another could never be set up as a sanction because for technical reasons no war can function as a sanction. In war, not he who is in the "right" is victorious, but he who is the strongest. For this reason, war cannot be a reaction against the wrong; if the party which suffered this wrong is the weaker.

### Third: The European Principles Of International Law<sup>(26)</sup>

Although modern international law is of European origin, the subsequent evolution confirms its universality. However, the features of European Communities gradually crystallized, and the common rules applicable within the legal and administrative framework of these communities have developed to the extent that deserve the designation of "Community Law".

Special concern has been given to certain joint activities such as integral economic co-operation,<sup>(26)</sup> regional security,<sup>(27)</sup> judicial settlement of differences,<sup>(28)</sup> and the protection of human rights.<sup>(29)</sup> The direct applicability of the Community Law, in certain cases and under certain conditions in communities, may be considered a distinctive characteristic of this law. National courts are also ready to give effect to Community Law where its primacy ought to be recognized, in cases such as the community rule or norm is clear and precise, and unconditional, without need for further implementary action.

### Fourth : The Problem Of Non-Liquet<sup>(30)</sup>

It was suggested, by Professor Stone,<sup>(31)</sup> that the question of non-liquet should be admissible de lege ferenda; and not in terms of whether a non-liquet was admissible as a matter of law, de lege lata. The juristic theories, as to non-liquet, may be divided into two trends. As a matter of law, no final solution may be possible.

### 1. The Admissibility Of The Existence Of Non-Liquet

It is the opinion of Professor Verzijl<sup>(32)</sup> that in the field of international law, lacunae often occur in the special variant, that in particular matters there are no generally recognized rules in existence, but merely divergent, though for the rest well rooted rules, each recognized by a limited group of states and consequently of limited geographical operation. He believes that the existence of a genuine lacunae in international law cannot be denied, or even seriously doubted. Denial of the possible existence of non-liquet is based on two arguments. The first is inter-state relation, whatsoever its nature may be, is basically susceptible of evaluation by a standard of justice. In commenting on this argument, Professor Verzijl says that it must be recognized that in a considerable number of cases treaty and customary law do not at least demonstrably provide a solution. The belief that inter-state relations is always governed by general principles, either of international law, or of law in a wider sense, or by equity; can only be held by those who do not distinguish between positive international law and other possible measuring rods of normative nature. The other argument departs from an asserted axiom of international law governing inter-state relations according to which states, as sovereign entities, are free to act as they choose unless their freedom is limited by a positive contrary rule of international law. This argument, Professor Verzijl comments, may provide an acceptable solution in many instances where the legality of one action is upheld by one party and contested by another, but it will often fail in cases in which two states proceed to mutually incompatible concurrent actions where there is no possibility of applying the axiom, or in which unprecedented novel problems arise that call for an entirely new legal solution.

Professor Politis believes that if the elements of fact and law which are furnished to an arbitrator are not sufficient to him to give a decision, he not only can but ought to refuse to do so. In commenting on the opinion of some writers, who consider Article 38 of the Statute of the International Court of Justice as indubitably banishing non-liquet, Professor Politis observes that the Court may find it impossible to judge, in default of positive rules or of the principles recognized by the civilized nations. The danger remains for the Court that it is obliged not to give its judgment.

### 2. The Non-Admissibility Of The Existence Of Non-Liquet

Kelsen is of the opinion that the legal order cannot have any gaps which means that prevailing law cannot be applied to a concrete case because there is no general norm which refers to this case. He believes that if the judge is authorised to decide a given dispute as legislator in case the legal order does not contain any general norm obligating the defendant to the behaviour claimed by the plaintiff, he does not fill a gap of actually valid law, but he adds to the actually valid law an individual norm corresponds. The actually valid law could be applied to the concrete case, by dismissing the suit. The judge, however, is authorized to change the law for a case, he has the power to bind legally any

individual who was legally free before.

In the international sphere, the assumption that the law-applying organs are authorized to fill such gaps, by applying to the particular case norms other than those of existing conventional or customary international law, Kelsen adds, implies that the law-applying organs have the power to create new law for a concrete case if they consider the application of existing law as unsatisfactory. From the point of view of legal positivism, he continues, such a law-creating power must be based on a rule of positive international law. It is doubtful that such a rule of general international law exists; but there can be no doubt that such a power may be conferred upon a law-applying organ by a treaty. It is from this point, Kelsen continues, that Article 38 of the Statute of the International Court of Justice is to be understood, that the Court "whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply" not only conventional and customary international law, but also "the general principles of law recognized by civilized nations". These "general principles of law", to be applied if the two others - treaty and custom - cannot be applicable.

Kelsen concludes that if there is no norm of conventional or customary international law imposing upon the state, or any other subject of international law, the obligation to behave in a certain way, the subject is under international law free to behave as it pleases, or in other words what is not legally forbidden to the subject of the law is legally permitted to them; and by a decision to this effect existing international law is applied to the case. However, Kelsen believes that though this decision is logically possible, it may be morally or politically not satisfactory. Only in this sense are there "gaps" in the international as in any legal order.

Professor Le Fur believes, from a natural standpoint, that access of the International Court of Justice to the general principles of law, wholly banishes the possibility of non-liquet. This opinion depends on the assumed sources of valid rules of international law.

Assuming that the function of international law is to provide a solution for every case, Professor Lauterpacht believes that there are no gaps in the legal systems taken as a whole.

On the assumption that the judicial process necessitates to decide what is the law, Professor Witenberg believes that the international judge must start from the fundamental principle that the essential function of international law is to prohibit war and cause peace to reign, consequently, the judge is required in every case, to decide what is the law.

Professor Denenciere-Ferrandiere believes that, in every dispute, the judge has only two choices; either to support the claimant depending on a particular rule supporting the claim, or to support the defendant depending on the general rule which leaves states free of legal obligation unless some rule basing the obligation can be shown. In both

cases, it is said, the decision is based on law.

#### Our Opinion On The Problem Of Non-Liquet

We believe that the existence of non-liquet must be admitted for a meta-legal reason. Imperfection is an inherent characteristic of man-made law, thus, it is possible to find gaps in law whether domestic or international. Contrary to man-made law, Al-Shari'a Al-Islamiya is perfect, ALLAH says, "We have neglected nothing in the Book [of Our Decrees]".<sup>(33)</sup> Therefore, principles of international law in Al-Shari'a are, by its very nature, complete, consequently, there is no possibility to raise the problem of nonliquet.

However, this problem must be understood in the light of the question of the justiciability of disputes. Intuitively, the problem of non-liquet will be never raised, if we accept the opinion that some disputes are not justiciable, whether by their very nature, or because there is no competent court. On the contrary, if we accept the opinion that all disputes are justiciable, the problem of non-liquet may be raised, whether due to the different views of states concerning a specific matter, or due to the emergence of an absolutely unprecedented matter. In both cases, the problem of non-liquet will be resolved by laying down a new binding rule by states. But in the second case, the international judge may lay down a new rule, if he is expressly authorized to fill the gaps in law by a rule of his own making, otherwise he will be deemed intervening in a matter beyond his jurisdiction.

Footnotes Of Chapter IV Of The  
Introductory Part

(1) See In English:

William W. Bishop, *International Law*, pp. 3-11; J.G. Starke, *An Introduction To International Law*, pp. 1-35; Michael Akehurst, *A Modern Introduction To International Law*, pp. 19-29; Charles S. Rhyne, *International Law*, pp.9-46; Julius Stone, *Legal Controls Of International Conflict*, pp. 57-64; J.L. Brierly, *The Law Of Nations*, pp. 1-40; Hans Kelsen, *General Theory Of Law And State*, passim; George A. Finch, *The Sources Of Modern International Law*, pp. 15-28; T.A. Taracouzio, *The Soviet Union And International Law*, passim; G. I. Tunkin, *Theory Of International Law*, passim; J.H.W. Verzijl, *International Law In Historical Perspective, Volume I*, pp. 47-89; W. F. Collier, *The Great Events Of History*, passim; M.K. Nawaz, *The Doctrine Of Outlawry Of War*, pp.80-111; Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres*, passim; Hugo Grotius, *The Law Of War And Peace*, passim; James Turner Johnson, *Ideology, Reason And The Limitation Of War (Religious And Secular Concepts) 1208-1740*, passim; James Turner Johnson, *Just War Tradition And The Restraint Of War-A Moral And Historical Inquiry*, passim; William V. O'Brien, *The Conduct Of Just And Limited War*, passim; Paul Ramesey, *The Just War-Force And Political Responsibility*, passim; Joachim von Elbe, *The Evolution Of The Concept Of Just War In International Law*, pp. 665-688; Josef L. Kunz, *Bellum Justum And Bellum Legale*, pp. 528-534.

See In Arabic:

Ali Maher, *Al-Qanun Ad-Dawli Al-A'am*, pp. 53-116; Ali Sadeq Abu Haif, *Al-Qanun Ad-Dawli Al- A'am*, pp. 38-57; Muhammad Hafez Ghanem, *Mabadi'i Al-Qanun Ad-Dawli Al-A'am*, pp. 44-64; Muhammad Talaat Al-Ghunaimi, *Al-Ghunaimi Fi Qanun As-Salam*, passim; Mahmud Sami Ginaina, *Al-Qanun Ad-Dawli Al-A'am*, pp. 52-70; Abdul Aziz Sarhan, *Al-Qanun Ad-Dawli Al-A'am*, pp. 11-27; Fouad Shibat, *Al-Huquq Ad-Dawliya Al-A'ama*, pp. 43-57; Mohsen Ash-Shishikly, *Al-Waseet Fi Al-Qanun Ad-Dawli, Volume I (Book 1)*, pp. 317-368; Muhammad Aziz Shukry, *Al-Madkhal Ila Al-Qanun Ad-Dawli Al-A'am Fi Waqt As-Silm*, pp. 12-32; Hamed Sultan, *Al-Qanun Ad-Dawli Fi Waqt As-Silm*, pp. 33-43; Hasan Al-Galaby, *Al-Qanun Ad-Dawli Al-A'am*, pp. 136-166; G.A. Tunkin, *Al-Qanun Ad-Dawli Al-A'am (Arabic Translation)*, pp. 17-72; René Jean Dupuy, *Al-Qanun Ad-Dawli (Arabic Translation)*, pp. 8-30; Nur Eddin Hatum, *Tarikh Assruna*, passim; Pierre Renouvin, *Tarikh Al-Qarn Al-Eshreen, 1900-1945, (Arabic Translation)*, passim; Ahmad Suwailam Al-Imary, *Usul An-Nuzum As-Siyasiya Al-Muqarana*, passim.

(2) Before Christianity, the ancient Israelites regulated their relations with their neighbours in peace and war, as the Old Testament informs us, the ancient Jewish system, based on the Mosaic Law, enforced upon Jews and Gentiles when they came into contact with each other. Traces of rules of conduct for regulation of relations

between independent communities were found in ancient Egypt, India and China; and during both the period of the Greek City States, and the period of the Roman dominance in the ancient world. The customary rules observed by the ancient Romans were of legal character. However, the total direct contribution of the Greeks and the Romans, to the development of international law, was relatively meagre.

- (3) Public international law is distinguished from private international law which is considered, particularly in the Anglo-American states, as merely one branch of the domestic law of each state rather than as part of international law. However, the latter has closed ties with private law; it contains many private law analogies; the pioneer jurists of international law had relied heavily on private law, particularly Roman law; and private law principles remain a potential source of international law rules through the "general principles of law recognized by civilized nations", referred to in Article 38 of "the Statute of the International Court of Justice".
- (4) Among different names; such as "Law Of Nations" (used for example by Prof. Kunz in his article on "Changing Law Of Nations", in AJIL, 337, (1957); "The Common Law Of Mankind" (used by Prof. Jenks in his treatise under the same title, 1958; the name devised by Bentham, i.e., "Public International Law" is the most familiar. Prof. Vinogradoff described the rules of conduct that regulated the relations between the Greek City States as international law.
- (5) A comparison between the number of the original Member States of the United Nations, and the recent Member states; besides the continuous increase of different subjects covered by international law, explains this fact.
- (6) The Austinian type of thinking is not valid any more. As Prof. Brierly said, "the best evidence for the existence of international law is that every actual state recognizes that it does exist and that it is itself under obligation to observe it. States may often violate international law, just as individuals often violate municipal law; but no more than individuals do states defend their violations by claiming that they are above the law. States may defend their conduct.....; but they do not use the explanation which would obviously be the natural one if there were any doubt, that international law has a real existence and that they are bound by it". According to the same authority, "law exists only in a society, and a society cannot exist without a system of law to regulate the relations of its members with one another. If then we speak of the "law of nations", we are assuming that a "society of nations exists". See Brierly, *Outlook For International Law*, 1944; referred to in Bishop, *International Law, Cases And Materials*, pp. 8-9.
- (7) See in particular, Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres*, passim; J.G. Starke, *An Introduction Of International Law*, pp. 1-

35; Charles S. Rhyne, *International Law*, pp. 9-46; J.L. Brierly, *The Law Of Nations*, pp. 1-40; Michael Akehurst, *A modern Introduction To International Law*, pp. 19-29.

- (8) His name in Holland is Hugo de Groot, but he is best known by the Latin form of his name, namely Hugo Grotius. Grotius was born in 1583 and died in 1645. He wrote two works, the "De Jure Praeda" in 1604, and the "De Jure Belli Ac Pacis". Also a short work which was published in 1609, the "Mare Liberium".
- (9) Two terms used in connection with just war conception are, "doctrine" and "theory". According to some writers, the term "theory" is more philosophical, and suggests a set of questions that to be asked by one desiring to wage just war; the other term "doctrine" is rather more theological, and it has a more prescriptive connotation; just war doctrine is a body of prescriptions that must be obeyed if a war is to be just. See in particular, Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres*; James Turner Johnson, *Ideology, Reason And The Limitation Of War (Religious And Secular Concepts)* 1208-1740; James Turner Johnson, *Just War Tradition And The Restraint Of War-A Moral And Historical Inquiry*; William V. O'Briend, *The Conduct Of Just And Limited War*; Paul Ramsey, *The Just War - Force And Political Responsibility*; Joachim von Elbe, *The Evolution Of The Concept Of Just War In International Law*, pp. 665-688; Josef L. Kunz, *Bellum Justum And Bellum Legale*, pp. 528-534.
- (10) Some writers believe that the expression "permissible war" is more accurate than "just war". In their opinion, "permissible war" conveys the basic thought that recourse to war is an exceptional prerogative that has to be justified, not a right readily available to those who consider themselves just.
- (11) According to Kelsen, the idea of *bellum justum* was found in primitive societies. The Vendetta, an act of revenge, in the relationships of the primitive tribes is probably the original form of socially organized reaction against a suffered wrong, the first socially organized sanction. The early Greek and Roman belligerents always alleged a definite cause considered by them as a valid and sufficient justification for their own wars. In Rome, the laws of war was closely connected with the so-called *jus fetiale*. Augustine and Isidore were influenced in their doctrine of just war by Cicero.
- (12) The Church issued the "Peace Of God" decrees, forbidding attacks upon priests or those who travelled with them, prohibiting the seizure of ecclesiastical lands, and outlawing any fighting or violence at certain times of the week (four days and five nights-Thursday through Sunday). The first "Peace of God" was declared in 989 in Charroux, France. The first general council of the Church held in 1122 proclaimed the penalty of anathema against all who violated the Truce of God.

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- (13) The Middle ages usually refer to the period from deposition of the last West Roman Emperor in 476 A.D., to the Italian Renaissance (or the fall of Constantinople in 1453).
- (14) Medieval warfare was conducted among members of a warrior and those who directly support them; clerics and bishops belonged to a different class.
- (15) William Ames (1576-1633) studied at Christ's college, Cambridge. His most famous work is "De Conscientia" (Conscience), and his other major work is "Medulla Theologiae".
- (16) Matthew Stuclyffe (1550-1629) wrote in a variety of topics including military discipline in which his theory in just war appears. He occupied the ecclesiastical positions of Dean of Exeter and Royal Chaplain under Elizabeth and James.
- (17) William Fulbecke (1560-1630) studied at Oxford. He wrote "Fulbecke's Pandects Of The Law Of Nations".
- (18) Francisco de Vitoria (1492-1546) wrote "De Indis" and "De Jure Belli". In both of them he takes up the political subjects that made him so widely respected.
- (19) Francisco Suarez (1548-1617) a theologian studied at Salamanca, Spain, and later taught at Coimbra, Portugal. Both Suarez and Vitoria recasted medieval political theory into the beginning of modern international law.
- (20) When there is some fault to be punished and right authority exists, the concept of the "Minister of God" denotes the magistrate when acting to execute his vengeance against the evildoer.
- (21) Some writers noted that since European nations were by definition "Christians", and since the customs and mutual agreements in the jus gentium were also products of interactions among European nations, it was difficult during the early modern period to distinguish between standards drawn from Christianity and those drawn from the jus gentium.
- (22) John Locke (1632-1704) is known as a philosopher and a political theorist. His concept of the "Social Contract" deeply affected the form taken by the United States as it is separated from England.
- (23) Emmerich De Vattel (1714-69) was born in the Swiss Principality of Neuchatel. He studied philosophy and law, and he served in diplomatic service of Saxony. His work, the "Law Of nations" was published in 1758.
- (24) It is the opinion of some writers that the contemporary rediscovery of just war tradition began in the decades between the First and the Second World Wars with such studies as Alfred Vanderpol's "La

"Doctrin Scholastique Du Droit De Guerre"; James Brown Scott's "The Spanish Origin Of International Law"; John Eppenstein's "The Catholic Tradition Of The Law Of Nations"; and the Carnegie Institute series "Classics Of International Law", which made obvious both the continuity of modern tradition on the restraint of war and its growth of medieval just war thought.

(25) Beside the general rules of international law, that of universal application, there is another category of rules which have developed in a particular region of the world as between states there located, without becoming rules of a universal character. Thus, it might be distinguished between general and regional rules of international law. Actually, the Soviet approach of international law may be distinguished as it emanates from certain ideology, but this does not signify the existence of two international law systems. However, as far as the regional approach is concerned, we shall refer, here, to some of its aspects, i.e., Asian, African, and the Latin-American international law.

The main interests of the Asian states, upon their revival to national sovereignty, lie in the protection of this sovereignty and identity from the claims of the larger more highly-industrialized states. Corollary to the importance given to the principle of national sovereignty is an equal importance attached to the principle of equality of states. Development, another principle, has largely taken on the aspects of international economic assistance.

The foundation of the African principles of international law is predicted on the awareness of Africans that they are a part of a continent composed of homogeneous as well as heterogeneous groups and linked not only by race and color, but also by history and future expectations, as contained in the concept "Africa for Africans". Essentially, this concept embodies the principle of African independence nationally, continentally, and internationally. However, it also encompasses the principle of non-intervention in domestic and regional affairs.

Latin-American states asserts that they have developed in their relations with one another, certain practices and principles which, in effect, constitute a unique body of international legal principles. The evolution of these principles has occurred since their emergence into sovereign states. These principles, found in the treaties and conventions among these states and their resolutions and declarations, concerning the following areas :

1. mutual respect for sovereignty;
2. equality of states;
3. non-intervention;
4. international law as the standard of conduct;
5. observance of treaties;
6. repudiation of the use of force;
7. pacific system of international disputes;

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8. mutual defence;
9. economic, social, and cultural co-operation; and
10. recognition of the fundamental human rights.

(26.) For example, the European Economic Community, under the Treaty of Rome of March 25, 1957.

(27.) For example, the North Atlantic Security Pact of April 4, 1949.

(28.) For example, the Court originally established by the treaty constituting the European Coal And Steel Community of April 18, 1951, and which is now the Court of Justice of this Community, of the European Economic Community, and of the European Atomic Energy Community under the the Rome Convention of March 28, 1957.

(29.) The European Convention For The Protection Of Human Rights And Fundamental Freedoms, signed at Rome on November 4, 1950.

(30.) Non-Liquet is generally rejected by positive municipal law; where it is not precluded by express enactment, it is precluded by customary law.

(31.) Julius Stone, *Legal Controls Of International Conflict*.

(32.) J.H.W. Verzijl, *International Law In Historical Perspective, Volume I*, pp. 47-89.

(33.) Sura VI : 38.

Chapter V: Sources Of Al-Shari'a Al-Islamiya And International Law<sup>(1)</sup>

A. Sources Of Al-Shari'a Al-Islamiya

The scope of legislation in Al-Islam is restricted by two essential principles; the first, ALLAH in Al-Islam is the absolute sovereign; and the second is that the Holy Prophet is "Khatim AL-Anbiya'a" or "Khatam An-Nabiyyin" (the Seal of the Prophets).

The first principle necessitates the inevitable surrender to the Shari'a of ALLAH, denying this inevitability is denying Divinity. ALLAH says, "And it becometh not a believing man or a believing woman, when ALLAH and His Messenger decided an affair [for them], that they should [after that] claim and say in their affair; and whoso is rebellious to ALLAH and His Messenger, he verily goeth astray in error manifest".<sup>(2)</sup>

The second principle of "Khatim Al-Anbiya'a" derives from the Holy Qur'an, ALLAH says, "Muhammad is not the father of any man among you but he is the Messenger of ALLAH and the Seal of the Prophets and ALLAH is ever aware of things".<sup>(3)</sup> The Holy Prophet Muhammad (peace be upon him), prior to the expedition of Tabbuk (9 A.H. / 630 A.D) decided to leave Ali in charge of Al-Madina for the duration of the fighting. Ali expressed his displeasure at being left out of the fighting force, and the Holy Prophet Muhammad (peace be upon him) said, "Are you not satisfied to relate to me as Harun related to Musa (Moses), except that there is no prophet after me?"

The expression "Al-Khatim" or "Al-Khatam" was given different interpretations.<sup>(4)</sup> The Kufi grammarian Tha'lab (died 291 A.H. / 904 A.D.) held that "Al-Khatim" is the one who sealed the prophets, and "Al-Khatam" is the best of prophets in character and physical constitution. But this interpretation did not gain universal acceptance. According to most commentators the meaning of "Al-Khatim" or "Al-Khatam" is the last.

It is attributed to A'isha (the wife of the Holy Prophet "peace be upon him") that she said, "Say [that the Prophet is] Khatam An-Nabiyyin (the Seal of the Prophets) and do not say there is no prophet after him". This tradition which is not so widely quoted interpret as "Khatam An-Nabiyyin" as the last prophet. The second part of this tradition indicates the second coming of Isa (Jesus) which does not contradict with "Khatam An-Nabiyyin" because Isa is an ancient prophet.

It was alleged that, as the son of Muhammad, Ibrahim, who died an infant when he died, was also destined to prophethood, and his survival was therefore contingent on the possibility of a prophet emerging after Muhammad's death. Goldziher considered the tradition about Ibrahim to be part of an anti-Shi'i trend designed to undermine the idea of the hereditary character of spiritual dignity. In replying to this interpretation of the finality of Muhammad's prophethood, Friedman quoted Ibn Abd

Al-Barr who rejected the idea that sons of prophets are necessarily prophets themselves, Ibn Abd Al-Barr says, "If this were so, all people would be prophets because all are descendants of Nuh (Noah) who was a prophet". In the opinion of Friedman, there seems to be no real reason to regard the traditions about Ibrahim in the context of the Sunni-Shi'i controversy. The Shi'is always stressed that those entitled to succeed the Prophet were the descendants of Ali and Fatima. Any dignity bestowed upon Ibrahim, the son of a Coptic slave-girl, would therefore not have enhanced their prestige.

Friedman refers to the opinion of certain Suffi writers, such as Ibn Al-Arabi, who believed in a continuity of non-legislative prophethood as distinct from legislative prophethood. This distinction is based on another distinction between a rasul (Messenger), who is a person to whom ALLAH reveals a book and a law; and a nabi (prophet), who is a person who is commanded by ALLAH to reaffirm and propagate a law which had preceded his. In fact, this view cannot be accepted because the Holy Qur'an and the Hadith of the Holy Prophet Muhammad (peace be upon him) are decisive in the finality of the prophethood by Muhammad (peace be upon him). It is not possible to raise any doubts about this matter, because fourteen centuries after the advent of Al-Islam there is no evidence that a rasul or nabi was sent after Muhammad (peace be upon him).

The principle that Muhammad (peace be upon him) is "Khatam Al-Anbiya'a" makes Al-Islam, the expression of the unity of belief, not only a theoretical thought, but a practical system, that is the Islamic system of life. The Holy Prophet (peace be upon him) was not only a Messenger, but was also a leader who explained Al-Shari'a, the Divine Law, and reared his people in accordance with the Islamic method.

Given these facts, it may seem that, in Islamic life, the human will has no role in legislation, because ALLAH is the sole legislator. In fact, Al-Islam does not close the door completely, but establishes the limits within which the human will, guided by Al-Shari'a, may participate. As regards the application of Al-Shari'a, the different affairs of human life may be divided into four segments :

1. The first segment is completely subject to certain rules specified by Al-Shari'a.
2. The second segment comprises affairs not subject to specific rules, but analogous affairs regulated by Al-Shari'a.
3. The third segment comprises affairs not regulated by Al-Shari'a, but subject to common principles. The regulation of these affairs must be restricted by these principles.
4. The fourth segment includes affairs never, explicitly or implicitly, regulated by any rule or principle of Al-Shari'a. Such affair must be regulated in compliance with the spirit and general principles of Al-Shari'a.

Thus, the participation of the human will in legislation is an exception from the general rule. Such participation is not an exercise in personal consideration, but is governed by specific rules that regulate similar affairs, the common principles established for certain affairs, or the spirit and general principles of Al-Shari'a as the case so requires. By no means, is man considered a legislator.

The sources from which the doctrines and precepts of Al-Islam are derived, or the foundations on which they rest, are :

- A. the Holy Qur'an;
- B. the Sunna;
- C. the Ijma' (Unanimous Agreement or Consensus); and
- D. the Qiyas (Analogy or Reasoning).

The Holy Qur'an and the Sunna are called "Al-Adilla Al-Qat'iyya" (the Absolutely Sure, Infallible Arguments or the Primary Sources); while the Ijma' and the Qiyas are called "Al-Adilla Al-Ijtihadiyya" (the Arguments Obtained By Exertion or Secondary Sources). All the four sources are called "Al-Adilla Al-Shar'iyya" (the Proofs of the Divine Law) or "Al-Adilla Al-Naqliyya" (the Traditional Proofs) in distinction from "Al-Adilla Al-Aqliyya" (the Proofs of Reason).

We believe that the only sources of Al-Shari'a Al-Islamiya, are a single original source, i.e., the revelation; and one subordinate source, i.e., the Ijma'.

## 1. The Original Source Of Al-Shari'a, The Revelation

The revelation is the original source of Al-Shari'a Al-Islamiya. If a certain system replaced the revelation by other sources derived from other origins; such system must, necessarily, be deemed illegal. The revelation consists of the Holy Qur'an and the Sunna.

### A. The Holy Qur'an

The Holy Qur'an seeks essential objectives :

1. To secure the faith in the message of the Holy Prophet (peace be upon him) in his call to Al-Islam. The Holy Qur'an, as a Divine miracle, challenge the Arabs who discredited Muhammad; ALLAH says, "And if ye are in doubt concerning that which We reveal unto Our slave [Muhammad], then produce a Sura of the like thereof, and call for your witness beside ALLAH if ye are trustful. And if ye do it not, and ye can never do it - then guard yourselves against the Fire prepared for the disbelievers, whose fuel is man and stones".<sup>(5)</sup>

2. As a source of guidance to the right path for all peoples at all times; ALLAH says, "And thus have We inspired in thee [Muhammad] a spirit of Our Command. Thou knowest not what the Scripture was, nor what the Faith. But We have made it a light whereby We guide whom We

will of Our bondmen. And lo ! thou verily dost guide unto a right path".<sup>(6)</sup> The Holy Qur'an is a guidance not only for men, but also for jinn; ALLAH says, "Say [O Muhammad]: It revealed unto me, that a company of the jinn gave ear, and they said : Lo ! we have heard a marvellous Qur'an, Which guideth unto righteousness, so we believe in it and we ascribe no partner unto our LORD".<sup>(7)</sup>

The Holy Qur'an contains all the principles needed to secure the happiness of man in his life, and a good reward in the Hereafter. ALLAH says, "And We reveal the Scripture as an exposition of all things";<sup>(8)</sup> and He also says, "We have neglected nothing in the Book [of Our decrees]".<sup>(9)</sup>

The Muslims must abide by the Holy Qur'an, which was revealed by ALLAH, and decision rest with Him. ALLAH says, "And lo ! it is the revelation of the LORD of the Worlds, which the True Spirit hath brought down upon thy heart, that thou mayst be [one] of the warners".<sup>(10)</sup>

The Sunna is the second part of revelation. The Sunna is as binding as the Holy Qur'an, and all Muslims must heed the Sunna.

Moreover, ALLAH enjoined the obedience to the Holy Prophet (peace be upon him) to His obedience, and He ordains a shameful doom for those who disobey Him and the Holy Prophet, ALLAH says, "Whoso obeyeth the Messenger hath obeyed ALLAH".<sup>(11)</sup>

The revelation, whether the Holy Qur'an or the Sunna, emanate from ALLAH; but the Holy Qur'an alone, is the words of ALLAH. ALLAH says, "And lo ! it is a revelation of the LORD of the Worlds, which the true Spirit hath brought down, upon thy heart, that thou mayst be [one] of the warners, in plain Arabic speech";<sup>(12)</sup> and ALLAH also says, "When before it was the Scripture of Moses, an example and a mercy; and this is a confirming Scripture in the Arabic language, that it may warn those who do wrong and bring good tidings for the regulation".<sup>(13)</sup>

### The Definition Of The Holy Qur'an And Its Different Divisions<sup>(14)</sup>

The Holy Qur'an<sup>(15)</sup> is the revelation of ALLAH to His Apostle Muhammad (peace be upon him), the last of the prophets, and was transmitted to us unchanged in meaning and wording. It is the last Divine Scripture to be revealed to mankind, and the all-embracing source of the true concept of Al-Islam, the last of the Divine religions.

The Holy Qur'an is not directed to specific persons, but to all peoples at all times and to all races. We must accept the Holy Qur'an as a miracle in itself, an everlasting miracle. Al-Islam is the most complete religion and the Holy Qur'an is the most thorough of all Divine Scriptures. The acceptance, or rejection, of Al Islam determines the dividing line between believers and unbelievers.

The Holy Qur'an consists of 114 Chapters, each of which called

"Sura" is an independent part of the book.<sup>(16)</sup> Each Sura consists of three or more verses<sup>(17)</sup> called "Ayat" (lit. Signs, Miracles) as each Verse is considered a Divine miracle. The Holy Qur'an itself is considered Al-Aya Al-Baqiya (the Standing Miracle). The Holy Qur'an refers to both terms "Sura"<sup>(18)</sup> and "Aya".<sup>(19)</sup>

Each of the Suras has a special title, taken from a particular subject dealt with in that Sura. The Holy Prophet (peace be upon him) gave names to certain Suras or portions of the Holy Qur'an.<sup>(20)</sup> The Suras of the Holy Qur'an fall under two categories, those revealed before the Hijra (Muhammad's forced journey from Macca to Al-Madina in 622 A.D.) called the Maccan Suras; and those revealed after the Hijra the Madinan Suras. However, it must be noticed that some of the Suras include Ayat revealed in both Macca and Al-Madina.

The order of compilation of the Suras of the Holy Qur'an was dictated to the Holy Prophet (peace be upon him) by the Archangel Jibril. It is the same compilation to this very day.<sup>(21)</sup>

### The Holy Qur'an As A Divine Scripture

It is held by the Sunni Muslims that the Holy Qur'an has existed from eternity, subsisting in the very essence of ALLAH, when this essential word of ALLAH is meant; but when the written and the pronounced Qur'an is meant, it is not eternal but created. Its texts are held by the Muslims to be unquestionable and decisive, as being Kalam-u-ALLAH (the Words of ALLAH) transmitted through the Holy Prophet (peace be upon him), the last of the messengers.

The Holy Qur'an, like every sacred text, should not be compared with any form of human writings, because, precisely, it is a Divine message in a human language. Some Muslim writers believe that this fact holds true for the Bible as well, which includes, in their opinion, not only the Gospels, but also the Old Testament and the Book of Apocalypse. However, we have no objection to agree with this opinion as far as the original holy books of the Jews and the Christians are concerned, as referred to in the Holy Qur'an.<sup>(22)</sup> The Holy Qur'an itself confirms the holy scriptures revealed before Muhammad (peace be upon him), "He hath revealed unto thee [Muhammad] the Scripture with truth, confirming that which was [revealed] before it, even as He revealed the Torah and the Gospel".<sup>(23)</sup> But, since the Holy Qur'an is the sole sacred scripture guarded by ALLAH Himself, "Lo! We, even We, reveal the Reminder, and lo! We verily are its Guardian".<sup>(24)</sup> According to the Holy Qur'an, these scriptures were changed.<sup>(25)</sup>

The power of the Holy Qur'an lies, in our opinion, in that it is a symbol whose meaning is valid always, because it concerns not a particular fact at a particular time, but truths which being in the very nature of things are perennial. Also, its power lies in its safety from alteration. The Ayat sent down to the Holy Prophet (peace be upon him), were immediately memorized, and he recited them to those around him. Then, he asked the scribes of revelation to write down what had been revealed,<sup>(26)</sup> and kept a copy of it at home. Among the most distinguished

scribes were the four Khalifas, Abu Bakr, Umar, Uthman and Ali; besides, Zaid Ibn Thabet, Ubbay Ibn Ka'ab and others. Among the companions of the Holy Prophet (peace be upon him) who knew the Holy Qur'an by heart were, Abd ALLAH Ibn Mas'ud, Zaid Ibn Thabet, Ubbay Ibn Ka'ab and Mu'adh Ibn Jabal. However, the compilation of the Holy Qur'an was not done in the lifetime of the Holy Prophet Muhammad (peace upon him).

During the time of Abu Bakr, the first Khalifa after the death of the Holy Prophet Muhammad (peace be upon him), Umar advised Abu Bakr to have the Holy Qur'an compiled in one volume, lest it should get lost with the death of those who knew it by heart. Abu Bakr summoned Zaid Ibn Thabet, who knew at best the Holy Qur'an by heart, and commissioned him to write down the Holy Qur'an in one volume. To this end, Zaid collected all the scattered sheets and put them in one volume. Abu Bakr kept these with him till his death, and they were given to Umar, the second Khalifa, who entrusted them to his daughter Hafsa, the Prophet's wife.

Uthman, the third Khalifa, was informed of the divergences in the recitation of the Holy Qur'an as a result of dialect differences. Uthman summoned three people to him, known as the Qurashites, who were known for the knowledge, precision and accuracy in their knowledge of the book, and commissioned them to write it down, according to the last revision made by the Holy Prophet (peace be upon him) with the Archangel Jibril in the last year before his death. The work was done and four copies were made, Uthman kept one himself, and the other three were sent to Al-Kufa, Al-Basra and Damascus. Then, he ordered that all existing versions of the Qur'an be burnt. The four copies remained the authentic text to which people referred to make their own copies.<sup><27></sup> Thus, the promise of ALLAH to safeguard the Holy Qur'an was realized, He says, "Lo ! upon Us [resteth] the putting together thereof and the reading thereof".<sup><28></sup>

The Holy Qur'an has a miraculous nature which emerges in several aspects, although numerous are those that are still unknown to mankind. One of them is the prediction made, some of which have been confirmed by subsequent developments. ALLAH says, "Say : He is able to send punishment upon you from above you or beneath your feet, or to bewilder you with dissension and make you taste the tyranny of one another. See how We display revelations so that they may understand".<sup><29></sup> Of this Aya, Abd ALLAH Ibn Mas'ud, one of the Prophet's companions, said, "It is a Divine prediction for generations to come". This Aya was proved by two World Wars and in many other events.

The Holy Qur'an predicts the permanent dissension among Christians, ALLAH says, "And those who say : 'Lo ! we are Christians', We made a covenant, but they forgot a part of that whereof they were admonished. Therefore, We have stirred up enmity and hatred among them till the Day of Resurrection, when ALLAH will inform them of their handiwork";<sup><30></sup> and also predicts of their continuous domination over the Jews, ALLAH says, "[And remember] when ALLAH said : O Jesus ! Lo ! I am gathering thee and causing thee to ascend unto Me, and I am cleansing thee of those disbelievers and am setting those who follow thee above those who

disbelieve until the Day of Resurrection".<sup>(31)</sup>

### The Holy Qur'an And Al-Shari'a Al-Islamiya

The Holy Qur'an is the comprehensive source of the true concept of Al-Islam in matters of both faith and law. But it must be clear that the Holy Qur'an is neither a legal code in the modern sense, nor is it a compendium of ethics. However, the main characteristic of the legal rules based or derived from the Holy Qur'an is their Divine source.

As regards Al-Shari'a, a distinction must be made between the period after Hijra and the period before it. The Holy Prophet (peace be upon him) lived at Macca for thirteen years and at Al-Madina for ten years. The period after Hijra, unlike that of Macca, was no longer a period of humiliation and persecution of the Muslims. The type of guidance which the Muslims required at Al-Madina was not the same as what they needed at Macca. That is why the Madinan Suras differ in character from those revealed at Macca. The latter are comparatively small in size, and generally deal with the basic beliefs of Al-Islam. They provide guidance to an individual soul. The Madinan Suras, on the other hand, are tem with laws relating to civil, criminal and social, and political problems of life. They provide guidance in a nascent social and political community.

The primary purpose of the Holy Qur'an is to lay down a way of life which regulates the relationship of man with man and his relationship with ALLAH. The Ayat of the Holy Qur'an that contain legal rules concerning worship, whether for Salat, Saum, Zakat or Haj; and concerning Jihad fi sabeel ALLAH, are about one hundred and forty. The Ayat of the Holy Qur'an that contain legal rules relating to dealings such as contracts and pledges, family life, marriage and divorce, penalties and crimes and the administration of justice are about two hundreds. The legal rules included in the Holy Qur'an are mostly contained in Surat Al-Baqara (the Cow);<sup>(32)</sup> Surat Ala-Imran (the Family of Imran);<sup>(33)</sup> Surat An-Nisa'a (the Women);<sup>(34)</sup> Surat Al-Ma'ida (the Table Spread);<sup>(35)</sup> Surat Al-Isra'a (the Nocturnal Journey);<sup>(36)</sup> Surat An-Nur (the Light);<sup>(37)</sup> and Surat At-Talaq (the Divorce).<sup>(38)</sup>

The legal rules of the Holy Qur'an are of two categories, that which has a crystal clear and decisive meaning not open to debate; and another liable to have two or more meanings. An important subject in connection with the exegesis of the Holy Qur'an is the knowledge of what are called muhkam (decisive), which contain the fundamental precepts of Al-Islam and are, therefore, obligatory; and mutashabih (ambiguous) which comprise Ayat liable to different interpretations and more elucidation and are, therefore, not obligatory. This classification is inferred from the Holy Qur'an, ALLAH says, "He it is Who hath revealed unto thee [Muhammad] the Scripture wherein are clear revelations - They are the substance of the Book - and others [which are] allegorical. But in those in whose hearts is doubt pursue, forsooth that which is allegorical seeking [to cause] dissension by seeking to

explain it. None knoweth its explanation save ALLAH. And those who are, of sound instruction say : We believe therein; the whole is from our LORD; but only men of understanding really heed".<sup>(39)</sup> A'isha reported that the Holy Prophet (peace be upon him) - after reciting the previous Aya - said [in connection with the allegorical Ayat], "When you see such Ayat, avoid them, for it is they whom ALLAH has pointed out [in these Ayat]". Abd ALLAH Ibn Umar reported, I went to ALLAH's Messenger (peace be upon him) in the morning and heard the voice of two persons who argued with each other about an Aya, ALLAH's Apostle (peace be upon him) came to us and the signs of anger could be seen on his face, and said, "Verily the [peoples] before you were ruined because they argued about their Book". A'isha also reported, ALLAH's Messenger (peace be upon him) as saying, "The most despicable amongst persons in the eyes of ALLAH is one who tries to fall into dispute with others [for nothing but only to display his knowledge and power of argumentation]".

The Islamic schools of law,<sup>(40)</sup> in their interpretations of probable meanings of passages in the Holy Qur'an and the Sunna, and in their judgments concerning issues, based their legal views on general principles found in the Holy Qur'an such as, all things are fundamentally allowable, unless specifically prohibited; toleration and the lifting of restrictions should be the aim of legislation; eradication of mischief is the aim of administration; necessity permits benefiting by things not otherwise allowable; necessity is given due appreciation; preventing mischief has priority over bringing about welfare; commit the lesser of two evils; mischief is not removed by mischief; and one should suffer private damage to avert general disaster. Such general principles are the guidelines for enacting laws based on Al-Islam. and for the interpretation of Al-Shari'a.

However, it should be clearly understood that Al-Islam does not require people to adhere to any person's individual views on questions which are open to private opinion. Al-Islam does not bind any Muslim to follow a particular person, for no duty is owed other than those duties owed to ALLAH and the Holy Prophet (peace be upon him). Nor did ALLAH or the Holy Prophet (peace be upon him) order anyone to follow a given school of thought. Al-Islam does not recognize as legitimate any tendency to initiate a given school of thought.

We believe that, only ALLAH and the Holy Prophet Muhammad (peace be upon him) know the sound interpretation of the Holy Qur'an. This is inferred from the Holy Qur'an itself, ALLAH says, "None knoweth its explanation save ALLAH";<sup>(41)</sup> and He also says, "And when We read it follow thou the reading; Thou lo ! upon Us [resteth] its explanation thereof".<sup>(42)</sup> Thus ALLAH, the Omni Prudent, taught the Holy Prophet Muhammad (peace be upon him) the explanation of the Holy Qur'an. However, seeking the understanding, and consequently the interpretation of the Holy Qur'an, is not prohibited in Al-Islam; but this requires a certain degree of knowledge, or in other words, this interpretation may be practised by those well-grounded in knowledge.

The important principle to be borne in mind in the interpretation

of the Holy Qur'an, is that the meaning should be sought from within the Holy Qur'an and never should an Aya be interpreted in such a manner that it may be at variance with any other Aya, but more especially with the basic principles laid down in the muhkam (decisive) Ayat.

Another problem relates to the interpretation of the Holy Qur'an, i.e., the idea of naskh (abrogation). It is not only Al-Islam who accepted the idea of naskh, but also Judaism and Christianity.<sup>'43'</sup> The idea of naskh, in itself, is reasonably accepted, as the evolution of mankind requires gradualness in the heavenly messages revealed by ALLAH, the later message abrogates all the previous messages, but not in a matter of belief such as the Oneness of ALLAH, the belief in mala'ika, holy scriptures, messengers and the Hereafter. This fact is undeniable, as there is mutual connection between the change of the messengers, and the change of messages, a fact which could be deduced from the Bible, "For a priesthood being changed, there is made of necessity a change also of law."<sup>'44'</sup> If we confined ourselves to Al-Islam, the Holy Qur'an was revealed piecemeal, also some of the prohibitions were gradually forbidden, which is clear in the prohibition of the strong drinks. This prohibition came into force by steps, first, ALLAH says, "They question thee about strong drink and games of chance. Say : In both is great sin, and [some] utility for men; but the sin of them is greater than their usefulness";<sup>'45'</sup> the next step was a partial prohibition, ALLAH says, "O ye who believe ! Draw not near unto prayer when ye are drunken, till ye know that which ye utter";<sup>'46'</sup> and the third and last step was the absolute prohibition, ALLAH says, "O ye who believe ! strong drink and games of chance and idols and dividing arrows are only an infamy of Satan's handiwork. Leave it aside in order that ye may succeed. Satan seeketh only to cast among you enmity and hatred by means of strong drink and games of chance, and to turn you from remembrance of ALLAH and from [His] worship. Will ye then have done ?"<sup>'47'</sup> Thus, it can be said that humankind progressed through one Divine law to another.

The idea of naskh can also be supported by the Holy Qur'an as it is clear from three of its Ayat. In the first Aya, ALLAH says, "Such of Our revelation as We abrogate or cause to be forgotten. We bring [in place] one better or the like thereof. Knowest thou not that ALLAH is Able to do all things".<sup>'48'</sup> Those who deny the idea of naskh say that the Holy Qur'an in this Aya refers to the abrogation of the law revealed to the Children of Israel, and only the Jews and the followers of previous revelations are addressed in this Aya. They also added that there is no point in supposing that ALLAH should first make the Holy Prophet (peace be upon him) forget an Aya and then reveal a new one in its place. Besides, the Holy Prophet (peace be upon him) never forget what was recited to him by the Archangel Jibril, a matter stated in the Holy Qur'an, "We shall make thee read [O Muhammad] so that thou shalt not forget".<sup>'49'</sup> The word "Aya" has different meanings, and it must not be restricted here, as the context denotes, to "Verse". Notwithstanding the reference in Surat Al-Baqara (Sura II) to the long disputation between the Muslims and the Jews, the context in this Aya came in general terms without any particularization. The other point may be

answered by indicating that ALLAH does what He pleases and there is no question about the Divine Will. To cause an Aya to be forgotten is a type of abrogation whose wisdom sometimes concealed from us. Thus, to cause an Aya to be forgotten is not distinct from its abrogation, and this Aya refers only to abrogation whether by causing it to be forgotten, or by different other means. Therefore, there is no contradiction between this Aya and the other Aya which rendered clear that the Holy Prophet (peace be upon him) never forgot what was recited to him, especially that ALLAH only Who safeguards the Holy Qur'an says, "Lo ! upon Us [resteth] the putting together thereof and the reading thereof";<sup>(50)</sup> and He also says, "Lo ! We, even We, reveal the Reminder, and Lo ! We verily are its Guardian".<sup>(51)</sup>

In the second Aya, ALLAH says, "And when put a revelation in place of [another] revelation - and ALLAH knoweth best what He revealeth - they say : Lo ! thou art but inventing. Most of them know not".<sup>(52)</sup> Those who deny the idea of naskh say that the reference in this Aya is to the abrogation not of the Qur'anic Ayat, but of the previous Divine messages or revelations by the revelation of the Holy Qur'an, and the opponents of the Holy Prophet (peace be upon him) called him a forger, and the entire Holy Qur'an a forgery, and no particular Aya of it abrogated another. They also added that this Aya could not be accepted in support of the idea of naskh, because it is a Maccan Aya, and consequently not dealing with legal topics, since the details of Al-Shari'a were revealed at Al-Madina. Again, they tried to twist the clear meaning of this Aya which directly indicates the Ayat of the Holy Qur'an, and could not be explained as signs or miracles. In fact, the said Aya is a continuation of the challenge made by ALLAH, "Say Verily, though mankind and the jinn should assemble to produce the like of the Qur'an, they could not produce the like thereof though they were helpers of one another".<sup>(53)</sup> The division of the Ayat of the Holy Qur'an into Ayat revealed at Macca and others revealed at Al-Madina; and the assumption that the idea of naskh only relates to that revealed at Al-Madina, are unfounded. There is only one Qur'an, it was revealed piecemeal according to the different circumstances of that period, but it must be recalled that the arrangement of the Ayat of the Holy Qur'an in several Suras was made by the Holy Prophet (peace be upon him) as revealed to him through the archangel Jibril. There are many Suras which contain some Ayat revealed at Macca and others revealed at Al-Madina. Therefore, it cannot be accepted that a Maccan Aya does not abrogate a Madinan Aya, and the idea of naskh is applied regardless of this distinction.

In the third Aya, ALLAH says, "ALLAH effaceth what He will, and establish [what He will], and with Him is the source of ordinance".<sup>(54)</sup> As far as this Aya is concerned, no additional arguments will be added other than that referred to before. However, this Aya confirms the idea of naskh and makes it subject to the Will of ALLAH.

We notice that the first Aya used the expression "abrogate or cause to be forgotten"; the second Aya used the expression "put a revelation in place of [another] revelation"; and the third Aya used the expression

"effaceth". All these terms signify naskh, and there is no difference between any of them.

Different matters such as that of faith, historical matters, promises and threatening can never be abrogated.

Al-Ayat Al-Mansukha (the Abrogated Verses) are divided into three categories :

1. Ayat the sense of which is abrogated but the words remain. For example, Al-Quds qibla was abrogated by Al-Masjid Al-Haram qibla, ALLAH says, "And We appointed the qibla which ye formerly observed only that We might know him who followeth the Messenger, from him who turneth on his heels".<sup>(55)</sup>

2. Ayat the words of which have been abrogated, but the sense remains. The well-known example of this category is the command of stoning adulterers,<sup>(56)</sup> the words of which are no more extant in the Holy Qur'an, but the command still remain obligatory. Ayat Ar-Rajm (the Stoning Verses), according to Ubbay Ibn Ka'ab, are "If the old man and the old woman commit adultery, stone them". Umar Ibn Al-Khattab is reported to have said that, " But for the fear that the people would say : Umar had made an addition to the Book of ALLAH : I would have written it (in the Holy Qur'an) because we have read it". It is said that Ayat Ar-Rajm were read in Surat Al-Ahzab (the Clans)<sup>(57)</sup> as reported by Ubbay. It is reported that A'isha have said, "The Sura of the Clans consisted at the time of the Prophet of two hundred Verses". Also, Ubbay is reported to have said, "It used to be as long as the Sura of the Cow". (286 verses)

3. Ayat abrogated both as to the sense and words. A'isha says that an earlier a Qur'anic commandment was revealed that ten feedings of a suckling child were necessary to establish foster-mother. But later on, she adds, it was abrogated and only five feedings were considered enough. A'isha further says that when the Holy Prophet (peace be upon him) died, it was read as a part of the Holy Qur'an.<sup>(58)</sup>

A question may be raised, as to whether any Qur'anic command can be abrogated by the Sunna and vice versa. One opinion is that the Sunna of the Holy Prophet Muhammad (peace be upon him) decides upon the Qur'an, while the Holy Qur'an does not decide upon the Sunna. Ash-Shafi'i maintains that the Holy Qur'an commands can be abrogated only by the Holy Qur'an, and those of the Sunna only by the Sunna. He argues that the Holy Prophet Muhammad (peace be upon him) was ordered by ALLAH to follow the revelation and not to change the Qur'an itself. He contends also that if the Qur'an abrogates any Sunna of the Prophet Muhammad (peace be upon him) while the Prophe himself does not point to its abrogation, this means that all the commands from him, not conforming to the Qur'an, would be taken as abrogated by the Qur'an. We believe that since the revelation consists of both the Holy Qur'an and the Sunna of the Holy Prophet Muhammad (peace be upon him), then the Qur'anic command can be abrogated by the Sunna or vice versa. It must be taken into

consideration that there are many cases in which the precise sense and the manner of application of the Qur'anic injunctions and statements was determined by the Sunna of the Holy Prophet Muhammad (peace be upon him).

We also wish to draw the attention to the misconception of some writers that naskh (abrogation) sometimes signifies takhsis (particularization). In fact, there are so many differences between either conception. Some of these differences that are naskh must be proved by either the Holy Qur'an or the Sunna, the abrogating must follow the abrogated, and naskh may be existed even if the commanded or the prohibited is only one person (for example the Holy Prophet "peace be upon him"); while takhsis may be occurred whether by the Qur'an, the Sunna, or other evidences. Also the takhsis may be contemporary, preceding or following to the general, and takhsis should not be existed if the commanded or the prohibited is only one person.

Finally, there was no naskh after the death of the Holy Prophet Muhammad (peace be upon him).

## 2. The Sunna

### The Definition Of The Sunna

The term Sunna means "Pathway", "Behaviour", "Practice", "Manner Of Acting" or "Conduct Of Life". The term implies the normative practice or the model of behaviour, whether actually good or bad of a particular individual, sect or community. <sup>(59)</sup>

The Holy Qur'an uses the term "Sunna" in different senses, first, this term refers to the practice or behaviour of the former generations, ALLAH says, "Tell those who disbelieve that if they cease [from persecution of believers] that which is past will be forgiven them; but if they return [thereto] then the example of the men of old hath already gone [before them for a warning]"; <sup>(60)</sup> and the other sense is ALLAH's Sunna, ALLAH says, "That was the way of ALLAH in the case of those who passed away of old; thou wilt not find for the way of ALLAH aught of power to change". <sup>(61)</sup> However, in both the two uses of the term "Sunna" it denotes practice or behaviour.

The technical sense of the term "Sunna" in Al-Shari'a Al-Islamiya indicates the doings of the Holy Prophet (peace be upon him). In its original meaning the term "Hadith" indicates the sayings of the Holy Prophet (peace be upon him). Both terms "Sunna" and "Hadith" are often used interchangeably as if they were synonymous, while strictly speaking they are not; but in effect both cover the same ground, and are applicable to the Holy Prophets actions, practices and sayings. Hadith, being the narration and record of the Sunna but containing, in addition, various prophetic and historical elements. The Hadith and the revelation stopped with the Holy Prophet's death.

### The Importance Of The Sunna

In fact, it is difficult for a non-Muslim to understand the spiritual significance of the Holy Prophet Muhammad (peace be upon him) and his role as a prototype of the religious and spiritual life. The reason for this difficulty is that the spiritual nature of the Holy Prophet (peace be upon him) is veiled in his human one, and his spiritual function is hidden in his duties as the guide of men, and the leader of a community. It was the function of the Holy Prophet (peace be upon him) to be, not only a spiritual guide, but also the organizer of a new social order with all that such a function implies. And it is precisely this aspect of his being that veils his spiritual dimension from foreign eyes. This is particularly true in the modern world in which religion is separated from other domains of life and most modern men can hardly imagine how a spiritual being could be immersed in the most political and social activity.

The spirituality of Al-Islam of which the Holy Prophet Muhammad (peace be upon him) is the prototype is not the rejection of the world but the transcending of it through its integration into a centre and the establishment of a harmony upon which the quest for the absolute is based. The Holy Prophet (peace be upon him) in these qualities, he so eminently displayed is the prototype of human and spiritual perfection as well as the guide towards its realization.

Although the actions of the Islamic community were governed by the Holy Qur'an, it was the Holy Prophet (peace be upon him) who gave its injunctions a practical shape and concrete form. The Holy Qur'an, generally, deals with the broad principles or essentials of religion, going into details in very rare cases. The details were generally supplied by the Holy Prophet himself, either by showing in his practice how an injunction shall be carried out, or by giving an explanation in words. Thus, the way in which the Holy prophet (peace be upon him) acted, upon the Holy Qur'an became the law of the community. Therefore, the according to Holy Qur'an and the Sunna of the Holy Prophet Muhammad (peace be upon him) - being the two elements of the revelation - are so related to each other, rather interwoven in such a way that they cannot be separated from each other. Some writers called them an "Integral Whole".

The Sunna, or Hadith, is largely important in understanding the meaning of the Holy Qur'an, exploring the principles within the folds of the Holy Book, and showing the way to understand them. Without the Sunna, the Holy Qur'an would have stayed unexplored and mysterious. The Sunna expounds the principles of the Holy Qur'an, by detailing the general, clarifying the obscure, specifying the common, and limiting the absolute.

Generally speaking, the legislative function of the Sunna may be classified under the following categories :

First :The Sunna in which the Holy Prophet Muhammad (peace be upon him) is reported to have acted, spoken or decided in certain matters in such a manner as to exercise his capacity as an Apostle, as when he clarifies a general concept in the Holy Qur'an, specifies a Qur'anic generalization, explains a matter of worship, legitimacy, prohibition, faith or morality. This kind of the Sunna is held as a general legislation till the Day of Resurrection. If we are requested by such Sunna to do or not to do something, we have to obey the ordinance.

Second :The Sunna or practices, which were done by the Holy Prophet Muhammad (peace be upon him) as an Imam of the Islamic Community, as when he dispatched armed troops to fight the enemy, or spent from the budget of the Exchequer on certain affairs, or collected money from those concerned, or when he appointed justices and governors, concluded treaties and alliances, and exercised such responsibilities, as Imam for the management of the Community welfare. *Legislatively, the Sunna of this category is not binding and they are put into practice only if the Imam finds them necessary or suitable.*

Third :The Sunna reported in the action of the Holy Prophet Muhammad (peace be upon him) as a judge and arbiter. Besides, being a Messenger conveying ALLAH's commandments, and a general leader of Muslims who managed and settled their affairs, he was, also, a judge who decided on their lawsuits. The principle that applies here is that this group of the Sunna is not a general legislation. Obviously, all claims and lawsuits are to be settled in a court, and adjudicated by a judge.

The Shi'is recognize the Sunna as a source of religious rules, but they judged it from their own standpoint and only considered the Sunna reliable when it was based on the authority of Ali and his adherents.

The Holy Prophet's Sunna was existed since the very dawn of Al-Islam. It is related that when Mu'adh Ibn Jabal on being appointed governor of Yaman by the Holy Prophet Muhammad (peace be upon him) was asked how he would judge cases, his reply was, "by the book of ALLAH". Then he was asked what he would do if he did not find a direction in the Book of ALLAH, he replied, "by the Sunna of the Apostle of ALLAH". The Sunna was, therefore, recognized in the lifetime of the Holy Prophet Muhammad (peace be upon him) as affording guidance in different, especially religious, matters.

The Holy Prophet (peace be upon him) was described by the Holy Qur'an as endowed with high moralities, ALLAH says, "And lo ! thou art of tremendous nature";<sup>(62)</sup> thus, he was deemed as "Uswa Hasana". (Exemplary Model), ALLAH says, "Verily in the Messenger of ALLAH ye have a good example for him who looketh unto ALLAH and the Last Day, and remembereth ALLAH much".<sup>(63)</sup> There is no doubt about the binding force of the Sunna, ALLAH says, "And whatsoever the Messenger giveth you take it. And whatsoever he forbids, abstain [from it]".<sup>(64)</sup> But, we believe that this binding force rests upon love of ALLAH, a base which is much stronger than any other bases of the binding force of positive law, and which is a distinctive characteristic of Al-Islam, ALLAH says, "Say [O

Muhammad, to Mankind] : If ye love ALLAH, follow me; ALLAH will love you and forgive you your sins, ALLAH is Forgiving, Merciful".<sup>(66)</sup>  
This is due to the transcending nature of Al-Shari'a.

### The Different Types, And Classes Of The Sunna

The different types of the Sunna may be classified as follows :<sup>(66)</sup>

First : Sunnat Al-Fi'l (Sunna of Action), which is an action or practice of the Holy Prophet Muhammad (peace be upon him).

Second : Sunnat Al-Qaul (Sunna of Saying) or Hadith,<sup>(67)</sup> which is the saying of the Holy Prophet Muhammad (peace be upon him) that has a bearing on a religious question.

Third : Sunnat At-Taqrir (Sunna of Approbation, Confirmation), which represents the Holy Prophet's silent approval of the action or practice of another.

As far as the Isnad (Transmission) is concerned, the types of Hadith are divided into the following categories :

First : Al-Mutawatir (that Which Comes Successively or Repeated by one After Another),<sup>(68)</sup> is a Hadith transmitted uninterruptedly by many or successive authorities or people who are not liable to meet on falsehood, so that the very fact that is commonly accepted makes its authority unquestionable. In this way, the Isnad is regularly traced back till the chain arrives to the first authority, the Holy Prophet (peace be upon him).<sup>(69)</sup> Al-Mutawatir is the Hadith accepted by every Muslim generation down from the time of the Holy Prophet (peace be upon him) without criticism of the narrators.<sup>(70)</sup>

Second : Al-Ahad or Al-Wahid (the Isolated). This category is divided into the following kinds :

1. Al-Mashur (the Well-Known), is a Hadith which is reported in more than two channels at every stage.
2. Al-Aziz (the Strong), is a Hadith which is not reported in less than two channels.
3. Al-Gharib (the Strange or the Unfamiliar), is a Hadith in whose link of narrators there is only a single person at any given stage.

It must be noted that in this classification, the condition of the Hadith being narrated by more than two or two persons at any stage applies only to the three generations following the companions of the Holy Prophet (peace be upon him).

In terms of trueness and weakness, the Hadith is classified into three categories :

1. As-Sahih (the Sound), is a Hadith free from falsity, and in whose Isnad there is no defect; it is transmitted by a reputed and trustworthy person from one like him with no deviation or defectiveness along the entire chain which goes back to the first authority. <sup>(71)</sup>
2. Al-Hasan (the Fair), is a Hadith in whose Isnad does not include a transmitter guilty of falsehood. However in the chain of authorities there is one known for a short in memory and lack of precision, without being guilty of falsehood.
3. Ad-Da'if (the Weak), is one where there is no doubt as regards its context or in its Isnad, but some of its transmitters are not reliable or have been guilty of some sort of innovation. <sup>(72)</sup>

### The Collection Of The Sunna

According to some writers, the stages of the collection of the Sunna may be divided into five stages :

#### The First Stage

This stage covers the lifetime of the Holy Prophet (peace be upon him). During his lifetime, there was a fear of confusion between the Qur'anic text and the Hadith, although the writing of anything beside the Holy Qur'an is not considered to be illegal. The Holy Prophet (peace be upon him) however sometimes objected to the writing down of the Hadith, but used to give instructions with regard to the transmission of what he taught. In this sense, he laid down an obligation on everyone of his followers to transmit his words to others. "Let him who is present deliver to him who is absent", is the concluding sentence of many of his important utterances. He also wrote letters; and treaties which were also put down in writing. All these evidences afford a clear proof that the work of the preservation and *transmission of the Sunna* had begun in the lifetime of the Holy Prophet (peace be upon him).

#### The Second Stage

This stage started after the death of the Holy Prophet (peace be upon him), and ended with the extinction of those who might report any Hadith. Certain factors affected this stage. When a right was claimed on the basis of a judgment or saying of the Holy Prophet (peace be upon him), and evidence was demanded as to the authenticity of that saying, which led, simultaneously, to the wide circulation of the Hadith was the great concern of the companions of the Holy Prophet (peace be upon him) of the dissemination of the knowledge of the Hadith.

#### The Third Stage

This stage started with the passing of the generation that had seen and heard the Holy Prophet (peace be upon him) directly. During this stage, Umar Ibn Abd Al-Aziz, who ruled towards the close of the

First Hijri Century, was the first person who issued definite orders to the effect that written Compendia of the Hadith should be done, as he requested Abu Bakr Ibn Muhammad to write down what he could find of the Sunna. The importance of this incident lies in the fact that the Khalifa himself took an interest in the collection of the Hadith, but he died after a short reign of two and half years, and his successor did not seem to have interested himself at all in this matter. However, the work was taken up independently of government patronage in the following century.

### The Fourth Stage

Due to the extensive dissemination of Hadith, in various centres, the work of preserving the name of the transmitter along with the Hadith itself, became more difficult and accordingly, written Compendia of Hadith had become indispensable. Thus, before the middle of the Second Hijri Century written Compendia began to emerge. <sup>(73)</sup>

Although these Compendia were a great improvement on the oral transmission in the work of collecting Hadith, they were however incomplete, and this was due to two reasons. Since the object of this compilation was the collection of such reports that touched on the daily life of the Muslims; reports relating to a large number of topics, such as faith, the life of the Holy Prophet (peace be upon him), comments on the Holy Qur'an, or Jihad were outside their scope. And secondly, every author collected only such reports as were taught in the centre at which he worked.

### The Fifth Stage

In the Third Hijri Century, the great work of collecting the Hadith was brought to completion. The Compendia of the Hadith made during this stage could be divided into two kinds :

1. The first kind is called "Al-Musnad" (the Supported), whose object is to furnish the supports "dicta probantia" by tracing the Hadith back through various transmitters to the companions of the Holy Prophet (peace be upon him) on whose authority it rested. The Compendia of the Hadith known as Musnads were arranged, not according to the subject-matter of the Hadith, but under the name of the companion on whose final authority the Hadith rested.

2. The second kind is called "Aj-Jami'i" (One Who Gathers Together) or "Al-Musanaf" (Compiled Together). Aj-Jami'i not only arranges reports according to their subject-matter, but is also of more critical tone.

### The Reliable Reference Sources Of The Sunna

It is a remarkable fact, according to the greatest Muslim historian Ibn Khaldun, that the greater number of scholars who have distinguished themselves among Muslims by their ability in the science of Hadith are

of alien origin. All the great scholars who have written about the fundamental principles of jurisprudence, all those who have distinguished themselves in the dogmatic theology, and the greater number of those who have specialized in the interpretation of the Holy Qur'an, were Persians, the teaching of all science having become a special art of the Persians. Similarly those persons who knew the Hadith were of Persian origin. However, some modern researchers tried to prove that quite a number of these scholars mentioned as Persians, were of Turkish origin.

The fact that the distinguished authors in the science of Hadith were non Arabs appears when we review the Compendia of the Hadith now considered as the greatest authority, known as "As Sihah As-Sitta" (the Six Reliable Compendia).<sup><74></sup> They are as follows : <sup><75></sup>

1. Sahih Al-Bukhari, compiled by Muhammad Ibn Isma'il Al-Bukhari (died in 56 A.H.). His plan was only to collect genuine or sound ahadith.<sup><76></sup> He quotes a verse of the Holy Qur'an whenever he finds one complying with his text before he cites a Hadith.
2. Sahih Muslim, compiled by Muslim Ibn Al-Hajaj Al-Kosheiry (died in 261 A.H.). Muslim, a disciple of Al-Bukhari, followed the plan of his master in editing his Compendium, receiving in it only what he considered genuine ahadith, of which he collected 4000 Hadiths.<sup><77></sup>
3. Sunan Abu Dawood, compiled by Abu Dawood Sulaiman Ibn Ash'ath As-Sejistani (died in 275 A.H.). His Compendium contains 4000 Hadiths.
4. Jami'i At-Termidhi, which is known as Sunan At-Termidhi, compiled by Muhammad Ibn Isa At-Termidhi (died in 279 A.H.). At-Termidhi was a disciple of Ibn Hanbal.
5. Sunan Ibn Maja, compiled by Abu Abd ALLAH Ibn Maja Al-Qazwini (died in 273 A.H.).
6. Sunan An-Nisa'i, compiled by Abu Abd Ar-Rahman Ibn Shuaib An-Nisa'i (died 303 A.H.).

### The Authenticity Of The Sunna, And The Adverse European Criticism

During the lifetime of the Holy Prophet (peace be upon him) some forged ahadith were falsely attributed to him, and of course this fabrication, after his death, became much easier. The Holy Prophet (peace be upon him) said, "For those who forge lies against me, their seat shall be the Everlasting Fire".

This is why the scholars of the Hadith took pains to verify how regularly the transmitter could memorize the prophetic ahadith, and thus compared his reports with one another and with those of others. When they found considerable mistakes and improper memorization on his part, they considered his reports weak, though there was no defect in his haracter or sincerity.

Also, those scholars took pains to investigate carefully the qualities of the Hadith's transmitters. This required a knowledge of such people's living, so that on this basis scholars classified them in terms of standing, confidence and morals.

They requested the mention of the names of those who successively had passed the text of Hadith from one to another, as a confirmation of the acceptability of the Hadith. They also required an investigation of the reported text and a production of the original expression without modification.

One of the scholars, Shah Abd Al-Aziz, in his book "Al-Ujala An-Nafi'a" (A Helpful Report) makes a resume of the standards of verification, and according to them a report was not accepted when :

1. the Hadith was opposed to recognised historical facts;
2. the transmitter is an innovator and the reported "hadith" defames one of the companions of the Holy Prophet (peace be upon him), or the transmitter is one of the Kharijis (a sect of Muslim dissenters), and the reported "hadith" defames the Prophet's family. If, however, such a Hadith was corroborated by an independent testimony, it was accepted;
3. the "hadith" is reported by only one transmitter, requesting Muslims to abide by some principle;
4. the time and circumstances of the narration contained evidence of the "hadith's" forgery;
5. the "hadith" disagrees with reason, or against the plain teachings of Al-Islam;
6. the "hadith" as reported by one person mentions an event which did not happen; had it happened indeed, people would have heard it, and many would have reported it;
7. the content of the "hadith" is too trivial to agree with the Holy Prophet's greatness, and its mode of expression is "rakik" (unsound or incorrect) to compete with the Holy Prophet's eloquent Arabic;
8. the "hadith" includes a severe penalty for a trifle misdeed, or a too great reward for a slight good deed;
9. the "hadith" talks of prophets and messengers as rewarding people for their righteous deeds; and when
10. the transmitter confessed that he fabricated the reported "hadith".

Thus, it is clear that the scholars of the Hadith gave great

concern to its authenticity.

As regards the adverse European criticism of the Sunna and the reply to this criticism, it can be summarised in the following :

1. The rejection of the concept of the Sunna by the Orientalists because of the rare use of the term "Sunna of the Prophet" in early literature. The existence of the term "Sunna of the Prophet" is not the necessary index for the existence of its concept. The main point is that the Muslims considered the Prophet's behaviour an ideal pattern and example for them since the inception of the revelation. This is an adequate proof for the existence of its concept from the early days of the Holy Prophet (peace be upon him). We referred before to the Hadith of Mu'adh Ibn Jabal which confirms the existence of the term "Sunna of the Prophet" even during the lifetime of the Holy Prophet Muhammad (peace be upon him).

2. Some Orientalists tried to prove that the Sunna in its Islamic context originally had a political rather than a legal connotation; as it is referred to the policy and administration of the four Khalifas who came after the Holy Prophet (peace be upon him). They pretend that the term "Sunna of the Prophet" was first used by the Kharijis, and also pretend that this term was introduced into Al-Shari'a towards the end of the First Hijri Century by the Iraqis. This criticism purposely ignores the testimony of the Holy Qur'an as regards the need for the concept of Sunna. The Holy Qur'an commands Muslims in general terms to follow the pattern of the Holy Prophet's behaviour in all fields of life.

3. Some Orientalists have the impression that the vast mass of reports taught at different centres in the Third Hijri Century was fabricated. This criticism is based on a misconception. For example, it is true that it is related that Al-Bukhari took cognizance of 600,000 reports and knew some 200,000 of them by heart, but it is not true that reports not contained in his Compendium were found by him to be false or fabricated. Considering the variety of transmitters, it is easy to understand that 600,000 reports did not mean so many reports coming through different transmitters, many of them referring to the same incident or conveying the same subject-matter with or without variation of words.

4. Some Orientalists have confused the Hadith with the tales read in the biographies of the Holy Prophet (peace be upon him). In reply to this criticism, it must be stated that many careless commentators confused Hadith with Jewish and Christian stories and made free use of the latter as if they were so many tales.

Therefore, no Muslim scholar has ever attached the same value to biographical reports as Hadith narrated in the said Compendia. On the other hand, all Muslim critics recognize that the biographers

never made efforts to sift truth from error.

5. Some Orientalists have a prevalent idea that the Muslim critics of the Hadith have never gone beyond the transmission line, and that the subject-matter of the Hadith has been left quite untouched. Suggestions have been made that even the companions of the Holy Prophet (peace be upon him) were at times so unscrupulous as to fabricate Hadith, while it should be common knowledge that the strictest Muslim critics of the transmitters are all agreed that when a Hadith is traced back to the companions of the Holy Prophet (peace be upon him), its authenticity has been placed beyond all question. For this criticism, the standard rules for judging whether a certain Hadith was spurious or genuine - which they were summarised by Shah Abd Al-Aziz - provide a decisive argument against any criticism as far as the subject-matter of Hadith is concerned. In addition to these rules, another very important test was applied to verify the trustworthiness of Hadith was commanded as directed by the Holy Prophet (peace be upon him) himself. "There will be narrators", he is reported to have said, "reporting Hadith from me, so judge by the Qur'an, then accept it; otherwise, reject it". The genuineness of this Hadith is beyond all question, as it stands on the soundest basis. As we have mentioned before, Al-Bukhari quotes a verse of the Holy Qur'an whenever he finds one complying with his text, before he citing a Hadith.

However, it must be recalled that, both Muslim and non-Muslim historians are agreed that the Holy Qur'an has been handed down intact, every word and every letter of it; while Hadith cannot claim that purity, as it was chiefly the substance of sayings that was reported.

### B. The Subordinate Source, The Ijma'

The Ijma' (Consensus, Unanimous Agreement, Concurrence) is the unanimous agreement of the mujtahideen (plural of mujtahid)<sup>(78)</sup> of the followers of the Holy Prophet Muhammad (peace be upon him) in a particular age, after the Prophet's death, on a practical question of law. <sup>(79)</sup> This definition excludes the following :

1. The agreement of the public which has no authority, and does not deserve any consideration, since the agreement of the unlearned people raises suspicion on the soundness of its results. <sup>(80)</sup> The Ijma' should be the function of the Ulama', who alone are well-versed in the sciences of Al-Shari'a. The sciences connected with Al-Shari'a are complex and require study before one can claim to be an authority in them. One could do no more than ask the consensus of a body of laymen on the diagnosis of certain disease than on the legitimacy of a certain law. The concept of Ijma' has always implied the consensus of those qualified in matters of Al-Shari'a combined with an interaction with the whole of the community whose results are felt only gradually.

2 The non-legal matters such as those relating to reason.

3. The matters relating to faith because they have been undoubtedly proved.

There was no Ijma' during the lifetime of the Holy Prophet Muhammad (peace be upon him), the only source at that time was the revelation.

The Ijma' is not an independent source of Al-Shari'a, but a subordinate source resting on the revelation, i.e., the Holy Qur'an and the Holy Prophet's Sunna. Thus, the Ijma' must be supported by an argument derived from the revelation. This complies with the prohibition of ALLAH included in the following Aya, "[O man], follow not that whereof thou hast knowledge".<sup><e1></sup> Giving opinion in matters related to religion without evidence is a greater wrong, ALLAH says, "These, our people, have chosen [other] guides beside Him though they bring no clear warrant [vouchsafed] to them. And who doeth greater wrong than he who inventeth lie concerning ALLAH ?"<sup><e2></sup>

The Ijma' finds its justification in the revelation. There are some Qur'anic Ayat which denounce those who follow other than the way of the believers,<sup><e3></sup> ALLAH says, "And whoso opposeth the Messenger after the guidance of [ALLAH] hath been manifested unto, and followeth other than the believers way, We appoint for him that unto which he himself hath turned, and expose him unto hell - a helpless journey's end".<sup><e4></sup> The Holy Prophet (peace be upon him) is reported to have said, "My people will never agree to an error".<sup><e5></sup>

The benefits of the Ijma' are to raise the conjectured argument unto the level of the decisive argument, i.e., by giving a certain meaning by the Ijma' of the Ulama' to the conjectured argument it became decisive; and in case of the decisive argument it is sufficient to refer to the Ijma' rather than to refer to the argument itself.

Like the Prophet's Sunna, the Ijma' too was originally preserved in the memory of the learned men who made the study and material preservation of the Sunna and the Ijma', as well as the Holy Qur'an, their special duty. These learned men were called hafaza (singular hafiz or preserver in memory). This refers to the fact that once the Ijma' was attained, all Muslim generations, one after another, are bound by it.

The Ijma' is said to be three fold :

1. Ijma' Al-Qawl (Agreement Of The Word) or declaration of opinion in words;
2. Ijma' Al-Fi'l (Agreement Of Action or Practice) or expressed in unanimity of action, practice; and
3. Ijma' As-Sukut or At-Taqrir (Agreement Of Silence) or tacit assent by silence or non-interference.<sup><e6></sup>

Some Muslims, blinded by the so-called modernization process,

instead of wanting to make man ALLAH-like, wish to make ALLAH man-like, especially like the Twentieth Century man, who simply equates the Ijma' with the parliamentary "democracy". This, however, is not exactly the case, because first of all the Ijma' can operate only where the Holy Qur'an and the Prophet's Sunna have not clarified a certain aspect of Al-Shari'a, so that its function is in this sense limited, and secondly it is a gradual process through which the community - represented by its Ulama' - over a period of time comes to give its Ijma' over a question of law.

Some contemporary writers suggest that the suitable alternative of the Ijma' in our recent time is the agreement of scientific organizations and institutions in the so-called Islamic states, because they embrace, according to this opinion, so many capable scientists. If they concurred on one opinion on a certain matter, this concurrence may be considered similar to the Ijma'; the opinion of the majority of them could be considered although it would not be similar to the Ijma'. By no means could this opinion be accepted. These institutions and scientific organizations do not embrace all the capable Ulama' who can participate in the Ijma'; besides the capability of some of their members is not beyond doubt; but above all considerations, these institutions and organizations are completely oppressed, or at least fully subject to the so-called Islamic governments, which are nothing but secular governments of Muslim peoples.

Some Western writers maintain that the concept of the Ijma' corresponds to the "Opinio Prudentium" (the Opinion of the Wise) of Roman law, the authority of which was stated by the Emperor Severus (193-211 A.D.). Those writers suggest that this is an influence of the Roman law on Al-Shari'a Al-Islamiya. This view must be rejected. It may be pointed out that the Ijma' of the Muslim Ulama' has nothing to do with the opinio prudentium of the Roman law; but rather quite different in several aspects. Firstly, in Al-Islam, neither the community nor any other known authority has ever vested scholars with such authority as was vested by the Emperor in the "Opinion of the Wise". In other words, there is no hierarchy in Al-Islam. It is true that the Ulama' have claimed the right of Ijma' for themselves, but this was grounded on the Qur'anic Aya<sup>67</sup> which says that among Muslims there should be those who have a deep understanding of the religion. Secondly, every Muslim who possesses the ability of interpreting Al-Shari'a has the right to think and re-interpret Al-Shari'a. Besides, one can challenge the decisions taken by the Ulama', if one thinks that they are not in consonance with the teachings of Al-Islam. This sort of liberty of interpreting Al-Shari'a and for criticizing the Ijma' of the Ulama' is available in Al-Islam; but not in Roman law.

Som writers consider that there is no legal rule, as far as international affairs is concerned, based on the Ijma'. however, we do not believe that this is true. In the time of the first Khalifa Abu Bakr, the Ijma' had concluded that it was right to fight those who refused to pay Zakat even if they professed Ash-Shahada. This Ijma' was based on the firm belief that neglect of part of the religion is neglect

of the whole religion as a whole.

The Shi'is recognise only the Ijma' of the members of the Holy Prophets family, or more accurately they hold that only the descendants of Ali and the Holy Prophet's daughter Fatima are the proper persons to attain the Ijma'.

On the other hand, the Sunni schools of law exclude the Shi'i mujtahideen from the purview of the Ijma'.

### The So-Called Other Sources Of Al-Shari'a Al-Islamiya

In addition to the foregoing sources, writers add so-called other sources of Al Shari'a with some difference in their attitudes. These so-called sources are, Al-Qiyas, Al-Istihsan, Al-Istislah, Al-Istidlal and Al-Istishab. We shall refer to them in brief, and then explain our opinion.

1. Al-Qiyas (literally it means measuring by, for comparing with, or judging by comparing with); as a technical term it refers to the analogical deduction or ratiocination. Some writers believe that the Holy Qur'an refers to Al-Qiyas and the foregoing sources, ALLAH says, "O ye who believe ! Obey ALLAH, and obey the Messenger and those of you who are in authority; and if ye have a dispute concerning any matter refer it to ALLAH and the Messenger";<sup>(22)</sup> other writers believe that the Holy Qur'an refers to Al Qiyas specifically, ALLAH says, "Lo ! We reveal unto thee the Scripture with the truth, that thou mayst judge between mankind by that which ALLAH showeth thee".<sup>(23)</sup>

The jurists use Al-Qiyas to denote a process of deduction by which the law of a text is applied to cases which, though not covered by the language, are governed by the reason of the text. Thus, it is an extension of the law complying with the Holy Qur'an and the Hadith. But even the writers who support Al-Qiyas believe that it is not of equal authority with the Holy Qur'an and the Hadith, for no jurist has ever claimed infallibility for analogical deductions, or for decisions and laws which are based on Al-Qiyas.

2. Al-Istihsan (literally it means considering a thing to be good or preferring it); as a technical term, it refers to the private judgment, not on the basis of Al-Qiyas, but on the public good or the interest of justice. The followers of this method try to support it by quoting from the Holy Qur'an, "And follow the better [guidance] of that which revealed unto you from your LORD before the doom cometh on you suddenly when ye know not";<sup>(24)</sup> they also refer to a Hadith, as the Holy Prophet Muhammad (peace be upon him) is reported to have said, "What Muslims consider better, is better before ALLAH". Imam Malik uses this term in connection with legal decisions for which he cannot find authority in Al-Hadith.

3. Al-Istislah. Both Al-Istislah and Al-Istihsan have a close

relationship, and are sometimes confused. Al-Istislah means a deduction of law based on consideration of public good.

The difference between Al-Istislah and Al-Istihsan is seen only when we inquire into the guiding ideas which form positive foundation for this principle which is negative in its effects. Al-Istihsan argues with the demands of human welfare in the widest sense. We then see that Al-Istislah is more limited and more closely defined in content than Al-Istihsan in so far as it replaces the "finding of good" of the latter by the material principle of "Al-Maslaha" (the Interest). Therefore, Al-Istislah might be contrasted with the more comprehensive and more indefinite general conception of Al-Istihsan.

4. Al-Istidlal (literally it means the inferring of one thing from another); as a technical term, it refers to the inference from customs and usages, and the laws of religions revealed before Al-Islam. It is recognized that customs and usages which prevailed in Arabia at the advent of Al-Islam, and which were not abrogated by Al-Islam, have the force of law. On the same principle, customs and usages prevailing anywhere, when not opposed to the spirit of the Qur'anic teachings or not expressly forbidden by the Holy Qur'an, would be admissible, because according to a well known maxim of the jurists, "permissibility is the original principle", and therefore what has not been declared unlawful is permissible. The only condition required is that it must not be opposed to a clear text of the Holy Qur'an, or a reliable Hadith of the Holy Prophet (peace be upon him).

5. Al-Istishab (literally it means the seeking for a link to something which is known and certain); as a technical term, it refers to a process of setting juristic rules by argument, which means the endeavour to link up a later set of circumstances with an earlier. If, for example, on account of the long absence of someone, it is doubtful whether he is alive or dead, then by Al-Istishab, all rules must remain in force which would hold if one knew for certain that he was still alive. Al-Istishab is based on the assumption that the juristic rules applicable to certain conditions remain valid so long as it is not certain that these conditions have altered. It was especially used by the Shafi'i law school, and with certain limitations among the Hanafi school of law also.

#### Our Opinion On The Other So-Called Sources Of Al-Shari'a Al-Islamiya

It is our opinion that these so-called other sources of Al-Shari'a Al-Islamiya are not, in fact, real sources whether original or subordinate. By analyzing them, we find that they are mere methodical procedures that may lead to a legal decision, and they could not be considered as objective sources. To apply Al-Qiyas, there are four points to be considered :

A. the thing compared with;

- B. the thing compared;
- C. the point of similarity between the two, or the thing common to both; and
- D. the decision resulting from the comparison of both.

The lack of a legal rule of the thing compared with, or the lack of a point of similarity between the thing compared and the thing compared with, render the process of Al-Qiyas not possible.

In other words, the process of Al-Qiyas will not be completed without the existence of the following four conditions :

- A. that the precept or practice upon which it is founded must be of general and not of special application;
- B. Al-Illa (the Cause) of the injunction must be known and understood;
- C. the legal rule (of the thing compared with) must be based upon either the Holy Qur'an, the Sunna or the Ijma'; and
- D. the decision arrived at, must not be contrary to anything declared elsewhere, in the Holy Qur'an or the Sunna.

Thus, there is no source of separate identity called Al-Qiyas, but only a process which may lead, under certain circumstances, to the legal decision. The same principle could be applied to the other methods. Actually, they all are, but modes of practising Ijtihad.

Ijtihad (literally it means exerting oneself to the utmost or the best of one's ability, or the exercise of judgment); as a technical term, it is applicable to a lawyer's exerting the faculties of mind to the utmost for the purpose of forming an opinion in a case of law respecting a doubtful and difficult point. Thus, the immediate purpose of Ijtihad is forming "Ra'y" (an Opinion); and its final purpose is reaching Al-Hukm (the Rule).

The Holy Qur'an recognizes the necessity of the exercise of judgment in order to arrive at a decision; ALLAH says, "And if any tidings, whether of safety or fear, come unto them, they noise it abroad, whereas if they had referred it to the Messenger and to such of them as are in authority those among them who are able to think out the matter would have known it".<sup>(91)</sup> This Aya recognizes the principle of the exercise of judgment which is the same as Ijtihad. The Aya refers to a particular situation, but the principle recognized is a general principle.

The Holy Qur'an compares those who do not use their reasoning faculty to animals, and they are spoken of as being deaf, dumb and blind; ALLAH says, "Lo ! the worst of the beast in ALLAH's sight are the deaf, the dumb, who have no sense".<sup>(92)</sup>

Also, Ijtihad or the exercise of judgment is expressly recognized in the Hadith as the means by which a decision may be arrived at when there is no direction in the Holy Qur'an or the Hadith. The Hadith of Mu'adh Ibn Jabal is regarded as the basis of Ijtihad in Al-Islam. On being appointed Governor of Yaman, Mu'adh was asked by the Holy Prophet (peace be upon him) as the rule by which he would abide. He replied "By the law of the Qur'an". "But if you do not find any direction therein?" asked the Prophet. "Then, I will act according to the Sunna of the Prophet" was the reply. "But if you do not find any direction in the Sunna?" he was again asked. Then, I will exercise my judgment and act on that" came the reply. The Holy Prophet (peace be upon him) raised his hands and said, "Praise be to ALLAH who guides the messenger of His Apostle as He pleases".

Ijtihad may be divided into three classes as follows :

### 1. Ijtihad Fi-l-Shar'a (Legal Exercise Of Judgment)

This class of Ijtihad is supposed to have been limited to the first three Hijri centuries, and practically it centres in the four great masters of the four schools of law who, it is thought, codified all the law and included in their systems whatever was reported from the companions of the Holy Prophet (peace be upon him), and the tabi'in (the generations following the companions). A mujtahid of this class is called "mujtahid mutlaq" (absolute mujtahid). This term refers to the one of general absolute authority, whose sphere of exertion embraces the whole of Al-Shari'a; but it is said that the conditions necessary for a mujtahid of the first class have not been met in any person after the four great masters, and it is further supposed that they will not be met in any person till the Day of Judgment.

### 2. Ijtihad Fi-l-Madhab (Exercise Of Judgment Of A School Of Law)

This class of Ijtihad is said to have been granted to the immediate disciples of the first four great masters. Abu Yusuf and Muhammad Ibn Al-Hasan Ash-Shaybani, the two famous disciples of Abu Hanifa, belong to this class, and their unanimous opinion on any point must be accepted even if it goes against their master. A mujtahid of this class is called "mujtahid-fi-l-madhab" (mujtahid of a special school of law), a term which refers to the one who is in authority within the sphere of one of the schools of law as mentioned before.

### 3. Ijtihad Fi-l-Masa'il (Exercise Of Judgment In Special Questions)

This class of Ijtihad was that of later jurists who could solve special cases that came before them which had not been decided by the mujtahideen of the first two classes. But such decisions must be in absolute accordance with the opinion of the great masters of the four schools of law. The mujtahid of this class is called "mujtahid fi-l-masa'il" (mujtahid of special questions and cases).

It is said that the door of Ijtihad was closed after the Sixth Hijri Century. It is also said at present that there can be only muqallidin, those who reiterate the views of predecessors firmly believing them to be right, regardless of proof or evidence. However, it is a mistake to suppose that the door of Ijtihad was closed after the four great masters. It is quite clear, on the basis of the directions of both the Holy Qur'an and the Hadith, that the free exercise of judgment is allowed, and on the same basis it must be continued.

Thus, it is clear that the other so-called sources of Al-Shari'a are just methods of Ijtihad that lead to the applicable rule in the concerned case. Wahy (revelation) is the only original source of Al-Shari'a; and the Ijma' is the subordinate source. However, it must be added that if Al-Islam adopts rules which were prevalent before the mission of the Holy Prophet Muhammad (peace be upon him), these rules must be considered as Islamic rules and not an independent source of Al-Shari'a.

### Specific Sources Of The Principles Of International Law In Al-Shari'a

In addition to the aforementioned original and subordinate sources of Al-Shari'a there are specific sources of the principles of international law in Al-Shari'a. It must first be stated that nothing will be considered as a source if it contradicts the revelation, i.e., the Holy Qur'an and the Sunna of the Holy Prophet Muhammad (peace be upon him); and the Ijma'. So, it is clearly a misunderstanding, for example, to try to conclude certain principles from historical incidents which are not complying with the revelation, considering them as Islamic principles of international law.

These specific sources are mainly the following :

1. The conventions and treaties concluded between Muslims and non-Muslims. The conclusion of these agreements started from the time of the Holy Prophet Muhammad (peace be upon him) and onwards. Many of these agreements were translated into Latin, but there is a possibility of forgery in these translations which were made by non-Muslims. However, there is no special concern given to prepare a systematic collection of these scattered documents, except for the collection of the political documents of the Holy Prophet's time made by Hamidullah, <sup>(23)</sup> which includes, inter alia, the Holy Prophet's messages to the leaders of other countries.
2. The messages of the Holy Prophet Muhammad (peace be upon him) to the leaders of other countries calling them to Al-Islam, and also his instructions to the military leaders. It must also be added the messages of the Khalifas to the leaders of other countries as well as their instructions to the Muslim military leaders.
3. History and Siyar books are also another important source. This

importance lies in the fact that these books represent the interaction between conception and application or between principles and facts.

#### B. Sources Of International Law<sup>(94)</sup>

In a developed legal system, the legislative process itself, subject to both procedural and often substantive limitations, is explicitly designed to perform the function of transforming political objectives into formally binding law-rules. As Western society became more socially mobile and interdependent, and as technology created serious problems of social and ethical adjustment, the need for more explicit norms to deal with the change led to an increasing dependence upon legislation. Positivism replaced natural law as the dominant jurisprudence, and the basic source of law became the edicts of government rather than the ethical consensus of the people as expressed through custom.

In the international process, the formal equivalent of a legislative process is explicit agreement; but this agreement does not represent all the sources of international law. It is usual in the exposition of these sources to refer to Article 38 of the Statute of the International Court of Justice.<sup>(95)</sup> This Article enumerates the sources of international law, although the word itself is not expressly used, to be applied on disputes submitted to the Court.

#### Preliminary Notes

It may be opportune, before any discussion on the sources of international law, to point at the following :

First : A distinction must be made between international law "jus gentium" and international comity "comitas gentium", the latter has no binding force although observed by states in their mutual intercourse.

Second : A distinction must also be made between the rules of the law in force "lex lata" and the rules in the process of formation "lege ferenda". It is understood that referring to the sources<sup>(96)</sup> of international law excludes international comity and lege ferenda.

Third : The state, according to the current situation of international law, as the law determining body, retains its control over the rules that could be applied in resolving a certain dispute as long as this dispute is handled by diplomatic methods. But, if such a dispute is referred to a judicial tribunal, this tribunal shall have the right to decide what rules should be applied.<sup>(97)</sup>

Fourth : In domestic law, it is common to distinguish the formal sources from the material sources. According to some writers, the "formal sources are the legal procedures and methods for the creation of rules of general application which are legally binding to the addressees";

while "the material sources provide evidence of the existence of rules which, when proved, have the status of legally binding rules of general application".

Since the machinery of law-making does not exist in the international society, it follows that, in international law, the distinction between formal and material sources is difficult to maintain especially if we note that Article 38 does not rest upon the said distinction. However, it may be concluded from this Article that a distinction could be made between the original sources which include those mentioned in sub-paragraphs a, b, and c of paragraph 1; and the subsidiary sources included in sub-paragraph d of the same paragraph 1. All these sources, whether original or subsidiary are to be considered material sources in the sense that they are the actual materials from which an international lawyer determines the rule applicable to a given situation.

### The Material Source Of International Law

#### 1. Law-Making Treaties

Agreement is the law for those who make it, which supersedes, supplements, or derogates from the ordinary law of the land, "Modus et conventio vincunt legem". The ordinary treaty by which two or more states enter into engagements with one another for some special purposes can very rarely be used even as evidence to establish the existence of a rule of a general law; it is more probable that the very reason of the treaty was to create an obligation which would not have existed by general law, or to exclude an existing rule which would have otherwise applied. The development of a treaty rule binding only on parties into a general rule of international law depends upon the political and extra-legal factors operating in the international sphere which, together, influence the acceptance or rejection of a particular rule by the rest of the world community.

The only class of treaties which it is admissible to treat as a source of general law are those which a large number of states have concluded for the purpose either of declaring their understanding of what the law is on a particular subject, or of laying down a new general rule for future conduct, or of creating some international institution. Thus, a distinction may be established between two categories of treaties, the treaty-contracts, and the law-making treaties.

According to some writers, the law-making treaties are of two kinds, treaties enunciating rules of universal international character such as the United Nations Charter; and treaties laying down general or fairly general rules. Treaties of the first kind are called "constitutive treaties", if they are establishing a special regime or an international institution. They do create rights and obligations under international law which non-parties cannot ignore. In the opinion of some writers, Article 2 paragraph 6 of the United Nations Charter <sup>(26)</sup> is principally a guide to political conduct, and even without it the obligations of the Charter relating to international peace and security would have come to be regarded as part of general international law.

Whereas this provision is a justification for conscious political action by the Parties to the United Nations Charter, the process whereby the provisions of a treaty may give rise to legal duties binding on third parties often involves the far less conscious pressure of a large group of states applying the terms of a treaty amongst themselves and, in so far as the treaty lays down rules of conduct, tending to apply the same principles in their relations with non-Parties. On the other hand, unlike the writers who maintain that the United Nations Charter is a formal restraint upon bilateral arrangement which is in conflict with it; other writers generally believe that even a law-making treaty is subject to the limitation which applies to other treaties, that it does not bind states which are not Parties to it. In their opinion, the real justification for ascribing a law-making function to this category of treaties is a practical one, that they do in fact perform the function which legislation performs in a state though they do so only imperfectly; and that they are the only machinery which exists for the purposive adapting of international law to new conditions and in general for strengthening the force of the rule of law between states. (99)

Some writers have criticized the use of the term "law-making" on the ground that these treaties do not so much lay down rules of law as set out the contractual obligations which the States Parties are to respect. It is noticed, by some writers, that some of the conventions and instruments are now adopted by the organs of international institutions instead of being signed by the plenipotentiaries at diplomatic conferences. Accordingly, other writers suggest the expression "normative treaties" as being more appropriate and it would be capable of embracing the following :

1. Treaties operating as general standard-setting instruments, or which states apply either on a "de facto" or a provisional basis, such as the General Agreement On Tariffs And Trade of October 30, 1974;
2. Unratified conventions, significant as agreed statements of principles to which a large number of states have subscribed;
3. "Closed" or "limited participation" treaties opened for signature by a restricted number of states;
4. Treaties formulating regional or community rules;
5. Treaties creating an internationally recognized status or regime, operative to some extent, "erga omnes", such as the Twelve-Power Treaty On Antarctica signed at Washington, on December 1, 1959.
6. Instruments such as Final Acts, to which are annexed International Regulations intended to be applied by States Parties as general rules "inter se", for example the International Regulations of 1960 For Preventing Collision At Sea, formulated by the London Conference of the same year on The Safety Of Life At Sea, and an Annex to the Conference's Final Act.

There are several forms of intergovernmental agreements, and several interchangeable names for the documents customarily used, charter, convention, exchange of notes, and so forth. Such differences do not have, in intention or interpretation, any international significance. Controversy usually focuses on the interpretation of various provisions, or on whether or not an agreement has been terminated or suspended, not in whether it is initially in force. But the growing personal diplomacy by Heads of State, during and since the Second World War, may be productive of new problems in this connection, especially since agreements entered into may, like Yalta and Potsdam, have especially volatile contents.

From the political point of view, the shift from the "balance of power" system to a "bipolar" system has had several consequences for the treaty process. Some writers noted the following :

1. As between members of opposing blocs, and particularly between the United States and the Soviet Union, there is awareness that the opposing bloc will seize immediate political advantages whenever they arise, and little confidence in good faith execution of treaties in which does not continue to be at all times a close balance of benefit and burden.
2. A shift in internal politics that aligns a state with an opposing bloc may have considerable impact on the desirability of preserving many treaty arrangements that had tacitly assumed at least a neutral status.
3. Among bloc members and between blocs and uncommitted nations there is (in sharp contrast to interbloc relations) great reluctance to press treaty rights if to do so is politically unwise, and consequently considerable willingness to renegotiate, amend, and even terminate agreements that are unpopular or that, if pressed, would lead to crises internally or internationally.

In recent times, treaties represent the most important source of international law. There is a strong predisposition to honour treaties faithfully and to comply with their terms. As a result, they add a considerable certainty and stability to the conduct of international affairs. Besides, there has been an astonishing development towards the "codification" of international law which narrowly defined by one authority as "involves the setting down in a comprehensive and ordered form, of rules of existing law and the approval of the resulting text by law determining agency". The deep rooted changes, such as the industrial and economic changes and as the rapid and continuous advance in international communications, have transformed the whole of international life, and led to an urgent and changing demands of the international society. The trend for "codification" has been fortified due to the inadequacy of custom in meeting their urgent and changing demands.

Groups of experts had prepared Drafts which were the subjects of Conferences sponsored by the League of Nations, or the American States. At the advent of the United Nations, its Charter entrusts to the General Assembly an important function, as indicated in Article 13 sub-paragraph 1.a. of the Charter which reads as follows :

"1. The General Assembly shall initiate studies and make recommendations for the purpose of :

- a. Promoting international co-operation in political field and encouraging the progressive development of international law and its codification".

In 1947, the International Law Commission<sup>(100)</sup> was established as a subsidiary organ of the General Assembly of the United Nations to achieve the purpose specified in sub-paragraph 1.a. of Article 13 of the Charter. In practice the Commission has not maintained a strict separation of its tasks of "codification" and "progressive development" of the law.

Most of the Commission's work consists in the preparation of Drafts on topics of international law, whether chosen by the Commission, or referred to by the General Assembly, or the Economic And Social Council. When the Commission completes Draft Articles on a particular topic, the General Assembly usually convenes an international conference of plenipotentiaries to incorporate the Draft Article into a convention which is then opened to states to become parties.<sup>(101)</sup>

## 2. International Custom

In simple traditional communities, custom<sup>(102)</sup> is the major source of law, not because of habit, but because such communities are tradition-oriented. Custom is binding because it is part of a pattern of mutual rights and obligations because it is right, and not because it is expedient. The violator of custom upsets the order of the world for such traditional communities.

Although the terms "custom" and "usage" are often used interchangeably; there is a clear technical distinction between the two. According to some writers, "a usage is a general practice which does not reflect legal obligation", or according to others, "usage is an international habit of action that has not yet received full legal attestation", such as a ceremonial salute at sea. The term "practice" is used by some writers instead of "usage" to indicate the same meaning or the aggregation of steps which are formative of law. The term "custom" is used to indicate the law itself, thus it begins where "usage" or "practice" ends.

Attempts to invoke custom as international law run into difficulties stemming from the differences between a modern international society and a custom-oriented community in which real custom plays a major role, and which is mainly a primary society; but is slowly changing; it is particularistic and ascriptive in its value orientations. The international society is subject to a rapid change; therefore, the progress of the law has come to be more closely bound to the law-making treaties. But, it is possible even today for new customs to develop and to win acceptance as law when the need is sufficiently clear and urgent.

Custom is most frequently invoked to supplement the provisions of

an international agreement, or to provide a norm where no more explicit agreement has been made. In both domestic and international cases, it is used primarily to interpret the explicit provisions of an existing arrangement or to fill in the gaps. Just as states are free not to enter in such arrangements, they may specify the particular conditions. They may usually, as to prospective arrangements, disclaim past practices or common customs. The use of custom in the international community is the predominant method of obtaining order and of deterring acts that frustrate the expectations of others. Since frustration is in any event an irritant that disturbs friendly relations, there is usually a common interest in avoiding the sort of crisis that may be provoked by abrupt change.

In its Judgment of June 27, 1986, the International Court of Justice<sup>(103)</sup> confirmed that an issue may be regulated by both customary international law and treaties, it says, "There can be no doubt that the issues of the use of force and collective self-defence raised in the present proceedings are issues which are regulated both by customary international law and by treaties, in particular the United Nations Charter".<sup>(104)</sup>

Also, in the opinion of the Court, the separate identity of both customary international law and international treaty law does not overlap with each other even if they have an identical content. Although such matter is not possible, the Court says, "The Court does not consider that, in the areas of law relevant to the present dispute, it can be claimed that all the customary rules which may be invoked have a content exactly identical to that of the rules contained in the treaties which cannot be applied by virtue of the United States reservation. On a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content. But, in addition, even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability..... It will therefore be clear that customary international law continues to exist and to apply, separately from a treaty law, even where the two categories of law have an identical content".<sup>(105)</sup>

Custom has two basic elements :

First : The material element which is, in general, a recurrence or repetition of similar acts by states, in a consistent and general manner; but no particular duration is required. Of course, the passage of time will be part of the evidence of consistency and generality. A practice usually becomes binding only when it induces some reliance by the others, and this reliance either must be knowingly induced or at least reasonably anticipated. In addition, there must be some socially useful purpose served by the activity that makes enforcement of practice socially justifiable, something of consequence must be thought to be involved, some importance attached to the conduct. However, it is noted that the rules relating to Outer Space,<sup>(106)</sup> and the Continental Shelf

have emerged from fairly quick maturing practice.

A customary rule may be created, by practice, without it being necessary to prove that every state has agreed to it, therefore, substantial, not complete, uniformity is required. The dissenting minority of states are, as much bound by the formulated rules as those who actively participated in its creation, the source of their obligation residing in the moral necessity which underlies all law. Similar to uniformity, substantial generality of practice, not consensus of states, is required. It is often said that states must "consent" to a custom before it becomes binding upon them, but, more often than not, consent is implied from failure to disclaim or object to what is prevailing. Obviously, consent here, as throughout so much of the law, is a fiction used to square practice with theory. Thus, to take an extreme case, one act by one state in a non-recurring or unique situation may create a binding custom in the absence of precedent to the contrary or changed conditions. However, some writers argue that "silence" or absence of protest, is of very relative value, because it may denote either tacit agreement or a simple lack of interest in the issue. Also, states may not protest for a variety of reasons unconnected with law. They may not know of the practice, or they may be indifferent to it.

Second : The psychological element, usually called "opinio juris sive necessitatis", is the feeling or sentiment of states that their practice is necessary for fulfilling a legal obligation, or according to some writers, it is the mutual conviction of the states that the recurrence of similar acts is the result of a compulsory rule. Some writers do not consider the psychological element to be a requirement for the formation of custom; but it is, in fact, a necessity.

The International Court of Justice in its Judgment of June 27, 1986, on "Military And Paramilitary Activities In And Against Nicaragua" case, is of the opinion that, "Opinio juris may, though with all due caution, be deduced from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly Resolution 2625 (XXV) entitled "Declaration On Principles Of International Law Concerning Friendly Relations And Co-Operation Among States In Accordance With The Charter Of The United Nations". The effect of consent to the text of such Resolutions cannot be understood as merely that of a "reiteration of elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the Resolution by themselves".<sup>(107)</sup>

The evidence of custom may obviously be very voluminous and also very diverse. Particularly important as sources of evidence are diplomatic practice; diplomatic correspondence or exchange of notes; official instructions to diplomats, consuls, naval and military commanders; protest and claims of states; municipal laws and decisions of state courts which tend to reinforce the view that a practice is regarded as obligatory; and the opinions of the law officers, especially when they are published, as they are in the United States. However, while all these elements help to evidence the binding force of a

particular custom, they do not have equal significance.

### 3. General Principles Of Law

According to Article 38 of the Statute of the international Court of Justice, the Court shall apply, not only conventional and customary international law; but also, "the general principles of law recognized by civilized nations". There are several opinions about these general principles, we shall refer to some of them as follows :

First : Some writers are of the opinion that these general principles of law are (probably) supposed to be a supplementary source of international law, to be applied if treaties or custom cannot be applied.

Second : Other writers believe that it cannot be denied, on the one hand, that there are general principles of law of such a fundamental nature that without their universal recognition the functioning of a legal community can hardly be imagined; but on the other hand, that the nature of inter-state relationships differ so radically from that of relationships between individuals (private law) or between the Government or State and their subjects (public and penal law). Those writers believe that the first group of principles belongs to the general stock of legal norms of the international order; but they do not consider the second group as a separate category of sources of the law since treaty and customary law must necessarily already be impregnated with them.

This opinion has been bitterly criticized as it yawns between the two groups of the general principles of law, on the one hand, the norms necessarily inherent in any legal order and therefore, also in that of inter-state relations; and on the other hand, the common principles of municipal law, recognized by all civilized states alike, and endorsed en bloc, by virtue of an express mandate, to the International Court for application in inter-state relationships. The former group is alleged to constitute "jus cogens", the mandatory law of international order to which even treaty and customary law have to yield; the latter group which acts as it were as the greatest common divisor between the various municipal systems of law, on the contrary, can only be held to possess subsidiary validity when confronted with treaty and customary law which are to be recognized as primary rules. The conclusion of this criticism is that instead of one fable group, there are now two, one about a body of rules to be binding upon a society of sovereign states against their expressed or tacitly revealed will; and the other about the international legal order having swallowed as a whole the content which municipal legislations have in common in the fields of private and public law as distilled from the general bulk by the processes of "comparative law".

### Our Opinion On General Principles of Law

We believe that the general principles of law are the total principles transferred from municipal private and public law to the sphere of direct relations between states. We agree with some writers

that, these general principles are to be applied with analogy, and they would be derived by selecting concepts from all systems of municipal law. Such was clearly the intention of the draftsmen of the Statute of the International Court of Justice, confirmed in the context of Article 9, under which electors of the judges are to bear in mind that the Court should be representative of the "main forms of civilization and the principal legal systems of the world".

Other writers have the same opinion but with some alteration. They believe that the intention of the draftsmen of the Statute is to authorize the Court to apply the general principles of municipal jurisprudence, in particular of private law, in so far as they are applicable to the relations of states. They support this addition by saying that it would be incorrect to assume that the tribunal has, in practice adopted a mechanical system of borrowing from domestic law after a census of domestic systems. What has happened is that international tribunals have employed elements of legal reasoning and private analogies in order to make the law of nations a viable system for application in a judicial process.

In this sense, these general principles include, inter alia, procedural and evidentiary principles, as well as principles of substantive law, provided that these do possess some character of generality over and above the context of each particular legal system to which they belong in common. Prescription, estoppel, res judicata are examples of such principles.

Going in line with the previous opinion, some writers add more clarification by saying that these principles must be taken to embody distinguishable categories :

First : Precepts which are demonstrably necessary to achieve justice, such as the rule that both parties to a lawsuit must be heard.

Second : Concepts which are of universal currency which have been pragmatically adopted by all or most states, which cannot logically be derived from the category of justice, such as the requirement of acquiescence in prescription.

Some writers hold the opinion that these general principles may refer to logical propositions resulting from judicial reasoning on the basis of existing pieces of international law and municipal analogies. Examples were given of this type of general principles, i.e., the principles of consent, reciprocity, equality of states, finality of awards and settlements, the legal validity of agreements, good faith, domestic jurisdiction, and the freedom of the seas.

Finally, we do believe that the qualification given to these general principles of law as specified in sub-paragraph 1.c. of Article 38 of the Statute, as being "recognized by civilized nations", is no more valid in the last two decenniums of the Twentieth Century, in the sense that certain interpretation must be given to this sub-paragraph to cope with the recent and actual position of development of the

international community as a whole. Although we admit that there are different degrees of development which vary from one state to another, but simultaneously a rigid distinction between development and underdevelopment, or advance and backwardness could not be applied. We must acknowledge that, the out-dated conceptions that prevailed in the time of colonialism, has become unrealistic after the independence of most countries of the world. The astonishing progress in the field of communications has created a common standard of understanding, which may be considered a minimum requirement of intellectual progress for all peoples. We also believe that these general principles may be applied to resolve the problem of non-liquet. In fact, as Kaplan and Katzenbach noted, a large part of the world has a common cultural heritage with large areas of common ethical and moral beliefs, similar political systems and economic institutions, and similar social problems. More specifically, the legal system of most of the world is derived from Roman law.

#### 4. Judicial Decisions

Judicial precedents of national and international tribunals is another source of international law. No rule exists to determine the value of any particular precedent, and the decisions of the national courts dealing with matters of international law, as well as those of international courts; but the decisions of the International Court of Justice and of its predecessor the Permanent Court of International Justice are accorded more weight than any others. Such decisions are not, however, regarded as binding; even the decisions of the International Court of Justice are not regarded as limitations on its authority to decide future controversies. Under Article 59 of its Statute, "the decision of the Court has no binding force except between the parties and in respect of that particular case".

As regards state judicial decisions, there are two ways in which these decisions may lead to the formation of rules of international law:

First : The decisions may be treated as weighty precedents, or even as binding authorities.

Second : The decisions may lead directly to the growth of customary rules of international law, such as certain rules of extradition law and state recognition, which were, in the first instance, derived from the uniform decisions of state courts.

Also, it may be added that state judicial decisions are evidence of international law just as much as the practice of government departments. It must not be thought, however, that every state judicial decision, in an international matter, is one of international law. If they are to be relegated to category in national law, it should be that of "foreign affairs law", like constitutional law and administrative law.

It is noted that the bulk of international law matters that arise

in international courts, or that the interested states are willing to submit to impartial decision do not involve policies involving serious disagreement or issues that directly threaten a state's political objectives. Differences between Civil and Common Law treatment of precedent are less significant in practice than in theory. <sup>(102)</sup>

The International Court of Justice is the only existing permanent tribunal with a general jurisdiction, which in 1946 succeeded the former Permanent Court of International Justice, itself first created in 1921. The International Court of Justice functions under a Statute containing virtually the same organic regulations as the Statute of the former Permanent Court.

The Judgment of the International Military Tribunal at Nuremberg in 1946, which laid down important principles relating to crimes against peace and security of mankind, is an example of a temporary - as distinct from a permanent - international judicial body contributing substantially towards the development of international law.

When an international court is called upon to decide a particular legal issue, it will be concerned with applying directly, or by analogy, existing rules. The further the process of analogy is taken, however, the more creative is the Court's role, and when there is no sufficiency of state practice and therefore no pre-existing rule, the decision reached by the court will serve as a direct source of international law for the future; to consider the new rule as the "determination" of customary rule would be unrealistic.

The great reliance upon pronouncements of the International Court, and of other International Tribunals can be explained on the ground, not that they themselves are sources of international law, but that they are the best evidence available of the existence of the rules of international law referred to in the course of decision.

As regards the decisions of international arbitral tribunals, one can distinguish two trends.

According to some writers, arbitrators have as a general practice tended to act as negotiators or diplomatic agents rather than as judges on questions of fact and law. They insist that arbitrators have been influenced to an unreasonable extent by the necessity of reaching a compromise. There is naturally an element of truth in this conception of arbitral decision, and arbitrators are less strictly bound by necessary technicalities than judges working within the ambit of established rules of procedure, but the distinction from judicial decision is by no means so fundamental as pictured. In the great majority of cases, arbitrators have regarded themselves as acting to some extent judicially rather than as amiables compositeurs.

We, therefore, agree with the other trend that the decisions of international arbitral tribunals, such as the Permanent Court of Arbitration, the British-American Mixed Claims Tribunal, and others,

have contributed to the development of international law. By far the greater majority of arbitral decisions have been based on strictly legal consideration in form and substance.

In fact, the main distinction between arbitration and judicial decision lies not in the principles which they respectively apply, but in the manner of selection of the judges, their security of tenure, their independence of the parties, and the fact that the judicial tribunal is governed by fixed rules of procedure instead of by an ad hoc rules for each case.

### 5. Juristic Works

In the earlier period of international law, text writers played a predominant and decisive role in the elaboration of the law. Jurists have been largely responsible for deducing customary rules from a coincidence or cumulation of similar usages or practices, and to this extent, they perform an indispensable service. Where the writings of publicists are not supported by the weight of evidence of state practice, they may yet influence a particular state or states to adopt a different practice in their relations with other members of the international community and so bring about a new development in the law. The reaction of the juristic opinion may be of great importance in assisting the transition from usage to custom.

There are two functions of text writers, and it is very important not to confuse one with the other, i.e., the providing of evidence of what the law is; and the exercise of influence on its development. The Statute of the International Court of Justice permits reference to the writings of scholars for subsidiary evidence of what the law is, but not for speculations concerning what the law ought to be.

The International Court of Justice has studiously refrained from making mention of specific writings, contenting itself with occasional references to "all or nearly all writers" or "the writing of publicists". If separate or dissenting opinions can be regarded as throwing light upon the Court deliberations in preparing its judgment, it appears that the Court will take notice of significant contributions from writers to the science of international law.

Sources analogous to the writings of publicists, and at least as authoritative, the Draft Articles produced by the International Law Commission, Harvard Research Drafts, the basis of discussion of the Hague Conference of 1930, and the Resolutions of the Institute of International Law and other scientific bodies.

### 6. Other Sources

According to some writers, other sources may be added to the foregoing; however, we shall refer to two of them.

### A. Organizational Acts

The creation of international law is more developed in the supra-national rather than in the classical international organizations where it still plays a very subordinate role. The supra-national development has even led to the drawing of a sharp distinction between different types of collective resolutions possessing different degrees of legal force. Also, the practice of international organizations may lead to the development of customary rules of international law concerning their powers and responsibilities.

According to Article 14 of the European Coal And Steel Community Treaty, the High Authority of the Community is authorized to proceed by means of "decisions" which are "obligatoires en tous leur elements" and of "recommendations" which "comportent des obligations dans les but qu'elles assignent mais laissent a deux qui en sont l'objet le choix des moyens propre a atteindre ces buts".

In the field of traditional international organizations binding regulations issued by specific organs thereof which are authorized to that effect are still rare. However, some of the various kinds of resolutions are less legislative than executive in character. Examples are as follows :

1. the power of the organs of the International Civil Aviation Organization (ICAO) to issue certain technical regulations;
2. the power of the International Court of Justice to lay down detailed rules of procedure, according to Article 30 of the Statute; and
3. the power of the Security Council to take binding decisions in accordance with Article 25 of the Charter.

Resolutions of the main organs of the League of Nations were generally considered to be binding upon the Member States, but the legal force was, under the Covenant, conditional upon their unanimous adoption by the organ concerned.

In general, the Resolutions of the United Nations' General Assembly are not binding upon Member States; but when they are concerned with general norms of international law, then acceptance by a majority vote constitutes evidence of the opinion of governments in the widest forum for the expression of such opinions. Even when they are framed as general principles, Resolutions of this kind provide a basis for the progressive development of the law and the speedy consolidation of customary rules.

### B. Equity

Equity plays a role in the international judicial process in the correction of over-rigorous law, in the filling of gaps, and in the

abrogation in law.

Article 38 paragraph 2 of the Statute of the International Court of Justice provides that :

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

A distinction must be drawn between an authorization to a tribunal to resort to equity; and an authorization to decide a question *ex aequo et bono*. The latter is an authorization to decide on the basis of equity which does not dispense the judge from giving a decision based upon law, but only to apply that law in such a way that any injustice which might result from strict application of the law can be avoided. In other words, it is a completely different kind of equity to that acted upon by arbitral bodies

To decide a matter *ex aequo et bono* is a matter of difference among jurists as follows :

A. Whereas some writers are of the opinion that the proper aim of this provision is to guarantee the Court against the "inevitability" of non-*liquet*; others do not agree.

B. Whereas some writers are of the opinion that this provision is intended to serve as a basis for decision, in particular as basis for decision in non-legal or "political" disputes; others rejected.

C. Whereas some writers are of the opinion that this provision aimed to grant the Court more freedom in giving grounds for its pronouncements; others protested.

Footnotes Of Chapter V Of The  
Introductory Part

(1) See In English:

AnNawawi, *Forty Hadith Nawawi's*, passim; H.A.R. Gibb and J.H. Kramers, *Shorter Encyclopaedia Of Islam*, passim; John R. Hinnels (Editor), *Dictionary Of Religions*, passim; Thomas Patrick Hughes, *A Dictionary Of Islam*, passim; Maulana Muhammad Ali, *The Religion Of Islam*, pp. 17-116; Mohammad Mustafa Azmi, *Studies In Early Hadith Literture*, passim; Mohammad Talaat Al-Ghunaimi, *The Muslim Conception Of International Law And The Western Approach*, pp. 106-122; H.A.R. Gibb, *Mohammedanism*, passim; Ahmad Hasan, *The Early Developments Of Islamic Jurisprudence*, pp. 33-151; The Rev. F. Klein, *The Religion Of Islam*, pp. 1-36; Shaukat Mahmood, *Principles And Digest of Muslim Law*, pp. 1-14; Henri Massé, *Islam*, pp. 91-126; Seyyed Hosein Nasr, *Ideals And Realities Of Islam*, pp. 41-92; Joseph Schacht, *An Introduction To Islamic Law*, passim; Ahmad Shalaby, *Islam, Belief, Legislation, Morals*, passim; Majid Khadduri, *War And Peace In The Law Of Islam*, passim; Shama Churun Sircar, *The Muhammadan Law*, pp. 1-77; Afif A. Tabbarah, *The Spirit Of Islam*, pp. 439-483; Sobhi Mahmassani, *The Principles Of International Law In The Light Of Islamic Doctrine*, pp. 205-328; Michael Akehurst, *A Modern Introduction To International Law*, pp. 30-47; J.L. Brierly, *The Law Of Nations*, pp. 56-68; Ian Brownlie, *Principles Of International Law*, pp. 1-32; Anthony Carty, *The Decay Of International Law*, pp. 25-42; George A. Finch, *The Sources Of International Law*, pp. 15-28; D.W. Greig, *International Law*, pp. 5-51; Morton A. Kaplan And Nicholas Deb Katzenbach, *The Political Foundations Of International Law*, pp. 231-264; R.C. Hingorani, *Modern International Law*, pp. 20-26; Hans Kelsen, *Principles Of International Law*, pp. 437-508; D.P. O'Connell, *International Law For Students*, pp. 5-14; Charles S. Rhyne, *International Law*, 25-46; William W. Bishop, *International Law*, pp. 3-11; Charles Rousseau, *Droit International Public*, pp. 17-20; Georg Schwarzenberger and E.D. Brown, *A Manual Of International Law*, pp. 21-28; Julius Stone, *Legal Controls Of International Conflict*, pp. 57-64, 153-164; J.G. Starke, *An Introduction To International Law*, pp. 36-65; T.A. Taracouzio, *The Soviet Union And International Law*, pp. 1-27, 334-351; J.H.W. Verzijl, *International Law In Historical Perspective*, Volume I, pp. 47-89; Rebecca M.M. Wallace, *International Law*, pp. 7-30; Yohanan Friedman, *The Finality Of Prophethood In Sunni Islam*, pp. 177-215.

See In Arabic:

Imam Muslim, *Sahih Muslim*, Volumes II and XVI, passim; Gaafar Abd-Assalam, *Qawaid Al-Alaqat Ad-Dawliya Fi Al-Qanun Ad-Dawli Wa Fi Al-Shari'a Al-Islamiya*, pp. 128-150; Attiyya Abdul Rahim Attiyya, *Udatt Al-Mujahideen Fi Al-Kitab Wa As-Sunna*, passim; Gamal Al-Banna, *Al-Aslan Al-Aziman "Al-Kitab Wa As-Sunna"*, passim; Muhammad Abd ALLAH Darraz, *Dirasat Islamiya Fi Al-Alaqat Al-Ijtima'iyah Wa Ad-Dawliya*, pp. 5-32; Ali Graisha, *Massader Al-Shar'iyah Al-Islamiya*, pp. 3-83;

CHAPTER V OF THE INTRODUCTORY PART

Sheikh Abdul Wahhab Khallaf, *Ilm Usul Al-Fiqh*, pp. 20-96; Sheikh Abdul Wahhab Khallaf, *Khulasat Tarikh At Tashri'i Al-Islami*, pp. 7-48; Majid Khadduri, *Al-Harb Wa As-Silm Fi Shir'at Al-Islam*, pp. 35-64; Sheikh Ahmad Ibrahim, *Ilm Usul Al-Fiqh Wayaleeh Tarikh At-Tashri'i Al-Islami*, pp. 4-26; Sheikh Muhammad Al-Khudary, *Tarikh At-Tashri'i Al-Islami*, passim; Sobhi Mahmassani, *Al-Qanun Wa Al-Alaqa Ad Dawliya Fi Al-Islam*, passim; Abul A'la Al Maududi, *Al-Hukuma Al-Islamiya (Arabic Translation)*, pp. 171-179; Sheikh Muhammad Mustafa Al-Maraghi, *Al-Ijtihad Fi Al-Islam*, passim; Sheikh Mahmud Shaltout, *Al-Islam Aqida Wa Shari'a*, pp. 52-69; Al-Imam Al-Hafez Galal Eddin As-Siutti, *Muftah Al Janna Fi Al-Ihtijaj Bi As-Sunna*, passim; Hamed Sultan, *Ahkam Al-Qanun Ad-Dawli Fi Al-Shari'a Al-Islamiya*, pp. 59-97; Ihsan Ilahi Zahir, *Ash-Shi'a Wa As-Sunna*, passim; Muhammad Sami Abdul Hamid, *Usul Al-Qanun Ad Dawli Al-A'am, Volume I (Al-Qa'ida Ad-Dawliya)*, passim; Ali Sadeq Abu Haif, *Al-Qanun Ad-Dawli Al-A'am*, pp. 23-37; Badriya Abd ALLAH Al-Awady, *Al-Qanun Ad-Dawli Al-A'am Fi Waqt As-Silm Wa Al-Harb Wa Tatbiqih Fi Dawlat Al-Kuwait*, pp. 26-35; Ash-Shafi'i Muhammad Bashir, *Al-Qanun Ad-Dawli Al-A'am Fi Waqt As-Silm Wa Al-Harb*, pp. 15-21; Hasan Al-Galaby, *Al-Qanun Ad-Dawli Al-A'am*, pp. 51-70; Muhammad Hafez Ghanem, *Mabadi'i Al-Qanun Ad-Dawli Al-A'am*, pp. 65-83; Muhammad Talaat Al-Ghunaimi, *Al-Ghunaimi Fi Qanun As Salam*, pp. 89-157; Mahmud Sami Ginaina, *Al-Qanun Ad-Dawli Al-A'am*, pp. 41-51; Ali Maher, *Al-Qanun Ad-Dawli AL-A'am*, pp. 38-52; Abdul Aziz Sarhan, *Al-Qanun Ad-Dawli Al-A'am*, pp. 56-66; Mufeed Mahmud Shihab, *Durous Fi Al-Qanun Ad-Dawli Al-A'am*, passim; Fouad Shibat, *Al-Huquq Ad-Dawliya Al-A'ama*, pp. 24-39; Mohsen Ash-Shishikly, *Al-Waseet Fi Al-Qanun Ad-Dawli, Volume I (Book 1)*, passim; Hikmat Shubur, *Al-Qanun Ad-Dawli Al-A'am - Dirasa Fi Al-Fiqhayn Al-Ishtraki Wa Ar-Raasmali, Volume I*, pp. 59-102; Muhammad Aziz Shukry, *Al-Madkhal Ila Al-Qanun Ad-Dawli Al-A'am Fi Waqt As-Silm*, pp. 52-59; Hamed Sultan, *Al-Qanun Ad-Dawli Fi Waqt As-Silm*, pp. 45-57; Hamed Sultan, A'isha Rateb and Salah Eddin Amer, *Al-Qanun Ad-Dawli Al-A'am*, pp. 45-54; G.A. Tunkin, *Al-Qanun Ad-Dawli Al-A'am (Arabic Translation)*, passim; Mufeed Mahmud Shihab, *Al-Mabadi'i Al-A'ama Li Al-Qanun Bi Wasfiha Masdar Li Al-Qanun Ad-Dawli*, pp. 1-20.

(2) Sura XXXIII : 36.

(3) Sura XXXIII : 40.

(4) In the following material we depend, mainly, on Friedman's article, "Finality Of Prophethood In Sunni Islam".

(5) Sura II : 23-24; see also Suras XI : 13-14; XVII : 88

(6) Sura XLII : 52.

(7) Sura LXXII : 1-2.

(8) Sura XVI : 89.

(9) Sura VI : 38.

- (10) Sura XXVI : 192-194; see also Suras IV : 105; V : 48-50; VI : 114; VII : 3; XII : 40; XLII : 10.
- (11) Sura IV : 80; and ayat 14 and 59 of the same Sura; see also Sura XXXIII : 36.
- (12) Sura XXVI : 192-195.
- (13) Sura XLVI : 12; see also Suras XIII : 37; XVI : 102-103; XXXIX : 28; XLII : 7; XLIII : 2-3.
- (14) Some Western definitions indicate the fact that the spirit of Al-Islam is still not absorbed by some writers; e.g., according to Gibb and Kramers, the Holy Qur'an is "the sacred book of Muhammadans, contains the collected revelation of Muhammad, in definitive form"; and according to Massé, it is "the Bible of Islam", see H.A.R. Gibb and J.H. Kramers, *Shorter Encyclopaedia Of Islam*; see also Henri Massé, *Islam*.
- (15) It is called "Al-Mushaf" (the Collection of Sheets), this name was invented during the time of Abu Bakr to evade the name "sifr" proposed by some of his companions, because the Abyssinians used to call their holy book by this name. The word "Al-Qur'an" is used to indicate the whole of this Divine Book; but the word Qur'an if used, indicates the whole book or any part of it. The word Qur'an is derived from the root "qara'a", which signifies primarily "he collected together things"; and also signifies "he read or recited". According to some authorities the name of this book "Al-Qur'an" is due to gathering together in itself the fruits of all Divine books. Also, it means that is or should be read. The Holy Qur'an speaks of itself under various names. It is called "Al-Kitab" (Sura II : 2) (the Writing Which Is Complete In Itself); "Al-Burhan" (Sura IV : 147) (the Argument); "Al-Nuhaimin" (Sura V : 48) (the Guardian); "An-Nur" (Sura VII : 157) (the Light); "Al-Nau'iza" (Sura X : 57) (the Admonition); "Ash-Shifa" (Sura X : 57) (the Healing); "Al-Hukm" (Sura XIII : 37) (the Judgment); "UM Al-Kitab" (Sura XIII : 39) (the Source Of Ordinance, or the Mother Of Books, in the sense that all knowledge is contained in essence in the Holy Qur'an); "Al-Haqq" (Sura XVII : 81) (the Truth); "Adh-Dhikra" (Sura XV : 9) (the Reminder); "Al-Hikma" (Sura XVII : 39) (the Wisdom); "Ar-Rahma" (Sura XVII : 82) (the Mercy); "Al-Qayyim" (Sura XVIII : 2) (the Maintainer); "Al-Furqan" (Sura XXV : 1) (the Distinguisher Between Right And Wrong); "At-Tanzil" (Sura XXVI : 192) (the Revelation From The High); "Ahsan Al-Hadith" (Sura XXXIX : 23) (the Best Saying); "Ar-Ruh" (Sura XLII : 52) (the Spirit); "Al-Bayan" (Sura LV : 7) (the Explanation); "Al-Huda" (Sura LXXII : 13) (the Guidance); "An-Ni'ma" (Sura XCII : 11) (the Blessing).
- (16) It is said that the number of letters of the Holy Qur'an is 77,934 or 77, 437.

- (17) The number of the Verses of the Holy Qur'an is 6211. This number, according to a comparison made by Massé, corresponding to nearly two thirds of the New Testament.
- (18) Sura II : 23-24.
- (19) Sura II : 129.
- (20) Klein claims that the names given to the Suras of the Holy Qur'an are, "no doubt", in imitation of the custom of the Jews.
- (21) Massé claims that the order of the Suras is in accordance with their respective length, see The Rev. F. Klein, *The Religion Of Islam*.
- (22) For example the Holy Qur'an says, "And We caused Jesus, son of Mary, to follow in their footsteps, confirming that which was [revealed] before him in the Torah, guidance and admonition unto those who ward off [evil]". (Sura V : 46)
- (23) Sura III : 3.
- (24) Sura XV : 9.
- (25) ALLAH says, "Have ye may hope that they will be true to you when a party of them used to listen to the Word of ALLAH; then used to change it, after they had understand it, knowingly?" (Sura II : 75)
- (26) The scribes wrote down the revelation in the wider ends of palm branches, on thin pieces of stone, on the shoulder blades of sheep and camels, and on the skin of dead animals, and on pieces of wood.
- (27) Gibb and Kramers claim that the edition of the Holy Qur'an made during the time of Uthman did not provide for the Muslims a real *textus receptus*, *op.cit.*
- (28) Sura LXXV : 17; see also Sura XV : 9.
- (29) Sura VI : 65.
- (30) Sura V : 14.
- (31) Sura III : 55.
- (32) Sura II.
- (33) Sura III.
- (34) Sura IV.

- (35) Sura V.
- (36) Sura XV.
- (37) Sura XXIV.
- (38) Sura LXV.
- (39) Sura III : 7.
- (40) One who brings into operation the whole capacity of forming a private judgment relative to be a legal position is called "mujtahid".
- (41) Sura III : 7.
- (42) Sura LXXV : 18 19.
- (43) In the Old Testament, marriage with sisters was permissible. "And yet indeed she is my sister; she is the daughter of my father, but not the daughter of my mother; and she became my wife"; (Genesis, XX : 12) and then became prohibited "Cursed be he that lieth with his sister, the daughter of his father, or the daughter of his mother. And all the people shall say Amen". (Deuteronomy, XXVII : 22) Eating every beast was also allowed. "Every moving thing that liveth shall be meat for you; even as the green herb have I given you all things"; (Genesis, IX : 3) then eating some of them became unlawful. "And every beast that parteth the hoof, and cleaveth the cleft into two claws, and chews the cud among the beasts, that ye shall eat. Nevertheless that ye shall not eat of them that chew the cud, or of them that divide the cloven hoof; as the camel, and the hare, and the coney : for they chew the cud, but divide not the hoof; therefore they are unclean unto you. And the swine, because it divideth the hoof, yet chewth not the cud, it is unclean unto you : ye shall not eat of their flesh, not touch their dead carcase". (Deuteronomy, XIV : 6 8) The magnification of saturday by the Jews. "And the Lord speaks unto Moses, saying, Speak thou also unto the Children of Israel, saying, "Verily my Sabbaths shall keep : for it is a sign given between me and you throughout your generations; that ye may know that I am the Lord that doeth sanctify you. Ye shall keep Sabbath therefore; for it is holy unto you : every one that defileth it shall surely be put to death : for whosoever doeth any work therein, that soul shall cut off from among his people. Six days may work be done ; but in the seventh is the Sabbath of rest, holy of the Lord : whosoever doeth any work in the Sabbath day, he shall surely be put to death. Wherefore the Children of Israel shall keep the Sabbath, to observe the Sabbath throughout their generations, for a perpetual covenant. It is a sign between me and the Children of Israel for ever : for in the six days the Lord made heaven and earth and on the seventh day he rested, and was refreshed"; (Exodus, XXXI : 12-17; also Exodus, XXXV : 2-3; XXIII : 12; Genesis, II : 3; Numbers, XV : 32-36); and in the New Testament, (St. John, IX : 16) this magnification was abrogated by

Christianity. "Let no man therefore judge you in meat, or in drink, or in respect of an holiday, or of the new moon, or in the Sabbath days". (Colossians, II : 16)

- (44) The Epistle to the Hebrews VII : 12; also the Epistle of St. Paul to the Ephesians, II : 15-16, also says, "Having abolished in his flesh the entity, even the law of commandments contained in ordinances; for to make in himself of twain one new man, so making peace; And that he might reconcile both unto God in one body by the cross having slain the enmity thereby".
- (45) Sura II : 219.
- (46) Sura IV : 43.
- (47) Sura V : 90-91.
- (48) Sura II : 106.
- (49) Sura LXXXVII : 6.
- (50) Sura LXXV : 17.
- (51) Sura XV : 9.
- (52) Sura XVI : 101.
- (53) Sura XVII : 88.
- (54) ALLAH says, "We have seen the turning of your face to heaven [for guidance, O Muhammad], And now verily We shall make the turn [in prayer] toward a qibla which is dear to thee. So turn your face toward the Inviolable place of worship, and ye [O Muhammad], where-soever ye may be, turn your face [when ye pray] toward it". (Sura II : 144)
- (55) Sura II : 143.
- (56) This punishment was a part of the Jewish law in the lifetime of the Holy Prophet (peace be upon him) who himself is reported to have practised this punishment in some cases. Thus, some writers believe that this punishment is based on the Sunna, and not on any Qur'anic Aya.
- (57) Sura XXXIII.
- (58) The opinion of jurists divided on the so-called episode of Al-Gharaniq Al-Ula (the Exalted Maiden Idols). It is said that the Holy Prophet (peace be upon him) when he recited Surat An-Najm or "the Star" (Sura LIII) in a big assembly of unbelievers, during the course of his recitation, Satan is said to have made him pronounce the following words, "Verily they [the idols] are the exalted maidens, and their intercession is to be hoped for". Towards the end of

the Sura, the Holy Prophet (peace be upon him) is further alleged to have prostrated and the unbelievers also followed suit. This reportedly gave great satisfaction to the people of Macca. Subsequently, Jibril came and repudiated the revelation of this passage. It is that the following Ayat, "And they indeed strove hard to beguile thee [Muhammad] away from that wherewith We have inspired thee that thou shouldst invent other than it against Us; and then would they have accepted thee as a friend. And if We had not made thee wholly firm thou mightest almost have inclined unto them a little. Then had We made thee taste a double [punishment] turneth away and is averse; and when ill toucheth him he is in despair" (Sura XVII : 73-75). Thereupon, the Holy Prophet (peace be upon him) is reported to have been deeply grieved until the following Aya came down, "Never We sent a Messenger or Prophet before thee but when he recited [the message] Satan proposed [opposition] in respect of that which he recited thereof, But ALLAH establisheth that which Satan proposeth. Then ALLAH establisheth His revelation". (Sura XXII : 52)

(69) The discontinuity from the Sunna was called bid'a (innovation), thus bid'a was the antithesis of the Sunna. The break with the customs and discontinuity of the established practises was decried by the pre-Islam Arabs.

(60) Sura VIII : 38.

(61) Sura XXXIII : 62.

(62) Sura LXVIII : 4.

(63) Sura XXXIII : 20.

(64) Sura LIX : 7.

(65) Sura III : 31.

(66) To obey the Sunna is a duty laid upon every pious Muslim, in imitation of the Holy Prophet (peace be upon him), however, a duty of the same obligation as the commands of the Holy Qur'an, which are fard (duty of the absolute obligation). The duty of observing the Sunna and conforming to its rules is of various degrees of importance, such as Sunnat Al-Huda (Sunna of Guidance); Sunna Mu'akkada (the Sure Sunna) or those duties which cannot be neglected without committing a fault; and Sunna Za'ida (Additional Sunna) which may, or may not, be observed.

(67) A Hadith is composed of two parts, Al-Matn (the Text); and Al-Isnad (the Foundation or the names preceding the text, of those who have collected the Hadith). One of the types of Hadith is called "Hadith Qudsi" (Sacred Saying) which is not a part of the Holy Qur'an, but in which ALLAH speaks in the first person through the Holy Prophet (peace be upon him). Within the vast corpus of the prophetic sayings there are forty of them, which they are of extreme importance. Sufism is based on these sayings which they deal with man's

direct relation with ALLAH as in the famous Hadith Qudsi often repeated by the Suffi masters over the ages, "My slave ceaseth not to draw nigh unto Me through devotions of a free-will until I love him, and when I love him, I am the hearing with which he heareth, and the sight with which he seeth, and the hand fighteth and the foot which he walketh".

(68) This term is used, technically, in two senses :

- A. In the theory of cognition, it is applied to historical knowledge, if the latter is generally acknowledged (e.g. the knowledge that there is a city called Macca).
- B. In prosody, the term is applied to the rhyme in which one moving letter intervenes between the quiescents.

(69) This category is of two kinds, the first is transmitted in letter and spirit, which is very rare; the second is transmitted in spirit such as in the five daily Salawat (Prayers), the number of bows and prostrations in each, and the like.

(70) As regards the defects in transmission, the Hadith may be divided into :

- A. Marfu', when the Hadith is traced back to the Holy Prophet (peace be upon him) without any defect in transmission.
- B. Muttasil, when its isnad is an uninterrupted.
- C. Mu'allaq (suspended), when the name of one or more transmitters is missing (being munqat'i, if the name is missing from middle; and mursal, if it is missing from the end).

(71) The conditions for a Hadith being sahih are as follows :

1. its narrators are 'adl (men whose sayings and decisions are approved or whom desire does not deviate from the right course), and tamm ad-dabt (guarding or taking care of Hadith effectually);
2. that it is muttasil as-sanad (that the authorities narrating it should be in contact with each other, so that there is no break in the transmission;
3. that there is no other illah (defect) in it; and
4. that it is not shadh (a thing apart from the general mass), in the sense that it is not against the general trend of Hadith, or at variance with the overwhelming evidence of other Hadith.

(72) Al-Maudu' (the Innovated) is the one which is forged, or falsely ascribed to the Holy Prophet (peace be upon him), and it is not deemed to be a Hadith.

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- (73) Some writers maintain that the first Compendium was that made by Ibn Juraij, while others say that Ibn Suhaib has the precedence.
- (74) Among *As-Sihah As-Sitta*, *Al-Bukhari* holds the first place in several respects, while *Muslim* comes second, and the two together are known as *As-Sahihan* (the Two Reliable Books).
- (75) According to Gibb, Jewish and Christian materials, and even aphorisms from Greek philosophy, were put into the mouth of the Holy Prophet (peace be upon him), see H.A.R. Gibb, *Mohammedanism*. However, we believe that *As-Sihah As-Sitta* are free from any forged Hadith.
- (76) *Al-Bukhari* is said to have been chosen out of 600,000 Hadiths, only 7275 which he considered genuine. As these are repeated under various heads they can be reduced to about 4000.
- (77) *Sahih Al-Bukhari* was in high reputed and preferred to all others in Asia and Egypt, while *Sahih Muslim* chiefly preferred in North Africa. It must be noted that *As-Sihah As-Sitta*, and some other Compendia are accepted by the Sunni Muslims.
- (78) *Al-Mujtahid* is, as said before, the one by his exertion formed his own opinion; *Al-Muqalled* (the Imitator) is the one who takes the saying of another without knowledge of its basis.
- (79) It is also called *Ijma' "Al-Khassa"* (the Notables), *Ijma' "Al-Ulama'"* (the Learned especially in the sciences of *Al-Shari'a*), or *Ijma' "Ahl AL-Ijma'"* (the People who are Capable to Constitute the Consensus); opposing to *Ijma' "Al-Awam"* (the Masses).
- (80) It is significant to note that *Ash-Shafi'i's* concept of the *Ijma'* has different characteristic. He holds that the *Ijma'* is something static and formal have no room for disagreement. That is why he is reluctant in accepting the validity of the *Ijma'* of the Learned as a source of *Al-Shari'a*, due to the differences among them. Only the *Ijma'* of the community is valid according to *Ash-Shafi'i*. In support of this argument he says that the community at large cannot neglect the *Sunna* of the Holy Prophet (peace be upon Him) which, however, the individuals may neglect.
- (81) *Sura XVII : 36.*
- (82) *Sura XVIII : 15.*
- (83) Some Muslim writers oppose the *Ijma'* on the basis that the Qur'anic Ayat quoted to support it, are of a general nature and their interpretation and application, in this regard, are not correct.
- (84) *Sura IV : 115; see also Suras II : 143; III : 103.*
- (85) This Hadith is regarded by some Western critics as an invention to justify the *Ijma'*, an assumption that has no foundation. Some Muslim

writers pretend that it might be motivatedly misinterpreted and applied.

(86) There is also the so-called "Ijma' Murakkab" (Composed Agreement), or Unanimous agreement as to the matter, but different as to the illah (cause); and "Ijma' Ghair Murakkab" (the Simple Agreement) which denotes the agreement in everything.

(87) Sura IX : 122.

(88) Sura IV : 59.

(89) Sura IV : 105.

(90) Sura XXXIX : 55.

(91) Sura IV : 83.

(92) Sura VIII : 22; see also Suras II : 171; VII : 179; XXV : 43-44.

(93) See Muhammad Hamidullah, *Documents Sur La Diplomatie Musulmane A L'Epoque Du Prophète Et De Khalifes Orthodoxes*, Paris, 1935.

(94) See Michael Akehurst, *A modern Introduction To International Law*, pp. 30-47; J.L. Brierly, *The Law Of Nations*, pp. 56-68; Ian Brownlie, *Principles Of International Law*, pp. 1-32; Anthony Carty, *The Decay Of International Law*, pp. 25-42; George A. Finch, *The Sources Of International Law*, pp. 15-28; D.W. Greig, *International Law*, pp. 5-51; Morton A. Kaplan and Nicholas Deb Katzenbach, *The Political Foundations Of International Law*, pp. 231-264; R.C. Hingorani, *Modern International Law*, pp. 20-26; Hans Kelsen, *Principles Of International Law*, pp. 437-508; D.P. O'Connell, *International Law For Students*, pp. 5-14; Charles S. Rhyne, *International Law*, pp. 25-46; William W. Bishop, *International Law*, pp. 3-11; Charles Rousseau, *Droit International Public*, pp. 17-20; Georg Schwarzenberger and E.D. Brown, *A Manual Of International Law*, pp. 21-28; Julius Stone, *Legal Controls Of International Conflict*, pp. 57-64, 153-164; J.G. Starke, *An Introduction To International Law*, pp. 36-65; T.A. Taracouzio, *The Soviet Union And International Law*, pp. 1-27, 334-351; J.H.W. Verzijl, *International Law In Historical Perspective*, Volume I, pp. 47-89; Rebecca M.M. Wallace, *International Law*, pp. 7-30.

(95) Article 38 of the Statute of the International Court of Justice provides that :

"1. The Court whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply :

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of general practice accepted

as law;

- c. the general principles of law recognized by civilized nations;
- d. subject to provisions of Article 59, judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

(Article 59 provides that, "The decision of the Court has no binding force except between the parties and in respect of that particular case.")

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

(<sup>96</sup>) According to some jurists the expression "source" is unclear for it is a figurative association that is misleading as to the way in which international law rules come about. The basic distinction which this expression "sources" obscures is that between the law itself - custom and general principles - and the agencies which contribute to its elaboration.

(<sup>97</sup>) Attention must be drawn to the category of rules of international law that called peremptory norms "*jus cogens*". Article 53 of The Vienna Convention On The Law Of Treaties of May 22, 1969, defines "*jus cogens*", it provides that : "For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". It may be referred to as examples of this category of norms, the principle of "*pacta sunt servanda*"; and the "threat or use of force against the territorial integrity or political independence of any state", a principle which is laid down in Article 2 paragraph 4 of the United Nations Charter. The legal effect of the inconsistency with this category of norms is specified in the said Article 53 which provides that, "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law". As regards, the legal effect of the emergence of a new peremptory norm on the existing treaties, Article 64 of the same Vienna Convention provides that : "if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates".

(<sup>98</sup>) Article 2 paragraph 6 of the United Nations Charter provides that :

"The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

.....  
6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and

security".

(<sup>99</sup>) Some writers believe that except for decisions by the Security Council and (perhaps) some recommendations by the General Assembly, the closest international analogous to legislation is international agreement.

(<sup>100</sup>) The Commission, which meets annually, is comprised of 34 Members who are elected by the General Assembly for five years term, and who serve in their individual capacity, not as representatives of their governments. Its members combine technical qualities, and experience of government work, so that its drafts are more likely to adopt solutions which are acceptable to governments.

(<sup>101</sup>) Draft Articles prepared by the Commission, on "Special Missions", and on the "Prevention And Punishment Of Crimes Against Internationally Protected Persons Including Diplomatic Agents" were not referred to an international conference but were considered directly by the General Assembly which adopted conventions on both subjects in 1969 and 1973 respectively.

(<sup>102</sup>) In domestic law, there are two differences between legislation and custom. First, legislation is conscious and deliberate, legislators know that they are making law and intend by their activity to make law; custom is unconscious and unintentional law-making. In establishing a custom, men do not necessarily know that they create by their conduct a rule of law. The rule of law is the effect and not the purpose of their activity. Second, is law-making by special organ instituted to this end, according to the principle of division of labor, this organ being different from and more or less independent of the individuals subject to the law created by the organ. Custom is law-making by individuals themselves who are subject to the law created by their conduct. The individuals creating the law and the individuals subject to the law are at least partly identical. Custom is a decentralized-creation, while legislation is centralized-creation of law. The law created by legislation is usually called statutory law.

(<sup>103</sup>) On April 9, 1984, the Republic of Nicaragua filed in the Registry of the International Court of Justice a case against the United States of America. Nicaragua also filed a request for the indication of provisional measures under Article 41 of the Statute of the Court.

The main claims of Nicaragua are as follows :

1. The United States has acted in violation of Article 2 paragraph 4 of the United Nations Charter, and of a customary international law obligation to refrain from the threat or use of force;
2. The actions of the United States amount to intervention in international affairs of Nicaragua, in breach of the Charter of the Organization of the American States and of rules of customary international law forbidding intervention;

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3. The United States has acted in violation of a number of other obligations in general customary international law and in inter-American system; and

4. The actions of the United States are claimed to be such as to defeat the object and purpose of a Treaty Of Friendship, Commerce And Navigation concluded between the Parties in 1956, and to be in breach of provisions of that Treaty.

On November 26, 1984, the Court decided that it had jurisdiction to entertain the case, firstly, on the basis of the United States declaration of acceptance of jurisdiction, under the optional clause of Article 36, paragraph 2, of the Statute deposited on August 26, 1946; and secondly, on the basis of Article 24 of a Treaty Of Friendship, Commerce And Navigation between the Parties signed at Managua on January 21, 1956. As a reaction to this Judgment, the United States sent a letter dated January 18, 1985, by which it described the judgment as "clearly and manifestly erroneous as to both fact and law", and decided "not to participate in any further proceedings in connection with this case".

The Court commented on the non-appearance of the United States in the proceedings in its Judgment of June 27, 1986, by saying, "It is not possible to argue that the Court had jurisdiction only to declare that it lacked Jurisdiction". See *Military And Paramilitary Activities In And against Nicaragua (Nicaragua V. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, pp. 14-92.

<sup>(104)</sup> Ibid, p. 17.

<sup>(105)</sup> Ibid, pp. 93-96.

<sup>(106)</sup> The General Assembly's Declaration Of Legal Principles Governing Activities Of States In The Exploration And Use Of Outer Space (The General Assembly's Resolution No. 1962 (XVIII), of December 1, 1963.

<sup>(107)</sup> I.C.J. Reports 1986, Ibid, pp. 99-100.

<sup>(108)</sup> The reasons given by some writers of the binding force of precedents in Common law, and its importance, though considered as secondary source, in Civil law, are as follows :

1. Decisions themselves are based on what some prior decision-maker was a social consensus that it was in the interest of society to maintain.

2. The use of precedents operates as a sign of impartiality and objectivity in the legal system, and helps to lift the adjudicative process above the immediate controversy. Any legal system requires that its judge be neutral as to litigants; this can be assured in several ways, one of which is to require him to square his decisions by invoking common norms. He not merely uses precedent but creates

*it as well; objectivity is built upon objectivity; source upon source.*

*3. Precedent help to protect the policy-making functions of the legislature by limiting judicial discretion to modify existing norms in the creation of new ones.*

*These reasons are all present in international practice, though with different emphasis and institutional coloration.*

Chapter VI: Basis Of The Obligatory  
Nature Of Al-Shari'a Al-Islamiya And  
International Law<sup>(1)</sup>

A. Basis Of The Obligatory Nature of Al-Shari'a  
Al-Islamiya

Some writers<sup>(2)</sup> hold the view that the rules of Al-Shari'a, that rule on the actions of men, are ALLAH's Will and His Commands to mankind, and He enjoins the surrender to the rules of Al-Shari'a with Iman (Faith). In the Holy Qur'an ALLAH says, "O Messenger, Make known that which hath been revealed unto thee from thy LORD, for if thou do it not, thou wilt not have conveyed His message",<sup>(3)</sup> and ALLAH also says, "But nay, by thy LORD, they will not believe [in truth] until they make thee judge of what is in dispute between them and find within themselves no dislike of which thou decidest, and submit with full submission".<sup>(4)</sup> Thus, the rules of Al-Shari'a are binding because it is ALLAH's Command, and the submission to it is a condition of Iman.

ALLAH in the opinion of the Mu'tazila doctrine, commanded the good because it is good, and forbade the evil because it is evil. Unlike them, the Ash'aris maintain that actions are good or bad exclusively because ALLAH commands or forbids them; but ALLAH does not command actions because they are intrinsically good, nor forbid certain actions because they are inherently evil.

Our Opinion On The Obligatory Nature Of Al-Shari'a  
Al-Islamiya

The opinion that makes the rule of Al-Shari'a obligatory because it is ALLAH's Command is surely true in the last analysis; but we believe it to be so general that it needs no clarification of this obligatory nature.

We believe that the obligatory nature of Al-Shari'a lies in what we may term it "Self-Censorship". Take the case of what happened during the lifetime of the Holy Prophet Muhammad (peace be upon him), an adulteress came and asked him to apply the punishment of adultery in Al-Islam to her (stoning until death), nobody saw her, but she went with her infant to the Holy Prophet Muhammad (peace be upon him) and told him "purify me", referring to this punishment as a purification of her sin. The punishment was postponed because the infant needed his mother, but the woman returned after her infant had grown, and asked again that the punishment be meted to her.

We also believe that the best illustration of self-censorship is the Hadith of the Holy Prophet Muhammad (peace be upon him), referred to before, on Al-Iman (Faith), Al-Islam and Al-Ihsan (Right-Doing). We conclude from this Hadith that Al-Ihsan or what we call it "Self-Censorship" reflected in "worshipping ALLAH as if we were seeing Him, while we see Him not, yet truly He is seeing us". Worshipping ALLAH is not only the fulfillment of the religious duties, but also the

enforcement of the rules of Al-Shari'a.

This Hadith is confirmed by the Holy Qur'an; ALLAH is with man wheresoever he may be, because ALLAH is much nearer to man than he may imagine, ALLAH says, "He knoweth all that entereth the earth and all that emergeth therefrom and all that cometh down from the sky and all that ascendeth therein; and He is with you wheresoever ye may be. And ALLAH is the Seer of wheresoever ye may be";<sup>(5)</sup> and He also says, "We verily created man and We know what his soul whispereth to him, and We are nearer to him than his jugular vein".<sup>(6)</sup> It is clear from the last Aya that ALLAH knows all the acts of man, even hidden acts; and moreover He knows what man's soul whispereth to him, a meaning which is confirmed many times in the Holy Qur'an.<sup>(7)</sup>

In recent times, under positive law, punishment applies only to discovered crimes, but if a crime has not been discovered there is no way to punish it. But, in the case of the adulteress, it is self-censorship that made her, willingly, insist to be punished, and also it is self-censorship which may prevent the committing of any crime. In other words, if the law is a part of religion, its respect and application also become religious. Therefore, self-censorship may act in two ways, punitive and preventive.

Al-Shari'a Al-Islamiya is distinct from man-made legislation in that it involves religion in secular deeds and promulgates precepts for this worldly life and for the life in the Hereafter. This is the motive that urges compliance with its teachings in the public and private life of Muslims during their prosperity and duress. Muslims, according to Al-Shari'a believe that such compliance is a facet of worship which brings them closer to ALLAH, and that they shall be rewarded for it. Those who are in a position to make mischief without being caught and punished, would abstain from such deeds for fear of punishment in the Hereafter. Such a belief helps in curtailing crimes and maintaining security and order in society. This is contrary to the case where man-made legislation is in force. These laws do not touch upon the conscience of the concerned individuals, as they do not obey these laws except for fear of being punished as provided by these laws alone. Thus, if somebody is capable of committing a crime without being liable to legal prosecution, he would have no impediment either moral or religious, to refrain. That is why in states applying man-made legislation, crimes are progressively increasing, morals are degenerating and criminals among the educated are more frequent. The increase of crime among educated men is due to their moral disintegration and because such classes are more capable of evading the laws than others.

Al-Shari'a Al-Islamiya assumes that man is responsible for his deeds in this world, and shall always be recompensed for them, at least in the Hereafter. If he does good, it is to his own credit; and if he does bad, he shall pay for it. But suffering a penalty in this world does not commute or abolish that of the Hereafter, unless man repents and ALLAH accepts his repentance.

There are at least two differences between penalties in positive law (man-made law), and that in Al-Shari'a.

**First:** In positive law, there is always one worldly penalty; whereas in Al-Shari'a there are two penalties, a worldly penalty and another in the Hereafter. For example, deliberate murder has two penalties, retaliation in this world, and torture in the Hereafter. In the Holy Qur'an ALLAH says, "O ye who believe! Retaliation is prescribed for you in the matter of the murdered; the freeman for the freeman, and the slave for the slave, and the female for the female";<sup>(9)</sup> and He also says, "Whoso slayeth a believer of set purpose, his reward is hell for ever. ALLAH is wroth against him and He hath cursed him and prepared for him an awful doom".<sup>(9)</sup> Not only evil deeds that receive two rewards, but good deeds as well. In the Holy Qur'an, ALLAH says, "Whosoever doeth right, whether male or female, and is a believer, him verily We shall quicken with good life, and We shall pay them a recompense in proportion to the best of what they used to do".<sup>(10)</sup> The meaning of this Aya becomes much clearer if we look to the other extreme, ALLAH says, "But he who turneth away from remembrance of Me, his will be a narrow life, and I shall bring him blind to the assembly on the Day of Resurrection. He will say : My LORD ! wherefor hast Thou gathered me [hither] blind, when I was wont to see ? He will say : So [it must be]. Our revelations came unto thee but thou didst forget them. In like manner thou art forgotten this Day. Thus do We reward him who is prodigal and believeth not the revelations of his Lord; and verily the doom of the Hereafter will be sterner and more lasting".<sup>(11)</sup>

**Second :** In positive law, penalty is, by its very nature, temporary, in the sense that it does not go beyond the life of the punished person; whereas one of the penalties in Al-Shari'a, i.e., the penalty which will be applied in the Hereafter, is eternal, in the Holy Qur'an ALLAH says, "And whose disobeyeth ALLAH and His Messenger and transgresseth His limits, He will make him enter Fire, where he will dwell for ever, his will be a shameful doom".<sup>(12)</sup> The reward for the good deeds of the believers will also be eternal, in the Holy Qur'an ALLAH says, "and for those who believe and do good works, We shall make them enter Gardens underneath which rivers flow to dwell therein for ever".<sup>(13)</sup>

Our idea of self-censorship consists of many integrated elements :

**First :** Al-Iman (the Faith) will not be completed without following the rules of Al Shari'a; in the Holy Qur'an ALLAH says, "With clear proofs and writings; and We have revealed unto thee the Remembrance that thou mayst explain to mankind that which hath been revealed for them, and that haply they may reflect".<sup>(14)</sup>

Al-Islam, as mentioned before, is not only a religion, but a Shari'a as well. Accordingly, belief in Al-Islam requires necessarily the strict application of the rules of Al-Shari'a, as a condition of Iman. In the Holy Qur'an ALLAH says, "O ye who believe! Obey ALLAH, and obey the Messenger and those of you who are in authority; and if ye have a dispute concerning any matter, refer it to ALLAH and the Messenger if

ye are [in truth] believers in ALLAH and the Last day. That is better and more seemly in the end. <sup>(15)</sup>

The ahadith of the Holy Prophet Muhammad (peace be upon him) covers the same meaning in several ahadith, some of which we quote :

On the authority of Abu Amr, quote : "I said : O Messenger of ALLAH, tell me something about Al-Islam which I can ask of no one but you. He said : Say : I believe in ALLAH - and thereafter be upright".

We believe that being upright is explained in another Hadith. On the authority of Abu Huraira, quote : "I heard the Messenger of ALLAH (peace be upon him) say : "What I have forbidden to you avoid; what I have ordered [to do], do as much of it as you can. It was their excessive questioning and their disagreeing with their Prophets that destroyed those where before you".

On the authority of Abu Najih Al-Irbad Ibn Sariya, quote : "The Messenger of ALLAH (peace be upon him) preached a sermon which filled our hearts fear and our eyes with tears. We said : O Messenger of ALLAH, it is as though this a farewell sermon, so counsel us. He said : I counsel you to fear ALLAH (may He be glorified) and to give absolute obedience even if a slave becomes your leader. Verily he among you who lives [long] will see great controversy, so you must keep to my Sunna and to the sunna of the Rightly-Guided Khalifas - cling to follow them firmly. Beware of newly invented matters, for every invented matter is an innovation, and every innovation leads astray, and anyone going astray is doomed to hell".

On the authority of Abu Tha'laba Al-Khushani, the Messenger of ALLAH (peace be upon him) said : ALLAH the Almighty has laid down religious duties, so do not neglect them; He has set boundaries, so do not overstep them; He has prohibited some things, so do not violate them; He was silent about some things out of compassion for you, not forgetfulness, so seek not after them".

Second : The Holy Prophet Muhammad (peace be upon him) warned the Muslims against doubtful matters. On the authority of Abu Muhammad Al-Hasan the son of Ali Ibn Abi Talib, the grandson of the Holy Prophet (peace be upon him), who said, I memorised from the Messenger of ALLAH (peace be upon him) : "Leave that which makes you doubt for that which does not make you doubt". This was clearly explained in another Hadith, On the authority of Abu Abd ALLAH An-Nu'man Ibn Bashir, who quote : "I heard the Messenger of ALLAH (peace be upon him) say : "That which is lawful is plain and that which is unlawful is plain and between the two of them are doubtful matters about which not many people know. Thus, he who avoids doubtful matters clear himself in regard to his religion and his honour, but he who falls into doubtful matters falls into that which is unlawful, like the shepherd who pastures around a sanctuary, all but grazing therein. Truly, every king has a sanctuary, and truly ALLAH's sanctuary is His prohibitions. Truly, in the body there is a morsel of flesh which, if it be whole, all the body is whole, and which, if it be

diseased, all of it is diseased. Truly, it is the heart".

Third : The Holy Qur'an emphasizes the abstention from the outwardness of sin, and its inwardness as well, ALLAH says, "Forsake the outwardness of sin and the inwardness thereof. Lo ! those who garner sin will be awarded that which they have earned".<sup>(16)</sup> Thus, the Holy Qur'an and the Hadith of the Holy Prophet Muhammad (peace be upon him) warn Muslims from sinning, by avoiding even the inwardness of sin and the doubtful matters. This is an essential introduction to the self-censorship.

Fourth : The attributes of ALLAH as indicated in the Holy Qur'an also confirm the Hadith of the Holy Prophet (peace be upon him). ALLAH is the Knower, He says, "ALLAH it is Who is the Hearer, the Knower".<sup>(17)</sup> Also, ALLAH is the Hearer and the Seer, He says, "Lo ! He, only He, is the Hearer, the Seer".<sup>(18)</sup> Also, ALLAH is the Watcher, He says, "Be careful of your duty toward ALLAH in Whom ye claim [your rights] of one another, and towards the wombs [that bare you]. Lo ! ALLAH hath been a Watcher over you".<sup>(19)</sup> Also, ALLAH is the Aware, in the Holy Qur'an He says, "Praise be to ALLAH, unto Whom belongeth whatsoever is in the Heavens and whatsoever is in the earth. He is the praise in the Hereafter, and He is the Wise, the Aware".<sup>(20)</sup>

Fifth : The works of man are recorded, so nothing will be forgotten even if any of these works is minor or trivial. In the Holy Qur'an, ALLAH says, "When the two Receivers receive [him], seated on the right hand and on the left, He uttereth no word but there is with him an observer ready".<sup>(21)</sup> Death is the inevitable end of all mankind. Although some tried to throw into doubt the fact of resurrection, ALLAH will raise those who are in the graves, and afterwards unto ALLAH is the return of man. The Holy Qur'an made all these facts very clear for everybody; ALLAH says, "Every soul will taste death";<sup>(22)</sup> and He also says, "Wheresoever ye may be, death will overtake you, even though ye were in lofty towers".<sup>(23)</sup> The Holy Qur'an refers to those who suspect in the Hereafter and the undoubted resurrection, ALLAH says, "There is naught but our life of the world; we die and we live and we shall not be raised [again];<sup>(24)</sup> and He says, "And because the Hour will come, there is no doubt thereof; and because ALLAH will raise who are in the graves".<sup>(25)</sup> And the Holy Qur'an confirms the inescapable return to ALLAH, He says, "And afterwards unto Him is your return. Then He will proclaim unto you what ye used to do".<sup>(26)</sup>

Sixth : When ALLAH calls to account man in the Hereafter, there will be no witness but himself, all the works of man, whether small or great, has been recorded, a fact expressed by the Holy Qur'an so many times, ALLAH says, "And the Book is placed, and thou seest the guilty fearful of that which is therein, and they say: What kind of a Book is this that leaveth not a small thing nor a great thing but hath counted it! And they find all that they did confronting them, and thy LORD wrongeth no-one".<sup>(27)</sup>

Seventh : On the Day of Resurrection every man and every nation will be requited naught save what they did whether good or evil, in the Holy Qur'an, ALLAH says, "On the day when every soul will find itself confronted with all that it hath done of good and all that it hath done of evil [every soul] will long that there might be a mighty space of distance between it and that [evil]";<sup>(28)</sup> and as regards nations, ALLAH says, "And thou will see each nation crouching, each nation summoned to its record. [And it will be said unto them] : This day ye are requited what ye used to do".<sup>(29)</sup> There is no injustice on the Day of Resurrection, ALLAH says, "This day no soul is wronged in aught; nor are ye requited aught-save what ye used to do".<sup>(30)</sup>

A painful and shameful doom will be the reward of the evil-doers, the Holy Qur'an draws several illustrations of this doom of which we quote one of them, ALLAH says, "Lo ! We have prepared for disbelievers Fire. Its tenet encloseth them. If they ask for showers, they will be showered with water like to molten lead which burneth the faces. Calamitous the drink and ill the rest-place !".<sup>(31)</sup>

Unlike evil-doings, the Holy Qur'an confirms that the reward of goodness aught save goodness, ALLAH says, "And it is said unto who ward off [evil] : What hath your revealed ? They say : Good. For those who do good in this world there is a good [reward] and home of the Hereafter will be better. Pleasant indeed will be the home of those who ward off [evil] Gardens of Eden which they enter, underneath which rivers flow, wherein they have what they will. Thus, ALLAH repayeth those who ward off [evil]. Those whom the angels cause to die [when they are] good. They say : peace be unto you ! Enter the Garden because of what ye used to do".<sup>(32)</sup>

Thus, we believe that our idea of self-censorship, truly, expresses the basis of the obligatory nature of Al-Shari'a which characterizes it from any man-made law. Because a Muslim believes that, his life in our world is just a temporary stage, the here and the Hereafter are both complementary to each other, and although he is not able to see ALLAH, ALLAH truly sees him, therefore, he must watch himself, and strictly follow the rules of Al-Shari'a.

It is not the fear from being punished by worldly penalty that makes a Muslim refrain from committing evil-doing; but it is his self-censorship that prevents him from doing that. The full compliance with Al-Shari'a, whether by following the tenets or refraining from the prohibitions, is the inevitable outcome of self-censorship.

## B. Basis Of The Obligatory Nature Of International Law

Intuitively, the question of the basis of the obligatory nature of international law will not be raised, if international law is not considered a law, but a code of rules of conduct of moral force only. Austin, Hobbes, Pufendorf, and Bentham have questioned the true legal character of international law.

In contemporary international law, there is no doubt of its obligatory nature, even if it be true that there is no determinate sovereign legislative authority in the international community.

### The Law Of Nature School

Several theories of the obligatory nature of international law were based upon the concept of the law of nature. Some of these theories held that the law of nature is of semi-theological character; others held that it is associated with human reason.

This conception was criticised because it lacked the emphasis on the actual practice followed by states in their mutual relations; it also lacked precision, and tended to be a subjective rather than an objective doctrine.

However, its influence on international law was great, because of its rational and idealistic character, which provided and still provides a moral and ethical foundation to international law.

### The Positivism School

The starting point of this school is that legal obligation, in the international field, arises from consent "ex consensu". One can distinguish between two theories, the theory of voluntary self-restriction (Selbstbeschränkung); and the theory of the common will of states (Vereinbarung).

As regards the first theory is concerned Jellinek advocates that the intrinsic faculty of state is self-determination by which a state, at its convenience, can subject itself to international law; and without the manifestation of consent, international law would not be binding. Zorn, a positivist writer, regards international law as external public law (Äußers Staatsrecht), a branch of the state law, and it is binding on the state for this reason only.

The second theory held by Triepel considers the common will of states, assuming their agreement to become bound by the common consent, is the base of the obligatory nature of international law. According to this theory, states cannot unilaterally withdraw their consent, because the common will of states is superior than the individual will of each state.<sup>(34)</sup>

Among the objections raised against positivism is that the notion of state-will is purely metaphorical. Also, it is difficult to ascribe consent to a new state that could have taken no part in the creation of international law. This objection was met by the theory that the recognition of a new state was conditional that this state accepts the rules of the international community. But some writers considers this conditional recognition a fiction to support the consent of states as an explanation of the obligatory nature of international law.

However, the important influence of the positivisim school is its focusing on the actual practice of states, by emphasising that only those rules which states do, in fact, observe, can be rules of international law.

### The Sociological School

Because he considers the conception that the state is a moral person or a sovereign, a fiction; Duguit holds that the state rules of conduct stem from social solidarity which, therefore, is the basis of the binding force of these rules. Duguit's theory was criticized on the ground that social solidarity is not sufficient to be the foundation of the binding force of a legal rule, since the existence of "Social" units in some animal species, such as a beehive, does not justify the assumption that this instinctive relationship, inevitably, originates certain legal system. Therefore, Duguit added to his theory the feeling of solidarity and justice, an idea that relates to the nature of man only.

### Our Opinion On The Obligatory Nature Of International Law

We believe that there is a necessary relationship between law and society, thus, a society always needs a law for its continuity. The fact that human life has created an international community requires necessarily the existence of international law, because this international community links between peoples whatever their differences in race, religion and political system. These peoples are distributed among political and legal units called states which commit them to the rules of international law by the mere fact of their membership of the international community.

There is no legislative authority in the international community, thus, a state is the law giver and simultaneously the subject of this law. And because the state is the legislator in the international community, it cannot be bound without its consent. The case of the new state does not constitute any violation of the theory of consent. It becomes a member of the international community under implied condition, namely, its acceptance of the international law in force, although it did not participate in its creation. The new state, by its membership of the international community, has the right to participate in the process of making alterations in the standing rules of international law to meet their needs; and to create new rules of international law; in both cases, the state practices its explicit consent.

Thus, we believe that the social needs for a system of law in the international community and the consent of states are the basis of the obligatory nature of international law. This opinion is in harmony with the prevailing trends in international law, especially those relating to the establishment of international organizations, the prohibition of the use of force in international relations, the guarantee of the international protection of human rights, the constitution of a new international system, and the protection of the human environment.

Footnotes Of Chapter VI Of The  
Introductory Part

(1) See In English:

Abdul Qader Audah, *I lam Between Ignorant Followers And Incapable Scholars*, pp. 15 18; Mohammad Talaat Al Ghunaimi, *The Muslim Conception Of International Law And The Western Approach*, pp. 96 103; H.A. R. Gibb, *Mohammedanism*, passim; J.L. Brierly, *The Law Of Nations*, pp. 41 93; D.W. Greig, *International Law*, pp. 28-30; Hans Kelsen, *General Theory Of Law And State*, pp. 328-341; Hans Kelsen, *Principles Of International Law*, pp. 420 433; J.G. Starke, *An Introduction To International Law*, pp.19-35; Michael Bothe, *Legal And Non-Legal Norms*, pp. 65 95; Martin Wight, *International Legitimacy*, pp. 1-28.

See In Arabic:

Gaafar Abd Assalam, *Qawa'id Al-Alaqat Ad Dawliya Fi Al-Qanun Ad-Dawli Wa Fi Al Shari'a Al-Islamiya*, pp. 128-130; Ali Graisha, *Shari'at ALLAH Hakima*, passim; Ali Graisha, *Massader Al-Shar'iyah Al-Islamiya*, passim; Ali Graisha, *Arkan Al-Shar'iyah Al-Islamiya*, passim; Ali Graisha, *Usul Al Shar'iyah Al Islamiya*, passim; Abdul Qader Audah, *Al-Islam Baina Jahl Abna'ihhi Wa Ajz Ulama'ihhi*, pp. 8-11; Mustafa Kamal Wasfi, *Al Mashru'iyah Fi An-Nizam Al-Islami*, passim; Mustafa Kamal Wasfi, *Mussanafat An-Nuzum Al-Islamiya Ad-Dusturiya Wa Ad-Dawliya Wa Al-Idariya Wa Al-Iqtisadiya Wa Al-Ijtima'iyah*, pp. 153-186; Mahmud Sami Ginaina, *Al-Qanun Ad-Dawli Al-A'am*, pp. 18-25; Muhammad Sami Abdul Hamid, *Usul Al-Qanun Ad-Dawli Al-A'am, Volume I (Al-Qa'ida Ad Dawliya)*, pp. 22 97; Ali Sadeq Abu Haif, *Al-Qanun Ad-Dawli Al-A'am*, pp. 84 91; Badriya Abd ALLAH Al Awady, *Al Qanun Ad-Dawli Al-A'am Fi Waqt As-Silm Wa Al-Harb Wa Tatbiqihhi Fi Dawlat Al-Kuwait*, pp. 46-51; Muhammad Hafez Ghanem, *Mabadi'i Al-Qanun Ad-Dawli Al-A'am*, pp. 84 106; Muhammad Hafez Ghanem, *Al-Wajeez Fi Al-Qanun Ad Dawli Al-A'am*, pp. 37 52; Muhammad Talaat Al-Ghunaimi, *Al-Ghunaimi Al-Wajiz Fi Qanun As Salam*, pp. 15-23; Fouad Shibab, *Al-Huquq Ad Dawliya Al A'ama*, pp. 19-20; Muhammad Aziz Shukry, *Al-Madkhal Ila Al Qanun Ad Dawli Al A'am Fi Waqt As-Silm*, pp. 40-47; Mohsen Ash-Shishkly, *Al Waseet Fi Al-Qanun Ad-Dawli, Volume I (Book 1)*, pp. 231-256; Hikmat Shubur, *Al-Qanun Ad-Dawli Al-A'am*, pp. 7-56; Hamed Sultan, *Al Qanun Ad-Dawli Fi Waqt As-Silm*, pp. 19-24; Ash-Shafi'i Muhammad Bashir, *Al-Qanun Ad-Dawli Al-A'am Fi Waqt As-Silm Wa Al-Harb*, pp. 22 33, Abdul Aziz Sarhan, *Al-Qanun Ad-Dawli Al-A'am*, pp. 35-47; Sheikh Muhammad Al-Ghazaly, *Haqiqat Al-Qaumiya Al-Arabiya Wa Ustturat Al-Baath Al Arabi*, pp. 22-23.

(2) See Gaafar Abd Assalam, *Qawa'id Al-Alaqat Ad-Dawliya Fi Al Qanun Ad-Dawli Wa Fi Al Shari'a Al-Islamiya (in Arabic)*, pp. 128-130.

(3) Sura V . 67.

(4) Sura IV : 65.

(5) Sura LVII : 4.

- (6) Sura L : 16.
- (7) See for example Suras II : 284; III : 119; V : 7; XX : 7; XXXIII : 54; XL : 19.
- (8) Sura II : 178.
- (9) Sura IV : 93.
- (10) Sura XVI : 97.
- (11) Sura XX : 124-127.
- (12) Sura IV : 14.
- (13) Sura IV : 57.
- (14) Sura XVI : 44; see also Sura IV : 105.
- (15) Sura IV : 59; see also Sura LIX : 7.
- (16) Sura VI : 120.
- (17) Sura V : 76; See also Suras II : 33; XXII : 70; XXV : 6.
- (18) Sura XVII : 1; see also Sura IV : 53.
- (19) Sura IV : 1.
- (20) Sura XXXIV : 1.
- (21) Sura L : 17-18.
- (22) Sura XXIX : 57.
- (23) Sura IV : 78.
- (24) Sura XXIII : 37.
- (25) Sura XXII : 7.
- (26) Sura VI : 60; see also Sura IX : 94.
- (27) Sura XVIII : 49; see also Suras XVII : 13-14; XLI : 22.
- (28) Sura III : 30.
- (29) Sura XLV : 28.
- (30) Sura XXXVI : 54; see also Sura XXXVII : 39.
- (31) Sura XVIII : 29; see also Suras XXIX : 54-55; LXXVIII : 21-26.

(32) Sura XVI : 30-31; see also Suras LV : 46-60; LVI : 10-24.

(33) See in particular, J. L. Brierly, *The Law Of Nations*, pp. 41-93; D. W. Greig, *International Law*, pp. 28-30; Hans Kelsen, *General Theory Of Law And State*, pp. 328-341; Hans Kelsen, *Principles Of International Law*, pp. 420-431; J. G. Starke, *An Introduction To International Law*, pp. 19-35; Michael Bothe, *Legal And Non-Legal Norms*, pp. 65-95; Martin Wight, *International Legitimacy*, pp. 1-28.

(34) Some writers maintain that there is no absolute truth in any of the two schools, each of them includes some elements of the other. According to this opinion, every Member State of the international community has a legislative will which expresses its authority. The objective of this legislative will is the achievement of justice; reason is the means to identify justice.

Within the framework of the international community, justice is the achievement of international peace and security. This legislative will of state is the prime substance of international legal rule.

CHAPTER I OF PART I

PART I : WAR AND LEGALITY

Chapter I : General Distinction  
Between The Conception Of Jihad In  
Al-Shari'a Al-Islamiya And The  
Conception Of War In International  
Law

General

Al-Islam differs, essentially, from Judaism and Christianity because it assembles the comprehensiveness of both religion and state. Consequently Al-Islam uses different means to achieve its objectives.

Jihad in Al-Islam is simply a name for striving to make the Islamic system of life dominant in the world. As far as belief is concerned, it clearly depends on personal opinion.

The term "Jihad" when used signifies the fighting with the unbelievers for the victory of Al-Islam, it is also used to signify the striving against the evils of oneself, and the striving against Shaitan (Satan).

The term "Jihad" is commonly translated as a "Holy or Religious War"; but this translation is far from exact, Jihad is a juridico-religious sense signifies "the exertion of one's power to the utmost of one's capacity in the cause of ALLAH.

On the other hand, war in international law means "a state of law; and a form of conflict; involving a high degree of legal equality of hostility, and violence in the relations of organized groups", or in other words, "war is the legal condition which equally permits two or more hostile groups to carry on conflict by armed force".

In fact, the word "war" was and is still being used for the struggle between nations and states which is waged for the achievement of individual or national self-interest. Since Islamic "war" does not belong to this category, Al-Islam shuns the use of the word of "war" altogether.

The Differences Between Jihad And The Just War Doctrine

In the evolution of international law, there was a distinction between just and unjust wars. Jihad must not be considered as the "just war" of Al-Islam. Both Jihad and the Just War doctrine are different in their sources, nature, conception, motives, binding force, execution, and sanction. These differences are as follows :

1. The sources of Jihad and the Just War doctrine are different. Jihad has a Divine source, while Just War has a man-made source. St. Augustine was the first Christian writer on this doctrine. His work is mainly juristic, although he based his position on evidence from the

CHAPTER I OF PART I

Bible.

2. Jihad is a religious duty, in this capacity always has religious nature. The Just War doctrine began with a religious nature; but later on the emphasis of natural law and, altered its nature.

3. The conception of Jihad is more comprehensive than that of Just War. As referred before, Jihad signifies, inter alia, the striving against the evils of oneself, and the striving against Shaitan (Satan).

4. Jihad must always be "for the cause of ALLAH", consequently its motive is to win the pleasure of ALLAH; while Just War lacks this motive.

5. Jihad is, for the Muslims, a legal duty. The Just War doctrine could not be considered an international legal obligation unless it was adopted by states through a legal instrument such as treaties or international custom.

6. Like all obligations of Al-Shari'a Al-Islamiya Jihad must be applied by Muslim individuals. The Just War doctrine would be applied by states if it became binding through a legal instrument.

7. If Jihad, as a legal duty binding the Muslims, has not been fulfilled, the sanction will be mainly in the Hereafter. But the sanction of the violation of the Just War doctrine, if it acquired a binding force, will be as specified in the concerned legal instrument.

The Differences Between The Causes Of Jihad In Al-Shari'a Al-Islamiya, And Of War In International Law

The causes of "war" or its motives, a term used by Quincy Wright, are different in both Al-Shari'a Al-Islamiya and international law. Al-Islam is a universal faith and ideology. It invites all peoples as human-beings to embrace this faith and ideology, and admits into its folds as equal members, men of all nationalities. The purpose of Al-Islam is to set up a State on the basis of its own ideology and programme.

The Islamic Community, believing in a comprehensive call which embraces the whole universe, men, and life, with its own specific method of life, can be nothing but a striving Community called to Al-Islam, and fought in the way of ALLAH. However, We must distinguish between the reason of Jihad and its motive. As far as the reason of Jihad is concerned, the disbelief of non-Muslims represents the reason, while the motive of Jihad is the application of Al-Shari'a Al-Islamiya. Thus, it cannot be claimed that the objective is to force non-Muslims to believe in Al-Islam.

Some writers have adopted the Western concept of "religion", which is merely a name of the "belief" in the heart, having no relation with the practical affairs of life, and they portrayed Jihad as a war to impose belief on people's heart.

Jihad is not merely a striving or struggle, it is a struggle "for the cause of ALLAH". "For the cause of ALLAH" is an essential condition

for Jihad in Al-Islam. Hence, the term "in the way of ALLAH is reserved for such deeds only as are undertaken with perfect sincerity, without any thought of gaining a selfish end, and executed on the understanding that to afford benefit to other men is a means of winning the pleasure of ALLAH, the sole purpose of human life being to win the favour of the Creator of the universe.

Unlike complexity is in the international society concerning the legality of "war", Al-Islam introduces a crystal clear criterion, that is Al-Islam only admits fighting in the way of ALLAH or Jihad as a legitimate "war", and forbids all other forms of fighting.

On the other hand, the reasons for "war" in international society were noted as follows :

1. The reasons for "war" cannot be categorized into one type, since these reasons differ.
2. The reasons for "war" are changing due to the evolutions and changes which may happen in the human society.
3. The reasons for "war" comprise a wide range of factors varying in importance.
4. There are neither an objective criterion to be applied, nor a tribunal to resort to know whether, or not, the reasons for certain "wars" are justifiable.

These reasons for "war" in the international society do vary, as mentioned before, but we may refer to the political, economic and religious reasons of "war". The main characteristic of all these reasons is that such wars were fought for individual or national self-interest.

#### The Difference Between The Nature Of Jihad In Al-Shari'a Al-Islamiya, And Of "War" In International Law

It is not relevant to use technical words such as "offensive" and "defensive" to describe Jihad as an instrument to remove material obstacles, i.e., political systems which stand between people and Al-Islam. However, Jihad can be described as offensive and defensive at one and the same time. But the term defensive must be understood in the sense that Al-Islam has to defend its principles whether or not there is an armed attack against the Islamic territory.

Under Article 51 of the United Nations Charter, self-defence, whether individual or collective, is an inherent right of states used if an armed attack occurs against a Member of the United Nations. Therefore, "defensive" Jihad and defensive "war" are two different conceptions. To describe Jihad as "defensive", it was suggested to change the meaning of the word "defense" to mean by it "the defense of man" against all the elements which limit his freedom. In this sense, the nature of Jihad and the nature of war are completely separated from each other.

The Inevitability Of Jihad In Al-Shari'a Al-Islamiya, And The Prohibition Of The Use Of Force In International Law

Al-Islam excludes all different types of "war", and only admits the fight in the way of ALLAH, or Jihad. Since the objective of the Islamic message is a decisive declaration of man's freedom, not merely on the philosophical plane, but also in the actual conditions of life, Jihad therefore must be inevitable.

The universal element in Al-Islam made it the duty of every able-bodied Muslim to contribute to its spread. Thus, Jihad may be regarded Al-Islam's instrument of carrying out its ultimate objective of the application of Al-Shari'a Al-Islamiya. It follows that dar Al-Islam (the Islamic State) is, legally speaking, permanently under the duty of Jihad until dar al-harb becomes non-existent.

The duty of the call to Al-Islam raises the subject of Jihad as an inevitable duty behaving every Muslim for the following reasons :

A. As mentioned before, Al-Islam is not merely a belief, it is a declaration of the freedom of man from the servitude of other men. Thus, it strives from the beginning to abolish all those systems and governments which are based on the rule of man over another, and the servitude of one human being to another. When Al-Islam releases people from this political pressure and provides them with a spiritual message appealing to their reason, it gives them complete freedom to accept or reject its beliefs. Again, it must be recalled that, the significance of religion is actually a way of life, and in Al-Islam this is based on belief. But, in the Islamic system there is no place for people who each wishes to apply his own beliefs, while obeying Al-Shari'a Al-Islamiya (the law of dar Al-Islam), which emanates from a Divine origin.

B. The truth and falsehood cannot co-exist on the earth. Whenever Al-Islam pronounced the universal declaration that ALLAH's LORDSHIP should be established on the entire earth, and that men should become free from servitude to other men, the usurper's of ALLAH's authority on earth struck out against it fiercely and never tolerated it. It became incumbent upon Al-Islam to strike back and release man throughout the earth from the grip of these usurpers. The eternal struggle for the freedom of man will continue until the religion is purified for ALLAH, in the Holy Qur'an ALLAH says, "And fight them until persecution is no more, and the religion is for ALLAH".<sup>(1)</sup>

C. According to one of the Islamic theories, the conception of peace in Al-Islam is a positive conception represented in the establishment of a World State embracing all mankind and applying Al-Shari'a Al-Islamiya as the absolute justice of ALLAH. According to this theory, Al-Islam is a revolutionary ideology and programme seeking to alter the social order of the whole world and build it in conformity with its own tenets and ideals. Thus, the Islamic Community is the title of that revolutionary programme. Consequently, Jihad refers to that revolutionary struggle and utmost exertion which the Islamic Party brings into

play to achieve this objective.

On the other hand, the use of force in contemporary international law is prohibited, not only use but the threat of the use of force is prohibited as well, Article 2 paragraph 4 of the United Nations Charter provides that :

"The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

.....  
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations".

The difference between the Islamic attitude and the attitude of international law is, in fact, a difference in the conception of peace in both systems of law. We referred previously to the meaning of peace in Al-Islam as a positive conception; but peace in international law is a negative conception represented in a state of non-hostilities. Its failure proved by the lack of peace and continuous hostilities in several parts of the world even after the establishment of the United Nations and until the recent times.

To eliminate any misunderstanding of the Islamic attitude, we shall clarify in the Epilogue how to solve, or at least alleviate, any possible clashes between the two systems, i.e., Al-Shari'a Al-Islamiya and international law.

The Different Attitudes Of Al-Islam And International Law Towards The Use Of Mass Destruction Weapons

The purpose of the Islamic message is to persuade mankind to accept Al-Islam as a belief and a way of life. Thus, it goes without saying that mass destruction wapons cannot be used by Muslims in the call to Al-Islam. The only possible use of mass destruction weapons by Muslims is in self-defence with the exception of anti-material weapons which could be used in all aspects of Jihad.

On the other hand, it may be said that there is no express conventional rule of international law that prohibits the use of nuclear weapons. It is also hard to say that the non-use of nuclear weapons since the Second World War was due to the existence of opinio juris among nuclear states, that there is a binding customary rule that prohibits the use of nuclear weapons.

As regards chemical weapons, it may be said that a customary rule exists that prohibits the use of these weapons with the exception of herbicides. The Geneva Protocol of June 17, 1925, still an important instrument in this regard, but it is to be noted that a number of states have ratified the Protocol with a reservation as regards reciprocity.

As regards biological weapons, it may be said that a customary rule exists prohibiting the use of these weapons, but it is to be noted that some interpretations make it possible to use biological weapons in reprisals. The 1925 Geneva Protocol is the first Treaty which expressly includes a rule relating to the prohibition of the use in war of "bacteriological methods of warfare". The Convention On The Development, Production And Stockpiling Of Bacteriological (Biological) And Toxin Weapons And On Their Destruction was adopted by the United Nations General Assembly, but it seems that there is no wide adherence to it.

It appears from this comparison that the Islamic attitude towards the use of mass destruction weapons is more advanced than that of contemporary international law. Although there are customary rules prohibiting chemical and biological weapons, it seems that there is no express conventional rule prohibiting the use of nuclear weapons, besides herbicides are excepted from the customary prohibition of chemical weapons. Al-Islam completely respects human life, and therefore it prohibits all mass destruction weapons which lead directly or indirectly to the damage or injury of human life. The attitude of Al-Islam towards the use of mass destruction weapons on the basis of reciprocity is similar to the attitude of international law in this regard. In brief, it may be said that the prohibition of mass destruction weapons in Al-Islam is more comprehensive than that of international law; but there are some similarity in attitudes towards the use of these weapons on the basis of reciprocity.

#### The Different Consequences Of the Unlawful Use Of Force In Al-Shari'a Al-Islamiya And International Law

If we confined these consequences to the jus ad bellum, it may be said that Al-Islam at the outset of the Eighth Century (or during the First Hijri Century) had reached a more advanced position than contemporary international law in the Twentieth Century. In contemporary international law, the last evolution is the concept of the international criminal responsibility without the establishment of a Permanent International Criminal Court of Justice; while the Islamic evolution in the Eighth Century had reached the degree that a Muslim judge could decide, in a case of the conquest of a country treacherously, to revert to the status quo ante bellum or the state of affairs as existed before a "war".

Footnotes Of Chapter I Of Part I

(1) Sura II : 193.

Chapter II: The Conception Of Jihad  
In Al Shari'a Al-Islamiya<sup>(1)</sup>

Is "War" Inevitable ?

Murder was the first crime in history committed by man, in the Holy Qur'an ALLAH says, "But recite unto them with truth the tale of the two sons of Adam, how they offered each a sacrifice, and it was accepted from one of them and it was not accepted from the other. [The one] said : I will surely kill thee. [The other] answered : ALLAH accepteth only from those who ward off [evil]. Even if thou stretch out thy hand against me to kill me , I shall not stretch out my hand against thee to kill thee, lo ! I fear ALLAH, the LORD of the worlds. Lo ! I would rather thou shouldst bear the punishment of the sin against me and thine own sin and become one of the owners of Fire. That is the reward of the evil-doers. But [the other's] mind imposed on him the killing of his brother, so he slew him and become one of the losers".<sup>(2)</sup> Since the dawn of humanity until this very day, man is still committing this crime in one way or another.

"War", as a continuous phenomenon in the history of mankind, has been of the concern to philosophers and different writers. But, in fact there is no consensus on the objective of the elimination of war, or at least the reduction of its hazards : thinkers, long ago said that "war" was a continuous function in the human existence; others pretended that it was a divine method and a supreme experiment of peoples.

The Romans glorified "war" and named "Mars" its "god"; the Ancient Greeks also magnified "war" and named "Ares" its "god"; the Ancient Egyptians sanctified "war" and made "Horis" (the son of the "god" Osiris) the "god of war".

According to some writers,<sup>(3)</sup> two aspects in the human nature motivated most "wars" among nations; to accrue benefits; and remove injustice.

Unlike his Muslim predecessors, Ibn Khaldun, the famous sociologist,<sup>(4)</sup> considers that vengeance is the objective of all "wars". This vengeance may be prompted by four kinds of motives, according to which "wars" are classified. They are, jealousy and rivalry as in tribal feuds; aggression as in "wars" between uncivilized nations; zeal for the cause of ALLAH as in Jihad; and lastly consideration for the state and its order as in punitive wars against rebels. The last two only are just in Ibn Khaldun's opinion.

Some Western and also Asian writers<sup>(5)</sup> pretend that the economic objectives were the chief causes of "wars" of Al-Islam, but they were not the only ones. Others pretend that the Holy Prophet (peace be upon him) and his successors laid waste and subdued Asia to avenge the disbelief in the Oneness of ALLAH. Others specify "the political ambition" of the rulers, and the economic necessity of the people as the chief if not the only cause of the wars in the early days of Al-Islam. An Arab writer claims that when the peoples of the countries

conquered by the Muslims, converted to Al-Islam, it was primarily to escape from paying jiziya and seek identification with the ruling class; but a long period elapsed before such conversions took place.

In fact, we are not willing to discuss, in detail, all these opinions in this part of our thesis; it is sufficient to explain the genuine meaning of Jihad and introduce the decisive response to these opinions. But what makes us really astonished is the twisting of facts to alter its real significance. When Al-Islam did not oppress peoples to change their beliefs this was interpreted as a sign of indifference to accept Al-Islam; and when they willingly believed in Al-Islam, this was interpreted as a sign of escape from jizya, a trivial amount of money could not be compared with the grave responsibilities of being a Muslim.

### War In Judaism And Christianity

Although the conception of Jihad in Al-Islam is not identical to the conception of war in Judaism or Christianity, it may be useful, for comparison purposes, to make the following notes.

Judaism is not a religion that proselytizes, because the Jews consider themselves the chosen people of God. The Holy war of the Jews is to defend their religion and not to call to it.

Christianity, since its advent, was a religion of salvation, and not a religion that aimed at the establishment of a state. Even after it was tied with politics, the Church and the state removed from each other.

Al-Islam differs, essentially, from these two religions because it assembles the comprehensiveness of both religion and state. Consequently, Al-Islam uses different means to realize its objectives.

### War In Judaism

War in Judaism is very harsh and hard-hearted because it means the extermination, eradication and extirpation of the signposts of the enemy. In the book of Deuteronomy, it is said, "Thou shalt surely smite the inhabitants of that city with the edge of the sword, destroying it utterly, and all that is therein, and the cattle thereof, with the edge of the sword. And thou shalt gather all the spoil of it in the midst of the street thereof, and shalt burn with fire the city, and all the spoil thereof every whit, for the Lord thy God : and it shall be an heap for ever; it shall not be built again";<sup>(6)</sup> and it is also said, "When thou comest nigh unto a city to fight against it, then proclaim peace unto it. And it shall be, if it make thee answer of peace, and open unto thee, then it shall be, that all the people that it is found therein shall be tributaries unto thee, and they shall serve thee. And if it will make war against thee, then thou shalt besiege it : And when the Lord thy God hath delivered it into thine hands, thou shalt smite every male thereof with the edge of the sword : but the women, and the little

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ones, and the cattle, and all that is in the city, even all the spoil thereof, shalt thou take unto myself; and thou shalt eat the spoil of thine enemies, which the Lord thy God hath given thee. Thus shalt thou do unto all the cities which are very far off from thee, which are not of the cities of these nations. But of the cities of these people which the Lord thy God give thee for an inheritance, thou shalt save alive nothing that breatheth : But thou shalt utterly destroy them; namely, the Hitties, and the Amorites, the Canaanites, and the Perizzites, the Hivites, and the Jebusites; as the Lord thy God hath commanded thee : That they teach you not to do after all their abominations, which they have done unto their gods, should ye sin against the Lord your God".<sup>(7)</sup>

War In Christianity

The attitude of Christianity towards war is obscure and vague. We find some verses speaking of sending fire on earth and that Christ came not to send peace but a sword and division on the earth. It is said, "I came to send fire on the earth; and what will I, if it be already kindled ? But I have a baptism to be baptized with; and how am I straitened till it be accomplished ! Suppose ye that I am come to give peace on earth ? I tell you, Nay : but rather division";<sup>(8)</sup> and it is also said, "Think not that I am come to set a man at variance against his father, and the daughter against her mother, and the daughter in law against her mother in law. And a man's foes shall be they of his own household. He that loveth father or mother more than me is not worthy of me : and he that loveth son or daughter more than me is not worthy of me. And he that taketh not his cross, and followeth after me, is not worthy of me. He that findeth his life shall lose it : and he that loseth his for my sake shall find it".<sup>(9)</sup>

As mentioned before, at the beginning of the Fourth Century A.D., St. Augustine accepted the notion of a defensive and an offensive war. In practice, the Christians waged wars to destroy Al-Islam in Spain, France, Italy, and East Europe. By means of war, the Christians spread their conviction during ten centuries, three centuries before the advent of Al-Islam, and seven centuries after it. When the Roman Emperor Constantine declared Christianity the official religion of the state, and announced the freedom of belief, this freedom was expounded by the Christians as the freedom of Christianity only and they used force to impose it. Charles the Great, imposed Christianity over the Saxons by the sword, forty five hundred were killed in cold blood. The Norwegian King Olaf imposed Christianity on one of the chiefs of the neighbouring tribes, in a brutal way by threatening him with a poisonous snake pointed at his neck. In 1454 A.D., the Pope issued a decree granting Henry the Prince of Portugal the right to invade, colonize, and subdue all peoples and territories ruled by the enemies of the Christ; and to possess the seas necessary to destroy the spread of "the Islam plague".

The Catholic King Ferdinand and Queen Isabella violated the Treaty of Surrender and Safety concluded with the Muslims of Granada, this violation shed the blood of three million Muslims and one Million Jews.

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The Crusaders after the capture of Bait Al-Maqdis (Jerusalem) in July 1099, slaughtered seventy thousand Muslims "to glorify their lord"; they broke the heads of the children against walls; they threw the infants from the ramparts of fortresses; they broiled men over fire; and ripped open the abdomens of pregnant women to see whether, or not, they had swallowed their golden jewels. The massacre continued three days, and the Crusaders stopped only when they became fatigued from such abundance of killing. The plenipotentiary of the Pope participated in the celebration of this "victory".

On the other hand, we find in some verses a call for peace, "Blessed are the meek : for they shall inherit the earth";<sup>'10'</sup> "Blessed are peacemakers : for they shall be called the children of God";<sup>'11'</sup> "Let your light so shine before men, that they may see your good works, and glorify your Father which is in heaven. Think not that I am not come to destroy, but to fulfil. For verily I say unto you, Till heaven and earth pass, one jot or one tittle shall in no way pass from the law, till all be fulfilled. Whosoever therefore shall break one of these last commandments, and shall teach men so, he shall be called great in the kingdom of heaven. For I say unto you, That except your righteousness shall exceed the righteousness of the scribes and Pharisees, ye shall in no case enter into the kingdom of heaven. Ye have heard that it was said by them of old time, Thou shalt not kill; and whosoever shall kill shall be in danger of the judgment : and whosoever shall say to his brother, Raca, shall be in danger of the council : but whosoever shall say, Thou fool, shall be in danger of hell fire";<sup>'12'</sup> "Ye have heard that it hath been said, An eye for an eye, and a tooth for a tooth : But I say unto you, That ye resist not evil : But whosoever shall smite thee on thy right cheek, turn to him the other also. And if any man will sue thee at the law, and take away thy coat, let him have thy cloak also. And whosoever shall compel thee to go a mile, go with him twain. Give to him that asketh thee, and from him that would borrow of thee turn not thou away".<sup>'13'</sup>

The Meaning Of Jihad

The Holy Qur'an stresses Jihad, the Ayat relating to Jihad accounts for the half the verses of the Holy Qur'an revealed in Al-Madina. The term Jihad derived from the verb jahada (abstract noun juhud) which means "he exerted himself", thus, Jihad literally means exertion or striving. The term Jihad is commonly translated as "Holy or religious war", but this translation is far from exact, Jihad in juridico-religious sense signifies "the exertion of one's power to the utmost of one's capacity in the cause of ALLAH". The term Jihad,<sup>'14'</sup> when used signifies the fighting with the unbelievers for the victory of Al-Islam, but it is also used to signify the striving against the evils of oneself, and the striving against Shaitan.

Like all revolutionary ideologies, Al-Islam shuns the use of the current vocabulary and adopt a terminology of its own, so that its own revolutionary ideals may be distinguished from common ideals. The term

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Jihad, in the sense of "exertion one's utmost endeavour in promoting a cause", belongs to this particular terminology of Al-Islam. Al-Islam purposely rejected the term "harb" (war)<sup>'15'</sup> and other Arabic words bearing the same meaning of war and used the word Jihad which is more forceful and wider in the connotation than mere struggle.

In fact, the word "war" was and is still being used for the struggle between nations and states which are waged for the achievement of individual and national self-interest.<sup>'16'</sup> The motive forces behind these conflicts are such individual or collective purposes as are completely devoid of any ideological bias or support for certain principles. Since Islamic "war" does not belong to this category, Al-Islam shuns the use of the word "war" altogether.

But Jihad is not merely a striving or struggle, it is a struggle "for the cause of ALLAH" or "in the way of ALLAH". "For the cause of ALLAH" is an essential condition for Jihad in Al-Islam. Hence, the term "in the way of ALLAH" is reserved for such deeds only as are undertaken with perfect sincerity, without any thought of gaining a selfish end, and executed on the understanding that to afford benefit to other human beings is a means of winning the pleasure of ALLAH and the sole purpose of human life is to win the favour of the Creator of the universe. The condition "for the cause of ALLAH" has been attached to Jihad for the same reason. In the Holy Qur'an ALLAH says, "Those who believe do battle for the cause of ALLAH; and those who disbelieve do battle for the cause of idols".<sup>'17'</sup> The Arabic word "taghut" used in this Aya<sup>'18'</sup> is derived from the "tughian" (the deluge) bears the meaning "to cross the limit".

Similarly, when man transgresses all lawful bounds and exerts himself to assume the position of ALLAH over human beings, or to expropriate more goods than are rightfully his due, this is called as "fighting in the way of taghut". In contrast to this, "fighting in the way of ALLAH" refers to the struggle for the establishment of ALLAH's just order in the world. The fighter's aim is to abide by the law of ALLAH Himself and enforce it among other human beings.

It is reported in Hadith that an individual enquired from the Holy Prophet (peace be upon him), what does "war in the cause of ALLAH" imply? A man fights to obtain goods. Another engages in a battle to secure a reputation for valour. A third man fights to wreak vengeance upon the other or is impelled to fight for national honour. Who among these men, is a fighter "in the way of ALLAH"? The Holy Prophet (peace be upon him) answered: "None. Only he fights in the way of ALLAH who holds no other purpose than the glorification of ALLAH".

Another Hadith relates, "If a man engaging in a battle entertains in his heart a desire to obtain out of the war only a rope to tie his camel with, his reward shall be forfeited. ALLAH accept only such deeds as are executed for the purpose of obtaining His goodwill, and the doers seek to serve no personal or collective objectives. Hence, from the standpoint of Al-Islam, the condition "in the way of ALLAH" is of utmost importance in relation to Jihad.

The noble spirit with which the Muslims have been exhorted to take up arms was expressed eloquently in a letter from the second Khalifa Umar Ibn Al-Khattab addressed to the military leader Sa'd Ibn Abi Waqqas : "Always search your minds and hearts and stress upon your men the need of perfect integrity and sincerity in the cause of ALLAH. There should be no material end before them in laying down their lives, but they should deem it a means whereby they can please their LORD and entitle themselves to His favour : such a spirit of selfishness should be inculcated in the minds of those who unfortunately lack it. Be firm in the thick of the battle as ALLAH helps man according to the perseverance that he shows in the cause of His faith and he would be rewarded in accordance with the spirit of sacrifice which he displays for the sake of the LORD. Be careful that those who have been entrusted to your care receive no harm at your hands and are never deprived of any of their legitimate rights".

An important element of Jihad is the utmost regard which was always shown to human life, honour and property even on the battlefield. That is why in all the encounters between Muslims and non-Muslims during the life of the Holy Prophet (peace be upon him), only 1018 persons lost their lives on both sides. Out of this 259 were Muslims, and the remaining 759 belonged to the opposite camp. (19)

#### An Islamic Draft Law Of War

It may be interesting to refer to the draft law of war prepared in the Arabic language by Dr. Wahba Az-Zihili, a contemporary Muslim Scholar. It goes without saying that this draft law of war reflects, in one way or another, the personal opinion of its author concerning the subject matter.

The draft comprises fifty four Articles divided into three parts. The First Part entitled "International Relations In Al-Islam" comprises twenty eight Articles. The Second Part entitled "The Persons And The Properties Of The Enemy" comprises eleven Articles. The Third and the last Part entitled "Modes Of Ending The War" comprises fourteen Articles.

#### The Different Conceptions Of Jihad

##### The Sunni Conception Of Jihad

According to the prevailing opinion of the Sunnis, Jihad is "fard-ala-kifaya" (a collective duty) which is binding on the community as a whole, in the sense that when a part of the Muslim community fulfils Jihad, it ceases to be any longer a duty on others. This opinion has its foundation in the Holy Qur'an, ALLAH says, "And the believers should not all go out to fight. Of every troop of them, a party only should go forth, that they [who left behind] may gain sound knowledge in religion and that they may warn their folk when they return to them, so that may beware"; (20) and also supported by the practice of the Holy Prophet

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Muhammad (peace be upon him).

Jihad is incumbent on the free, sane and major Muslim male who is not weak nor sick and who can find what he spends. But Al-Islam has exempted some groups from the duty of Jihad, in the Holy Qur'an ALLAH says, "Not unto the weak, nor unto the sick, nor unto those who can find naught to spend is any fault [to be imputed though they stay at home] if they are true to ALLAH and His Messenger. Not unto the good is there any road [of blame]. ALLAH is Forgiving, Merciful";<sup>(21)</sup> and ALLAH also says, "There is no blame for the blind, nor is there blame for the lame, nor is there blame for the sick [that they go not forth to war]".<sup>(22)</sup>

As far as women are concerned, the practice of the Holy Prophet (peace be upon him), indicates that they were permitted, with certain restrictions, to take part in Jihad in some services such as nursing.

However, Jihad may be considered "fard 'ayn" (individual duty) in the sense that its proper implementation is the Muslim's individual responsibility in the following cases :

1. If a Muslim attended the battle it is not permitted to desert it, this is reflected in the Holy Qur'an, ALLAH says, "O ye who believe ! When ye meet those who disbelieve in battle, turn not your backs to them".<sup>(23)</sup>
2. If an enemy invaded the Muslim territory, it will be the duty of every Muslim, whether man or woman; free or slave to fight, because self-defense of one's own life or property is an important duty in the sight of Al-Islam. In the Holy Qur'an, ALLAH says, "Fight in the way of ALLAH against those who fight you".<sup>(24)</sup>
3. If Al-Imam appoints a specific group for Jihad. In the Holy Qur'an, ALLAH says, "O ye who believe ! What aileth you that when it is said unto you : Go forth in the way of ALLAH, ye are bowed down to the ground with heaviness. Take ye pleasure in the life of the world rather than in the Hereafter".<sup>(25)</sup>

We believe that Jihad is, initially, fard 'ayn, unless it has been fulfilled by a part of the Muslim community, then it will cease to be any longer a duty on the Muslim individual. This finds its strong support in the Sunna of the Holy Prophet Muhammad (peace be upon him). On the authority of Ibn Umar who said, I heard the Messenger of ALLAH (peace be upon him) say, "Al-Islam rose on five (pillars) : testifying that there is no god but ALLAH and Muhammad is the Messenger of ALLAH, performing the Salat, paying the Zakat, making the Haj to the House, and Saum in Ramadan". Also, on the authority Ibn Umar, the Messenger of ALLAH (peace be upon him) said, "I have been ordered to fight against people until they testify that there is no god but ALLAH and that Muhammad is the Messenger of ALLAH, and until they perform the Salat and pay the Zakat, and if they do so they will have gained my protection for their lives and property, unless [they do acts that are punishable] in accordance with Al-Islam, and their reckoning will be with ALLAH the Almighty". The two Hadiths are inter-related, and explain the six

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pillars of Al-Islam. It is not necessary that all the six pillars be included in one Hadith.

We therefore do not agree with the conclusions reached by some writers that Jihad is excluded from the pillars of Al-Islam; and that the recruitment of any army may be regarded as an adequate representation of Jihad. If it is true to say that Jihad, in a modern state, should be a state institution, any of these modern states cannot claim that it is a true Islamic State. However, if Jihad should be a state institution, the non-fulfilment of this duty by a given state shall not relieve the Muslim individual from his responsibility to fulfil this duty.

The Shi'i Conception Of Jihad ✓

In the Shi'i legal theory, the element that characterizes Jihad is the linking of a special duty of executing Jihad with the doctrine of Al-Walaya (the Allegiance to the Imam). Thus, Jihad without an allegiance to the Imam would not constitute Iman (Faith) according to the Shi'i conception.

The Imam, as an infallible ruler, is the only one who can judge when Jihad should be declared, and under what circumstances it would be advisable not to declare it. But, the disappearance of Al-Imam, has left the duty of declaring Jihad unfulfilled. Since the duty of calling the believers to Jihad is a matter in which an infallible judgment is necessary, because the interest of the entire community would be at stake, only the Imam is capable of fulfilling such a duty. Thus, according to the Shi'i conception, Jihad has entered into a state of quiescence, and its resumption would be dependent on the return of the Imam from his ghaiba (absence).

According to this legal theory, not only would the failure of a non-Muslim to believe in ALLAH justify waging Jihad, but also the failure of a Muslim to obey the Imam would make him liable for punishment by Jihad.

The Khariji Conception Of Jihad ✓

The Khariji conception is that Jihad is the sixth rukn (pillar or fundamental duty) of Al-Islam. The Kharijis are of the opinion that faith is a matter of conviction which should be imposed on the reluctant individuals, not a subject of debate and argumentation; for, if the evil is to be exterminated, and justice re-established, obstinate heretics must be either forced to believe or be killed by the sword. This based on a Hadith in which the Holy Prophet (peace be upon him) is reported to have said, "My fate is under the shadow of my spear".

The Qadyani Attitude Toward Jihad

The Qadyani doctrine was established in India by Mirza Ghulam Ahmad in the last two decades of the Nineteenth Century. After his death in 1908, the Qadyanism was divided into two parts, the first is the Qadyani

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party, and the second is the Ahmadiya movement.

According to the Qadyani doctrine, it is claimed that the Holy Prophet Muhammad is not the last of prophets. The Muslims who deny the Qadyani thoughts, are considered unbelievers. As far as Jihad is concerned, and according to Friedman, three arguments were used by Ghulam Ahmad to substantiate his conception of Jihad.

The first argument is the rejection of naskh (abrogation) in the sense that this concept does not apply to the abrogation of the Qur'anic Aya by another; Ghulam Ahmad accepts naskh only in the sense of the abrogation of all former religions by Al-Islam. As a result of this understanding all Qur'anic Ayat ought to have equal validity. In case of different statements on a certain issue, one should act according to the Ayat which was revealed in circumstances similar to his own with no regard to temporal considerations.

The second argument is the idea of "Al-Masih or Al-Mahdi Al-Mau'ud" (the Promised Messiah or Mahdi) as a peaceful figure. The Qadyani understanding of the second coming of Isa (Jesus) is the coming of a person similar to him and not Isa himself. Ghulam Ahmad pretended that he was the Promised Messiah. As mentioned by Friedman, the fact that Isa did not advocate religious war is used by Ghulam Ahmad as a justification of his own conception of Jihad, and at the same time as a proof that he really is similar to Isa and was entrusted with messianic task.

The third argument used by Ghulam Ahmad was the evolution of history. The Qadyani view is that the development of human civilization progressively reduced the severity of religious wars. This development reached, in this view, its peak with the emergence of Ghulam Ahmad, since his time Jihad must be abolished.

Ghulam Ahmad forbids Jihad in all its aspects, and he considered it a wrong belief. In the Qadyani view, the commandment of Jihad was promulgated when nascent Islam was in grave danger, and is therefore valid only if circumstances of a similar kind come again into existence. Ghulam Ahmad held the opinion that circumstances in British India, where Muslims enjoyed full religious freedom, did not justify to call for Jihad.

Ghulam Ahmad invested the British rule over Indian Muslims with unquestioned legitimacy. He gave an interpretation of this Ayā of the Holy Qur'an, "O ye who believe ! Obey ALLAH, and obey the Messenger and those of you who are in authority",<sup>(26)</sup> considering the British Government as "those of you who are in authority". He considered the British rule a "God given favour". Also, he claimed that it is not permissible to fight against the British government. In the Qadyani view, Al-Islam, in the modern period does not suffer from physical violence of infidels, but rather from their attempts to defame Al-Islam and from their lies. These lies cannot be refuted by the sword or, as referred to by Friedman, there is no sword except the sword of arguments and proofs.

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According to some writers, Qadyanism was created and motivated by Britain during its colonialism of the Indian sub-continent to fight against Al-Islam and Muslims. We believe that this forbidding of Jihad by Ghulam Ahmad, and considering Britain as "those of you who are in authority", ignores deliberately several Ayat of the Holy Qur'an. <sup>(27)</sup>

Some Aspects Of The Islamic Military Thought

The Islamic military thought is an integral part of the comprehensive Islamic message. It is natural that we shall not understand this specific part without understanding the characteristics of the whole Islamic message. The Ghazawat of the Holy Prophet (peace be upon him) are not only military expeditions, but also an integral part of the Divine revelation.

The Holy Qur'an is an illimitable source of guidance, science, and wisdom for all humanity until the Day of Resurrection, ALLAH says, "And We reveal the Scripture unto thee as an exposition of all things, and a guidance and a mercy and a good tidings for those who have surrendered [to ALLAH]. <sup>(28)</sup> ALLAH guarantees, it will be recalled, the purity of the Holy Qur'an, He says, "Lo ! We, even We, reveal the Reminder, and lo ! We verily are its guardian". <sup>(29)</sup>

However the Holy Qur'an directs its instructions to the following three categories of peoples :

the first category, those who fully believe in ALLAH. ALLAH says, "This is the Scripture whereof there is no doubt, a guidance unto those who ward off [evil] Who believe in the Unseen, and establish worship, and spend of that We have bestowed upon them; And who believe in that which is revealed to thee [Muhammad] and that which was revealed before thee, and are certain of the Hereafter. These depend on guidance from their LORD. These are the successful"; <sup>(30)</sup>

the second category, those who fully rejected belief in ALLAH. ALLAH says, "As for the disbelievers, whether thou warn them or thou warn them not it is all one for them; they believe not. ALLAH hath sealed their hearing and their hearts, and on their eyes there is a covering. Theirs will be an awful doom"; <sup>(31)</sup> and

the third category is the hypocrites. ALLAH says, "And of mankind are some who say : We believe in ALLAH and the Last Day, when they believe not. They think to beguile ALLAH and those who believe, and they beguile none but themselves; but they perceive not". <sup>(32)</sup>

Unlike the complexity in international society concerning the legitimacy of war; Al-Islam introduces to us a clear criterion, that is, Al-Islam admits only the fighting in the way of ALLAH or Jihad, as a legitimate "war", and prevents all forms of fighting. <sup>(33)</sup>

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According to some writers,<sup>(34)</sup> one may distinguish between the total strategy and the military strategy; they consider Jihad as a total strategy, in the sense that it leads to the direction of all aspects of force, also the use of them all. According to these writers, Jihad is a continuous contest on all fronts including the political, economic, social, psychological, domestic, moral, and spiritual fields to realize the objectives of the Islamic message. The military strategy is only one of the available methods to realize these objectives.

Thus, according to this view, Jihad is the Qur'anic theory of comprehensive strategy, which requires the preparation of all elements of force and the complete use of them; and the military instrument is not but one of the elements of force. Therefore, the military strategy is one of the elements of the complete total strategy. The objective of this military strategy is to dismay the enemy from the stage of the preparation to fight, and during the fight; and at the same time the effective prevention of the Muslims from being dismayed by their enemy. The military strategy realizes its objectives if it acts at all stages; from the preparation to fight until the actual fight between the Muslims and their enemy; as a part of the complete total strategy and not as a detached part from it.

We believe that the meaning of Jihad must be restricted to the fight against unbelievers residing outside dar Al-Islam for the victory of Al-Islam. This means that Jihad may not only be waged against states; but may also be waged against individuals such as what happened between the Islamic authority in Al-Madina, in the first Islamic era, and those false prophets like Musaylemma Al-Kadhab,<sup>(35)</sup> Tulaiha Al-Udiy,<sup>(36)</sup> Al-Aswad Al-Ansy,<sup>(37)</sup> and Sajah.<sup>(38)</sup> Jihad, in this sense, is the military strategy of the Islamic State. But this military strategy does not ignore the other elements of the Islamic force, which will be pooled and then used to realize the same objectives.

Some Essential Rules Of The Islamic Military Thought

First: The Holy Qur'an refers in many places to the fighting of the Muslims against their enemies; as regards the battle of Badr, ALLAH says, "When ye sought help of your LORD and He answered you [saying] : I will help you with a thousand of the angels, rank on rank. ALLAH appointed it only as good tidings, and that your hearts thereby might be at rest. Victory cometh only by the help of ALLAH. Lo ! ALLAH is Mighty, and Wise";<sup>(39)</sup> and as regards the battle of Uhud, ALLAH says, "When thou didst say unto the believers : Is not sufficient for you that your LORD should support you with three thousand angels sent down [to your help] ? Nay, but if ye preserve, and keep from evil, and [the enemy] attack you suddenly, your LORD will help you with five thousand angels sweeping on. ALLAH ordained this only as a message of good cheer for you, and that thereby your hearts might be at rest-Victory cometh only from ALLAH, the Mighty, the Wise".<sup>(40)</sup> At the battle of Uhud the Muslims were suffered a military setback and then ALLAH sent down security for them.<sup>(41)</sup> At the battle of Huneyn the Muslims were also exposed to a

similar situations;<sup>42</sup> but again ALLAH sent down His security to the Muslims who swore allegiance to the Holy Prophet (peace be upon him).<sup>43</sup>

It is concluded from the Holy Qur'an that ALLAH reinforces the belief of the Muslims and grants His tranquillity to them when He wants to destroy the plans of their enemy. The significance that can be deduced from the Holy Qur'an in this regard, is that the Muslims have to hold their belief strong and to keep their tranquillity as well. Thus, they will be able to prevent their enemy from imposing his will upon them.

Second: It is also concluded from the Holy Qur'an that ALLAH dismays His enemies when He wants to impose His Will upon them, as happened in the battles of Badr,<sup>44</sup> Uhud,<sup>45</sup> and Al-Khandaq (the Trench).<sup>46</sup> The Muslims have to follow the same strategy as is drawn in the Holy Qur'an, ALLAH says, "And let not those who disbelieve suppose that they can outstrip [ALLAH's purpose]. Lo ! they cannot escape. Make ready for them all thou canst of [armed] force and of horses tethered, that thereby ye may dismay the enemy of ALLAH and your enemy, and others beside them whom ye know not. ALLAH knoweth them".<sup>47</sup>

Thus, it is deduced from the Holy Qur'an that the Qur'anic military strategy requires Muslims to, constantly, prepare themselves to fight so that they dismay their apparent and concealed enemies, and not be dismayed by their enemy which is the most important point.

This military strategy revolves around two points, one is the strengthening of the faith and self-confidence of the Muslims; and the other, the weakening of the faith and self-confidence of the enemy.<sup>48</sup> The ability to dismay the enemies and resist against his attempts to dismay the Muslims are linked with the degree of faith. In other words, depending on their own strong faith; and the weakness of their enemy's faith, the Muslims will be able to draw plans and determine the steps required to dismay their enemies. This Qur'anic strategy applies in the nuclear war as well as to the conventional war.

In practice, the message sent by Umar Ibn Al-Khattab to S'ad Ibn Abi Waqqas and his soldiers who had gone to fight Firis (Persia), is an example of the application of this Islamic Strategy, Umar says, "I order you and those accompanying you to beware disobeying ALLAH more than your enemy, the guilts of the army are more harmful than your enemy does. The Muslims conquer their enemy by the disobedience of their enemy to ALLAH, otherwise we would not be able to do so, because neither our number, nor our arms can compete with those of the enemy. If they disobey ALLAH as much as we do, they will have the privilege of their force, and we cannot vanquish them. You have to know that, in your battle, there are protectors [angels] sent from ALLAH, who are aware of what you are doing, so be ashamed of them, and do not disobey ALLAH, while you are fighting in His way".

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Third: The Muslims must believe that victory comes only from ALLAH. In the Holy Qur'an, ALLAH says, "Victory cometh only from ALLAH, the Mighty, the Wise".<sup>(49)</sup> They must be confident that ALLAH shall help the believers, He says, "O ye who believe ! If ye help ALLAH, He will help you and will make your foothold firm".<sup>(50)</sup> ALLAH guarantees that the Muslims shall conquer their enemies, if ALLAH so wills, even if have only half the forces of their enemy, ALLAH says, "O Prophet ! Exhort the believers to fight. If there be of you twenty steadfast they shall overcome two hundred, and if there be of you a hundred [steadfast] they shall overcome thousand of those who disbelieve, because they [the disbelievers] are a folk without intelligence. Now hath ALLAH lightened your burden, for He knoweth that there is weakness in you. So if there be of you a thousand [steadfast] they shall overcome two thousand by permission of ALLAH. ALLAH is with the steadfast".<sup>(51)</sup>

Fourth: The Muslim are required, during the battle, to hold firm. They either win or become martyrs, two satisfying prospects. If the Muslim runs away from the battle he will incur the wrath from ALLAH. In the Holy Qur'an, ALLAH says, "O ye who believe ! When ye meet an army, hold firm and think of ALLAH much, that ye may be successful".<sup>(52)</sup>

Fifth: The main conclusion that we may derive from Al-Ghazawat and As-Saraya<sup>(53)</sup> of the Holy Prophet Muhammad (peace be upon him) is that the political objective must be realized through the combined use of military, spiritual, and diplomatic instruments.

Sixth: Stratagem is permitted in war. It is narrated on the authority of Jabir that the Messenger of ALLAH (peace be upon him) said "War is a stratagem". As an example of this permissible stratagem is what happened during the battle of Al-Khandaq, when one of the Muslims, Na'im Ibn Mas'ud Al Ashga'i, deceived the Muslims' enemies and stirred up dissension between the Jews and the Arab idolaters.

Seventh: In the Holy Qur'an, ALLAH says, "O ye who believe ! Take your precautions".<sup>(54)</sup> This Aya requires Muslims to evade any hazards which may reflect on their strength.

The Juristic Trends On The Nature Of Jihad

In general, two main trends concerning the nature of Jihad may be identified.

The First Trend

Although various views are expressed, the core of the first trend is that Jihad is of "defensive" nature, to defend the Islamic State and the call for Al-Islam. According to this trend, the "offensive" Jihad contradicts the essence of Al-Islam and does not represent its established principles. The evidences of this trend may be categorized as follows :

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First: The Evidences Of The Holy Qur'an

1. According to the Holy Qur'an, ALLAH enjoins Jihad to defend aggression against Muslims, He says, "Sanction is given unto those who fight because they have been wronged; and ALLAH is indeed Able to give them victory".<sup>(55)</sup>

2. Al-Islam prohibits offensive fighting. In the Holy Qur'an, ALLAH says, "Fight in the way of ALLAH against those who fight against you, but begin not hostilities. Lo ! ALLAH loveth not aggressors".<sup>(56)</sup> The prohibition of aggression cannot be abrogated due to the reason of this prohibition, "ALLAH loveth not aggressors".

3. ALLAH forbids making friendship with those who war against Muslims alone. In the Holy Qur'an, ALLAH says, "ALLAH forbiddeth you not those who warred not against you on account of religion and drove you not out from your homes, that ye should show them kindness and deal justly with them. Lo ! ALLAH loveth just dealers. ALLAH forbiddeth you only those who warred against you on account of religion and have driven you out from your homes and helped to drive you out, that ye make friends of them. Whosoever maketh friends of them-[All] such wrongdoers".<sup>(57)</sup>

Second: The Evidences Of The Holy Prophet's Sunna

1. Muhammad (peace be upon him) did not fight the enemies of Al-Islam before inviting them to accept Al-Islam or pay jizya.

2. All the military expeditions of the Holy Prophet Muhammad (peace be upon him) were only defensive against actual or potential aggression.

Third: Evidences Of The Duty To Call To Al-Islam

To faith, there is no compulsion in religion. Conviction is the only method, thus fighting to call to Al-Islam contradicts its principles.

According to this trend, Jihad is only justified in the following four cases.

A. Self-Defense

Self-defense is a type of legitimate defense which is permitted by Al-Islam. When permitting legitimate defense, Al-Islam not only exempts from punishment; but erases the crime itself. Muslims do not fight, unless they defend themselves.<sup>(58)</sup> In the Holy Qur'an, ALLAH says, "And one who attacketh you, attack him in like manner as he attacked you".<sup>(59)</sup>

B. Obligatory Assistance To Muslim People

Muslims are duty bound to remove the oppression suffered by a Muslim people living in a non-Islamic state. In the Holy Qur'an, ALLAH

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says, "How should ye not fight for the cause of ALLAH and the feeble among men and of the women and the children who are crying : Our LORD ! Bring us forth from out this town of which the people are oppressors ! Oh, give us from Thy presence some defender !".<sup>(60)</sup>

C. Guarantee Of The Freedom To Believe

This guarantee secures the rights of the followers of any creed and eliminates the persecution of man due to his religion, as was the case of the early Muslims at the hands of the Arab unbelievers. In the Holy Qur'an, ALLAH says, "And fight them until persecution is no more, and religion is for ALLAH. But if they desist, then let there be no hostility except for wrong-doers".<sup>(61)</sup> ALLAH considers persecution as worse than slaughter, He says, "And slay them wherever ye find them, and drive them out of places whence they drove you out, for persecution is worse than slaughter".<sup>(62)</sup>

D. Safeguarding The Authority Of Al-Islam And Its Sovereign Rights To Impose Jiziya

The Holy Qur'an justifies this reason, ALLAH says, "Fight against such of those who have been given the Scripture as believe not in ALLAH nor the Last Day, and forbid not that which ALLAH hath forbidden by His Messenger, and follow not the Religion of the Truth, until they pay the tribute readily, being brought low".<sup>(63)</sup>

The Shortcomings Of The First Trend

We believe that this trend misunderstands Jihad, in at least five ways.

A. The Misunderstanding Of The Different Stages Of Jihad

The first trend does not take into account the nature of the various stages through which Jihad had developed, confusing these stages and thereby distorting the entire concept of Jihad. It also misunderstands how the Ayat relates to the various stages of Jihad. These writers regard every Qur'anic Aya as if it represented the final development in Al-Islam, and deduce from these Ayat final principles and generalities for which there is no justification.

The different stages of Jihad, can be categorized into two periods, the period before Al-Hijra (the Emigration of the Holy Prophet "peace be upon him" from Macca to Al-Madina); and the period after Al-Hijra.

The Period Before Al-Hijra

The first revelation from ALLAH to the Holy Prophet Muhammad (peace be upon him) was, "Iqra'a bism Rabbika alladhee khalaq..." (Read : In the name of thy LORD Who createth).<sup>(64)</sup> This was the beginning of the Prophethood. ALLAH enjoined the Holy Prophet Muhammad (peace be

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upon him) to memorize them. Then ALLAH revealed "Ya ayyuha Al-Muddathir, qum fa'andhir" (O thou enveloped in thy cloak, Arise and warn !).<sup>(65)</sup> Thus, the revelation of "Iqra'a" was his appointment to Prophethood, while "Ya ayyuha Al-Muddathir" was his appointment to Messengership. Later, ALLAH enjoined the Holy Prophet (peace be upon him) to call his near relatives for Al-Islam;<sup>(66)</sup> then his people;<sup>(67)</sup> then the Arabs who were around them;<sup>(68)</sup> then all of Arabia;<sup>(69)</sup> and finally the whole world.<sup>(70)</sup>

Thus, for thirteen years after the beginning of his Messengership, the Holy Prophet (peace be upon him) called people to believe in ALLAH through preaching without fighting or levying jizya, and was enjoined to restrain himself and to practice patience and forbearance.

The Period After Al-Hijra<sup>(71)</sup>

The stages of Jihad after Al-Hijra may be summarized as follows :

1. Permission was given to fight. In the Holy Qur'an, ALLAH says, "Sanction is given unto those who fight because they been wronged; and ALLAH is indeed Able to give them victory; Those who have been driven from their homes unjustly only because they said : Our LORD is ALLAH - For had it not been for ALLAH's repelling some men by means of others, cloisters and churches and oratories and mosques, wherein the name of ALLAH is oft mentioned, would assuredly have been pulled down. Verily ALLAH helpth one who helpth Him. Lo ! ALLAH is Strong, Almighty".<sup>(72)</sup>

2. Subsequently the Holy Prophet Muhammad (peace be upon him) was commanded to fight those who fought him, and restrain himself from those who did not make war with him. In the Holy Qur'an ALLAH says, "Fight in the way of ALLAH against those who fight against you, but begin not with hostilities. Lo ! ALLAH loveth not aggressors".<sup>(73)</sup>

3. Later, the Holy Prophet Muhammad (peace be upon him) was commanded to fight polytheists until ALLAH's religion was fully established, in the Holy Qur'an ALLAH says, "Warfare is ordained for you, though it is hateful unto you; but it may happen that ye hate a thing which is good for you. ALLAH knoweth, ye know not".<sup>(74)</sup>

After the Holy Prophet Muhammad (peace be upon him) only the final stage of Jihad is to be followed; the initial or middle stages are not applicable because they have come to an end.

When Surat At-Tauba (Repentance)<sup>(75)</sup> was revealed, the details of the treatment of three kinds of non believers<sup>(76)</sup> were described. It was also explained that war should be declared against those from among "the people of the Book" who declare open enmity, until they agree to pay jizya or accept Al-Islam. Concerning the polytheists and the hypocrites, it was enjoined in this Sura that Jihad be declared against them and that they be treated harshly. The Holy Prophet Muhammad (peace be upon him) carried on Jihad against the polytheists by fighting, and against hypocrites by preaching and argument. In the same Sura, it was

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enjoined that the treaties with the polytheists be brought to an end at the period of their expiration.

In this respect, the people with whom these treaties were concluded, are divided into three categories :

the first : those who broke the treaty and did not fulfil its terms. The Holy Prophet Muhammad (peace be upon him) was ordered to fight against them; he fought with them and was victorious;

the second : those with whom the treaty was concluded for a stated term, not broken this treaty nor helped anyone against the Holy Prophet Muhammad (peace be upon him). Regarding them, ALLAH ordered that these treaties be honoured to their full term; and

the third : those with whom there was neither treaty, nor were they fighting against the Holy Prophet Muhammad (peace be upon him); or those with whom no expiration date was stated. Concerning these, it was ordered that they be given four months' notice of expiration, at the end of which they would be considered open enemies and fought.

Some writers, such as Al Ghunaimi,<sup>(77)</sup> claim that certain Ayat of the Holy Qur'an particularized the general character of Jihad; "Fight in the way of ALLAH against those who fight against you, but begin not hostilities. Lo ! ALLAH loveth not aggressors;<sup>(78)</sup> "And if they incline to peace, incline thou also to it, and trust in ALLAH. Lo ! He, even He, is the Hearer, the Knower";<sup>(79)</sup> and, "Sanction is given unto those who fight because they have been wronged; and ALLAH is indeed Able to give them victory".<sup>(80)</sup> In fact, this claim has no foundation, because Surat At Tauba was revealed after the former Suras, and it is unreasonable to say that a general text comes after its specification by other texts.

After the revelation of Surat Bara't or At-Tauba of the Holy Qur'an, the disbelievers fell into three groups, adversaries in war who were always afraid of the Holy Prophet Muhammad (peace be upon him); people having treaties with the Islamic State; and dhimmis. As regards the hypocrites, ALLAH commanded the Holy Prophet Muhammad (peace be upon him) to accept their lip service, leave their intentions to ALLAH, and carry on Jihad against them by argument and persuasion.

As of now (presupposing the existence of the Islamic State) the people of the world are composed of three kinds, the Muslims; those who enjoy the status of dhimmi (the non-Muslim residents in dar Al-Islam of the Islamic State); and the opponents of Al-Islam outside dar Al-Islam.

B. The Misunderstanding Of The Holy Prophet's Sunna

The first juristic trend also misunderstands the Sunna of the Holy Prophet Muhammad (peace be upon him). It is generally concluded from

his Sunna that Jihad is obligatory.

In addition to the Hadith of the Holy Prophet Muhammad (peace be upon him) referred to previously, "I have been ordered to fight against people....."; he is reported to have said, "There is no migration after the conquest [of Maccal], but Jihad and sincere intention. When you are asked to set out [for the cause of Al-Islam], you should set out". Jihad like all other actions in Al-Islam is subject to the principle stated in the Hadith of the Holy Prophet Muhammad (peace be upon him) that "Actions are but by intention and every man shall have but that which he intended". The intention of Jihad is required from every Muslim, the Holy Prophet Muhammad (peace be upon him) is reported to have said, "He who when he dies has never campaigned or even intended to campaign dies in a kind of hypocrisy".

Some writers, such as Al-Ghunaimi, claim that this Hadith is to be considered one of the reasons to terminate war if it breaks out between Muslims and non Muslims in keeping with their opinion that Jihad is defensive only. According to this opinion, the interpretation of this Hadith in a different sense will be against the Qur'anic principles. We believe that this interpretation of the Hadith contradicts the nature of Jihad as revealed in the Holy Qur'an, the Sunna and the gist of this Hadith itself. It is not logical to interpret this Hadith as specifying one of the reasons to terminate fighting between Muslims and non-Muslims while still maintaining that Jihad is strictly defensive.

The Holy Prophet Muhammad (peace be upon him) is also reported to have said, "Some of my people will continue to fight victoriously for the sake of the truth until the last of them will combat the anti-Christ". This Hadith indicates that Jihad will remain a permanent duty of the entire Islamic Community until the world reaches this happens.

### C. The Misunderstanding Of The Difference Between Offensive And Defensive Jihad

The third area of misunderstanding involves the difference between "offensive" and "defensive" Jihad. Some writers confine Jihad to what to-day is called "defensive war", and confuse the Islamic principle "there is no compulsion in religion" with the method of Al-Islam to annihilate the political and the material powers which stand between the people and Al-Islam. The Holy Qur'an is very clear and decisive in the matter of "the freedom of belief".<sup>(61)</sup>

Jihad has no relationship to modern warfare, either in its causes, or in the way in which it is conducted. The causes of Jihad should be sought in the very nature of Al-Islam and its role in the world, in its principles which were ordained to it by ALLAH and for the implementation of which ALLAH appointed the Holy Prophet Muhammad (peace be upon him) as His Messenger and declared him to be the last of all prophets and messengers.

In fact, Jihad is both offensive and defensive at one and the same time. It is offensive because the Islamic Community is constrained to capture state powers in order to establish the principles of Al-Islam in a space-time forces. On the other hand, Jihad, in a strict analysis, is defensive in the sense that it has to defend its principles and not a specific territory. In other words, if an aggression against dar Al-Islam happens, then Jihad is resorted to in defense of Islamic principles, not just the Islamic home, because Al-Islam as a universal faith and ideology has no sphere to defend, but upholds certain principles which must be protected. In the same way, the attack against the opponent of Al-Islam, is an assault on his principles, and by no means an attack against its territory. The objective of this attack, moreover, is not to coerce the opponent to relinquish his principles, but to topple the government which sustains these principles.

We agree with Sayyid Qutb<sup>(82)</sup> that, if there is an insistence on calling Jihad a defensive movement, then we must change the meaning of the word "defense" to mean by it "the defense of man" against all those elements which limit his freedom. These elements take the form of beliefs and concepts, as well as political systems, based on economic, racial or class distinctions. When Al-Islam first came into existence, the world was full of such systems, and the present-day jahiliyya (time of ignorance), also, has various kinds of such systems.

Anyone who understands the particular character of Al-Islam as a declaration of the freedom of man, and not only a religion, will also understand the place of Jihad bis saif (striving through sword), which is to clear the way for striving through preaching in the application of the Islamic movement. He will understand that Al-Islam is not a mere "defensive movement" in the narrow sense which to-day is technically called a "defensive war". The narrow meaning is ascribed to it by those who are under the pressure of circumstances and are defeated by the attacks of the Orientalists who distorted the conception of Jihad in Al-Islam.

The interpretation of Jihad as a "defensive" movement is a non-Islamic idea, nor an Islamic opinion. The true purpose of Jihad cannot allow for such an interpretation -and none such existed before the Nineteenth Century either linguistically or legally. This interpretation entails the stopping or even the complete abolition of Jihad, and makes the call to Al-Islam a merely preaching action, while the Holy Qur'an and the Sunna of the Holy Prophet (peace be upon him) give no support to such notions. In Surat At-Tauba one of the latest Suras of the Holy Qur'an revealed in respect of Jihad, ALLAH says, "Fight against such of those who have been given the Scripture as believe not in ALLAH nor in the Last Day, and forbid not that which ALLAH hath forbidden by His Messenger, and follow not the Religion of Truth, until they pay the tribute readily, being brought low".<sup>(83)</sup> There is no doubt that all the prophets of ALLAH, without exception, were revolutionary leaders, and the Holy Prophet Muhammad (peace be upon him) was the greatest of them all. But the revolutionaries of the world either rise from the oppressed classes themselves, or uphold the rights of the oppressed.

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They, therefore, look at all matters from the standpoint of these classes alone. The natural result is that their viewpoint is never impartial and purely humane. The prophets did not allow their personal feelings to influence the course of their revolutionary movements. They acted under direct guidance of their LORD. Since the LORD is above all human passions, He has no special connection with any human group or class, nor does He entertain any grudge or feelings of animosity against any other class of human beings.

Al-Islam is a universal message whose purpose is to free all mankind throughout the earth, and it would be naive to confine it to preaching. In fact, Al-Islam strives through preaching when the freedom of communication exists and when the people are free from any influences. In the Holy Qur'an, ALLAH says, "There is no compulsion in religion";<sup>(64)</sup> but when obstacles and practical difficulties are put in its way, it has no recourse but remove them by force so that when addressed to peoples' hearts and minds, they are free to accept or reject with an open mind. *Al Islam as a universal faith and ideology* has no territory to defend, but it upholds certain principles. Thus Jihad, in a strict analysis, is defensive in the sense that it has to defend its principles although not its territory. Jihad, then, is both "offensive" and "defensive" at the same time.

Since Jihad cannot be described as "defensive" only, it is immaterial, in initiating Jihad, whether the Islamic State is in a condition of peace or threatened by its neighbors. This is because of the independence of Jihad from the question of peace.

#### D. The Misunderstanding Of The Relationship Of The Believers And Unbelievers

The first trend also misunderstands the relationship between the believers and unbelievers. The claim of the first trend that ALLAH only forbids friendship with those who warred against Muslims, and not those who do not fight Muslims has not been substantiated. The unbelievers are ALLAH's enemy, the Holy Qur'an clearly forbids the believers from friendship with the unbelievers, ALLAH says, "O ye who believe! choose not My enemy and your enemy for friends. Do you give them friendship when they disbelieve in that truth which hath come unto you, driving out the Messenger and you because ye believe in ALLAH, your LORD? If ye have come to strive in MY way and seeking My good pleasure, [show them not friendship]. Do ye show friendship unto them in secret, when I am Best Aware of what ye hide and what ye proclaim? And whosoever doeth it among you, he verily hath strayed from the right way"<sup>(65)</sup> Establishing friendship with the unbelievers is only permissible if the believers want to guard themselves against them. In the Holy Qur'an, ALLAH says, "Let not the believers take the disbelievers for their friends in preference to believers. Whoso doeth that hath no connection with ALLAH unless [it be] that ye but guard yourselves against them, taking [as it were] security. ALLAH biddeth you beware [only] of himself. Unto ALLAH is journeying".<sup>(66)</sup>

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However, ALLAH ordered the believers to deal justly even with those who feel hatred against them. In the Holy Qur'an, ALLAH says, "O ye who believe ! Be steadfast witness for ALLAH in equity, and let not hatred of any people seduce you that ye deal not unjustly. Deal justly, that is nearer to your duty".<sup>(87)</sup>

E. The Misunderstanding Of The Islamic Conception Of Religion And Belief

Finally, this trend misunderstands the Islamic conception of religion and faith. Consider religion as merely a name for faith, with no relation to the practical affairs of life. Some writers conceive Jihad as a war to impose faith on people.

Actually, Al-Islam is the way of life ordained by ALLAH for all mankind, and establishes the Divinity of ALLAH alone or His sovereignty. Thus the purpose of Jihad is the subjection of the whole world to Al-Shari'a Al-Islamiya by the transformation of dar al-harb (the non-Islamic states) into dar Al-Islam (the Islamic State). By no means does Jihad aim to impose Al-Islam on non-Muslims as is clearly specified in the Holy Qur'an, where ALLAH says, "And if thy LORD had willed, He verily would have made mankind one nation, yet they cease not differing";<sup>(88)</sup> and ALLAH also says, "And though thou try much, most men will not believe".<sup>(89)</sup> This principle is also confirmed in the Holy Qur'an, when ALLAH says, "And if thy LORD willed, all who are in the earth would have believed together. Wouldst thou [Muhammad] compel men until they are believers ?".<sup>(90)</sup> Thus, ALLAH ordered His Prophet saying, "Remind them, for thou art but a remembrancer, Thou art not at all a warder over them".<sup>(91)</sup>

The Second Trend

This second trend comprises two opinions. According to the first, Jihad is employed as an instrument of preaching Al-Islam; and according to the second, Jihad is employed for the comprehensive application of Al-Shari'a Al-Islamiya in the whole world.

A. The First Opinion

According to Professor Khadduri,<sup>(92)</sup> the Muslims are required to preach Al-Islam by persuasion, and the Khalifa or his commanders in the field have to offer Al-Islam as an alternative to paying jizya or fighting. Failure by non-Muslims to accept Al-Islam or to pay jizya made it incumbent on the Islamic State to declare Jihad upon the recalcitrant individuals and communities. Jihad was therefore employed as an instrument for both the universalization of religion and the establishment of a world state. Thus, Jihad reflects the normal war relations existing between Muslims and non-Muslims.

## B. The Second Opinion

The essence of this opinion is that Jihad is employed as an instrument for the comprehensive application of Al-Shari'a Al-Islamiya throughout the world. This opinion has several elements.

### 1. Al-Islam Is The Last Of The Divine Messages

The universal and revolutionary nature of Al-Islam is expressed in the Holy Qur'an, where ALLAH says, "O mankind ! Worship your LORD, Who hath created you and those before you";<sup>(93)</sup> and where He also says, "The decision rests with ALLAH only, Who hath commanded you that ye worship none save Him".<sup>(94)</sup>

Man's excessive concern with worldly matters made him forget the objective of life and creation as expressed in the Holy Qur'an where ALLAH says, "I created the jinn and and humankind only that they might worship Me".<sup>(95)</sup>

Thus, ALLAH sent prophets to guide man to the right path; the Holy Prophet Muhammad (peace be upon him) is the last of the prophets, in the Holy Qur'an ALLAH says, "Muhammad is not the father of any man among you, but he is the Messenger of ALLAH and the Seal of the prophets; and ALLAH is even Aware of all things";<sup>(96)</sup> and Al-Islam is the last of the religions. In the Holy Qur'an, ALLAH says, "THIS day have I perfected your religion for you and completed My favour unto you, and have chosen for you as religion Al-Islam";<sup>(97)</sup> "Lo religion with ALLAH [is] the Surrender [to His Will and Guidancel";<sup>(98)</sup> "And whoso seeketh as religion other than the Surrender [to ALLAH] it will not be accepted from him, and he will be a loser in the Hereafter".<sup>(99)</sup> The Holy Qur'an also states the fact that Al-Islam will prevail over all other religions. In the Holy Qur'an, ALLAH says, "He it is Who hath sent His Messenger with the guidance and the Religion of Truth, that He may cause it to prevail over all religion. And ALLAH sufficeth as a Witness".<sup>(100)</sup>

### 2. The Universality Of The Islamic Message

Al-Islam is not merely a message confined to the Arabs, but a universal faith and ideology. The universal element in Al-Islam make it incumbent on every able-bodied Muslim to contribute to its dissemination, by striving to dismantle the rule of opposing ideologies and set up in their place a system of government based on the Islamic ideology. Therefore, Jihad may be regarded as the instrument of Al-Islam, carrying out its eventual objective of the application of Al-Shari'a Al-Islamiya.

The Holy Qur'an states the universality of Al-Islam and all mankind is required to believe in it, ALLAH says, "And We have sent not thee [O Muhammad] save as a bringer of good tidings and a warner unto all

mankind".<sup>(101)</sup>

### 3. The Islamic Community Is Required To Call To Al-Islam

The Islamic Community is required to call to Al-Islam, in the Holy Qur'an, ALLAH says of this community, "Ye are the best community that hath been raised up for mankind. Ye enjoin right conduct and forbid indecency; and believe in ALLAH".<sup>(102)</sup> To enjoin the right conduct and forbid the wrong is one of the characteristics of the believers, ALLAH says, "And the believers, men and women, are protecting friends one for another; they enjoin the right and forbid the wrong".<sup>(103)</sup> In the Holy Qur'an ALLAH reveals the purpose of the call for Al-Islam, He says, "This is a declaration for mankind, a guidance and admonition unto those who ward off [evil]".<sup>(104)</sup>

The duty to call to Al-Islam may be implemented in two ways : individually, or through Muslim individuals as Members of the Islamic Community. In the Holy Qur'an, ALLAH says, "And there may spring from you a nation who invite to goodness, and enjoin right conduct and forbid indecency. Such are they who are successful".<sup>(105)</sup>

Thus, Jihad is an undeniable duty for every Muslim to alter the social order of the whole world and rebuild it in conformity with the tenets and ideals of Al-Islam. Yet no state, including the Islamic State, can put its ideology into full operation until the same ideology comes into force in the neighbouring states. Hence, for reasons of both the general welfare of humanity and self-defense, it is imperative for the Islamic Community that it not rest content with establishing the Islamic system of government in one territory alone, but extend the sway of the Islamic system as far as its resources will permit.

It is the policy that was applied by the Holy Prophet Muhammad (peace be upon him) and his successor Khalifas. Arabia where the Islamic Community was founded, was the first country that was subjugated and brought under the rule of Al-Islam. Later, the Holy Prophet Muhammad (peace be upon him) sent invitations to other surrounding states to accept the faith and the ideology of Al-Islam. When the ruling classes of those states declined to accept this invitation, the Holy Prophet Muhammad (peace be upon him) resolved to take military action against them. The battle of Tabbuk was the first in the series of military actions. Then when Abu Bakr assumed the leadership of the Islamic Community after the death of the Holy Prophet Muhammad (peace be upon him), he launched Jihad against Rome and Persia (Iran), which were under the domination of un-Islamic governments. Subsequently, Umar Ibn Al-Khattab carried Jihad to further victory.

### 4. Jihad Is Not An Instrument To Impose Al-Islam

Some writers claim that the above-mentioned Qur'anic Aya, "There is

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no compulsion in religion",<sup>(106)</sup> has been abrogated on the ground that the Holy Prophet Muhammad (peace be upon him) compelled the Arabs and fought them until they converted to Al-Islam. Others claim that this Aya applies only to "the people of the Scripture"; their proof is that Umar Ibn Al-Khattab, the third Khalifa after the death of the Holy Prophet Muhammad (peace be upon him), once called an old Christian woman to Al Islam and, when she declined, he then replied, "ALLAH, be my witness" and recited the said Aya.

But the prevailing opinion is that this Aya has not been abrogated. The Aya expresses its meaning in general words; and such meaning is supported by several Ayat of the Holy Qur'an. Besides, the evidence cited do not decisively indicate that this Aya refers only to the people of the Scripture.

It may be added that the continuous existence, until this very time, of Christian minorities in Muslim societies stands as a solid proof of the freedom of belief in Al-Islam.

5. Jihad Is An Instrument To Apply Al-Shari'a Al-Islamiya

As mentioned before, Al Islam wishes to destroy all states and governments anywhere on earth which are opposed to its ideology and programme, regardless of the country or the nation which rules it. The purpose of Al Islam is to set up a state on the basis of its own ideology and programme, regardless of which nation assumes the role of the standard bearer of Al-Islam, or the rule of which nation is undermined in the process of the establishment of an ideological Islamic State.

Levtzion refers to some examples of the Jihad movements led by the Muslims who lived in West Africa in the Seventeenth, Eighteenth and Nineteenth Centuries.<sup>(107)</sup>

Of these examples in the mid of the Seventeenth Century, an Inselmen (the clerical clans of the Tuareg in the Sahel north-east of the Niger Bend) by the name of Hadahada challenged the legitimacy of the Sultan of Agades. He declared Jihad and inspired to create an Islamic State over the region between Timbuktu and Air.

The movement led, in the Eighteenth Century, by Uthman Dan Fodio, in what is presently Northern Nigeria, is another example. At first, he had attempted to bring about reform through the existing rulers. Uthman Dan Fodio argued that Muslims must not live in the lands of unbelief, his definition of countries ruled by non Muslims. He urged Muslims to emigrate from the lands of unbelief if they were unable to seize power. As a result of Jihad led by Utman Dan Fodio, the Sokoto Khilafa was established, and the process of Islamization accelerated in comparison to the pre-Jihad period.

Towards the end of establishing of an ideological Islamic State,

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Al-Islam wishes to press into service all forces which can bring about a revolution and a composite term for the use of all these forces is Jihad. To change the outlook of the people and initiate a mental revolution among them through speech or writings is a form of Jihad. To alter the old tyrannical social system and establish a new just order of life by the power of sword is also Jihad; and to expend goods and exert physically for this cause is Jihad too. (108)

Tirmidhi has reported on the authority of 'Adi Ibn Hatim, that when the Prophet's message reached him, he ran away to Syria [he had accepted Christianity before the Prophet's time], but his sister and some of the people of his tribe became prisoners of war. The Holy Prophet Muhammad (peace be upon him) treated his sister kindly and gave her some gifts. She went back to her brother and invited him to Al-Islam, and advised him to visit the Holy Prophet Muhammad (peace be upon him). 'Adi agreed to this. When he came into the presence of the Holy Prophet Muhammad (peace be upon him), he was wearing a silver cross. The Holy Prophet (peace be upon him) was reciting the Aya, "They [the people of the Scripture] have taken their rabbis and priests as lords other than ALLAH". (109) 'Adi reports, "I said, 'They do not worship their priests'. ALLAH'S Messenger replied, "Whatever their priests and rabbis call permissible, they accept as permissible; whatever they declare as forbidden they consider as forbidden, and thus they worship them".

The Holy Prophet's explanation of this Aya makes it clear that obedience to the laws and judgments is a sort of worship, and anyone who does this is considered alien to Al-Islam. Thus Al-Islam declares that all the people of the earth should rid themselves of the servitude to anyone other than ALLAH.

Finally, it must be clearly understood that the term Jihad, as used in this thesis means fighting against unbelievers for the victory of Al-Islam: it presupposes that this fighting is directed against the unbelievers outside dar Al-Islam whether, or not, they constitute a state. The unbelievers who reside in dar Al-Islam enjoy the status of dhimmi and pay jizya. If they act against the Islamic State, the State may punish them according to its authority. This is not Jihad in the technical sense; it is a mere use of force of the Islamic State against some of its residents who are considered rebels. (110)

The fighting against the non-Muslims of the city-State of Al-Madina after the establishment of the First Islamic State by the Holy Prophet Muhammad (peace be upon him), is not considered Jihad in the technical sense. Consequently, the Ghazwat "singular Ghazwa" (Military Expedition) against them were not military expeditions in the technical sense if this term is confined to the military expeditions directed against the unbelievers resident outside dar Al-Islam (the Islamic State).

Footnotes Of Chapter II Of Part I

(1) See In English:

Imam Muslim, *Sahih Muslim* (English Translation), *passim*; An Nawawi, *Forty Hadith Nawawi's*, *passim*; H.A.R. Gibb and J.H. Kramers, *Shorter Encyclopaedia Of Islam*, *passim*; John R. Hinnels (Editor), *Dictionary Of Religions*, *passim*; Thomas Patrick Hughes, *A Dictionary Of Islam*, *passim*; Carl Brockelmann, *History Of Islamic Peoples*, *passim*; Francesco Gabrieli, *Muhammad And The Conquests Of Islam*, *passim*; Muhammad Talaat Al Ghunaimi, *The Muslim Conception Of International Law And The Western Approach*, *passim*; H.A.R. Gibb, *The Arab Conquests In Central Asia*, *passim*; Muhammad Hussein Haykal, *The Life Of Muhammad*, *passim*; Majid Khadduri, *War And Peace In The Law Of Islam*, *passim*; Henri Massé, *Islam*, *passim*; Abul A'la Al-Maududi, *Jihad In Islam*, *passim*; Abd Assamii Al-Misry, *Mohammad, The Prophet Of Islam*, *passim*; Daniel Pipes, *In The Path Of God*, *passim*; Sayyid Qutb, *Milestones*, *passim*; Maxime Rodinson, *Mohammad*, *passim*; Muhammad Ibn Al Hasan Ash Shaybani, *Shaybani's Siyar*, *passim*; William Montgomery Watt, *Muhammad : Prophet And Statesman*, *passim*; S.H. Amin, *International And Legal Problems Of The Gulf*, pp. 65-95; Ibn Khaldun, *The Muqaddima*, *passim*; Yohanan Friedman, *Jihad In Ahmadi Thought*, pp. 221-235; Majid Khadduri, *Islam And The Modern Law Of Nations*, pp. 358-372; Majid Khadduri, *International Law, Islamic*, pp. 227-233; Ahmed S. El Kosheri, *History Of The Law Of Nations*, pp. 220-230; Nehmia Levtzion, *The Eighteen Century : Background To The Islamic Revolutions In West Africa (Special Narrative)*; Nehmia Levtzion, *Eighteen Century Renewal And Reform In Islam (Special Narrative)*; Sobhi Mahmassani, *The Principles Of International Law In The Light Of Islamic Doctrine*, pp. 205-328; M.K. Nawaz, *The Doctrine Of "Jihad" In Islamic Legal Theory And Practice*, pp. 32-48; Abdulla Ahmed An-Na'im, *International Relations And Human Rights*, *passim*; Earl Waugh, *Peace As Seen In The Qur'an*, *passim*.

See In Arabic:

Imam Muslim, *Sahih Muslim*, Volumes XII, pp. 35-199, and XIII, pp. 2-68; An Nawawi, *Al-Arba'in Hadith An Nawawiya*, *passim*; Sheikh Muhammad Ibn Al-Hasan Al-Hurr Al A'ameli, *Wasa'il Ash-Shi'a Ela Tahsil Masa'il Al-Shari'a*, Volume VI, *passim*; Ala'u Eddin Al-Mutaqi Ibn Husam Eddin Al-Hindi, *Kanz Al-Ummal Fi Sunnan Al-Aqal Wa Al-Af'al*, Volume VI, pp. 279-615; Hizb At-Tahrir Al-Islami, *Muqaddimat Ad-Dustur*, *passim*; Gaafar Abd Assalam, *Qawa'id Al-Alaqat Ad-Dawliya Fi Al-Qanun Ad-Dawli Wa Fi Al-Shari'a Al-Islamiya*, pp. 686-692; As-Sayyad Hafez Abd-Rabbuh, *Falsafat Al-Jihad Fi Al-Islam*, *passim*; Sheikh Muhammad Abu Zahra, *Nazariyat Al-Harb Fi Al-Islam*, pp. 1-42; Sheikh Muhammad Abu Zahra, *Al-Alaqat Ad-Dawliya Fi Al-Islam*, *passim*; Sheikh Muhammad Abu Zahra, *Ad-Daawa Ela Al-Islam*, *passim*; Muhammad Abdul Hameed Abu Zaid, *As-Salam Fi Al-Islam*, *passim*; Mahmud Muhammad Ali, *Al-Jihad Fi At-Tashri'i Al-Islami*, *passim*; Abbas Mahmud Al-Aqqad, *Haqaeq Al-Islam Wa Abateel Khussumu*, *passim*; Abbas Mahmud Al-Aqqad, *Al-Islam Daawa A'lamiya*, *passim*; Amir Shakeeb Arslan, *Tareekh Ghazawat Al-Arab Fi Faransa Wa Swisra Wa Italia Wa Gaza'ir Al-Bahr Al-Mutawassit*, *passim*; Gamal Eddin Ayyad, *Nuzum Al-Harb Fi Al-Islam*, *passim*; Hasan Ayoob, *Al-Jihad Wa Al-Fida'iyah Fi Al-*

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Isalm, passim; Salah Azzam, Al-Jihad Fi Khutab Wa Ahadith Sayyidina Rasulullah ALLAH, passim; Muhammad Hasan Sa'id Bangar, Al-Jihad Wa As-Salam Fi Dhirwat Al-Islam, passim; Abu Al-Abbas Ibn Yahia Ibn Jaber Al-Beladhury, Futuh Al-Buldan, passim; Kamel Salama Ad-Daqqs, Ayat Al-Jihad Fi Al-Qur'an Al-Karim, passim; Muhammad Abd ALLAH Darraz, Dirasat Islamiya Fi Al-Alaqat Al-Ijtima'iya Wa Ad-Dawliya, passim; Shukry Faisal, Hara'kat Al-Fath Al-Islami Fi Al-Qarn Al-Aw'wal, passim; Muhammad Farag, As Salam Wa Al-Harb Fi Al-Islam, passim; Ahmad Ghunaim, Al-Jihad Al-Islami Difa'a Wa Aqida Wa Akhlaq, passim; Ibn Qayyim Al-Guziyya, Zad Al-Maad Fi Hady Khair Al-Ibad, passim; Muhammad Hussain Haykal, Hayat Muhammad, passim; Muhammad Ali Al-Hasan, Al-Alaqat Ad-Dawliya Fi Al-Qur'an Wa As-Sunna, passim; Ahmad Hussain, Al-Harb Ala Hady Al-Qur'an Wa As-Sunna, passim; Sheikh Muhammad Al-Khadr Hussain, Adab Al-Harb Fi Al-Islam, passim; Muhammad Mustafa Al-Hussainy, Al-Alaqat Ad-Dawliya Fi Al-Isalm, passim; Al-Hafez Yusuf Ibn Abd Al-Barr, Ad Durar Fi Ikhtisar Al-Maghazi Wa As-Siyar, passim; Muhammad Ibn Abd-Wahhab, Mukhtasar Zad Al-Maad Li Al-Imam Ibn Qayyim Al-Guziyya, passim; Imam Ali Ibn Abi Taleb, Manhaj Al-Kifah, passim; Abd ALLAH Ibn Al-Mubarak, Kitab Al-Jihad, passim; Al-Hafez Abi Al-Fida'a Ismael Ibn Katheer, Al Fusul Fi Ikhtisar Sirat Ar-Rasul, passim; Fath Eddin Abul Fath Muhammad Ibn Muhammad Ibn Abd ALLAH Ibn Muhammad Ibn Yahya Ibn Sayyed An Nas, Uyun Al Athar Fi Funun Al-Maghazi Wa Ash-Shama'el Wa As-Siyar, passim; Sha'aban Muhammad Isma'il, Nazariyat An-Naskh Fi Ash-Shara'i As Samawiya, passim; Mer'i Ibn Yusuf Al-Karmi, Qala'id Al-Marjan Fi Bian An-Nasekh Wa Al-Mansukh Fi Al-Qur'an, passim; Majid Khadduri, Al-Harb Wa As-Silm Fi Shir'at Al-Islam, passim; Sheikh Abdul Wahhab Khallaf, As-Siyasa Ash-Shar'iyah Wa Nizam Ad-Dawla Al-Islamiya Fi Ash Shuoun Ad-Dusturiya Wa Al-Kharigiya Wa Al-Ma'liya, passim; Sheikh Amin Al-Khuli, Al-Gundiya Wa As Silm, Waqi'un Wa Mithal, passim; General Muhammad Gamal Eddin Mahfuz, Al-Madkhal Ela Al-Aqida Wa Al-Istratijiya Al-Askariya Al-Islamiya, passim; Sobhi Mahmassani, Al-Qanun Wa Al-Alaqat Ad-Dawliya Fi Al-Islam, passim; Sheikh Abdul Halim Mahmud, Al-Jihad Wa An Nasr, passim; Gamal Eddin Muhammad Mahmud, Al-Islam Wa Qaddiyat As-Salam Wa Al-Harb, passim; Majma'a Al-Buhouth Al-Islamiya (Islamic Researches Academy), Book of the Fourth Conference of the Islamic Researches Academy (September 27-October 24, 1968, For The Support Of Struggle Against Israel), Volume II entitled "The Muslims And The Israeli Aggression", passim; Ali Ali Mansour, Shari'at ALLAH Wa Shari'at Al-Insan, passim; Ali Ali Mansour, Al-Shari'a Al-Islamiya Wa Al-Qanun Ad-Dawli Al-A'am, passim; Muhammad Abdul Aziz Mansour, Fi A'lamm Al-Harb, passim; Abul A'la Al-Maududi, Hasan Al-Banna and Sayyid Qutb, Al-Jihad Fi Sabeel ALLAH, passim; Sheikh Taquei Eddin An-Nabahani Nizam Al-Hukm Fi Al-Islam, passim; Sheikh Taquei Eddin An-Nabahani, Ash-Shakhisiya Al-Islamiya, Volume II, passim; Sheikh Taquei Eddin An-Nabahani, Sur'atu Al-Badiha, passim; Abdul Khaleq An-Nawawi, Al-Alaqat Ad-Dawliya Wa An-Nuzum Al-Qadaiya Fi Al-Shari'a Al-Islamiya, passim; Shahab Eddin Ibn Ahmad Ibn Abdul Wahhab An-Nuwairy, Nihayat Al-Arab Fi Funun Al-Adab, Volumes XVII, XIX and XX, passim; Mohsen Qandil, Nazariyat Al-Harb Fi Al-Qur'an, passim; Yusuf Qasem, Nazariyat Ad-Difa'a Ash-Shar'i Fi Al-Fiqh Al-Jina'i Al-Islami Wa Al-Qanun Al-Jina'i Al-Wad'i, passim; Sayyid Qutb, Maa'lem Fi At-Tariq, passim; Sayyid Qutb, As-Salam Al-A'alami Wa Al-Islam, passim; Sheikh Essayyed Sabeq, Fiqh As-Sunna, Volume III (As-Silm Wa Al-Harb Al-Mu'amalat), pp. 5-107; Muhammad Abd ALLAH As-

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Samman, *Al Islam Wa Al-Amn Ad-Dawli*, passim; Muhammad Shadeed, *Al-Jihad Fi Al Islam*, passim; Ahmad Shalaby, *Al-Jihad Wa An-Nuzum Al-Askariya Al-Islamiya*, passim; Sheikh Mahmud Shaltout, *Al-Islam Aqida Wa Shari'a*, pp. 451-459; Imam Muhammad Ibn Yusuf As-Salihi Ash-Shami, *Subul Al-Huda Wa Ar-Rashad Fi Sirat Khair Al Ibad*, Volume IV, passim; Uthman As-Sa'id Ash Sharqawi, *Shari'at Al-Qital Fi Al-Islam*, passim; Muhammad Ibn Al-Hasan Ash-Shaybani, *Kitab As-Siyar (Islamic International Law)*, passim; Saber Tueima, *Al-Islam Wa Mushkilat As-Siyasa*, passim; Hamed Sultan, *Ahkam Al Qanun Ad-Dawli Fi Al-Shari'a Al-Islamiya*, passim; Mustafa Kamal Wasfi, *An-Nabi Salla ALLAH Alaihi Wa Sallam Wa As-Siyasa Ad-Dawliya*, passim; Mustafa Kamal Wasfi, *Mussanafat An-Nuzum Al-Islamiya Ad-Dusturiya Wa Ad Dawliya Wa Al-Idariya Wa Al-Iqtisadiya Wa Al-Ijtima'iyah*, pp. 279-419; Abdul Aziz Zahran, *As-Silm Wa Al-Harb Fi Al-Islam*, passim; Abdul Karim Zeidan, *Usul Ad-Da'awa*, passim; Wahba Az-Zihili, *Athar Al-Harb Fi Al-Fiqh Al Islami*, passim; Muhammad Ibn Muslim Ibn Ubaid ALLAH Ibn Shahab Az Zuhry, *Al-Maghazi An-Nabawiya*, passim; Badriya Al-Awady, *Al-Qanun Ad Dawli Al-A'am Fi Waqt As-Silm Wa Al-Harb Wa Tatbiqih Fi Dawlat Al-Kuwait*, pp. 425-441; Suhail Hussain Al-Fatlawy, *Qadisiyat Saddam Fi Dou' Ahkam Al Qanun Ad Dawli*, passim; Jaber Ibrahim Ar-Rawi, *Ilgha'a Al Itifaqiya Al-Iraqiya Al-Iraniya*, passim; Yahia Ash-Shimi. *Tahrim Al Hurub Fi Al Alaqat Ad Dawliya*, pp. 200-218; Mohsen Ash-Shishkly, *Al-Waseet Fi Al Qanun Ad Dawli*, Volume I (Book 1), passim; Sedillot, *Khulasat Tarikh Al-Arab (Arabic Translation)*, passim; Abdul Halim Ahmadi, *Al-Jihad Fi Afghanistan*, pp. 159-188; Badriya Abd ALLAH Al Awadi, *Al-Mas'ala Al-Afghaniya Fi Dou' Al-Qanun Ad-Dawli*, pp. 141-158; Mohamed Mokbel El Bakry, *Mashru'iyat Al Harb Fi Al-Shari'a Al-Islamiya Wa Al-Qanun Ad Dawli Al Mu'aser*, pp. 71-123; Muhammad Abd ALLAH Darraz, *Al-Qanun Ad Dawli Al-A'am Wa Al Islam*, pp. 1-15 ; General Mahmud Sheit Khattab, *Iradat Al Qital Fi Al Jihad Al-Islami*, pp. 143-153 ; Mohsen Mohyee Eddin Ash Shishkly, *Al-Islam Wa Al-Alaqat Ad-Dawliya*, pp. 457-505 ; Sheikh Abdul Latif As-Subky, *Al-Jihad Fi Al-Islam*, pp. 277-298; Hasan Al Hodaiby, *Da'awat Al-Islam*, passim; Muhammad Hafez Ghanem, *Mabadi'i Al Qanun Ad Dawli Al A'am*, pp. 49-54; Salah Abd Al-Badi'i Shalaby, *Haqq Al-Istirdad Fi Al Qanun Ad-Dawli*, pp. 21-30.

‘<’ Sura V : 27-30.

‘ ’ Muhammad Abd ALLAH Darraz, *Al-Qanun Ad-Dawli Al-A'am Wa Al-Islam*, pp. 1-15.

‘4’ Abdul Rahman Ibn Khaldun, *Al-Muqaddima (in Arabic)*.

‘5’ See for example, M. K. Nawaz, *Jihad In Islamic Legal Theory And Practice*, pp. 32-48.

‘6’ Deuteronomy, XIII : 15-16.

‘7’ Deuteronomy, XX : 10-18.

‘8’ St. Luke, XII : 49-51.

‘9’ St. Matthew, X : 34-39.

- (10) St. Matthew, V : 5.
- (11) St. Matthew, V : 9.
- (12) St. Matthew, V : 16-22.
- (13) St. Matthew, V : 38-42.
- (14) The term "jahada" (he exerted himself) and all other terms derived from it, have been used forty times in the Holy Qur'an. Reviewing the Holy Qur'an proves that the term "Fi Sabeel ALLAH" (In The Way Of ALLAH) has been attached to Jihad or "qital" (fighting) thirty two times. In the Holy Qur'an, ALLAH says, "And strive for ALLAH with the endeavour which is His right" (Sura XXII : 78); and ALLAH also says, "And those who are slain in the way of ALLAH, He rendereth not their actions vain". (Sura XLVII : 4)
- (15) The Holy Qur'an refers to the terms "Jihad" and "harb", but they are not synonymous. The Holy Qur'an uses the term "harb" (war between two groups) and the terms derived from it eleven times. In the Holy Qur'an, ALLAH says, "If thou comest on them in the war, deal with them so as to strike fear in those who are behind them, that haply they may remember". (Sura X : 57) The Holy Qur'an refers to the term "qatala" (to fight) and all other terms derived from it one hundred seventy times. In the Holy Qur'an, ALLAH says, "Fight against such of those who have been given the Scripture as believe not in ALLAH nor the Last Day, and forbid not that which ALLAH hath forbidden by His Messenger, and follow not the Religion of the Truth, until they pay the tribute readily, being brought low"; (Sura IX : 29) and He also says, "Sanction is given unto those who fight because they have been wronged; and ALLAH is indeed Able to give them victory". (Sura XVII : 39) The term "fataha" and all other terms derived from it have been referred to in the Holy Qur'an thirty eight times. This term signifies, inter alia, the seizure of a country for its guidance to Al-Islam, and not to exploit it.
- (16) The meaning of war in international law, will be explained in the next Chapter.
- (17) Sura IV : 76.
- (18) Referred to in the translation as "the idols".
- (19) Compare these figures with the numbers of casualties of both the First and Second World Wars given in the Prologue.
- (20) Sura II : 122.
- (21) Sura IX : 91.

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- (27) Sura XLVII : 17.
- (28) Sura VIII : 15; see also Aya 45 of the same Sura.
- (29) Sura II : 190.
- (30) Sura IX : 38.
- (31) Sura IV : 59.
- (32) Sura V : 51; see also Sura LX : 1, 13.
- (33) Sura XVI : 89.
- (34) Sura XV : 9.
- (35) Sura II : 2-5.
- (36) Sura II : 6 7.
- (37) Sura II : 8 9.
- (38) Al-Islam does not ignore completely all the previous customs prevailing in Arabia before its advent. In the Holy Qur'an, ALLAH says, "Lo ! the number of months with ALLAH is twelve months by ALLAH's ordinance in the day He created the Heavens and the earth. Fur of th m ar cred : that is the right religion. So wrong, not yourself in them". (Sura IX : 36) However, the meaning of this Aya is clarified by another Aya of the Holy Qur'an, ALLAH says, "The forbidden month for the forbidden month, and forbidden things in retaliation. And one who attacketh you, attack him in like manner as he attacked you". (Sura II : 194)
- (39) Mohsen Qandil, *Nazariyat Al-Harb Fi Al-Qur'an* (in Arabic).
- (40) He was killed by Khalid Ibn Al-Walid, in 12 A.H.
- (41) He later became a Muslim, and was martyred in 21 A.H.
- (42) He was the first apostate in Al-Islam, and was assassinated in 11 A.H.
- (43) She pretended prophethood; but later became a Muslim.
- (44) Sura VIII : 9 10.
- (45) Sura III : 124 126
- (46) Sura III : 153-154.
- (47) Sura IX : 25 26.
- (48) Sura XLVIII : 18.

- (44) Sura VIII : 12.
- (45) Sura III : 151.
- (46) Sura XXXIII : 25-26.
- (47) Sura VIII : 59-60.
- (48) This is supposed to be the permanent status.
- (49) Sura III : 126.
- (50) Sura XLVII : 7; see also Suras XXII : 40; VIII : 17; XXX : 47.
- (51) Sura VIII : 65-66.
- (52) Sura VIII : 45; see also Suras IX : 52; VIII : 15-16.
- (53) The military expedition is called "Ghazwa" if it was led by the Holy Prophet Muhammad (peace be upon him) and directed to the fight of the unbelievers outside Al-Madina itself; and it is called "Sarriya" if it is led by one of the companions of the Holy Prophet Muhammad (peace be upon him). However, it is said that a "Sarriya" must not exceed than four hundred persons, and it was so called because it fulfilled its duties by night. The main purpose of sending a "Sarriya" was to make some investigations and collect different information about the enemy.
- Opinion differs concerning the number of Ghazwat of the Holy Prophet Muhammad (peace be upon him), as it was ranging between seventeen and twenty seven whether he himself actually fight or not. The number of Sarraya (plural of Sarriya) is ranged between fifty sixty and sixty.
- (54) Sura IV : 71; see also Aya 83 of the same Sura.
- (55) Sura XXII : 39; see also Sura II : 191.
- (56) Sura II : 190.
- (57) Sura LX : 8-9.
- (58) Sura II : 190.
- (59) Sura II : 194.
- (60) Sura IV : 75.
- (61) Sura II : 193; see also Sura VIII : 39-40.
- (62) Sura II : 191.

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63) Sura IX : 29. It is very astonishing to notice that some advocates of the first trend refer to this reason to justify recourse to fight in Al Islam. In fact, this reason which is deduced from the Holy Qur'an, belongs to the second trend, especially that Surat At-Tawba is among the latest Suras relating to Jihad, and therefore Jihad is the original status between the Islamic State and non-Islamic states.

64) Sura XCV : 1

65) Sura LXXIV : 1-2.

66) Sura XXVI : 214

67) Sura VI : 19.

68) Sura VI : 92; see also Sura XLII : 7.

69) Sura XXXVI : 6

70) Sura XIV : 52.

71) The Madinan or Madinese Suras of the Holy Qur'an draw the image of the Islamic society established in Al-Madina. They include legislations for different aspects of life, Jihad is one of the topics, which these Suras are concerned with. The sequence of the revelation of the Madinese Suras which give concern to Jihad are according to the prevailing opinion, as follows :

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|---|--|
| 1. Sura II (The Cow)                    | 2. Sura VIII (Spoils of War)           |
| 3. Sura III (The Family of Imran)       | 4. Sura XXXIII (The Clans)             |
| 5. Sura LX (She That Is To Be Examined) | 6. Sura IV (Women)                     |
| 7. Sura XCIX (The Earthquake)           | 8. Sura LVII (Iron)                    |
| 9. Sura XLVII (Muhammad)                | 10. Sura XIII (The Thunder)            |
| 11. Sura LV (The Beneficent)            | 12. Sura LXXVI ("Time" or "Man" )      |
| 13. Sura LXV (Divorce)                  | 14. Sura XCVIII (The Clear Proof)      |
| 15. Sura LIX (Exile)                    | 16. Sura XXIV (Light)                  |
| 17. Sura XXII (The Pilgrimage)          | 18. Sura LXIII (The Hypocrites)        |
| 19. Sura LVIII (She That Disputeth)     | 20. Sura XLIX (The Private Apartments) |

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|---------------------------|------------------------------------|
| 21. Sura LXVI (Banning)   | 22. Sura LXIV (Mutual Disillusion) |
| 23. Sura LXI (The Ranks)  | 24. Sura LXII (The Congregation)   |
| 25. Sura XLVIII (Victory) | 26. Sura V (The Table Spread)      |
| 27. Sura IX (Repentance)  | 28. Sura CV (Succour)              |

(72) Sura XXII : 39-40.

(73) Sura II : 190. It was argued that this Aya was the first that revealed concerning fighting. But, it is to be noticed that Sura XXII : 39-40 gives the permission to fight without giving a command to do it, and it is unreasonable that ALLAH commands to fight, and then gives the permission to do it.

(74) Sura II : 216; see also Sura IX : 36, and Aya 29 of the same Sura.

(75) Sura IX.

(76) After the command for Jihad came, the non-believers were divided into three categories, one, those with whom there was peace; two, the people with whom the Muslims were at war; and three; those who enjoy the status of dhimmis. It was commanded that as long as the non-believers with whom the Holy Prophet (peace be upon him) had a treaty met their obligations, he should fulfil the articles of the treaty, but if they broke this treaty, then they should be given notice of having broken it; until then, no war should be declared. If they persisted, he should fight with them.

(77) Muhammad Talaat Al-Ghunaimi, *The Muslim Conception Of International Law And The Western Approach*.

(78) Sura II : 190.

(79) Sura VIII : 61.

(80) Sura XXII : 39.

(81) See for example Sura XLII : 48; see also Sura X : 99-100; and Suras XI : 118; XVIII : 17, 29; XXXV : 23; LXXXVIII : 21-22; CIX : 1-6.

(82) Sayyid Qutb, *Maa'lem Fi At-Tariq* (in Arabic).

(83) Sura IX : 29; see also Ayat 36, 73, 111 123 of the same Sura.

(84) Sura II : 256.

(85) Sura LX : 1.

(86) Sura III : 28.

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- (87) Sura V : 8.
- (88) Sura XI : 118.
- (89) Sura XII : 103.
- (90) Sura X : 99.
- (91) Sura LXXXVIII : 21 23.
- (92) Majid Khadduri, *War And Peace In The Law Of Islam*.
- (93) Sura II : 21.
- (94) Sura XXII : 40.
- (95) Sura LII : 56.
- (96) Sura XXXI : 22.
- (97) Sura V : 3.
- (98) Sura III : 19.
- (99) Sura III : 85.
- (100) Sura XLVIII : 28.
- (101) Sura XXXIV : 28; see also Suras VII : 158; XXII : 107.
- (102) Sura III : 110.
- (103) Sura IX : 71.
- (104) Sura III : 138.
- (105) Sura III : 104.
- (106) Sura II : 256.
- (107) Nehmia Levtzion, *The Eighteen Century : Background To The Islamic Revolutions In West Africa*; also for the same author, *Eighteen Century Renewal And Reform In Islam*.
- (108) Due to the revolutionary nature of Al-Islam, if the actual life of human beings is found to be different from the declaration of freedom, then it becomes incumbent upon Al-Islam to enter the field of preaching as well as the movement to strike hard all those political powers which force people to bow before them and which rule over them, unmindful of the commandments of ALLAH, and which prevent people from listening to the preaching and accepting

- Sura V : 8.
- 1 Sura XI : 118.
- Sura XII : 103.
- 2 Sura X : 99.
- 3 Sura LXXXVIII : 21-23.
- 4 Majid Khaddri, *War And Peace In The Law Of Islam*.
- 5 Sura II : 21.
- 6 Sura XXII : 40.
- 7 Sura LIII : 56.
- Sura XXXI : 2
- Sura V : 3
- Sura III : 19.
- Sura III : 5.
- Sura XLVIII : 28.
- 8 Sura XXXIV : 28; see also Suras VII : 158; XXII : 107.
- 9 Sura III : 110.
- 10 Sura IX : 71.
- 11 Sura III : 138.
- 12 Sura III : 104.
- 13 Sura II : 256.
- 14 Nehmia Levtzion, *The Eighteen Century : Background To The Islamic Revolutions In West Africa*; also for the same author, *Eighteen Century Renewal And Reform In Islam*.
- 15 Due to the revolutionary nature of Al-Islam, if the actual life of human beings is found to be different from the declaration of freedom, then it becomes incumbent upon Al-Islam to enter the field of preaching as well as the movement to strike hard all those political powers which force people to bow before them and which rule over them, unmindful of the commandments of ALLAH, and which prevent people from listening to the preaching and accepting

the belief if they wish to do so. After annihilating the tyrannical force whether it be in a political or social form, or in the form of class distinctions within the same race. Al-Islam establishes a new social, economic and political system, in which the concept of freedom of man is applied in practice. In fact, the alteration of tyranny, whether political or social, and the establishment of the Islamic justice within the borders of an Islamic State, is the main objective of Al Islam. The means of Jihad is to expend money and goods, and to exert physically; both of them must be in the way of ALLAH. Jihad may be divided into two main categories, Jihad against believers; and Jihad against unbelievers. According to some Muslim jurists, Jihad against believers is divided into three categories, Jihad against Ar-Ridda (Apostasy); Jihad against Al-Bughat (Dissension); and Jihad against Al-Muharibun (Secession). The other main category is Jihad against unbelievers, or as previously explained, the fighting with unbelievers for the victory of Al Islam. This last category is what is meant by the use of this word technically.

<sup>10</sup> ' The terminological or technical meaning of Jihad, as used in this thesis, is restricted only to the external relations of the Islamic State.

CHAPTER III OF PART I

Chapter III: The Conception Of "War"  
In International Law<sup>(1)</sup>

It is difficult to embrace, within the framework of this Chapter, all the different aspects relating to war. We shall therefore concentrate on the following points.

First: Motives Of War

According to Quincy Wright<sup>(2)</sup> motives of war may be classified into different categories, we shall refer to some of them only.

1. The Political Motive Of War

The political motive of war has changed from the wish of the governing class to maintain its position of dominance and prestige in the state, into the wish of the population of the nation to maintain and improve the position of the state in the family of nations. Both types of political motive, however, continue with varying relative importance in different states.

2. The Economic Motive Of War

The economic factor in war was the desire of rulers to acquire wealth for their enjoyment or to increase the power of the state. War was made to augment the power to make war.

3. The Religious Motive Of War

In the opinion of Rosalyn Higgins,<sup>(3)</sup> the external relations of the early civilizations were to a large degree motivated by religious considerations, and peaceful intercourse between nations of different religions was rare. But Professor Higgins misunderstands Jihad when she considers it as a type of religious war, she decides, "By the Eleventh Century... the war [against Jews and Christians] was to be continuous and unremitting : this was known as the doctrine of Jihad". It seems that Professor Higgins considers the Just War doctrine a necessity to resist the infidels [the Muslims according to her opinion] and there was a relationship between the growing strength of Al-Islam and the development of the Just War doctrine, which reveal the real attitude of some Christians against Muslims, whether for religious purposes or, over and above, for political objectives, Professor Higgins decides, "As Islam grew in strength, so the need for a Just War against the infidel was felt to be ever more urgent. The Moslem Arabs had spread to west Asia, North Africa, Spain and into France in the Seventh Century. The Church of Rome had become the Master of both the spiritual and the temporal authority, though in the East the Church remained subordinate to the state. The War against the infidel represented not only the holy duty for the Church to bind together its disintegrating Empire. The conflict thus gradually extended from the Saracen in the Holy Land to the heretic in Europe". To describe the cruelty resulting from the religious motive of war of the Christians at that time, we use the words of Professor Higgins to describe the Crusades as "[the] period of

bloodshed and slaughter the Church did". Another example of this type of cruelty in modern times, in the form of cruelty of non-Muslims against non-Muslims, i.e., the Jews claim that six million Jews were killed by the Nazi during the Second World War.

A Western interpretation of the religious motive of war is suggested by Quincy Wright, he says, "The growing mechanization and impersonalization of modern societies, particularly of their economic processes, continually increases the incompatibility between social requirements and individual drives. Consequently, there is an increasing demand for an opportunity such as war is thought to provide, for the release of normally suppressed anti-social dispositions without a sense of guilt".

#### 4. The Cultural Motive Of War

According to Wright, in modern states attacks upon the homeland, upon government officials and agencies, and upon citizens and their property have been regarded as breaches of law justifying war.

#### Second: Ancient Civilizations And The Law Of War

Rosalyn Higgins refers to the fact, previously stated in this thesis, i.e., modern international law is the outcome of the contributions of many nations. She says, "Contrary to a widely held belief, certain international norms were formulated and acknowledged by non-European states, both in their relations with each other and with Christendom.....Undeniably, the mainstream of modern international law is European; but a contribution which was far from negligible had been made by practice of the non-Christian civilizations".

War, in every ancient civilization<sup>(4)</sup> was used as an instrument to political ends. However, according to Quincy Wright, the political ends have not been the only ends which people have deemed important in most stages of most civilizations.

It is noticed that every civilization placed some limitations on the conduct of warfare. For example, in the Egyptian and Sumerian wars of the Second Millennium B.C., there were rules defining the circumstances under which war might be initiated. Also, in ancient China, it was prohibited to wage war during the planting and harvesting seasons. War between the Greek Cities was subject to limitations growing from custom and "natural law" resting on the concepts of reciprocity; but their wars with others were subject to few limitations. In ancient Rome, certain formalities were required in the initiation of war. We note that the use of poisoned weapons was not allowed in some ancient civilizations such as the Hindu, Greek and Roman civilizations.

#### Third: Definition of War

It is difficult to set a clear demarcation around the boundaries of "war",<sup>(5)</sup> this is due to different reasons which include, inter alia,

the interaction between the continuous development in the international relations and organizations, and the continuous advance in different aspects of science especially the military sciences and the industry of modern weapons. However, in the following we shall throw the light on the essential points we believe are necessary for the exploration of the subject-matter. The Charter of the United Nations does not use the term "war",<sup>(6)</sup> but refers instead to terms such as "use of force";<sup>(7)</sup> "breach of peace or act of aggression";<sup>(8)</sup> and "armed attack".<sup>(9)</sup> The Geneva Conventions of 1949<sup>(10)</sup> provides that "...the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if a state of war is not recognized by one of them".<sup>(11)</sup>

We must distinguish between war in the material sense and war in the legal sense. According to Quincy Wright, war in the material sense is often described by the term "hostilities" or "acts of war" which refers to any use of armed force on a large scale in the relations of political groups. War in the material sense is a phenomenon distinguished not by qualitative but by quantitative differences. War in the legal sense is designated "lawful war" or a "state of war". War in the legal sense is distinguished from peace by qualitative differences.

The state of war may exist even if no armed force is being employed by the opposing parties and no actual hostilities between them are occurring. Conversely, force may be used by one state against another without any state of war arising. In this latter circumstances peace will, in law, still subsist between the parties although their relations will be strained to a greater or lesser extent. This absence of identity between the state of war and hostilities has led to the adoption of various pairs of terms to point the difference, such as "de jure war" and "de facto war"; "war" and "war like acts"; or, as mentioned before "war in the legal sense" and "war in the material sense" or (actual war).<sup>(12)</sup>

Professor Feinberg<sup>(13)</sup> raises the question of whether a Member of the United Nations is entitled to consider itself in a "state of war" with a fellow-Member of that Organization, or even with a non-Member. More specifically Professor Feinberg raises the question of whether a state is entitled after the cessation of hostilities between it and another state, to claim to be in a "state of war" with the latter. He believes that after the United Nations, the termination of war without a formal peace treaty is gradually becoming an accepted procedure and consequently a state cannot claim the existence of the "state of war" after the cessation of hostilities. This is, in his opinion, "the natural consequences of the absolute prohibition of war in modern international law and of a proper interpretation of the Charter".

In fact, Professor Feinberg established his opinion when criticizing the Egyptian attitude, in the early fifties, of the exercise of the right of visit and seizure of cargoes to and from Israel, and its ban on the transit of Israel ships through the Suez Canal on the basis

of the existence of a "state of war" between the two states (at that time). Professor Feinberg considers the Armistice Agreement of February 24<sup>th</sup>, 1949, between Egypt and Israel as a "non-aggression pact" because, in his opinion, of its prohibition against the renewal of hostilities.

In our opinion, the prohibition against the renewal of hostilities is not synonymous with the end of war in the legal sense, otherwise the distinction between war in the material sense and war in the legal sense will be of no significance. As we shall indicate in this Chapter, the armistice agreement is not an instrument to terminate the war. There is no doubt that this is the understanding of the government of Israel adopted in the Peace Treaty of March 26<sup>th</sup>, 1979, between Egypt and Israel which provides in its Article 1 that :

"The state of war between the Parties will be terminated and peace will be established between them upon the exchange of instruments of ratification of this Treaty".

It is to be noted that this Peace Treaty is "sui generis" because it is not a treaty to restore the state of peace, but it is a treaty to establish the state of peace which had never existed before between the Parties. Thus, the peace between the two states is created by the individual will of each state.

International law attaches far-reaching consequences to the state of war, and it confers upon states who might be affected by it a distinct legal status which applies not only to the states parties to the war, but also to third states, since where a state of war exists it gives rise to collateral status of neutrality for non-participants in the contest, with all its attendant rights and duties.

In the light of this distinction, we shall refer to some definitions of war as follows :

1. Grotius<sup>(14)</sup> expressing his conception of war, says, war was "not a contest but a condition", or "the condition of those contending by force as such".
2. Clausewitz<sup>(15)</sup> defines war as "an act of violence intended to compel our opponents to fulfil our will".
3. Lord McNair<sup>(16)</sup> defines war as "a state or condition of affairs, not a mere series of acts of force. It is a state of affairs to which International Law attaches certain far-reaching consequences, and it is by reason of those consequences that it is necessary, as a matter of practice rather than of speculation, to define the state of affairs giving rise to them. Moreover, Peace and War are mutually exclusive; there is no half-way house". On the contrary, Schwarzenberger<sup>(17)</sup> is of the opinion of the existence of three states of international law, a state of peace; status mixtus;<sup>(18)</sup> and state of war; but they are abstractions on a level comparable to that of the fundamental principles of international law. Schwarzenberger believe that in international

systems of power politics and power politics in disguise, it is probably more realistic to treat peace as an interval between two wars.

4. Quincy Wright<sup>(19)</sup> defines war, in a narrow sense, as "the legal condition which equally permits two or more hostile groups to carry on a conflict by armed force", or more strictly "war is seen to be a state of law; and a form of conflict; involving a high degree of legal equality of hostility, and of violence; in the relations of organized human groups", or in other words, "war is the legal condition which equality permits two or more hostile groups to carry on a conflict by armed force".<sup>(20)</sup>

#### Fourth: Different Conceptions Of War

The continuous evolution in the techniques of war reflects on the instruments (weapons and organizations) with which war is carried out, and on the utilizations of these instruments (operations and policies) to achieve the objects of the war, therefore giving rise to different conceptions of war. But, we shall refer, only, to three of these conceptions of war, or relating to war, i.e., total war; limited war; and war and deterrence.

##### 1. Total War

Although the Seventeenth Century writers on international law admit that the entire population of the enemy was, in strict law, subject to attack; they distinguished between the combatants and non-combatants, asserting that approved usage should, in general, exempt the latter. Quincy Wright notices that with the progress of modern military technique in the Nineteenth Century, the "armed forces" came to include numerous non-combatants, such as "transport workers", but the civilians outside of the armed forces were in general exempted from direct attack, though their property at sea was liable to confiscation and in occupied areas they and their property were subject to requisition.

While the exemption of non-combatants, civilian population and the national economy is still supported by reference to the sources of international law, the practice of war has tended to become totalitarian as happened in the Second World War. Therefore, as observed by Wright, total war became a characteristic of modern war technique. Thus, the population, manufacturing, and transport centres have become military targets. Modern war techniques, such as bombarding aircraft and starvation blockade, have made it possible to reach these targets beyond any fortifications; consequently, the principles of military necessity has tended to be interpreted in a way to override the traditional rules of war for the protection of the civilian life and property.

##### 2. Limited War

We may distinguish between six contemporary<sup>(21)</sup> uses of limited war, four of them identified, by the British strategic analyst John Garnett : <sup>(22)</sup> limitation by geography, by overall war aims, by means

employed by the belligerents, and by targets chosen for attack; the fifth is a composite definition, and the sixth is a special definition of the limited war.

A. Limited war is a war which is fought in, and confined to, restricted area of the world. <sup>(23)</sup>

B. Limited war is a war fought for limited objectives. <sup>(24)</sup> But, there is a problem concerning this definition which emerges when one belligerent has limited aims and the other does not. As in the case of geographically limited wars, wars limited by the objectives of the belligerents can be fought with great harshness. There is, furthermore, a difficulty in reconciling this usage which was fought with conscious restraint on one side, but on the other side with concentration of every available recourse to support the war. This definition has also been criticised on the ground that the restraint necessary to keep war limited is primarily a restraint on means, not ends. In either of these latter cases, it is suggested that a definition of limited war by limited objectives is inadequate.

C. Limited war is a war fought with limited means, in the sense that restraint practised by the belligerents in respect to the quantity and quality of the weaponry used in the conduct of war. <sup>(25)</sup> But, there are some difficulties concerning this definition, Garnett says, where one side employs such restraint while the other does not as in the case of the Vietnam War; Garnett refers to another difficulty, the criterion of the restraint of means, implies that the Indo-Pakistani and Arab-Israeli wars were not limited wars since all the evidence suggests that each party used all the military power at its disposal to achieve its objectives. Johnson adds that at least some of the belligerents had absolute objective as in the case of some Arab states : the utter annihilation of Israel. According to some writers, limited war guidelines prescribe restraint in the use of psychological instruments; that uncontrollable passions will not be built up, resulting in irresistible pressures for total war.

As noted by some writers, in the Ramadan War of 1973 (also known as the October War, or the Yom Kippur War), the goal of utter destruction of Israel was not proclaimed with the prominence and insistence characteristic of Arab utterance both in war and peace up to that time. On the other hand, the acceptance of the Israeli society of the limits and the terms of termination of the war proves the restrained nature of Israeli use of psychological instrument.

D. Limited war is a war in which some restraint or choice is used in selecting the targets for attack, this refers to the nuclear strategy alone.

E. Johnson <sup>(26)</sup> suggests a composite definition of limited war which includes all the characteristics taken collectively. In his opinion, the result is a generalized idea of limited war in the form of an "ideal type", to which particular limited wars theories and particular wars

that occur, as well as the Just War idea, can be compared and judged. Two conclusions result from his idea, first, not all the criteria seem to be of equal importance or priority, the limitation by overall war goals and the limitation by available resources are the most important; and second, these two concepts realize themselves through other three limitations, limitation by geographic area of the theatre of war, limitations by means chosen, and limitations by targets chosen for attack.

F. Another definition is suggested, as the term "limited war" refers to "a war in which there is deliberate non-use of gigantically powerful military instruments between the United States and the Soviet Union". This deliberate restraint is necessary to keep such war limited, and of course there must be other restraints as well. Limited war might conceivably include strategic bombing carried on a selective otherwise limited manner, but strategic bombing of cities with nuclear weapons must be avoided.

It is clear that this definition confines limited war to war between the two super-powers. It excludes conflicts which are limited naturally by the fact that one or both sides lack the capability to make them total; such as, wars which were kept limited by the small margin of the national economic resources available for mobilization, and a weak potential for destruction means that could be purchased with that narrow margin.

This definition of limited war has focused on a local war between East and West; but some writers suggest that central war as well as limited war may be limited. The most likely limitation in a central war involves targets. According to those writers, the limit might be quantitative with each side attacking some but not all of a particular type of target; also the qualitative limitation is possible when one side or both deliberately avoid destruction of particular targets.

### 3. War And Deterrence

The strategy of deterrence is derived from the fact that favourable results of total war can never be sufficient to justify its cost. The threat of war, open or implied, has always been an instrument of diplomacy by which one state deterred another from doing something of a military or political nature, which the former did not wish the latter to do. However, it must be remembered that, the very large number of wars that have occurred in modern times proves that the threat to use force, even what sometimes looked like superior force, has often failed to deter.

Deterrence means compelling the opponent of one state to consider, in an environment of great uncertainty, the probable cost to him of attacking this state against the expected gain thereof.

Deterrence is meaningful, as a strategic policy, when the retaliatory

instrument, upon which certain state relies, will not be called to function at all; and that instrument has to have its capacity to function maintained at a very high level and constantly refined.

The capacity to deter is usually confused with the capacity to win a war. But, in the strategic thought, deterrence has always suggested something relative, not absolute, and that its effectiveness must be measured not only by the amount of power that it holds in check, but also by the incentives to aggression residing behind that power.

#### Fifth: Commencement Of War

The determination of time of commencing a war, and the time of its termination distinguishes the time of war from the time of peace. Such distinction leads to another distinction made by international lawyers, that is the distinction between the law to war (jus ad bellum) and the law applicable during war (jus in bello), or the distinction between the law of the Hague and the law of Geneva. In the recent Iraqi-Iranian War, which is commonly known as "the Gulf War", there is a difference between the two states about the date of commencement of this war. The Iraqi party considers September 4, 1980, as the date of commencement of this war. Iraq claims that Iran<sup>(27)</sup> rejected "the Algeria Agreement of March 6, 1975", and consequently put off the restoration of the disputed regions to Iraq, i.e., Saif Sa'ad, Zain Al-Qaws, and Maimak, in accordance with the said agreement.<sup>(28)</sup> Besides, Iran, in application of its principle to export the Islamic Revolution to neighbouring countries, started a series of aggressions on Iraqi territory, and devastation within it.<sup>(29)</sup> The Iranian party considers September 22, 1980, as the date of commencement of the Gulf War. According to the Iranian side, at this date the Iraqi armed forces started its invasion of the Iranian territory.<sup>(30)</sup> It is to be noted that Iraq had officially severed the diplomatic relations with Iran on October 1979.

The existence of a state of war between two states depends upon at least one of them being of that opinion; but its ending presupposes the consent of both parties, if the enemy state survives as a sovereign state. If the parties have clearly asserted the existence of a state of war, third parties are bound thereby to the extent that they become neutrals and their relationship with the belligerents involves the rights and obligations of neutrality. Some writers suggest that this will, in principle, be the case even where the state of war is asserted by one contestant only, the other denying it.

War commences either by :

1. a declaration of war<sup>(31)</sup> which was not required by customary international law, although since 1907 the Hague Convention III has required of all states who are parties thereto at the relevant time a previous and unequivocal warning;<sup>(32)</sup>
2. if the declaration itself does not specify the moment at which a state of war is to arise, then war will arise immediately upon the

communication of the declaration of war to the other party; or

3. upon the communication of an act of force, under the authority of a state, which is done animo belligerendi, or which, being done sine animo belligerendi but by way of reprisals or intervention, the other state elects to regard as creating a state of war, either by repelling force or in some other way, retroactive effect being given to this election, so that the state of war arises on the commission of the first act of force.

#### Sixth: Termination Of War

Similarly, it is important to know definitely when a state of war comes to an end, so that the normal commercial and other intercourse with the late enemy may be resumed. A state of war will cease as soon as the continued existence of the state of war is maintained by neither party. However, the state of war can come to an end, under the norms of international law,<sup>(33)</sup> by the following instruments :

##### 1. The Conclusion Of A Peace Treaty<sup>(34)</sup>

The state of war is not terminated by treaty of peace until it has entered into force in accordance with whatever procedure may be provided in the treaty, this will usually involve ratification.

##### 2. Subjugation

According to some writers, subjugation has been defined as "the extermination in war of one belligerent by another through annexation of the former's territory after conquest, the enemy's force having been annihilated".<sup>(35)</sup> Since the subjugated state ceased to exist as a state, thus, the war is inevitable brought to an end through the disappearance of the enemy state. It is noticed that subjugation, while more frequently occurring before the Twentieth Century, is not unknown in modern times.<sup>(36)</sup>

##### 3. The Abstention Of The Belligerents From Further Acts Of War And The Establishment Of Peaceful Relations Without Any Formal Peace Treaty<sup>(37)</sup>

The mere cessation of hostilities does not, in itself, put an end to the state of war, because the latter is not necessarily accompanied by active hostilities. Thus, in addition to the cessation of hostilities, neither party to the prior conflict must maintain the continued existence of the state of war. The uncertainty of the precise date on which the war ended, which may occur in this case, will be avoided if some suitable declaration is issued.

##### 4. Armistice Agreement

An armistice may be general or local, Article 37 of the Regulations Respecting The Laws And Customs Of War On Land, annexed to the 1907

Hague Convention IV, provides that :

"An armistice may be general or local. The first suspends the military operations of the belligerent states everywhere; the second only between certain reactions of the belligerent armies and within a fixed radius".

According to Colonel Levi, "a general armistice is an agreement between belligerents which results in a complete cessation of all hostilities for a specified period of time, usually of some considerable duration, or for an indeterminate period. It applies to all of the forces of the opposing belligerents, wherever they may be located. It may have a political and economic, as well as a military character". There is no fixed rule or custom which prescribe what provisions should, or should not, be included in an armistice agreement.<sup>(38)</sup> An armistice per se, with or without specific provision, results in a cessation of hostilities.

According to the same authority, an armistice does not terminate the state of war existing between the belligerents, neither de jure nor de facto, and the state of war continues to exist and control the actions of neutrals as well as belligerents. Consequently, during an armistice, the rights and duties of belligerents<sup>(39)</sup> and of neutrals remain in being. This complies with the aforementioned Article 36 of the Regulations Respecting The Law And Customs Of War On Land annexed to the 1907 Hague Convention IV.

However, it has been suggested that in contemporary international practice, an armistice may in certain circumstances terminate the legal state of war. Two justifications were given to support this trend :

1. In recent times, an armistice agreement increasingly tend to assume the character of "a preliminary peace treaty". This is due to the developments which occurred in the nature of armistice agreements, so that they concern themselves with matters much wider than necessary merely to secure a cessation of hostilities.

2. The apparent inappropriateness of an armistice, which is clearly intended to put a permanent end to the hostilities pending the eventual conclusion of formal peace arrangements, as having the same legal effects as an armistice which involves a cessation of hostilities, is essentially only temporary distinct from each other. Some writers note that, since the Second World War a persistent phenomenon has been the ending of hostilities by means of an armistice, which in the absence of a political settlement or peace treaty, has been very durable. We believe that an armistice agreement, even of general character, cannot play the said role in terminating the state of war between belligerents; only a peace treaty can play do so. However, as an exception from the above, a general armistice agreement can terminate the state of war in accordance with the following conditions :

A. The agreement has no provision stating the continuation of the state of war;

- B. the hostile acts between the parties to the general armistice agreement have been finally stopped; and
- C. the parties to the general armistice agreement established peaceful relations among themselves.

### Seventh : War And The United Nations

Because the United Nations is entrusted with the maintenance of international peace and security, the Charter, as noted by some writers, develops four interrelated approaches, peaceful settlement of disputes; collective security; disarmament; and promotion of international socio-economic co-operation.

#### A. Peaceful Settlement Of Disputes

This approach is included in Article 1 paragraph 1, and Article 2 paragraph 3 of the United Nations Charter. This approach is based, mainly, on two assumptions, one presupposes that war is a technique for settling disputes, which can be replaced by others; and the second assumption presupposes that war frequently comes about because of the unawareness of decision makers of the possibility of settling disputes peacefully to the mutual advantage of both sides. Thus, it is possible that international organization can contribute to the prevention of wars by devising and institutionalizing peaceful techniques for the settlement of disputes, as an alternative; and by persuading the states to resort to them.

#### B. Collective Security

This approach is included in the Preamble,<sup>(40)</sup> Article 1 paragraph 1, and Article 2 paragraph 5 of the Charter. It involves an agreement by which states agree to take collective action against any state defined as an aggressor.

According to Quincy Wright, collective security differs from collective defence in that it refers, not to collective action by a group of states against an outside aggressor, but to action by the community of nations as a whole against one of its members guilty of aggression.

#### C. Disarmament

This approach is included in Article 11 paragraph 1, and Article 26 of the Charter. Disarmament and limitation of armaments presupposes that states are inclined to strive for predominance in arms over any potential rivals, and that leads to arms races that tend to end in war. This theory has been criticized on the ground that tensions, and not arms

racism cause war; said racism being the consequence of political tensions. Conclusion of this criticism is that reducing the levels of armaments does not necessarily reduce these tensions.

#### D. Promotion Of International Socio-Economic Co-Operation

This approach is included in the Preamble, and Article 1 paragraph 3 of the Charter. The Preamble provides that, "The Peoples of the United Nations Determined,... to promote social progress and better standards of life in larger freedom, And For These Ends... to employ international machinery for the promotion of the economic and social advancement of all peoples". According to Article 1 paragraph 3, the promotion of international socio-economic co-operation is one of the Purposes of the United Nations, which we believe to be one of the important basis of international peace and security.

#### Eighth : The Laws Of War And Insurgency And Belligerency

International law is also concerned with hostilities within a single state. According to McNair and Watts, a condition of insurgency will exist when there is, within a state an armed conflict which has reached proportions necessitating outside states taking cognizance of it. The condition of insurgency changes to a state of belligerency where there exists, within a state, an armed conflict of a general character, where the insurgents occupy and administer a substantial portion of national territory, and where they conduct the hostilities in accordance with the rules of war and through organized armed forces acting under a responsible authority.

The insurgents are considered a "party to the conflict" for purposes of the application of Article 3 of each of the four Geneva Conventions of 1949. The acknowledgement of a situation of insurgency does not entitle either the insurgents or the parent state to exercise belligerent rights against foreign states, nor does it impose on such states the rights and duties of neutrals. The existence of the state of belligerency between the parent state and the rebels, and between them and outside states, is the same as when there is a state of war between two independent states, and will be governed by the rights and duties of belligerency and neutrality. The status of belligerents is an international legal status possessed by the belligerents only in so far as states recognize them to possess it, even in the absence of any express or clearly implicit recognition of belligerency by the parent state.

Footnotes Of Chapter III Of Part I

(1) See in English:

The New Encyclopaedia Britannica, Volumes VII, XIX, passim; The World Book Encyclopaedia, Volume XV, passim; Muhammad Talaat Al-Ghunaimi, The Muslim Conception Of International Law And The Western Approach, passim; Bernard Brodie, The Anatomy Of Deterrence, in John Garnett (Editor), Theories Of Peace And Security, pp. 87-105; Bernard Brodie, Limited War, in John Garnett (Editor), Theories Of Peace And Security, pp. 213-234; Cyril E. Black and Richard A. Falk (Editors), The Future Of The International Legal Order, Volume III (Conflict Management), passim; Ian Brownlie, International Law And The Use Of Force By States, passim; Nathan Feinberg, The Legality Of A "State Of War" After The Cessation Of Hostilities, passim; Hugo Grotius, De Jure Belli AC Pacis Libri Tres, passim; A.D. McNair, The Legal Meaning Of War And The Relation Of War To Reprisals, in Selected Papers, pp. 34-56, this Article was originally published in Grotius Society Transactions, 1925, pp. 29 51; A.D. McNair and Watts, The Legal Effects Of War, pp. 2 34; William V. O'Brien, The Conduct Of Just And Limited War, passim; Morton H. Halperin, The Limitation Of Central War, in John Garnett (Editor), Theories Of Peace And Security, pp. 235-247; Herman Khan, The Concept Of Escalation, in John Garnett (Editor), Theories of Peace And Security, pp. 248-258; Paul Ramsey, The Just War, passim; Julius Stone, Legal Controls Of International Conflict pp.297 323, 635 647; T.A. Taracouzio, The Soviet Union And International Law, pp. 311-342; The Forward by Telford Taylor, pp. I-XXV, and the Introduction by Leon Friedman, pp.1-15, in Leon Friedman (Editor), The Law Of War, Volume I; Quincy Wright, A Study Of War, Volumes I and II, passim; Christy Campbell, War Facts Now, Passim; Edward Bernard Glick, Peaceful Conflict, passim; James Turner Johnson, Ideology, Reason And The Limitation Of War, passim; James Turner Johnson, Just War Tradition And The Restraint Of War, passim; Georgi Zadorozhny, Peaceful Coexistence, pp. 47-69; Georg Schwarzenberger, International Law As Applied by International Courts And Tribunals, Volume II (The Law of Armed Conflict), pp. 9-74, 723 734; Georg Schwarzenberger and E.D. Brown, A Manual Of International Law, passim; Carl von Clausewitz, On War, passim, Rosalyn Higgins, Conflicts Of Interests - International Law In A Divided World, passim; L. Oppenheim, International Law, Volume II (Disputes, War And Neutrality), edited by H. Lauterpacht, passim; R.R. Baxter, Definition of War, pp. 1-14; Kenneth E Boulding, The Prevention Of World War III, in Richard A. Falk and Saul Mendelovitz, The Strategy Of World Order, Volume I (Toward A Theory Of War Prevention), pp.3-16; Karl Zemanek, Neutral Nationals, pp. 4 7; Edwin Borchard, When Did The War Begin? pp. 621-622; Karl Joseph Partsch, Armed Conflict, pp. 25-28; Karl Josef Partsch, Armed Conflict, Fundamental Rules, pp. 28-31; Ulrich Scheuner, Humanitarian Intervention, pp. 211 215; Jost Delbrück, Collective Self-Defence, pp.114 117; Herman Khan, The Arms Race And Some Of Its Hazards, in Richard A. Falk and Saul Mendelovitz, The Strategy Of World Order,

Volume II (Toward A Theory of War Prevention), pp. 17-54; Josef L. Kunz, *Bellum Justum And Bellum Legale*, pp. 528-534; Josef L. Kunz, *Ending The War With Germany*, pp. 114-119; Colonel Howard S. Levi, *The Nature And Scope Of Armistice Agreement*, pp. 880-906; Myres S. McDougal, *Peace And War*, pp. 63-68; Saul H. Mendelovitz, *The Study Of War Prevention*, in Richard A. Falk and Saul Mendelovitz, *The Strategy Of World Order, Volume I (Toward A Theory Of War Prevention)*, pp. 384-389; M.K. Nawaz, *The Doctrine Of Outlawry Of War*, pp. 80-111; Pitman B. Potter, *Preventive War Critically Considered*, pp. 142-145; Joachim von Elbe, *The Evolution Of The Concept Of Just War In International Law*, pp. 665-688; C.H.M. Waldock, *The Regulation Of The Use Of Force By Individual State In International Law*, pp. 455-515; Quincy Wright, *Changes In The Concept Of War*, pp. 755-767; Quincy Wright, *The Outlawry Of War*, pp. 76-103; Quincy Wright, *When Does War Exist?* pp. 362-368; Quincy Wright, *The Outlawry Of War And The Laws Of War*, pp. 365-376; Quincy Wright, *History Of The Concept Of War*, pp. 116-147; Werner Meng, *War*, pp. 282-290

See in Arabic:

Salah Eddin Amer, *Muqaddima Li Diraset Qanun An-Nizaaat Al-Musallaha*, passim; Amir Ameen Arslan, *Kitab Huquq Al-Milal Wa Mu'ahadat Ad-Duwal, Volume V (On War)*, passim; Jaber Ibrahim Ar-Rawi, *Ilgha'a Al-Itifaqiya Al-Iraqiyya Al-Iraniyya*, passim; Suhail Hussain Al-Fatlawy, *Qadisiyyat Saddam Fi Dou' Ahkam Al-Qanun Ad-Dawli*, passim; Yahia Ash-Shimi, *Tahrim Al-Hurub Fi Al-Alaaqat Ad-Dawliyya*, passim; Hamed Sultan, *A'isha Rateb and Salah eddin Amer, Al-Qanun Ad-Dawli Al-A'am*, passim; Hamed Sultan, *Al-Harb Fi Nitaq Al-Qanun Ad-Dawli*, pp. 1-25; Mohamed Mokbel El-Bakry, *Mashru'iyat Al-Harb Fi Al-Shari'a Al-Islamiyya Wa Al-Qanun Ad-Dawli Al-Mu'aser*, pp. 71-123; Abdul Aziz Sarhan, *Tattawur Wazifat Mu'ahadat As-Sulh*, pp. 57-126; Rashad As-Sayyed, *Baadd Al-Gawaneb Al-Qanuniyya Li Itifaqiyat Waqf Al-Qital*, pp. 169-191.

- (2) Quincy Wright, *A Study Of War, Volume I*, pp. 273-290.
- (3) Rosalyn Higgins, *Conflict Of Interests - International Law In A Divided World*.
- (4) *War in ancient civilizations is different from primitive, preliterate warfare in prehistory ages. The function of warfare in prehistory was mainly the preservation of the social group by increasing its solidarity. Probably, it also served the purpose of satisfying certain psychic needs of the individual.*
- (5) *According to Wright, war, in the broadest sense, is a violent contact of distinct but similar entities. In this sense a collision of stars, a fight between a lion and a tiger, a battle between two primitive tribes, and hostilities between two modern nations would all be war. However, as Grotius explained, the origin of the word "war" is not inconsistent with the use. For bellum, "war", comes from the old word duellum, as bonus "good", from an earlier duonus, and bis, "twice", from dvis. The word duellum, again, bears to duo, "two", a relation sense similar to that which we have in mind*

when we call peace "union".

- <6> Only the Preamble and Articles 53 (2), 77 (1/B), and 107 of the of the United Nations Charter refer to the word "war".
- <7> Article 2 paragraph 4 of the Charter.
- <8> Article 39 of the Charter.
- <9> Article 51 of the Charter.
- <10> The four Geneva Conventions of August 12, 1949, are :
  - a. Geneva Convention For The Amelioration Of The Condition Of The Wounded And Sick In Armed Forces In The Field.
  - b. Geneva Convention For The Amelioration Of The Condition Of The Wounded And Sick And Shipwrecked Members Of Armed Forces At Sea.
  - c. Geneva Convention Relative To The Treatment Of Prisoners Of War.
  - d. Geneva Convention Relative To The Protection Of Civilian Persons In Time Of War.
- <11> Article 2 is one of the common provisions of the four conventions.
- <12> States have invoked the concept of a state of war, even after the entry into force of the Charter of the United Nations. Several of the Arab states did so in their relations with Israel including Egypt before the conclusion of the Peace Treaty of 1979.
- <13> Nathan Feinberg, *The Legality Of A "State Of War" After The Cessation Of Hostilities*.
- <14> Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres*.
- <15> Carl von Clausewitz, *On War*, p. 101.
- <16> A.D. McNair, *The Legal Meaning Of War, And The Relation Of War To Reprisals*, pp. 34-56.
- <17> Georg Schwarzenberger (and E.D. Brown), *A Manual Of International Law*.
- <18> Sometimes referred to as "no peace, no war".
- <19> Schwarzenberger, *op. cit.*, pp. 8-13.
- <20> According to the Soviet approach, the real objective of the Soviets is the destruction of the other protagonist class, brought about either by the breakdown of the capitalist economic centre and the substitution of a universal world economy in its stead, or by the forcible submission of non-proletarian elements to the will of

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the proletariat.

The Soviets distinguish between the "imperialistic" and "nationalistic" wars. Wars are considered "imperialistic" if waged by capitalist states, pursuing imperialistic aims, these wars are condemned by the Soviets. Wars are considered "nationalistic" or "revolutionary", when conducted by countries or peoples for national liberation. The Soviets have a different attitude whether these wars are civil wars or international wars when waged by the proletarian state for the purpose of the overthrowing capitalist regimes in other countries.

Unlike the liberal who consider the political structure as of primary importance in determining the propensity of state to engage in war, Karl Marx attributed war to the class structure of the society. Therefore, the only way to avoid war is to abolish class struggle, by replacing capitalism with socialism, see T. A. Taracouzio, *The Soviet Union And International Law*, pp. 311-342.

- (21) Historically, the term "limited war" denotes the specific kind of warfare that characterized Eighteenth Century Europe. The Historical usage denoted the theory and practice of war within European Society from the closing years of the Seventeenth Century through most of the Eighteenth.
- (22) John Garnett (and others), *Contemporary Strategy: Theories And Policies*, Holmes and Meier Publishers, New York, 1975; referred to in James Turner Johnson, *War Tradition And Restraint Of War, A Moral And Historical Inquiry*.
- (23) As examples of this kind, the Korean War, the Vietnam War, the Indo-Pakistan War of 1968, and the Ramadan War of 1973 (sometimes known as the October War or the Yom Kippur War).
- (24) According to Garnett, the Vietnam War is an example of this kind because the United States neither sought to defeat the North Vietnamese nor to impose "unconditional surrender" terms on them.
- (25) According to Garnett, the Korean War is an example of this kind, because nuclear weapons were accessible to both sides, yet were used by neither.
- (26) James Turner Johnson, *Just War Tradition And Restraint Of War*.
- (27) It was known as the Persian State and its subjects as "the Persians", in 1935 it was renamed by Shah Muhammad Rida Bahlavi and then known as the Iranian State.
- (28) The Iraqi President declared the annulment of the Algeria Agreement in a speech delivered before the National Assembly on September 17, 1980 (before the date considered by Iran as commencement of the Gulf War).

- (29) According to Iraqi official statements, the Iranian armed forces have started its "aggression" from a date previous to September 4, 1980 for example during August and on the first of September 1980; and even during 1979, see Dr. Jaber Ibrahim Ar-Rawi, *The Annulment Of The Iraqi-Iranian Agreement Of 1975 In The Light Of International Law* (in Arabic), especially pp. 35-109.
- (30) Iraq occupied some parts of the Iranian territory, other than the disputed regions, to enforce Iran to confess with "the Iraqi legitimate rights"; see Dr. Suhail Husain (in Arabic), pp. 5-22, especially p. 7. Iraq has withdrawn its forces to the international frontiers in the summer of 1982.
- (31) This declaration may take the form of "a Conditional Ultimatum".
- (32) In the case of the Japanese attack on Pearl Harbour, on December 7, 1941, the Japanese had issued a declaration of war two hours and forty minutes after the attack began; while the Congress of the United States declared war on December 8, 1941, at 4:10 p.m. The facts emphasized by the material concept of war have a role in determining whether a state of peace exists at a given moment in the relations of two states. In this case, the hostilities began on the morning of December 7, 1941, which must be considered the time when the war had commenced between Japan and the United States.
- (33) The Soviet approach in this regard, is that the Soviets ordinarily follow the form of ending the war by a peace treaty. They consider cessation of hostilities terminates war de facto, but this does not necessarily mean a de jure termination. However, the Soviets followed other instruments in certain occasions, for example the Soviet Union ended the war with Japan by a joint declaration on October 19, 1956.
- (34) The First World War came to an end by the Paris Peace Treaties, although separate peace treaties, coming into force at different times, were concluded with each enemy. This also happened after the Second World War, the Paris Peace Treaties of 1947 with Italy, Hungary, Rumania, Bulgaria and Finland; and also the San Francisco Peace Treaty of 1951 with Japan, which was prepared diplomatically and not by a peace conference.
- (35) In this form of ending the war, which is also called "debellatio", no peace treaty can be concluded, because there is no contracting party left.
- (36) For example, the Italian annexation of Abyssinia in 1936.
- (37) This form of ending the war presupposes that the enemy state continues to be a sovereign state in international law.
- (38) The New Manual of the United States Army entitled "The Law Of Land

Warfare" summarized the provisions suggested to be included in an armistice agreement :

1. Effective date and time;
  2. Duration;
  3. Line of demarcation and neutral zone;
  4. Relations with inhabitants;
  5. Prohibited acts;
  6. Prisoners of war;
  7. Consultative machinery;
  8. Miscellaneous political-military matters.
- (39) Other than those suspended, expressly or by implication, by the armistice agreement in bringing about a cessation of hostilities.
- (40) The Preamble provides that, "and for these Ends.....to unite our strength to maintain international peace and security".

## Chapter IV : The Conception Of Legality In Al-Shari'a Al-Islamiya<sup>(1)</sup>

### First : Meaning Of The Islamic Legality

The Islamic legality is the sovereignty of Al-Shari'a AL-Islamiya, in the Islamic Community. Islamic legality is linked to the belief in the Unity of ALLAH. Consequently, this belief leads to the acknowledgement of ALLAH as the sole legislator. In the Holy Qur'an, ALLAH says, "Lo! the decision rests with ALLAH only";<sup>(2)</sup> He also says, "His verily is all creation and commandment";<sup>(3)</sup> and He also says, "And in whatsoever ye differ, the verdict therein belongeth to ALLAH".<sup>(4)</sup> Therefore, it is considered a violation of Islamic legality to entrust the authority of legislation to other than ALLAH; besides, falsehood leads to disbelief, in the Holy Qur'an ALLAH says, "And speak not, concerning that which your own tongue qualify [as clean or unclean], the falsehood: "This is lawful, and this is forbidden", so that ye invent a lie against ALLAH. Lo! those who invent a lie against ALLAH will not succeed";<sup>(5)</sup> moreover it is considered an excess of disbelief, ALLAH says, "Postponement [of a sacred month]<sup>(6)</sup> is only an excess of disbelief whereby those who disbelieve are misled; they allow it one year and forbid it [another] year, that they make up the number of the months which ALLAH has allowed, so that they allow that which ALLAH hath forbidden. The evil of their deeds is made fairseeming unto them. ALLAH guideth not the disbelieving folk".<sup>(7)</sup>

Violation of Islamic legality, in this sense, may be in either of two ways :

1. The complete refrainment from the application of Al-Shari'a Al-Islamiya, and its replacement of secular laws, which really means the replacement of ALLAH by other "gods". ALLAH is the Sole Legislator, and He did not delegate this authority to any man. Those who do not apply Al-Shari'a are described by the Holy Qur'an as disbelievers, ALLAH says, "Whoso judgeth not by that which ALLAH hath revealed: such are disbelievers";<sup>(8)</sup> wrong-doers, ALLAH says, "Whoso judgeth not by that which ALLAH hath revealed: such are wrong-doers";<sup>(9)</sup> and evil-doers, ALLAH says, "Whoso judgeth not by that which ALLAH hath revealed; such are evil-doers".<sup>(10)</sup>
2. The partial refrainment from the application of Al-Shari'a Al-Islamiya, by considering it only one of the original sources of the positive law; or a mere subsidiary source subsequent to original sources.

These two cases are considered shirk (polytheism). In the first case the "legislator" of the positive law is made the equal of ALLAH; and in the second, ALLAH becomes "inferior" to the positive "legislator".

The different aspects of the partial refrainment from the application of Al-Shari'a are the following :

A. To allow what ALLAH has forbidden, whether expressly or implicitly, e.g., the enactment of a legislation concerning a prohibited matter by

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ALLAH, without stating the punishment imposed by ALLAH; or by modifying this punishment.

B. To prohibit what ALLAH has permitted; or to restrict it to the extent that makes it as prohibited, such as the restriction of the right to divorce in some Muslim states. However, it must be noted that the Khalifa, in the Islamic State, is entitled to regulate matters not regulated by Al-Shari'a, but taking into consideration its purposes which represent the public order in the Islamic system, without restricting these matters completely.

The Islamic legality is an objective legality. It is objective because it is not merely a set of legal norms, but a supreme legal idea, and a general principle. Therefore, the idea of justice as one of the main characteristics of Islamic legality, is derived from the purposes of Al-Shari'a and its spirit; and not derived from legal texts alone, as in the case of positive law.

It is also an ideological legality, in the sense that it leads to the establishment of a comprehensive system of life, and not fragments of different legal norms. This means that the social and legal life, and the qualifications of all different statutes shall have this ideological type.

The prohibitions and orders of Al-Shari'a Al-Islamiya are considered ideological general restraints which must be taken into account in all legal relations, whether internal or external, on the ground that the ideological restrictions are general and comprehensive. Thus, we believe that there is no Islamic international legality distinct from the legality within the Islamic State. The principles of international law in Al-Shari'a are only a part of the domestic law, i.e., Al-Shari'a Al-Islamiya. These principles are self-obligatory in the sense that they are applicable without need of a treaty, international custom, or on the basis of reciprocity.

According to the conception of Islamic legality, the legal rights have social function on reciprocal bases, in the sense that every right involves an obligation. Actually, Al-Shari'a Al-Islamiya is, mainly, a set of obligations; and accordingly the Islamic Community comprises a group of legally-bound individuals.

However, some Islamic sects; such as Al-Mu'tazilla, Al-Karramiya, Al-Murji'a, Ash-Shi'a Az-Zaydiya and Ash-Shi'a Aj-Ja'fariya have a different conception of Islamic legality. They consider Al-Aql (reason) above the Islamic legal system. Its superiority is over any Shari'a text in the sense that Al-Aql is sovereign and the Shari'a text only discloses its wisdom. Therefore, in the case of contradiction between Al-Shari'a and Al-Aql, the latter will prevail. This trend has been bitterly criticised on the ground that Al-Aql, by all means, is limited if compared with the wisdom of ALLAH.

## Second : Pillars Of The Islamic Legality

Islamic legality rises two pillars, Al-Shari'a Al-Islamiya (the Islamic Law), and dar Al-Islam (the Islamic State).

### 1. Al-Shari'a Al-Islamiya

Al-Shari'a Al-Islamiya is the truth revealed by ALLAH Who says in the Holy Qur'an, "With truth have We sent it down, and with truth hath it descended";<sup>'11'</sup> and Al-Islam is the perfect religion, ALLAH says, "This day have I perfected your religion for you and completed My favour unto you, and have chosen for you as religion Al-Islam".<sup>'12'</sup> Thus, after the completion of the revelation, it is supposed that Al-Shari'a will be applied because Al-Islam is the final and perfect religion.

However, it is essential to explain that the application of Al-Shari'a is not a disputable matter because it is firmly decided ordained by ALLAH in the Holy Qur'an, He says, "His verily is all creation and commandment".<sup>'13'</sup> The term "commandment" in this Aya signifies, inter alia, that ALLAH, solely, has the authority to legislate for man; this is confirmed again in the Holy Qur'an, ALLAH says, "Or have they partners [of ALLAH] who have made lawful for them in religion that which ALLAH allowed not? And but for a decisive word [gone forth already], it would have been judged between them. Lo! for wrong-doers is a painful doom".<sup>'14'</sup>

Moreover, the application of Al-Shari'a is *not an optional matter*, in the Holy Qur'an ALLAH says, "And it becometh not a believing man or a believing woman, when ALLAH and His Messenger have decided an affair [for them] that they should [after that] claim any say in their affair; and whoso is rebellious to ALLAH and His Messenger, he verily goeth astray in error manifest".<sup>'15'</sup>

Furthermore, the application of Al-Shari'a Al-Islamiya is not only linked to belief, but is also a condition of belief, in the Holy Qur'an ALLAH says, "O ye who believe! Obey ALLAH, and obey the Messenger and those of you who are in authority; and if ye have a dispute concerning any matter, refer it to ALLAH and the Messenger if ye are [in truth] believers in ALLAH and the Last Day. That is better and more seemly in the end".<sup>'16'</sup> Therefore, the refrainment from the application of Al-Shari'a is synonym to disbelief. In the Holy Qur'an, ALLAH says, "Hast thou not seen those who pretend that they believe in that which is revealed unto thee and that which was revealed before thee, how they would go for judgment [in their disputes] to false deities when they have been ordered to abjure them? Satan would mislead them far astray".<sup>'17'</sup> In the Holy Qur'an ALLAH promises the believers with the best reward, He says, "Lo! those who believe and do good works, theirs will be Gardens underneath which rivers flow. That is the Great Success";<sup>'18'</sup> but He warned those who do not observe their duty towards Him, ALLAH says, "And if ye do not, then be warned of war [against you] from ALLAH and His Messenger";<sup>'19'</sup> and He confirms that His punishment is stern, ALLAH says, "Lo! the punishment of thy LORD is stern".<sup>'20'</sup>

Because it has a Divine source, Al-Shari'a Al-Islamiya is considered the supreme law. In the Holy Qur'an, ALLAH says, "O ye who believe ! Be not forward in the presence of ALLAH and His Messenger";<sup>(21)</sup> and He also says, "O ye who believe ! Lift not up your voices above the voice of the Prophet".<sup>(22)</sup> Some Muslim scholars interpret the first Aya as a prohibition to forward any shari'a (law) other than that of ALLAH. As regards the second Aya, it means that it is forbidden to raise any opinion, shari'a or institution above that of the Holy Prophet (peace be upon him), as it is forbidden to raise any voice above his voice. We agree with this interpretation which is confirmed by the Holy Qur'an, ALLAH says, "Nor doeth he speak of [his own] desire. It is naught save an inspiration that it is inspired".<sup>(23)</sup>

## 2. Dar Al-Islam

Dar Al-Islam (or the Islamic State) is the second pillar on which rests Islamic legality. The City-State in Al-Madina, established by the Holy Prophet Muhammad (peace be upon him), is the First Islamic State<sup>(24)</sup> We confirm the following points :

A. Jihad Fi Sabeel ALLAH (Struggle In The Way Of ALLAH) aims to apply Al-Shari'a Al-Islamiya; this objective requires the continuous expansion of dar Al-Islam.

B. This continuous expansion presupposes the actual existence of dar Al-Islam. This means the existence of a real Islamic State; and not states of Muslim peoples.

C. Any regime in these states who refrains from applying Al-Shari'a Al-Islamiya in its totality, is deemed illegal; it is the responsibility of the Muslims in these states to overthrow their ruling regimes in order to establish a genuine Islamic State.<sup>(25)</sup>

Generally, in the present "Islamic states", or what may be described as "muslim states", the supreme law is the constitution.<sup>(26)</sup> Since the constitution may be modified, and since the modification of the Holy Qur'an is an impossibility, it is difficult to say in a truly Islamic regime, that the Holy Qur'an is the constitution. It may be said that an Islamic constitution<sup>(27)</sup> could be enacted, but supremacy must be assigned to the Holy Qur'an alone. Thus, a legal text could be invalidated if it is inconsistent with the Islamic constitution; and a provision of this constitution could also be invalidated if it is inconsistent with the Holy Qur'an. We therefore believe that, in a real Islamic régime, there are two aspects of Islamic legality, the constitutionality of laws, in terms of their consistency with the Islamic constitution; and what may be called a supra-constitutionality of a constitutional provision, in terms of its consistency with the Holy Qur'an.<sup>(28)</sup> The same principle applies to the Sunna, the other part of the revelation; and the Ijma' because it is based on the revelation. However, in the Islamic system, the Holy Qur'an remains the first source of legality because it is the last of the Divine Scriptures; absolutely transmitted; both its meaning and wording are from ALLAH. It is all-embracing neglects nothing.

### Third : Effects Of The Islamic Legality

We believe it is essential, before discussing the effects of Islamic legality, to refer to the various degrees of permissibility and prohibition of ahkam<sup>(29)</sup> Al-Shari'a Al-Islamiya (rules of the Islamic law) and the classification of rights in Al-Islam.

#### A. Degrees Of Permissibility And Prohibition Of Ahkam Al-Shari'a Al-Islamiya

The classification of ahkam Al-Shari'a Al-Islamiya into various degrees of permissibility and prohibition is essential because every act of a Muslim must fall under a certain legal category.

Primarily, in the absence of revelation, there is no legal bearing on a given action. Action comes within the scope of Al-Shari'a only if it is subject to revelation.

Two terms frequently used by the Holy Qur'an are "halal" (permissible), and haram (forbidden). Thus, the Holy Qur'an does not lay down the various degrees of permissibility and prohibition. The classification of these degrees is due to the endeavors of the Muslim jurists.

The classification comprise five degrees :

1. Wajib, means actions obligatory on believers, the omission of which will be punished, while the execution will be rewarded. According to Ash-Shafi'i the two terms "wajib" and "fard" are synonymous. There are two categories of wajib, wajib al'nee, to which everyone is bound, and will be rewarded individually; and wajib Kifa'i, which is collectively demanded in the sense that a sufficient number of Muslims should fulfil the concerned wajib, but if nobody fulfils it, all of them will be punished.
2. Mandub, means desirable or recommended, but not an obligatory action.
3. Mubah or Ja'iz, means an action legally indifferent, neither forbidden, nor ordained, the doing of which will not be rewarded, nor its omission punished.
4. Makruh, means objectionable or disapproved, but not a forbidden action.
5. Muharram, means prohibited action.

#### B. Classification Of Rights In Al-Islam

According to some Muslim jurists, we may distinguish three categories of rights in Al-Islam :

1. Absolute rights of ALLAH, such as His right to legislate for man.

2. Absolute rights of man, such as his right in Al-Qisas (Retaliation) according to Al-Shari'a.

3. Prevailing rights of ALLAH, for example the right of ALLAH to penalize the accusing of an honourable woman, includes another right that of man to protect his honour.

### C. Effects Of The Islamic Legality

The effects of the Islamic legality can be summarised in the following :

1. The contradiction to any text of decisive meaning in the Holy Qur'an, Hadith, or the purposes of Al-Shari'a shall be considered null and void. This is based on a Hadith of the Holy Prophet Muhammad (peace be upon him) on the authority of A'isha who said : quote, "The Messenger of ALLAH (peace be upon him) said, 'He who innovates something in this matter of ours that is not of it will have it rejected'"

2. According to some Muslim scholars, the violation of any of the absolute or of His prevailing rights generates what may be called the "right of public self-defence". In fact, it is not merely a right, but it is a "wajib ai'nee" (individual duty). This is based on the Holy Qur'an, ALLAH says, "And these may spring from you a nation who invite to goodness and enjoin right conduct and forbid indecency".<sup>(30)</sup> We have also referred to a Hadith of the Holy Prophet Muhammad (peace be upon him) on "Whosoever of you sees an evil action, let him change it with hand"; this is a clear permission to use force to change any evil action.

3. The duty of "public self-defence" includes the removal of the ruler if he refrains from the complete application of Al-Shari'a, which is one of the pillars of the Islamic legality.

4. Also, the duty of "public self-defence" includes the removal of the whole régime in the case of "Al-Kufr Al-Bau'wah" (the Express Disbelief) which brands it with illegality.

Footnotes Of Chapter IV Of Part I

(1) See In English

H.A.R. Gibb and J.H. Kramers, *Shorter Encyclopaedia Of Islam*, passim; Thomas Patric Huges, *A Dictionary Of Islam*, passim; H.A.R. Gibb, *Mohammedanism*, passim; Ahmad Hasan, *Early Developments Of Islamic Jurisprudence*, passim.

See In Arabic

Muhammad Abd ALLAH Darraz, *Dirasat Islamiya Fi Al-Alaqat Al-Ijtima'iyah Wa Ad-Dawliya*, passim; Ali Graisha, *Arkan Al-Shar'iyah Al-Islamiya*, passim; Ali Graisha, *Usul Al-Shar'iyah Al-Islamiya*, passim; Ali Graisha, *Shari'at ALLAH Hakima*, passim; Ali Graisha, *Masader Al-Shar'iyah Al-Islamiya*, passim; Sheikh Tafei Eddin An-Nabahani, *Nizam Al-Hukm Fi Al-Islam*, pp. 40-44; Hamed Sultan, *Ahkam Al-Qanun Ad-Dawli Fi Al-Shari'a Al-Islamiya*, passim; Mustafa Kamal Wasfi, *Mussanafat An-Nuzum Al-Islamiya Ad-Dusturiya Wa Ad-Dawliya Wa Al-Idariya Wa Al-Iqtisadiya*, passim; Mustafa Kamal Wasfi, *Al-Mashru'iyah Fi An-Nizam Al-Islami*, passim.

(2) Sura XII : 67.

(3) Sura VII : 54.

(4) Sura XLII : 10.

(5) Sura XVI : 116, see also Aya 105.

(6) The idolaters would postpone a sacred month in which war was forbidden, when they wanted to make war and make up for it by hallowing another month.

(7) Sura IX : 37.

(8) Sura V : 44.

(9) Sura V : 45.

(10) Sura V : 47.

(11) Sura XVII : 105.

(12) Sura V : 3.

(13) Sura VII : 54.

(14) Sura XLII : 21.

(15) Sura XXXIII : 36.

(16) Sura IV : 59.

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- (17) Sura IV : 60.
- (18) Sura LXXXV : 11.
- (19) Sura II : 79.
- (20) Sura LXXXV : 12.
- (21) Sura XLIX : 1.
- (22) Sura XLIX : 2.
- (23) Sura LIII : 3-4.
- (24) We referred in Chapter III of the Introductory Part to the details relating to the Islamic State.
- (25) Some Muslim scholars believe that every territory subjected to the Islamic rule for a certain period (not defined) is considered a part of dar Al-Islam even after removing the Islamic rule; or the muslim inhabitants became unsafe in their residence; or they have been exiled outside this territory. The regimes which replaced the Islamic rule are considered illegal. Consequently, some territories in the Soviet Union, Spain (and other parts in Europe), and some other territories are considered parts of dar Al-Islam which is entitled of their inheritance. The use of force is permissible to restore these territories.
- (26) Some of these states have no constitution.
- (27) There are some attempts to prepare an Islamic Constitution, whether as a personal endeavor such as that prepared by Mustafa Kamal Wasfi, a Muslim jurist (from Egypt); or as a method to introduce the thought of an Islamic group, such as that prepared by "Hizb At-Tahrir Al-Islami" (the Islamic Liberation Party). This Constitution is drafted in the same way of drafting modern constitutions, but each Article is expounded and supported by proofs represent the view of this group. Thus, this Constitution is not only a "legislative" endeavor, but also of juristic importance.
- (28) According to Article 2 of the Constitution prepared by Hizb At-Tahrir Al-Islami, "The Head of the Islamic State has the sole right to adopt the rules of Al-Shari'a.
- (29) Hukm (singular of Ahkam) means a rule in general, but it also denotes other different meanings such as :
1. judgment or legal decision;
  2. the exercise of administrative authority; and
  3. an ordinance or decree.
- (30) Sura III : 104.

Chapter V : The Conception Of  
Legality In International Law<sup>(1)</sup>

We believe it is axiomatic to say that the question of legality will never arise if international law is not considered as law. Although the tangible weakness in the structure of international law, due to its decentralized system of application and interpretation, the legal nature of its norms is not disputable. For those who consider centralized enforcement as the essential character of law, it may be said that although the regulation of sanctions, to be applied by the executive authority, assists in the enforcement of the legal norm in the developed societies; but by no means deemed a pre-condition of its existence. The question of legality raises three main points, one is the distinction between the legal and non-legal rules in international relations; the second is the consequences of the illegal acts of states; and the third is the main rules included in the Draft Articles prepared by the International Law Commission on state responsibility.

First : The Distinction Between The Legal And Non-  
Legal Rules In International Relations

Legal rules are not the only rules that regulate state behaviour in international relations; there are also other rules which do not fall within the category of legal rules. Being social rules, the non-legal rules have many features in connection with legal rules, but there are also important differences. As an example of these non-legal rules, there are the joint-statements of the so-called Summit-meetings, non-legal agreements,<sup>(2)</sup> and the resolutions of the international organizations.<sup>(3)</sup>

However, it must be noted that in some cases the nature of the obligations deriving from an agreement or joint-statement, depending on their wording, are not very clear, thus, their qualification as legal or non-legal is problematical. Michael Bothe considers the Camp David agreements, at least partly, as constituting non-legal obligations. The Camp David agreements concluded between Egypt and Israel consisted essentially of two agreed frameworks, one for peace in the Middle East, and the other for the conclusion of a peace treaty between Egypt and Israel. It is hard to conceive, Bothe says, that Egypt and Israel would bind themselves under international law as to the content of separate peace treaties to be negotiated between, on the one hand Israel, and the other Jordan, Syria and Lebanon. If the first framework were a treaty, Bothe says, it would probably be a treaty in favorem tertii, which would in the light of the existing tension in the area, be rather far reaching. But, in the light of the whole context, Bothe says, it is more appropriate to see this general framework as a political agreement, at least as far as these questions are concerned, which are not strictly confined to relations between Egypt and Israel.

It is concluded from some writings as a criterion for the distinction between the legal and non-legal rules in international relations,

the degree of predictability in the state behaviour. Both kinds of rules formulate community expectations, as they provide some stability in international relations by making state behaviour more predictable, but non-legal rules do so in a lesser extent.

We believe that this criterion is vague, the wording of the instrument will assist to reveal whether it contains legal or non-legal rules. As far as the non-legal rules are concerned, the question of legality will never be raised. Some writers believe that non-legal obligations are obligations of good faith. Thus, a state is legally obliged to behave as others expect it to do, even when this expectation is not itself based on a legal rule which protecting reliance and confidence in certain cases. We believe, from a strict legal point of view, that the binding force of any rule emanates from its nature as a legal rule, therefore, a non-legal rule presupposes the lack of the legal basis for obligation.

### Second : The Consequences Of The Illegal Acts Of States

No doubt that the illegal act of a state is not legalised. But some writers argue that although the illegal act is not legalised, its results are not a legal nullity.

According to Kelsen, norms are the source of legal rights. It is only the validation of facts through a principle of law which, in effect, considers these facts as law-creating facts that can give rise to a new legal rights and duties. The practices of states does not prevent facts, according to the principle of effectiveness, from being law-creating, even though violative of rules of international law. Illegal acts of states, once effecting a firmly established situation, give rise to new legal rights and duties in the admission of "ex injuria jus oritur" (out of injustice justice can arise) in international law, and it is the principle of effectiveness which is applied. A certain period of time is required before a situation, originating in violation of law, can be considered as firmly established. (4)

Kelsen maintains, it is one of the characteristics of the principle of effectiveness that is applied to determine the legal existence of some facts (situations) as well as the legal consequences to be attached to these facts. The mere protest on the part of the injured state, or states, not followed by measures effectively contesting the new situation, did not serve to prevent this situation from giving rise to new rights and obligations. At the same time, third states were under no obligation to refrain from recognizing those situations, effective in fact, produced by unlawful acts.

We believe that this opinion expresses the recent situation in the international society. It has been observed that neither the Covenant of the League of Nations, nor the Pact of Paris expressly obligated the Parties to refrain from recognizing the situations resulting from the

violation of either instrument. Nor did the practice of the League add to the obligations contained in the Covenant. It has also been observed that there is no provision in the United Nations' Charter expressly obligating the Member States to refuse recognition to those changes brought about in violation of Article 2 paragraphs 3 and 4 of the Charter.

We believe that the non-recognition of the consequences of the illegal action is a negative behaviour which adds nothing to the situation because it cannot prevent the existence of these consequences. Moreover, in many cases, the right of territorial integrity (legal) is the arbitrary result of the colonial rule (illegal). Actually, rules of legality, as some writers say, are circumscribed by the pragmatism of the law of recognition, a fact of the contemporary international law. Kelsen asserts that so long as the international legal order remains in its present condition of decentralization, so long as it lacks the effective collective procedures characteristic of the state, substantial scope will be afforded to the principle of effectiveness and, in consequence to the operation of the principle of ex injuria jus oritur.

### Third : The Draft Articles On State Responsibility Adopted By The International Law Commission

. This Draft may add a new dimension to the conception of legality in international law. We shall focus on two points, the internationally wrongful act; and the conduct of organs, entities or persons which is considered an Act of State according to the Draft.

#### A. The Internationally Wrongful Act

Article 3 of the Draft determines two elements of an internationally wrongful act :

1. When conduct consisting of an action or omission is attributable to the state under international law, and
2. That conduct constitutes a breach of an international obligation of the state.

According to Article 4 of the Draft, the characterization of an act of state as lawful by international law does not affect the same act being internationally wrongful, if it is so characterized by international law.

According to Article 16 of the Draft, a breach of an international obligation by a state exists when an Act of State is not in conformity with what is required of it by that obligation.

Article 17 paragraph 1 of the Draft clarifies the irrelevance of the

origin of international obligation breached, whether customary, conventional or other.

Article 19 of the Draft, relating to international crimes and international delicts, provides that :

"1. An Act of State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a state of an international obligation so essential for the protection of fundamental interest of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia, from :

a. a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

b. a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

c. a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide;

d. a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict".

### B. The Conduct Of Organs, Entities, Or Persons Which Is Considered An Act Of State

The basic rule in this regard is that the conduct of organs, entities or persons in breach of an international obligation of the state, if such conduct is attributed to that state. Thus, according to Articles 5, 6, 7, 8, 9, 10 and 15, the following conduct shall be considered an Act of State attributed to the state.

1. The conduct of any state organ having that status under international law (Article 5), whether that organ belongs to the constituent, legislative, executive, judicial or other power. (Article 6)

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2. The conduct of an organ of a territorial governmental entity within a state, provided that organ was acting in that capacity in the case in question. (Article 7 paragraph 1)

3. The conduct of an organ of an entity which is not part of the formal structure of the state or of a territorial governmental entity, but which is empowered by the internal law of that state to exercise elements of the governmental authority. (Article 7 paragraph 2)

4. The conduct of person or group of persons acting on behalf of that state; or exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority. (Article 8)

5. The conduct of an organ which has been placed at the disposal of a state by another state or by an international organization, if that organ was acting in the exercise of elements of the governmental authority of the state at whose disposal it has been placed. (Article 9)

6. The act of an insurrectional movement which becomes the new government of a state. (Article 15 paragraph 1)

7. The act of an insurrectional movement whose action results in the formation of a new state in part of the territory under its administration. (Article 15 paragraph 2)

Footnotes Of Chapter V Of Part I

(1) See In English

Hans Kelsen, *General Theory Of Law And State*, passim; Hans Kelsen, *Principles Of International Law*, pp. 420-433; Michael Bothe, *Legal And Non-Legal Norms*, pp. 65-95; Martin Wight, *International Legitimacy*, pp. 1-28; The International Law Commission, *Draft Articles On State Responsibility*, *International Legal Materials*, Volume XVIII, Number 4, July 1979, pp. 1557-1577.

See In Arabic

Mohsen Ash-Shishkly, *Al-Waseet Fi Al-Qanun Ad-Dawli*, Volume I (Book 1), passim; Fawziya Abd As-Sattar, *Adam Al-Mashru'iyah Fi Al-Qanun Al-Jina'i*, passim; Sami Gamal Eddin, *Ar-Raqaba Ala A'amal Al-Idara*, pp. 11-22; Tueima Al-Garf, *Mabda'a Al-Mashru'iyah Wa Dawabet Khudu' Al-Idara Al-A'ama Li Al-Qanun*, pp. 3-19.

(2) *Such as Gentlemen's Agreements.*

(3) *It was suggested to distinguish between three categories of Resolutions of international organizations :*

- Resolutions purporting to state existing principles of international law such as Resolution 2603 (XXIV) A, on The Question Of Chemical And Biological Weapons;
- Resolutions purporting to create new principles of international law such as Resolution 1962 (XVIII), on Declaration Of Legal Principles Governing The Activities Of States In The Exploration And Use Of Outer Space; and
- Resolutions prompting specific programs such as Resolution 217 (III), on The Universal Declaration Of Human Rights.

The first category constitute an evidence not necessarily conclusive of existing international law; the second category creates new rules of international law; and the third category has only moral authority and constitutes non-legal program of action especially in international economic relations.

(4) *In Roman Law, prescription is the principle by which a thing long used, becomes the property of the possessor against a known former owner. Lurking within prescription, which appears to embody the stability of customary society, is the principle of ex injuria jus oritur. Prescription embodies two statements, a statement of fact; and a statement of right; the former precedes the latter. The fact of possession, provided it is long enough standing to be regarded as immemorial, given rise to right.*

'5.) The "Draft Articles On State Responsibility" contains Articles 1 to 27 adopted by the International Law Commission at its Twenty-Fifth to Thirtieth Sessions, and of Articles 28 to 32 adopted at the Thirty-First Session, see Official Records of the General Assembly, Thirty-First Session [May 14 - August 3, 1979], A/34/194, reprinted in International Legal Materials, Volume XVIII, Number 4, July 1979, pp. 1557-1577.

'6.) According to Article 18 paragraph 2 of the Draft, an internationally wrongful Act Of State ceases to be so considered if, subsequently, such an act has become compulsory by virtue of a peremptory norm of general international law. Article 29 paragraph 2 of the Draft provides that :

"2. For the purposes of the present Draft Articles, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

'7.) According to Article 10 of the Draft :

"The conduct of an organ of a State, of a territorial governmental entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an Act of the State under international law even if, in the particular case, the organ exceeded its competence according to international law or contravened instructions concerning its activity".

PART II : THE LIMITATIONS OF THE  
LEGALITY OF "WAR"

Chapter I : The Limitations Of Jihad  
In Al-Shari'a Al-Islamiya<sup>(1)</sup>

I. The Nature Of The Relations Between The Islamic  
State And The Non-Islamic States

In the Holy Qur'an ALLAH says, "Verily We have honoured the Children of Adam";<sup>(2)</sup> in this Aya, the honour granted from ALLAH extends embrace all mankind without giving any preference to any race or colour over another. This is simply because all mankind is ALLAH-made, and humanity is the continuous evidence of His Existence, and that He is the Omnipotent.

The wisdom of creating mankind in nations and tribes is to make them know one another; in the Holy Qur'an ALLAH says, "O mankind ! Lo ! We have created you male and female, and have made you nations and tribes that ye may know one another".<sup>(3)</sup> But this wisdom cannot be achieved, in its full meaning, unless Al-Shari'a Al-Islamiya is applied in the whole world.

For this purpose, ALLAH enjoins Jihad, which the Holy Prophet Muhammad (peace be upon him) considers it the acme among acts which entitle man to Al-Janna (Paradise), and will keep him away from An-Nar (Fire). On the authority of Mu'adh Ibn Jabal, quote, "I said : O Messenger of ALLAH, tell me of an act which will take me into Paradise and will keep me away from Hell-fire. He said : "You have asked about a major matter, yet it is easy for him for whom ALLAH Almighty makes it easy. You worship ALLAH, associating nothing with Him; you perform the prayers; you pay the Zakat; you fast in Ramdan; and you make the pilgrimage to the House. Then he said : Shall I not tell you the greatest goodness [which] is a shield; charity extinguishes fire; and the praying of man in the depth of night. Then he recited : "Who forsakes their beds to cry unto their LORD in fear and hope, and spend of that We have bestowed on them. No soul knoweth what is kept hid for them of joy, as a reward for what they used to do". Then he said : "Shall I not tell you the peak of the matter, its pillar, and its acme ?" I said : Yes, O Messenger of ALLAH. He said : the peak of the matter is Al-Islam; the pillar is prayer; and its acme is Jihad...". . .

The zeal of the early Muslims was very strong. Within a century after the emigration of the Holy Prophet (peace be upon him) from Macca to Al-Madina, the Islamic State extended from India to the Atlantic, and comprised Persia, Syria, Egypt, Africa and Spain, then penetrated into France. But for the defeat of the Muslims in the battle of Tour in 732 A.D., Europe might have been assimilated into dar Al-Islam. The existence of both dar Al-Islam and dar al-harb raises the question of the nature of the relationships between them. We will explain this matter in the following points :

### Preliminary Notes

1. The nature of relations between the Islamic State and non-Islamic states is non-peaceful or using the terminology of international law, a continuous ipso jure state of war.<sup>4</sup> But this state of war does not necessarily entail continuous fighting. Such a matter is decided by the Khalifa according to the strength or weakness of the Muslims.

Some writers argue that since Jihad is regarded the instrument of Al-Islam to transform dar al-harb into dar Al-Islam, the ultimate objective of Al-Islam is therefore not war per se, but the eventual establishment of peace. Thus, Jihad is not to be considered the sixth pillar of faith according to this opinion.

We believe that there is no contradiction between Jihad being the sixth pillar of Al-Islam and being an instrument to transform dar al-harb into dar Al-Islam. The duty of Jihad aims at achieving a certain objective. The fulfillment of this duty, not the achievement of said objective, is the sixth pillar of Al-Islam. This duty will continue, or must be fulfilled, as long as the objective exists, or has not been achieved. It is very important to stress that Al-Islam has brought a significant modification in the function of communities and their responsibility towards the coming generations. Since Al-Islam is the last of the religions, and the Holy Prophet (peace be upon him) is the Seal of prophets, the Islamic Community, at every time and place is entrusted with the duty of calling to Al-Islam, and the universal application of Al-Shari'a.

2. The existence of hostile relations between dar Al-Islam and dar al-harb, does not lead to the acknowledgement of equality between them. Since dar al-harb is outside the pale of Al-Shari'a Al-Islamiya, it lacks an essential element for the constitution of a state in accordance with it. The letter of the Holy Prophet (peace be upon him) sent to Hiraql (Hercules) Caesar of Rome indicates this fact, as the letter was addressed to "Hiraql the grand chief of the Rum" (Byzantines), and not to "Hiraql Caesar of Rome". Therefore, any arrangement between the two dars (the Islamic State and non-Islamic states) is, necessarily, of short duration, since it carries with it no implied recognition or change in the war status. However, the Muslims are under obligation to respect the rights of non-Muslims, both combatant and civilians, as prescribed by Al-Shari'a, while the fighting is in progress.

3. The Islamic State is responsible only for the Muslims living in it, but not for the Muslim minorities who live in non-Islamic states. In the Holy Qur'an, ALLAH says, "Lo ! those who believed and left their homes and strove with their wealth and their lives for the cause of ALLAH, and those who took them in and helped them : these are protecting friends one of another. And those who believed but did not leave their homes, ye have no duty to protect them till they leave their homes; but if they seek help from you in the matter of religion, then it is your duty to help [them] except against a folk between whom and you there is

a treaty. ALLAH is Sear of what ye do".<sup>(5)</sup> The second part of this Aya indicates the duty to help them if they seek help in matters of religion, but within the limits of this Aya. This duty is based on the bond of Islamic brotherhood that links the Muslims everywhere.

4. There are special rules of Al-Shari'a to be applied if the Muslims are defeated and under duress. In the Holy Qur'an, ALLAH says, "Let not the believers take disbelievers for their friends in preference to believers. Whoso doeth that hath no connection with ALLAH unless [it be] that ye but guard yourselves against them, taking [as it were] security. ALLAH biddeth you beware [only] of Himself. Unto ALLAH is the journeying".<sup>(6)</sup> The rule contained in this Aya is called "AT-Taqiyya" (Guarding Oneself).

There are different opinions concerning this Aya. Some Scholars argue that it was in force at the beginning of the Islamic message only, due to the weakness of the believers before their emigration from Macca to Al-Madina, but was later abrogated. Conversely, other writers believe that this Aya was not abrogated. We are inclined to a third opinion that there is no evidence of the abrogation of this Aya, and the rule included in it is connected with the reasons that justify its application according to the different circumstances of the weakness or strength of the Muslims. This opinion may be supported by another Aya. In the Holy Qur'an, ALLAH says, "Whoso disbelieveth in ALLAH after belief- save him who is forced thereto and whose heart is still content with faith".<sup>(7)</sup> Therefore, if the Muslim, under duress, is compelled to commit acts prohibited by Al-Shari'a, he is not liable to punishment. If a Muslim woman is subjected to physical hardships, she must at first endure persecution; but if she fears death, she may submit to enemy demands unwillingly.

5. Neutrality, as a voluntarily attitude of a state toward two or more belligerents, is not accepted in Al-Shari'a because this means the suspension of Jihad a toward non-Muslim state based on the Islamic State's own discretion. Moreover, the idea of neutrality, in this regard is merely a hypothesis; being non-Muslim makes the state, according to the Islamic legal theory, a belligerent, and a state cannot be a belligerent and a neutral at the same time.<sup>(8)</sup>

6. The diplomatic intercourse has been foreseen as a task of the Islamic State since the time of the Holy Prophet (peace be upon him), who sent envoys to Byzantium, Egypt, Persia and Ethiopia inviting them to convert to Al-Islam. The character of this diplomatic intercourse was essentially religious; but in later times other functions were added such as the exchange of gifts and prisoners of war, and conciliating differences or facilitating trade.

The real significance of the invitation of the leaders of these states to convert to Al-Islam is to remove the obstacles which prevent people from believing in Al-Islam. In the view of Al-Islam, these obstacles are non-Islamic regimes; thus if these leaders convert to Al-Islam, their peoples will be free to accept or reject it. The letter of

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the Holy Prophet (peace be upon him) to Al-Muqauqas "the Grand Chief of Copts of Egypt" indicates this meaning, it says, "I extend to you the invitation to accept Al-Islam. Embrace Al-Islam and you will be safe. Accept Al-Islam, and ALLAH will give you double the reward. And if you turn away, upon you will be the sin of your subjects". This invitation also served as a notification of Jihad in case of refusal to convert to Al Islam.

Diplomatic intercourse in Al-Islam is, by its very nature, temporary because of the non-peaceful relations between the Islamic State and non Islamic states. In these circumstances diplomatic intercourse can serve for signing truces and similar purposes.

The Permissible And Prohibited Treaties

Despite the non peaceful relations between the Islamic State and non-Islamic states, the conclusion of certain types of treaties is permissible in accordance with the Holy Qur'an and the Sunna. In the Holy Qur'an ALLAH says, "How can there be a treaty with ALLAH and His Messenger for the Idolaters save those with whom ye made a treaty at the Inviolable Place of Worship ? So long as they are true to you, be true to them. Lo ! ALLAH loveth those who keep their duty".<sup>(9)</sup> In the Sunna, the Holy Prophet (peace be upon him) concluded in 6 A.H. (628 A.D.) the Treaty of Al-Hudaybiya, which established a truce between the Muslims of Al Madina and the polytheists of Macca.<sup>(10)</sup> This Treaty constitutes a precedent of legal evidence that may be followed by the Islamic State in its relations with non-Islamic states, provided that any such treaty is concluded for only a temporary period.

According to the Holy Qur'an, after the conclusion of a treaty, its obligations must be fulfilled, ALLAH says, "Excepting those of idolaters with whom ye [Muslims] have a treaty, and who have since abated nothing of your right nor have supported anyone against you. [As for those], fulfil their treaty to them till their term. Lo ! ALLAH loveth those who keep their duty [unto Him]".<sup>(11)</sup>

The treaty is terminated when its duration expires, but it may also be terminated before the end of its duration, if terminated by mutual consent of the parties. The Khalifa is also permitted to declare the termination of the treaty if he finds its terms harmful to Al-Islam; or if he fears an imminent attack by the enemy, provided an adequate prior notification is sent to the other party informing them of the Muslims' intention to terminate the treaty.

As regards the possibility of concluding treaties between the Islamic State and non-Islamic states, we distinguish between two categories, the permissible treaties, and the prohibited treaties.

## The Permissible Treaties

### A. Treaties To Import Weapons From Non-Islamic States

It is permissible to conclude treaties to import weapons from non-Islamic states, especially if the Islamic State is weak and unable to produce the necessary weapons itself. During the time of the Holy Prophet Muhammad (peace be upon him), it was permissible to borrow weapons from non Muslims, as in the case of the Christians of Najran. Also before the expedition of Hawazin, the Holy Prophet (peace be upon him) borrowed from Safwan Ibn Ummaya, a polytheist, one hundred coats of mail with their accessory weapons.<sup>(12)</sup>

### B. Temporary Treaties

The conclusion of a temporary treaty is permissible, provided that it does not run counter to the interests of the Islamic State and of Muslims. The duration of this type of treaty ranges from two years - the actual period in which the Treaty of Al-Hudaybiya was in force - to a maximum of ten years, which was the period provided for in that treaty. The Khalifa is entitled to renew the treaty at its expiry in accordance with the interests of the Islamic State and of Muslims at that time.

Some writers claim that the Khalifa is entitled to conclude a treaty for a period exceeding the maximum period provided for in the Treaty of Al-Hudaybiya. We believe that if the Khalifa is entitled to reconsider the matter at the expiry of the treaty, in accordance with the interests of the Islamic State and of Muslims at that time, this does not necessarily mean that he is entitled to establish, in advance, treaty obligations for a period exceeding the maximum duration.

We must also add, that mutual consent must be the underlying principle of terminating a treaty, as well as the underlying principle for signing it. The Khalifa should therefore never agree to a treaty in which one of the two parties is allowed to terminate the treaty, even if he were the party given this right.

## The Prohibited Treaties

### A. Military Pacts

The Islamic State must not conclude a military pact with a non-Islamic state or states; and if concluded they are considered null and void. The Holy Prophet (peace be upon him) is reported to have said, "We do not seek aid from polytheist [to overcome] polytheists". He is also reported to have said, "I am acquitted from every Muslim fights with a polytheist". The two reasons for this prohibition are, first, that the Muslim under a military pact, would be fighting under the command

of a disbeliever and under the flag of disbelief; and second, that the Muslim would be fighting for the preservation and continuation of the non Islamic state, whereas he is under the obligation to wage Jihad against it.

On the contrary, some writers are of the opinion that it is permissible to seek aid from non-Muslim to fight non-Muslims in accordance with some Muslim sects. Moreover, some Shi'i sects permit seeking aid from non Muslims to fight Muslims; others permit it only to fight against Khariji Muslims.

We believe that there is no doubt about the prohibition of military pacts for the reasons given above, but it is permissible to seek aid from non Muslim individuals to fight non-Muslims, as there are many precedents of the Sunna of the Holy Prophet Muhammad (peace be upon him) which support aid from non Muslim individuals.

#### B. The Treaties Which May Be Terminated Unilaterally, And The Permanent Treaties

The Islamic State is prohibited to conclude either treaties that one party is allowed to terminate it unilaterally, or permanent treaties. If one party is allowed to terminate a treaty at any time, while the other party is still committed thereto, Al-Shari'a considers this treaty null and void.

Some writers maintain that it is permissible to conclude permanent treaties in accordance with their interpretation of the following Aya of Surat At-Tauba of the Holy Qur'an, "so long as they are true to you, be true to them".<sup>13</sup> It is claimed that this entails permission to conclude such treaties with polytheists for as long - even permanently - as they keep their word with the Muslims. But the prevailing opinion is that in this Aya ALLAH enjoins the completion only of the full period of the treaty, so long as the polytheists hold up their end of it.

#### C. Boundaries' Treaties

The Islamic State is also prohibited to conclude treaties involving boundaries. The eventual objective of Al-Islam, as a revolutionary ideology; is the complete application of Al-Shari'a Al-Islamiya throughout the world. Therefore the idea of political boundaries within the confines of the Islamic State contradicts the principles of Al-Islam as a universal message sent to all of mankind. The Holy Prophet himself (peace be upon him) sent messages inviting the leaders of the states at that time calling upon them to believe in Al-Islam. Moreover, the military expeditions sent in the time of Abu Bakr outside the Arab Peninsula were a continuation execution of what the Holy Prophet (peace be upon him) had planned before his death (Mu'ta expedition and the preparation of an army under the command of Usama Ibn Zaid).

#### D. Forced Treaties<sup>(14)</sup>

Certain circumstances, such as a grave crisis, may occur and force the Islamic State to accept certain situations leading to the suspension of Jihad, but at the same time preserve the existence of the Islamic State and Muslims, and enables them to prepare for the resumption of Jihad.

Treaties concluded under such circumstances may be permissible in two cases.

#### The First Case

The conclusion of a treaty between the Islamic State and non-Islamic states concerning the acceptance of a non-Islamic state to pay Kharaj against its exemption from the application of Al-Shari'a Al-Islamiya in its territory, is prohibited because it means approval by the Islamic State of an ongoing disbelief in the non-Islamic state.

But the conclusion of such a treaty may be permissible, if the Islamic State is not able to fight; and provided that its conclusion will be in the interest of Muslims. While the Holy Prophet Muhammad (peace be upon him) was in Tabuk, he agreed that Yuhanna Ibn Ru'ya would not abjure his religion. The conclusion of this treaty must be for a temporary period during which the Islamic State guarantees the security of the non-Islamic state. The legal status of the non-Islamic state's citizens, as harbis, will remain unchanged, but they are permitted to enter the Islamic State by virtue of the aman<sup>(15)</sup> of this treaty.

#### The Second Case

If the non-Islamic state besieged the Muslims in the Islamic State, and required them to pay a sum of money annually against a temporary truce, the Khalifa must reject this, because it comprises humiliation and contempt for the Muslims. However, the Khalifa can accept this condition in case of necessity if he fears perdition for the Muslims. During the battle of the Trench, the Holy Prophet Muhammad (peace be upon him) agreed to pay half of the products of Al-Madina every year to the unbelievers, and he was on the point of concluding a treaty with them in this sense. But, because the Muslims expressed to the Holy Prophet (peace be upon him) their desire to continue fighting, this treaty was never concluded.

#### The Relationship Between Individuals From The Islamic State And Non-Islamic States

Since relations between the Islamic State and non-Islamic states, as mentioned before, are of hostile nature; any arrangement between

he two parties, during truce periods is, by necessity, of short duration. According to Professor Khadduri, Al-Islam, during these temporary truce periods, take a cognizance of the authority or authorities that exist in countries which are not under the Muslim rule. But this cognizance means that authority is, by nature, necessary for the survival of the society, and does not constitute recognition in the modern sense of the term, since recognition implies approval of the conduct of non-Muslim authorities by Al-Islam.

If the harbi (citizen of a non-Islamic state) obtains the aman (safe conduct), he with his family and property, will be permitted to travel or reside in the Islamic State for a period less than a year; the harbi must pay jizya if he requests to extend this period for more than one year because he will then enjoy the status of dhimmi, if the Islamic State accepts his request. The harbi who is granted an aman is called "musta'min", this capacity by allows him to enter into business transactions within the limits of Al-Shari'a. The musta'min is, in no way, allowed to buy contraband, such as war weapons, which might result in strengthening the non-Islamic state against the Islamic State. We believe that the aman may be assimilated, to some extent, with the entry visa in recent times. According to Professor Khadduri, the aman may be regarded as a qualifying principle of the Muslim - non-Muslim relations, which permits Muslims and non-Muslims to travel in the country of each other. The aman might be repudiated by the Imam, at any time, if in his opinion he considers the stay of the musta'min inconsistent with the interests of the Islamic State. The aman is also terminated at the expiry of its duration, or when the musta'min leaves the Islamic State. A new aman is required for the re-entry to the Islamic State.

Aman is also required for the entry of a Muslim into the non-Islamic State. According to Professor Khadduri, the Muslim in a non-Islamic territory without aman, is at war with that territory. Consequently, he is under no obligation to submit to the law of non-Islamic territories, but is not expected to engage in hostile actions. The Muslim in the non-Islamic state is under obligation to refuse to participate in any activity which may lead to the strengthening of the non-Islamic state against the Islamic State.

## 2. The Limitations Of Jihad In Al-Shari'a Al-Islamiya

It will be recalled that the Holy Prophet Muhammad (peace be upon him), is reported to have said, "I have been ordered to fight against people until they testify that there is no god but ALLAH, and that Muhammad is the Messenger of ALLAH, and until they perform the Salât, and pay the Zakat, and if they do so, they will have gained my protection for their life and property, unless [they do acts that are punishable] in accordance with Al-Islam, and their reckoning will be with ALLAH the Almighty". The inevitability of Jihad must not be understood in the light of the opinion of Ibn Khaldun, although it is true, that war existed in society ever since "creation"; because Jihad is, in our opinion, a religious duty and not merely a social phenomenon. Jihad must also not be understood in the light of the rule laid down by

the Roman jurists that, "si vis pacem, para bellum", unless we accept that Al-Islam, as a world ideology, cannot co-exist with other ideologies.

The Muslim army<sup>'16'</sup> in fulfilling the duty of Jihad, must abide with certain limitations some of which we shall refer to.

1. The Mujahed (one who exerts himself in the way of ALLAH) must proceed into action with good intentions. On the authority of Ummar Ibn Al Khattab, quote, "I heard the Messenger of ALLAH (peace be upon him) say, 'Actions are but by intention and every man shall have but that which he intended'". This principle of "Bona Fide" requires that the main purpose of the mujahed is to uphold and further the cause of Al-Islam, not to take his share of the spoils, or any other purpose.

2. Before Al-Islam, war was prohibited during the sacred months (Shawwal, Dhu Al-Qi'da, Dhu Al-Hijja, and Muharram). This custom was observed in the early days of Al-Islam, the Holy Qur'an laid down the prohibition of fighting during the sacred months, ALLAH says, "They question thee [O Muhammad] with regard to warfare in the sacred month. Say : Warfare therein is a great [transgression]".<sup>'17'</sup> But this prohibition was later abrogated. In the Holy Qur'an, ALLAH says, "Slay the idolaters wherever ye find them, and take them [captive], and besiege them, and prepare for them each ambush".<sup>'18'</sup>

3. Jihad must be preceded by a call to Al-Islam or; as alternate to pay jizya. Muslim jurists hold that a prior invitation to accept Al-Islam is obligatory; but only the Maliki and Hanafi jurists held that it is commendable that the Muslim army renew the invitation to accept Al-Islam. The Hanbali jurists insist that those who have received an invitation (such as the Scripturaries), should never be reinvited or notified. However, later jurist-theologians, who thought of Jihad as a defensive measure, have either regarded the rule of invitation as obsolete, since Al-Islam was known to the world at large, or remained silent about it. We believe that the prior invitation to accept Al-Islam is still obligatory before waging Jihad, since this rule had been laid down and followed by the Holy Prophet Muhammad (peace be upon him). This invitation that precedes Jihad is an Islamic rule, and it might be likened to the "invitation" of Sulaiman (Solomon) to Balqis the Queen of Sheba.<sup>'19'</sup>

4. Enemy non-combatants who do not participate in the hostilities, and are unable to do so are inviolable; they cannot be attacked, nor killed or otherwise molested. The general rule in this regard is that any person, capable of fighting, may be killed, whether he actually fights or not, and that any person unable to fight cannot be killed unless he actually fights physically or mentally by way of advice or provocation. However the inviolable persons may be categorized as follows :

A. The very old, children, blind, crippled, disabled and sick persons, as well as lunatics and idiots. Ash-Shafi'i and Ibn Hazm limited the

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exemption of enemy persons to children,<sup>(20)</sup> and women;<sup>(21)</sup> but the majority of jurists include other categories. The Holy Prophet Muhammad (peace be upon him) is reported to have said, "Do not kill a very old man, nor child, nor woman".

B. Abu Bakr, the first Khalifa after the death of the Holy Prophet Muhammad (peace be upon him), gave the following order to Yazid Ibn Abi Sufian, when he appointed him leader of a military expedition : "You will meet people who contend that they have retired in cloisters devoting themselves to GOD; leave them to what they have devoted themselves". Thus, we may add the monks and hermits who retire to a life of solitude in mon steries or cloisters, and other priests who do not associate with other peoples.

These categories, as mentioned before, forfeit their immunity if they take part in fighting, or in the conduct of war by way of advice or opinion. The exemption is also forfeited in case of necessity, such as when the enemy uses them as a shield to advance against Muslims.<sup>(22)</sup>

5. Even in cases where killing is allowed, human rules are imposed :

A. Treachery and mutilation are proscribed, except in case of reprisals. The Holy Prophet Muhammad (peace be upon him) is reported to have said, "Do not steal from the spoils, do not commit treachery, and do not mutilate".

B. It is forbidden to burn enemy warriors alive.

C. A Muslim must avoid killing his father, if the latter fights in the ranks of the enemy.

D. The Muslim is under obligation to refrain from causing unnecessary suffering to non-combatants. During the siege of Macca, the Muslim army laid a ban on the provision of grain. Its inhabitants wrote to the Holy Prophet Muhammad (peace be upon him), "You ordain devotion to relatives, but you have broken the bonds of kinship by killing parents and starving children". Upon receiving this complaint, the Holy Prophet Muhammad (peace be upon him) immediately ordered the lifting of the ban.

6. Al-Islam improved the cruel treatment<sup>(23)</sup> previously meted to prisoners of war, by introducing the system of ransom, or setting free by grace.

7. The majority of the Muslim jurists held that the inviolability of property is a corollary of the inviolability of its owner. If the life of its owner is not immune, a fortiori, his property cannot possess this quality. It is permissible therefore, in dealing with the property of the enemy, to pull down, burn, inundate, cut down or otherwise destroy all fortresses, houses, water supplies, palms and other fruitful trees, and all other plants and crops.<sup>(24)</sup> It is also permissible to

slaughter any animal belonging to the enemy<sup>(25)</sup> including horses, sheep and cattle, poultry of any kind, bees and beehives.

## II. The Legality Of Certain Aspects Of The Use Of Force In Al-Shari'a Al-Islamiya

The scientific approach, new ideas and actual experiments improved old weapons and produced new ones. Science and technology also transformed delivery systems. As weaponry developed, weapons took distinctive forms including, inter alia, the so-called mass destruction weapons which was defined, by the working committee of the "United Nations Commission On Conventional Armaments" in 1947, as follows :

"Weapons of mass destruction should be defined to include atomic explosive weapons, radioactive material weapons, lethal chemical and biological weapons; and any weapons developed in the future which have characteristics comparable in destructive effect to those of atomic bomb or other weapons mentioned above"<sup>(26)</sup>

To explain the attitude of Al-Shari'a Al-Islamiya towards the possession and use of mass destruction weapons, we shall refer to the following points :

- First: The essential types of mass destruction weapons.
- Second: Analysis of the Islamic attitude towards the possession and use of mass destruction weapons.

### First: The Essential Types Of Mass Destruction Weapons

#### 1. Nuclear Weapons

According to the Paris Protocol No. III on The Control Of Armaments of October 23, 1954, Annex II, nuclear weapons are, by explosion or other un-controlled nuclear transformation of nuclear fuel, or by radioactivity of nuclear fuel or radioactive isotopes, capable of mass destruction, mass injury or mass poisoning.

As a result of the researches of the great physicist Albert Einstein examination of radioactive substances indicated the possibility that some atoms were not stable. The growing information about radioactive elements<sup>(27)</sup> led to ideas about the possibility of atomic bombs.

The first nuclear bombs which derived their nuclear energy from fission of "Uranium 235" and "Plutonium 239" were dropped on the Japanese cities of Hiroshima and Nagasaki on August 6 and 9, 1945 respectively. Each had a destructive power of at least 20 kilotons<sup>(28)</sup> of T.N.T.<sup>(29)</sup> Fission bombs have an equivalent power of from 0.1 to 100 kilotons.

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In 1952, the first thermonuclear or hydrogen or fission-fusion bomb was tested. Thermonuclear bombs were based on the principle that fission bombs can produce enough heat to cause fusion of light elements, especially two isotopes of hydrogen. Standard thermonuclear bomb have an equivalent up to tens of megatons.

The "enhanced radiation weapon" or neutron bomb is constructed by using a very small fission part as an igniter for a fusion bomb and enlarging the neutron yield by a special kind of coating. The fusion bombs coated with "Uranium 238" have reached a yield of 60 Megatons. Neutron bombs deliver high radiation combined with comparatively low blast and flash damage. The radiation attacks organic matter within a controllable radius, leaving equipment or structure more or less intact.

The idea behind the cobalt bomb is to coat a nuclear device with a material that would be turned into radioactive isotopes by the explosion and vaporized. The production of radioactive aerosols would thereby be multiplied.

Missiles were developed to replace aircraft for delivery of nuclear bombs. The largest of the missile delivery systems is the intercontinental ballistic missiles (ICBM). Some of these have a multiple warhead and control systems that will allow, under perfect conditions, the precise hitting of ten different enemy targets from a single carrier rocket.

No existing weapon, other than nuclear weapons, is capable to produce a many-sided destructive effect. No target is capable of withstanding a nuclear attack, nor is there a shield that could afford effective protection against nuclear weapons.

Modern nuclear weapons produce a four-fold destructive effect, the shock wave, heat radiation, penetrating radiation and radioactive fall-out.

People who will remain alive after a nuclear explosion, that is, after exposure to shock wave, heat emission, penetrating radiation, etc., will suffer widely from burns, fractures, internal injuries, blindness, and so on. After the radiation level drops on the surface, infectious diseases will be spread by flies, mosquitoes, midges and other insects which have much greater resistance than mammals, including man. It will be practically impossible to solve the problem of burying a few million corpses concentrated mainly in high radiation zones, access to which will be barred for a long period time. The most virulent infectious diseases will become prevalent, such as tuberculosis and plague, as well as cholera, malaria, smallpox, typhus, yellow fever and meningitis.

Radioactive fall-out constitutes an extremely grave danger in the area of the nuclear explosion and in the areas adjoining it. It contributes to an increase in the death rate from cancer and stimulates development of benign cancer lesions. Radioactive fall-out from numerous nuclear explosions will indisputably make vast regions of the

world uninhabitable. For a long period of time it will be impossible to produce foodstuffs in these areas. As a result of a nuclear war, large quantities of nitric oxides, and an enormous amount of dust will pollute the atmosphere. On reaching the ozone layer of the stratosphere, which is a shield against the sun's ultra-violet radiation, nitric oxide may partly destroy it. A partial destruction of the ozone layer may result in an increase in radiation doses on the earth surface. The increase in ultra-violet radiation intensity may be accompanied by a loss of mean temperature on the earth surface.

According to some medical scientists, we may distinguish between the direct and indirect effects of a nuclear attack. The direct effects are caused by the direct influence produced on people, plants and animals by the destructive factors of a nuclear explosion, the shock wave, light emission, primary radiation and residual radiation in the form of radioactive fall-out. The indirect effects on people are consequent to the destruction or a severe damage to material and technological facilities, disintegration of the economy, as well as a derangement of all elements of social life. The indirect effects include famine and epidemics, the prevalence of various disorders and diseases; and a sharp increase in the hard ultra-violet radiation of the sun and a possible change in the climate. Some scientists add to these effects a severe psychological shock caused by the scene of general destruction. The social and cultural concepts of civilized man will be irreparably damaged. According to these scientists, it is hard to imagine the impact of the emotional factor, the fear of death will haunt survivors of nuclear war as long as they live. Fear of cancer and other diseases and fear of transmission of genetic defects will have a ruinous impact on the human psyche.

Early consequences are the result of direct effects of nuclear explosions within a relatively short period. It may be assumed that early consequences will make themselves felt within two or four months following a nuclear strike. Late consequences become evident within months or even years after such an attack. Genetic effects will be observed over a period of many decades, in a number of generations of descendants of the initially irradiated people. (29)

The neutron weapons are the most inhuman instrument of war, because they are designed primarily for massive killing of human beings. In contrast to other types of nuclear weapons, the energy of the neutron bomb is distributed roughly as follows, 20 % is concentrated in the shock wave, and 80 % is emitted as penetrating radiation. Residual radiation accounts for a relatively small share of this energy. According to some specialists, the explosion of a nuclear device with a relatively small capacity of 1 Kiloton<sup>(30)</sup> will produce the following effects :

- a. It will destroy all the buildings and structures within a range of 150 to 300 metres from ground zero.
- b. People in shelters will be killed within a radius of up to 800

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metres and those within a range of 1.6 Kilometers will be lethally irradiated. Living organisms a long distance away will be exposed to irradiation doses causing radiation sickness.

c. Great harm will be caused to the natural environment. All animal life will die in an area of 520 hectares, coniferous forests in an area of 310 hectares, leaf-bearing forests in an area of 170 hectares.

d. Objects not destroyed by the explosion, including metal structures, soil and foodstuffs, will become radiation sources.

The hazards of nuclear weapons are not restricted only to the case of nuclear warfare, but they also extend to nuclear accidents. The United States Air Force disclosed that between 1975 and 1979 there were 125 accidents at Titan<sup>(31)</sup> sites in Arkansas, and 10 in 1979/80 in Arkansas Titan silos.<sup>( 2 )</sup> The United States Department of Defence released in 1980 a report in response to the accident involving a Titan II which exploded in its Arkansas silo in September 1980. No details are available of accidents involving nuclear materials in the Soviet Union. As an example of Soviet accidents, we may refer to a very large explosion which occurred in January/February 1970 in the Gorki submarine yards. The Volga river and its Black sea estuary were afterwards contaminated with radioactive material.

Due to the importance of this matter, the General Assembly of the United Nations, by its Resolution 913 (X) of December 3, 1955, established the United Nations Scientific Committee On The Effects Of Atomic Radiation. The General Assembly, by its Resolution 94 (XXXIX) of December 14, 1984, requested, inter alia, the Scientific Committee to continue its work, and invited Member States and the organizations of the United Nations system and non-governmental organizations concerned to provide further relevant data about doses, effects and risks from various sources of radiation, which would greatly help in the preparation of the Scientific Committee's future reports to the General Assembly.

## 2. Chemical Weapons

Chemical weapons are chemical substances, whether gaseous, liquid or solid, which might be employed because of their toxic effects on men, animals or plants. According to Thomas and Thomas, chemical warfare, in its most comprehensive sense, can be defined as the use of, and the defence against, chemical compounds, smoke and incendiary materials which are intentionally disseminated to reduce man's military effectiveness.

According to the same authority, each class of chemical weapons has its own specific objectives. However, they refer to the anticipatory psychological reaction to chemical weapons, as their use may lower the morale of the enemy armed forces and civil population and may induce a

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will to compromise or surrender by causing widespread fear and anxiety. They refer also to the objectives of chemical antiplant agent as they are used to destroy or limit seriously the production of crops for food or for their economic value, to modify the normal pattern of growth of plants, or to damage or defoliate plants to prevent ambush of friendly forces along routes in jungle and forest, and to deny concealment to the enemy, or to mark areas of forest for reconnaissance or as guidance for aircraft.

Chemical weapons may be classified, according to their purpose, in three categories, antipersonnel agents, antiplant agents and antimaterial agents.

A. Antipersonnel Chemical Agents

Antipersonnel chemical agents include lethal or severely injurious agents, <sup>(2a)</sup> incapacitating agents, riot control agents, incendiaries and screening and signalling smokes.

B. Antiplant Chemical Agents

The major antiplant chemical agents are herbicides, defoliants and soil sterilants.

C. Antimaterial Chemical Agents

According to Thomas and Thomas, antimaterial chemical agents aim, mainly, at causing the enemy's military equipment to break down or become useless, such as antilubricants and catalytic agents. Antilubricants cause the lubricating elements in weapons to adhere together. A catalytic agent accelerates a reaction produced by a chemical substance.

Most chemical agents are delivered to the target by conventional methods, such as mortar shells, bombs, rockets, missiles, cylinders or large-calibre artillery shells.

3. Biological Weapons

According to Thomas and Thomas, the concept of biological or bacteriological warfare consists of the deliberate dissemination of pathogenic microorganisms or their toxic products to produce non-effectiveness or death of a military or civilian population, or to bring about the destruction of food crops or other vegetation, or to cause the deterioration of material.

According to the same authority, the psychological effects of exposure to biological weapons might add materially to the chaotic situation, for fear and misunderstanding could grow with rumour and false self-diagnosis.

Thomas and Thomas divide potential biological weapons, depending on the object of attack, into four classes, antipersonnel weapons, antianimal weapons, antiplant weapons and antimaterial weapons. Their scientific classification consists of micro-organisms such as fungi, bacteria, rickettsia, viruses and the toxic products of these.

### Second: Analysis Of The Islamic Attitude Towards The Possession And Use Of Mass Destruction Weapons

In Al-Islam, the Muslims must make themselves ready to counter their enemies. In the Holy Qur'an, ALLAH says, "Make ready for them all thou canst of [armed] force and of horses tethered, that thereby ye may dismay the enemy of ALLAH and your enemy, and others beside them whom ye know not. ALLAH knoweth them. Whatsoever ye spend in the way of ALLAH it will be repaid to you in full, and ye will not be wronged".<sup>(34)</sup>

The expression "make ready" means to plan something for the future; and the expression "of horse tethered" indicates owning horses which were among the means of fighting at the time of the Holy Prophet Muhammad (peace be upon him), and to be ready in defence posts. Therefore, in this Aya ALLAH orders Muslims to make ready for war by planning and owning modern weapons and delivery systems; and to picket their knights at every defence post on the frontiers of the Islamic State. Since weapons and delivery systems are always changing according to the continuous advance in technology, Muslims are required to possess the most sophisticated weapons and delivery systems including mass destruction weapons.

Some writers believe that the Hadith of the Holy Prophet Muhammad (peace be upon him) : "Strength is in throwing" means that the "thrown" object is an indication of strength. A "thrown" object may include whatever is propelled such as an arrow, a cannon ball, a rocket or any other nuclear weapon.

Since most chemical and biological agents are delivered to the target by conventional methods such as bombs, rockets and missiles, we can add chemical and biological agents to the "thrown" objects which must be possessed by Muslims, because they are among the features of strength to be ready for Muslim's enemies.

We believe that Muslim states must not be parties to treaties such as The Treaty On The Non Proliferation Of Nuclear Weapons of 1968, because these treaties deprive Muslim states of the possibility to manufacture; acquire or control such weapons or devices. In other words, these treaties deprive them from some elements of strength to be ready for their enemies.

As regards the use of mass destruction weapons by Muslims, it must be noted that this type of weapons shall not be used in the call to Al-Islam. It is impossible to imagine that mass destruction weapons, which exterminate the human existence or at least severely injure this

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existence, may be used in the call to Al-Islam which confirms that "There is no compulsion in religion".<sup>(35)</sup> Therefore, the only possible use of mass destruction weapons by Muslim, is in defence of Al-Islam and Muslims. Only antimaterial weapons may be used to attack the enemies of Al-Islam and Muslims.

In this regard, we can find the principle of reciprocity in several Ayat of the Holy Qur'an, ALLAH says, "The guerdon of an ill-deed is an ill-deed the like thereof. But whosoever pardoneth and amendeth, his wage is the affair of ALLAH. Lo ! He loveth not wrong-doers. And whoso defendeth himself after he hath suffered wrong - for such, there is no way [of blame] against them";<sup>(36)</sup> and He also says, "And one who attacketh you, attack him in like manner as he attacked you".<sup>(37)</sup>

We may also add the instruction of Abu Bakr, the first Khalifa after the death of the Holy Prophet Muhammad (peace be upon him), to the military commander Khalid Ibn Al-Walid, "If you meet your enemy, fight them with the same weapon they fight you with".

If the Muslims refrain from the using of mass destruction weapons, whereas their enemies use them, it is tantamount to committing suicide, a matter prohibited by the Holy Qur'an. ALLAH says "And be not cast by your own hands to ruin";<sup>(38)</sup> or at least this means that they accept to humiliate themselves in contradiction with the Holy Qur'an, ALLAH says, "Might belongeth to ALLAH and to His Messenger and to the believers".<sup>(39)</sup>

Mass destruction weapons may also be used by Muslims, against an enemy who uses this type of weapons, to remove the oppression from a Muslim people liveing in a non-Islamic state. In the Holy Qur'an, ALLAH says, "How should ye not fight for the cause of ALLAH and of the feeble among men and of the women and children who are crying; Our LORD ! Bring us forth from out this town of which the people are oppressors ! Oh, give us from Thy presence some protecting friend ! Oh, give us from Thy presence some defender".<sup>(40)</sup>

It is to be noted that mass destruction weapons of all kinds, antipersonnel, antiplant, antianimal and antimaterial weapons, may be used in defence but on condition that the use of them must be proportionate with the aggression against Muslims. In the Holy Qur'an, ALLAH says, "If you punish, then punish with the like of that wherewith ye were afflicted"<sup>(41)</sup> In the Holy Qur'an, it is permissible to destroy the enemy's property, ALLAH says, "But ALLAH reached them from a place whereof they reached not, and cast terror in their hearts so that they ruined their houses with their own hands and the hands of the believers";<sup>(42)</sup> and He also says, "Whatsoever palm-trees ye cut down or left standing on their roots, it was by ALLAH's leave, in order that He might confound the evil-livers".<sup>(43)</sup> This destruction of enemy' property causes anger to the disbelievers. In the Holy Qur'an, ALLAH says, "It is not for the town folk of Al-Madina and for those around them of the wandering Arabs to stay behind the Messenger of ALLAH and prefer their life to his life. That is because neither thirst nor toil nor hunger afflicteth them in the way of ALLAH, nor step they any step

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that angereth the disbelievers, nor gain they from the enemy a gain, but a good deed recorded therefore. Lo! ALLAH loseth not the wages of the good",<sup>'44'</sup> but this must be dictated by military necessity. The Islamic ethics prevent Muslims from destruction for the mere purpose of destruction.

According to some writers, the customary principle of military necessity provides that, strictly subject to the principles of humanity<sup>'45'</sup> and Chivalry,<sup>'46'</sup> a belligerent is justified in applying the amount and kind of force necessary to achieve complete submission of the enemy at the earliest possible moment with the least expenditure of time, life and resources. In contemporary international law there are two doctrines of military necessity. Under one doctrine, military necessity may overrule all law. The other doctrine of military necessity is that it may justify extreme measures within the law. It is considered most important that this latter doctrine of military necessity prevail rather than the concept that military necessity knows no law. If military necessity is not kept within the law, then military advantage or expediency will be confused with military necessity and chaos will result. In the same manner, we believe that military necessity must be understood by Muslims as legal boundaries of resort to extreme measures in the fight against non-Muslims.

We believe that it may be justified, as a military necessity, to destroy cultural property if this is necessary to secure the victory of Muslims over their enemy. This cultural property will not be more important than human souls.

Footnotes Of Chapter I Of Part II

(1) See In English:

H.A.R. Gibb and J.H. Kramers, *Shorter Encyclopaedia Of Islam*, passim; Thomas Patric Hughes, *A Dictionary Of Islam*, passim; Imam Muslim, *Sahih Muslim*, Volume III, pp. 938-1006; Muhammad Talaat Al-Ghunaimi, *The Muslim Conception Of International Law And The Western Approach*, passim; Majid Khadduri, *War And Peace In The Law Of Islam*, passim; Abul A'la Al-Maududi, *Jihad In Islam*, passim; Yadh Ben Ashoor, *Islam And International Humanitarian Law*, passim; Carl Brockelmann, *History Of Islamic Peoples*, passim; Francesco Gabrieli, *The Conquests Of Islam*, passim; Muhammad Hussein Haykal, *The Life Of Muhammad*, passim; Sayyid Fayyaz Mahmud, *A Short History Of Islam*, passim; Abd Assamii Al-Misry, *Mohammad, The Prophet Of Islam*, passim; Phinhas Hacohen Peli, Fr. Roger Ruston and Muhammad As'ad Al-Imam Al-Husseini, *The Possession And Use Of Nuclear Weapons In The Light Of Torah, Gospel And Shari'a*, passim; Daniel Pipes, *In The Path Of God*, passim; Sayyid Qutb, *Milestones*, passim; Muhammad Ibn Al-Hasan Ash-Shaybani, *Shaybani's Siyar*, passim; William Montgomery Watt, *Muhammad : Prophet And Statesman*, passim; Earl Waugh, *Peace As Seen In The Qur'an*, passim; Rosalyn Higgins, *Conflict Of Interests*, passim; Ann Van Wynen Thomas and A.J. Thomas, *Legal Limits On The Use Of Chemical And Biological Weapons*, passim; Majid Khadduri, *Islam And The Modern Law Of Nations*, pp. 358-372; Majid Khadduri, *International Law, Islamic* pp. 227-233; Ahmed S. El-Kosheri, *History Of The Law Of Nations, Regional Development : Islam*, pp. 222-230; Sobhi Mahmassani, *The Principles Of International Law In The Light Of Islamic Doctrine*, pp. 205- 328; M.K. Nawaz, *The Doctrine Of "Jihad" In Islamic Legal Theory And Practice*, pp. 32-48; M.K. Ereksoussi, *The Koran And The Humanitarian Conventions*, passim; Maxim Rodinson, *Mohammad*, passim.

See In Arabic:

Imam Muslim, *Sahih Muslim*, Volumes XII, pp. 35-199, and XIII, pp. 2-68; AnNawawi, *Al-Arba'in Hadith An-Nawawiya* passim; Sheikh Muhammad Ibn Al-Hasan Al-Hurr Al-A'ameli, *Wasa'il Ash-Shi'a Ela Tahsil Masa'il Al-Shari'a*, Volume VI, passim; Ala'u Eddin Al-Mutaqi Ibn Husam Eddin Al-Hindi, *Kanz Al-Ummal Fi Sunnan Al-Aqal Wa Al-Af'al*, Volume VI, pp. 279-615; Hizb At-Tahrir Al-Islami, *Muqaddimat Ad-Dustur*, passim; Gaafar Abd Assalam, *Qawa'id Al-Alaqt Ad-Dawliya Fi Al-Qanun Ad-Dawli Wa Fi Al-Shari'a Al-Islamiya*, passim; As-Sayyed Hafez Abd Rabbuh, *Falsafat Al-Jihad Fi Al-Islam*, passim; Sheikh Muhammad Abu Zahra, *Al-Alaqt Ad-Dawliya Fi Al-Islam*, passim; Sheikh Muhammad Abu Zahra, *Ad-Da'awa Ela Al-Islam*, passim; Muhammad Abdul Hameed Abu Zaid, *As-Salam Fi Al-Islam*, passim; Mahmud Muhammad Ali, *Al-Jihad Fi At-Tashri'i Al-Islami*, passim; Abbas Mahmud Al-Aqqad, *Haqaeq Al-Islam Wa Abateel Khusumu*, passim; Abbas Mahmud Al-Aqqad, *Al-Islam Da'awa A'lamiya*, passim; Amir Shakeeb Arslan, *Tareekh Ghazawat Al-Arab Fi Faransa Wa Swisra Wa Italia Wa Gaza'ir Al-Bahr Al-Mutawassit*, passim; Gamal Eddin Ayyad, *Nuzum Al-Harb Fi Al-Islam*, passim; Hasan Ayoob, *Al-Jihad Wa Al-Fida'iyah Fi Al-Islam*, passim; Salah Azzam, *Al-Jihad Fi Khutab Wa Ahadith Sayyidina Rasulu ALLAH*, passim; Muhammad Hasan Sa'id Bangar, *Al-Jihad Wa As-Salam Fi Dhirwat Al-*

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(2) Sura XVII : 70.

(3) Sura XLIX : 13.

(4) Some writers consider this situation equivalent to non-recognition. The nearest equivalent, in international law, is the recognition of insurgency as it merely means that an authority to enforce the law in a certain territory was needed under certain circumstances.

(5) Sura VIII : 72.

(6) Sura III : 28.

(7) Sura XVI : 106.

(8) Professor Khadduri suggests another division, in addition to dar Al-Islam and dar al-harb, that is dar al-hiyad (world of neutrality), or as he also suggests "the neutralized states", a division comprises states which Al-Islam refrains from attacking them due to their benevolent attitude toward the Holy Prophet (peace be upon him) and his companions, or because of their inaccessibility as immune from Jihad. These states were considered neutral because their neutrality was guaranteed by the belligerent power(s).

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- (8) Sura : 7.
- (10) Since the Jews and Christians of Al-Madina were residents of the Islamic State, there were no treaties between the Holy Prophet Muhammad (peace be upon him) and them; the respective legal instrument was of constitutional character.
- (11) Sura IX : 4.
- (12) This case may be deemed similar to "lend and lease" agreement between Great Britain and the U.S.A. during the Second World War.
- (13) Sura IX : 7.
- (14) We refer to these treaties under the category of the prohibited treaties because they are originally prohibited; although it is permitted to conclude them, exceptionally, under certain circumstances.
- (15) According to Professor Khadduri, "the aman is a pledge by virtue of which the harbi would be entitled to protection while he is in the dar Al-Islam by Muslim authority". The aman may be given by the Imam, or by an individual Muslim.
- (16) The organization of army in Al-Islam was first divided into five units or the so-called Al-khamis (the Army Of The Five Divisions), an organization that existed in Arabia before Al-Islam but the term was borrowed from the Hebrew. These divisions are Qalb (the Center); the two wings Maymana (Right), and Maysara (Left); Muqaddama (the Vanguard); and Saga (the Rear-Guard). The cavalry used lances, and bows and arrows; and being drawn upon the wings for greater manoeuvrability. The foot-soldiers used the heavier spear and sword. Gradually, the army took on more of professional character, especially under the Umayyads; Al-Khamis system was abandoned and the army became one compact body called Kurdu. From the time of the Abasid Khalifas, it was distinguished between the Murtaziqa and the Mutatawwi'a. The Murtaziqa constituted the regular army, who were always on active service and regularly paid; while the Mutatawwi'a were recruited for temporary service, and received grants while on duty.
- (17) Sura II : 217.
- (18) Sura IX : 5. Abu Hanifa and Abu Yusuf held the opinion of abrogation. Other jurists (Al-Kalbi), held that the prohibition of fighting during the sacred months was not abrogated.
- (19) Sura XXVII : 23-24. In At-Tawrat, "When thou comest nigh unto a city to fight against it, then proclaim peace unto it. And it shall be, if it make thee answer of peace, and open unto thee. And if it will make no peace with thee, but will make war against thee, then thee, then thou shalt besiege it". (Deut, XX : 10-12) Professor

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Khadduri considers the invitation preceded Jihad like the Jus Fetiale which required the Romans to observe regular ceremonies with regard to the declaration of war; but this invitation is based on the Sunna of the Holy Prophet Muhammad (peace be upon him) and not a ceremony.

- (20) The majority age of the children is generally fixed at puberty or at 15 years.
- (21) If a woman is a Queen, she is supposed to share in the hostilities.
- (22) The same rule is applied if the enemy shields himself behind Muslims.
- (23) In ancient times, custom tolerated the slaughter of the prisoners of war as a rule, but admitted their enslavement as a mitigation. For this reason, war was considered as the main source of slavery in Athena and Rome and in most ancient systems of law. The same treatment of prisoners of war was applied in Arabia before Al-Islam.
- (24) Abu Bakr, the first Khalifa after the death of the Holy Prophet Muhammad (peace be upon him), proscribed the destruction of any dwelling or the cutting of any palm, or any fruit-bearing tree, or any vine. This view was followed by a minority of jurists such as Al-Awza'i.
- (25) A minority of jurists, such as those of the Zahiri school, disagree on the permissibility of killing animals, except those required for food or slaughtered by necessity.
- (26) Yearbook of the United Nations, 1947-48, No. 4, p. 477.
- (27) Uranium 235 was one of the fissionable materials which produces energy by fission or atomic breakdown.
- (28) The size of a nuclear weapon is measured by its equivalence to the blast effect of tons of T.N.T. calculated in kilotons (KT) "one thousand tons", and megatons (MT) "one million tons".
- (29) According to some scientists, irradiation may occur in different and multiple ways. Firstly, there will be external irradiation as long as radioactive clouds remain in the atmosphere; secondly, internal radiation as a result of inhaling air saturated with radioactive particles; thirdly, external irradiation with gamma rays emitted by radioactive matter on the earth surface; and fourthly, internal irradiation after eating meat or milk of animals with radioactive particles in their elementary tract.
- (30) Out of 400, 000 the population of Hiroshima, the 1945 atomic bomb of 20-Kiloton capacity killed about 78, 000 people and wounded about 64, 000. The total death toll following the effect of all destructive factors was 240, 000 and other casualties ran to

163, 000.

(31) The Titan II is one of the biggest and oldest inter-continental ballistic missiles in the United States inventory, operational since 1963. The United States Air Force, after revision of the weapon's safety and supportability concluded that the weapon was satisfactory and recommended additional safety precautions.

(32) The United States Department of Defence Nuclear Accident Codes are as follows :

- NUCFLASH

Accidental or unauthorized incident involving detonation of a nuclear warhead by U.S. forces which could create risk of war with the Soviet Union.

- BROKEN ARROW

a. Unauthorized or accidental nuclear detonation, no war risk.

b. Non-nuclear detonation of a nuclear weapon.

c. Radioactive contamination.

d. Seizure, theft or loss of nuclear weapon including emergency jettisoning.

e. Public hazard, actual or implied.

- BENT SPEAR

Any nuclear weapon incidents other than nuclear weapon accidents or war risk detonation actual or possible.

- DULL SWORD

Any nuclear weapon incident other than significant incidents.

- FADED GIANT

Accident involving nuclear reactor.

(33) Abbreviation of Trinitrotoluene, a powerful explosive.

(34) Among the lethal or severely injurious chemical agents are nerve agents, blood agents, the choking agent, phosgene and blister agents.

(35) Sura VIII : 60.

(36) Sura II : 256.

(37) Sura XLII : 40-41.

(38) Sura II : 194.

THE LEGALITY OF WAR IN AL-SHARI'A AL-ISLAMIYA AND INTERNATIONAL LAW  
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- (39) Sura II : 195.
- (40) Sura LXIII : 8.
- (41) Sura IV : 75.
- (42) Sura XVI : 126.
- (43) Sura LIX : 2.
- (44) Sura LIX : 5.
- (45) Sura IX : 120.
- (46) *The principle of humanity prohibits the employment of any kind or degree of force not actually necessary for military purposes.*
- (47) *The principle of chivalry denounces and forbids resort to dishonourable means, expedients, or conduct in the course of armed hostility.*

Chapter II: The Limitations Of The  
Legality Of "War" In International  
Law<sup>(1)</sup>

I. The Legality Of "War" Under The League Of  
Nations

Three main points will be discussed in this section, the main features of the legality of war in the League of Nations' Covenant; the practice of the League of Nations; and the evaluation of the League of Nations' system. This will be followed by a brief summary of the evolution in the period during the two World Wars.<sup>(2)</sup>

First: The Main Features Of The Legality Of "War"  
In The League Of Nations' Covenant

The Covenant of the League of Nations was drafted in February 1919 by the Commission of the League of Nations of the Peace Conference. After changes in the drafting Committee, it was finally adopted by the Conference and became an integral part of the peace treaties.

The main features of the legality of "war" in the Covenant may be summed up as follows :

1. Although the Preamble declared that the High Contracting Parties accept "obligations not to resort to war", the Covenant of the League of Nations has not prohibited war altogether, but simply prohibited resort to war where the Covenant provided (in theory) effective substitutes in the way of substitute procedures.

Article 11<sup>(3)</sup> of the Covenant made any war and any threat of war a matter of concern to the whole League, but it did not determine the legality or illegality of recourse to force by individual states. Under Article 12<sup>(4)</sup> of the Covenant, the Members of the League undertook to submit all disputes "likely lead to a rupture" to arbitration, judicial settlement, or conciliation by the Council, and not to go to war until three months after the arbitrator's award, the court's decision or the Council's report. Under certain articles of the League's Covenant, i.e., Articles 13,<sup>(5)</sup> 14,<sup>(6)</sup> and 15,<sup>(7)</sup> the Members further undertook not to go to war at all against a state which complied with the award of the arbitration, the judgment of the Court, or the unanimous report of the Council - unanimous, that is, apart from the votes of the disputing States.

Thus, the clear implications of Articles 11-15, although it was not expressly stated in the Covenant, was that Members of the League remained at liberty to resort to war :

A. If the other state failed to carry out an award, a judgment or unanimous report of the Council.

B. If the Council failed to arrive at unanimous report.

C. If a plea of domestic jurisdiction was upheld.

2. Under Article 10 of Covenant, <sup>(8)</sup> Members of the League undertook to respect and preserve, as against external aggression, each other's territorial integrity and existing political independence. Aggression was not however defined in the Covenant nor the aggressor. But, by necessary implication, the state which went to war in breach of Articles 12-15 was considered as aggressor, although the claims of self-defence. The Covenant itself never mentioned self-defence, but it was universally agreed that resort to war, and therefore any lesser use of force, in self-defence was not restricted by the Covenant. The Assembly of the League, as noted by some writers, considered self-defence to be a duty as much as a right. According to Waldock, Article 10 of the Covenant provided a legal basis for the adoption by the League of the Stimson doctrine of non-recognition of situations brought about by illegal resort to force. <sup>(9)</sup>

3. Resort to war in violation of the Covenant was illegal, but the content of illegality was prima facie a violation of a treaty obligation. The resort to war was regulated by the Covenant, but not by reference to the legitimacy of grounds for resorting to war, as was the case with measure short of war under customary law. The Covenant was a legal instrument of special character as it was concerned with the machinery of and procedures for peaceful settlement of disputes. Articles 12-15 of the Covenant made the legitimacy of war dependent on prior efforts to reach a settlement of disputes. The illegality of the breach of the Covenant's obligation was not equated with the violation of the duties laid down by public international law, such violation giving rise to a right of reparation. In fact, the Covenant left the determination of the legality, or illegality, of any resort to war to each individual state.

4. Article 16 of the Covenant <sup>(10)</sup> laid an obligation on the Members to apply sanctions against the Covenant-breaking State. The sanctions consisted of political and economic measures, and if these were thought insufficient, military actions. Although the sanctions of the Covenant were penal in character rather than remedial to the wrong done to the victim of aggression, the Covenant did not characterize resort to war in breach to its provisions as a criminal act. The decision to apply sanction was for each state an individual decision as the Covenant did not compel any Member to accept even the unanimous decision of the Council or of other Members of the Assembly. Oppenheim describes this situation as "the machinery of sanctions was decentralized in the sense that each Member of the League -as distinguished from a central agency such as its Council -was bound and entitled to determine for itself whether a breach of the Covenant, under the Articles mentioned, had occurred".

### Second: The League Of Nations In Practice

It was noted by some writers that the majority of cases handled by

the League had one similar feature, they generally involved disputed claims over frontiers and territory resulting from the break-up of the Austro-Hungarian and the Russian Empires. Most of these were in Europe; but the League was also involved in Asia (Manchuria), in South America (Chaco and Leticia), and Africa (Ethiopia).

Also, it was noted that the League succeeded in preventing war and restoring peace whenever the great powers were in accord, particularly when Great Britain and France agreed on the action to take. Thus, all efforts of the Council of the League to maintain peace from 1920 to 1930 were measurably successful.<sup>'11'</sup> After 1930, when other great powers - Japan, Italy, Germany and Russia - began their aggressive action, the League proved to be unequal to the task of maintaining or restoring peace.<sup>'12'</sup> In other words, as Professor Corbet explains,<sup>'13'</sup> "Between two small states, neither of which had a Great-Power champion, the law of the Covenant had been enforced", the two famous examples were the invasion of Manchuria by Japan, and the conquest of Ethiopia by Italy.

The Covenant of the League of Nations did not impose restrictions on the use of the armed force, but on "resort to war" so that it was arguable that it did not forbid the customary rights of reprisals and intervention short of war.<sup>'14'</sup> The majority of jurists considered armed reprisals to be contrary to the Covenant, whether or not it amounted to "resort of war".

During its lifetime, the League adopted many resolutions related to the "resort to war", we shall refer to some of them in a chronological sequence.

1. In "Resolutions Regarding The Economic Weapon Of 4 October 1921", the Second Assembly recommended certain "rules of guidance" according to which the Council was to make a decision and "invite Members of the League to take action accordingly" although the individual Members need only take action "if satisfied that a breach had occurred".

2. An interpretative Resolution approved, but not adopted formally, by the Fourth Assembly which gave freedom of decision to Members in the matter of taking measures to implement the guarantee it contained. This Resolution greatly diminished any potential practical importance of Article 10 of the Covenant.

3. In accordance with a proposal of the Spanish delegation, the Sixth Assembly adopted a Resolution on September 25, 1925, which stated that a "war of aggression" constituted "an international crime".

4. In accordance with a Polish proposal, the Eighth Assembly adopted unanimously on September 24, 1927, a Resolution prohibiting wars of aggression. By this Resolution the Assembly declared :

- A. That all wars of aggression are, and shall always be, prohibited.
- B. That every pacific means must be employed to settle disputes of every description, which may arise between states.

Third: The Evaluation Of The League Of Nations' System

Many jurists have criticised the League of Nations' system from different aspects. In general, the Covenant of the League is considered a result of compromise and was a political document. Besides, the draftsmanship was a source of the so-called gaps in the Covenant.

1. One of the gaps in the Covenant was its use, in Article 13, of the expression "resort to war", because if this expression had its general meaning of full-dress war, grave acts of force might occur without breach of the Covenant.

2. Article 10 of the Covenant was attacked on various grounds. Its terms, such as "territorial integrity" and "political independence" were vague. The duty of "preserving" these was onerous, it was said that the Article would lead to war in fulfilment of its guarantees.

This Article was in contradiction with Article 15, paragraph 7. The latter permitted war in certain circumstances to enforce claims whereas the plain words of Article 10 would seem to put a prohibition on war except in self-defence. If it is considered, as suggested by some writers, that Article 10 was subordinate to the Articles of pacific settlement and that its guarantee only operated in relation to wars which were illicit under Article 15; the text of Article 10 still appeared to contradict Article 15, unless it was assumed that there was general acceptance of the interpretation suggested by some writers to reconcile the two Articles. It was suggested that a war, lawful in its inception in accordance with Article 15, might become illegal qua objective if the lawful belligerent decided to take steps which would permanently affect the territorial integrity and political independence of the adversary.

3. The absence of any provision for authoritative ascertainment of breaches of the Covenant.

In practice, the membership of the League of Nations was not really universal and did not include the United States<sup>(15)</sup> and the U.S.S.R.

Also, in practice, the "resort to war" expression was utilized to avoid obligations under the Covenant. In relation to the conflict between China and Japan between 1937 and 1941, victim, aggressor, and other interested states actively connived in maintaining the fiction that war did not exist.

Moreover, the Covenant's system of sanctions, as regards military sanctions, was in practice inefficient.

On the other hand, there were some positive aspects in the system of the League of Nations. According to some writers the Covenant of the League changed the position radically :

A. It created express obligations to employ pacific means of settling disputes and not to resort to war without first exhausting those pacific means.

B. It established a political organization of states, the members of which were empowered and concerned to pass judgment on the legality under the Covenant of any state's resort to war and to apply sanctions to any violations of the Covenant.

However, other writers state that there can be no question that the general obligations contained in the Covenant and also the Pact of Paris, prohibiting recourse to war for the settlement of disputes and requiring disputes to be settled by pacific means, reflected and recorded a fundamental change in *customary law in regard to the legality of war*.

Actually, one of the most significant changes which the Covenant effected was to make any war between states a matter of international concern. War was no longer to have the aspect of private duel but of a breach of the peace which affected the whole community. Thus, Article 11 provided that any war or threat of war was a matter of concern to the whole League.

The Covenant also promoted the view that the use of force was illegal not only when directed to conquest and unjustified acquisition, but also as a means of enforcing rights. The Covenant in view of its general purpose and its particular provisions created a presumption against the legality of war as a means of self-help. That presumption was reinforced by various instruments and legal developments such as the Stimson Doctrine.

Even in Article 10 of the Covenant, which was attacked on various grounds, its obligation has been considered as "perhaps the most revolutionary element in the Covenant".

### A Brief Summary Of The Evolution In The Period During The Two World Wars

#### First: General

Apart from the development which took place in the American Continent, some of its features will be later referred to, we can distinguish between the following instruments which marked this period.

#### 1. Treaty Of Mutual Assistance Of 1923

When it became apparent after the interpretative resolutions of the Second Assembly that Member States did not consider themselves bound to automatic action to implement Article 16, attempts were made to provide more specific guarantees of aid to states threatened by the use of force.

The drafters of the Treaty had discussions concerning the signs of detecting aggression-preparation for war, mobilisation, disposition of forces before hostilities, aggressive policy, refusal of pacific methods of settlement etc. They concluded that the factors were too complex to be stated in a treaty and that the only course was to entrust the Council of the League with full power to designate the aggressor with binding effect on all Members of the League.

As noted by some writers, Article 1 of the Treaty<sup>(16)</sup> was more explicit than the Covenant of the League in two senses :

- a. unlike Article 15 of the Covenant, it makes plain that the terms of any settlement may be enforced by war; and
- b. it emphasizes the illegality of war which has a character inconsistent with the provisions for peaceful settlement, such war constituting an international crime which could mean, at that time, the delictual rather than the criminal liability of states.

The Treaty did not meet with the approval of governments and did not come into force.

## 2. The Geneva Protocol For The Peaceful Settlement Of International Disputes Of 1924

The Draft Protocol, adopted by the League Assembly on October 2, 1924, had the same object as the Treaty of Mutual Assistance, namely the provision of mutual guarantees against aggression, but a system of obligatory resort to peaceful means of settlement was combined with the security system. It was proposed in the Protocol that :

- a. all the Signatories should accept the compulsory jurisdiction of the Court for legal disputes;
- b. other disputes, if the Parties agreed should be submitted to arbitration;
- c. failing judicial settlement or arbitration, the Council was to make a report which, if unanimous except for the Parties, would be binding upon them;
- d. failing an unanimous report, the Parties became bound to accept compulsory arbitration by a tribunal appointed by the Council. Only the Council was to enforce the verdict in any of these four cases.

## 3. The Locarno Treaties Of 1925

The key instrument was "The Treaty Of Mutual Guarantee" between Germany, Belgium, France, Great Britain and Italy. There were also arbitration conventions or treaties by Germany with Belgium; France, Poland and Czechoslovakia. The system was completed by mutual assistance treaties between France and Poland; and France and Czechoslovakia. These

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treaties were significant for their influence on the development of arbitration and conciliation in the practice of states. According to Article 2 of the first Treaty, the Parties mutually undertake that they will in no case attack or invade each other or resort to war against each other, this undertaking was subject to exceptions, i.e., shall not apply in the following cases :

- a. The exercise of the right of legitimate defence;
- b. Action in pursuance of Article 16 of the Covenant;
- c. Action as a result of a decision taken by the Assembly or by the Council of the League of Nations in pursuance of Article 15, paragraph 7 of the Covenant...provided that in this last event the action is directed against a state which was the first to attack.<sup>(17)</sup>

4. Treaties Of Friendship And Security, Of Guarantee And Neutrality, And Non-Aggression 1925-35

a. Treaties Of Friendship And Security

- a.1. The treaty concluded by Turkey and Persia in 1926.
- a.2. The treaty concluded by Persia and Afghanistan in 1927.

b. Treaties Of Guarantee And Neutrality

The treaty concluded by Persia and the U.S.S.R. in 1927.

C. Treaties Of Non-Aggression<sup>(18)</sup>

- c.1. The Treaty concluded by U.S.S.R. and Lithuania in 1926.
- c.2. The Treaty of Non-Aggression And Arbitration concluded by Greece and Rumania in 1928.
- c.3. The Treaty concluded by Finland and the U.S.S.R. in 1932.
- c.4. The Treaty concluded by the U.S.S.R. and China in 1937.<sup>(19)</sup>

5. The Convention To Improve The Means Of Preventing War Of 1931

The League of Nations attempted to codify the experience gained from 1921 to 1931 in setting up and using Commissions of Enquiry, by the adoption of the "Convention To Improve The Means Of Preventing War". The Convention had been prepared by the Committee On Arbitration And Security of the Preparatory Commission On Disarmament and was based on suggestions originally put forward by the German delegation in 1928.

A Protocol accompanied the Convention embodying executive regulations as to the composition and working of Commissions of Inspections.

The Convention represented a further development of Article 11 in that it considered the prevention of hostilities in political disputes

by conciliation instead of the use of collective force and sanctions after hostilities were already under way.

The Convention never received the ten ratifications necessary to enter into force.

### Second: The Pact Of Paris Of 1928

The General Treaty For The Renunciation Of War, popularly known as the Pact of Paris or the Kellogg Briand Pact, was signed on August 27, 1928 as a result of the initiative of France and the United States. The Pact was of universal obligation, because it had been ratified or adhered to by sixty-three states, and only a few states in international society as existed before the Second World War were not bound by its provisions.<sup>(20)</sup>

The Pact contains no provision for renunciation or lapse. Having been concluded outside the League, the Pact did not perish with the League, and being fully consistent with the provisions of the Charter of the United Nations, it retains its full force today. It was concluded against the background of the Covenant system, but it has now to be read against the background of the Charter system which provides for the collective maintenance of international peace. In the opinion of Oppenheim, the Pact must be considered as having a degree of permanency comparable with that appertaining to the rules of customary international law, due to its object and the number of states bound by it.

The Pact of Paris is an instrument of outstanding importance, because it was the culmination of a growing movement to prohibit any unilateral resort to war except in self-defence. The Signatories of the Pact have renounced the right of war both as a legal instrument of self-help against an international wrong, and as an act of national sovereignty for the purpose of changing existing rights.<sup>(21)</sup>

Declarations and Statements were made by the various Signatories of the Pact, prior to their final acceptance, to emphasise that self-defence is a natural right inherent in every state and untouched by the Pact; they reserved the right to judge for themselves whether a situation had arisen calling for such action. In the opinion of Oppenheim, these declarations and statements have not impaired the legal effect of the Pact to any appreciable degree since the right to use force in self-defence constitutes a permanent limitation of the prohibition of recourse to force in any system of law.

Article 1 of the Pact<sup>(22)</sup> renounced war as "an instrument of national policy" in the relations of the Contracting Parties. The intention, as Waldock explains, was to forbid all unilateral resort to war for purely national objects, whether on just grounds, but to permit war as a collective sanction either under the Covenant or the Pact itself (and now under the Charter). The Pact does not contain provisions to make its principles applicable to non-Signatories with the result

that a war by a Signatory with a non-Signatory would not be a breach of the terms of the Pact.

Kelsen considers that a war waged as a reaction against a violation of international law and therefore for the maintenance of law, is not war as an instrument of national policy. Other writers do not agree with Kelsen as it is doubtful that such an interpretation was intended by the Parties, and no State has relied upon it to justify action *prima facie* in violation of the Pact. Another interpretation is submitted, in harmony with international law prevailing at the time of signature, that war was illegal unless in self-defence or under authority of an international organ (in accordance with Article 16 of the Covenant).

In the Preamble of the Pact, the Contracting Parties express their conviction that "all changes in their relations with one another should be sought only by pacific means and be the result of peaceful and orderly process".<sup>(23)</sup> Article 2 of the Pact<sup>(24)</sup> refers to the obligation of the Contracting Parties not to solve disputes by any except pacific means. Brierly and Quincy Wright rely on this Article for the proposition that forcible measures short of war are prohibited. Oppenheim asserts that "pacific means" may comprehend compulsive measures short of war in the formal sense, he says, "although measures short of war are compulsive means, they are still pacific means".

Although the Pact renounced the recourse to war as an instrument of national policy,<sup>(25)</sup> it has not abolished, even for its Signatories, the institution of war. According to Oppenheim, resort to war still remains lawful in the following instances :

1. As a means of legally permissible self-defence;
2. As a measure of collective action for the enforcement of international obligations by virtue of existing instruments such as the Charter of the United Nations;
3. As between Signatories of the Pact and non-Signatories;
4. As against a Signatory who has broken the Pact by resorting to war in violation of its provisions.

### The Evaluation Of The Pact Of Paris

The Pact was criticized, by many jurists, from different aspects which may be summed up as follows :

1. Similar to the League Covenant, the Pact used, in Article 1, the expression "recourse to war".
2. Similar to the League Covenant, the Pact of Paris left the determination of the legality or illegality of any resort to war to each individual state.

3. Unlike the Covenant of the League of Nations or the Charter of the United Nations, the Pact contains no specific machinery for the pacific settlement of disputes or for the application of sanctions to a state going to war in breach of the Pact. The only expressed sanction is a statement in the Preamble denying to the wrongdoer the protection of the Pact, "any Signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty".

4. According to Oppenheim, one of the shortcomings of the Pact is the uncertainty as to how far the prohibition of resort to war includes measures of force short of war.

5. Another shortcoming was remarked by Oppenheim, that is the failure to provide for collective enforcement of its obligations, at least to the extent of mitigation of the rigidity of the established rules of neutrality to the disadvantage of the law-breaker.

On the other hand, the positive aspects of the Pact, as noticed by some jurists, may be summed up as follows :

1. According to Oppenheim, resort to war ceased to be a discretionary prerogative right of States Signatories of the Pact; it became a matter of legitimate concern for other Signatories whose legal rights are violated by recourse to war in breach of the Pact; it became an act for which justification must be sought in one of the exceptions permitted by the Pact of Paris.

2. Nawaz argues that the Pact of Paris altered the old state of law which did not prohibit war as a means of national policy. It is noted that the Nuremberg Trial of the Major War Criminals clearly showed that the Pact had important legal consequences in this sphere. Erhards contends that the Nuremberg Charter was an infringement of the maxim "nulla poena sine lege". But the Tribunal itself held that the Pact of Paris, together with the other evidences concerning the criminal nature of aggressive war provided a sufficient basis for the application of the principles in the Nuremberg Charter. (20)

3. According to Brownlie, the Stimson Doctrine of non-recognition rested on the League Covenant and the Pact of Paris; and the Resolution of the League Assembly on March 11, 1932, similarly recited the Pact as a basis for an obligation not to recognize situations created by force. No state challenged the legal nature of the obligations created by the Pact. Two arguments may be submitted against the legal nature of the Pact's obligations, one is that the Pact was accompanied by some widely expressed reservations of a political nature; and the other argument based on the absence of sanctions in the nature of mutual assistance and armed action to suppress acts infringing the Pact. In replying these arguments, as for the first, Brownlie says that these reservations, in the context of an international legal order, result in obligations similar to those formed in many contemporary treaties and resolutions of an international organ; as for the second argument he says, it is a non-

sequitur, many treaties and other sources of law provide no sanctions.

In conclusion, the Pact was considered by Oppenheim as one of the corner-stones of the international legal system, although it has not expressly incorporated in the Charter of the United Nations. The Pact, in the opinion of Quincy Wright completes the legal case against war and armed violence in international affairs. Brownlie considers the Pact as parallel to and a complement of the United Nations Charter. It reinforces the obligations of the latter, although in some ways the Charter improves on the Pact by being more explicit in references to "threat or use of force" and "self-defence".

### Third: An Outline Of The Efforts Of The Latin American States

In this outline, we shall refer only to some examples of the instruments used by the Latin American States during the Two World Wars. Among these instruments, we may distinguish between resolutions, declarations, and treaties as follows :

#### 1. Resolutions And Declarations

A. The Resolution Of The Sixth International Conference Of American States adopted on February 18, 1928. According to this Resolution, the war of aggression is considered as constituting an international crime against the human species.

B. The Chaco Declaration of August 3, 1932, stated that, in relation to the Chaco War, the Signatories would not recognize any territorial settlement not obtained by peaceful means nor the validity of territorial acquisitions which may be obtained through occupation or conquest by force of arms.

C. The Declaration Of The Eighth International Conference Of American States of December 22, 1938. This Declaration stated that intervention in the internal or external affairs of any state is inadmissible; all international differences should be settled by peaceful means; and the use of force as an instrument of national or international policy is proscribed.

#### 2. Treaties

A. The Anti-War Treaty Of Non-Aggression And Conciliation was signed at Rio de Janeiro on October 10, 1933.<sup>(27)</sup> The Parties of the Treaty declare that they condemn wars of aggression in their mutual relations or in those with other states, and that the settlement of disputes or controversies of any kind that may arise among them shall be effected only by pacific means which have the sanction of international law. (Article 1) The Parties also declare that they will not recognize any territorial arrangement which is not obtained by pacific means. (Article 2) This treaty was replaced by the coming into force of the Bogota Pact of 1948.

B. The Convention On Rights And Duties Of States, which was signed at Montevideo on December 26, 1933, resulted from the Seventh International Conference of American States. According to Article 8 of this Convention, "No state has the right to intervene in the internal or external affairs of another". And according to Article 11 of the Convention, an obligation was laid down, "not to recognize territorial acquisitions or special advantages which have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representatives, or in any other effective coercive measure.

C. The Convention For The Maintenance, Preservation, And Reestablishment of Peace, which was signed at Buenos Aires on December 23, 1936, resulted from the Inter-American Conference for the Maintenance of Peace.

D. The States represented at the said Conference also signed an Additional Protocol relative to Non-Intervention.<sup>(28)</sup>

## II. The Legal Limits Of The Use Of Force Under The United Nations Charter<sup>(29)</sup>

The practice of states from 1920 to 1939 abundantly proves that war continued to exist in fact. The dropping of atomic bombs over Hiroshima and Nagasaki initiated a new era of high technology in arms.<sup>(30)</sup> As noticed by Kunz, total war is the result of the combination of technological progress with a changed manner of waging war, and of the combination of unlimited use of highly destructive weapons for unlimited war aims. The Second World War experiment led to the establishment of the United Nations.<sup>(31)</sup> The first draft of the United Nations' Charter was prepared at a Conference held at Dumbarton Oaks near Washington D.C. The first phase of the Conference was between the representatives of the U.S.S.R., the U.K., and the U.S.A. from August 21 to September 28, 1944; and the second phase, between the representatives of China, the U.K., and the U.S.A. from September 29 to October 7, 1944.<sup>(32)</sup> At the end of the Conference, proposals for the structure of a World Organisation were published.<sup>(33)</sup> Thereafter, the "United Nations Conference On International Organization" was held at San Francisco from April 25 to June 26, 1945.<sup>(34)</sup> The Charter of the United Nations was adopted unanimously and was signed by all representatives. It came into force on October 24, 1945, by the Governments represented at the United Nations Conference on International Organisations, this agreement established the "Preparatory Commission of the United Nations".

The Charter of the United Nations has brought about profound changes in international law, particularly in the law of war. A new regulation to preserve international peace and security was needed to prove that technological developments make total war only possible, but not inevitable. The Charter initiated a new system in this regard, i.e., the Collective Security system.<sup>(35)</sup>

It is clear from reviewing the Preamble,<sup>(36)</sup> and Article 1 (1) of the Charter,<sup>(37)</sup> that Dumbarton Oaks Proposals have been followed in

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making the maintenance of international peace and security the first purpose of the United Nations, which is not concerned with internal disorder unless it affects international peace. The order of listing the Purposes of the United Nations in Article 1,<sup>(38)</sup> together with the content of subsequent Charter provisions, gives support to the conclusion that the maintenance of peace and security takes priority over other purposes.<sup>(39)</sup>

According to some writers, the Collective Security system may be defined as an institutionalized universal or regional system in which states have agreed by treaty jointly to meet any act of aggression or other illegal use of force resorted to by a Member State of the system. According to the United Nations Charter, there are two corner-stones of the Collective Security system, first, the prohibition of the threat or use of force; and second, the peaceful settlement of international disputes. Self-defence, whether individual or collective, represents the main exception from the use of force under the Charter.<sup>(40)</sup> We shall explain all these points as follows :

First: The Prohibition Of The Threat Or Use Of Force

We may distinguish between the obligation of Member States to refrain from the threat or use of force; the role of the Security Council in the prohibition of the threat or use of force; and the role of the General Assembly in the maintenance of international peace and security.

1. The Obligation Of Member-States To Refrain From The Threat Or Use Of Force

This obligation is contained in Article 2 (4) of the Charter,<sup>(41)</sup> which lays down one of the basic Principles of the United Nations. As an Organization established to maintain international peace and security, the United Nations' success is obviously dependent on the extent to which its Members respect this basic Principle, and the extent to which its organs are effective in discharging their responsibilities to that end.

The experience under the League of Nations and the Pact of Paris that the word "war" used in these instruments is of uncertain meaning, has led to a great technical progress in the Charter of the United Nations, as the word "war" has been replaced by the broader and less ambiguous phrase "threat or use of force". Actually, this change means that the Charter goes beyond, and adds to the obligations of these two instruments. But the Charter, by this Article does not abolish the use of force completely, as this prohibition, however, qualified :

A. by the collective military actions authorized by the Security Council in accordance with Article 42,<sup>(42)</sup>

- B. by the inherent right of individual or collective self-defence in accordance with Article 51, <sup>(43)</sup>
- C. by the enforcement action of regional arrangements or agencies under the authority of the Security Council in accordance with Article 53 (1), <sup>(44)</sup> and
- D. by the approval of Member States to use force against enemy-states, <sup>(45)</sup> in accordance with Article 107. <sup>(46)</sup>

According to Article 2 (4) the threat or use of force is prohibited in the "international relations" of the Members of the United Nations, thus, the use of force by a state for the suppression of internal disturbances, such as a revolution, is not affected by Article 2 (4). This conclusion is supported by Article 2 (7) of the Charter. <sup>(47)</sup> But a State which had resorted to force against another state could not appeal to Article 2 (7) to protect itself against the intervention of the United Nations. The use of force by one state against another is a matter which is necessarily outside the domestic jurisdiction of either State.

However, the Security Council, according to Goodrich, Hambro and Simons, may find the situation resulting from the use of force in internal disturbances constitutes "a threat to the peace" under Article 39, justifying the taking of measures to maintain international peace and security. We agree with Waldock that in such a case, it hardly seems that the resort to force by the parent state could be a breach of Article 2 (4), though it might still be a matter of international concern calling for investigation by the Council. We find Article 2 (7) makes no contradiction between the Principle of "domestic jurisdiction" and the application of enforcement measures under Chapter VII, it provides in this regard that, "this Principle shall not prejudice the application of enforcement measure under Chapter VII".

On the other hand, the Principle of self-determination in Article 1 (2) <sup>(48)</sup> has been used to support the claim that force can be used on behalf of independence movements.

In the actual practice of the United Nations, there has been extensive discussion but no general agreement among Members regarding the kind of force referred to in Article 2 (4). One view holds that "force" means "armed force" and does not include political and economic pressure. This interpretation is based on the record of discussion at San Francisco and the other provisions of the Charter. Another view holds that the Charter does not make a sharp distinction between armed and other forms of force; and that the use of political and economic coercion could be a great threat to the political independence of states as military force.

Among the jurists, such as Oppenheim, Brierly and Waldock, there seems to be a general agreement that what is meant by "force", is armed and physical force. This was the meaning given to it at San Francisco,

and the Preamble to the Charter states the aim of the United Nations to be "to ensure, by the acceptance of Principles, and the institution of methods, that armed force shall not be used, save in the common interest".

According to this opinion, the dispatch of troops to another state territory to prevent an unlawful expropriation of the property of nationals and other acts of similar kind are forbidden by Article 2 (4). But we do not agree with the opinion of Brierly who justifies the intervention of troops to save the lives of nationals under imminent threat of death or serious injury owing to the breakdown of law and order. His justification is the sheer necessity of instant action to save the lives of innocent nationals, whom the local government is unable or unwilling to protect. This justification, in our opinion, is contradictory to the express provision of Article 2 (4). Also, according to this interpretation of Article 2 (4), armed reprisals is strictly forbidden,<sup>49</sup> while it is permissible for a state to take unilaterally economic or other reprisals not involving the use of armed force in retaliation for a breach of international peace by another state.

According to Article 2 (4), the threat or use of force in international relations is prohibited if it is "against the territorial integrity or political independence of any state", or "in any manner inconsistent with the Purposes of the United Nations". The prohibition of armed force in Article 2 (4) is not limited to its actual use, but it extends to the threat of armed force. Practically, it is not easy to determine, in any particular case, what constitutes a threat. The threat or use of force may be indirect as well as direct. It may be indirect in cases such as giving active assistance to the organization of civil strife in another state; or encouraging the organization of armed bands for incursions into the territory of another state. There is a consensus that such cases are a violation of Article 2 (4).

At San Francisco, there was strong resistance on the part of the major powers to the inclusion of any references to international law and justice as criteria for Council action in maintaining peace, and the proposal to define the meaning of aggression, in Article 39 of the Charter and elsewhere, was not adopted on the ground that it introduced an undue element of rigidity in the interpretation of the Charter. However, the first limiting phrase "against the territorial integrity or political independence of any state" was inserted in Article 2 (4) in response to the demand of smaller states who have asked for an affirmative guarantee of protection against aggression. In the opinion of some jurists, such as Waldock, Goodrich, Hambro and Simons, the result of the insertion was to endanger rather than strengthen the expression of the negative undertaking to refrain from aggression which is given by all Members in Article 2 (4). Also, the obligation of the United Nations' Members is much more limited than that of the League Members in that while the former are obliged "to respect", they are not obligated to "preserve as against external aggression" the political independence and the territorial integrity of Members.

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The second limiting phrase "or in any other manner inconsistent with the Purposes of the United Nations", may exclude, according to Kunz, armed intervention, armed reprisals, or armed interference for the protection of nationals abroad. Some writers, such as Stone, hold that the use of force which is not against the "territorial integrity", or "political independence" of states, or which is not "inconsistent with the Purposes of the United Nations" is not prohibited by the Charter; but we believe that the use of force is prohibited for all Purposes, except where it is resorted to in accordance with the provisions of the Charter, i.e., Articles 42, 51, 53 (1), and 107.

Some writers hold that the prohibited threat or use of force, under Article 2 (4), must be directed by one Member State against another. We believe that this prohibition extends to include threat or use of force against groups other than states on condition that this threat or use of force is not considered a matter "essentially within the domestic jurisdiction" in accordance with Article 2 (7). Our justification is that Article 2 (4) includes two limitations, one is that the threat or use of force is prohibited in international relations if it is "against the territorial integrity or political independence of any state"; and the other is that the threat or use of force in any manner inconsistent with the Purposes of the United Nations", while the first limitation requires the victim to be a state, this is not necessary under the second limitation. Also, in the practice of the United Nations, a substantial number of Member States have held that the use of force is justified to terminate colonialism and implement the Principle of self-determination. In December 20, 1965 the General Assembly issued a Resolution which recognized the legitimacy of liberation movements for self-determination and independence.

The threat or use of force in a manner inconsistent with the Purposes of the United Nations holds the state responsible, and subject to the application of sanctions provided for in Articles 6,<sup>(50)</sup> 41,<sup>(51)</sup> and 42.<sup>(52)</sup>

The judgment of the International Court of Justice of June 27, 1986, in "Military And Paramilitary Activities In And Against Nicaragua" case, considers, as far as the use of force is concerned, that customary international law is effective and operative as well as the United Nations Charter, the Court says, "However, so far from having constituted a marked departure from customary international law which still exists unmodified, the Charter gave expression in this field to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter, to such an extent that a number of rules contained in the Charter acquired a status independent of it. The essential consideration is that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations. The differences which may exist between the specific content of each are not, in the Court's view, such as to cause a judgment confined to the field of customary international law to be ineffective or inappropriate, or a judgment not susceptible of compliance or

execution".<sup>(53)</sup> Also, the Court refers in that Judgment to the view of the International Law Commission that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*" (the International Law Commission Yearbook, 1966-II, p. 247).

In appraising some facts in the light of the Principle of the non-use of force, the Court, in that Judgment, considers these activities :

- "the laying of mines in Nicaraguan internal or territorial waters;
- certain attacks on Nicaraguan ports, oil installations and a naval base; "constitutes infringements of the principle of the prohibition of the use of force, defined earlier, unless they are justified by circumstances which exclude their unlawfulness".<sup>(54)</sup> But the Court considers "that the mere supply of funds to the Contras, while undoubtedly an act of intervention in the internal affairs of Nicaragua.....does not in itself amount to a use of force".<sup>(55)</sup> In that Judgment the Court, by twelve votes to three, "Decides that the United States of America, by certain attacks on Nicaragua territory in 1983-1984, has acted, against the Republic of Nicaragua, in breach of its obligations under customary international law not to use force against another state".<sup>(56)</sup>

As regards the relationship between intervention and the use of force, "The Court concludes that acts constituting a breach of the customary principle of non-intervention will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations".<sup>(57)</sup> The Court, by twelve votes to three, "Decides that the United States of America, by training, arming, equipping, financing and supplying the Contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another state".

## 2. The Role Of The Security Council In The Prohibition Of The Threat Or Use Of Force

Article 24 of the Charter<sup>(59)</sup> confers on the Security Council the primary responsibility for maintaining international peace and security and expressly lays down that, in discharging this responsibility, the Council acts on behalf of all Members. Article 25<sup>(60)</sup> requires Members to accept and carry out decisions of the Council taken in accordance with the Charter. Under Article 39<sup>(61)</sup> the Security Council is responsible for the determination of the existence of a threat to the peace, breach of the peace, or an act of aggression; and for making recommendations or taking decisions on measures to maintain or restore international peace and security.

### A. Responsibility For Making A Determination

According to Goodrich, Hambro and Simons, the claims of Member States of the existence of a situation of the nature described in Article 39,

did not affect the way in which the Council had proceeded to deal with the question. The same attitude was followed toward findings by the General Assembly. It is accepted that such findings are not binding upon the Council, which must make its own determination as to the nature of the situation.

According to the same authority, it would appear, from the Council's discussions, to be generally accepted that a determination of a breach of peace is less serious than a finding of aggression, in so far as the positions of the Parties are concerned, but more serious than a determination of "a threat to the peace" in terms of implications for further Council action.

It is noted by Wainhouse and others that the Security Council has only twice, in the Palestine and Korean cases, made the determination under Article 39 of the existence of a threat to the peace, breach of peace, or act of aggression which is a necessary preliminary to action under Articles 40 and 41.

### B. Responsibility For Making Recommendations And Taking Decisions

According to Goodrich, Hambro, and Simons, when the Security Council makes a determination under Article 39, it may make "recommendations" in accordance with Article 39, call for "provisional measures" under Article 40;<sup>62</sup> call upon Members to apply non-military enforcement measures under Article 41;<sup>63</sup> and/or take such military action in accordance with Article 42<sup>64</sup> as it deems necessary to maintain or restore peace and security. At San Francisco, it was stated that the term "recommendation" in this provision had the same meaning as in the provisions regarding the pacific settlement of disputes; only the "situation" differed, and the recommendations were not mandatory in either case.

According to Article 40, the Security Council is authorized to call for the application of provisional measures before making recommendations or taking decisions under Article 39. As noticed by Goodrich, Hambro, and Simons, the practice of the Security Council does not confirm whether the Council may invoke Article 40 without first making determination under Article 39.

Since the Charter does not specifically indicate the kind of provisional measures the Parties may be called upon to undertake, the Council has followed a variety of practices in calling for measures that might be deemed "provisional", such as cease-fires, cessations of hostilities, withdrawal of troops and para-military personnel, the conclusions of truces or armistices, and various measures to maintain such agreements.

Under Article 41, Member States are obligated to carry out whatever measures the Security Council decides should be "employed to give

effect to its decisions". As noticed by Goodrich, Hambro, and Simons, the Charter seeks to enhance the effectiveness of non-military measures by requiring the United Nations Members to comply with the Council's decisions on military measures, an obligation that the Members of the League were not required to assume.

According to Article 42, the Security Council is empowered to take military enforcement decisions that all Members are obligated to accept and carry out. In practice, Article 42 has been formally proposed only during the Suez crisis in 1956, but has never been applied by the Security Council.

As noticed by Goodrich, Hambro, and Simons, the peace-keeping forces established by the Council in such situations as the Congo and Cyprus, were not intended to implement enforcement measures.

### 3. The Role Of The General Assembly In The Maintenance Of International Peace And Security<sup>(65)</sup>

The General Assembly of the United Nations, under Articles 11 of the Charter,<sup>(66)</sup> may "consider the general principles of co-operation in the maintenance of international peace and security" and make recommendations in this respect.

Under Article 12,<sup>(67)</sup> the General Assembly may discuss any dispute or situation, but not recommend with respect thereto, unless the Security Council so requests.

Under Article 13, the General Assembly has the responsibility to initiate studies and make recommendations for prompting international political co-operation encouraging the development and codification of international law. Among the important matters the Assembly has considered have been the essential conditions of peace,<sup>(68)</sup> and the definition of aggression.<sup>(70)</sup>

According to Goodrich, Hambro, and Simons, the General Assembly has considered itself as having the same right, as the Security Council, to determine the existence of a threat to the peace, breach of the peace, or act of aggression, under Article 39. It has made its findings as a basis for its own recommendations as to the measures that should be taken to deal with the situation. Under the Uniting for Peace Resolution, the Assembly asserted its authority to recommend collective measures in the event of a breach of the peace or act of aggression whenever the Council failed to exercise its primary responsibility, because of lack of agreement among the permanent Members.

### Second: The Peaceful Settlement Of International Disputes

Article 2 (3) of the Charter<sup>(71)</sup> binds the Member States of the United Nations to settle their international disputes by peaceful means in such a manner that international peace and security, and justice are

not endangered.

At San Francisco, the major Powers accepted an amendment to the Dumbarton Oaks text providing that adjustment or settlement of international disputes or situations should be "in conformity with the principles of international law and justice", although they refused to accept an amendment requiring that collective measures be taken in accordance with international law and justice, on the grounds that this would tie the hands of the Security Council to an undesirable extent and that, in any case, the object of collective measures was to prevent or suppress the use of armed force and not to achieve a settlement.

Also, at San Francisco the majority wished to confer compulsory jurisdiction on the International Court of Justice in regard to legal disputes but yielded to the opposition of the United States and the Soviet Union. In the opinion of Waldock, this gap in the Charter system of pacific settlement is to some extent filled by bilateral treaties of arbitration and multilateral treaties such as the General Act of Geneva, the Brussels Treaty, and the Pact of Bogota as well as by acceptances of the jurisdiction of the Court under the Optional Clause.

Under Article 33,<sup>67</sup> the obligation to settle disputes by peaceful means is limited to disputes which are "likely to endanger the maintenance of international peace and security". Under the same Article, the Security Council is authorized to call upon the Parties to settle their dispute by the peaceful means listed therein, when it deems necessary. No doubt that "peaceful means" in the Charter excludes resort to force short of war.

Under Article 37 (1), if the parties fail to settle their dispute by peaceful means, they are bound to submit it to the Security Council.

Actually, the Security Council, under Chapter VI of the Charter, is given several powers for the pacific settlement of disputes :

A. As mentioned before, the Council, under Article 33 (2) is entitled to call upon the Parties to settle their dispute by peaceful means, when it deems necessary.

B. Under Article 34,<sup>74</sup> the Council is authorized to investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the maintenance of peace is likely to be endangered.

C. Under Article 36,<sup>75</sup> the Council is authorized to recommend appropriate procedures or methods of adjustment.

D. Under Article 37 (2),<sup>68</sup> the Council is entitled to decide, in the dispute submitted to it by the Parties, whether to take action under Article 36 or to recommend terms of settlement.

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E. Under Article 38,<sup>(77)</sup> the Council is authorized to make recommendations with a view to pacific settlement if all the Parties to the dispute so request.

On the other hand, under Article 35,<sup>(78)</sup> any dispute, or any situation of the nature referred to in Article 34, may be brought to the attention of the Security Council or of the General Assembly, by any Member of the United Nations, or by a non-Member state if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the Charter.

Third: Self-Defence

The inherent right of self-defence, as it existed in international law before the United Nations Charter, was a general right of self-protection against forcible threat to a state's legal rights.

Article 51<sup>(79)</sup> was not included in the Dumbarton Oaks Proposals, but was inserted for the purpose of clarifying the position in regard to collective understanding for mutual self-defence, particularly the Pan American Treaty known as the Act of Chapultepec. At San Francisco, it was agreed on the British proposal which omitted any reference to regional arrangements, emphasized the inherent right of individual or collective self-defence in case of armed attack in the event of failure of the Security Council to act, and provided that measures taken in the exercise of this right should be immediately reported to the Council and should not affect in any way its responsibility.

1. The Nature Of The Right Of Self-Defence Under The Charter

Unlike the League Covenant, the right of self-defence in the United Nations Charter is recognized to be a necessary exception to the fundamental Principle in Article 2 (4) that resort to force by an individual state is illegal without the prior authority of the United Nations. Therefore, the right of self-defence, under the Charter, is not a right which is left altogether outside the Collective Security system.

As noticed by Goodrich, Hambro, and Simons, the right of self-defence, under previous international agreements relating to peace and security, has more commonly been tacitly reserved. Being an inherent right, the effect of Article 51 is not to create the right of self-defence, but explicitly to recognize its existence.

According to the same authority, Article 51, as approved by the San Francisco Conference, provided the legal basis for special security arrangements, not necessarily strictly regional in nature, which might appear necessary if the global security system failed to materialize due to the lack of agreement of the permanent Members of the Security Council.

The right of self-defence, under Article 51, has temporary nature,

nature, since any measures of self-defence must be "immediately reported to the Security Council". The exercise of this right is expressly made subject to the judgment and control of the Security Council; and if the Veto is used to prevent the Council from intervening, the power of judgment and control can be transferred to the Assembly under the Uniting For Peace Resolution.

The right of self-defence, under Article 51, has no remedial or repressive nature in order to enforce legal rights as that of self-help; the function of self-defence is to preserve or restore the legal status quo.

## 2. The Scope Of The Right Of Self-Defence Under The Charter

Resulting from the fact that the right of self-defence, under Article 51, works within the Collective Security system, the individual state necessarily decides whether or not to use force in self-defence, but the propriety of its decision is a matter for the United Nations.

States resorting to the right of self-defence are not the ultimate judges of the justification of their action. Self-defence is an entirely legal concept, it is subject in any particular case to determination by a court of law. According to Greig, it is the responsibility of the international community as a whole to ensure that the plea of self-defence is not advanced as an excuse for the illegal use of force. This responsibility is implicit in the requirement of Article 51 that measures taken by Members in the exercise of the right of self-defence shall be immediately reported to the Security Council.

According to Waldock, action in self-defence under Article 51, cannot be barred by the Veto, and cannot be terminated except by the unanimous Veto of the permanent Members of the Council. He draws the attention to the case when Veto is used to protect a state which illegitimately resorted to force in pretended self-defence by preventing the Council from making pronouncement concerning the illegality of the resort to force. This difficulty, he continues, has been met by the Uniting For Peace Resolution, under which the General Assembly, by two-thirds vote, has power to make a determination of threats to the peace, breaches of the peace or acts of aggression.

Some writers concluded, from the practice of the United Nations, the existence of certain limits on the right of self-defence under Article 51. First, this Article did not allow for military measures of self-defence against hostile actions short of armed attack on the territorial integrity of a state. Second, it was generally accepted that Article 51 prohibited the use of force as a means of self-help by a Member State for the enforcement of legal rights, even if resort to arbitration or judicial settlement was impossible. Third, the provision of the Definition Of Aggression Resolution related to self-determination, freedom and independence of peoples forcibly deprived of that right, and their right to struggle to that end, has been interpreted

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repeatedly to mean that the forcible denial of the right of self-determination justifies wars of national liberation as being pursued in self defence.

Finally, it must be added that other aspects of self-defence which do not require the use of armed force, are subject to public international law according to which self-defence is also given an "imminent attack".

3. The Conditions Of The Use Of The Right Of Self-Defence Under The Charter

A. The first condition is included in the expression "if an armed attack occurs". Actually, juristic opinion varies on the interpretation of this expression, but we may distinguish between two trends

The First Trend

Some writers consider that Article 51 is the exclusive source of authority to have recourse to self-defence in the sense that "any threat or use of force" not falling within its terms, must, automatically, be deemed a violation of Article 2 (4).

Brownlie holds the opinion that, in order to give the expression "if an armed attack occurs" its full meaning, as a requirement of the principle of "effective interpretation", it must be interpreted as restricting the right of self-defence.

Beckett interprets "if an armed attack occurs" as meaning "after an attack has occurred". According to this opinion any recourse to force in the face of even the most imminent invasion of a tack is considered illegitimate.

The Second Trend

In our opinion the first trend is unrealistic, and unable to absorb the stunning evolution of weapons and their methods of delivery. It seems there is a substantial impression of the significance of self-defence in domestic law on the first trend in spite of different conditions of self-defence in each system of law.

Waldock, one of the representatives of the second trend, criticised the opinion of Beckett as going beyond the necessary meaning of Article 51, nor does it seem that at San Francisco there was an intention to cut down the right of self-defence beyond the doctrine of the Caroline incident. This doctrine allows recourse to armed force in self-defence, if there is "an instant and overwhelming necessity of self-defence, leaving no choice of means, and no moment for deliberation". Thus, in the opinion of Waldock, if there is convincing evidence not merely of threat and potential danger, but of an attack being actually mounted, then an armed attack may be said to have begun to occur, though it has not passed the frontier. If the United Nations' action, in a dispute

dangerous to peace, is obstructed, delayed or inadequate and the armed attack becomes manifestly imminent, then, Waldock continues, it would be a travesty of the Purposes of the Charter to compel a defending state to allow its assailant to deliver the first and perhaps fatal blow.

Briefly, another representative of the second trend, adopts the doctrine of the Caroline incident. Also, Goodrich, Hambro, and Simons are supporters of the point of view represented by the second trend. They consider the evolution of atomic and hydrogen bombs and methods of delivery, as creating the possibility that the initial armed attack will be decisive, make it highly unlikely that states will wait for such an attack to occur before exercising the right of self-defence. They believe that Article 51 retains the "inherent right of self-defence" independently of other provisions of the Charter in cases of an armed attack. In cases where there is no armed attack but where, under the traditional rules of international law, there existed a wider right of action in self-defence, the right of self-defence, which Article 51 recognises as inherent, still continues to exist, though made subject to restrictions contained in the Charter. To us, the latter opinion seems hesitant to accept the interpretation according to the requirements of the high level technology of weapons, without seeking the support of traditional rules of international law. Kaplan and Katzenbach believe that the only serious defect of Article 51 is the limitation to "an armed attack", a limitation that may be both naive and futile in an atomic age, or, for small states, in an age of jet planes and fast tanks. Also Greig, another supporter of the second trend, believes that it is hardly likely that those who drafted Article 51 would have been prepared to disregard the lessons of recent history, and to insist that a state should wait for the aggressor's blow to fall before taking positive measures for its own protection.

We believe that the second trend is more realistic, and responds to the said evolution in weapons and its methods of delivery. From the very beginning, the Atomic Energy Commission, in a report to the Security Council, stated, "In consideration to the problem of violation of the terms of the treaty or convention, it should also be borne in mind that a violation might be of so grave a character as to give rise to the inherent right of self-defence recognized in Article 51 of the Charter of the United Nations".

B. The second condition is concluded from the Caroline incident. It was emphasized that acts of self-defence must be strictly limited to the needs of defence and may not be converted into reprisals or punitive sanctions. The use of force in self-defence must approximate in degree to that employed by the aggressor, that is what is known as the principle of proportionality.

C. The third condition is concluded from both Article 51 and Article 2 (4) as complementary to each other. Article 2 (4) sets the limit for, and itself is limited by the right of self-defence. In other words, the use of the right of self-defence does not lead to the acquisition by the defendant of areas of the territory of the aggressor, because this acquisition is considered a violation of Article 2 (4), and also

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contradicts the principle of proportionality. However, Greig considers the legality of the temporary retention of the territory of threatening neighbours, is doubtful, and the legality of permanent incorporation of such territory could not be justified.

4. The Collective Self-Defence

Some writers contend that collective self-defence is not the same thing as collective defence. In their opinion there are two requirements for the right to collective self-defence, firstly that each participating state has an individual right to self-defence; and secondly that there exists an agreement between the participating states to exercise their rights collectively. In fact, both two terms, "collective self-defence" and "collective defence" have the same meaning. Some writers argue that inasmuch as the term "collective self-defence" has been inserted in Article 51 of the Charter in order to bring certain regional agreements into conformity with it, it should be interpreted to mean that states may act collectively against an armed attack until such time as the Security Council has taken appropriate action.

Article 51 explicitly recognizes the right of collective self-defence. According to Goodrich, Hambro, and Simons, this right might be conceived in principle in two distinct ways, as the right of states to exercise collectively their individual rights to self-defence; and as the right of one state to come to the assistance of another state that is exercising the right to self-defence, not on the basis of special substantive interest, but rather on the basis of a general interest in peace and security. This latter understanding of the term "collective self-defence" is considered by some writers as conforming to the needs of the international community which is committed to the prohibition of the use of force, and simultaneously lacks a central authority for the enforcement of that principle. But, by no means, Article 51, by itself, has weakened the authority of the Security Council. This Article is necessary to provide the basis for measures of self-defence should the Security Council be unable to discharge its responsibilities because of disagreements among Major Powers.

Because Article 51 does not form part of Chapter VIII which regulates regional arrangements, Waldock considers the right of self-defence entirely independent of the existence of a regional arrangement. Therefore, in his opinion a multilateral treaty for mutual defence like "the North Atlantic Treaty" creates a collective system for exercising the right of self-defence.

We believe that by referring to "the inherent right of individual self-defence", Article 51 has provided a legal basis for a regional security system. Although any reference to the regional arrangements was omitted from Article 51 at San Francisco, this Article was introduced into the Charter primarily to safeguard the consistency of the Pan-American regional system of mutual defence with

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the new régime for maintaining peace established by the Charter. As noted by Greig, collective self-defence and regional security are closely associated because, politically, at least, a state has a greater interest in the security of its neighbours than in the security of some geographically remote state. In the opinion of Delbruck, states may associate in regional systems of collective self-defence. He considers organization such as, the North Atlantic Treaty Organization, the South East Asia Treaty Organization, and the Warsaw Treaty Organization, as regional organizations. But these organizations, in his opinion, must be distinguished from the regional arrangements or agencies formed according to Article 52 of the Charter.<sup>64</sup> While these arrangements or agencies may fulfill tasks of collective self-defence, they are also intended to function as collective security systems to maintain or restore peace and security within their areas such as the Inter-American Treaty Of Reciprocal Assistance of Rio de Janeiro of 1947. Further, arrangements under Article 52 fit closely into the United Nations collective security system, while regional organizations of collective self-defence exist independently of the United Nations. Some writers, such as Greig, consider that Article 51 is of general application because it falls within Chapter VII of the Charter dealing with threats to the peace, breaches of the peace, and acts of aggression; whereas Articles 53 and 54(81) fall within Chapter VIII which deals with regional organizations. The tendency to contrast Article 51 with Articles 53 and 54 was due to that, in practice, the right to act in collective self-defence was claimed by regional organizations.<sup>65</sup>

In conclusion, we believe that there is no contradiction between Article 51 and Articles 52, 53 and 54, or in other words there is no contradiction between regional arrangements according to Article 52, and the exercise of the inherent right of collective self-defence according to Article 51, because the latter is of general application. The Joint Defence And Economic Co-operation Treaty between the states of the Arab League of June 17, 1950 is considered, in our opinion, a regional arrangement entitled to exercise the right of Collective self-defence. As noted by Delbruck, the dual character of the Inter-American Security system as collective defence organization under Article 51, and a regional arrangement under Article 52 of the Charter is indicated by the provision that any measure taken by the Member States are to be reported to the United Nations Security Council under Article 51 as well as under Article 54. Also, the North Atlantic Council was actively engaged in the restoration of peace in disputes such as, the Greek-Turkish conflict in Cyprus of 1974, and the Greek-Turkish dispute concerning the right to exploit natural resources in the Aegean Sea in 1976.

#### The Extent Of The Right Of Collective Self-Defence Under The Charter

According to some writers, such as Delbruck, collective self-defence may be lawfully exercised in favour of non-Member of the United Nations since Article 2 (6) of the Charter<sup>66</sup> extends the

scope of the Charter with respect to its basic Principles such as the prohibition of the use of force to non-Members. Collective self-defence in favour of non-Members is, in his opinion, covered by Article 51. We believe that this opinion cannot be accepted since Article 51 itself states explicitly that the armed attack occurs against "a Member of the United Nations". Any interpretation to the contrary will be against the provision of Article 51. However, Collective self-defence, in case of armed attack against a non-Member, may be exercised if there is a treaty of joint defence between this state and whether, or not, this treaty is concluded as a regional arrangement according to Article 52.<sup>(84)</sup>

### The Conditions Of The Use Of The Right Of Collective Self-Defence Under The Charter

A. The first condition of the use of the right of Collective self-defence is similar to that of the right of individual self-defence. According to Goodrich, Hambro, and Simons, it was not intended by the drafters that this right was limited to the taking of Collective measures only after an armed attack occurred. The history of Article 51 conclusively shows that it was intended to provide the basis for advance arrangements for meeting such an attack.

B. Also, the second condition is similar to that of the right of individual self-defence. According to Delbruck, Collective self-defence is strictly bound by the Principle of proportionality. Thus, as concluded by Greig, the requirement that the action in self-defence should be proportionate to the rights to be protected and the harm to be prevented, would certainly prevent a purely punitive action against the attacking state.

C. Again, the third condition is similar to that of the right of individual self-defence. According to Delbruck, the right of collective self-defence must never be exercised beyond the Purpose of restoring status quo ante" (the state of affairs as it existed before).

### III. The Evolution Of The Legality Of War After The Inception Of The United Nations

Even after the establishment of the United Nations, some writers take a stand against what is characterised as a legalistic-moralistic approach to foreign policy.<sup>(85)</sup>

Morganthau considers legalism one of the four intellectual errors of American postwar foreign policy, the other three are utopianism, sentimentalism and isolationism. Morganthau asserts that naive distinctions are made between peace-loving and aggressor nations, and hence between law-abiding and criminal ones, and the peace-loving nations are necessarily those who defend the existing legal order against violent change and the aggressor nations are those who are oblivious of their legal obligations. Thus, it comes about that the conflict between the two groups, instead of being seen in

terms of relative power, is conceived in the absolute terms of "peace, law and order" versus "aggression, crime and anarchy", and the United Nations becomes a forum for "legalistic exercises" which have done nothing at all to bring closer to solution the great political issues outstanding between the contenders on the international scene. Also, Morgenthau attacks the so-called "pactomania" as an irrational faith in agreements that do not register existing facts, and observes that from that iron law of international politics, that legal obligations must yield to the national interest, no nation has ever been completely immune.

Kennan argues that the very principle of "one government, one vote", regardless of physical or political differences between states, glorifies the concept of national sovereignty and makes it the exclusive form of participation in international life. Kennan suggests that instead of making ourselves slaves of the concepts of international law and morality, we should confine these concepts to the unobtrusive, almost feminine, function of the gentle civilizer of national self-interest in which they find their true value. He believes that the "legalistic approach to international affairs" ignores in general the international significance of political problems and the deeper sources of international instability.

On the other hand we find writers such as Myres McDougal believing that, it is commonplace wisdom today that progress toward a world governed by effective law depends in the long run upon a consensus of peoples. The national way to promote such a world is accordingly, he suggests, not to deny, but rather to affirm and support, existing moral perspectives and legal procedures that work toward such consensus.

However, the United Nations, after its inception, evolved substantially. According to Goodrich and Simons, the United Nations, as an Organization for the maintenance of international peace and security, is a system of agreed procedures for the peaceful settlement or adjustment of disputes and situations, for the use of collective measures in dealing with threats to or breaches of the peace, and for the development of arrangements for the regulation of national armaments.

According to the same authority, the Purposes and Principles set forth in Articles 1 and 2 of the Charter have been of fundamental importance in the functioning of the United Nations as an Organization for the maintenance of international peace and security. This was anticipated by the framers of the Charter, for quite clearly they intended that these Purposes and Principles should serve not only as limitations on the organs and Members of the United Nations, but also as a basis for developing and expanding the activities of the Organization and for indicating the general direction and scope of the co-operative efforts of its Members. (22) With the growing inability of the Security Council to act, it seemed desirable to make greater use of the General Assembly, and Articles 1 and 2 of the Charter came into play an increasingly important role. Articles 10 and 14 provided the basis for

the development of the role of the General Assembly in the field of peace and security, because these Articles empower the Assembly to discuss questions relating to the Purposes and Principles of the Organization and to make recommendations on them. Thus, it may be said that the decline in the importance of the Security Council has been paralleled by a marked increase in the importance and influence of the General Assembly and the assumption by it of these responsibilities for the maintenance of international peace and security that the Council had been expected to discharge. As noticed by Goodrich and Simons, this shift was probably inevitable in any case, for such had been the experience of the League of Nations.

Also, according to Goodrich and Simons, the increasing inability of the Security Council to act led directly to the use of other provisions of the Charter under which the individual Member States might achieve their collective security, with the result that since 1947 there has been a proliferation of regional security and collective defence arrangements. These arrangements have been based for the most part on agreements that utilize the right of individual and collective self-defense that Member States have reserved under Article 51.

After this introduction, we believe that it is not possible to cover all aspects of the evolution that happened after the inception of the United Nations, within the boundaries of this thesis, as this needs a separate study. We shall focus, only, on the following points :

1. The Protection Of Cultural Property.
2. The Uniting For Peace Resolution.
3. The Offences Against Peace.
4. The Geneva Conventions of 1949 and the Protocols of 1977.
5. The definition of Aggression.
6. The United Nations Forces.
7. International Terrorism.
8. The Prohibition Or Restriction On The Use Of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious Or To Have Indiscriminate Effects.

### 1. The Protection Of Cultural Property

Prior to 1945, provision was made for the special protection of cultural property in earlier treaties particularly in Article 27 of the Hague Regulations of 1899 and 1907,<sup>(e7)</sup> and Article 5 of the Hague Convention IX concerning Bombardment By Naval Forces In Time Of War of 1907.<sup>(ee)</sup> Both treaties make it the duty of the inhabitants to

indicate Cultural property by distinctive signs. Further provisions were included in the Hague Rules Of Aerial Warfare of 1923, in particular Articles 25,<sup>(89)</sup> and 26.<sup>(90)</sup> The Treaty On The Protection Of Artistic And Scientific Institution And Historic Monuments known as the "Roerich Pact"<sup>(91)</sup> signed at Washington on April 15, 1935 and entered into force on August 26, 1935, was the first treaty specified for the protection of Cultural Property.

In the period after the establishment of the United Nations, we may refer to the 1954 Convention, Protocol and Resolutions of the Intergovernmental Conference On The Protection Of Cultural Property.<sup>(92)</sup>

A Convention For The Protection Of Cultural Property In The Event Of Armed Conflict Of May 14, 1954

Following the signature of the Roerich Pact by the American States in 1935, attempts were made to draft a more comprehensive convention for the protection of monuments and works of art in time of war, In 1939, a draft convention, elaborated under the auspices of the International Museums Office of the League of Nations, was presented to governments by the Netherlands.

Due to the outbreak of the Second World War no further steps could be taken.

After the war, a new proposal was submitted to UNESCO by the Netherlands in 1948. The General Conference of UNESCO in 1951 decided to convene a Committee of government experts to draft a convention. This Committee met in 1952 and thereafter submitted its drafts to the General Conference. The revised drafts were then transmitted to governments for advice.

Fifty Six States represented in the Intergovernmental Conference On The Protection Of Cultural Property In The Event Of Armed Conflict, signed the Convention on May 14, 1954, which entered into force on August 7, 1956.

Article 36 of the Convention determines the relation between the Convention and previous Conventions, it provides that :

"1. In the relations between Powers which are bound by the Convention of the Hague Concerning The Laws And Customs Of War On Land (IV), and Concerning Naval Bombardment In Time Of War (IX), whether those of July 29, 1899, or those of October 18, 1907, and which are Parties to the present convention, this last Convention shall be supplementary to the aforementioned Convention (IX) and to the Regulations annexed to the aforementioned Convention (IV) and shall substitute for the emblem described in Article of 51 of the aforementioned Convention (IX) the emblem described in Article 16 of the present Convention, in cases in which the present Convention and

the Regulations for its execution provide for the use of this distinctive emblem.

2. In the relations between Powers which are bound by the Washington Pact of April 15, 1935, for the Protection Of Artistic And Scientific Institutions And Of Historic Monuments (Roerich Pact) and which are Parties to the present Convention, the latter Convention shall be supplementary to the Roerich Pact and shall substitute for the distinguishing flag described in Article 3 of the Pact the emblem defined in Article 16 of the present Convention, in cases in which the present Convention and the Regulations for its execution provide for the use of this distinctive emblem."

The Convention comprises forty Articles, and the Regulations for its execution comprise 21 Article divided into four Chapters.

Article 1 of the Convention defines the "Cultural Property" for the purposes of the Convention, it provides that :

"1. For the purposes of the present Convention, the term "Cultural Property" shall cover, irrespective of origin or ownership :

a. movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or reproductions of the property defined above;

b. buildings whose main and effective purpose is to preserve or exhibit the movable Cultural Property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable Cultural Property defined in sub-paragraph (a);

c. Centres containing a large amount of Cultural Property as defined in sub-paragraphs (a) and (b), to be known as "Centres Containing Monuments".

The protection of Cultural Property is specified in Article 2 of the Convention which provides that :

"For the purposes of the present Convention, the protection of Cultural Property shall comprise the safeguarding of and respect for such property".

Article 8 of the Convention provides for special protection as follows :

"1. There may be placed under special protection limited number of

refuges intended to shelter movable Cultural Property in the event of armed conflict, of centres containing monuments and other immovable Cultural Property of very great importance, provided that they :

a. are situated at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defence, a port or railway station of relative importance or a main line of communication;

b. are not used for military purposes.

2. A refuge for movable Cultural Property may also be placed under special protection, whatever its location, if it is constructed that, in all probability it will not be damaged by bombs.

.....

6. Special protection is granted to Cultural Property by its entry in the "International Register of Cultural Property under Special Protection". This entry shall only be made, in accordance with the provisions of the present Convention and under the conditions provided for in the Regulations for the execution of the Convention".

Article 14 of the Convention provides that :

"1. Immunity from seizure, placing in prize, or capture shall be granted to :

a. Cultural Property enjoying the protection provided for in Article 13;

b. the means of transport exclusively engaged in the transfer of such Cultural Property.

2. Nothing in the present Article shall limit the right of visit and search".

The main undertakings of the Parties under the Convention are Comprised in Articles 3, 4 and 5.

According to Article 3 of the Convention, the Parties undertake to prepare, in time of peace, for the safeguarding of Cultural Property. <sup>(93)</sup>

According to Article 4 of the Convention, the Parties undertake to respect Cultural Property in the manner specified in this Article. <sup>(94)</sup>

Article 5 of the Convention specifies the undertakings in case of

occupation of the whole or part of the territory of another Party.<sup>(95)</sup>

Articles 18 and 19 of the Convention specify the scope of application of the Convention, the former specifies this scope in the event of declared war or of any other armed conflict;<sup>(96)</sup> the latter specifies this scope in the event of an armed conflict not of an international character.<sup>(97)</sup>

According to Article 28 of the Convention, the Parties undertake to take all the necessary steps to prosecute and impose penal or disciplinary sanction upon persons who commit a breach of the Convention, it provides that :

"The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention".

According to Article 37 of the Convention, each Party may denounce the Convention by a notification to the Director-General of the UNESCO.<sup>(98)</sup>

### B. Protocol For The Protection Of Cultural Property In The Event Of Armed Conflict Of May 14, 1954

In view of the difficulties of several governments in adopting provisions on the restitution of property, it was decided to separate them from the Convention and to adopt them in the form of a separate Protocol. Thus, the purpose of the Protocol is to prevent the exportation of Cultural Property and provide for the restitution of illegally exported objects.

Forty States signed the Protocol,<sup>(99)</sup> but other states later acceded to it. Similar to the Convention, the Protocol was signed on May 14, 1954, and entered into force on August 7, 1965. The Protocol comprises fifteen paragraphs divided into three sections.

The first five paragraphs comprised in Section I of the Protocol determine the undertakings of each Contracting Party as follows :

"1. Each High Contracting Party undertakes to prevent the exportation, from a territory occupied by it during an armed conflict, of Cultural Property defined in Article 1 of the Convention For The Protection Of Cultural Property In The Event Of Armed Conflict, signed at the Hague on May 14, 1954.

2. Each High Contracting Party undertakes to take into its custody Cultural Property imported into its territory either directly or indirectly from any occupied territory. This shall either be effected automatically upon the importation of the property, or

failing this, at the request of the authorities of that territory.

3. Each High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, Cultural Property which is in its territory, if such property has been exported in contravention of the principles laid down in the first paragraph. Such property shall never be retained as war reparations.

4. The High Contracting Party whose obligation it was to prevent the exportation of Cultural Property from the territory occupied by it, shall pay an indemnity to the holders in good faith of any Cultural Property which has to be returned in accordance with the preceding paragraph.

5. The Cultural Property coming from the territory of High Contracting Party and deposited by it in the territory of another High Contracting Party for the purpose of protecting such property against the dangers of and armed conflict shall be returned by the latter, at the end of the hostilities, to the competent authorities of the territory from which it came".

According to Section III paragraph 13 of the Protocol, each Party may, denounce the Protocol by a notification to the Director-General of the UNESCO. <sup>(100)</sup>

### C. Resolutions Of The Intergovernmental Conference On The Protection Of Cultural Property In The Event Of Armed Conflict Of May 14, 1954

The Conference adopted three Resolutions attached to the Final Act of the Conference. <sup>(101)</sup> Both of the Final Act and the three Resolutions have no legal binding force.

## 2. The Uniting For Peace Resolution Of November 3, 1950.

### A. Analysis Of The Uniting For Peace Resolution

On November 3, 1950, the General Assembly of the United Nations adopted by an overwhelming vote, 52 to 5, the Uniting For Peace Resolution A, B, <sup>(102)</sup> and C. <sup>(103)</sup>

Resolution A consists of a Preamble, five paragraphs A, B, C, D, E and an Annex.

In the Preamble, the General Assembly declare it is "conscious that failure of the Security Council to discharge its responsibilities on behalf of all the Member States, particularly those responsibilities referred to in the two preceding paragraphs, does not relieve Member States of their obligations or the United Nations of its responsibility under the Charter to maintain international peace and Security". <sup>(104)</sup>

In paragraph A of this Resolution, the General Assembly :

"1. Resolves that if the Security Council, because of lack of unanimity of the Permanent Members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendation to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.

If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council;

2. Adopts for this purpose the amendments to its rules of procedure set forth in the Annex to the present Resolution".

According to paragraph B of the Resolution, a Fourteen Member Peace Observation Commission of the Assembly was established to observe and report on any situation of tension likely to endanger international peace and security, on which the Security Council was not acting. Its activities, however, were to be under direction of a two-thirds vote of the Assembly or its Interim Committee; <sup>(105)</sup> and only upon the invitation or with the consent of any State into whose Territory it would be sent.

Paragraph C of the Resolution, mainly, refers to the recommendation of the Assembly to the Member States of the United Nations that "each Member maintain with its national armed forces elements so trained, organised and equipped that they could promptly be made available, in accordance with its constitutional process, for service as a United Nations unit or units, upon recommendation by the Security Council or General Assembly, without prejudice to the use of such elements in exercise of the right of individual or collective self-defence recognized in Article 51 of the Charter".

According to paragraph D of the Resolution, a Fourteen Member Collective Measures Committee was established to study and report by September 1, 1951, on methods to maintain and strengthen international peace and security including the Assembly recommendation to each Member to maintain elements within national armed forces for service on behalf of the United Nations, as well as collective self-defence and regional arrangements under Article 51 and 52 of the Charter.

In paragraph E of the Resolution, the General Assembly declares that a genuine and lasting peace depends not only upon collective security measures, but also upon "the observance of all the Principles and Purposes established in the Charter of the United Nations, upon the implementation of the Resolutions of the Security Council, the General Assembly and other principal organs of the United Nations intended to

achieve the maintenance of international peace and security".

The Annex to Resolution A, as referred before, comprises the amendments to the rules of procedure of the General Assembly.

In analysing the Uniting For Peace Resolution, some writers refer to the United Nations Charter as it distinguishes several degrees of danger. The lower degree motivating the application of Chapter VI, is represented by disputes or situations the continuance of which is likely to endanger the maintenance of international peace and security (Articles 33 and 34). There the danger for peace is more remote. On the contrary, action under Chapter VII takes place only in case of a threat to the peace, breach of the peace, or act of aggression (Article 39). Chapter VII co-ordinates rather different cases of danger to peace; on the one hand, cases where there is a great danger to peace, but the peace is not yet broken; on the other hand, cases where a breach of the peace has already occurred. Article 39 makes no distinction between the two groups : in both groups of cases the use of even the strongest enforcement measures is equally authorized. The Uniting For Peace Resolution makes a distinction and provides different effects for each of the two groups. It reserves the use of armed forces only for those cases where the imminent danger has changed into an actual breach of peace or act of aggression. In such cases, fighting has already started and the means to suppress it might have recourse to fighting as well. On the contrary, where a threat to the peace exists, be it in the highest degree, but peace is not yet broken, fighting would start by collective action at a moment when there is perhaps a slight hope of averting the threat to peace and of preventing fighting from arising out of a breach of peace or act of aggression.

### B. The Legality Of The Uniting For Peace Resolution

There are two legal opinions concerning the legality of the Uniting For Peace Resolution.

#### The First Opinion

The arguments of the opponents of the Resolution may be summarized as follows :

1. It was argued that the Resolution was abandoning one of the fundamental working Principles of the United Nations which was built up on the maintenance of peace through the unanimity of the Permanent Members of the Security Council. The Resolution was therefore inconsistent with the Charter, it meant unlawful amendment of the Charter contrary to the provisions of Articles 108<sup>(106)</sup> and 109.<sup>(107)</sup>
2. It was argued that the Security Council is the organ exclusively entitled to take action, or at least enforcement action, for the

maintenance of peace. This opinion is based upon Article 24 of the Charter.<sup>(108)</sup>

### The Second Opinion

We are inclined to favour the second opinion, the arguments of which are as follows :

1. After quoting the expressions used by Article 24 paragraph 1 of the Charter, Members of the United Nations "Confer on the Security Council primary responsibility for the maintenance of international peace and security and agree that... the Security Council acts on their behalf", Andrassy concluded that, if the Security Council fails to discharge its duties, then it is quite consistent with the spirit as well as the letter of the Charter to substitute for that primarily and principally responsible organ another mechanism which would respond to the task of preserving peace. The primary responsible organ being unable to act on behalf of the Members, they proceed to take over the responsibility they have conferred upon that organ; they propose to work for that task through a body where they are all represented; and they attempt to ensure the maintenance of peace by their direct action. By doing so, the Members exercise a right which they possess under international law, the right to defend themselves and to assist others against unlawful aggression.

2. Stone argues that the assumption that the Charter gives the Security Council a monopoly over peace enforcement, is false. He believes that the Charter gives to the Council a primary responsibility; and this implies what is expressed in Article 1 paragraph 1, that the United Nations as a whole also has some responsibility. The Assembly as the other principal organ would therefore share this responsibility, albeit on a secondary level conditional on the failure of the Security Council to fulfil its primary responsibility. This inference, which receives some support from the general functions in relation to international peace conferred on the Assembly under Articles 10, 11 and 14, would suffice to sustain Assembly recommendations for collective peace enforcement action, insofar as these were in turn conditional on the failure of the Security Council to act, whether because of the veto, or from lack of available armed force.

3. To give some details of the competence of the General Assembly and the limitations thereof, Article 10<sup>(109)</sup> entrusts the Assembly with a very broad authority. By mere application of Article 10, the General Assembly is entitled to deal with all matters which are attributed to the Security Council as its special task. Consequently, even the matters relating to the maintenance of international peace and security belong to the general sphere of the General Assembly's function.

Article 11<sup>(110)</sup> is not wide in scope; instead it contains provisions relating to special powers of the General Assembly in the field of the maintenance of international peace and security.

According to Andrassy, Article 11 paragraph 2 has three distinct stages, the mere discussion of a question, the adopting of a recommendation, and the necessity of action. The discussion of any question is by no means restricted. According to Article 11 paragraph 2, the General Assembly shall not make any recommendation with regard to a dispute or situation while the Security Council is exercising its functions in respect of such dispute or situation as provided in Article 12. A contrario, Andrassy concludes that the General Assembly is empowered to make recommendations in respect of any individual case, dispute or situation, whenever the Security Council is not exercising its functions in respect of that case. The expression "exercising functions" does not depend exclusively on the formality that a question be included in, or deleted from, the agenda of the Security Council. In addition, it must be ascertained whether the Council is actually dealing with the question. As a result of the fact that the General Assembly has no power to take decisions on the enforcement measure the execution of which would be compulsory for the Members, Andrassy suggests that whenever collective and obligatory execution of enforcement measure is needed, the Assembly is directed to refer the matter to the Security Council as the organ which has the necessary power to issue mandatory decisions. Therefore, he concludes that the last sentence of Article 11 paragraph 2, does not stipulate a prohibitive restriction, and the General Assembly is not precluded from discussing and making recommendations with respect to the cases referred to in that sentence. Andrassy is also of the opinion that, if the matter is brought again before the General Assembly, the latter is free to arrive at any solution it deems necessary, and even recommend an "action" in the narrowest sense of that term, but it would be only a recommendation, and not a decision.

### 3. The Offences Against Peace And Security

#### A. The Trial Of War Criminals

Before the end of the Second World War, the Allied Powers decided to proceed against war criminals, and consequently the three principal Powers who participated in the Moscow Declaration of October 30, 1943, reaffirming their determination to bring war criminals to trial, divided all war crimes into two groups. Those offences which could be localized were to be tried by the countries in whose territories or against whose nationals the alleged crimes had been committed. Crimes which could not be so localized were to be tried by inter-Allied court.

According to Stone, the principal Tribunals which dealt with the cases of war criminals, apart from the main Nuremberg and Tokyo Tribunals and from the ordinary municipal criminal courts which tried those charged with treason, were as follows :

- a. The Special American Tribunals, operating at Nuremberg; and the French Courts, functioning at Rastatt near Baden-Baden, were set up under the Allied Control Council Law No. 10 promulgated for Germany

in December, 1945. No British or Soviet Tribunals were set up under this law.

b. The American Military Tribunals established by the Judge Advocate's Department of the United States Army, operating in the American zone of Germany, and in the Far East, including the Philippines.

c. The British Military Tribunals operating under Royal Warrant in the British zone of Germany.

d. The Military or Special Civil Tribunals of Allied or ex-Occupied States functioning both in Europe and in the far East and South Pacific, such as Australian War Crimes Courts , sat from 1945 to 1951 in Darwin.

By an Agreement on August 8, 1945, the United Kingdom, the United States, France and the Soviet Union established an International Military Tribunal at Nuremberg, consisting under the annexed Charter of one judge appointed by each Power, with procedure and form of appeals from sentence therein defined, as only an appeal from the sentence was allowed, to the Allied Council in Berlin.

According to Article 6 paragraphs a, b and c, the jurisdiction of the Tribunal covers the following classes of crimes :

a. Crimes against the peace, defined as meaning the planning, preparation, invitation or waging of war of aggression, or a war in violation of international treaties, etc., or participation in a plan or conspiracy for accomplishment of any of the foregoing.

b. War crimes, namely, violations of the laws and customs of war, which it was stated "shall include but not be limited to murder, ill-treatment or deportation to slave labour, or for any other purpose, of civilian population of or in occupied territory, murder or ill-treatment of prisoners on the seas, killing of hostages, plunder of private or public property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity".

c. Crimes against humanity, defined as "Murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population, before or during the war, or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated".

The trials, convictions and punishments under all the counts of the Nuremberg Charter have a technically sound legal basis in the powers of the Victor States over the defeated German State and its soldiers, ministers, and nationals, that state having unconditionally surrendered; and as to the court for violations of war-law stricto sensu, it was also legally well based on the traditional right of each belligerent to try

violators, regardless of nationality, in its own tribunals. Two objections have been raised against these proceedings. The first is that as to some of the counts, they violated the maxim *nulla poena sine lege*<sup>(112)</sup> by virtue of the fact that the acts in question were not criminal when committed. The second is that the Charter also violated the maxim *nulla poena sine lege*, insofar as it deprived the accused of the plea of superior orders which was available when the acts were committed.<sup>(113)</sup>

Another Charter, which proclaimed at Tokyo on January 19, 1946, established the International Military Tribunal For The Trial Of the Major War Criminals Of The Far East.

However, the General Assembly of the United Nations adopted on December 11, 1946, the Resolution 95 (I)<sup>(114)</sup> affirming the principles of international law recognized by the Charter of the Nuremberg Tribunal. In this Resolution, the General Assembly, "takes note of an Agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the Europe Axis signed in London on August 8, 1945, and of the charter annexed thereto, and of the fact that similar principles have been adopted in the Charter of International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on January 19, 1946; therefore, affirms the principles of international law recognized by the Charter of the Nuremberg Tribunal".

The General Assembly approved, on 1968, the Convention On The Non-Application Of Statutory Limitations To War Crimes And Crimes Against Humanity.

The General Assembly on October 24, 1970 also adopted the Resolution 2625 (XXV) a Declaration on Principles Of International Law Concerning Friendly Relations And Co-Operation Among States In Accordance With The Charter Of The United Nations. Among the principles comprised in the Resolution, "the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. Under this principle, the General Assembly proclaims that :

"every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues.

A war of aggression constitutes a crime against the peace, for which there is responsibility under international law.

In accordance with the Purposes and Principles of the United Nations, States have the duty to refrain from propaganda for wars of aggression".

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Moreover, the General Assembly on December 15, 1970, adopted the Resolution 2712 (XXV) On War Criminals.<sup>(115)</sup> In this Resolution, the General Assembly :

"1. Draws attention to the fact that many war criminals and persons who have committed crimes against humanity are continuing to take refuge in the territories of certain States and are enjoying protection;

2. Calls upon all States to take measures, in accordance with recognized principles of international law, to arrest such persons and extradite them to the destination must be made at all times between persons actively taking part in the hostilities and civilian populations.  
.....

8. The provision of international relief to civilian populations is in conformity with the humanitarian Principles of the Charter of the United Nations, the Universal Declaration Of Human Rights and other international instruments in the field of human rights.....".

B. The Offences Against Peace And Security

The General Assembly of the United Nations instructed the International Law Commission to prepare a "general codification of offences against the peace and security of mankind" on the basis of "the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal".<sup>(116)</sup>

After examining a preliminary report at its meeting in 1950, the Commission studied at its meeting in 1951 a second report prepared in the light of observations made by the governments and the "Draft Code Of Offences Against The Peace And Security Of Mankind" was adopted. As noted by Fenwick, the Commission limited the scope of "offences against the peace and security of mankind" to offences which contained a political element, thus excluding such offences as piracy, traffic in dangerous drugs, and others of a like character. The Commission further decided to deal with the criminal responsibility of individuals only, recalling in that connection the judgment of the Nuremberg Tribunal which declared that crimes against international law were "committed by men, not by abstract entities, and only by punishing individuals who commit crimes can the provisions of international law be enforced".

On December, 1978, the Sixth Committee of the United Nations General Assembly resumed work on the Draft Code Of Offences Against The Peace And Security Of Mankind.

C. The Convention On The Prevention And Punishment Of The Crime Of Genocide Of December 9, 1948

In December 11, 1946, the General Assembly of the United Nations adopted the Resolution 96 (I) by which it declared that Genocide is a crime under international law, contrary to the spirit and aims of the

United Nations and condemned by the civilized world. On December 9, 1948, the General Assembly, adopted the Resolution 260 (III) A, B and C. By Resolution A, the General Assembly adopted the Convention on the Prevention And Punishment Of The Crime Of Genocide.<sup>(117)</sup> By Resolution B, the General Assembly invited the International Law Commission to study the desirability of establishing an international judicial organ for the trial of persons charged with Genocide or other crimes.<sup>(118)</sup> By Resolution C, the General Assembly recommended that Parties to the Convention which administer dependent territories should take such measures as are necessary and feasible to enable the provisions of the Convention to be extended to those territories as soon as possible.<sup>(119)</sup>

Article 10 of the Convention states that it shall bear the date of December 9, 1948; and according to Article 11 paragraph 1, it shall be open until December 31, 1949, for signature on behalf of any Member of the United Nations and of any non-Member State to which an invitation to sign has been addressed by the General Assembly. Article 13 paragraph 2 states that it shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession. The Convention came into force on January 12, 1951.<sup>(120)</sup>

The prohibition of Genocide can be regarded as a principal of customary international law. Article 1 of the Convention<sup>(121)</sup> confirms that Genocide, whether committed in time of war or peace, is a crime under international law.

The Convention defines Genocide in Article 2. According to some writers, the term "homicide" relates to the destruction of individual human being; while the term "Genocide" relates exclusively to the destruction of individual human being. Genocide, as defined in the Convention, includes acts other than killing, and it must always be accompanied by the intent to partially or completely destroy a particular group. Article 2 of the Convention provides that :

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

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

Article 3 of the Convention defines punishable acts as including not only the crime of Genocide itself, but also conspiracy, incitement, attempts, and complicity in relation to crimes; it provides that :

"The following acts shall be punishable :

- a. Genocide;
- b. Conspiracy to commit Genocide;
- c. Direct and public incitement to commit Genocide;
- d. Attempts to commit Genocide;
- e. Complicity in Genocide".

According to Article 5 of the Convention, "The Contracting Parties undertake to enact, in accordance with their respective constitutions, the necessary legislation to give effect to the provisions of the present Convention, in particular, to promise effective penalties for persons guilty of Genocide or any of the other acts enumerated in Article 3".

We may conclude from Articles 4 and 6 of the Convention, the following rules :

- a. There is no distinction between rulers, public officials or private individuals as far as the responsible individuals are concerned. <sup>(122)</sup>
- b. Persons charged with acts under the Convention shall be tried by a domestic competent tribunal or by an international penal tribunal. <sup>(123)</sup>
- c. Acts covered by the Convention shall not be considered as political crimes for the purpose of extradition. <sup>(124)</sup>

Articles 14<sup>(125)</sup> and 15<sup>(126)</sup> determine the duration of the Convention, denunciation and its expiry.

#### D. Domestic Acts Punish Offences Against Peace And Violation Of International Law

Some states promulgated domestic Acts for the punishment of offences against peace and violation of international law. In this regard, it may be referred to Acts of the Czechoslovak Republic, Federative People's Republic of Yugoslavia and the Soviet Union.

The Czechoslovak Republic promulgated the "Act On The Protection Of Peace" of December 20, 1950. Section 1 of the Act provides that :

- "1. Any person who attempts to disturb the peaceful communion of nations by inciting in any way whatsoever to war, by propagating war

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or otherwise supporting war propoganda, shall commit a criminal act against peace.

2. The offender shall be punished by deprivation of liberty for a term of from one year to ten years; the offender shall be punished by deprivation of liberty for a term from ten to twenty-five years if he commits the act specified in sub-section 1

- a. as a member of a conspiracy,
- b. to a considerable extent, or
- c. if there exists any other aggravating circumstance".

The Criminal Code of the Federative People's Republic of Yugoslavia was promulgated by edict of the Presidium of the National Assembly No. 332 of March 2, 1951. Chapter Eleven of this Code entitled "Criminal Offences Against Humanity And International Law" comprises extensive Articles (124-134) that punish several crimes against peace and the violation of international law.

The punishment of Genocide is comprised in Article 124 which provides that :

"Whoever, with intent to exterminate, completely or partially, a national, ethnical, racial or religious group commits homicides or inflicts grievous bodily injuries, or gravely ruins physical or mental health of members of such groups, or forcefully displaces the population, or places such a group under the conditions of life leading to complete or partial extermination of the group, or applies measures calculated to prevent propagation of members of such a group, shall be punished by imprisonment for not less than five years or by death".

Article 132 of the Code relating to the punishment of destruction of cultural and historical monuments, provides that :

"Whoever in violation of the provisions of international law in time of war or armed conflict orders or carries out destruction of cultural and historical monuments and buildings or institutions devoted to science, arts, education and humanitarian purposes, shall be punished by detention or by imprisonment".

The punishment of war crime may be categorized as follows :

1. War Crimes against civil population (Article 125); and
2. War Crime against wounded, sick and shipwrecked persons, or medical personnel (Article 126); unlawful killing or wounding of enemy (Article 129); and if a crime committed against a parliamentary

in violation of international law in time of war (Article 130).

3. War crimes against prisoners of war (Article 127); cruel treatment of wounded and sick persons and prisoners of war (Article 131); and misuse of Red Cross sign (Article 133).

4. Organizing a group for commission of criminal offences under Articles 124-127, or inciting other persons to create such groups, or preparing their organization (Article 128); the confiscation of property as a complementary punishment may be applied by the court (Article 134).

On March 12, 1951, the Union of Soviet Socialist Republics promulgated the "Peace Defence Act"; it provides that :

"The Supreme Soviet of the Union of Soviet Socialist Republics resolves:

1. That war propaganda, in whatever form conducted undermines the cause of peace, creates the danger of a new war and is therefore a grave crime against humanity.

2. The persons guilty of war propaganda shall be committed for trial as major criminals".

#### 4. The Four Geneva Conventions Of August 12, 1949, And Protocols Of December 12, 1977

The Geneva conventions and the beginning of the Red Cross Societies find its genesis in a small booklet entitled "A Memory Of Solferino"<sup>(127)</sup> written by Henri Dunant which was published in 1862. In this booklet, Dunant's two main proposals were the conclusion of arrangements between the warring parties in order to promote aid for the wounded and sick; and secondly the creation of voluntary association in each country in order to care for the wounded without distinction of nationality. His ideas were the inspiration of a long evolution in this field started in 1864.

The Swiss Federal Council invited Seventy States to a Diplomatic Conference at Geneva, which was held from April 21 to August 12, 1949. The purpose of the Conference attended by the representatives of Sixty-four States, was the revision of :

1. The 1929 Geneva Convention For The Relief Of Wounded And Sick In Armies In The Field.

2. The 1907 Hague Convention X for the Adaptation To Maritime Warfare Of The Principles of the 1906 Geneva Convention.

3. The 1929 Geneva Convention Relative To The Treatment Of The Prisoners Of war.

In addition, the Conference was to establish :

4. A Convention for the Protection Of Civilian Persons In Time Of War.

The following four Conventions were signed at Geneva on August 12, 1949 :

1. The Geneva Convention For The Amelioration Of The Condition Of The Wounded And Sick In The Field. (Convention I)

2. The Geneva Convention For The Amelioration Of The Condition Of Wounded, Sick And Shipwrecked Members Of Armed Forces At Sea. (Convention II)

3. The Geneva Convention Relative To The Treatment Of Prisoners Of War. (Convention III)

4. The Geneva Convention Relative To The Protection Of Civilian Persons In Time Of War. (Convention IV)

These four Conventions entered into force on October 21, 1950. They have been supplemented by the following two Protocols :

1. The Protocol Additional To The Geneva Conventions of August 12, 1949, And Relating To The Protection Of Victims Of International Armed Conflicts. (Protocol I)

2. The Protocol Additional To The Geneva Convention Of August 12, 1949, And Relating To The Protection Of Victims Of Non-International Armed Conflicts. (Protocol II)

Protocols I and II were signed on December 12, 1977; and entered into force on December 1978.<sup>(12)</sup>

## A. General

### The Four Conventions

1. The four Conventions are linked not only by certain general principles, but more specifically by certain common Articles. Such common Articles are found among the general provisions at the beginning of each Convention, among the provisions relating to the execution of each Convention, and in the concluding procedural provisions.

2. The following are common principles of the conventions :

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a. The Conventions are applicable in full in all conflicts between States Parties to the Conventions. <sup>(129)</sup>

b. In the case of armed conflict not of an international character occurring in the territory of one of the States Parties to the Conventions, certain essential principles shall be observed as a minimum. <sup>(130)</sup>

c. The following are prohibited at all times and in all places, the taking of hostages, execution without regular trial, torture and all cruel and degrading treatment. <sup>(131)</sup>

d. Reprisals on persons protected by the Convention are forbidden. <sup>(132)</sup>

e. No one may renounce or be forced to renounce the protection accorded to him by the Convention. <sup>(133)</sup>

f. Protected persons must at all times be able to have resort to a Protecting Power (the neutral state responsible for safeguarding their interests), and to the International Committee Of The Red Cross, or any other qualified humanitarian agency. <sup>(134)</sup>

g. Women are to be treated with all consideration due to their sex. They are also to be protected against rape and any form of indecent assault. <sup>(135)</sup>

The Two Additional Protocols

1. Seeking a protection for liberation movements, Protocol I extends the scope of application to armed conflicts in which peoples are fighting against colonial domination, alien occupation or against racist regimes in the exercise of their right to self-determination. By so doing, as noted by Bar-Yaacov, the drafters of Protocol I have, in effect, excluded its application in the very conflicts that they had in mind. No state would agree to apply the Protocol by virtue of Article 1 (4), because that would mean admitting that it suppresses by means of colonial domination, alien occupation, or a racist régime, the right of a particular people to self-determination. Bar-Yaacov also raises a question regarding the application of Protocol I to particular conflicts, that is, who is to determine whether a certain movement possesses the necessary qualifications warranting the extension of the Protocol to its struggle. In his opinion, the Diplomatic Conference failed to provide guidance on this issue.

According to some writers, a war of national liberation is defined as an armed conflict in which a people or a nation, lacking statehood, but organized within the framework of a national liberation movement, struggle for independence so as to achieve self-determination.

Within the United Nations a clear tendency of the majority of

Members has been to restrict the notion of such wars to traditional colonial situations and to apply the principle of sovereignty once a non-white anti-colonial régime has been established on the territory of a former colony. This is evidenced by the United Nations General Assembly Resolution 1514 (XV) of December 14, 1960, On The Granting Of Independence To Colonial Countries And Peoples; and Resolution 2625 (XXV) of October 24, 1970, Declaration On Principles Of International Law Concerning Friendly Relations And Co-Operation Among States In Accordance With The Charter Of The United Nations. In the latter Resolution, the General Assembly proclaimed certain principles comprising, inter alia, the principle of equal rights and self-determination of peoples. Under this principle "the territory of a colony or other Non-Self Governing Territory has, under the Charter, a status separate and distinct from the territory of the state administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right to self-determination in accordance with the Charter, and particularly its Purposes and Principles".

2. In Protocol II, the definition of a non-international conflict is more restricted, Article 1 provides that :

"1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

2. This Protocol shall not apply to situations of international disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of similar nature, as not being armed conflicts".

On the other hand, the provisions applicable to it are extensive. (137)

#### 6. The Geneva Conventions I and II

The Geneva Convention I For The Amelioration Of The Condition Of Wounded And Sick In Armed Forces In the Field of August 12, 1949, was preceded by several other international agreements on this subject, those of 1864, (138) 1906, (139) and 1929. (140)

The Geneva Convention II For The Amelioration Of The Condition Of The Wounded, Sick And Shipwrecked Members Of Armed Forces At Sea of

August 12, 1949, was also preceded by several other international agreements on this subject, those of 1899,<sup>(141)</sup> and 1907.<sup>(142)</sup>

The two Geneva Conventions I and II of August 12, 1949, contain so many repetitions of each other's provisions that they can easily be treated together as follows :

1. The wounded and sick of armed forces must be respected and protected in all circumstances. There must be no attempt on their lives or violence on their persons. They must be aided and cared for.<sup>(143)</sup> The shipwrecked shall be similarly treated.<sup>(144)</sup>

2. Belligerents must treat the wounded, sick or shipwrecked members of enemy forces taken prisoner as they do their own.<sup>(145)</sup>

3. The dead must be collected and their bodies protected against robbery.<sup>(146)</sup> Bodies must be identified before burial and death confirmed, if possible by medical examination.<sup>(147)</sup>

4. Everything which serves for the care of the wounded and sick shall, in their interest, be respected and protected, namely, personnel, establishments, vehicles, and medical supplies belonging to the Military Medical Services, the National Red Cross or other Relief Societies; and shall be indicated by the emblem of the Red Cross on a white ground. Medical and religious personnel includes :

a. persons responsible for the care and transport of the wounded and sick, and for the prevention of disease (doctors, orderlies, nurses and stretcher-bearers);

b. the administrative staff of medical establishments and units;

c. Chaplains.<sup>(148)</sup>

5. Medical and religious personnel shall wear an armlet with a Red Cross, and carry an identity card.<sup>(149)</sup> They may bear arms for their own defence and that of the wounded.<sup>(150)</sup>

6. If medical and religious personnel fall into enemy hands, they shall be allowed to continue their duties towards the wounded and sick.<sup>(151)</sup> Personnel whose retention is not indispensable to the care of prisoners shall be repatriated.<sup>(152)</sup> Those retained shall not be considered as prisoners of war and shall have wide facilities for their work.<sup>(153)</sup>

7. Civilians may not be prevented from giving care and shelter to the wounded and sick, whoever they may be and shall not be penalized for doing so; they must on the contrary be aided in this work.<sup>(154)</sup>

8. Medical units and establishments shall include all building or permanent installations (hospitals, stores, etc.), or mobile units (ambulances, field hospitals, tents, open-air installations, etc.) used exclusively in collecting and caring for the wounded and sick.<sup>(155)</sup>

9. Medical units and establishments may not be attacked or damaged, or prevented from operating even if, for the moment, they do not contain either wounded or sick.<sup>(15)</sup> The same shall apply to medical vehicles, ambulances, lorries and trucks, hospital ships, lifeboats, medical aircraft, etc.<sup>(157)</sup>

10. Medical equipment (stretcher, medical and surgical appliances and instruments, medical supplies, dressings, etc.) must never be destroyed, but must be left at the disposal of the medical personnel, wherever they may be.<sup>(158)</sup>

11. The emblem of Red Cross<sup>15</sup> on a white ground, symbol of aid to the wounded and sick, shall be used to designate buildings, staff, and material entitled to protection. It may not be otherwise employed and must at all times be scrupulously respected.<sup>(160)</sup>

### C. The Geneva Convention III

The Geneva Convention III Relative To The Treatment Of Prisoners Of War of August 12, 1949, was preceded by several other international instruments on this subject, those of 1874,<sup>161</sup> 1899 and 1907,<sup>162</sup> and 1929.<sup>(163)</sup>

#### 1. The Status Of The Prisoners Of War

a. Members of the armed forces and assimilated personnel<sup>164</sup> who fall into enemy hands shall become Prisoners of War.<sup>(165)</sup> They shall then be in the power of the enemy State, but not of the individuals or troops who have captured them.<sup>166</sup>

b. Prisoners of War are entitled in all circumstances to humane treatment and to respect for their persons and their honour.

c. Prisoners of War shall all be treated alike, privileged treatment may be accorded only on grounds of health, sex, age, military rank or professional qualifications.<sup>167</sup>

d. Prisoners of War, if questioned, are bound to give their name, first names and age, rank and army number. They may not be compelled to give other information.<sup>(168)</sup>

e. Prisoners of War shall be entitled to retain their effects and articles of personal use. The enemy may impound their military equipment, except articles of clothing and feeding utensils. Sums of money and valuables may not be taken from them except against receipt, and must be handed back at the time of release.<sup>169</sup>

f. Prisoners of War shall in general be subject to the discipline and the military code of the Capturing State (or the Detaining Power).<sup>(171)</sup> For security reasons their liberty may be restricted, but they may not be imprisoned unless for breaches of the law.<sup>172</sup> Before sentence, they must have the possibility of stating their case.<sup>(173)</sup>

## 2. The Conditions Of Captivity

a. The Detaining Power shall supply Prisoners of War, free of charge, with adequate food and clothing, provide them with quarters not inferior to those of its own troops, and give them the medical care their state of health demands. <sup>(174)</sup>

b. Prisoners of War, with the exception of officers, may be obliged to work. They shall receive pay; working conditions shall be equal to those of nationals of the Detaining Power. They may not be compelled to do military work, nor work which is dangerous, unhealthy, or degrading. <sup>(175)</sup>

c. When taken prisoner, they shall be enabled to advise their next of kin and the Central Prisoners of War Information Agency (The International Committee Of The Red Cross). Also, they may correspond regularly with their relatives, receive relief, and be attended by ministers of their own religion. <sup>(176)</sup>

d. Prisoners of War shall be entitled to elect spokesman (Prisoners' Representative), who shall act for them with the authorities of the Detaining Power and with welfare organizations assisting them. <sup>(177)</sup>

e. Prisoners of War shall have the right to address complaints and requests to representatives of the Protecting Power who are authorized, as are Delegates of The International Committee Of The Red Cross, to visit the camps, and talk with them either directly or through their representatives. <sup>(178)</sup>

f. The text of the Convention must be posted up in each camp, so that prisoners may at all times ascertain their rights and duties. <sup>(179)</sup>

## 3. The Repatriation Of The Prisoners Of War

a. Prisoners of War certified seriously ill or wounded shall be repatriated, but may not afterwards take up active military duties. <sup>(180)</sup>

b. At the end of active hostilities, prisoners must be released and repatriated without delay. <sup>(181)</sup>

## 4. The Geneva Convention IV

As noted by some writers, in the early codification of the laws of war, international agreements were primarily concerned with the treatment of combatants rather than civilians. The 1864 Geneva Convention II and 1907 Hague Convention IV make express reference to civilians primarily in respect of the occupation of territory by enemy armed forces.

The 1929 Geneva Diplomatic Conference merely recommended that a study must be made with a view to the conclusion of a Convention on the Protection of Civilians.

In 1939, the Swiss Government transmitted to the States a Draft Convention on the Protection of Civilians, prepared by The International Committee Of The Red Cross, as a basis for a Diplomatic Conference which the Swiss Government planned to convene in early 1940. The outbreak of the Second World War intervened, and the process of drafting an agreement only resumed after the war.

The Geneva Convention IV Relative To The Protection Of Civilian Persons In Time Of War of August 12, 1949, is not regarded as introducing specifically new ideas to international law on the subject.

A Civilian, in the conception of the Convention, is defined as a person who does not belong to the armed forces and takes no part in hostilities, Civilians may never be attacked, they shall be respected, protected, and at all times humanely treated.<sup>(182)</sup> They shall be entitled at all times to correspond with their relatives.<sup>(183)</sup>

The Convention deals especially with civilians in enemy hands, and distinguishes two categories, civilians in enemy territory, and population of occupied territory.<sup>(184)</sup>

### 1. The Civilians In Enemy Territory

Unless security reasons forbid it, civilians in enemy territory must be allowed to leave.<sup>(185)</sup> If they do not leave or are retained, they shall be treated in the same way as aliens in general.<sup>(186)</sup> If security reasons make their internment imperative, they shall have the right to appeal, and to have their case impartially reviewed.<sup>(187)</sup>

### 2. The Population Of Occupied Territory

a. The Civilian Population shall, so far as possible be enabled to continue as usual.<sup>(188)</sup> The Occupying Power shall be responsible for the maintenance of public order.<sup>(189)</sup>

b. Deportations and transfers of population shall, in general, be prohibited.<sup>(190)</sup> Every compulsory enlisting of manpower shall be subject to strict regulation. Persons under eighteen years of age are entirely excepted, and enlisted workers may not be forced to do labour which would make them participate in military operations.<sup>(191)</sup> Pillage and unnecessary destruction of property are forbidden.<sup>(192)</sup>

c. The Occupying Power shall be responsible for the welfare of children,<sup>(193)</sup> the maintenance of the medical and health services,<sup>(194)</sup> and the feeding of the population.<sup>(195)</sup> It shall allow the entry of relief consignments, and facilitate their transport,<sup>(196)</sup> In general, the authorities, administration, and public and private institutions shall continue to function.<sup>(197)</sup>

d. The Occupying Power has the right to defend itself against acts hostile to its administration and to members of its armed forces. It may introduce special laws in this connection.<sup>(198)</sup> It may try

accused persons before its own tribunals, but no sentence may be pronounced without regular trial.<sup>(199)</sup> It may, for imperative security reasons, intern certain persons.<sup>(200)</sup> All these measures are, however governed by explicit provisions and subject to the supervision of the Protecting Power.<sup>(201)</sup>

### 3. Common Rights Of The Civilians In Enemy Territory And The Inhabitants Of Occupied Territory

a. They are in all circumstances entitled to respect for their persons, their honour, family rights, religious convictions and practices, and their manners and customs. They shall at all times be humanely treated;<sup>(202)</sup> no coercion shall be exercised against them.<sup>(203)</sup> Women shall be especially protected against any attack on their honour, and, in particular, against rape and any form of indecent assault.<sup>(204)</sup>

b. They shall have the right of free resort to the Protecting Power, The International Committee Of The Red Cross and the National Red Cross of the Country where they may be.<sup>(205)</sup> The representatives of the Protecting Power and of the International Committee shall be able to visit them freely.<sup>(206)</sup>

c. The enemy Government shall be responsible for the treatment accorded to them by its officials or military personnel.<sup>(207)</sup>

d. Should they be interned - a measure which cannot be taken as a form of punishment - they shall be entitled to treatment which shall, in general, and taking into account the fact that they are civilians, be analogous to that of Prisoners of War.<sup>(208)</sup>

### E. Protocol Additional I

Protocol Additional I to the Geneva Convention of August 12, 1949, and Relating To The Protection Of Victims Of International Armed Conflicts (Protocol I) of December 12, 1977, embodied certain matters, we shall refer to some of them.

1. The conditions which the guerrilla or other volunteer corps have to meet have been minimized. The Protocol modifies the requirements of distinctive emblem and carrying arms openly.<sup>(209)</sup> The Protocol's provisions relating to guerillas are an important development in the-law governing military occupation as well as armed conflict generally.

2. The status of a Combatant or Prisoner of War has been completely denied to mercenaries.<sup>(210)</sup>

3. The Protocol I extends the use of the emblem for civilian purposes. Now all civilian medical and some religious personnel, together with medical materials and medical transports including the single medical vehicle may be provided with the distinctive sign.<sup>(211)</sup>

4. Protocol I extends and elaborates the provisions of general

protection of the population. Civilian medical units, civilian medical and religious personnel, doctors, all types of medical vehicles are protected.<sup>(212)</sup> Medical aircraft are also specifically included.<sup>(213)</sup> The protection of women and children has also been extended.<sup>(214)</sup>

#### F. Protocol Additional II

Article 3 of the four Geneva Convention of 1949, as referred before, binds the Parties to observe a limited number of fundamental humanitarian principles in "armed conflict not of an international character". Experience demonstrated the inadequacy of this common Article. It does not provide any definitive codification of the laws of war for non-international armed conflict, as it only extends certain fundamental humanitarian protection to non-combatants. Also, this Article is so general and incomplete that it cannot be regarded as an adequate guide for the conduct of belligerents in such conflicts.

Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating To The Protection Of Victims Of Non-International Armed Conflicts (Protocol II) of December 12, 1977, constitutes a modest progress in this regard.

1. A non-international conflict is defined, for the first time, as a conflict which takes place between the armed forces of a state and dissident armed forces which, under responsible command, exercise such control over a part of the territory of the state concerned as to enable them to carry out sustained and concerted military operations and to implement the Protocol.<sup>(215)</sup> The requirement of control of a part of a territory is the decisive criterion.
2. The persons who do not take part in hostilities are protected against violence to life and health, against torture and the taking of hostages, and acts of terrorism, pillage and slavery. The protection of children is regulated in detail.<sup>(216)</sup>
3. Protocol II draws up guiding rules for penal prosecution, which should ensure a procedure that is legally unobjectionable.<sup>(217)</sup>
4. Part III of Protocol II is specified to the protection of the wounded, sick and shipwrecked,<sup>(218)</sup> including the protection of persons carrying out medical duties.<sup>(219)</sup>
5. Part IV of Protocol II is specified to the protection of Civilian Population,<sup>(220)</sup> including the protection of the objects indispensable to Civilian Population such as foodstuffs and drinking and irrigation water supplies;<sup>(221)</sup> cultural objects and places of worship;<sup>(222)</sup> and the prohibition of forced displacements of civilians.<sup>(223)</sup>

## 5. The Definition Of Aggression

### A. The Historical Evolution

The word "aggression" employed as a term of international politics and propaganda since earliest history, and the efforts to limit the use of force are as old as the history of armed conflict. Some writers refer that at least 400 years before Christ, the Chinese philosopher Mo Ti urged that international aggression be abandoned and that wars be outlawed as the greatest of all crimes.

During the period of the League of Nations, the question of aggression was discussed in connection with the interpretation of the League Covenant Clauses concerning the prevention of war and the application of sanctions, and in connection with several disputes, particularly the Greco-Bulgarian frontier (1926), Manchuria (1931), and Ethiopia (1935).

The United Nations Charter does not define aggression, Article 39 of the Charter provides only that :

"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security".

Under the Charter, the problem of maintaining international peace and security is outside the domestic jurisdiction of any state because of the general principle provided for in Article 2 paragraph 4 of the Charter that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".

The Charter of the International Military Tribunal did not attempt a definition, nor did the Tribunal's judgment advance the matter.

The question of the definition of aggression was raised in the United Nations in 1950, when the Soviet Union submitted to the General Assembly a Draft Resolution containing a list of acts to be considered as aggression. The Assembly referred the proposal to the International Law Commission which, though it did not agree on a definition, included aggression among the offences set out in its Draft Code of Offences against the Peace and the Security of Mankind. The Assembly, in 1954 and again in 1957, decided to put off action on the Draft Code pending a decision on the definition of aggression.

In 1952, the General Assembly set-up a 15-Member Committee to formulate a Draft definition of aggression on Draft statements of the notion of aggression.

Another special Committee, established in 1954, met in 1956 and

reported to the General Assembly without having adopted a definition.

In 1957, the General Assembly set up a third Committee to study the comments of Member States on the matter "for the purpose of determining when it shall be appropriate for the General Assembly to consider again the question of defining aggression."<sup>224</sup>

In 1967, the Soviet Union proposed an item for the agenda of the General Assembly entitled "Need to expedite the drafting of a definition of aggression in the light of the present situation". After consideration of the item in the Assembly Plenary and in the Sixth (Legal) Committee, the Resolution establishing the Special Committee on the question of defining aggression was adopted.<sup>225</sup>

The General Assembly requested the 35-Member Committee to consider all aspects of the question.

After six annual sessions since it first met in 1968, the Committee, when it resumed work in 1974, found that it had a number of issues to be resolved before the final approval of the text of the eight Articles in the Draft definition of aggression. In its Seventh Session, on April 12, 1974, the Committee approved by consensus the final version of the Draft definition and submitted it with its report to the General Assembly for final adoption.

The report of the Special Committee, which contained the Draft definition, was taken up by the General Assembly at its Twenty-Ninth Session, which opened on September 17, 1974, and was referred to the General Assembly's Sixth (Legal) Committee. The Sixth Committee considered the report and the text of the definition at 18 meetings held between October 8 and November 22, 1974. The majority of the Sixth Committee Members noted with satisfaction that the Special Committee had succeeded after many years of work in elaborating a definition of aggression on which a consensus had been reached. On December 14, 1974, the General Assembly adopted without vote the Resolution 3314 (XXIX) to which the definition of aggression was annexed.

## E. The United Nations Definition Of Aggression

To explain the definition of aggression adopted by the General Assembly, it would be of importance to discuss in brief the main schools of thought concerning this definition.

### 1. The Enumerative School

This school, led by the Soviet Union, seeks an exhaustive list specifying each individual form of aggression. The Soviet Union had the same attitude in its proposal to the League Disarmament Committee in 1933. The basic principle of this school is that the first to strike is the aggressor irrespective of the policies and intentions of the two Parties when the first blow was struck. Enumerative definition was

opposed as being calculated to tie the hands of the Security Council or the General Assembly with disastrous results in the event of an unforeseen case of aggression.

## 2. The General Definition School

This school, led by France, considers a general formula for aggression to be both possible and desirable. The formula would simply state the basic elements in the concept of aggression.

## 3. The Neo-Definition School

This school, led by Greece, the United Kingdom and the United States, considers that no definition, general or enumerative will exhaust all possible manifestations of aggression. It maintains that aggression like fraud and negligence, is a "natural" concept which involves mixed questions of law and fact, and that variations in the facts of aggression are inexhaustible. According to this school, the elements in the concept of aggression are also partly subjective.

## The General Assembly Resolution 3314 (XXIX) Of December 14, 1974

In the operative part of the Resolution, the General Assembly, "calls the attention of the Security Council to the definition of aggression as set out below, and recommends that it should, as appropriate, take account of that definition as guidance in determining, in accordance with the Charter, the existence of an act of aggression".

Article 1 of the definition annexed to the Assembly Resolution contains a generic definition of aggression, it provides that :

"Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition.

Explanatory note : In this definition the term "State" :

- a. is used without prejudice to questions of recognition or to whether a State is a Member of the United Nations;
- b. includes the concept of "group of states" where appropriate".

The definition makes no reference to the "threat of force" mentioned in Article 2 paragraph 4 of the Charter. It limits aggression to the "use of armed force"; other forms of coercion, such as economic or political, were deliberately omitted.

The meaning of "force" as suggested by Rosalyn Higgins excludes, at least, low-level non-military coercion. In this context "low-level" means coercion enough to limit the freedom of action of the state against

which it is directed, but not enough adversely to affect its national security.

As regards aggression Professor Higgins states that "certainly it is arguable that aggression (which, being a narrower term than "breach of the peace" or "threat to the peace", implies a very high degree of coercion) can take place without any use of force, and must be considered, even where the methods are solely economic in nature, as too major to be a mere "illegality" - that to say, a "tort".

Professor Higgins believes that there are strong grounds for arguing that the term "use of force" must be taken to cover ideological and diplomatic methods when these are employed in very high degree and aimed at impairing the territorial integrity or political independence of a state - though these latter words, as they appear in Article 2 paragraph 4 of the Charter, are governed by the phrase "threat or use of force".

The use of force by States, according to Higgins, can be passive as well as active, can be indirect as well as direct, thus the arming of rebel groups in another State, or the refusal to forbid the training of rebels against another government on one's own territory, or the failure to restrain volunteers from fighting in another State, are all forms of aggression commonly termed "indirect aggression" - and from a functional point of view are a use of force.

As noted by Higgins, there are two main elements of force, the first is the method of coercion-military, economic, diplomatic or ideological; and the second is the degree of coercion involved.

However, although the definition adopted by the General Assembly limits aggression to the use of "armed force", the Security Council has sufficient latitude to include other forms if it sees fit.

The explanatory note showed that it was intended to cover divided territories such as Germany, Korea and China.

Article 3 of the definition follows the enumerative school, it provides that :

"Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of Article 2, qualify as an act of aggression :

- a. The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- b. Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

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- c. The blockade of the ports or coasts of a State by the armed forces of another State;
- d. An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- e. The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- f. The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- g. The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein".

In the report of the Special Committee on the question of defining aggression, the explanatory note concerning this Article 3 stipulated that the expression "any weapons" in sub-paragraph b was used without making a distinction between conventional weapons, weapons of mass destruction and any other kind of weapon.

With regard to sub-paragraph c of Article 3, a number of States in the Sixth Committee stated that the concept of blockade described there should be extended to the unjustified denial to land-locked States of access to and from the sea. The problem of the land-locked State when it was denied the right of free access to the sea, the consequences were the same as for the blockade of a port, and amounted to an aggression.

In connection with sub-paragraph g of Article 3, the attitude of several States, including the Soviet Union, in the Sixth Committee was that this sub-paragraph could in no way prejudice the exercise of the right to self-determination, nor the right of other State to provide support to peoples struggling for their freedom and independence.<sup>c 2</sup>

The Canadian representative in the Committee expressed the opinion that Article 3 (g) represented an attempt to outlaw one aspect of the serious problem of terrorism which starkly confronted the international community.

In the opinion of Israel's representative in the Sixth Committee, Article 3 was particularly weak with regard to indirect aggression and terrorism. Indirect aggression, he said, was one of the most dangerous and provocative forms that naked aggression could assume; the failure of the text to deal with indirect aggression was a serious omission.

Article 4 of the definition confirms that the prohibitions listed in Article 3 were not exhaustive, it provides that :

"The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

Article 5 of the definition provides that :

- "1. No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.
2. A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.
3. No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful".

In the opinion of some States, including Algeria, Czechoslovakia and Spain, Article 5 drew an artificial distinction between aggression and wars of aggression. On the other hand, other States including the United Kingdom and the United States, thought this Article unexceptionable. In their view, the first sentence of the second paragraph reflected principles embodied in the Nuremberg Charter and repeated in the Declaration on Friendly Relations, and the second sentence of that paragraph states a proposition, not in the context of criminal law, with which all Members could agree.

In analysing the attitude of States relating the legal status of the definition of aggression, some writers distinguish between the following attitudes.

1. Some States contend that it is nothing more than a recommendation and the Security Council is free to decide for itself what weight, if any, it will give to it. They argue that only the Charter can bind the Council and that seeking to bind it by any other instrument would be a violation of the Charter.
2. Other States maintain that the Security Council is bound to accept the definition of aggression as an authoritative and binding interpretation of a part of international law.
3. All States have agreed that only the Security Council can render a final decision on whether or not aggression has taken place and what the legitimate response should be. Since the Security Council is a political and not a judicial body, it may be expected that its decision will be based primarily upon political rather than legal considerations.

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At the beginning, it was not our intention to refer to peace-keeping operations for observation and fact-finding under the United Nations such as "United Nations Military Observer Group In India And Pakistan" (UNMOGIP), "United Nations Military Observer Group In Yemen" (UNYOM), and "United Nations Observer Group In Lebanon" (UNOGIL); but we shall refer only to the United Nations forces.<sup>(228)</sup>

Both the Security Council,<sup>(229)</sup> and the General Assembly,<sup>(230)</sup> have certain responsibilities and competences concerning the maintenance and restoration of international peace and security, thus, armed forces may be created to act under the authority of the United Nations for this purpose. All members of the United Nations are obliged, by Article 2 (5) of the Charter to give the United Nations every assistance in any action it takes in accordance with the Charter, and to refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action. Lord McNair and Watts<sup>(231)</sup> believe that this obligation may be reinforced by specific decisions of the Security Council which would impose obligations on Member States under Articles 25,<sup>(232)</sup> and 49<sup>(233)</sup> of the Charter. As examples of the armed forces created by the authority of the United Nations, UNFICYP was created by the Security Council, and UNEF was created by the General Assembly under the "Uniting For Peace" Resolution. The distinction between the forces acting under the United Nations authority, and armed forces of states is that the action of the former is undertaken for the collective enforcement of the basic instrument of organized international society, and not to secure the interests of an individual state.

According to McNair and Watts, an armed conflict between the armed forces of a state and those of the United Nations would not amount to a war within the meaning of any definition with regards war as a relationship between states. It is hardly appropriate to apply the technical concept of war to action taken on behalf of the general community of states acting in pursuance of the general international interest. We believe that the laws of war (jus in bello) are applied to conflicts involving forces acting under the authority of the United Nations although this conflict is not considered war in the technical sense. This opinion finds its justification in the humanitarian nature of these laws.

In this regard, it must be recalled that Article 41 of the United Nations Charter which provides for non-military enforcement action, and Article 42 of the Charter which provides for military enforcement action. Article 42 is closely connected with Article 43 of the Charter,<sup>(234)</sup> which aims at facilitating action by the Security Council by the undertaking of the Member States to make available to it, in accordance with a special agreement or agreements, armed forces, assistance and facilities. According to Akehurst, it would be wholly alien to the purpose of Article 43 to argue that the absence of agreements under this Article should prevent action by the Security

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Council. Bowett adopts the same opinion as he believes that the absence of agreements under Article 43 would not prevent Member States from agreeing ad hoc, and in relation to a particular situation, to place forces at the disposal of the Council.

Article 99 of the Charter,<sup>(2-5)</sup> which provides for the power of the Secretary-General to bring matters to the attention of the United Nations organs, is considered important. Akehurst notes that this Article throws the light on the general nature of the Secretary General's functions, who is not only a mere servant of the political organs, but is expected to take political initiatives of his own. This Western interpretation has been opposed by the Soviet Union, who has tried to minimise the power of the Secretariat.

Again, it must be referred to the Uniting for Peace Resolution of November 3, 1950, under which, if the Security Council fails in its primary responsibility for maintaining international peace and security, the General Assembly shall consider the matter immediately with a view to making recommendations for collective measures, including the use of armed force where necessary; and it recommends to Members to maintain contingents in their armed forces which should be made available for service as a United Nations unit.

In the following, we shall refer to the United Nations forces constituted in certain occasions. As for the case of Korea,<sup>(2 e)</sup> we agree with Akehurst on his opinion that it is doubtful whether the forces in Korea, which flew the United Nations flag, constituted a United Nations force, because all the decisions concerning the operations of the forces were taken by the U.S.A. and the commander took his orders from the U.S.A.; the decision to dismiss the original Commander, General MacArthur, and to replace him by a new Commander was taken unilaterally by the U.S.A. Moreover, when the fighting ended and a Conference met at Geneva in 1954 to try to reunify Korea, the "Allied side" at the Conference did not consist of representatives of the United Nations, but of representatives of the individual States which had sent forces to Korea.

A. The United Nations Emergency Force (UNEF)

After the invasion of Egypt on October 29, 1956, by the troops of the United Kingdom, France and Israel, the Security Council, on October 31, failed to adopt a Resolution proposing measures for the cessation of the military action against Egypt, because the United Kingdom and France had voted against it. The procedure comprised in the Uniting for Peace Resolution to invite the General Assembly, if not in session, to meet within 24 hours in the event of a breach of peace or act of aggression, such procedure was followed and the Suez question was referred to the General Assembly.

On November 5, 1956, the General Assembly set up a "United Nations Emergency Force" to secure and supervise the cessation of hostilities. After the withdrawal of the three States troops from the Egyptian territory, the United Nations Emergency Force was sent to patrol the

Israeli-Egyptian armistice line. The General Assembly appointed the Commander of the Force, and authorized the Secretary-General to enact regulations setting out the rights and duties of soldiers serving in it.

The force was founded on the principle of consent for the following reasons :

1. No State was obliged to provide a contingent unless it consented to do so.
2. The force could not enter the Egyptian territory without Egypt's consent, while Israel refused that. Thus, when the United Arab Republic (Egypt) requested, on May 18, 1967, the withdrawal of the Force, it ceased operating from May 19 following the Secretary General's agreeing to withdraw the Force, without reference to the General Assembly, As Bowett pointed out, such decision, on legal grounds, is extremely difficult to justify.

It may be argued that the legal basis for the creation of the Force is in Article 22 of the Charter which provides that :

"The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions".

### B. United Nations Force In The Congo (ONUC)

On June 30, 1960, Belgium granted independence, reluctantly, to Congo (now Zaire), because it did not want to leave the copper-rich colony. Before leaving, Belgium had fanned intertribal and interstate rivalry. President, Kasavubu, and Prime Minister Lumumba, tried to dominate each other. The balancing factor was Mobutu who was then Commander in Chief of the armed forces. Belgium had also sponsored Tshombe, Chief Minister of Copper-rich Katanga Province, to secede from Congo. Belgium, which had retained military bases in Congo, deployed its military forces on the plea of protecting the lives of Europeans. The Congolese government appealed to the United Nations for military assistance against "Belgian aggression".

On July 14, 1960, the Security Council adopted a Resolution to provide the local government with military assistance and asked the Belgian government to withdraw its forces from Congo. The Secretary-General announced that he would interpret this Resolution as authorizing him to create a Force modelled on the "United Nations Emergency Force". This Resolution was reaffirmed by the Security Council Resolution of July 22, 1960, with a request to States not to do anything which could threaten the territorial integrity or political independence of the State. On August 9, 1960, the Security Council by its third Resolution called upon Belgium to withdraw from Katanga which had accelerated its secession demand with active Belgian support.

The Force, which was constituted according to the Security Council Resolution of July 14, 1960, was originally intended to fight only in order to defend itself, but it was subsequently authorized to fight in

other circumstances as well, in order to preserve its freedom of movement throughout the whole of Congo (including Katanga), in order to prevent civil war, and in order to expel foreign mercenaries. Finally, the Force found itself engaged in extensive military operations against the secessionist movement in Katanga.

The Soviet Union considered that the constitution of the Force was illegal for some reasons including, inter alia, the Force was virtually under the control of the Secretary-General, instead of being under the control of the Security Council, as it ought to have been. Akehurst suggests that the creation of the Force constituted "provisional measures" within the meaning of Article 40 of the Charter.

### C. The United Nations Force In Cyprus (UNFICYP)

In 1963, the war broke out between the Greek and Turkish communities in Cyprus. The British troops arrived with the consent of all the interested parties, to keep the peace between the two communities, a matter which the British felt to be a very hard task, and they asked the United Nations to send a peace-keeping force.

On March 4, 1964, the Security Council, unanimously, adopted a Resolution to set up a United Nations Force for the purpose of preventing a recurrence of fighting between the two communities in Cyprus. The Secretary General established the composition and size of the Force, and the Commander was also to be appointed by him. The Force was set up for three months period to be extended for successive periods of three or six months upon the request of the Secretary General.

According to the instructions of the Secretary-General, the Force had to fight only in self-defence. It is to be noted that various international bodies have addressed the application of the laws of war to United Nations forces. The United Nations itself is not a Party to any international agreements on the laws of war. Moreover, these agreements do not express or provide for the applications of the laws of war by United Nations Forces. However, the 1954 Hague Intergovernmental Conference adopted a Resolution recommending that the United Nations ensure the application of the Convention by United Nations forces involved in military action. The International Committee of the Red Cross has frequently also raised with the United Nations the issue of the application of the laws of war to United Nations Forces. On September 3, 1971, the Institute of International Law adopted, at its 55<sup>th</sup> Session held in Zagreb, a Resolution On Conditions Of Application Of Humanitarian Rules Of Armed Conflict To Hostilities In Which United Nations Forces May Be Engaged. (237)

Article 2 of this Resolution provides that :

"The humanitarian rules of the law of armed conflict apply to the United Nations as of right, and they must be complied with in all circumstances by United Nations Forces which are engaged in hostilities".

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The rules referred to in the preceding paragraph include in particular :

- a. the rules pertaining to the conduct of hostilities in general and especially those prohibiting the use or some uses of certain weapons, those concerning the means of injuring the other Party, and those relating to the distinction between military and non-military objectives;
- b. the rules contained in the Geneva Conventions of August 12, 1949;
- c. the rules which aim at protecting civilian persons and property".

Article 7 of the Resolution,<sup>(238)</sup> provides for reparation to be made for injuries caused to the United Nations Forces in violation of the humanitarian rules or armed conflict. At the same time Article 8 of the Resolution,<sup>(239)</sup> provides for the liability for damage which may be caused by its Forces in violation of the same rules.

As regards the legal basis of the Security Council Resolution of March 4, 1964, relating to the United Nations Force in Cyprus, it was said that it is based on Chapter VI of the Charter rather than Chapter VII. This was concluded from the Preamble of this resolution which provides that "the present situation with regard to Cyprus is likely to threaten international peace and security, which echoes the language of Chapter VI as in Article 33 which refers to a "dispute... likely to endanger the maintenance of international peace and security". Chapter VII of the Charter deals with actual "threat to the peace, breach of peace, or act of aggression".

D. The Second United Nations Emergency Force (UNEF)

On October 6, 1973, Egypt and Syria launched attacks against "Israel" which was celebrating the festival of the so-called Yum Kippur. On October 22, 1973, the Security Council adopted the Resolution 338 (XXVIII) by which it "calls upon all Parties to the present fighting to cease all firing and terminate all military activity immediately not later than 12 hours after the moment of the adoption of this decision, in the positions they now occupy". On October 25, 1973, the Security Council adopted the Resolution 340 (XXVIII) by which it set up a new United Nations Emergency Force (UNEF) to supervise ceasefire.

On January 18, 1974 and September 1, 1975, Egypt and Israel concluded two agreements for the disengagement of their forces. These agreements provided that the United Nations Emergency Force should occupy a buffer zone between the Egyptian and Israeli forces, and should carry out periodic inspections to ensure that Egypt and Israel were complying with the terms of the disengagement agreement. The Force, which was set up originally for six months, was authorized to fight only in order to defend itself.

The legal basis of the Security Council Resolution 340 of October

25, 1973, according to Akehurst, is Article 40 of the Charter, or alternatively Chapter VI.

The Security Council set up a Disengagement Observer Force (UNDOF), to practice the same functions of the United Nations Emergency Force established in 1973, as far as the Syrian Israeli disengagement agreement of May 1974, is concerned.

E. The Role Of The United Nations Forces Under The Egyptian Israeli Peace Treaty Of March 26, 1979

The Egyptian Israeli Peace Treaty was signed at Washington D.C. on March 26, 1979, and entered into force on April 1, 1979. According to Article 4 paragraph 1 Of the Treaty, the Parties agree, on the basis of reciprocity, to establish security arrangements including limited force zones in Egyptian and Israeli territory, United Nations Forces and Observers<sup>(240)</sup> and other security arrangements agreed by the Parties.

According to Article 4 paragraph 2 of the Treaty, the Parties agree to the stationing of United Nations personnel in areas described in Annex I. Article 6 paragraph 1 of this Annex provides that :

"1. The Parties will request the United Nations to provide Forces and Observers to supervise the implementation of this Annex and employ their best efforts to prevent any violation of its terms". According to the same Article 6, the functions of the United Nations Forces and Observers are, mainly, periodic verification of the implementation of the provisions of Annex I to the peace Treaty; and ensuring the freedom of navigation through the Strait of Tiran in accordance with Article 5 of the Peace Treaty.

We state before that the stationing of the United Nations Forces in the territory of certain State is subject to the principle of consent; but Article 4 paragraph 2 of the Peace Treaty contradicts this principle as it provides that "the Parties agree not to request withdrawal of the united Nations personnel and that these personnel will not be removed unless such removal is approved by the Security Council of the United Nations, with the affirmative vote of the five Permanent Members, unless the Parties otherwise agree".

In fact, this sub-Article is considered a limitation on the Egyptian sovereignty represented in the following three aspects :

1. The Parties agree not to request the withdrawal of the United Nations personnel, while the continuity of these personnel in fulfilling their functions must be subject to the consent of the State, otherwise the United Nations Forces and Observers will be considered a coercion Forces which is beyond the purposes of the Peace Treaty.

2. The removal of the United Nations personnel must be approved by the Security Council with the affirmative vote of the five Permanent Members. This matter is another limitation on the Egyptian sovereignty, it is enough that any Permanent Member of the Security Council uses his

veto right to prevent any removal of these personnel. This matter is not beyond expectation.

3. The two Parties to the Peace Treaty agree to the contrary for the removal of the United Nations personnel- is the third limitation. It is not possible that Israel will agree to this removal. Even if this matter is possible, it is not accepted to make a matter of sovereignty of one State - the stationing of foreign forces in its territory - subject to the will of another State.

For these reasons we believe that Article 4 paragraph 2 of the Egyptian Israeli Peace Treaty is null and void.

## 7. International Terrorism

The history of terrorism has been closely linked to the history of violence. The necessity of violence in history is determined by the existence of contradiction which are impossible to resolve through a compromise arrangement between the exponents of these contradictions, states, classes, or individuals. Terror is used as a method of violence, while terrorism is the application of this method through individual terrorist acts.

As noticed by Jenkins,<sup>(24)</sup> terrorism appears to have increased markedly in the past few years. Political and criminal extremists in various parts of the world have attacked passengers in air line terminals and railway stations; planted bombs in government buildings, the offices of multinational corporations, pubs and theatres; hijacked airliners and ships, even ferryboats in Singapore; held hundreds of passengers hostage; seized embassies; and kidnapped government officials, diplomats and business executives.

An act of terrorism can be practised both in peace and in wartime.

According to Blishchenko and Zhdanov, an act of terrorism, in peacetime, can be committed by the authorities of a State in respect of some of its citizens with a view to intimidating them or suppressing the opposition, or as part of the policy of racial discrimination, racial superiority, or as acts of Genocide. As to wartime, international law already provides for a series of standards - such as the four Geneva Conventions of August 12, 1949 - to govern the prohibition and punishment of an act of terrorism with regard to Prisoners of War, civilians, combatants and non-combatants who will have stopped participating in hostilities even in the event of a conflict of other than international character; guerillas and militia squads whose status while in captivity is held to be equivalent to that of War Prisoners coming from standing armies, as well as in respect of cultural property ensuring an armed conflict. In other words, acts of terrorism in wartime come within the framework of jus in bello and denote the practices which appear to be uselessly cruel or odious, and are eventually interpreted as war crimes, crimes against humanity or infringement of humanitarian law.

In the opinion of Blishchenko and Zhdanov, an international element - in international terrorism - should be taken to mean the commission of an act of terrorism :

1. on the territory of one or several foreign nations or on the territory that does not come under the jurisdiction of any State;
2. by a foreign citizen or subject, or in complicity with a foreign citizen or subject;
3. in respect of a foreign citizen or property of a foreign physical or legal person or state;

According to the same writers, an act of terrorism shall come under international law if the action committed by a physical person includes:

1. violent action : an attempted or committed attack, seizure, kidnapping, infliction of bodily harm, murder or action creating a threat in relation of official representatives or members of their families in their area of political, economic, technical, civilian, trade and cultural relations between subjects of international law;
2. seizure, damaging or destruction of property essential for the conduct of political, economic, technical, trade, and cultural relations between States as well as means, equipment or structures used in air, water, rail and motor transport, if those actions comprised an international element.

Wilkinson holds that international law has granted legal status to terrorists and legalised their terrorist activities by the official recognition of the United Nations attitude to liberation organizations in action against racist regimes.<sup>(242)</sup> In fact, this opinion mixes up the concept of terrorism and activities of national liberation movements.

The wave of terrorism which has swept across the world in recent years has led to an international concern to fight against terrorism. On the European level, the Conference On Security And Co-Operation In Europe, which was held in Madrid in 1981 - succeeded in reaching an Agreement On Principles Of The Fight Against Acts Of International Terrorism. On the universal level, in 1972, the General Assembly of the United Nations discussed the issue of "International Terrorism".

We shall discuss this issue in the following three points, the concept of international terrorism; the treaties on international terrorism; and international terrorism and national liberation movements.

#### A. The Concept Of International Terrorism

The American Senator Jeremiah Denton (Republican) defined terrorism as "the threat or use of violence aimed at achieving a psychological impact on a target group wider than its immediate victims".<sup>(243)</sup> As

noticed by Blishchenko and Zhdanov, this definition is deliberately confusing national and international character of an act of terrorism. It considers an act of terrorism also the operations in pursuit of "military or para-military objectives or those of a rebellion "if they include acts of terrorism".

Professor Karpets suggests another definition, "Terrorism is international or internationally intended national organizing or other activity aimed at creating special organizations and groups to commit murder, use violence and take people hostage for a ransom or other demands; forcible deprivation of freedom, often involving torture, blackmail, etc.; terrorism can also mean the destruction of buildings, their ransacking and similar acts".<sup>(244)</sup>

Wilkinson defines terrorism as a policy or process consisting of three basic elements :

1. the decision to use terrorism as a systematic weapon;
2. the threats or acts of extranormal violence themselves;
3. the effects of this violence upon the immediate victims and the wider national and international opinion.<sup>(245)</sup>

We prefer the more concise and accurate definition suggested by Banker, Miller and Russel who define terrorism as "the threatened or actual use of force or violence to attain political goal through fear, coercion or intimidation".<sup>(246)</sup>

### B. The Treaties On The Prevention And Punishment Of International Terrorism

An international Conference which met in Geneva from 1 to 16 November, 1937, adopted two Conventions, one for the prevention and punishment of terrorism, and the other for the creation of an international criminal court.

The Convention For The Prevention And Punishment Of Terrorism,<sup>27</sup> which did not enter into force, was designed to make more effective the prevention and punishment of terrorism of an international character.

Under Article 1 of the Convention, acts of terrorism means criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, a group of persons or the general public.

Under Article 2 of the Convention, an act of terrorism of international character is determined by its being directed against the State in the person of its representatives such as the Head of State.

The following acts are acts of terrorism of an international character :

1. Any wilful act causing death or grievous bodily harm or less of liberty to :
  - a. Heads of State, persons exercising the prerogatives of the Heads of State, their hereditary or designated successors;
  - b. the wives or husbands of the above-mentioned persons;
  - c. persons charged with public functions or holding public positions when the act is directed against them in their public capacity.
2. Wilful destruction of, or damage to, public property or property devoted to a public purpose and belonging to or subject to the authority of another High Contracting Party.
3. Any wilful act calculated to endanger the lives of members of the public.
4. Any attempt to commit an offence falling within the foregoing provisions of the present Article.
5. The manufacture, obtaining, possession. or supplying of arms, ammunition, explosives or harmful substances with a view to the commission in any country whatsoever of an offence falling within the present Article.

Articles 8, 9, 10, 11, 12, 13 and 19 assume the principle of inescapable punishment.

After the inception of the United Nations, different Conventions on the prevention and punishment of different acts of terrorism were signed as follows :

1. The Tokyo Convention On Offences And Certain Other Acts Committed On Board Aircraft Of September 13, 1963

The Convention On Offences And Certain Other Acts Committed On Board Aircraft was signed at Tokyo on September 13, 1963, and entered into force on December 4, 1969. The Convention applies in respect of offences committed or acts done by a person on board any aircraft registered in a Contracting State, while that aircraft is in flight or the surface of the high seas or of any other areas outside the territory of any State. Article 1 of the Convention covers the following :

- a. offences against penal law;
- b. acts which, whether or not they are offences, may or do jeopardise the safety of the aircraft or of persons or property therein or which jeopardise good order and discipline on board.

2. The Hague Convention For The Suppression Of Unlawful Seizure Of Aircraft Of December 16, 1970

On December 16, 1970, the Diplomatic Conference held at the Hague, adopted the Convention For The Suppression Of Unlawful Seizure Of Aircraft, which entered into force on October 14, 1971.

The Convention is designed to protect only an aircraft in flight; moreover, it protects an aircraft in flight only in the event of it being an object of an act of seizure; besides, this act is qualified as an offence only when committed by a person on board this particular aircraft. Consequently, the Convention excludes from its scope all the categories of other acts which could produce a no lesser threat to the operation of civil aviation.

Article 1 of the Convention considers, as committing an offence, any person who on board an aircraft in flight :

- a. unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act; or
- b. is an accomplice of a person who performs or attempts to perform any such act.

Article 3 of the Convention extends its scope into the domestic line traffic.

Article 2 of the Convention requires each Contracting State to make the offence punishable by severe penalties; and Article 8 provides for the offence set out in Article 1 as an extraditable offence to be included in all extradition treaties concluded between States.

3. The Montreal Convention For The Suppression Of Unlawful Acts Against The Safety Of Civil Aviation Of September 23, 1971

On September 23, 1971, the Diplomatic Conference held at Montreal, adopted the Convention for the Suppression of Unlawful Acts Against The Safety Of Civil Aviation, which entered into force on January 26, 1973.

The Convention is directed not only against acts of seizure or exercise of control of an aircraft with a view to using it as a transport vehicle, but also against acts of terrorism committed in respect of aircraft in service whether on the ground or in the air as well as in respect of ground based air navigation facilities.

Article 1 of the Convention provides that :

- "1. Any person commits an offence if he unlawfully and intentionally :

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- a. performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
  - b. destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
  - c. places or causes to be placed on aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft or to cause damage to it which is likely to endanger its safety in flight; or
  - d. destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or
  - e. communicates information which he knows to be false thereby endangering the safety of an aircraft in flight.
2. Any person also commits an offence if he :
- a. attempts to commit any of the offences mentioned in paragraph 1 of this Article; or
  - b. is an accomplice of a person who commits or attempts to commit any such offence<sup>a</sup>.

Article 10 of the Convention provides that the Contracting Parties shall, in accordance with international law, and national legislation, endeavour to take all practicable measures for the purpose of preventing the offences mentioned in the Convention.

4. The Washington Convention To Prevent And Punish The Acts Of Terrorism Taking The Form Of Crimes Against Persons And Related Extortion That Are Of International Significance Of February 2, 1971

The Third Special Session of the Organization of American States General Assembly which met at Washington from January 25 to February 2, 1971, adopted the Convention To Prevent And Punish The Acts Of Terrorism Taking The Form Of Crimes Against Persons And Related Extortion That Are Of International Significance.

Article 1 of the Convention stipulates the undertaking of the Contracting States to co-operate among themselves by taking all the measures that they may consider effective, under their own laws, and especially those established in this Convention, to prevent and punish acts of terrorism, especially kidnapping, murder and other assaults against the life or physical integrity of those persons to whom the

State has the duty according to international law to give special protection, as well as extortion in connection with those crimes.

Article 2 qualifies the above-mentioned crimes as common crimes of international significance regardless of motive.

Article 3 provides that persons who have been charged or, convicted for any crimes referred to in Article 2 shall be subject to extradition under the extradition treaties in force between the Parties, or under their own laws in the case of States that do not make extradition dependent on the existence of a treaty. Article 5 of the Convention provides that when the extradition requested is refused, the requested State is obliged to submit the case to its competent authorities for prosecution as if the act had been committed in its territory.

#### 5. The European Convention On The Suppression Of Terrorism Of January 27, 1977

On January 27, 1977, the European Convention On The Suppression Of Terrorism was signed at Strasbourg on January 27, 1977.

Article 1 of the Convention does not regard the following offences as a political offence, or as an offence connected with a political offence, or as an offence inspired by political motives :

- an offence within the scope of the Convention For The Suppression Of Unlawful Seizure Of Aircraft, signed at the Hague on December 16, 1970;
- an offence within the scope of the Convention For The Suppression Of Unlawful Acts Against The Safety Of Civil Aviation, signed at Montreal on September 23, 1971;
- a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;
- an offence involving kidnapping, the taking of hostages or serious unlawful detention;
- an offence involving the use of bomb, grenade, rocket, automatic firearm or letter or parcel-bomb if this use endangers persons;
- an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

Article 3 of the Convention demands a modification of all extradition treaties and arrangements applicable between Contracting States, including the European Convention On Extradition, to the extent that they are incompatible with this Convention.

E. The International Convention Against The Taking Of Hostages Adopted On December 17, 1979

On December 17, 1979, the United Nations General Assembly adopted the International Convention against the Taking Of Hostages.

According to Article 1 of the Convention, any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (referred to in the Convention as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or to abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages within the meaning of the Convention.

Also, under this Article, any person who :

- a. attempts to commit an act of taking hostages,
- b. or is an accomplice of any person who commits or attempts to commit an act of hostage-taking also commits an offence within the meaning of the Convention.

Article 4 provides for severe penalties against persons having committed any of the offences defined in the Convention.

Article 5 provides that the fixing of jurisdiction over the offences defined in the Convention does not exclude any criminal jurisdiction exercised in accordance with national legislation.

C. International Terrorism And National Liberation Movements

Sometimes there is a sort of deliberate *mixing* up between international terrorism and National Liberation Movements.

National Liberation Movements are partial subjects of international law with reference to the implementation of the principle of self-determination of peoples as contained in the United Nations Charter. Unlike insurgency in a civil war, or a de facto government the recognition of Liberation Movements does not require proof of any effective territorial control. On December 11, 1969, the United Nations General Assembly adopted the Resolution 2548 (XXIV) which qualified the use of mercenaries against National Liberation Movements as punishable criminal offences, and declared the mercenaries themselves outlawed.

According to Blishchenko and Zhdanov, terror, by its character, differs from the revolutionary movement of the mass of the people, which is aimed straight at fundamentally changing society. An act of

terrorism, even if its long-term objective is to draw attention to a particular political cause or situation, has something relatively limited, if important, as its immediate target, as raising the money to meet the needs of political struggle, obtaining the release of political prisoners, spreading general terror, removing a "strong personality", showing up the impotence of government authorities, or provoking reprisals which can have the effect of dividing public opinion. Consequently, a terrorist usually cannot directly achieve the ultimate objective he had announced.

8. The Prohibitions Or Restrictions On The Uses Of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious Or To Have Indiscriminate Effects

The United Nations Conference on this issue held two sessions at Geneva, the First from 10 to 28 September 1979; and the Second from 15 September to October 10, 1980.<sup>(248)</sup> On April 10, 1981, the United Nations Convention On Prohibitions Or Restrictions On The Use Of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious Or To Have Indiscriminate Effects. The following three Protocols are annexed to the Convention :

Protocol I : Protocol on Non-Detectable Fragments.

Protocol II : Protocol on Prohibitions Or Restrictions Of Mines, Booby Traps And Other Devices.

Protocol III : Protocol on Prohibitions Or Restrictions On The Use Incendiary Weapons.<sup>(249)</sup>

This Convention is derived from two fundamental customary principles of the laws of war :<sup>(250)</sup>

The right of belligerents to adopt means of warfare is not unlimited; and

the use of weapons, projectiles or material calculated to cause unnecessary suffering is prohibited.

IV : The Legality Of Certain Aspects Of The Use Of Force In International Law

General

The application of jus in bello, or the rules governing the actual conduct of armed conflict, does depend upon the recognition of the existence of a formal state of war, but comprehends situations of armed

conflict and military occupation in general, whether formally recognized as "war" or not. Also, jus in bello applies in cases of armed conflict whether the conflict is lawful or unlawful in its inception under jus ad bellum. The sources of jus in bello may be found in international custom and agreements, judicial decisions, national manuals of military law<sup>(251)</sup> and writings of publicists.

Customary international law prohibits the use of certain weapons<sup>(252)</sup> such as poisoned weapons, or the use of weapons which cause unnecessary suffering. We shall refer, in the following, to some of the endeavours of states in this regard.

First : In 1868, a Conference met at St. Petersburg for the examination of a proposal made by Russia with regard to the use of explosive projectiles in war.<sup>(253)</sup> On December 11, 1868,<sup>(254)</sup> the representatives of Seventeen Powers<sup>(255)</sup> signed the Declaration of St. Petersburg<sup>(256)</sup> which is considered the first formal agreement prohibiting the use of certain weapons in war. It is also considered as expressing the customary rule prohibiting the use of weapons causing unnecessary suffering. To the extent that the St. Petersburg Declaration represents customary international law, it would be binding upon all states and not merely those who are formally Parties to it.

The St. Petersburg Declaration stipulates that the Signatory Powers, and those who should accede later, renounce in case of war between themselves the employment by their military or naval troops of any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances.

The application of the St. Petersburg Declaration to certain weapons which were developed later raises difficult questions. Some writers suggest that the Declaration's prohibition imply by analogy, that it is unlawful to use incendiary weapons such as flame-throwers and napalm.<sup>(257)</sup> Other writers doubt that any prohibition may be inferred by analogy. However, other writers suggest that the use of fire weapons is unlawful because they cause unnecessary suffering to individuals.

Second : The First Hague Peace Conference of 1899 had adopted a Declaration concerning a kind of bullets, the hard jacket of which did not quite cover the core, and which therefore expanded and flattened in the human body. This kind of bullets was first manufactured at the British Indian arsenal of Dum Dum near Calcutta. On July 29, 1899, the representatives of Fifteen Powers signed this Declaration which stipulates that the Contracting Parties should abstain, in case of war between two or more of them, from the use of bullets which expand or flatten easily in the human body, such as bullets with hard envelopes which do not entirely cover the core, or are pierced with incision. The Declaration came into force on September 4, 1900.<sup>(258)</sup> This Declaration is considered as codifying the customary rule prohibiting the use of weapons causing unnecessary suffering. To the extent that this Declaration represents customary international law, it would be binding

upon all states and not merely those who are formally Parties to it.

Some writers suggest the prohibition of high-velocity rifle ammunition, tumbling end over end on striking its target by analogy on the prohibition of dum dum bullet, because they produce a large jagged wound. Other writers contest the validity of any such analogy.<sup>(259)</sup>

Third : The Second Hague Peace Conference of 1907 was held with the primary objective of limiting armaments. Although this Conference, which was attended by the representatives of Forty-four States, did not succeed to reach general agreement on arms limitation, it was successful in adopting thirteen conventions and one declaration. The 1907 Hague Convention IV Respecting The Laws And Customs Of War On Land was intended to replace the 1899 Hague Convention II, although most Articles of the Regulations annexed to both Conventions are identical.

Article 23 (e) of the Regulations annexed to the 1907 Hague Convention IV<sup>(260)</sup> reaffirmed the customary rule prohibiting the use of weapons causing unnecessary suffering. It provides that :

"In addition to the prohibition provided by special conventions it is especially forbidden :

e. To employ arms, projectiles, or material calculated to cause unnecessary suffering".

This prohibition is an application of the principle embodied in Article 22 of this Convention which provides that :

"The right of belligerents to adopt means of injuring the enemy is not unlimited".

Eighteen State Parties to the 1899 Hague Convention II did not become Parties to the 1907 Hague Convention IV. They or their successor states<sup>(261)</sup> remain formally bound by the 1899 Convention.

In the following, we shall discuss the legality of the use of certain weapons in war, namely, nuclear, chemical and biological weapons. All these kinds of weapons may be described as mass destruction weapons.

### First: The Legality Of The Nuclear Weapons

Since 1945 the nuclear weapons have not been used; but is this a proof of the existence of a general rule of customary international law that prevents their use ?

We shall discuss in the following, the different attitudes towards the legality of nuclear weapons.

(1) The Arguments Of The Illegality Of Nuclear Weapons

According to Article 2 (4) of the United Nations Charter, Member States are under obligation "to refrain in their international relations from the threat or use of force". We believe that this obligation is not conclusive for the illegality of nuclear weapons, because it relates to "jus ad bellum", whereas as the legality of the nuclear weapons relates to "jus in bello". Therefore, it is necessary to look for other evidences of the illegality of nuclear weapons.

The arguments of the illegality of nuclear weapons may be summarized in two main arguments :

(A) The non-conformity of nuclear weapons with principles, and customary and conventional rules of international law.

(B) The evolution of the illegality of nuclear weapons under the United Nations.

We shall clarify the arguments of the attitude adopting the illegality of nuclear weapons in the following points :

- A. Nuclear weapons do not conform to principles and customary and conventional rules of international law.
- B. Banning nuclear weapons tests.
- C. Non-proliferation of nuclear weapons.
- D. Nuclear weapons reduction.
- E. Nuclear-free zones.
- F. The endeavours of the prevention of nuclear war.
- G. Banning nuclear neutron weapons.
- H. The prevention of the threat or use of nuclear weapons against the non-nuclear-weapon states.

A. Nuclear Weapons Do Not Conform To Principles, And Customary And Conventional Rules Of International Law

Nuclear weapons may be deemed illegal, since they do not conform to certain principles; and customary and conventional rules of international law as follows :

1. The St. Petersburg Declaration of 1868 formulated some major provisions concerning differentiation between legal and illegal instruments for waging war. Those provisions have retained their significance to date, which may be applicable to the nuclear weapons. Among the illegal instruments for waging war, the St. Petersburg Declaration listed weapons "which, uselessly aggravate the sufferings of disabled men, or render their death inevitable". Article 23 (e) of the Rules annexed to the 1907 Hague Convention Concerning The Laws And Customs Of War On Land, prohibits the employment of "arms, projectiles or material calculated to cause unnecessary suffering". The inhuman character of the neutron weapon, for example, which can exterminate all

life within the hitting area makes it subject to these provisions. The intensive radioactive emission of the neutron weapon dooms the population of the affected locality to certain and agonizing death, but leaves material property intact.

2. There is a general ban in the so-called "Martens clause" contained in the Preamble to the aforementioned 1907 Hague Convention. The clause reads as follows :

"Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience".

The meaning of this clause is that any variety of armaments not envisaged in the Hague Convention may be considered legal only if they conform to "the usages established among civilized peoples", as well as "the laws of humanity" and "the dictates of public conscience". Thus, the use, on any appreciable scale, of nuclear weapons involves the commission of crimes under international law in the Agreement On Military Trials of 1945, which provided for the establishment of an International Military Tribunal at Nuremberg.<sup>(262)</sup> The General Assembly of the United Nations, by its Resolution 95 (I) of December 11, 1946, affirmed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal".

3. The Convention On The Prevention And Punishment Of The Crime Of Genocide, adopted by the General Assembly in 1948 establishes Genocide, whether committed in peace or war, as a crime under international law which the Parties undertake to prevent and punish. Genocide is defined as actions, committed with intent, to exterminate fully or partially a national, ethnic, race or religious group as such. It may be said that the use of nuclear weapons may bring about the complete destruction of a nation which is subject to the Convention On Genocide.

4. Some writers are of the opinion that the use of nuclear and thermonuclear weapons in retaliation, on a large scale, would involve extensive fall-out which could inflict great harm on the populations of neutral states, a matter contradicting the duties which customary law imposes on belligerents. Moreover, they added, it infringes Article 1 of the Hague Convention of 1907 Concerning The Rights And Duties Of Neutral Powers And Persons In War On Land, which provides :

"The territory of Neutral Powers is inviolable".

5. The conduct of warfare causing indiscriminate civilian casualties has long been established as illegal. According to some writers, the use of neutron weapons, wiping out all life, would run, counter to all such rules firmly established in international law.

We can find the distinction between combatants and non-combatants in Article 25 of the Regulations Respecting The Laws And Customs Of War On Land annexed to the 1907 Hague Convention, it provides that :

"The attack or bombardment, by whatever means, of towns, villages, dwellings or buildings which are undefended is prohibited".

Also, Article 24 (3) of the 1923 Hague Rules of Aerial Warfare provides that :

"3. The bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighbourhood of the operations of land forces is prohibited.<sup>(263)</sup> In cases where the objectives specified in paragraph 2<sup>(264)</sup> are so situated, that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment".

Moreover, Article 22 of the aforementioned "Rules" provides that :

"Aerial bombardment for the purpose of terrorizing civilian population, of destroying or damaging private property not of military character or of injuring non-combatants is prohibited".

The legitimate aerial bombardment is, according to Article 24 (1) of the Hague Rules, "only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent". The questions which may be raised, "What is the meaning of a military objective in the time being ? and "Is it similar to that during the drafting of the Hague Rules of Aerial Warfare ?"

According to Carty, "the Strategic bombing of World War II gave a new meaning to the term. Its targets were not military forces as such but any enemy's fundamental strength". Taking account of the legal significance of the fact that nuclear strategies are a continuation of the policy of the area bombardment, Carty argues that "such an approach will prove to be characteristic of the juridical perspective on the legality of nuclear weapons as it arises at the end of 1950's and onwards".

The distinction between military objectives and non-military objects is also included in the Resolution adopted by the Institute Of International Law. On September 9, 1969, at its Session at Edinburgh, the Institute adopted a Resolution on "The Distinction Between Military Objectives And Non-Military Objects And Particularly The Problems Associated With The Weapons Of Mass Destruction". The rules included in the Resolution as indicated in its Preamble, form part of the principles to be observed in armed conflicts by any de jure or de facto government, or by any other authority responsible for the conduct of hostilities.

Paragraph 1 of the Resolution provides that :

"The obligation to respect the distinction between military objectives

and non-military objects as well as between person participating in the hostilities and members of the civilian population remains a fundamental principle of international law in force".

Paragraph 2 of the Resolution establishes a criterion for this distinction, it provides that :

"There can be considered as military objectives only those which, by their very nature or purpose or use, make an effective contribution to military action, or exhibit a generally recognized military significance, such that their total or partial destruction in the actual circumstances gives a substantial, specific and immediate military advantage to those who are in a position to destroy them".

Paragraph 5 of the Resolution provides that :

"The provisions of the preceding paragraphs do not affect the application of the existing rules of international law which prohibit the exposure of civilian populations and of non-military objects to the destructive effects of military means".

In paragraph 7, the Resolution provides that :

"Existing international law prohibits the use of all weapons which, by their nature, affect indiscriminately both military objectives and non-military objects, or both armed forces and civilian populations. In particular, it prohibits the use of weapons the destructive effect of which is so great that it cannot be limited to specific military objectives or is otherwise uncontrollable (self-governing weapons), as well as of "blind" weapons".

We referred before that among the principles of customary international law is "the principle of humanity" which prohibits the employment of any kind or degree of force not actually necessary for military purposes. This leads, in our opinion, to the illegality of the conduct of warfare which ignores the distinction between combatants and non-combatants, or between military objectives and exclusively civilian objectives. The advance in military technology must be accompanied with an equal advance in the legal rules that judge the production and use of the advanced military weapon. In other words, the advancement in military technology must not be used as a justification for the deterioration of the relevant international legal rules. It may be said that this is a meta-legal argument belonging to *lege ferenda*, but we believe that the aforementioned principle of humanity is a legal principle, and accordingly the relevant conventional rules must not contradict this customary principle.

6. Article 23 (a) of the Regulations annexed to the 1907 Hague Convention Respecting The Laws And Customs Of War On Land provides that:

"In addition to the prohibitions provided by special conventions, it is especially forbidden :

a. To employ poison or poisoned weapons".

The 1925 Geneva Protocol For The Prohibition Of The Use Of War Of Asphyxiating, Poisonous Or Other Gases, And Of Bacteriological Methods Of Warfare also prohibits the use in war of asphyxiating, poisonous or other gases and of all analogous liquids, materials or devices.

Since the nuclear explosions are followed by the spread of considerable "poisonous" substances in the form of radioactive dust, that they render death inevitable over a wide area, and great suffering over an even wider one, it may be said that these weapons violate, at least by analogy, the aforementioned Hague Regulations of 1907 and the Geneva Protocol of 1925.

B. Banning Nuclear Weapons Tests

Nuclear weapon tests cause grave direct harm to human health by polluting man's natural environment, which is especially true of nuclear explosion on the ground surface and in the atmosphere, which aggravate radiation hazards in various regions of the world and are a factor contributing to international political tensions.

In 1963, the Treaty Banning Nuclear Weapon Tests In The Atmosphere, In Outer Space And Under Water was concluded at Moscow, by the U.S.S.R., the United States and the United Kingdom. Now, more than one hundred states are Party to this Treaty, but the People's Republic of China and France refused to accede to it.

The Preamble of the Treaty makes provision for further steps to be taken in the direction of a comprehensive treaty to achieve the cessation of all nuclear weapon test explosions for all time and to put an end to the pollution of man's environment with radioactive fall-out. This commitment was later reaffirmed in the Treaty On The Non-Proliferation Of Nuclear Weapons.

Article 1 Paragraph 1 provides that :

"1. Each of the Parties to this Treaty undertakes to prohibit, to prevent, and to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control:

- a. in the atmosphere; beyond its limits, including outer space or underwater, including territorial waters or high seas; or
- b. in any other environment if such explosion causes radioactive debris to be present outside the territorial limits of the state under whose jurisdiction or control such explosion is conducted..."

Article 1 paragraph 2 provides that :

"2. Each of the Parties to this Treaty undertakes furthermore to refrain from causing, encouraging, or in any way participating in, the carrying out of any nuclear weapon test explosion, anywhere which would take

place in any of the environments described, or have the effect referred to, in paragraph 1 of this Article".

The Treaty is, according to Article 4, of unlimited duration. ( 55 )

In 1974, the U.S.S.R. and the United States signed The Treaty On The Limitation Of Underground Nuclear Weapons Tests. The Treaty bans underground explosions having a yield exceeding 150 Kilotons. In 1976, the U.S.S.R. and the United States signed the Treaty On Underground Nuclear Explosions For Peaceful Purposes which laid down definite rules for carrying out such explosions.

Some writers noted that the efforts concerning the problems of complete termination of nuclear weapons tests have not been altogether successful for the following reasons :

First : Not all of the nuclear Powers have acceded to the Moscow Treaty of 1963.

Second : Underground nuclear tests widely ranging in yield not covered by the ban.

The General Assembly of the United Nations concerned itself with the banning of nuclear weapons tests. In its Resolution 53 (XXXIX) of December 12, 1984, the General Assembly reaffirms its conviction that "an end to all nuclear testing by all States in all environments for all time would be a major step towards ending the qualitative improvement, development and proliferation of nuclear weapons, a means of relieving the deep apprehension concerning the harmful consequences of radioactive contamination for the health of present and future generation and a measure of the utmost importance in bringing the nuclear-arms race to an end".

### C. Non-Proliferation Of Nuclear Weapons

It was thought that the risk of war involving the use of nuclear weapons would be largely lessened by effective measures to prevent the emergence of new nuclear weapon States, to reinforce security guarantees for non-nuclear States to prevent deployment of such weapons in the territories of States where non-exist at present.

More than one Hundred States are Members of the Treaty On The Non-Proliferation Of Nuclear Weapons which was signed on July 1, 1968, and entered into force on March 5, 1970.

The Preamble to this Treaty recalls the determination expressed by the Parties to the Treaty Banning Nuclear Weapon Tests to seek to achieve the discontinuance of all test explosions of nuclear weapons for all time and to continue negotiations to this end.

The Parties to the 1968 Treaty, declare their desire "to further the easing of international tension and the strengthening of trust between

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states in order to facilitate the cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a treaty on general and complete disarmament under strict and effective international control.

The system of non-proliferation of nuclear weapons, under this Treaty, establishes obligations on the part of States in possession of nuclear weapons;<sup>(266)</sup> and Non-Nuclear Weapon States concerning non-proliferation of such weapons,<sup>(267)</sup> and concerning safeguards to prevent diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices.<sup>(268)</sup>

Some writers believe that this international arrangement - the Commitments of the Nuclear Weapon States and of the Non-Nuclear Weapon States to refrain from any steps leading directly or indirectly to the deployment of nuclear weapon on their territories - which would be binding on the Parties involved, would be a step towards a wide goal - the complete withdrawal of such weapons from the territories of foreign States - contributing thereby to the geographical limitation of nuclear weapons, and would eventually result in their total abolition.

We believe that the attitudes of the great Western Nuclear Powers contradict each other. On the one hand they decide that there is no specific rule of international law that prohibits the production, development, stockpiling and the use of nuclear weapons; and on the other hand they seek to prevent the emergence of new Nuclear Weapon States under a false argument, namely, this measure would lessen the risk of war involving the use of nuclear weapon. Moreover, we believe that it is possible to expect more potential risk of war involving the use of nuclear weapons as a result of the existence of two categories of states, the Nuclear Weapon States and the Non-Nuclear Weapon States. Furthermore, although the accession to the Treaty on the Non-Proliferation Of Nuclear Weapons is a matter of consent of the State Members of this Treaty, however it leads to the non-equality with the Nuclear Weapon States.

We believe that the legal attitude must be either the complete prohibition of the production, development, stockpiling and use of nuclear weapons for all states; or the acknowledgement that the use of such weapons by all states does not contradict any rule of international law.<sup>(269)</sup>

D. Nuclear Weapons Reduction

Termination of the continued growth of the strategic nuclear arsenals of states, to be followed by their quantitative reduction and qualitative limitation is of decisive significance for lessening the danger of nuclear weapons. In this regard we may refer to the Strategic Arms Limitation Talks, "Salt I" and "Salt II".

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1. The Strategic Arms Limitation Talks "Salt I"

These talks, held between 1969-1972, produced a number of agreements.

a. The 1971 Agreement On Measures To Reduce The Risk Of Outbreak Of Nuclear War (The Accidents Agreement).

b. The 1971 Agreement On Measures To Improve The Direct Communication Link (The Hot-Line Upgrade Agreement).

c. The 1972 Treaty On the Limitation Of Anti-Ballistic Missiles System. This Treaty, signed by President Nixon and Premier Brezhnev on May 26, 1972,<sup>(270)</sup> was the first Soviet-American strategic arms limitation agreement. This Treaty allows each state to establish Anti-Ballistic Missiles (ABM) defences only around the national Capital and one Inter-Continental Ballistic Missile (ICBM) site. This Treaty entered into force on October 3, 1972.

d. The Interim Agreement On Certain Measures With Respect To The Limitation Of Strategic Offensive Arms providing for a five-year freeze on (ICBM) deployment at then-existing levels. This Agreement was signed on May 26, 1972, and entered into force on October 3, 1972.

2. The Strategic Arms Limitation Talks "Salt II"

The Salt II negotiations did not prove so fruitful. Only one treaty was produced, namely, the Treaty On The Limitation Of Strategic Offensive Arms,<sup>(271)</sup> and this has been signed on June 18, 1979, but has never been ratified by the United States.

According to some writers, if this Treaty had come into effect in due time, then, as of January 1, 1981, the Soviet Union and the United States would have limited their strategic offensive arms to a total of not over 2,250 units and would have embarked on reduction.

The 1980s witnessed the initiation of new talks, Strategic Arms Reduction Talks (START), and Reduction of Intermediate-Range Nuclear Forces (INF). The INF Treaty was signed in Washington on December 8, 1987. The documents of ratification of this Treaty were exchanged in Moscow on May 31, 1988.

E. Nuclear-Free Zones

The idea of establishing Nuclear-Free Zones, first appeared in the mid-1950s. The Polish Foreign Minister Rapacki, in a speech before the United Nations General Assembly on October 2, 1957, proposed a Nuclear-Free Zone which was initially to embrace Poland, the Federal Republic of Germany and the German Democratic Republic, later to be extended to other Central European territories. Similar initiatives have been pursued since late 1957 for the Balkans, and the Adriatic and the Mediterranean Sea areas, and since 1961 for Northern Europe. According to the United Nations General Assembly Resolution 3472 B (XXX) of

December 11, 1975, on "The Question Of Nuclear Weapon-Free Zones", a Nuclear-Free Zone is defined as :

"Any zone, recognized as such by the General Assembly of the United Nations, which any group of States, in the free exercise of their sovereignty, has established by virtue of a treaty or convention whereby:

a. The Statute of total absence of nuclear weapons to which the zone shall be subject, including the procedure of the delimitation of the zone, is defined;

b. An international system of verification and control is established to guarantee compliance with the obligations deriving from the Statute".

The principal aim pursued by the establishment of any Nuclear-Free Zones is to prevent the proliferation of nuclear weapons on a regional scale to safeguard the states of that region against their possible involvement in a nuclear conflict, against the danger of nuclear war.

Some initiations for the establishment of Nuclear-Free Zones have led to international agreements as follows :

### 1. The Antarctic Treaty

The Antarctic Treaty was opened for signature on December 11, 1959, and entered into force on June 23, 1961. Article 1 of this Treaty stipulates that Antarctica<sup>(272)</sup> is to be used for peaceful purposes only, and prohibits any measures of a military nature in its area of application. Article 5 paragraph 1 of the Treaty prohibits any nuclear explosions and the disposal of radioactive waste in Antarctica. Paragraph 2 of the same Article exempts from this rule activities which are in conformity with international agreements to which all the Contracting Parties of the Antarctic Treaty are Parties. According to Article 8 of the Treaty, the observance of its obligations is ensured by a system of control.

### 2. The Outer Space Treaty

The United Nations Committee On The Peaceful Uses Of Outer Space established in 1958 has been responsible for the measures adopted regulating Outer Space activity, and all such measures recognise that outer space is :

- to be used for peaceful means; and
- that it is the common heritage of all mankind.

The Treaty On Principles Governing The Activities Of States In The Exploration And Use Of Outer Space Including The Moon And Other Celestial Bodies was signed on January 27, 1967.<sup>(273)</sup> In accordance with Article 2 of the Treaty, no area of the Outer Space is to be appropriated by any state; and according to Article 3, the exploration is to be conducted in accordance with international law including the

Charter of the United Nations. Article 4 of the Treaty stipulates that the Contracting Parties are not to place in orbit around the earth any objects carrying nuclear weapons and other kinds of weapons of mass destruction, or install such weapons on celestial bodies, or station weapons in outer space in any other manner. The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes.

The Outer Space Treaty has been revised and clarified by the Agreement Governing The Activities Of States On The Moon And Other Celestial Bodies adopted by the United Nations General Assembly Resolution of December 5, 1979 and entered into force on July 11, 1984. The Moon Agreement provides that the natural resources of the moon and other celestial bodies should be exploited as the common heritage of mankind in accordance with an international legal regime. Article 3 of the Agreement provides that "the States Parties shall not place in orbit around or other trajectory to or around the Moon objects carrying nuclear weapons ... or place or use such weapons on or in the Moon".

### 3. The Sea-Bed Treaty

The Treaty On The Prohibition Of The Emplacement Of Nuclear Weapons And Other Weapons Of Mass Destruction On The Sea-Bed And The Ocean Floor And In The Subsoil Thereof was signed on February 11, 1971, and entered into force on May 18, 1972. According to Article 1 of the Treaty, the Contracting Parties are forbidden to emplant or emplace on the sea-bed and the ocean floor and in the subsoil thereof beyond the outer limit of the 12-mile offshore zone any nuclear weapons or any other types of mass destruction weapons as well as structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons.

### 4. The Treaty Of Tlatelolco

The Treaty For The Prohibition Of Nuclear Weapons On Latin America was signed on February 14, 1967, and entered into force on April 25, 1969.<sup>(274)</sup> According to Article 1 of the Treaty, the Contracting Parties undertake to prohibit and prevent the testing, use, manufacture, production or acquisition by any means whatsoever of any nuclear weapons, as well as the receipt, storage, installation, deployment and any form of possession of any nuclear weapons.<sup>(275)</sup> The Contracting Parties, under Article 17 of the Treaty, have the right to the peaceful uses of nuclear energy.

The obligations of the Contracting Parties are guaranteed to be observed by the following Control System :

Firstly: Articles 7-11 of the Treaty establishes "Organismo para la Proscripcion de las Armas Nucleares en la America Latina (OPANAL) as an organization to ensure compliance with the Treaty obligations.

Secondly: According to Article 13 of the Treaty, the Contracting Parties are obliged to enter into multilateral or bilateral safeguard agreements

with the International Atomic Agency within a certain time limit, thereby submitting themselves to the Agency Control as well.

By Additional Protocol I, States from outside Latin America are required to apply the Treaty to territories within the region for whose international rules they are responsible. (276)

By Additional Protocol II, States with nuclear weapons are required to respect the denuclearized States of Latin America, and neither to use nuclear weapons in the region nor to threaten their use. (277)

### The United Nations Resolutions

The United Nations General Assembly adopted several resolutions on the denuclearization of Africa, (278) the Middle East, (279) South Asia (280) and the declaration of the Indian Ocean as a "Zone of Peace" (281) a plan proposed at the Lusaka Conference in September 1979. According to some writers, the concept of a "Zone of Peace" exceeds a mere denuclearization and calls for a total demilitarization and neutralization of the Indian Ocean.

### F. The Endeavours Of The Prevention Of Nuclear War

1. Some international instruments prohibit the possession of nuclear weapons.
  - a. According to the Peace Treaties of 1947, Italy, Romania, Hungary, Bulgaria and Finland are obliged not to possess, construct or test nuclear weapons.
  - b. In the Declaration Of Paris of October 23, 1954, the Federal Republic of Germany undertakes not to manufacture nuclear weapons within its territory.
  - c. The Austrian State Treaty of 1955 includes the same prohibition as the Peace Treaties of 1947.
2. Some international instruments to prevent the use of nuclear weapons, or try to reduce the risk of the outbreak of nuclear war.
  - a. The Agreement On Measures To Reduce The Risk Of Outbreak of Nuclear War between the Soviet Union and the United States was signed on September 30, 1971, and entered into force on the same date.
  - b. The Agreement On The Prevention Of Nuclear War between the Soviet Union and the United States which was signed on June 22, 1973, and entered into force on the same date. According to Article 1

of the Agreement, the Parties declare that the aim of their policy is to eliminate the danger of nuclear war and prohibit the use of nuclear weapons, and that they will act in such a way as to prevent the emergence of situations likely to cause a dangerous exacerbation of their relations, to avoid military confrontation and to rule out nuclear war between them, or between each Party and other countries.

- c. The Agreement On The Prevention Of Accidental Or Unsanctioned Use Of Nuclear Weapons between the Soviet Union and France<sup>(282)</sup> which was concluded on July 16, 1976, and entered into force on the same date.
  - d. The Agreement On The Prevention Of Accidental Outbreak Of Nuclear War between the Soviet Union and the United Kingdom which was signed on October 10, 1977, and entered into force on the same date.
3. Some international instruments, in particular in resolutions of the United Nations General Assembly, outlawing the use of nuclear weapons, such as :

A. The General Assembly adopted the Resolution 1653 (XVI) of November 24, 1961, on Nuclear Weapons.<sup>(283)</sup>

According to paragraph 1 of the Resolution, the General Assembly declares that :

- "a. The use of nuclear and thermo-nuclear weapons is contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations.
- b. The use of nuclear and thermo-nuclear weapons would exceed even the scope of war and cause indiscriminate suffering and destruction to mankind and civilization and, as such, is contrary to the rules of international law and to the laws of humanity;
- c. The use of nuclear and thermo-nuclear weapons is a war directed not against an enemy or enemies alone but also against mankind in general, since the people of the world not involved in such a war will be subjected to all the evils generated by the use of such weapons;
- d. Any state using nuclear and thermo-nuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilization".

In paragraph 2 of the Resolution, the General Assembly requests the Secretary General to ascertain the views of the Member States on the possibility of convening a special Conference for the purpose of signing a convention on the prohibition of such weapons.<sup>(284)</sup>

B. On the Soviet Union's initiative, the General Assembly adopted Resolution 2936 (XXVII) of November 29, 1972, on "the Non Use Of Force In International Relations And Permanent Prohibition Of The Use Of Nuclear Weapons".<sup>28</sup> In this Resolution, the General Assembly "solemnly declares, on behalf of the Member States of the Organization, their renunciation of the use or threat of force in all its forms and manifestations in international relations, in accordance with the Charter of the United Nations, and the permanent prohibition of the use of nuclear weapons.

C. The Soviet Union submitted a proposal to the General Assembly at its Thirty-First Session (1976) to conclude a World Treaty on the Non-Use of Force in International Relations. Article 1 of the Draft makes it incumbent on states to refrain from "the use of armed forces and any types of weapons, including nuclear and other weapons of mass destruction.

D. The General Assembly adopted Resolution 100 (XXXVI) of December 9, 1981, On The Prevention Of Nuclear Catastrophe. In this Resolution, the General Assembly declares that states and statesmen that resort first to the use of nuclear weapons will be committing the gravest crime against humanity.

E. The General Assembly also adopted Resolutions On The Prohibitions Of The Development And Manufacture Of New Types Of Weapons Of Mass Destruction And New Systems Of Such Weapons. In its Resolution 2 (XXXIX) of December 12, 1984, the General Assembly calls upon "the States Permanent Members of the Security Council as well as upon other military significant states to make declarations, identical in substance, concerning the refusal to create new types of weapons of mass destruction and new systems of such weapons, as a first step towards the conclusion of comprehensive agreement on this subject, bearing in mind that such declarations would be approved thereafter by a decision of the Security Council.

#### G. Banning Nuclear Neutron Weapons

We referred to the inhuman character of the neutron weapons. On March 10, 1978, eight states, namely Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Mongolia, Poland, Rumania and the Soviet Union, submitted to the Committee On Disarmament a Draft International Convention On The Prohibition Of The Production, Stockpiling, Deployment And Use Of Nuclear Neutron Weapons

In its Resolution 92 K (XXXVI) of December 9, 1981, the General Assembly approves for the first time the prohibition of the neutron weapon, and requests the Committee On Disarmament to start without delay negotiations in an appropriate organizational framework with a view to concluding a convention on the prohibition of the production, stockpiling, deployment and use of nuclear neutron weapon.

H. The Prevention Of The Threat Or Use Of Nuclear Weapons Against The Non-Nuclear-Weapon States

1. The General Assembly adopted Resolution 57 (XXXIX) of December 12, 1984, on the "Conclusion Of An International Convention On The Strengthening Of The Security Of Non-Nuclear Weapon State Against The Use Or Threat Of The Use Of Nuclear Weapons",<sup>(287)</sup> in which it declares its awareness that "unconditional guarantees by all Nuclear-Weapon States not to use nuclear weapons under any circumstances against the Non-Nuclear Weapon States having no nuclear weapons on their territories should constitute an integral element of a mandatory system of norms regulating the relations between the Nuclear-Weapon States, which bear the primary responsibility of preventing a nuclear war, thus sparing mankind from its devastating consequences". The General Assembly, in this Resolution, also "expresses its regret that specific difficulties related to differing perceptions of security interest of some Nuclear-Weapon States and Non-Nuclear-Weapon States have once again prevented the Conference On Disarmament from making substantive progress towards the achievement of an agreement".

Some writers believe that the desire of some Nuclear Powers to have a wide choice of options for using nuclear weapons and maintain their nuclear forces in foreign territories, is the reason behind the problem of strengthening security gaurantees for Non-Nuclear States.

2. The General Assembly also adopted Resolution 58 (XXXIX) of December 12, 1984 on the "Conclusion Of Effective International Arrangements To Assure Non-Nuclear Weapon States Against The Use Or Threat Of Use Of Nuclear Weapons",<sup>(288)</sup> in which it recommends that "the Conference on Disarmament should actively continue negotiations with a view to reaching early agreement and concluding effective international arrangements to assure Non-Nuclear Weapons States against the use or threat of use, taking into account the wide-spread support for the conclusion of an international convention and giving consideration to any other proposals designed to secure the same objective".<sup>(289)</sup>

(2) The Arguments Of The Legality Of Nuclear Weapons

We shall clarify the arguments of the legality of nuclear weapons in the following points :

- A. The legality of nuclear weapons under customary and conventional rules of international law.
- B. The legality of nuclear weapons in the light of the relevant United Nations Declarations.

A. The Legality Of Nuclear Weapons Under Customary And Conventional Rules Of International Law

1. It is said that the Declaration of St. Petersburg of 1868 was

not aimed at weapons of mass destruction since, in the case of projectiles under four hundred grammes in weight, the cruelty of the weapon was out of proportion to its destructive potential.

2. As referred before, Article 23 (e) of the Regulations annexed to the 1907 Hague Convention IV Respecting The Laws And Customs Of War On Land provides that :

"In addition to the prohibitions provided by special Conventions, it is especially forbidden :

(e) To employ arms, projectiles, or material calculated to cause unnecessary suffering".

According to the arguments of illegality, the use of the nuclear weapons is considered violating the rule expressed in the said Article 23 (e), and therefore is forbidden. Some writers maintain that the main criterion of Article 23 (e) is "unnecessary suffering" which is interpreted as unnecessary when it is not justifiable by military necessity, or when the suffering is disproportionate in view of the military gain derived from the employment of the weapons. It is also added that weapons which do not always cause immediate death are not generally outlawed, and one might consider that in these cases there might be a possibility for the victim to recover. Judging from the somatic effects of a nuclear weapon used against the military personnel of the enemy, the only employment outlawed by this rule is that which causes illness after a considerable amount of time, but does not disable a combatant from fighting or fulfilling a military task.

Carty adds another argument, that is the nuclear weapons, as mass destruction weapons are by definition incapable of distinguishing civilian and military targets. So it could be said that they are likely to cause indiscriminate suffering and unnecessary pain contrary to the aforementioned Article 23(e). Yet, Carty continues, it is legitimate to balance military against civilian interest. As long as one is doing this much, actions with nuclear weapons could be said to have the object of weakening the military within the terms of the St. Petersburg Declaration.<sup>(290)</sup> Therefore, it is not possible to say that their use would necessarily be always illegal.

Some writers add that it is not possible to outlaw the use of nuclear weapons, due to the genetic defects<sup>(291)</sup> caused by the use of such weapons, under the rule forbidding unnecessary suffering. If a nuclear weapon is employed to gain military advantage, the side-effect of genetic damage - which is not the damage that the weapon is calculated to cause - is not disproportionate.

Also, according to some writers, if an attack against military

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objectives causes excessive damage in relation to the concrete and direct military advantage anticipated, the attack is forbidden. Under this view, mass destruction ground bursts of nuclear weapons producing huge amounts of early fall-out are always outlawed. Thus, they believe that the restricted use of low-yield in air bursts to attack military objectives (tactical use) does not seem to be covered by the prohibition. They also add accurate strategic weapons of moderate yield employed against highly defined military objectives such as missile silos even in a ground burst, if the early fall-out were not to produce excessive collateral damage to civilians.

3. The principles which distinguish between military and civilian objectives which are still accepted as customary international law, were restated in Part IV of the Additional Protocol I of 1977 especially Articles 48,<sup>(292)</sup> 51,<sup>(293)</sup> 52,<sup>(294)</sup> 54,<sup>(295)</sup> and 55.<sup>(296)</sup> According to some writers, as far as these principles are concerned, the interpretation in the declarations of some states that the Protocol does not outlaw nuclear weapons as such is not important. But, in the opinion of Carty, lawyers who oppose the legality of the use of nuclear weapons are perhaps too readily helped along in their reasoning by the apparent consistency with which basic rules of humanitarian law seems always to contain a distinction between civilian and combatant and, related to this, to reassert the doctrines of proportionality and the prohibition of indiscriminate use of force. As regards the aforementioned declarations, Carty notices that it is somewhat strange that the assembled international community did not bother to make any objection to these declarations. Of the 96 States participating, no other State took particular and direct exception to the declarations.

Carty refers to the view that those declarations are a recognition of two salient facts about the risk of future strategic warfare. First, nuclear weapons are virtually unusable in the context of classical warfare. Second, and related to this, their very quality as massively indiscriminate weapons gives them a dual character as annihilatory weapons, and as a means of political dissuasion. It is their virtual uselessness in classical warfare which is taken to be their main function. Strategic warfare always contained within itself a feature which rendered classical warfare obsolete. It may also be added that the Warsaw Pact has joined the abstaining voters in the periodic United Nations debates on the issue of the legality of the use of nuclear weapons.

As Carty concluded, this argument leads to endorse the view of Schwarzenberger that it appears impossible to state with any confidence that near total air and missile warfare will be avoided simply because of the contemporary customary laws of war. The rules of war are obsolete not because of the advent of especially destructive weapons such as nuclear weapons, but because they are incompatible with the total war assumptions of which nuclear weapons are an integral part.

4. As mentioned before, The 1925 Geneva Protocol for the "Prohibition Of The Use In War Of Asphyxiating, Poisonous Or Other Gases, And Of Bacteriological Methods Of Warfare" provides that :

"the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilized world".

According to some writers, the definition of nuclear weapons in Protocol III of 1954, gives no support to conclude from it that all nuclear weapons and all means of their employment constitute poisoning in the sense of the prohibition of poison or poisonous gas, although this definition includes means of mass destruction which destroy by distribution of radioactive isotopes, producing mass poisoning and local fall-out.

As noticed by some writers, the aforementioned description of the 1925 Geneva Protocol does not include the radiation of gamma rays and that caused by neutrons in the first period of initial radiation, because this kind of radiation, does not involve introducing a damaging substance into the human body. According to these writers, air burst of a nuclear device normally produces practically no local fall-out, and the residual or global fall-out cannot be considered to be analogous to gas warfare. Since the prohibition covers only the employment of weapons where the effect of the damaging gas is one of the main results and not simply a side effect of the weapon, air bursts of nuclear warheads, at least of a lower yield, are not banned by this rule.

### B. The Legality Of Nuclear Weapons In The Light Of The Relevant United Nations Declarations

As referred before, the United Nations adopted Declarations on the Prohibition of the Use of Nuclear and Thermonuclear Weapons. It is the opinion of some writers that these declarations could not create new law, and the voting demonstrates the conflicting views of states in this question.

### (3) The Arguments Of The Conditional Legality Of Nuclear Weapons

A. According to some writers, we may refer to some manuals of military law<sup>(297)</sup> which adopt the principle that the use of nuclear weapons is lawful provided that the laws of war are applied as examples of the conditional legality of nuclear weapons. However, these writers added that, even, if it is assumed that the use of nuclear weapons is lawful under certain conditions, the use of nuclear and thermonuclear weapons delivered by bomber and missile in pursuance of a policy of deterrence and involving massive retaliation would still be unlawful for certain compelling reasons. The deterrent principle rests on the threat of massive retaliation, and this even in reply to attack with conventional weapons to official Western statements.<sup>(298)</sup>

According to these writers, the distinction between conditional and absolute illegality has important legal effects. If the conditional view be taken, then preparation for nuclear war, including testing, deployment and transport of warheads, may not be characterized as

illegal - unless they are specifically designed for what would be in any case an illegal threat or use of force. On the principle of absolute illegality, normal legal powers and privileges would not extend to preparation and transport of the weapons. Thus, if there is a right of passage for warships through the territorial sea, it could hardly apply to vessels carrying nuclear weapons. Treaties relating to the supply, maintenance or manufacture of these weapons would also be void.

B. We referred before to the right of self-defence under the United Nations Charter. Being recognized by Article 51 of the United Nations Charter, and hence based on the general principles of law, the right to self-defence is, therefore, essentially a legal concept.

According to some writers, it would be legitimate to use nuclear weapons to repel a nuclear attack either at the very outset of the exercise of the right to self-defence or at any stage during the exercise, irrespective of the legality of nuclear weapons. But, the force used in self-defence must be proportionate to and commensurate with the quality and character of the attack which it is intended to meet. It may also be added that the right to self-defence commences as soon as the armed attack is launched and exists only so long as the attack continues. As soon as the attack is permanently repelled, the use of further force must cease at once.

C. According to some writers, it is maintained, generally, that aggression as a breach of the peace does not justify a breach of the rules of the laws of war by way of reprisals. Therefore, neither the right to take reprisals nor the right to self-defence generally justify the use of nuclear weapons by the defender, if this use is illegal pursuant to the laws of war. But, faced with the immediate danger of being completely destroyed by an illegal attack with conventional weapons, the defending state might be granted the right to employ nuclear weapons to damage the forces of the aggressor state as reprisal and in the exercise of self-defence, even if this use would normally infringe the laws of war.

According to these writers, the prohibition against attacking the civilian population by way of reprisals, included in Article 51 paragraph 6 of the Additional Protocol I of 1977, is not applied to the use of nuclear weapons.

#### (4) Conclusion

A. We shall refer to the following remarks, noted by some writers, which relate to the legality of the nuclear and thermo-nuclear weapons :

1. The workability of a system of legal control of weapons depends on their technological character, <sup>(299)</sup> as well as on the realities of politics. <sup>(300)</sup>

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2. Self-preservation is not a legal right but an instinct and no doubt when this instinct comes into conflict with legal duty either in a state or an individual, it often happens that the instinct prevails over the duty. But, we ought not to argue that because states or individuals are likely to behave in a certain way in certain circumstances, therefore, they have a right to behave in that way.

3. The sovereignty concept, which is still basically intact so far as the Great Powers are concerned, would be transformed by the existence of an international authority empowered to penetrate and use the requisite policing force regardless of frontiers; a consideration underlined by the fact that every state involved has made nuclear development a supremely political function, closely monopolised by the state.

4. The role of the United Nations, and particularly the General Assembly, relating to the legality of nuclear weapons, has been affected by the following two factors :

a. where matters of high policy of the state are concerned, the influence of international law is minimal.

b. It is very easy to underestimate the relevance of moral arguments in world affairs.

However, there is no evidence that, in a crisis, governments deliberately choose instruments of policy outside the law; and to deny the existence of legal standards is to free governments from the burden of justification.

B. Since 1945, nuclear weapons have not been used, but, as noticed by some writers, it would be very difficult to establish that a rule of customary international law has developed.

There is also no general convention expressly prohibiting the use of nuclear weapons. The efforts of a number of United Nations Member States to promote, within the United Nations framework, a treaty prohibiting the use of nuclear weapons have not been successful.

As referred before, the United Nations Declarations on the prohibition of the use of nuclear weapons demonstrates the conflicting views of states on the question. According to some writers, the general statements of a number of Non-Nuclear Weapon States cannot create a rule of international law without the concurring opinion and practice of the Nuclear-Weapon States. It is also noticed that a number of Non-Nuclear-Weapon States do not share the conviction that these weapons are in general illegal.

The juristic attitude of considering the use of nuclear weapons illegal is based on the approach which judges the legality of the use of these weapons by applying the various specific rules of warfare.

Second: The Legality Of Chemical Weapons'

(1) General

The use of poisoned arrows and of poisonous fumes are old means of war.

Modern chemical weapons in various forms were used on a large scale during the First World War. According to Thomas and Thomas about 100 principal gas attacks occurred, causing over one million injuries and 91, 198 deaths. Since that war, there have been only a few instances of the use or alleged use of chemical weapons.

Between the two World Wars, Italy used chemical weapons against Ethiopia. Although Italy declared its intention to abide by the 1925 Geneva Gas Protocol, it argued that the Protocol did not forbid the use of gas on legal grounds as reprisals not in kind, but against barbarians and illegal means of warfare of another nature. In the Sino-Japanese war, Chemical weapons were used by Japan.

During the Second World War, gas was not used in the European theatre of war; but few instances of were reported of Japanese use of choking and vomiting gases against United States forces in Guadal Canal and New Guinea. This use was discontinued after the United States warnings of retaliation.

After the Second World War, gas agents were not used in the Korean War. According to Thomas and Thomas, political motivation could be behind the abstention of the United States from the use of Chemical weapons, for the Korean conflict was a limited war with limited political objectives against the enemies including the People's Republic of China. In the Vietnam War, the United States used chemical weapons such as tear gas and herbicides. The United States contended that the gas was used as a "humanitarian" weapon. Farer refers to a statement of the Director of the United States Arms Control And Disarmament Agency, in 1966, before a United Nations Committee, he says, "In Vietnam, when the Vietcong take refuge in a village and use innocent civilians and prisoners as shields, would it be more humane to use rifle and machine gun, fire and explosive grenades to dislodge and destroy the Vietcong and in so doing risk the lives of the innocent and wounded hostages?" But Farer refers also to news reports in 1969, that the United States Command in Saigon, responding to a Pentagon request for an evaluation of the use of tear gas, had stated that the bulk of the principal gas employed "had been used against enemy camps, bunkers and caves", and had "rarely been used to save civilian lives or property".

In 1963 charges were made against the United Arab Republic (Egypt) of the use of poison gases against royalist villages in Yemen. In 1967, gas raids were, again, reported. Charges were also made against the Soviet Union of the use of tear gas in Afghanistan. Most recently, it was reported that Iraq used chemical weapons against Iranian troops.

(2) The Legality Of Chemical Weapons And Customary International Law

There are two opinions, one maintains that according to customary international law, the use of some chemical weapons is illegal, the other considers the use of all chemical weapons except herbicides illegal.

According to Thomas and Thomas, the conduct of states indicates a belief in the existence of a binding customary norm prohibiting at least the first use of the lethal or severely injurious types of chemical weapons. But they believe that chemical incendiary weapons, including flamethrowers and napalm weapons, and smokes are accepted as legal.

We are inclined to favour the opinion of other writers who believe that the prohibition of chemical weapons is founded in customary international law. It developed as part of the customary prohibition of the use of poison. There is also sufficient evidence of state opinio juris specifically relating to chemical weapons, which shows that the instances of use of such weapons, lethal, incapacitating and irritants, constituted breaches of then existing international obligations. In supporting their opinion, these writers add that an opinio juris was formed after the First World War to the effect that these kinds of weapons were indeed prohibited which developed during the 1920's and 1930's. The few instances of the use of chemical weapons since the First World War met severe protest from the international community.

As far as herbicides are concerned, it seems that the expressions of opinio juris are not numerous enough to constitute a customary rule.

(3) The Legality Of Chemical Weapons And Treaty Law

We may distinguish between three periods in this regard, the period before the First World War, the period between the two World Wars and the period after the Second World War. This distinction does not mean the existence of three different stages. The distinction aims to clarify the different treaties concluded during each period.

A. The Period Before World War I:

1. The Hague Declaration Of July 29, 1899

The Hague Declaration concerning the prohibition of the use of projectiles diffusing asphyxiating gases of July 29, 1899, provides that :

"The Contracting Powers agree to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases". The Declaration entered into force on September 4, 1900.

This Declaration was derived from the general principles of customary international law prohibiting the use of poison and materials causing unnecessary suffering.<sup>(302)</sup> To the extent that the specific prohibition embodied in this Declaration, it is applicable, as a particular rule of customary international law, to all states and not merely those which have formally ratified or acceded to it,<sup>(303)</sup> and the Declaration's general participation clause would cease to be relevant.

As noted by Thomas and Thomas, the addition of the word "deleterious" to the word "asphyxiating", in defining the type of gas, would extend the meaning to any gas which would be hurtful or injurious to life or health. This would broaden the definition to include not only the killing or gravely injurious gases, but also those such as some incapacitating and riot control gases which may have injurious or harmful effects on health.

The Declaration was criticized by Thomas and Thomas, who refer, inter alia, to the use of the words "sole object" as permitting a literal interpretation to the effect that any projectile diffusing even gravely injurious gases which had objects other than the diffusion of such injurious gases would be permitted although this was not the interpretation intended by the drafters. In the opinion of Thomas and Thomas, to have effectuated their true intention, the drafters should have written "primary" or "main" rather than "sole" object. Due to this drafting, some writers suggest that the Declaration may have been overtaken by the more comprehensive prohibition in the 1925 Geneva Protocol.

## 2. The Hague Regulations Of October 18, 1907

Article 23 of the Regulations annexed to the Hague Convention Respecting The Laws And Customs Of War On Land provides that :

"In addition to the prohibitions provided by special conventions, it is especially forbidden :

a) To employ poison or poisoned weapons".

This prohibition of the use of poison or poisoned weapons is a codification of a customary rule of international law, consequently it confirms a rule already obligatory upon all states.

According to Thomas and Thomas, poison is a substance which produces chemically<sup>(304)</sup> an injurious or deadly effect when introduced into an organism in relatively small quantities.

According to the same authority, toxic chemical agents which make up a large part of chemical warfare would automatically be poisonous under the various definitions of poison. A toxic substance is a poisonous substance, one which kills or injures through chemical or physicochemical action on the body; and the use of such a substance to

reduce the military effectiveness of the enemy by killing or injuring the members of the armed force would constitute a use of a poison in warfare. The incapacitating chemical agents and riot control chemical agents are toxic, with chemical reactions on the system which may, in cases of overexposure, cause serious illness or death. Therefore, they would fall under the label of poison.

## B. The Period Between The Two World Wars

### 1. The Treaty Of Versailles Of June 28, 1919

On June 28, 1919, a Peace Treaty with Germany was signed at Versailles. This Treaty proscribed the manufacture and importation of "asphyxiating, poisonous or other gases and all analogous liquids, materials or devices in Germany, while referring to an already existing prohibition of use, Article 171 of the Treaty provides that :

"The use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices being prohibited, their manufacture and importation are strictly forbidden in Germany.

The same applies to materials for the manufacture, storage and use of the said products or devices".

The United States never ratified the Paris Peace Treaties,<sup>(305)</sup> but in the Treaty Restoring Friendly Relations Between The United States And Germany of August 25, 1921, certain portions of the Versailles Treaty were incorporated, including the version of the Article on the asphyxiating gas.

### 2. The Treaty Of Saint-Germain En-Laye Of September 10, 1919

On September 10, 1919, a Peace Treaty between the Allies and Austria was signed at Saint-Germain. Article 135 of this Treaty, which includes some changes to Article 171 of the Treaty of Versailles, provides that :

"The use of flame-throwers asphyxiating, poisonous or other gases, and all similar liquids, materials or devices being prohibited, their manufacture and importation are strictly forbidden in Austria.

Material specifically intended for the manufacture, storage or use of the said products or devices is equally forbidden".

### 3. The Treaty Of Neuilly-Sur-Seine Of November 27, 1919

On November 27, 1919, a Peace between the Alliance and Bulgaria was

signed at Neuilly. This Treaty followed the wording adopted by the Treaties with Austria and Hungary in prohibiting flamethrowers.

#### 4. The Treaty Of The Trianon Of June 4, 1920

On June 4, 1920 a Peace Treaty was signed with Hungary at the Trianon. Article 119 of this Treaty is identical to Article 135 of the Treaty of Saint-Germain with Austria.

#### 5. The Washington Treaty In Relation To The Use Of Submarines And Noxious Gases In Warfare Of February- 6, 1922

The Washington Conference On Disarmament, <sup>(306)</sup> led to the conclusion of a Treaty In Relation To The Use Of Submarine And Noxious Gases In Warfare on February 6, 1922. Article 5 of the Treaty provides that :

"The use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, having been justly condemned by the general opinion of the civilized world and a prohibition of such use having been declared in treaties to which a majority of the Civilized Powers are Parties.

The Signatory Powers, to the end that this prohibition shall be universally accepted as a part of international law binding alike the conscience and practice of nations, declare their assent to such prohibition, agree to be bound thereby as between themselves and invite all other civilized nations to adhere thereto".

This Treaty never entered into force because France did not ratify it. <sup>307)</sup>

#### 6. The Geneva Protocol For The Prohibition Of The Use In War Of Asphyxiating, Poisonous Or Other Gases, And Of Bacteriological Methods Of Warfare, Of June 17, 1925

The Geneva Protocol of June 17, 1925, was adopted by the International Conference On The Control Of The International Trade In Arms, Munitions And Implements Of War, which had been convened by the Council of the League of Nations and met in Geneva in May and June, 1925. <sup>(308)</sup> The Protocol entered into force on February 8, 1928. Like earlier agreements referred to above, this Protocol was derived from the general principles of customary international law prohibiting the use of poison and materials causing unnecessary suffering.

The Geneva Protocol provides that :

"Whereas the use in war of asphyxiating, poisonous or other gases, and

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of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilized world; and

whereas the prohibition of such use has been declared in Treaties to which the majority of Powers of the World are Parties; and

To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations;

Declare :

The High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound as between themselves according to the terms of this declaration".

It is to be noted that the scope of the Protocol's terminology is comprehensive, and its broad proscription of chemical agents far exceeds the very restrictive prohibition of the Hague Gas Declaration of 1899. According to some writers, the Protocol not only covers lethal or incapacitating agents, but also irritating agents such as lachrymatory gases (tear gases),<sup>(309)</sup> and herbicides which its toxic effect mainly works on plants. Under the Protocol the use in war of all chemical agents or substances is prohibited whether it is gaseous, liquid or solid. The words "gases" and "liquids" are expressly used; and solid substances would fall under "analogous materials".

A number of States have ratified the Geneva Protocol with a reservation as regards reciprocity.<sup>(310)</sup> If a state uses chemical weapons first, its enemies are thus free from their obligation under the Protocol, but they still remain bound by the corresponding customary rules.

C. The Period After The Second World War

1. The Peace Treaties With Italy, Bulgaria, Finland, Hungary And Romania Of February 10, 1947.

On February 10, 1947, Peace Treaties were signed between the Allies on the one side and Italy, Bulgaria, Finland, Hungary and Romania on the other. In these Treaties, the defeated State agreed not to manufacture or possess either publicly or privately, certain types of war materials including asphyxiating, lethal, toxic or incapacitating substances intended for war purposes or manufactured in excess of civilian requirements; propellants, explosives, pyrotechnics, or liquified gases destined for the propulsion, exploding, charging, or filling of , or for use in connection with war materials in the above categories, not capable of civilian use or manufactured in excess of civilian

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requirements; and factories and tool equipment especially designed for the production and maintenance of the material enumerated and not technically convertible to civilian use.

2. The Peace Treaty With Austria Of 1955

This Peace Treaty stipulates that Austria was not to "possess, construct experiment" with "asphyxiating, vesicant or poisonous materials or biological substances in quantities greater than or of types other than, are required for legitimate civil purposes, or any apparatus designed to produce, project or spread such materials or substances for war purposes".

3. The Western European Union

The Treaty Of Economic, Social And Cultural Collaboration And Collective Self-Defence was signed at Brussels on March 17, 1948.<sup>(311)</sup> When the French National Assembly, on August 30, 1954, refused to ratify the Treaty On The European Defence Community, a need was felt among Western nations to find other ways and means of incorporating Germany into the Western defence system. A Conference was held in London from September 28 to October 3, 1954, to discuss the problem. This conference resulted in a series of Protocols, signed at Paris on October 23, 1954, and were ratified on May 6, 1955.<sup>(312)</sup>

Article 2 of Protocol III On The Control Of Armaments provides that:

"The High Contracting Parties, Members of Western European Union also take note and record their agreement with the undertaking given by the Chancellor of the Federal Republic of Germany in the same Declaration that certain types of armaments will not be manufactured in the territory of the Federal Republic of Germany,<sup>(313)</sup> except that in accordance with the needs of the armed forces a recommendation for an amendment to, or cancellation of the content of the list of these armaments is made by the competent Supreme Commander of the North Atlantic Treaty Organization, and if the Government of the Federal Republic of Germany submits a request accordingly, such an amendment or cancellation may be made by a resolution of the Council of Western European Union passed by a two-thirds majority. The types of armaments referred to in this Article are listed in Annex III".

Article 3 of this Protocol provides that :

"When the development of atomic, biological and chemical weapons in the territory on the mainland of Europe of the High Contracting Parties who have not given up the right to produce them has passed the experimental stage and effective production of them has started there, the level of stocks that the High Contracting Parties concerned will be allowed to hold on the mainland of Europe shall be decided by a majority of vote of the Council of Western European Union".<sup>(314)</sup>

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4. The Outer Space Treaty Of 1967

We referred before to the Treaty On Principles Governing The Activities Of States In The Exploration And Use Of Outer Space Including The Moon And Other Celestial Bodies, which was signed on January 27, 1967. This Treaty was mainly drafted to restrain nuclear weapons, but it would also cover chemical and biological weapons, since the Parties to the Treaty agreed not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons or any other kinds of weapons of mass destruction on celestial bodies, or station such weapons in outer space in any other manner. Chemical and biological weapons fall within the definition of "weapons of mass destruction".

(4) The Legality Of Chemical Weapons And The United Nations

1. The concern of the United Nations with chemical and biological weapons was as early as August 1948, when the former Secretary General of the United Nations Mr. Trygvie Lie, urged action of the United Nations looking toward the adoption of a treaty for preventing or controlling the manufacture of chemical and biological weapons.

2. On April 8, 1953, the General Assembly of the United Nations adopted the Resolution 704 (VII), which encouraged the continuation of disarmament negotiations and referred to the chemical and biological weapons as a part of a general phrase on "the elimination and prohibition of all major weapons, including bacteriological adaptable to mass destruction".

3. On November 28, 1953, the General Assembly adopted Resolution 715 (VIII), by which it instructed the Disarmament Commission to prepare a disarmament treaty which included the elimination and prohibition of bacteriological, chemical and all other weapons of mass destruction.

4. After its establishment, the Eighteen Nations Disarmament Committee, began meeting in Geneva in March, 1962. Various draft general and complete disarmament treaties have been discussed, all containing references to the need to eliminate stockpiling of chemical, biological and other weapons of mass destruction, the cessation of the production of such weapons, and the elimination of all means of delivery of such weapons.

5. In its Resolution 2162 (XXI) of December 5, 1966, the General Assembly considers that "weapons of mass destruction constitute a danger to all mankind and are incompatible with the accepted norms of civilization"; calls for "strict observance by all states of the principles and objectives of the Protocol For The Prohibition Of The Use In War Of Asphyxiating, Poisonous Or Other Gases, And Bacteriological Methods Of Warfare, signed at Geneva on June 17, 1925, condemns all actions contrary to those objectives"; and invites "all states to accede to the Geneva Protocol of June 17, 1925".

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6. On December 20, 1968, by its Resolution 2425 (XXIII), the General Assembly requested the Secretary General to appoint a group of experts to study the effects of chemical and bacteriological (biological) weapons. On July 1969, in submitting the expert's report entitled "Chemical And Bacteriological (Biological) Weapons And The Effects Of Their Possible Use", the Secretary General recommended that Members of the United Nations, inter alia, "make a clear affirmation that the prohibition contained in the Geneva Protocol applies to the use in war of all chemical, bacteriological and biological agents including tear gases and other harassing agents - which now exist or which may be developed in the future". On December 16, 1969, the General Assembly adopted Resolution 2603 (XXIV), by which it declares "as contrary to the generally recognized rules of international law, as embodied in the Protocol For The Prohibition Of The Use In War Of Asphyxiating, Poisonous Or Other Gases, And Of Bacteriological Methods Of Warfare, signed at Geneva on June 17, 1925, the use in international armed conflicts of :

- a. Any chemical agents of warfare - chemical substances, whether gaseous, liquid or solid - which might be employed because of their direct toxic effects on man, animals or plants;
- b. Any biological agents of warfare - living organisms, whatever their nature, or incentive material derived from them - which are intended to cause disease or death in man, animals or plants, and which depend for their effects on their ability to multiply in the person, animal or plant attacked.

As regards the illegality of the use of herbicides in warfare, it may be said that, in the light of reservations and opposition expressed during the United Nations debates,<sup>(315)</sup> the expressions of opinio juris are not as numerous as would be necessary for the formation of a customary rule.

7. On December 16, 1971, the General Assembly adopted Resolution 2862 (XXVI), by which it adopted The Convention On The Prohibition Of The Development, Production And Stockpiling Of Bacteriological (Biological) And Toxin Weapons And On Their Destruction.

8. The United Nations General Assembly adopted many resolutions, such as its Resolution 65 (XXXIX) of December 12, 1984, which comprises Parts A,<sup>(316)</sup> B,<sup>(317)</sup> C,<sup>(318)</sup> D and E.<sup>(319)</sup> This Resolution reaffirms the necessity of strict observance by all states of the principles and objectives of the Geneva Protocol of 1925; and call for strict observance of existing international obligations regarding prohibitions on chemical and biological weapons.

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Third: The Legality Of Biological Weapons

(1) General

Biological weapons for the conduct of war are living organisms, regardless of their nature, or infectious materials extractable from them which are intended to cause disease to or the death of humans, animals or plants, and the effect of which depends on their ability to multiply in the organism of a person, animal or plant affected by them. Such weapons already exist in nature. For the purpose of legal regulation, toxins produced by living organisms are treated together with biological weapons, although they constitute chemical weapons from the point of view of natural science.

According to Thomas and Thomas, crude methods of biological war were utilized early in the history of conflict. In ancient times bodies of cholera and plague victims were dropped over the walls of beleaguered cities, or left on the ground the enemy was expected to occupy. Rivers and wells were often polluted so as to produce disease by throwing the carcasses of animals or corpses of men into them.

In the First World War, there is no proof that biological weapons were used, although it was claimed that Germany dropped garlic and sweets infected with cholera germs in Romania and Italy.

In the Second World War, it was claimed that Japan made a few limited attempts to employ biological weapons. For example, Japan's alleged use of plague and typhus biological weapons against the Mongolian People's Republic in 1939, and against China in 1940-42.

Thomas and Thomas refer to the charges made against the United Nations forces and the United States, during the Korean War, that they had used "cruel and inhuman" bacteriological warfare against the inhabitants of North Korea and Northeast China. Also, the use of ancient and very unsophisticated forms of biological warfare have been reported in Vietnam.

(2) The Legality Of Biological Weapons And Customary International Law

A customary rule prohibiting the use of biological weapons, may be said to exist, the evidence of which can be found in the universal support of a series of pertinent United Nations General Assembly Resolutions, which affirmed the binding character of the "principles and objectives" of the 1925 Geneva Protocol as "generally recognized rules of international law". The abstention from use of the biological weapons while they are military feasible could well indicate

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a belief in a customary rule.

However, some writers believe that it is permissible to use of biological weapons, and also possible as a retaliation in kind against a previous use, and also possible as a retaliation in a proportionate manner against any previous breach of the laws of war whether or not use of biological weapons was involved. Others believe that reprisals by biological weapons are permissible only if such weapons are capable of being directed with precision against armed forces or military objectives. In the opinion of some writers, although reprisals are the only effective sanction of the law of war, they are of limited value, for they generally lead to counter-reprisals.

(3) The Legality Of Biological Weapons And Treaty Law

To eliminate repetition, we shall refer only to the main features of the legality of biological weapons under treaty law.

Since Article 23 (a) of the Hague Regulation prohibits the use in war of poison or poisoned weapons, it is essential to determine whether or not all biological agents or certain biological agents can be categorised as poison. The antimaterial agents may be excluded from being poisonous because they are not applied to living organisms. Some writers believe that all biological agents, whether toxin-creating or not, are to be characterized, by definition, as poison. They are substances causing death or injury in living organisms, and these effects are the results of chemical changes in the host produced directly or indirectly by the bacteria. Moreover, an infectious disease is said to invade the tissues, and the damage is done by pathogenic organisms. Thus, the disease acts not mechanically, but by its own inherent qualities. According to Thomas and Thomas, Article 23 (a) relates to the use of poison to injure or destroy the person of the enemy, rather than the destruction of his property. To the extent that antianimal, antiplant agents are used to deprive the enemy armed forces of property valuable to them and upon which they are dependent, there would seem to be no serious objection. But, to contaminate food and water deliberately so as to poison enemy forces would offend against Article 23 (a).

The 1925 Geneva Protocol is the first treaty which expressly includes a rule relating to the prohibition of the use in war of "bacteriological methods of warfare". According to some writers, the prohibition of "bacteriological methods of warfare" must be understood as a prohibition of all biological weapons. Although the term "bacteriological" is scientifically narrower than the term "biological", the general character of the biological weapons envisaged by the Protocol does not appear to be open to serious dispute. Due to the

difference in meaning between the English and the French versions,<sup>(220)</sup> both of them are equally authentic, two opposing inter-pretations of the Protocol exist. The restrictive interpretation maintains that the prohibition does not cover incapacitating agents in general, irritant agents in particular, or attacks against animal and plant life. But, the opinion of the majority of writers, based on the preparatory work, agrees that the Protocol applies to all biological agents.

Some of the treaties concluded after the Second World War include obligations of renunciation of biological weapons such as Protocol III of 1954 modifying and completing the Brussels Treaty of 1948 and the Austrian State Treaty of 1955, but they are applied to few states.

Other treaties include a restriction to the placement of biological weapons such as the Treaty On Principles Governing The Activities Of States In The Exploration And Use Of Outer Space Including The Moon And Other Celestial Bodies of 1967; and the Treaty On The Prohibition Of The Emplacement Of Nuclear Weapons And Other Weapons Of Mass Destruction In The Sea-Bed And The Ocean Floor And In The Subsoil Thereof of 1971.

On December 16, 1971, the General Assembly of the United Nations, by its Resolution 2826 (XXVI), adopted the Convention On The Prohibition Of The Development, Production, And Stockpiling Of Bacteriological (Biological) And Toxin Weapons And On Their Destruction. Simultaneously, the General Assembly requested the Depositary Governments of the United States, the United Kingdom and the Soviet Union to open the Convention for signature and ratification at the earliest possible date, and expressed the hope for the widest adherence to it.

According to Article 1 of the Convention<sup>(221)</sup> each Party undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain microbial or other biological agents, toxins, weapons, equipment or the means of delivery designed to employ such agents or toxins for hostile purposes or in an armed conflict.

According to Article 2 of the Convention<sup>(222)</sup> the Parties undertake to destroy or to divert to peaceful purposes all such agents, toxins and equipment; and according to Article 3 of the Convention,<sup>(223)</sup> they undertake not to transfer them to any recipient whatsoever.

Another important obligation is included in Article 9 of the Convention which provides that :

"Each State Party to this Convention affirms the recognized objective of effective prohibition of chemical weapons and to this end, undertakes to continue negotiations in good faith with a view to reaching early

agreement on effective measures for the prohibition of their development, production and stockpiling and for their destruction, and on appropriate measures concerning equipment and means of delivery specifically designed for the production or use of chemical agents for weapons purposes".

It is to be noted that the Convention does not include any arrangements for verification of mutual fulfilment. A complaint of violation may be lodged with the United Nations Security Council in accordance with Article 6 of the Convention.

According to Article 13 paragraph 1, the Convention shall be of unlimited duration. This Convention entered into force on March 26, 1975.<sup><224></sup> According to Article 12 of the Convention, a First Review Conference of the States Parties must be held five years after the entry into force of the Convention. This Conference was held at Geneva from 3 to 21 March 1980. In its final Declaration, the Review Conference decided that a Second Review conference should be held at Geneva at the request of a majority of States Parties not earlier than 1985 and, in any case not later than 1990. At the request of a majority of State Parties, the Second Review Conference was held in 1986.

We may also add to the treaty law in this regard, the rules of the law of war which regulate methods and means of warfare in general. They are contained in the 1977 Additional Protocol I to the Geneva Red Cross Conventions of 1949.

We may identify in this Protocol, certain rules to be applied, specifically, on antipersonnel;<sup><225></sup> antiplant; and antianimal biological agents.<sup><226></sup>

#### (4) The Legality of Biological Weapons And The United Nations

We referred before to some Resolutions of the General Assembly of the United Nations relating to both chemical and biological weapons. Many of these Resolutions emphasize the danger of these mass destruction weapons to all mankind; and call for "strict observance by all states of the principles and objectives of The Protocol For The Prohibitions Of The Use In War Of Asphyxiating Poisonous Or Other Gases, And Of Bacteriological Methods Of Warfare, signed at Geneva on June 17, 1925, and condemns all actions contrary to those objectives". In its latest Resolutions the General Assembly reaffirms the urgent necessity of strict observance by all states of the principles and objectives of the 1925 Geneva Protocol.

Footnotes Of Chapter II Of Part II

(1) See In English:

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Higgins, *The Development Of International Law Through The Political Organs Of The United Nations*, passim; R.C. Hingorani, *Modern International Law*, passim; A.N. Kaliadin, O.V. Bogdanov and G.A. Vorontsov, *Prevention Of Nuclear War*, passim; Morton A. Kaplan and Nicholas DeB Katzenbach, *The Political Foundations Of International Law*, passim; J.L. Brierly, *The Law Of Nations*, passim; Chris N. Okeke, *Controversial Subjects Of Contemporary International Law*, passim; L. Oppenheim, *International Law, Volume II (Disputes, War and Neutrality)*, passim; Jean Pictet, *The Principles Of International Humanitarian Law*, passim; D.W. Greig, *International Law*, passim; Jack C. Plano and Robert E. Riggs, *Forging World Order*, passim; Georg Schwarzenberger, *International Law As Applied By International Courts And Tribunals, Volume II (The Law Of Armed Conflict)*, passim; Georg Schwarzenberger and E.D. Brown, *A Manual Of International Law*, passim; Frederic Siordet, *The Geneva Conventions of 1949*, passim; Julius Stone, *Legal Controls Of International Conflict*, passim; T.A. Taracouzio, *The Soviet Union And International Law*, passim; An Van Wynen Thomas and A.J. Thomas, *Legal Limits On The Use Of Chemical And Biological Weapons*, passim; G.I. Tunkin, *Theory Of International Law*, passim; J.H.W. Verzijl, *International Law In Historical Perspective, Volume I (General Subjects)*, passim; David W. Wainhouse in association with Bernhard G: Bechhoefer, John C. Dreier, Benjamin Greig, and Harry R. Turkel, *International Peace Observation*, passim; Rebecca M.M. Wallace, *International Law*, Passim; Quincy Wright, *A Study Of War, Volumes I and II*, passim; Christy Campbell, *War Facts Now*, passim; Georgi Zadorozhny, *Peaceful Coexistence*, passim; Juraj Andrassy, *Uniting For Peace*, pp. 563-582; Nessim Bar-Yaacov, *Some Aspects Of Prisoner-Of-War Status According To the Geneva Protocol I of 1977*, pp. 243-281; William J. Bivens, *Restatement Of The Laws Of War As Applied To The Armed Forces Of Collective Security Arrangements*, pp. 140-145; E.M. Borchard, *The Multilateral Treaty For The Renunciation Of War*, pp. 116-120; Michael Bothe, *Chemical Warfare*, pp. 83-85; Michael Bothe, *War And Environment*, pp. 290-293; D. Bowett, *The Use Of Force In The Protection Of Nationals*, pp. 111-126; Ian Brownlie, *Some Legal Aspects Of The Use Of Nuclear Weapons*, pp. 437-457; Tony Carty, *The Origins Of The Doctrine Of Deterrence And The Legal Status Of Nuclear Weapons*, pp. 104-132; Tony Carty, *Legality And Nuclear Weapons*, pp. 133-154; T. Cyprian, *Prohibition Of Weapons Of Mass Destruction And Collective Security*, pp.13-40; Jost Delbrück, *Collective Measures*, pp. 101-103; Jost Delbrück, *Collective Security*, pp. 104-114; Jost Delbrück, *Collective Self-Defence*, pp. 114-117; Tom J. Farer, *The Laws Of War, 25 Years After Nuremberg*, pp. 5-54; C.G. Fenwick, *Draft Code Of Offences Against The Peace And Security Of Mankind*, pp. 98-101; Benjamin B. Ferencz, *Aggression*, pp. 1-6; Muhammad Hafez Ghanem, *The Illegality Of Nuclear Tests*, pp. 39-52 ; Hans Heinrich Jescheck, *Collective Punishment*, pp. 103-104; Nagat T. Kassar, *The Legal Limits To The Use Of International Force Through The United Nations Practice*, pp. 163-236; Herman Khan, *The Arms Race And Some Of Its Hazards*, in Richard A. Falk and Saul Mendelovitz, *The Strategy Of World Order, Volume II (Toward A Theory Of War Prevention)*, pp. 17-51; L. Kopelmanis, *The Problem Of Aggression And The Prevention Of War*, pp. 244-257; Josef L. Kunz, *Individual And Collective Self-Defence In Article 51 Of The Charter Of The United Nations*, pp. 872-879; Josef L.

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A'alam Al-Arabi, passim; Muhammad Talaat Al-Ghunaimi, Al-Ghunaimi Fi At-Tanzim Ad-Dawli, passim; Muhammad Talaat Al-Ghunaimi, Al-Ghunaimi Al-Wajiz Fi At-Tanzim Ad-Dawli, passim; Zaki Hashem, Al-Umam Al-Mutahida, passim; Abdul Fatah Muhammad Isma'il, Guhud Al-Umam Al-Mutahida Li Naz'a As-Silah, passim; Saleh Jawad Al-Kazem, Dirasa Fi Al-Munazzamat Ad-Dawliya, passim; Muhammad Mahmud Khalaf, Haqq Ad-Difa'a Ash-Shar'i Fi Al-Qanun Ad-Dawli Al-Jina'i, passim; Tayseer An-Nabulsi, Al-Ihtilal Al-Israeli Li Al-Araddi Al-Arabiya, passim; Jean Pictet, Mabadi'i Al-Qanun Ad-Dawli Al-Insani (Arabic Translation), passim; A'isha Rateb, At-Tanzim Ad-Dawli, passim; A'isha Rateb, An-Nazariya Al-A'ama Li Al-Hiyad, passim; A'isha Rateb, Al-Munazzamat Ad-Dawliya, passim; Jaber Ibrahim Ar-Rawi, Al-Munazzamat Ad-Dawliya, passim; Jaber Ibrahim Ar-Rawi, Ilgh'a Al-Itafaqiya Al-Iraqiya Al-Iraniya, passim; Abdul Aziz Sarhan, Al-Usul Al-A'ama Li Al-Munazzamat Ad-Dawliya, passim; Abdul Aziz Sarhan, At-Tanzim Ad-Dawli, passim; Mufeed Mahmud Shihab, Al-Munazzamat Ad-Dawliya, passim; Yahia Ash-Shimi, Tahrim Al-Hurub Fi Al-Alaqaq Ad-Dawliya, passim; Badriya Abd ALLAH Al-Awady, Al-Qanun Ad-Dawli Al-A'am Fi Waqt As-Silm Wa Al-Harb Wa Tatbiqih Fi Dawlat Al-Kuwait, passim; Hamed Sultan, A'isha Rateb and Salah Eddin Amer, Al-Qanun Ad-Dawli Al-A'am, passim; Abdul Latif Al-Baghdadi (and Others), Ad-Dameer Al-Misry Yudeen Al-Mu'ahada - Declaration Of The Leaders Of The 23<sup>rd</sup> July Revolution (Egypt), passim; Nur Eddin Hattum, Tarikh Assruna from 1945, passim; Malek Ibn Nabi, Fikrat Al-Afriqiya Al-Asiawiya, passim; Pierre Renouvin, Tarikh Al-Qarn Al-Eshreen, 1900-1945 (Arabic Translation), passim; Samih Atef Az-Zain, As-Siyasa Wa As-Siyasa Ad-Dawliya, passim; Abdul Halim Ahmadi, Al-Jihad Fi Afghanistan, pp. 159-188; Badriya Abd ALLAH Al-Awadi, Al-Mas'ala Al-Afghaniya Fi Dou' Al-Qanun Ad-Dawli; pp. 141-158; Abdul Halim Badawi, Al-Wad'u Ad-Dawli Li Madinat Al-Quds, pp. 51-56; Mohamed Mokbel El-Bakry, Itijahat Mahkamat An-Naqdd Al-Misriya Fi Masael Al-Qanun Ad-Dawli, pp. 201-234; Mohamed Mokbel El-Bakry, Al-Markaz Al-Qanuni Li Al-Aqaleem Al-Maudu'a Tahta Al-Intidab Inda Intiba'a Hadha An-Nizam, pp. 139-223; Mahmud Khairy Bannuna, At-Tasaluh An-Nawawi Baina Al-Hazr Al-Guz'i Wa Man'i Al-Intishar, pp. 95-123; Ezze Eddin Foda, Al-Markaz Al-Qanuni Li Al-Ihtilal Al-Harbi, pp. 27-62; Hasan El-Galaby, Markaz Al-Umam Al-Mutahida Bin'nisba Li Ad-Duwal Ghairi Al-A'ada'a Fiha, pp. 45-107; Boutrus Boutrus Ghali, Al-Khitat Allati Yumkin Itiba'uha Li Tahqiq Tanfidh Qarar Majlis Al-Amn 242, pp. 19-24; Hussain Abdul Khaleq Hassouna, Tawassul Al-Umam Al-Mutahida Ela Taarif Al-Udwan, pp. 51-62; Hasan Kamel, Haqq Taqrir Al-Masseer Al-Qaumi, pp. 1-61; ; Ahmad Tawfiq Khalil, Quwat Al-Umam Al-Mutahida Wa Dauruha Fi Hifz As-Salam, pp. 25-38; Ahmad Musa, Ala Hamesh Haqq Ad-Difa'a Ash-Shar'i A'n An-Nafs Wa Isti'mal Al-Asliha An-Nawawiya, pp. 1-11 ; Wahid Raafat, Mustaqbal Al-Umam Al-Mutahida, pp. 13-81; Issam Sadeq Ramadan, Al-Abaad Al-Qanuniya Li Al-Irhab Ad-Dawli, pp. 8-36; A'isha Rateb, Al-Manatteq Manzu'at As-Silah, pp. 37-67 ; A'isha Rateb, Qarar Majlis Al-Amn Fi 22 November 1967, pp. 1-18; Abdul Aziz Sarhan, Tattawur Wazifat Mu'ahadat As-Sulh pp. 57-126; Abdul Aziz Sarhan, Hawla Taarif Al-Irhab Ad-Dawli Wa Tahdid Maddmunuh, pp. 173-178; Hamed Sultan, Al-Harb Fi Nitaq Al-Qanun Ad-Dawli, pp. 1-25; Ahmad Uthman, Mu'ahadat Man'i Intishar Al-Asliha An-Nawawiya, pp. 125-152.

(2) In this section, the question under discussion, will be explained

according to the Covenant, and during the period between the two World Wars.

(3) Article 11 of the Covenant entitled "Collective Action" provides that :

"1. Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case such emergency should arise the Secretary-General shall on the request of any Member of the League forthwith summon a meeting of the Council.

2. It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends".

(4) Article 12 of the Covenant entitled "Disputes" provides that :

"1. The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or judicial settlement or to inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council.

2. In any case under this Article the award of the arbitrators or the judicial decision shall be made within a reasonable time, and the report of the Council shall be made within 6 months after the submission of the dispute".

(5) Article 13 Of the Covenant entitled "Arbitration Or Judicial Settlement" provides that :

"1. The Members of the League agree that, whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration or judicial settlement, and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration or judicial settlement.

2. Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration or judicial settlement.

3. For the consideration of any such dispute, the Court to which the case is referred shall be the Permanent Court of

International Justice, established in accordance with Article 14, or any Tribunal agreed on by the Parties to the dispute or stipulated in any convention existing between them.

4. The Members of the League agree that they will carry out in full good faith any award or decision that may be rendered, and that they will not resort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award or decision, the Council shall propose what steps should be taken to give effect thereto".

(6) Article 14 of the Covenant entitled "Permanent Court of International Justice" provides that :

"The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the Parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly".

(7) Article 15 of the Covenant entitled "Disputes Not Submitted To Arbitration Or Judicial Settlement" provides that :

"1. If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration or judicial settlement in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council. Any Party to the dispute may effect such submission by giving notice of the existence of the dispute to the Secretary-General who will make all necessary arrangements for a full investigation and consideration thereof.

2. For this purpose, the Parties to the dispute will communicate to the Secretary General, as promptly as possible, statements of their case with all the relevant facts and papers, and the Council may forthwith direct the publication thereof.

3. The Council shall endeavor to effect a settlement of the dispute and if such efforts are successful, a statement shall be made public giving such facts and explanations regarding the dispute and the terms of settlement thereof as the Council may deem appropriate.

4. If the dispute is not thus settled, the Council either unanimously or by a majority vote shall make and publish a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto.

5. Any Member of the League represented in the Council may make public a statement of the facts of the dispute and of its conclusions regarding the same.

6. If a report by the Council is unanimously agreed by the Members thereof other than the representatives of one or more of the Parties to the dispute, the Members of the League agree that they will not go to war with any Party to the dispute which complies with the recommendations of the report.

7. If the Council fails to reach a report which is unanimously agreed to by the Members thereof, other than the Representatives of one or more of the Parties to the dispute, the Members of the League reserve to themselves the right to make such action as they shall consider necessary for the maintenance of right and Justice.

8. If the dispute between the Parties is claimed by one of them, and is found by the Council to arise out of a matter which by international law is solely within the domestic jurisdiction of that Party, the Council shall so report, and shall make no recommendation as to its settlement.

9. The Council in any case under this Article refer the dispute to the Assembly. The dispute shall so referred at the request of either Party to the dispute, provided that such request be made within 14 days after the submission of the dispute to the Council.

10. In any case referred to the Assembly, all the provisions of this Article and of Article 12 relating to the actions and powers of the Council shall apply to the actions and powers of the Assembly, provided that a report made by the Assembly, if concurred in by the Representatives of those Members of the League, exclusive in each case of the Representatives of the Parties to the dispute, shall have the same force as a report by the Council concurred in by all the Members thereof of other than the Representatives of one or more of the Parties to the dispute".

(8) Article 10 of the Covenant entitled "Guaranties Against Aggression" provides that :

"The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled".

(9) In 1932, the Secretary Stimson made his famous declaration to Japan and China with regard to the Manchurian incident.

(10) Article 16 of the Covenant entitled "Sanctions And Explanations" provides that :

"1. Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13, or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of

the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the Covenant-breaking state and the nationals of any other state, whether a Member of the League or not.

2. It shall be the duty of the Council in such a case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the Covenant of the League.

3. The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this Article, in order to minimize the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures, aimed at once of their number by the Covenant-breaking state, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are cooperating to protect the covenants of the League.

4. Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented therein".

<sup>(11)</sup> The Vilna Case was an exception, where France was willing to put pressure on Poland.

<sup>(12)</sup> Japan withdrew from the League, thus, in 1932, the final breakdown down of the League began, and thereafter it was defied successively by Germany, Italy, and Russia.

<sup>(13)</sup> Referred to in the article of Nawaz, "The Doctrine Of Outlawry Of War".

<sup>(14)</sup> This contention was put forward by Italy in the Corfu incident in 1923. Italy bombarded and occupied Corfu allegedly in reprisal for the murder of the Italian General Tellini on Greek-Albanian boundary Commission. In response to a question whether measure of coercion not intended to constitute acts of war consistent with Articles 12-15 of the Covenant, when taken without recourse to arbitration, judicial settlement or conciliation, a committee of jurists replied that such coercive measures might or might not be consistent with the Covenant according to circumstances of the case. However, the dispute itself was settled outside the League. This reply really means that armed reprisals might, at any rate in some circumstances, still be the legal even without any prior attempt at pacific settlement.

<sup>(15)</sup> The United States was among the Signatories of the Treaty Of Peace

but did not ratify it.

(16) Article 1 of the Mutual Assistance Treaty provides that :

"The High Contracting Parties solemnly declare that aggressive war is an international crime and severally undertake that no one of them will be guilty of its commission. A war shall not be considered as a war of aggression if waged by a state which is Party to a dispute and has accepted the unanimous recommendation of the Council, the verdict of the Permanent Court of International Justice or an arbitral award against a High Contracting Party which has not accepted it, provided, however, that the first state does not intend to violate the political independence or the territorial integrity of the High Contracting Party".

(17) Due to the importance of the "Pact Of Paris", we shall refer to it separately.

(18) During this period there were some other instruments, not entitled "non-aggression" or the like, contained clear obligations on non-resort to force and peaceful settlement of disputes and that mutual assistance agreements assumed the illegality of aggression, e.g., "Treaty Of Islamic Friendship And Arab Brotherhood" concluded by Yemen and Saudi Arabia on 1934; "Protocol Of Peace" concluded between Colombia and Peru on 1934; "Treaty For The Peaceful Solution Of Disputes" concluded by Venezuela and Brazil on 1940; and "Treaty Of Peace And Friendship" concluded by Chile and Paraguay on 1943. Usually non-aggression pacts contain provisions to the effect that the obligations of the Covenant and other treaties in force are to remain unaffected and some, but not all, provide for automatic termination of the treaty should one Party attack a third state.

(19) This Treaty contains a reference to the "Pact of Paris".

(20) Bolivia, El Salvador, Uruguay and Argentina were not bound by the Pact. Other states could be added such as San Marino, Yemen and Nepal, but they took little part in the international life at that time.

(21) Waldock believes that the Pact renounced only war as "an instrument of national policy", thus it was open to the interpretation that it did not prohibit the use of force by states as a sanction, to enforce rights - the classic *bellum iustum* - which was always conceived as a sanction for community policy. This interpretation, in the opinion of Waldock, was to some extent reinforced by the fact that the Covenant itself did not prohibit war altogether. In the event of failure of the peaceful settlement methods, or on matters not covered by them (if any), a good argument for "self-help" as lawful could be made - that is, argument in favor of the just war or lesser forms of sanctions.

(22) Article 1 of the Pact Of Paris provides that :

"The High Contracting Parties solemnly declare, in the names of their respective peoples, that they condemn recourse to war for the solution of international controversies and renounce it as instrument of national policy in their relations with one another.

(23) The Preamble of the Pact provides that :

"[The Contracting Parties] Deeply sensible of their solemn duty to promote the welfare of mankind; Persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated; Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any Signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty; etc. Have decided to conclude a Treaty and for that purpose have appointed as their respective Plenipotentiaries [names of plenipotentiaries]. Who, having communicated to one another their full powers found in good and due form have agreed upon the following Articles".

(24) Article 2 of the Pact of Paris provides that :

"The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means".

(25) After the conclusion of the Pact Of Paris many instances of recourse to force on a large scale had occurred such as :

1. The hostilities conducted by Russia in 1929 against China in connection with the dispute concerning the Chinese Eastern Railway.
2. The occupation of Manchuria by Japan in 1931 and 1932.
3. The invasion of the Colombian province of Leticia by Peru in 1932.
4. The invasion of Abyssinia by Italy in 1935.
5. The invasion of China by Japan in 1937.
6. The invasion of Finland by Russia in 1939.

In the first three cases, which happened without declaration of war, on or both Parties were reminded by other Signatories of their obligations under the Pact, but there was no authoritative finding to the effect that the Pact had been violated.

(26) The Principles of the Nuremberg Charter were expressly reaffirmed by unanimous Resolution of the General Assembly in 1946.

CHAPTER II OF PART II

- (27) This Treaty is not a mere regional instrument since it was acceded to by Bulgaria, Czechoslovakia, Finland, Greece, Italy, Norway Portugal, Romania, Spain, Turkey and Yugoslavia. The Treaty was originally signed by Brazil, Chile, Mexico Paraguay and Uruguay; then it was acceded by Bolivia, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, the United States and Venezuela.
- (28) Another Convention was signed at the same Conference, a Convention To Co-ordinate, Extend, And Assure The Fulfilment Of The Existing Treaties Between The American States. Also, the Conference approved a "Declaration Of Principles Of Inter-American Solidarity And Co-Operation".
- (29) In "Dumbarton Oaks Proposals", it had been suggested that the new Organization be given the name "The United Nations", a title which had been suggested by President Roosevelt. According to Goodrich, Hambro and Simons, the idea back of the suggestion was, first, that this name accurately described the kind of Organization that was necessary to the achievement of common purposes; and second, that it had been given recognition in the "Declaration by United Nations" of January 1, 1942.
- (30) Kunz noted the existence of technological progress in arms, even before the atomic bombs had been dropped, the Germans had sent V-1, and later V-2 bombs to England; the V-2 bomb made use of the stratosphere and travelled faster than sound, so that no warning and hardly an interception was possible.
- (31) The roots of the United Nations may be traced as follows:
1. In the Declaration Of Principles, known as the "Atlantic Charter" of August 14, 1941, issued by President Roosevelt and Mr. Churchill, the eighth principle provides that :  
  
"they believe that all of the nations of the world, for realistic as well as spiritual reasons, must come to the abandonment of the use of force. Since no future peace can be maintained if land, sea or air armaments, continue to be employed by nations which threaten, or may threaten, aggression outside of their frontiers, they believe, pending the establishment of a wider and permanent system of general security, that the disarmament of such nations is essential...".
  2. In "Moscow Declaration On General Security" of October 30, 1943, the U.S.A., the U.K., the Soviet Union, and China, jointly declare,  
  
"4. That they recognize the necessity of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of peace-loving states, and open to membership by all such states, large and small for the maintenance of international peace and security".

(32) This arrangement served to respect the Soviet Union neutrality in the war against Japan.

(33) Dumbarton Oaks Proposals did not specify the voting procedure in the Security Council. This was discussed between President Roosevelt, Mr. Churchill and Premier Stalin at a conference at Yalta from 3 to 11 February, 1945, the Conference announced that this point had been settled. Then, the three leaders declared :

"We have agreed that a Conference of United Nations should be called to meet at San Francisco in the United States on the twenty-fifth April 1945, to prepare the Charter of such an Organization, along the lines proposed in the informal conversations of Dumbarton Oaks".

(34) Among the fifty states took part in the Conference, were forty six Signatories of the United Nations Declaration of January 1, 1942. Argentina, the Byelo-Russian Socialist Republic, and the Ukrainian Socialist Soviet Republic were admitted on April 30, 1945. Denmark was invited after its liberation on June 5, 1945. Poland could not be invited, as a Polish Government recognized by all the Great Powers was not constituted until after the Conference. However, a place was reserved for Poland's signature as an Original Member.

(35) The Collective Security system has its origins in the efforts of the European Powers to maintain peace and security within the 19th Century international system which came to be known as the Concert of Europe. However, three distinctions may be drawn between this system and the traditional alliances, first, only the Collective Security system is based on the illegality of the use of force by individual states or groups of states with the exception of self-defence or the application of force authorized by the Collective Security system itself; second, the obligations of the Members of Collective Security system are more far reaching and have more effect upon the sovereign rights than that incurred by Members of an alliance; and third, the central aim of the Collective Security system is to ward off any act of aggression by one Member state against another Member state, while the preservation of peace by alliances tends to be realized either by deterring a potential aggressor from outside the alliance or at least by keeping up a balance of power between competing alliances. However, it is noticed from state practice that modern types of alliances have diminished the importance of these distinctions.

(36) The Preamble provides that :

"to unite our [the Peoples of the United Nations] strength to maintain international peace and security". Dumbarton Oaks Proposals did not contain a Preamble. At San Francisco, upon the request of several delegates, a draft was proposed by Field Marshal Smuts of South Africa which became the basis of discussion. While the Preamble is an integrated part of the Charter; it does not

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not define the basic obligations of Members. It is considered by the drafters of the Charter as a statement of "declared common intentions".

(37) Article 1 (1) of the United Nations Charter provides that :

"The Purposes of the United Nations are :

1. To maintain international peace and security, and to that end : to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of peace".

(38) In fact, as noted by Goodrich, Hambro, and Simons, the important objectives of the United Nations with respect to non-self-governing territories, which are set forth in some detail in Articles 73 and 76, are not included in Article 1.

(39) It is noted by Goodrich, Hambro, and Simons that, in the growth of the functions and activities of the United Nations organs, the General Assembly in particular, great reliance has been placed on the "Purposes" as set forth in Article 1. Two examples may be given, first, the Uniting For Peace Resolution by which the General Assembly assumed for itself a "residual responsibility" for discharging the functions set forth in Article 1 (1), in case the Security Council was prevented from discharging them due to the lack of unanimity among the Permanent Members; and second, the Declaration On Granting Independence To Colonial Countries And Peoples by which the General Assembly, invoking, inter alia, Article 1 (2), proclaimed "the right to self-determination" of all peoples and the corresponding obligation of all Member States to transfer immediately all powers to the peoples of the non - self - governing territories.

(40) Some writers are of the opinion that because the Security Council could not properly perform its functions, the majority of the Members returned to the practice of collective measures as a substitute for actions taken under the Collective Security system. Such collective enforcement measures have usually been based on the Uniting for Peace Resolution.

(41) Article 2 (4) of the United Nations Charter provides that :

"The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:

"4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".

(42.) Article 42 of the United Nations Charter provides that :

"Should the Security Council consider that measures provided for in Article 41 would be inadequate, it may take action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade and other operations by air, sea, or land forces of Members of the United Nations".

(43.) Self-defence will later be explained extensively.

(44.) Article 53 (1) of the United Nations Charter provides that :

"The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of the measures against an enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing aggression by such a state".

(45.) Article 53 (2) of the United Nations Charter defines "enemy states" as follows :

"The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any Signatory State of the present Charter".

(46.) Article 107 of the United Nations Charter provides that :

"Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any Signatory to the present Charter, taken or authorized as a result of that war by the Governments have responsibility for such action".

In fact, the validity of this Article, and Article 53 paragraphs 1 and 2 are now questioned, since all the former enemy states have become Members of the United Nations.

(47.) Article 2 (7) of the United Nations Charter provides that :

Nothing contained in the present Charter, shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but but this Principle shall not prejudice the application of enforcement measures under Chapter VII".

The expression used in Article 15 (8) of the Covenant of the League was "which by international law is solely within the domestic jurisdiction".

(48) Article 1 (2) of the United Nations Charter provides that :

"The Purposes of the United Nations are ....

2. To develop friendly relations among nations based on respect for the Principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace".

(49) Thus, the American raid on Libiya in April 1986, as a mere act of reprisal, is illegal. It could not be justified as a self-defence in accordance with Article 51.

(50) Article 6 of the United Nations Charter provides that :

"A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council".

(51) Article 41 of the United Nations Charter provides that :

"The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication and the severance of diplomatic relations".

(52) We referred before to Article 42 which relating to action by air, sea, or land forces. Subsequent to preventive or enforcement action against a Member State, Article 5 maybe applied, which provides that :

"A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council".

(53) I.C.J. Reports 1986, pp. 96-97.

(54) I.C.J. Reports 1986, p. 118.

(55) I.C.J. Reports 1986, p.119.

(56) I.C.J. Reports 1986, pp. 146-147.

(57) I.C.J. Reports 1986, pp. 109-110.

(58) I.C.J. Reports 1986, p. 146.

(59) Article 24 of the United Nations Charter provides that :

"1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration".

(60) Article 25 of the United Nations Charter provides that :

"The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".

(61) Article 39 of the United Nations Charter provides that :

"The Security Council shall determine the existence of any threat to the peace, breach of peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security".

(62) Article 40 of the United Nations Charter provides that :

"In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the Parties to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the Parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures".

(63) We referred before to Article 41 in footnote no. (51).

(64) We referred before to Article 42, in footnote no. (42), which depends on the undertaking of the Member States under Article 43.

The latter provides that :

"1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call in accordance with a special agreement or agreements, armed forces, assistance and facilities, including rights of passage, necessary for the Purpose of maintaining international peace and security.

2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and the Members or between the Security Council and groups of Members and shall be subject to ratification by the Signatory States in accordance with their respective constitutional processes".

(65) The General Assembly has a general competence under Article 10 of the Charter, which provides that :

"The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter and, except as provided for in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters".

(66) Article 11 of the United Nations Charter provides that :

"1. The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments and may make recommendations with regard to such principles to the Members or to the Security Council or to both.

2. The General Assembly may discuss any question relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.

3. The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security.

4. The powers of the General Assembly set forth in this Article shall not limit the general scope of Article 10".

(67) Article 12 of the United Nations Charter provides that :

"1. While the Security Council is exercising in respect of any dispute or situation the function assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.

2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in a session immediately the Security Council ceases to deal with such matters".

(68) Article 13 of the United Nations Charter provides that :

"1. The General Assembly shall initiate studies to make recommendations for the purpose of :

- a. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification;
- b. promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

2. The further responsibilities, functions and powers of the General Assembly with respect to matters mentioned in paragraph 1 (b) above are set forth in Chapters IX and X".

(69) On December 1, 1949, the General Assembly adopted the "Essentials Of Peace" Resolution "290 (IV)", containing twelve principles that Members were called upon to respect. Of these, the second was a repetition in substance of Article 2 (4) of the Charter. The third principle was, "to refrain from any threats or acts, direct or indirect, aimed at impairing the freedom, independence or integrity of any state, or at fomenting civil strife and subverting the will of the people in any state".

(70) On December 14, 1974, the General Assembly adopted Resolution 3314 (XXIX), on "Definition Of Aggression" after controversial discussions of a large number of proposals over a period of almost twenty years, details of this Resolution will later be discussed.

(71) Article 2 (3) of the United Nations Charter provides that :

"All Members shall settle their intrnational disputes by peaceful means in such a manner that international peace and Security, and justice, are not endangered".

(72) Article 33 of the United Nations Charter provides that :

"1. The Parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the Parties to settle their dispute by such means".

(73) Article 37 (1) of the United Nations Charter provides that :

"1. Should the Parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council".

(74) Article 34 of the United Nations Charter provides that :

"The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security".

(75) Article 36 of the United Nations Charter provides that :

"1. The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.

2. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the Parties.

3. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the Parties to the International Court of Justice in accordance with the provisions of the Statute of the Court".

(76) Article 37 (2) of the United Nations Charter provides that :

"2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as

it may consider appropriate".

(77) Article 38 of the United Nations Charter provides that :

"Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the Parties to any dispute so request make recommendations to the Parties with a view to a pacific settlement of the dispute".

(78) Article 35 of the United Nations Charter provides that :

"1. Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.

2. A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute which it is a Party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.

3. The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12".

(79) Article 51 of the United Nations Charter provides that :-

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security".

(80) Article 52 United Nations Charter provides that :

"1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.

3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.

4. This Article in no way impairs the application of Articles 34 and 35".

(81) Article 54 of the United Nations Charter provides that :

"The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security".

(82) In the opinion of Greig, the power to take measures to restore security to the North Atlantic area, could include action not justifiable on the grounds of self-defence, and even if it is accepted that NATO is primarily an organization for the Purposes of self-defence there is no reason for rejecting that it is also entitled to exercise powers appropriate to a regional agency. Therefore, it is equally entitled to act in accordance with Articles 53 and 54 as with Article 51".

(83) Article 2 (6) of the United Nations Charter provides that :

"The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security".

(84) In the opinion of Waldock, the right of Collective self-defence may be exercised in favour of a non-Member of the United Nations. He believe that the purpose of Article 51 is to reserve a right of self-defence inherent in all states and it can hardly have the effect of precluding, for no reason whatever, defensive aid to a non-Member state defending itself against an aggressor. But his justifications differ than that of Delbrück, firstly, the word "collective" does not appear to have been intended to cover only contractual systems of self-defence; and secondly, it does not seem seem legitimate, on the principle "expressio unius exclusio alterius", (the express mention of one thing implies the exclusion of another) to interpret the express reference to Members in Article 51 as only authorising defence of another Member but not of a non-Member.

(85) See Hans J. Morgenthau, In Defence Of National Interest : A Critical Examination Of American Foreign Policy, New York, Alfred A. Knopf, 1951; and George F. Kennan, American Diplomacy 1900-1950, Chicago, University of Chicago Press, 1951, referred to in Myres S. McDougal, Law And Power, The American Journal of International Law, Vol. 46, pp. 102-114.

(86) It is noteworthy to refer to the "Panch Shila" or the (Five Principles Of Peaceful Co-Existence), which were first formulated in an agreement on April 29, 1954, between India and the People's Republic of China. The Five Principles are :

1. Mutual respect of each other's territorial integrity and sovereignty,
2. Non-aggression,
3. Non-interference in each other's internal affairs for any reasons of an economic, political or ideological character,
4. Equality and mutual benefit, and
5. Peaceful Co-existence.

The final Communiqué of the Afro-Asian Conference at Bandung, of April 24, 1955, gave approval to ten principles as a basis for the promotion of world peace and co-operation, which include inter alia:

- Respect for the Purposes and Principles of the Charter of the United Nations
- Respect for sovereignty and territorial integrity of all nations
- Respect for the right of each nation to defend itself singly or collectively, in conformity with the Charter of the United Nations
- Refraining from acts or threats of aggression or the use of force against the territorial integrity or political independence of any Country
- Settlement of all international disputes by peaceful means in conformity with the United Nations Charter

(87) Article 27 of the Regulations Respecting The Laws And Customs Of War On Land Annexed To The Hague Convention IV of 1907 provides that :

"In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand".

(88) Article 5 of the Hague Convention IX Concerning Bombardment Of Naval Forces In Time Of War, which was signed on October 18, 1907, and entered into force on January 26, 1910, provides that :

"In bombardments by naval forces all the necessary measures must be taken by the Commander to spare as far as possible sacred edifices, buildings used for artistic, scientific or charitable purposes, historic monuments, hospitals and places where the sick or wounded are collected, on the understanding that they are not used at the same time for military purposes.

It is the duty of the inhabitants to indicate such monuments, edifices or places by visible signs, which shall consist of large, stiff rectangular panels divided diagonally into two colored triangular portions, the upper portion black, and the lower portion white".

(89) The Rules of Aerial Warfare were adopted on February 1923 by a Commission of Jurists appointed by the states represented in the 1921-1922 Washington Conference On The Limitation Of Armament, but they were never adopted in a legally binding form. Article 25 of these rules provides that :

"In bombardment by aircraft, all necessary steps must be taken by the Commander to spare as far as possible buildings dedicated to public worship, art, science or charitable purposes, historic monuments, hospital ships, hospitals and other places where the sick and wounded are collected, provided such buildings, objects or places are not at the time used for military purposes. Such buildings, objects and places must by day be indicated by marks visible to aircraft. The use of marks to indicate other buildings, objects or places than those specified above is to be deemed an act of perfidy. The marks used as aforesaid shall be in the case of buildings protected under the Geneva Convention the Red Cross on a white ground and in the case of other protected buildings a large rectangular panel divided diagonally into two pointed triangular portions, one black and the other white.

A belligerent who desires to secure by night the protection for the hospitals and other privileged buildings above mentioned must take the necessary measures to render the special signs referred to sufficiently visible".

(90) Article 26 of the rules of Aerial Warfare provides that :

"The following special rules are adopted for the purpose of enabling states to obtain more efficient protection for important historic monuments situated within their territory, provided that they are willing to refrain from the use of such monuments and a surrounding zone for military purposes, and to accept a special regime for their inspection.

1. A state shall be entitled, if it sees fit, to establish a zone of protection round such monuments situated in its territory. Such zones shall in time of war enjoy immunity from bombardment.

2. The monuments round which a zone is to be established shall be notified to other Powers in peace time through the diplomatic channel; the notification shall also indicate the limits of the zones. The notification may not be withdrawn in time of war.

3. The zone of protection may include, in addition to the area actually occupied by the monument or group of monuments, an outer zone, not exceeding 500 metres in width, measured from the

circumference of the said area.

4. Marks clearly visible from aircraft either by day or by night will be employed for the purpose of ensuring the identification by belligerent airmen of the limits of the zones.

5. The marks on the monuments themselves will be those defined in Article 25. The marks employed for indicating the surrounding zones will be fixed by each state adopting the provisions of this Article, and will be notified to other Powers at the same time as the monuments and zones are notified.

6. Any abusive use of the marks indicating the zones referred to in paragraph 5 will be regarded as an act of perfidy.

7. A state adopting the provisions of this Article must abstain from using the monument and the surrounding zone for military purposes, or for the benefit in any way whatever of its military organization, or from committing within such monuments or zone any act with a military purpose in view.

8. An inspection committee consisting of three neutral representatives accredited to the state adopting the provisions of this Article, or their delegates, shall be appointed for the purpose of ensuring that no violation is committed of the provisions of paragraph 7. One of the members of the committee of inspection shall be the representative (or his delegate) of the state to which has been entrusted the interests of the opposing belligerent".

(91) The title the "Roerich Pact", came from the name of Professor Nicholas Roerich of New York University, who in 1929 suggested the preparation of this Treaty. In 1933, the Seventh International Conference of American States recommended the signature of the Roerich Pact. The Treaty was then drawn up by the Governing Board of the Pan-American Union and signed on April 15, 1935, by 21 American States including the United States. Article 1 of the Treaty provides that :

"The historic monuments, museums, scientific, artistic, educational and cultural institutions shall be considered as neutral and as such respected and protected by belligerents.

The same respect and protection shall be due to the personnel of the institutions mentioned above.

The same respect and protection shall be accorded to the historic monuments, museums, scientific, artistic, educational and cultural institutions in time of peace as well as in war".

Article 5 of the Treaty provides that :

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"The monuments and institutions mentioned in Article 1 shall cease to enjoy the privileges recognized in the present Treaty in case they are made use of for military purposes".

Article 2 of the Treaty provides that :

"The neutrality of, and protection and respect due to the monuments and institutions mentioned in the preceding Article, shall be recognized in the entire expanse of territories subject to the sovereignty of each of the Signatory and Acceding States, without any discrimination, as to the state allegiance of the said monuments and institutions. The respective Governments agree to adopt the measures of internal legislation necessary to insure said protection and respect".

Article 3 of the Treaty provides that :

"In order to identify the monuments and institutions mentioned in Article 1, use may be made of distinctive flag (red circle with a triple red sphere in the circle on a white background) in accordance with the model attached to the Treaty".

Article 8 of the Treaty provides that :

"The present Treaty may be denounced at any time by any of the Signatory or Acceding States, and the denunciation shall go into effect three months after notice of it has been given to the other Signatory or Acceding States".

(92) Among the states signed the Convention on May 14, 1954, China, France, the Soviet Union, the United Kingdom, the United States, Iran, Iraq and Israel. Egypt signed the convention on December 30, 1954, and ratified it on August 17, 1955.

(93) Article 3 of the Convention provides that :

"The High Contracting Parties undertake to prepare in time of peace for the safeguarding of Cultural Property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they considered appropriate".

(94) Article 4 of the Convention provides that :

"1. The High Contracting Parties undertake to respect Cultural Property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of property and the immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.

2. The obligations mentioned in paragraph 1 of the present

Article may be waived only in cases where military necessity imperatively requires such a waiver.

3. The High Contracting Parties further undertake to prohibit, prevent and if necessary, put a stop to any form of theft, pillage or misappropriation of any of the acts of vandalism directed against Cultural Property. They shall refrain from requisitioning movable Cultural Property situated in the territory of another High Contracting Party.

4. They shall refrain from any act directed by way of reprisals against Cultural Property.

5. No High Contracting Party may evade the obligations incumbent upon it under the present Article, in respect of another High Contracting Party, by reason of the fact that the latter has not applied the measure of safeguard referred to in Article 3".

(95) Article 5 of the Convention provides that:

"1. Any High Contracting Party in occupation of the whole or part of the territory of another High Contracting Party shall as far as possible support the competent national authorities of the occupied country in safeguarding and preserving its Cultural Property.

2. Should it prove necessary to take measures to preserve Cultural Property situated in occupied territory and damaged by military operations, and should the competent national authorities be unable to take such measures, the occupying Power shall, as far as possible, and in close co-operation with such authorities, take the most necessary measures of preservation.

3. Any High Contracting Party whose government is considered their legitimate government by members of a resistance movement, shall, if possible, draw their attention to the obligation to comply with those provisions of the Conventions dealing with respect for Cultural Property".

(96) Article 18 of the Convention provides that :

"1. Apart from the provisions which shall take effect in time of peace, the present Convention shall apply in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one or more of them.

2. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

3. If one of the Powers in conflict is not a Party to the present Convention, the Powers which are Parties thereto shall nevertheless

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remain bound by it in their mutual relations. They shall furthermore be bound by the Convention, in relation to the said power, if the latter has declared that it accepts the provisions thereof and so long as it applies them".

(97) Article 19 of the Convention provides that :

"1. In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for Cultural Property.

2. The Parties to the conflict shall endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

3. The United Nations Educational, Scientific And Cultural Organization may offer its services to the Parties to the conflict.

4. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict".

(98) Article 37 of the Convention provides that :

"1. Each High Contracting Party may denounce the present Convention, on its own behalf, or on behalf of any territory for whose international relations it is responsible.

2. The denunciation shall be notified by an instrument in writing, deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

3. The denunciation shall take effect one year after the receipt of the instrument of denunciation. However, if, on the expiry of this period, the denouncing Party is involved in an armed conflict, the denunciation shall not take effect until the end of the hostilities, or until the operations of repatriating Cultural Property are completed, whichever is the later".

(99) Section III of the Protocol provides that :

"The present Protocol shall bear the date of May 14, 1954, and, until the date of December 13, 1954, shall remain open for signature by all States invited to the Conference which met at the Hague from April 21, 1954, to 14 May, 1954".

On May 14, 1954, only fourteen States signed the Protocol, among these States were China, France, Iran and Iraq. The Soviet Union and the United Arab Republic (Egypt) signed the Protocol on December 30, 1954. Israel acceded to the Protocol on April 1, 1958.

Similar to Article 35 of the Convention relating to its territorial

extension, Section III paragraph 12 of the Protocol provides that :

"Any High Contracting Party may, at the time of ratification or accession, or at any time thereafter, declare by notification addressed to the Director-General of the United Nations, Educational, Scientific And Cultural Organization, that the present Protocol shall extend to all or any of the territories for whose international relations it is responsible. The said notification shall take effect three months after the date of its receipt".

(100) Section III paragraph 13 of the Protocol provides that :

"a. Each High Contracting Party may denounce the present Protocol, on its own behalf, or on behalf of any territory for whose international relations it is responsible.

b. The denunciation shall be notified by an instrument in writing, deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

c. The denunciation shall take effect one year after receipt of the instrument of denunciation. However, if, on the expiry of this period the denouncing Party is involved in an armed conflict, the denunciation shall not take effect until the end of hostilities, or until the operations of repatriating Cultural Property are completed, whichever is later".

(101) The first Resolution provides that :

"The Conference expresses the hope that the competent organs of the United Nations should decide, in the event of military action being taken in implementation of the Charter, to ensure application of the provisions of the Convention by the armed forces taking part in such action".

The Second Resolution provides that :

"The Conference expresses the hope that each of the High Contracting Parties, on acceding to the Convention, should set up within the framework of its constitutional and administrative system, a national advisory committee consisting of a small number of distinguished persons, for example, senior official of archaeological services, museums, etc., a representative of the military general of staff, a representative of the Ministry of Foreign Affairs, a specialist in international law and two or three other members whose official duties or specialized knowledge are related to the field covered by the Convention. Its chief functions would be :

a. to advise the government concerning the measures required for the implementation of the Convention in its legislative, technical

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or military aspect, both in time of peace and during an armed conflict;

b. to approach its government in the event of an armed conflict or when such a conflict appears imminent, with a view to ensuring that Cultural Property situated within its own territory or within that of other countries is known to, and respected and protected by the armed forces of the country, in accordance with the provisions of the Convention;

c. to arrange, in agreement with its government, for liaison and co-operation with other similar national committees and with any competent international authority".

The Third Resolution provides that :

"The Conference expresses the hope that the Director-General of the United Nations Educational, Scientific And Cultural Organization should convene, as soon as possible after the entry into force of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, a meeting of the High Contracting Parties".

(102) In Resolution B, the General Assembly, urged the Security Council to efforts to effectuate the Charter provisions for peaceful settlement; and in particular those of Articles 43 and 45 to 47 to the Military Staff Committee and the placing of armed forces at the disposal of the United Nations.

Resolution B provides, inter alia, that :

"The General Assembly Recommends to the Security Council..... That it should devise measures for the earliest application of Articles 43, 45, 46 and 47 of the charter of the United Nations regarding the placing of armed forces at the disposal of the Security Council by the States Members of the United Nations and the effective functioning of the Military Staff Committee.

The above dispositions should in no manner prevent the General Assembly from fulfilling its functions under resolution".

(103) In Resolution C, the General Assembly recommended to the Permanent Members of the Security Council that they meet and discuss all problems likely to threaten international peace with a view to reaching agreement in accordance with the spirit and letter of the Charter.

The operative part of Resolution C provides that :

"[the] General Assembly.....Recommends to the present Members of the Security Council that :

"a. They meet and discuss, collectively or otherwise, and, if necessary, with other States concerned, all problems which are

likely to threaten international peace and hamper activities of the United Nations, with a view to their resolving fundamental differences and reaching agreement in accordance with the spirit and letter of the Charter;

They advise the General Assembly and, when it is not in session, the Members of the United Nations, as soon as appropriate, of the results of their consultations".

(104) We quote the following paragraphs from the Preamble of Resolution A :

"The General Assembly ... Reaffirming that it remains the primary duty of all Members of the United Nations, when involved in an international dispute, to seek settlement of such a dispute by peaceful means through the procedures laid down in Chapter VI of the Charter, .....

Recalling its Resolution 290 (IV) entitled "Essentials Of Peace", which states that disregard of the Principles of the Charter of the United Nations is primarily responsible for the continuance of objectives of that Resolution.

Reaffirming the importance of the exercise by the Security Council of its primary responsibility for the maintenance of international peace and security, and the duty of the Permanent Members to seek unanimity and to exercise restraint in the use of the veto,.....

Recognizing in particular that such failure does not deprive the General Assembly of its rights or relieve it of its responsibilities under the Charter in regard to the maintenance of international peace and security.

Recognizing that discharge by the General Assembly of its responsibilities in these respects calls for possibilities of observation which would ascertain the facts and expose aggressors; for the existence of armed forces which could be used collectively; and for the possibility of timely recommendation by the General Assembly to Members of the United Nations for collective action which, to be effective, should be prompt".

(105) The Interim Committee or the "Little Assembly" was established by the General Assembly during its Second Ordinary Session on January 5, 1948.

(106) Article 108 of the Charter provides that :

"Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the Members of the General Assembly and ratified in accordance with their respective constitutional processes by two

thirds of the Members of the United Nations, including all the Permanent Members of the Security Council".

(107) Article 109 of the Charter provides that :

"1. A General conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the Members of the General Assembly and by a vote of any Nine Members of the Security Council. Each Member of the United Nations shall have one vote in the Conference.

2. Any alteration of the present Charter recommended by a two-thirds vote of the Conference shall take effect when ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations including all the Permanent Members of the Security Council.

3. If such a Conference has not been held before the tenth annual session of the General Assembly following the coming into force of the present Charter, the proposal to call such a Conference shall be placed on the agenda of that session of the General Assembly, and the Conference shall be held if so decided by a majority vote of the Members of the General Assembly and by a vote of any Seven Members of the Security Council.

(108) We referred before to Article 24 of the Charter in footnote No. (59).

(109) We referred before to Article 10 of the Charter in footnote No. (65).

(110) We referred before to Article 11 of the Charter in footnote No. (66).

(111) We referred before to Article 12 of the Charter in footnote No. (67).

(112) According to Schwarzenberger, this maxim means "no punishment without a pre-existing prohibitory rule".

(113) The details of the trials of war criminals will later be discussed in Part IV of this thesis.

(114) The Draft of this Resolution was submitted by the United States on November 15, 1946.

(115) In the Preamble of this Resolution, the General Assembly refers to the Resolution 2583 (XXIV) of December 15, 1969, On The Punishment Of War Criminals And Of Persons Who Have committed Crimes Against Humanity, and The Convention On The Non-Applicability Of Statutory Limitations To War Crimes And Crimes Against Humanity.

(116) In the aforementioned Resolution affirming the Principles Of International Law Recognized By The Charter Of The Nuremberg Tribunal, the General Assembly "directing the Committee On Codification Of International Law established by the Resolution of the General Assembly of December 11, 1946, to treat as a matter of primary importance plans of the formulation in the context of a general codification of offences against the peace and security of mankind or of an International Criminal Code of the Principles in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.

(118) Resolution B was adopted by 43 votes to 6, with 3 abstentions.

(119) Resolution C was adopted by 50 votes with one abstention.

(120) Among the States signed and ratified the Convention, China, France, the Soviet Union, Lebanon, Egypt, Iran and Israel; the United States signed the Convention but it did not ratify it. Among the States acceded to the Convention, the United Kingdom, (January 30, 1970), Iraq, Jordan, Saudi Arabia, Algeria, Morocco and Tunisia.

(121) Article 1 of the Convention provides that :

"The Contracting Parties confirm that Genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish".

(122) Article 4 of the Convention provides that :

"Persons committing Genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals".

(123) Article 6 of the Convention provides that :

"Persons charged with Genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".

(124) Article 7 of the Convention provides that :

"Genocide and the other acts enumerated in Article 3 shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force".

(125) Article 14 of the Convention provides that :

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"The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary General of the United Nations".

(126) Article 15 of the Convention provides that :

"If, as a result of denunciation, the number of the Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective".

(127) On June 24, 1859, the battle of Solferino took place, in which 110,000 French and 50,000 Sardinians fought against 140,000 Austrians. As a result of this battle approximately 40,000 were wounded.

(128) China, France, the United Kingdom, the United States and the Soviet Union are Parties to the four Geneva Conventions of 1949. It is to be noted that the Republic of China signed these Conventions, but it never ratified them. In 1952, the People's Republic of China announced that, subject to certain reservation, it recognized the Republic of China's signature of the four Geneva Conventions. On December 28, 1956, it ratified them with reservations.

The following Arab States signed and ratified or acceded to these Conventions :

Algeria, Bahrain, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, Yemen Arab Republic (North), and Yemen People's Democratic Republic (South).

Israel signed the four Conventions on December 8, 1949, with reservations, and ratified them on July 6, 1951.

Iran signed these Conventions on December 8, 1949 and ratified them on February 20, 1957.

The number of States signed or acceded to the two Protocols is less than the Parties to the four Geneva Conventions. Many of States who signed these Protocols did not ratify them.

Among the States signed the Protocols, whether or not they ratify them, Egypt, Iran, Jordan, Morocco, Tunisia, the United Kingdom,

the United States, the Soviet Union and Yemen Arab Republic (North).

Libya and Mauritania are among the States who acceded to the two Protocols.

- (129) Conventions I to IV, Article 2.
- (130) Conventions I to IV, Article 3.
- (131) Conventions I to IV, Article 3; Conventions I, II, Article 12; Convention III, Article 13; Convention IV, Articles 32, 33.
- (132) Convention I, Article 46; Convention II, Article 47; Convention III, Article 13; Convention IV, Article 34.
- (133) Conventions I to III, Article 7; Convention IV, Article 8.
- (134) Conventions I to III, Articles 8, 9, 10; Convention IV, Articles 9, 10, 11.
- (135) Conventions I to IV, Articles 3 (1 c); Conventions I and II, Article 12; Convention III, Article 14; Convention IV, Article 27.
- (136) Protocol I, Article 1 (4).
- (137) Protocol II, Articles 2 to 18.
- (138) In 1864, the Swiss Federal Council convened a Conference in Geneva to consider a Draft Convention on the subject. This Conference led to the adoption of the 1864 Geneva Convention For The Amelioration Of The Condition Of The Wounded In Armies In The Field. In 1868, a Diplomatic Conference was convened to clarify certain provisions and, in particular, to extend the Convention's principles to naval warfare. But the additional Articles relating to the condition of the Wounded in War were not ratified and did not enter into force.
- (139) In 1906, the Swiss Federal Council invited all the States Parties Parties to the Convention of 1864 to a Second Diplomatic Conference in which a new Convention, entitled the "Geneva Convention of July 6, 1906, For The Amelioration Of The Wounded And Sick In Armies In Field", was adopted.
- (140) In 1929, the Swiss Federal Council convened a Diplomatic Conference in Geneva partly for the purpose of revising the 1906 Geneva Convention, and partly for the purpose of adopting a Convention On Prisoners Of War. The Conference adopted the 1929 Geneva Convention For The Amelioration Of The Condition Of The Wounded And Sick In Armies In The Field.

In 1937, a further Draft Convention was formulated by the International Committee of the Red Cross, and was submitted to the 16th International Conference of the Red Cross held in London

in 1938. In 1939, the Swiss Government transmitted the Draft of the International Committee Of The Red Cross to the States as a basis for a Diplomatic Conference which the Swiss Government planned to convene in Geneva in early 1940. The outbreak of the Second World War intervened, and the process of drafting a new agreement only resumed after the war.

(141) As referred before, the 1868 Geneva Conference adopted the 1868 Additional Articles Relating To The Conditions Of Wounded In War. These Articles extended to naval forces the protection of 1864 Geneva Convention, but were not ratified and did not enter into force.

The First Hague Peace Conference of 1899 Hague Convention III For The Adaptation To Maritime Warfare Of the Principles Of The Geneva Convention of August 22, 1864.

(142) At the Second Hague Peace Conference of 1907, the provisions of 1899 Hague Convention III were revised, greatly enlarged, and then embodied in 1907 Hague Convention X For The Adaptation To Maritime Warfare Of The Principles Of The Geneva Convention. The 1907 Hague Convention X replaced the 1899 Hague Convention III as between Parties to both agreements. Where the 1899 Hague Convention III had been based, on the adaptation of the principles of the 1864 Geneva Convention, the 1907 Hague Convention X was based on the 1906 Geneva Convention.

In 1937, the International Committee of the Red Cross formulated a Draft Convention which revised the 1907 Hague Convention X. In 1939, the Swiss Government transmitted the International Committee of the Red Cross Draft to States as a basis for a Diplomatic Conference which the Swiss Government planned to convene in Geneva in early 1940. The outbreak of the Second World War intervened, and the process of drafting a new agreement only resumed after the war, as mentioned before.

(143) Convention I, Articles 12, 15.

(144) Convention II, Articles 12, 18.

(145) Convention I, Articles 12, 14; Convention II, Articles 12, 16.

(146) Convention I, Article 15; Convention II, Article 18.

(147) Convention I, Articles 16, 17; Convention II, Articles 19, 20.

(148) Convention I, Articles 24 to 27; Convention II, Articles 36, 37.

(149) Convention I, Article 40; Convention II, Article 42.

(150) Convention I, Article 22; Convention II, Article 35.

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- (151) Convention I, Article 19.
- (152) Convention I, Articles 30, 31; Convention II, Articles 36, 37.
- (153) Convention I, Article 28.
- (154) Convention I, Article 18.
- (155) Convention I, Article 19.
- (156) Convention I, Article 19.
- (157) Convention I, Articles 35, 36; Convention II, Articles 22 to 27, 38, 39.
- (158) Convention I, Articles 33, 34; Convention II, Articles 28, 38.
- (159) The Red Crescent and the Red Lion and Sun have an equal status to the Red Cross. Turkey has used the symbol of the Red Crescent since 1876; now several states and national societies use this emblem. Iran chose the Red Lion and Sun symbol in 1924; but renounced in 1980 in favour of the Red Crescent. Israel did not succeed in obtaining acceptance of the Magen David Adom which it uses as its symbol. It is to be noted that Israel signed the Geneva Conventions I, II, and IV under the reservation to use the Magen David Adom as emblem. Israel signed the Geneva Convention III without any reservation.
- (160) Convention I, Articles 38- 44; Convention II, Articles 41-43.
- (161) Some Articles of the 1874 Brussels Declaration established a regime governing Prisoners of War; but it was not ratified and did not enter into force.
- (162) Some Articles relating to the Prisoners of War were included in the Regulations annexed to both 1899 Hague Convention II and 1907 Hague Convention II. There were also some Articles relevant to Prisoners Of War in some of the other 1907 Hague Convention.
- (163) The 1929 Diplomatic Conference convened, as referred before, partly for the purpose of adopting a convention on Prisoner Of War, and partly to revise the 1906 Geneva Convention On Wounded And Sick. The Conference adopted the 1929 Geneva Convention Relative To The Treatment Of Prisoners Of War. The 1929 Geneva Convention supplemented rather than replaced the provisions on Prisoners Of War contained in the Hague Regulations of 1899 and 1907.
- (164) Assimilated personnel covers members of militia and volunteer corps, including those of organized resistance movements not part of the regular forces, when they are attached to a belligerent, on condition that they :

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1. have a responsible leader;
2. wear a fixed distinctive sign, recognizable at a distance;
3. carry arms openly; and
4. conform to the laws and customs of war.

(165) Article 4.

(166) Article 12.

(167) Article 13, 14.

(168) Article 16.

(169) Article 17.

(170) Article 18.

(171) Articles 39, 82 to 88.

(172) Article 21.

(173) Articles 96, 99, 105, 106.

(174) Articles 15, 25, 26, 27, 30.

(175) Articles 49-54.

(176) Articles 33, 70, 71, 72.

(177) Article 79.

(178) Articles 78, 126.

(179) Article 41.

(180) Articles 109, 117.

(181) Article 118.

(182) Articles 3, 27.

(183) Article 25.

(184) Article 4.

(185) Article 35.

(186) Article 38.

(187) Articles 41 to 43.

(188) Article 47.

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- (189) Article 64.
- (190) Article 49.
- (191) Article 51.
- (192) Articles 33, 53.
- (193) Article 50.
- (194) Article 56.
- (195) Article 55.
- (196) Articles 59 to 62.
- (197) Articles 54, 63, 64.
- (198) Article 64.
- (199) Article 66.
- (200) Article 78.
- (201) Articles 65 to 77, 78, 136, 137, 143.
- (203) Article 31.
- (204) Article 27.
- (205) Article 30.
- (206) Articles 30, 143.
- (207) Article 29.
- (208) Articles 79-135.
- (209) Article 44.
- (210) Article 47. According to paragraph 2 of this Article : . .

"A mercenary is any person who :

- a. is specially recruited locally or abroad in order to fight in an armed conflict;
- b. does, in fact, take a direct part in the hostilities;
- c. is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially

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*in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party;*

*d. is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;*

*e. is not a member of the armed forces of a Party to the conflict; and*

*f. has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces".*

(211) Article 18.

(212) Articles 14, 15, 21.

(213) Articles 24 to 30.

(214) Articles 76 to 78.

(215) Article 1.

(216) Article 4.

(217) Article 6.

(218) Articles 7 to 12.

(219) Articles 9 to 12.

(220) Articles 13 to 18.

(221) Article 14.

(222) Article 16.

(223) Article 17.

(224) This Committee met in 1959, 1962 and 1967, but it took no decision on the question referred to it.

(225) A 35-Member Committee was set up under the General Assembly Resolution 2330 (XXII) of December 18, 1967.

(226) The representative of Israel found the Draft Definition unsatisfactory, inadequate, incomplete, and deceptive, and said that he was unable to participate in the general mood of self-congratulation prevailing in the Sixth Committee.

(227) Article 7 of the definition provides that :

"Nothing in this definition, and in particular Article 3, could in

any way prejudice the right to self determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration On Principles Of International Law Concerning Friendly Relations And Co-operation Among States In Accordance With The Charter Of The United Nations, particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the Principles of the Charter and in conformity with the above-mentioned Declaration".

(228) Article 41 of the Charter provides for the non-enforcement military action. We referred before to this Article in footnote No. (51).

(229) We referred before to Article 42 of the Charter in footnote No. (42).

(230) Under the "Uniting For Peace" Resolution of 1950, the General Assembly may, in certain circumstances, make "appropriate recommendations to Members for collective measures, including in the case of the breach of peace or act of aggression the use of armed forces when necessary, to maintain or restore international peace and security".

(231) A. D. McNair and Watts, *The Legal Effects Of War*.

(232) We referred before to Article 25 of the Charter in footnote No. (60).

(233) Article 49 of the Charter provides that :

"The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Council.

(234) We referred before to Article 43 of the Charter in footnote No. (64).

(235) Article 99 of the United Nations Charter provides that :

"The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security".

(236) On June 25, 1950, the Security Council, in the absence of the Soviet Union, adopted a Resolution recommending Member States to send forces to help South Korea which was invaded by North Korea. On June 27, 1950, the Council adopted a Resolution recommending Member States to place their forces in Korea under a unified command to be appointed by the U.S.A.

(237) The Institute Of International Law was founded in 1873, as an unofficial body consisting of Sixty Members and Sixty Associates, all of whom are distinguished international lawyers from various states throughout the world. According to its Statute, the objective of the Institute is to assist the progressive development of international law by, inter alia, contributing to the maintenance of peace and the observance by the U.S.A.

(238) Article 7 of the Resolution provides that :

"Without prejudice to the individual or collective responsibility which derives from the very fact that the Party opposing the United Nations Forces has committed aggression, the Party shall make reparation for injuries caused in violation of the humanitarian rules of armed conflict. The United Nations is entitled to demand compliance with these rules for the benefit of its forces and to claim damages for injuries suffered by its forces in violation of these rules".

(239) Article 8 of the Resolution provides that :

"The United Nations is liable for damage which may be caused by its Forces in violation of the humanitarian rules of armed conflict, without prejudice to any possible recourse against the State whose contingent has caused the damage".

It is desirable that claims presented by persons thus injured be submitted to bodies composed of independent and impartial persons. Such bodies should be designated or set up either by the regulations issued by the United Nations or by the agreements concluded by the Organization with the States which put contingents at its disposal and, possibly, with any other interested State.

It is equally desirable that if such bodies have been designated or set up by a binding decision of the United Nations, or if the jurisdiction of similar bodies has been accepted by the State of which the injured person is a national, no claims may be presented to the United Nations by that State unless the injured person has exhausted the remedy thus made available to it".

(240) The United Nations Forces are to be stationed in the Egyptian territory only, and the United Nations Observers are to be stationed in the Israeli territory.

According to Article 2 of Annex I entitled "Protocol concerning Israeli Withdrawal And Security Arrangements" four zones are to be established. The United Nations Forces will be deployed within zone "C" in the Egyptian territory.

Article 6 paragraph 3 of Annex I provides that :

"the arrangements described in this Article for each zone will be

implemented in zones A, B, and C by the United Nations Force and in zone D (in the Israeli territory) by the United Nations Observers". It is to be noted that the United Nations Emergency Force had supervised the Israeli withdrawal from the Egyptian territory as specified in Article 3 of Appendix to Annex I.

(241) See Briand M. Jenkins, *International Terrorism, A New Mode Of Conflict In International Terrorism And World Security*, edited by David Carlton and Schaeref, Croom Helm, London, 1975; referred to in I. Blishchenko and Zhdanov, *Terrorism And International Law*, translated from the Russian By Lev Bobrov, Progress Publishers, Moscow, 1984, pp. 8-9.

(242) See Paul Wilkinson, Jonah Alexander and David Carlton (Editors), *Terrorism, Theory And Practices*, Westview Press, Boulder, Colorado, 1979, referred to in Blishchenko and Zhdanov, *op. cit.*, pp. 27-29.

(243) Referred to in Blishchenko and Zhdanov, *op. cit.*, p. 57.

(244) See I. Karpets, *Crimes Of International Significance (in the Russian)*, *Yuridicheskaya Literatura*, Moscow, 1979, referred to in Blishchenko and Zhdanov, *op.cit.*, p. 40.

(245) *Op. Cit.*, p. 28.

(246) *Op. Cit.*, p. 27.

(247) Egypt signed this Convention.

(248) The Geneva Diplomatic Conference On The Reaffirmation And Development Of International Humanitarian Law Applicable In Armed Conflicts adopted the Resolution 22 (IV) of June 9, 1977, which recommended that a separate Conference be convened not later than 1979 with a view to reaching agreement on prohibitions or restrictions of the use of specific conventional weapons. Also, in December 19, 1977, the United Nations General Assembly resolved that a United Nations Conference on specific conventional weapons be convened in 1979.

(249) On December 12, 1984, the United Nations General Assembly adopted the Resolution 56 (XXXIX), by which it "urges all states that have not yet done so to exert their best endeavour to become Parties to the Convention and the Protocols annexed thereto as early as possible, so as ultimately to obtain universality of adherence"...

(250) Both principles had been codified in Articles 22 and 23 (e) of the Regulations annexed to 1899 Hague Convention II and 1907 Hague Convention IV.

(251) The most famous example of these Manuals was "Instructions For

The Government Of Armies Of The United States In The Field". These instructions were prepared by Professor Francis Lieber of Columbia University in New York and promulgated as "General Order No. 100" by President Lincoln on April 24, 1863. These instructions were applied by the forces of the United States during the American Civil War.

The "Lieber Instructions" became the model for many other national manuals such as those of the Netherlands in 1871, France in 1877, Serbia in 1879, Spain in 1882, Portugal in 1890 and Italy 1896.

Although the "Lieber Instructions" were binding only on the forces of the United States, they correspond to a great extent to the laws and customs of war existing at that time.

- (252) The regulation of warfare in ancient India, Greece and Rome included prohibitions against the use of poisoned weapons and blazing arrows. During the Middle Ages, the Lateran Council of 1132 declared that the cross bow and arbalest were "unchristian" weapons.
- (253) In 1863, the Russian military authorities invented a bullet which exploded on contact with a hard substance and whose primary object was to blow up ammunition wagons. In 1876, a modification of the bullet was developed which enabled it to explode on the contact with even a soft surface. Moreover, the new bullet shattered upon explosion.
- (254) Or November 29, by the Julian calendar applied in Russia at that time.
- (255) Baden and Brazil acceded to the St. Petersburg Declaration on January 11, and October 23, 1869 respectively.
- (256) The St. Petersburg Declaration came into force on December 11, 1868.
- (257) According to Thomas and Thomas, incendiaries are flammable materials and devices that are used to set fire to tactical and strategic target, such as buildings, industrial installations, fuel and ammunition dumps. According to the same authority, napalm is a mixed aluminium soap in which the organic acids are derived from coconut oil, naphthenic acids, and oleic acid. Gasoline thickened with napalm becomes a firm jelly when undisturbed but in motion, as when it forced through a flamethrower nozzle, it acts as a viscous liquid.
- (258) The number of the Parties of the Declaration are 34.
- (259) The issue was discussed before and during 1979-80 United Nations Weapons Conference in Geneva without resulting an agreement.
- (260) This Article is identical to the same Article of the Regulations

annexed to the 1899 Hague Convention II.

(261) Such as Yugoslavia.

(262) Article 6 (c) of the Charter of the Nuremberg Tribunal defines crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal of the Country where perpetrated". The agreement was signed by the U.K., U.S.A. and France and was adhered to by Nineteen States.

(263) Apart from the 1907 Hague Declaration On Balloons, there is no international agreement, in force, which exclusively addresses either air warfare in general or bombardment in particular. The Hague Rules of Aerial Warfare were drafted by a Commission of Jurists following a directive of the 1922 Conference of Washington for the Limitation of Armaments. The agreement includes these rules was never ratified.

The issue of aerial warfare was discussed in 1932-34 Geneva Disarmament Conference, but no binding agreement was reached. Various states regarded the 1936 London Procès-Verbal on Submarine Warfare Against Merchant Ships, as being applicable to military aircraft in operations against merchant shipping.

On September 30, 1938, the League of Nations Assembly unanimously adopted a Resolution includes the following principles :

1. Direct attack against civilian population is unlawful.
2. Targets for air bombardment must be legitimate, identifiable military objectives.
3. Reasonable care must be taken in attacking military objectives to avoid bombardment of a civilian population in the neighbourhood.

(264) Article 24 (2) provides that :

"(2) Such bombardment is legitimate only when directed exclusively at the following objectives : military forces; military works; military establishments or depots; factories constituting important and well-known centres engaged in the manufacture of arms, ammunition or distinctively military supplies; lines of communication or transportation used for military purposes".

(265) Article 4 of the Treaty provides that :

"Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give

notice of such withdrawal to all other Parties to the Treaty three months in advance".

(266) Article 1 of the Treaty provides that :

"Each Nuclear Weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any Non-Nuclear weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices".

(267) Article 2 of the Treaty provides that :

"Each Non-Nuclear Weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices".

(268) Article 3 paragraphs 1 and 4 of the Treaty provides that :

"1. Each Non-Nuclear Weapon State Party to the Treaty undertakes to accept safeguards, as set forth in an agreement to be negotiated and concluded with the International Atomic Energy Agency in accordance with the Statute of the International Atomic Energy Agency and the Agency's safeguards system, for the exclusive purpose of verification of the fulfilment of its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices. Procedures for the safeguards required by this Article shall be followed with respect to source or special fissionable material whether it is being produced, processed or used in any principal nuclear facility or it is outside any such facility. The safeguards required by this Article shall be applied on all source or special fissionable material in all peaceful nuclear activities within the territory of such State, under its jurisdiction, or carried out under its control anywhere.

4. Non-Nuclear Weapon States Party to the Treaty shall conclude agreements with the International Atomic Energy Agency to meet the requirements of this Article either individually or together with other States in accordance with the Statute of the International Atomic Energy Agency. Negotiation of such agreements shall commence within 180 days from the original entry into force of this Treaty. For States depositing instruments of ratification or accession after 180-day period, negotiation of such agreements shall enter into force not later than eighteen months after the date of initiation of negotiations".

- (269.) China and France as well as a number of "near-nuclear" state, an expression used by some writers, remain outside of "The Treaty On The Non-Proliferation Of Nuclear Weapons" to this day. Among these states, South Africa, Israel and Pakistan. According to the expectations of some writers, there is an increasing in the number of states which have no nuclear weapons but their potential capacity to produce plutonium is sufficient theoretically, for the production of Atomic bombs.
- (270.) This Treaty was signed at Moscow.
- (271.) This Treaty was signed at Vienna.
- (272.) It is defined, according to Article 6, as the area south of 60 degrees South Latitude.
- (273.) The Outer Space Treaty has been supplemented by two further agreements :
- The 1968 Agreement On The Rescue Of Astronauts, The Return Of Astronauts And The Return Of Objects Launched Into Outer Space; and
  - The 1972 Convention On International Liability For Damages Caused By Space Objects.
- (274.) Argentina and Brazil did not sign the Treaty, but Brazil later became a Party to the Treaty.
- (275.) The transit of the nuclear weapons has not been included in the Treaty.
- (276.) The Netherlands, the United Kingdom and the United States ratified Protocol I.
- (277.) China, France, the Soviet Union, the United Kingdom and the United States accepted Protocol II.
- (278.) The denuclearization of Africa was demanded by African States after France's nuclear tests in the Sahara in 1960. The Assembly of Heads Of State And Government of the Organization of African Unity at its First Ordinary Session held at Cairo (Egypt) from 17 to 21 July, 1964, adopted the Declaration On The Denuclearization Of Africa. Among the latest Resolutions of the United Nations General Assembly on the implementation of this Declaration, is the Resolution 61 (XXXIX) of December 132, 1984, in which it reaffirms that the implementation of this Declaration would be an important measure to prevent the proliferation of nuclear weapons and to promote international peace and security. It also condemns South Africa's continued pursuit of a nuclear capability and all forms of nuclear collaboration by any state, corporation, institution or individual with the racist regime that enable it to frustrate the

objective of the Declaration which seeks to keep Africa free from nuclear weapons.

(279) At the 29th Session of the United Nations General Assembly, Iran submitted a proposal, which was supported by Egypt, regarding the denuclearization of the Middle East, and to this effect, the General Assembly adopted the Resolution 3263 (XXIX) of December 9, 1974. Among the latest resolutions of the General Assembly, is the Resolution 54 (XXXIX) of December 12, 1984, according to which all the Parties directly concerned are required, pending and during the establishment of a Nuclear-Weapon Free Zone in the Middle East, to declare solemnly that they will refrain, on a reciprocal basis, from producing, acquiring or in any way possessing nuclear weapons and nuclear explosive devices and from permitting the stationing of nuclear weapons on their territory by any third party, to agree to place all their nuclear facilities under International Atomic Energy Agency safeguards and to declare their support for the establishment of the zone and deposit such declarations with the Security Council for consideration, as appropriate.

(280) At the same 29th Session of the General Assembly, Pakistan requested the discussion of the question of a Nuclear-Free Zone in Southern Asia, and to this effect the General Assembly adopted the Resolution 3265 B (XXIX) of December 9, 1974. The General Assembly in the Resolution 55 (XXXIX) of December 12, 1984, reiterates its conviction that the establishment of Nuclear-Weapon Free Zones in various regions of the world is one of the measures which can contribute most effectively to the objectives of non-proliferation of nuclear weapons and general and complete disarmament.

(281) The Declaration of the Indian Ocean as a zone of peace was contained in the General Assembly's Resolution 2832 (XXVI) of December 16, 1971.

In its Resolution 149 (XXXIX) of December 17, 1984, the General Assembly reaffirms its conviction that concrete action for the achievement of the objectives of the Declaration would be a substantial contribution to the strengthening of international peace and security.

(282) This Agreement was concluded by an exchange of letters between the Ministers of Foreign Affairs of the two states.

(283) The Draft Resolution was submitted by twelve Asian and African States acting on the initiative of Ethiopia. The Resolution was adopted by a vote of 55 in favour; 20 against; and 26 abstentions. The Soviet Union and the United Arab Republic (Egypt) voted in favour of it. Canada, China, France, South Africa, the United Kingdom and the United States were among the states voted against it. Iran, Israel and Pakistan were among the states abstained from voting.

Some writers criticize the drafting of this Resolution as having many faults from the technical point of view, these faults are :

1. The Declaration of St. Petersburg may have no relevance at all to the prohibition of the use of nuclear weapons.
2. The Declaration of Brussels was not ratified by any state.
3. The assertion in the substance of the Resolution that the "letter" of the Charter of the United Nations forbids the use of nuclear weapons, is not clear.

However, these writers add that the existence of such faults hardly reduces the value of the Resolution as an expression of the opinion of many governments on the state of the law. Even from the technical point of view, the recital containing the enumeration of declarations and agreements as a whole may be thought to make its point. Further, the Resolution itself makes the simple but important point that the use of such weapons is irreconcilable with the political and legal rationale of war.

(284) 62 Member States replied to the Secretary General in 1962, 33 of them viewed favourably the possibility of such Conference, 26 States expressed negative views or doubts; and three States wished to await the results of the meetings of the Eighteen-Nation Committee On Disarmament before submitting their views.

(285) The Resolution was adopted by a vote of 73 in favour, 4 against, and 46 abstention. The Soviet Union and Egypt voted in favour of it; China and South Africa were among the states voted against it; and France, the United Kingdom, the United States and Israel were among the States abstained from voting.

(286) The Resolution was adopted by a vote of 125 in favour; 1 against; 23 abstained from voting and 8 States were absent. The Soviet Union and Egypt voted in favour of it; the United States was the only state who voted against it; and China, France, and the United Kingdom were among the States abstained from voting.

(287) The Resolution was adopted by a vote of 104 in favour; 19 against; 20 abstained from voting and 14 States were absent. The Soviet Union and Egypt voted in favour of it; France, the United Kingdom, the United States and Israel were among the States who voted against it; and China was among the States abstained from voting.

(288) The Resolution was adopted by a vote of 146 in favour; none against; 4 abstained from voting and 7 States were absent. China, France, the United Kingdom, the Soviet Union, Egypt and Israel were among the States who voted in favour of it; and the United States abstained from voting.

CHAPTER II OF PART II

(289) In this Resolution, the General Assembly takes note of "the decision of the Seventh Conference Of Heads Of State Or Government Of The Non-Aligned Countries, held at New Delhi from 7 to 12 March 1983, as well as the relevant recommendations of the Organization of the Islamic Conference reiterated at the Fourteenth Islamic Conference of Foreign Ministers, held at Dhaka from 6 to 10 December 1983".

(290) The St. Petersburg Declaration provides that :

"... the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy".

(291) The genetic defects caused by the use of nuclear weapons might appear over some generations. Radiation included changes in gonad cells might cause lower fertility, spontaneous abortion and still-births. They might cause birth defects or non-specific constitutional weakness as well.

(292) Article 48 of the Additional Protocol I of 1977 provides that :

"In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the Conflict shall at all times distinguish between the civilian population and combatants and between civilian objectives and accordingly shall direct their operations only against military objectives".

(293) Article 51 paragraphs 1 to 6 of the Additional Protocol I of 1977 provides that :

"1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are :

a. those which are not directed at a specific military objective;

b. those which employ a method or means of combat which cannot

be directed at a specific military objective; or

- c. those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate :

- a. an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

- b. an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

6. Attacks against the civilian population or civilians by way of reprisals are prohibited".

(294) Article 52 paragraphs 1 and 2 of the Additional Protocol I of 1977 provides that :

"1. Civilian objects shall not be the object of attack or reprisals. Civilian objects are concerned, military objectives are limited to those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".

(295) Article 54 paragraph 1 of the Additional Protocol I of 1977 provides that :

"Starvation of civilians as a method of warfare is prohibited".

(296) Article 55 paragraph 1 of the Additional Protocol I of 1977 provides that :

"1. Care shall be taken in warfare to protect the neutral environment against widespread, long term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the nature of environment and thereby to prejudice health or survival of the population".

(297) Such as the United Kingdom Manual of 1958; the United States Department Of The Army Field Manual, The Law Of The Land Warfare, July 1956; and the United States Manual of Naval Warfare.

(298) Another reason was added, i.e., the use of these principles on a large scale could not be reconciled with the principles of the laws of war envisaged by the U.K. Manual.

(299) Of the facts, specified by some writers, relative to technological character, we may refer to the following :

1. The scale of destructiveness of the nuclear weapons.
2. Besides its destructive use, nuclear energy has applications and implications of tremendous potential benefit to mankind.

(300) Of the facts, specified by these writers, relative to the realities of politics, we may refer to the following :

1. The low level of integration of the international community.
2. The consequential absence of an international legal order even approximating the strength of most municipal orders.
3. The limited area of general consensus as distinct from the area of conflict and misunderstanding between peoples.
4. The vast unevenness of development among them as regards standards of life, cultural inheritance, internal political structure, and external power.

(301) On 1969, the British delegate submitted to the Eighteen-Nation Disarmament Conference, a Draft Convention concerning with the biological weapons. We believe that the British point of view concerning the separation between the chemical and biological weapons is convincing. This point of view was based on the distinction between the two kinds of weapons made by the United Nations Secretary General's Report On Chemical And Biological Weapons And The Effects Of Their Possible Use - it was pointed out that differences exist, between the two kinds of weapons, as to toxicity, speed of action, duration of effect, specificity, controllability and the residual effects. The biological weapons were shown to have potentially a general contaminating power and to be more difficult to control than chemical weapons. The ability of biological weapons to self-propagate - to multiply themselves, and as a living weapons to seek out victims for destruction - was said to make them the most horrifying and inhumane of all weapons.

(302) These customary rules were formally enacted in Articles 23 (a) and 23 (e) of the Hague Regulations of 1899 and 1907. The prohibition of the use of poison is also mentioned in Article 70 of

the Lieber Instructions. Article 13 (a) of the Brussels Declaration of 1874 and Article 8 (a) of the Oxford Manual adopted by the Institute Of International Law in 1880.

(303) The States who ratified or acceded to the Declaration are 28, the United States is not among them. China, France, Great Britain and Ireland, Russia, Germany, Italy, Japan, Turkey and Persia (Iran) were among these States.

(304) This means that the action must not take place by mechanical means, but by the inherent qualities of the substance. Thus, according to Thomas and Thomas, it would be excluded from the meaning of poison, the killing or injuring by means of force such as caused by the cutting of the body with a sword or knife, the penetration of the body with a bullet, or the injury caused by explosions or explosive shells.

(305) The so-called "Treaties of the Paris Suburbs" were signed between the Allies and the defeated states. They are the Versailles Treaty of June 28, 1919 with Germany; the Saint-Germaine Treaty of September 10, 1919, with Austria; the Neuilly Treaty of November 27, 1919, with Bulgaria; the Treaty of the Trianon of June 4, 1920, with Hungary; and the Treaty of Sèvres of August 11, 1920, with Turkey. The last Treaty was never been ratified by Turkey and hence was never been effective.

(306) The First Session of the Conference took place on November 12, 1921.

(307) Article 6 paragraph 1 of the Treaty provides that :

"The present Treaty shall be ratified as soon as possible in accordance with the constitutional methods of the Signatory Powers and shall take effect on the deposit of all the ratifications, which shall take place at Washington".

(308) Among the States Parties to this Protocol by ratification, accession or succession, Federal Republic of Germany, German Democratic Republic, Peoples Republic of China, Great Britain, France, the Soviet Union and the United States. The latter state signed the Protocol on June 17, 1925 and ratified it on April 10, 1975. Also, among the Parties to the Protocol, the following Arab States, Egypt, Sudan, Yemen Arab Republic (North), Saudi Arabia, Kuwait, Qatar, Syria, Lebanon, Jordan, Iraq, Libya, Tunisia and Morocco. India, Pakistan, Persia (Iran) and Israel. Israel acceded to the Protocol on February 20, 1969 are also among the States Parties.

(309) The British attitude before 1970, considered lachrymatory gases prohibited under the Geneva Protocol. The British memorandum submitted on December 2, 1930, to the Preparatory Commission For The Disarmament Conference took this view. On February 2, 1970, the British Foreign Secretary announced that such gases are outside

the scope of the Geneva Protocol.

(310) The States Parties who ratified the Protocol under reservation are Belgium, Bulgaria, Canada, Chile, Czechoslovakia, Estonia, France, Great Britain, Netherlands, Portugal, Romania, Kingdom of Serbs, Croats and Slovenes (Yugoslavia), Spain and the United States. The States Parties who acceded with reservation are Australia, Iraq, Ireland, Israel, Jordan, Kuwait, Libya, Mongolia, New Zealand, South Africa, Syria, the Soviet Union and Vietnam. The States Parties by succession with a reservation are People's Republic of China, Nigeria and Pakistan.

(311) Belgium, France, Luxembourg, Netherlands and Great Britain signed this Treaty.

(312) Federal Republic of Germany and the Italian Republic acceded to the Treaty through Protocol I.

(313) Article 1 of the Protocol refers to the Declaration of the German Chancellor on October 3, 1954, in which Germany undertook not to manufacture in its territory atomic, biological and chemical weapons.

(314) Protocol IV established the Agency of Western European Union for the Control of Armaments, giving it a twofold task :

1. to check that the level of armaments subject to control in each of the Member Countries did not exceed the appropriate levels laid down in accordance with the provisions of the Treaty (quantitative control);

2. to satisfy itself that the undertakings given by Germany not to manufacture certain types of weapons including chemical and biological weapons were being observed (non-productive control).

(315) The Resolution 2603 (XXIV) was adopted by a vote of 80 in favour; 3 against; 36 abstained from voting and 7 States were absent. The Soviet Union, the United Arab Republic (Egypt), Iraq, Iran voted in favour of it; the United States was among the three States voted against it; and China, France, the United Kingdom and Israel were among the States abstained from voting.

(316) Part A of the Resolution 65 (XXXIX) was adopted by a vote of 119 in favour; 16 against; 14 abstained from voting and ten States were absent. China, France, the United Kingdom, the United States; Iraq, Iran and Egypt voted in favour of it; the Soviet Union was among the States voted against it; and Israel was among the absent States.

(317) Part B of the Resolution 65 (XXXIX) was adopted by a vote of 84 in favour; one vote against; 62 abstained from voting and ten States were absent. The Soviet Union, Iraq, Iran and Egypt voted in favour of it; only the United States voted against it, China,

France and the United Kingdom were among the States abstained from voting; and Israel was among the absent States.

(318) In Part C of the Resolution entitled "Chemical and Bacteriological (Biological) Weapons", the General Assembly reaffirms the urgent necessity of strict observance by all States of the principles and objectives of the Geneva Protocol of 1925. In Part D of the Resolution entitled "Second Review Conference Of The States Parties To The Convention On The Prohibition Of The Development, Production And Stockpiling Of Bacteriological (Biological) And Toxin Weapons And On Their Destruction", the General Assembly after noting the provisions of Article 12 of the Convention according to which the First Review Conference Of The Parties To The Convention was held at Geneva from 3 to 21 March 1980, recommends a Preparatory Committee is to be established prior to the holding of the Second Review Conference in 1986 at the request of a majority of States Parties to the Convention.

(319) Part E of the Resolution 65 (XXXIX) was adopted by a vote of 85 in favour; 18 against; 30 abstained from voting and 23 states were absent. China, France, the United Kingdom, the United States and Egypt voted in favour of it; the Soviet Union was among the States voted against it; Iraq and Iran were among the States abstained from voting; and "Israel" was among the absent States.

(320) The English version of the Protocol prohibits the use in war of "asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices"; while the French version forbids the use in war of "gas asphyxiants, toxiques ou similaire, ainsi que de tous liquides, matières or procédés analogues". The French version is more restricted than the English, the latter forbidding all forms of gas while the French prohibits specific types of gases, toxics and asphyxiants and analogous materials.

(321) Article 1 of the Convention provides that :

"Each State Party to this Convention undertakes never in any circumstances to develop, stockpile or otherwise acquire or retain :

1. Microbial or other biological agent, or toxins whatever their origin or method of production, of types and in quantities that have no justification of prophylactic, protective or other peaceful purposes;

2. Weapon, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict".

(322) Article 2 of the Convention provides that :

"Each State Party to the Convention undertakes to destroy or to divert to peaceful purposes, as soon as possible but not later than nine months after the entry into force of the Convention, which are

in its possession or under its jurisdiction or control. In implementing the provisions of this Article all necessary safety precautions shall be observed to protect populations and the environment".

(323) Article 3 of the Convention provides that :

"Each State Party to this Convention undertakes not to transfer to any recipient whatsoever, directly or indirectly, and not in any way to assist, encourage, or induce any State, group of States or international organizations to manufacture or otherwise acquire any of the agents, toxins, weapons, equipment or means of delivery specified in Article 1 of the Convention".

(324) Article 14 paragraph 3 of the Convention provides that :

"This Convention shall enter into force after the deposit of instruments of ratification by 22 Governments, including the Governments designated as Depositaries of the Convention".

(325) The rules to be applied on antipersonnel biological agents may be concluded from Article 51 paragraphs 2, 4 (b) and (c) and 5 (b).

Article 51 paragraph 2 provides that :

"2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited".

Article 51 paragraph 4 (b) and (c) provides that :

"Indiscriminate attacks are prohibited. Indiscriminate attacks are :

- b. those which employ a method or means of combat which cannot be directed at a specific military objective; or
- c. those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each case, are of a nature to strike military objectives and civilians or civilian objects without distinction".

Article 51 paragraph 5 (b) provides that :

"Among others, the following types of attacks are to be considered as indiscriminate :

- b. an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation

to the concrete and direct military advantage anticipated".

(326) The rules to be applied on antiplant and antianimal biological agents may be concluded from Articles 35 paragraph 3, 54 paragraphs 1 and 2 and 55.

Article 35 paragraph 3 provides that :

"3. It is prohibited to employ methods or means of warfare which are intended, or may be expected to cause widespread, long-term and severe damage to the natural environment".

Article 54 paragraphs 1 and 2 provides that :

"1. Starvation of civilians as a method of warfare is prohibited.

2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive".

Article 55 provides that :

"1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

2. Attacks against the natural environment by way of reprisals are prohibited".

Chapter III : The Consequences Of  
The Unlawful Use Of Force<sup>(1)</sup>

I. The Consequences Of The Unlawful Use Of Force  
In Al-Shari'a Al-Islamiya

It is clear from this study that Jihad in Al-Shari'a Al-Islamiya is a conception different from war in international law.

Jihad by its very nature is a legal duty of Muslims. However, it does not imply that all the practices of Muslims, in their fulfilment of this duty in the course of history, were lawful, whether as to jus ad bellum or jus in bello using the terminology of international law. In general, the consequences of the unlawful use of force in Al-Shari'a Al-Islamiya are similar to that in international law, but the Islamic attitude is more advanced than the attitude of international law in certain aspects.

As regards jus ad bellum, the unlawful use of force may be exemplified by the conquest of a country treacherously; or without prior calling of its people to Al-Islam, or alternatively to pay jizya. In this regard, Al-Islam reached, at the outset of the Eight Century (or during the First Hijri Century), a position more advanced than contemporary international law in the Twentieth Century. In contemporary international law, the last evolution is the concept of international criminal responsibility; while the Islamic evolution in the Eighth Century reached the extent that a Muslim judge could decide, in a certain case, to revert to the status quo ante bellum or the state of affairs as it existed before "war".

In the time of Umar Ibn Abdul Aziz (in the 8<sup>th</sup> Century A.D.), a delegate from Samarqand came to him complaining that the military Commander Qutayba Ibn Muslim had treacherously dealt with them and permitted the Muslim to reside there. Umar Ibn Abdul Aziz instructed the governor of Samarqand Sulayman Ibn Abi-Sari to appoint a judge to try the case. The governor appointed Gumay'a Ibn Hader Al-Bagi as a judge who decided that the Muslims must leave Samarqand to return to the status quo ante bellum; and then the two parties, the Muslims and the people of Samarqand, would start fighting again on equal basis. Due to this just decision and because they hated to fight again, the people of Samarqand accepted the Muslims to reside among them.

As regards the jus in bello, it may be said, very briefly, that if there is a violation of Islamic rules and principles to the extent that it constitutes a crime according to Al-Shari'a, the Khalifa would instruct the judiciary to try the violators and punish them in accordance with its rules. This worldly punishment will not relieve the violators from punishment in the Hereafter.

Also, the Khalifa may decide to pay compensation for damages done by the Muslims in their fighting with non-Muslims in violation of the rules and principles of Al-Shari'a.

## II. The Consequences Of The Unlawful Use Of Force In International Law

The Nuremberg Tribunal may be characterized, as the very essence of its Charter, that international law imposes duties and liabilities on individuals as well as on states.

As regards jus ad bellum, the Charters of the Nuremberg and Tokyo Tribunals, and their Judgments recognized the legal existence of the crime against peace as defined in both Charters. The Judgments of the Nuremberg and Tokyo Tribunals, combined with the endeavours of the United Nations in this regard, confirmed the crime against peace as a crime under international law. Therefore, as far as jus ad bellum is concerned, the consequences of the unlawful use of force, are the trial and punishment of individuals who had committed this crime.

As regards jus in bello, war crimes, according to Jescheck, include all grave violations of the laws of war and the arbitrary destruction of private property, which are committed by the agents of a belligerent state against the citizens or property of the enemy of a conquered nation or of forcibly occupying a neutral territory

Oppenheim distinguishes between four kinds of war crimes :

1. violations of recognized rules regarding warfare committed by members of the armed forces;
2. all hostilities in arms committed by individuals who are not members of the enemy armed forces;
3. espionage and war treason;
4. all marauding acts.

As noted by Jescheck, the concept of war crimes was broadened in the course of war crime trials following the Second World War to include the arrest and transportation of civilians to labour camps on political or other grounds; the taking of hostages; the employment of prisoners of war in violation of international law in dangerous areas; the economic exploitation of occupied territories to enhance the military advantage of the occupying forces; the imprisonment of foreign workers; participation in the promulgation of laws and regulations whose content violates international law; the pronouncement of grossly unjust criminal judgments; and the performance of medical experiments on unwilling person.

It is to be noted that the illegal resort to war does not justify the breach of the laws of war by the other belligerent state, or in other words does not justify waiving war crimes from punishment.

A distinction must be made, in the legal consequences of the commission of war crimes between the criminal responsibility for war crimes, and the compensation for war crimes.

### First : The Criminal Responsibility For War Crimes

In this regard, a distinction must be made between national and international prosecution of war crimes.

#### A. The National Prosecution Of War Crimes

1. According to the Geneva Conventions of August 12, 1949,<sup>(2)</sup> the Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of these Conventions; also each Contracting Party shall bring such persons, regardless of their nationality, before its own courts, or hand such persons over for trial to another Contracting Party. Thus, the duty to punish, as Jescheck noticed, attaches not only to the states to which the accused owes his allegiance; or to the injured state, but to all Contracting Parties; this duty even extends to neutrals in an armed conflict, and it exists without regard to the nationality of the perpetrator or victim, or to the place where the crime took place. Hence, the Geneva Conventions provide universal jurisdiction for the punishment of war crimes, coupled with a duty to prosecute.

2. Article 88 of the 1977 Geneva Protocol I Additional To The Geneva Conventions of August 12, 1949, And Relating To The Protection Of Victims Of International Armed Conflicts provides that :

"1. The High Contracting Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol.

2. Subject to the rights and obligations established in the Conventions and in Article 85 paragraph 1 of this Protocol,<sup>(3)</sup> and when circumstances permit, the High Contracting Parties shall cooperate in the matter of extradition. They shall give due consideration to the request of the state in whose territory the alleged offence has occurred.

3. The law of the High Contracting Party shall apply in all cases. The provisions of the preceding paragraphs shall not, however, affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters".

#### B. The International Prosecution Of War Crimes

As regards the international prosecution of war crimes, the United

Nations system does not include International Criminal Court, or Criminal Chamber within the framework of the International Court of Justice. However, the precedents of the Nuremberg and Tokyo Tribunals may be invoked to establish ad hoc criminal tribunals in similar circumstances.

### Second : The Compensation For War Crimes

According to Oppenheim, it was an established customary rule that claims for reparation for damages caused by violations of the rules of legitimate warfare could not be raised after the conclusion of peace, unless the contrary was expressly stipulated.

According to Article 3 of the Hague Convention IV Respecting The Laws And Customs Of War On Land :

1. A belligerent who violates the Hague Regulations shall if the case demand, pay compensation; and
2. A belligerent is responsible for all acts committed by any persons forming part of his armed forces.

The principle of compensation for violations of the laws of war is also included in Article 91 of the 1977 Geneva Protocol I Additional To The Geneva Conventions of 1949 which provides that :

"A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces".

Article 1 of the Draft Articles On State Responsibility adopted by the International Law Commission provides that :

"Every internationally wrongful act of State entails international responsibility of that State".

Article 17 paragraph 2 of the Draft provides that :

"The origin of the international obligation breached by a State does not affect the international responsibility arising from the internationally wrongful act of that State".

In the "Military And Paramilitary Activities In And Against Nicaragua" case, the International Court of Justice in its Judgment of June 27, 1986, decides that "jurisdiction to determine the merits of a dispute entails jurisdiction to determine reparation".<sup>(4)</sup> Thus, the Court, by twelve votes to three, "Decides that the United States of America is under obligation to make reparation to the Republic of

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Nicaragua for all injury caused to Nicaragua by the breaches of obligations under customary international law".<sup>(5)</sup>

In that case the United States did not appear in the proceedings, and this was reflected in the attitude of the Court which refrained from deciding the amount requested by Nicaragua, i.e., \$ 370,200,000, as the minimum valuation of directed damages. In this regard, the Court says, "There is no provision in the Statute of the Court to make an interim award of this kind, or indeed debarring it from doing so. In view of the final and binding character of the Court's Judgments, under Articles 59 and 60 of the Statute, it would however only be appropriate to make an award of this kind, assuming that the Court possesses the power to do so, in exceptional circumstances, and where the entitlement of the State making the claim was already established with certainty and precision. Furthermore, in a case in which the respondent State is not appearing, so that its views on the matter are not known to the Court, the Court should refrain from any unnecessary act which might prove an obstacle to a negotiated settlement. It bears repeating that :

"the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties; as consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement.....). (Free Zones Of Upper Savoy And The District Of Gex, Order of 19 August 1929, P.C.I.J. Series A, No. 22, p. 13).

Accordingly, the Court does not consider that it can accede at this stage to the request made in the Fourth Submission of Nicaragua".<sup>(6)</sup>

The Court, by fourteen votes to one, "Decides that the form and amount of such reparation, failing agreement between the Parties, will be settled by the Court, and reserves for this purpose the subsequent procedure in the case".<sup>(7)</sup>

Footnotes Of Chapter III Of Part II

(1) See In English

Ian Brownlie, *International Law And The Use Of Force By States*, pp. 150-166, 195-213; L. Oppenheim, *International Law, Volume II (Disputes, War And Neutrality)*, pp. 592-595; Georg Schwarzenberger, *International Law As Applied By International Courts And Tribunals*, pp. 443-461; G.I. Tunkin, *Theory Of International Law*, pp. 396-415; Muhammad Hafez Ghanem, *State Responsibility Today*, pp. 16-32; H.A.R. Gibb, *The Arab Conquests In Central Asia*, pp. 29-58; The Draft Articles On State Responsibility adopted by the International Law Commission, *Official Records Of The General Assembly, Thirty-First Session (May 14- August 3, 1979)*, A/34/194, reprinted in *International Legal Materials*, Number 4, July 1979, pp. 1557-1577; *Military And Paramilitary Activities In And Against Nicaragua (Nicaragua V. The United States Of America)*, Merits, Judgment, I.C.J. Reports 1986.

See In Arabic

Abul-Abbas Ibn Yahia Ibn Jaber Al-Beladhry, *Futuh Al-Buldan*, pp. 411-422; Muhammad Abd ALLAH Darraz, *Dirasat Islamiya Fi Al-Alaqat Al-Ijtima'iyah Wa Ad-Dawliyah*, pp. 43-86; Muhammad Hafez Ghanem, *Al-Masuliya Ad-Dawliyah*, passim; Yunus Al-Azzawi, *Mushkilat Al-Masuliya Al-Jina'iyah Ash-Shakhsiya Fi Al-Qanun Ad-Dawli*, passim; Abdul Wahhab Humad, *Al-Ijram Ad-Dawli*, passim; Hameed As-Saadi, *Muqaddima Fi Dirasat Al-Qanun Ad-Dawli Al-Jina'i*, passim; Hasanain Ibrahim Saleh Ubaid, *Al-Qada'a Ad-Dawli Al-Jina'i*, passim; Hasanain Ibrahim Saleh Ubaid, *Al-Jarima Ad-Dawliyah*, passim; Muhammad Mohyee Eddin Awad, *Dirasa Fi Al-Qanun Al-Jina'i Ad-Dawli*, passim; Gamal Eddin Al-Uttaifi, *Nahwa Muhakama Jina'iyah Li Mujrimi Al-Harb Al-Israeliyyeen*, pp. 181-219.

(2) *Convention I, Article 49; Convention II, Article 129; Convention IV, Article 146.*

(3) *Article 85 paragraph 1 of Protocol I relates to the repression of breaches and grave breaches of this Protocol.*

(4) *I.C.J. Reports 1986, p. 142.*

(5) *I.C.J. Reports 1986, p. 149.*

(6) *I.C.J. Reports 1986, p. 143.*

(7) *I.C.J. Reports 1986, p. 149.*

PART III: THE LEGALITY OF "WAR"  
WITHIN THE FRAMEWORK OF REGIONAL  
ORGANIZATION

Chapter I: Universalism And  
Regionalism In International Law And  
Al-Shari'a Al-Islamiya<sup>(1)</sup>

The subject of this Chapter requires, essentially, to explain the following points :

First: The arguments in favour of or against to both universalism and regionalism.

Second: Regionalism under the United Nations Charter.

Third: The conception of Universalism in Al-Shari'a Al-Islamiya.

Fourth: Classification of Regional Organizations.

First: The Arguments In Favour Of, Or Against To  
Both Universalism And Regionalism

There are two main approaches to world security, the universal approach and the regional approach.

Some writers summarise the arguments of the universalists to substantiate their preference for universalism over regionalism as follows :

1. World interdependence has created an increasing number of problems that require global solutions. Political, economic, and social problems reach across regional boundaries.
2. Regional resources are often inadequate to resolve the problems of states within the region.
3. Since peace is indivisible only a world organization can deal effectively with threats to the peace that may, if unchecked, spread beyond local or regional limits.
4. Only a universal organization can provide an adequate check on the power of a large state that can often dominate the other members of a regional arrangements.
5. Sanctions against an aggressor are usually ineffective if applied on a regional basis because of sources of aid to the aggressor from outside the region.
6. Regions are imprecise and impermanent. No agreement can be reached on a system of regions into which the globe can be conveniently

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divided.

7. Regional alliances provide the basis for rivalry and competition for military supremacy among regions leading to greater possibilities for major wars.
8. The existence of numerous, moderately successful universal organizations demonstrates the desire of governments and peoples for a global basis without the necessity of first using regional organizations as laboratories for gradually developing enlarged areas of consensus or community.

On the other hand, the arguments of the regionalists for the superiority of regionalism over universalism are summarised by the said writers as follows :

1. There is a natural tendency toward regionalism based on the homogeneity of interests, traditions and values within small groups of neighbouring states.
2. Political, economic and social integration is more easily attained among a lesser number of states within a limited geographic area than on global basis.
3. Regional economic co-operation provides more efficient economic units than the smaller states, and these larger units can compete successfully in world markets.
4. Local threats to peace are more willingly and promptly dealt with by the governments of that area than by disinterested states at greater distances from the scene of conflict.
5. By combining states into regional groupings, a global balance of power will be maintained, and world peace and security will be promoted.
6. The world is not ready to establish global authority sufficient to maintain world peace and promote world welfare. Regionalism is the first step in gaining experience and building areas of consensus toward eventual intergovernmental co-ordination or integration.
7. Universalists fail to take into account the heterogeneity of political, economic, social and geographical factors throughout the world that militate against global unity. These differences can be easily more accommodated within the regional framework.

Both World Organizations, the League of Nations and the United Nations, strongly emphasized universalism and consequently insisted on an unlimited supra-ordinated position with regard to regional organizations. But, it is to be noted that there was a complete lack of any provision in the League Covenant formalizing the relation of regional organizations with the World Organization. Therefore, none of the regional organizations of that period stood in a clearly defined

relation to the League.

During the wartime planning for the post-Second World War international organization, there was some debate within the Allied camp as to whether emphasis should be given to regional councils or a universal organization. Churchill, the British Premier, emphasized regional council; while Cordell Hull, the U.S. Secretary of State, opposed this trend on the ground that emphasis on competing regional councils might create a system conducive to war between regions, and that it might encourage great power hegemony within regions.

In fact, both universal and regional organizations may have a role in the maintenance of peace and security and the real issue is allocation of authority between them in the most policy-responsive manner. The choice is not necessarily one of either universalism or regionalism, but allows for both universalism and regionalism co-existing, a sometimes competing and sometimes mutually supporting relationship. The relationship of regional with universal organizations may be either antagonistic or harmonious.

## Second: Regionalism Under The United Nations Charter

### A. Preliminary Remarks

According to some writers, the idea of "regional" agencies arose from pure practical considerations, especially owing to geographical, economic and cultural variations. These regional arrangements help to provide regional defence systems, to maintain peace and security within limited areas of the world and to settle disputes of regional concern by peaceful means.

In other words, it is to be said that regional co-operation was grounded on a certain historic identity and a measure of common socio-economic aspirations. According to these writers, language, religion and ethnic differences constitute real obstacles towards regional co-operation. That explains the formation of sub-regional groupings amongst Asian States such as the establishment of the Arab League among the Arab States.

At the San Francisco Conference Egypt proposed that regional arrangements should be defined as :

"Organizations of a permanent nature grouping, in a given geographical area, several countries which, by reason of their proximity, community of interests or cultural, linguistic, historical or spiritual affinities, make themselves jointly responsible for the peaceful settlement of disputes which may arise... as well as for the safeguarding of their interests and the development of their economic and cultural relations".

The Egyptian proposal was rejected by a Sub-Committee of Committee III/4 that seems to have been motivated in part by feelings that the

listing of factors was too narrow, and in part by fear of reopening the difficult negotiations which had led to agreement on the regional provisions.

We agree with some writers that, although it might be expected that heterogeneous organizations without common geographic, ideological, ethnic or religious ties might be poor performers in dealing with local disputes, there seems to be nothing in the Charter that limits regional organizations to states with common geographic, ideological, ethnic or religious base.

We believe that, under the United Nations Charter, the term "regional organization" covers not only regional arrangements and regional agencies within the meaning of Chapter VIII of the Charter, but also regional organizations based on collective self-defence as referred to in Article 51, in Chapter VII of the Charter.

The Dumbarton Oaks Proposals, which served as a basis of discussion at the San Francisco Conference, assumed the primary responsibility of the Security Council for maintaining peace and security, and placed regional arrangements under the absolute supremacy of the Security Council.

According to some writers, there are strong reasons for urging that a universal organization should have ultimate authority for the maintenance of peace and security. In the interdependent world in which we live, most issues of peace and security affect all of the Members of the World Community. Moreover, a universal forum is a more broadly based forum for the resolution of security issues, both in the sense of greater assurance that decision will reflect common community interest, and in the sense of greater effectiveness by inclusion of the major powers in the decision process.

### B. The Relationship Between Regional Organizations And The United Nations

1. According to Article 52 of the United Nations Charter :

"a. Regional agencies may exist for dealing with such issues of international peace and security as are appropriate for regional action as long as their activities are consistent with the Purposes and Principles of the United Nations.

b. States are encouraged to settle local disputes through regional agencies<sup>(2)</sup> before referring them to the Security Council".

It is the opinion of Goodrich, Hambro and Simons that Article 52 of the Charter goes beyond legitimizing such arrangements constituting such agencies, as it requires Members to make every effort to achieve pacific settlement of local disputes by these means before referring them to the Security Council. Such procedure is consistent with the obligation Members assume under Article 33 to seek, first of all, the settlement of

their disputes by means of their own choice before appealing to the Council.

Also, according to Goodrich, Hambro and Simons, regional action, under Article 52 is not appropriate in a matter involving a state not a party to regional arrangement.

Article 52 paragraph 2 of the Charter establishes an obligation on the Member States of regional organizations to exhaust the remedies of the regional system prior to referral to the United Nations. However, failure to do so is not necessarily a reason for denial of a hearing or even a refusal by the Security Council or the General Assembly to adopt substantive measures. The United Nations practice supports the right of Member States to appeal to the United Nations at any time. (3)

Under Article 35 of the Charter, any Member of the United Nations, whether a Member of a regional arrangement or not, can bring a dispute or situation to the attention of the Security Council. Thus, it is possible for regional Members to resort only to regional machinery and still have the issue raised in the Security Council. Similarly any state may raise the issue in the General Assembly.

2. According to Article 53 of the Charter :

- a. The Security Council may utilize regional agencies for the settlement of local disputes.
- b. With the exception of action against enemy states resulting from the Second World War, no enforcement action shall be taken by regional agencies without the authorization of the Security Council.

Article 53 paragraph 1 concerns two different types of enforcement actions, those initiated by regional arrangements or agencies and those initiated by the Security Council. The division of powers between the Security Council and regional arrangements, under Article 53, depends on the existence of "enforcement action".

Article 53 does not define "enforcement action" but this definition may be concluded from Articles 41, and 42 of the Charter.

Goodrich, Hambro and Simons refer to the meaning of the term "enforcement action", in the practice of some states, the Socialist States in particular, as it signifies in the context of Article 53 that even non-military sanctions in terms of Article 41 could only be applied at the regional level with the authorization of the Security Council. But the other Members argued that approval was not necessary, and that the report to the Council on the action taken was made in conformity with Article 54.

Like all collective security measures, the granting of authorization under Article 53 (1) depends legally on the existence of a threat to the peace, a breach of the peace or an act of aggression. The Security

Council is empowered to decide on both these prerequisites and on the granting of authorization. The effective Security Council control over regional enforcement actions is only guaranteed by clear and prior authorization, and not to approve regional enforcement actions by regional organizations after the fact.

The Security Council, in accordance with Chapter VII of the Charter, may resort to its own enforcement measures to settle disputes which threaten the peace, and under Article 53 paragraph 1, the council may utilize the regional arrangements or agencies to carry them out. The regional character of a dispute is, in such cases, of no consequence.

We agree with some writers that, there is no legal basis for regional enforcement actions against third states who are not Members of the particular regional arrangement or agency. Whether or not the third state belongs to a particular geographical region is not legally relevant since the basis for regional peacekeeping is not a "region" in the geographical sense but rather a regional arrangement or agency established between Member States.

The measures that are expected from the requirement of Security Council authorization in Article 53 falls into two categories :

- a. measures against any enemy state as defined in paragraph 2 of this Article, provided for pursuant to Article 107, and
- b. measures against such enemy states provided for in regional arrangements directed against the renewal of aggressive policy on the part of any such state.

Actually, this exception has no practical importance at the time being.<sup>(4)</sup>

3. According to Article 54 of the Charter, the Security Council shall be kept fully informed of activities undertaken or in contemplation by regional agencies for the maintenance of peace and security.

The purpose of this Article is to provide the Security Council with the information it needs to discharge its "primary obligation" under Article 24, and to exercise the degree of control over the activities of regional organizations in the maintenance of international security that Articles 52 and 53 in particular envisage.

As Goodrich, Hambro and Simons pointed out, the obligation under Article 54 is more extensive than that assumed under Article 51 in that it extends to activities "in contemplation" as well as to those "undertaken". In practice, it would seem that the purpose of this Article has not been fully carried out.

Third: The Conception Of Universalism In Al-Shari'a Al-Islamiya

It may be said that views differ concerning the attitude of Al-Islam towards universalism and regionalism. In the opinion of Al-Ghunaimi, the objective of Al-Islam in the international sphere is an association of strong and stable states allied together in pursuance and promotion of human welfare. In other words, the Islamic theory, legally, conceives of the existence an international society.

He believes that Islamic universalism is based on the existence of international society comprising of legally equal states, as follows :

a. He concludes from some Ayat of the Holy Qur'an that Al-Islam divides the world into separate political entities. ALLAH says, "Had ALLAH willed He could have made you one community. But that He may try you by that which He hath given you [He hath made you as ye are]".<sup>(6)</sup>

Al-Ghunaimi adds , the Holy Qur'an stresses that it is the wish of ALLAH that the world continue to be divided among different political groups. This idea, in his opinion, could be inferred from the following Ayat of the Holy Qur'an, ALLAH says, "And were it not that mankind would have become one community. We might well have appointed, for those who disbelieve in the Beneficent, roofs of silver for their houses and stairs [of silver] whereby to mount";<sup>(6)</sup> and ALLAH also says, "For had it not been for ALLAH's repelling some men by means of others, cloisters and churches and oratories and mosques, wherein the name of ALLAH is oft mentioned, would assuredly have been pulled down".<sup>(7)</sup>

Al-Ghunaimi concludes, on the basis of the close and indispensable relation between the religious and the political in the Islamic theory, that the ideas expressed by the said Ayat apply to political aspects as well as to religion. In commenting on this Aya of the Holy Qur'an, "And if two parties of believers fall to fighting, then make peace between them",<sup>(8)</sup> Al-Ghunaimi says, if Al-Islam tolerates the division of the Islamic Community into different states, Al-Islam a fortiori, must accept the division of the World Community into different states.

b. Also, in the opinion of Al-Ghunaimi, the Islamic theory acknowledges the equality among states, the basis of this equality is laid by the Holy Qur'an, ALLAH says, "Say O People of the Scripture ! Come to an agreement between us and you : that we shall worship none but ALLAH, and that we shall ascribe no partner unto Him, and that none of us shall take others for lords beside ALLAH".<sup>(9)</sup> He explains his view that the term "an agreement" which occurs in the Aya is the translation of the Arabic text "qualimatin sawaa" which literally means "a word on the basis of equality".

But Al-Ghunaimi adds, a state under Muslim international law, is not entitled to claim the right of legal equality unless it attains a certain degree of civilization, that is to say when its civilization

complies with the idea of the Unity of ALLAH.

Furthermore, Al-Ghunaimi says that if we adhere to the Maliki view, the pagan states could be admitted to the pale of Muslim international law since the Islamic State could exact jizya even from pagans provided that they were not of Quraish. Accordingly, Muslim international law, in his opinion, covers the activities of all the countries of World Society.

The idea of universalism in Al-Islam is, in the opinion of Al-Ghunaimi, restricted to the propagation of Al-Islam by preaching in fair exhortation.<sup>(10)</sup> In other words, the idea of universalism in Al-Islam, as he believes, originally means universality of principles and not of sovereignty. Universalism in Al-Islam, he adds, starts in the first place, on ideological not political lines.

Al-Ghunaimi says that there is no doubt that the propagation of Al-Islam is a religious duty of the Islamic State because Al-Islam is a missionary religion. It is the birth right of every true Muslim, and of the Islamic state as well, to spread the message of Al-Islam and to invite other peoples to embrace Al-Islam.

Professor Al-Ghunaimi rejects the interpretation of this Aya of the Holy Qur'an, "O ye who believe! Take not for intimates others than your own folk, who would spare no pains to ruin you; they love to hamper you. Hatred is revealed by [the utterance of] their mouth, but that which their breasts hide is greater. We have made plain for you the revelations if ye will understand",<sup>(11)</sup> as prohibiting the Islamic State from sharing with non-Islamic States a wide range of common interests and purposes. He considers the prohibitions referred to in this Aya is not general in its scope. It specifies a certain category of non-Muslims; namely, those who spare no pains to ruin Muslims and love to hamper them. Al-Ghunaimi believes that if non-Muslims do not reveal such hatred, the Muslims must establish with them bonds of close friendship sanctioned by the following Aya: "ALLAH forbiddeth you not those who warred not against you on account of religion and drove you not out from you homes, that ye should show them kindness and deal justly with them. Lo! ALLAH loveth the just dealers".<sup>(12)</sup>

Al-Ghunaimi also believes that the Holy Qur'an envisages the possibility of the partition of the Islamic World into political independent entities. This trend could be inferred, in his opinion, from the Aya to which we referred before.<sup>(13)</sup> He interprets this Aya as foreseeing three independent parties of Muslims, two of them engaged in an armed conflict and the third neutral. It thereby, connotes the probability of the Islamic world being divided into several states independent from each other.

Finally, Al-Ghunaimi believes that Muslim international law, as modern international law, includes two categories of rules, i.e., regional and universal. The regional tackles mostly the inter-relations of the "Islamic" states. He adds, that this regionality, of course,

does not impair the international character of the law as a whole.

2. We believe that the opinion of Professor Al-Ghunaimi does not represent the real Islamic conception of universalism. We shall expose our opinion in the following :

A. We referred before to the fact that Muslims are required to establish the Islamic State. The twofold divisions of the world into dar Al-Islam (The Islamic State) and dar al-harb (Non-Islamic states) will emerge automatically because the Islamic State, after its establishment, will not extend to embrace the whole world immediately. As long as the Muslims are required to call to Al-Islam, this division shall be considered permanent. If several Khalifas are been chosen and appointed for the Islamic State, the one who was first appointed is to be considered the rightful Khalifa or Imam, and the others are to be disregarded, and, if they refuse to abdicate they are to be considered bughat (rebels) and ought to be fought against, till they are overcome.

We referred also to the duty of the call to Al-Islam as it raises the subject of Jihad as an inevitable duty for all Muslims. The twofold division of the world will disappear when dar al-harb is turned into dar Al-Islam.

Therefore, the twofold division of the world is based on the difference of religion between dar Al-Islam and dar al-harb because dar Al-Islam (The Islamic State), after its establishment, will not extend to embrace the whole world immediately and not because Al-Islam acknowledges the continuous existence of non-Islamic political entities as Professor Al-Ghunaimi believes.

B. All the Qur'anic Ayat referred to by Al-Ghunaimi relate to religion and are not applicable to political aspects. The Divine wisdom behind this differences of communities revealed in several places of the Holy Qur'an. ALLAH says, "And unto thee have We revealed the Scripture with truth, confirming whatever Scripture was before it, and a watcher over it. So judge between them by which ALLAH have revealed, and follow not their desires away from the Truth which hath come unto thee. For each We have appointed a Divine law and a traced out way. Had ALLAH willed He could have made you one community",<sup>'14'</sup> and He also says, "And if thy LORD had willed, He verily would have made mankind one nation, yet they cease to not differing, Save him on whom thy LORD hath mercy; and for that He did create them".<sup>'15'</sup>

The purpose of this difference is to examine the obedience of mankind to what ALLAH has revealed. The Holy Prophet Muhammad was instructed to call to Al-Islam, in the Holy Qur'an ALLAH says, "O Messenger ! Make known that which hath been revealed unto thee from thy LORD for if thou do it not, thou wilt have conveyed His message. ALLAH will protect thee from mankind. Lo ! ALLAH guideth not the disbelieving folk".<sup>'16'</sup> Even if these Ayat referred to by Professor Al-Ghunaimi have political implication, they must be interpreted in the sense that

Muslims are required to call to Al-Islam and to initiate Jihad against the unbelievers until dar al-harb is turned into dar Al-Islam otherwise Al-Islam, as the last of the revealed messages, will loose its significance.

C. The belief that Al-Islam tolerates the division of the Islamic community into different states, cannot be substantiated. The Qur'anic Aya referred to by Al-Ghunaimi in this regard,<sup>'17'</sup> relates to the case of civil war within the Islamic State, the Arabic term used in this Aya is "Ta'iftan" literally meaning "two groups". This means two groups of believers within the Islamic State and not "two Islamic states". This interpretation is strongly supported by the subsequent Aya of the Holy Qur'an : "The believers are naught else than brothers. Therefore make peace between your brethren and observe your duty to ALLAH that haply ye may obtain mercy".<sup>'18'</sup> It referred before to the Islamic brotherhood as the strong relationship between Muslims within the Islamic State.

D. The Muslims are, it is to be recalled, under legal obligation to enforce Al-Shari'a and to recognize no authority, other than their own. Since dar al-harb is outside the pale of Al-Shari'a Al-Islamiya, it lacks an essential element for the constitution of a state in accordance with Al-Shari'a. No legal equality can therefore be claimed between the Islamic State and any of the non-Islamic states including pagan states.

The Aya of the Holy Qur'an referred to by Professor Al-Ghunaimi as a basis of the legal equality between the Islamic State and the non-Islamic state<sup>'19'</sup> is a mere call to Al-Islam. This is very clear from the same Aya which says, "And if they turn away, then say; Bear witness that we are they who have surrendered [unto Him]". The term "agreement" or in Arabic "qualimatin sawaa" in the Aya, is the belief in Al-Islam, and only in this way can a legal equality be established. Several Ayat of the Holy Qur'an in the same Sura confirm that this "agreement" or "Qualimatin sawaa" between Muslims and "the People of the Book" is a mere call to Al-Islam, ALLAH says, "Abraham was not a Jew, not yet a Christian; but he was an upright man who had surrendered [to ALLAH], and was not of the idolaters";<sup>'20'</sup> and He also says, "O People of the Scripture ! Why disbelieve ye in the revelations of ALLAH, when ye [yourselves] bear witness [to their truth] ?"<sup>'21'</sup>

The so-called "the People of the Book" of our times are, it is to be recalled, either mushrikun or kafirun. The existence of "the People of the Book" completely ended with the advent of Al-Islam. Therefore, the distinction made by Professor Al-Ghunaimi between pagan states and states belonging to a civilization believing in the unity of ALLAH, has no effect on the legal equality between the Islamic State and non-Islamic states. All non-Islamic states are in fact one category of states, and they do not enjoy legal equality with the Islamic State.

E. The restriction of Islamic universalism to the propagation of Al-Islam by preaching in fair exhortation, as Professor Al-Ghunaimi suggests, is a call in disguise to abolish Jihad.

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As mentioned before, the significance of religion is much wider than than that of faith; religion actually means a way of life, and in Al-Islam this is based on faith. But in the Islamic system there is no room for all kinds of people each following his own faith, while obeying Al-Shari'a Al-Islamiya (the law of dar Al-Islam) which is deduced from Divine origin. Al-Islam is, as mentioned before, a revolutionary ideology and programme which seeks to alter the social order of the whole world and build it in conformity with its own tenets and ideals. Thus, the Islamic Community is the title of that revolutionary party organized by Al-Islam to carry into effect its revolutionary programme. Therefore, Jihad refers to that revolutionary struggle and utmost exertion which the Islamic party brings into play to achieve this objective. Professor Al-Ghunaimi himself acknowledges that it is the duty of every true Muslim and of the Islamic State to spread the message of Al-Islam and to invite other peoples to embrace Al-Islam.

F. In fact, we find some vagueness in the attitude of Professor Al-Ghunaimi. On the one hand, he refers to "the close and indispensable relation between the religious and political in the Islamic theory" when he wants to prove that Al-Islam "must accept the division of the world community into different states"; but on the other hand, he ignores this close and indispensable relation and considers Al-Islam as a mere article of faith to be propagated through preaching, when he interprets universalism in Al-Islam as a universality of principles and not of sovereignty. Jihad does not mean the compulsion of religion.

In our opinion, the Islamic conception of universalism is different from that in international law. Universalism in international law presupposes the existence of "international society" comprising several states legally equal to each other.

Al-Islam is distinct from other religions in that the application of ALLAH's legislation (Al-Shari'a Al-Islamiya), has to be within a political system which must be constituted according to Al-Islam, namely, Al-Khilafa. The structure of the Islamic Community is based on Al-Shari'a, in which both political and religious conduct find sanction. The Islamic State was centred around the Khalifa who was the defender of the faith, the preserver of Al-Shari'a and the leader in Salat.

Al-Khilafa is, as we mentioned before, the general leadership in religious and worldly affairs over the Muslim nation, or the succession of the Holy Prophet Muhammad (peace be upon him) for the purpose of upholding Al-Islam, and the interest of the Muslim nation. Al-Khilafa is, as we believe, one of the most important obligations laid on Muslims.

Dar Al-Islam is that place where the Islamic State is established, Al-Shari'a is the authority, ALLAH's injunctions are observed, and governed by a Muslim sovereign. Dar al-harb, or the enemy territory, is the opposite of dar Al-Islam. It comprises countries with which, actually or potentially, Al-Islam is at war, and which are outside the jurisdiction of Al-Shari'a Al-Islamiya and Muslim rule. In principle, to turn dar al-harb into dar Al-Islam is the object of Jihad and the

eventual objective of Al-Islam. This Islamic World State represents the Islamic conception of universalism. Thus, universalism in international law is the severalty of legally equal states in an international society, and universalism in Al-Islam is the existence of an Islamic World State.

We therefore do not agree with Professor Al-Ghunaimi in his opinion that Al-Shari'a, as modern international law, includes universal and regional rules, and the regional tackles mostly the inter-relations of "Islamic" states.

Regionalism presupposes, a priori, the existence of an international society which, according to the Islamic theory, does not exist. The final goal is the establishment of one Islamic World State, and before the attainment of this objective, dar Al-Islam is legally at war with dar al-harb.

Moreover, the basis of regionalism in international law such as geographical and other considerations are not the basis of relations among Muslims. Al-Shari'a Al-Islamiya makes Muslims one community based on the unity of faith, disregarding differences in race, colour; language...etc. Thus, this idea of brotherhood amongst Muslims is complete and is founded on the unity of religion and faith.

In Al-Shari'a Al-Islamiya, it is not possible, as in positive law, to draw a distinction between lege ferenda and lex lata. The lex lata, in Al-Shari'a, must always be the lege ferenda. If this distinction is acceptable in positive law because of human impotency, it cannot be accepted in Al-Shari'a because of its Divine origin. In other words; if the reality of the Muslims, nowadays, is different from Islamic principles, this does not justify the desertion of Al-Islam because of the shortcomings of Muslims practise which cannot be deemed the Muslims lex lata. Consequently, the Islamic conception of universalism, although it now seems, remote, must be considered always a legal duty of the Islamic "lex lata".

#### Fourth: Classification of Regional Organizations

It has been customary to distinguish between three categories of regional organizations<sup>(22)</sup> as follows :

1. The so-called genuine regional arrangements created pursuant to Chapter VIII of the United Nations Charter, which focused on intra-regional threats. This category includes, for example, the Organization of American States, and the Organization of African Unity.
2. The postwar defence organizations created pursuant to Article 51 of the Charter which focused on extraregional threats. This category includes, for example, the North Atlantic Treaty Organization and the Warsaw Pact Organization.

3. The functional organizations which focused on regional economic integration or transnational community-building, such as the British Commonwealth, the European Community, the Council for Mutual Economic Assistance, and the Latin American Free Trade Association.

To be in line with the topic of this thesis, as a comparative study of Al-Shari'a Al-Islamiya and international law, we shall follow different classification of regional organizations in our exposition of the legality of war within the framework of regional organization. Our classification will be as follows :

1. Regional Organizations of Muslims Member States.
2. Regional Organizations of Muslim and non-Muslim Member States.
3. Regional Organizations of non-Muslim Member States.

Footnotes Of Chapter I Of Part III

(1) See In English:

A. LeRoy Bennett, *International Organizations : Principles And Issues*, pp. 288-305, 320-322; Cyril E. Black and Richard A. Falk (Editors), *The Future Of The International Legal Order*, pp. 122-164; D.W. Bowett, *The Law Of International Institutions*, pp. 143-148; G.I. A.D. Draper, *Regional Arrangements And Enforcement Action*, pp. 1-44; Leland M. Goodrich and Anne P. Simons, *The United Nations And The Maintenance Of International Peace And Security*, passim; Leland M. Goodrich, Edvard Hambro and Anne Patricia Simons, *Charter Of The United Nations*, passim; Gerhard Bebr, *Regional Organization : A United Nations Problem*, pp. 166-184; Rahmatullah Khan, *Regional Cooperation And Organization : Asian States*, pp.314-319; Muhammad Talaat Al-Ghunaimi, *The Muslim Conception Of International Law And The Western Approach*, passim; Majid Khadduri, *War And Peace In The Law Of Islam*, passim; D.W. Greig, *International Law*, passim.

See In Arabic:

Gaafar Abd As-Salam, *Al-Munazzamat Ad-Dawliya*, passim; Ibrahim Al-Enani, *At-Tanzim Ad-Dawli*, passim; Boutrus Boutrus Ghali, *Al-Hukuma Al-A'alamiya*, passim; Muhammad Hafez Ghanem and A'isha Rateb, *Al-Munazzamat Al-Iqlimiya Ad-Dawliya Wa Al-Mutakhasisa*, passim; Muhammad Talaat Al-Ghunaimi, *Al-Ghunaimi Fi At-Tanzim Ad-Dawli*, passim; Muhammad Talaat Al-Ghunaimi, *Al-Ghunaimi Al-Wajiz Fi At-Tanzim Ad-Dawli*, passim; Zaki Hashem, *Al-Umam Al-Mutahida*, passim; A'isha Rateb, *Al-Munazzamat Ad-Dawliya*, passim; A'isha Rateb, *At-Tanzim Ad-Dawli*, passim; Jaber Ibrahim Ar-Rawi, *Al-Munazzamat Ad-Dawliya*, passim; Abdul Aziz Sarhan, *Al-Usul Al-A'ama Li Al-Munazzamat Ad-Dawliya*, passim; Abdul Aziz Sarhan, *At-Tanzim Ad-Dawli*, passim; Mufeed Mahmud Shihab, *Al-Munazzamat Ad-Dawliya*, passim; Saleh Jawad Al-Kazem, *Dirasa Fi Al-Munazzamat Ad-Dawliya*, passim.

(2) According to some writers, peaceful regional settlement of disputes is not only available to two or more Member States involved in a local dispute, but also in cases of internal conflicts within a Member State. Such an interpretation may be derived from the reference in Article 52 paragraph 4 to Articles 34 and 35. which apply not only to "disputes" but also to "situations", and thus to internal conflicts which are a threat to international peace.

The peaceful methods for settlement of disputes, in accordance with Article 33 of the Charter includes, inter alia, negotiation, enquiry, mediation, conciliation, arbitration and judicial settlement.

We would like to refer, in particular, to "arbitration and conciliation treaties" which establish rules either for a binding third-party decision by judges of the Parties' own choice, or for a non-binding proposal of terms of settlement by an impartial commission

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or single conciliator not vested with political authority of their own. The notion of "arbitration and conciliation treaties" may be used according to one or two interpretations.

The first interpretation of the term "arbitration and conciliation treaties" is limited to agreements whereby the parties undertake to settle any present or future dispute by arbitration or conciliation. This definition excludes such arbitration treaties as the 1899 and 1907 Hague Conventions For The Pacific Settlement Of International Disputes or the 1964 Protocol Of The Organization Of African Unity On The Commission Of Mediation, Conciliation And Arbitration which contain no compulsion whatsoever. The 1899 and 1907 Hague Conventions establish subsidiary rules and organizational facilities which may be resorted to in any kind of arbitration commitment isolated or institutionalized.

The second interpretation excludes dispute settlement by an international court.

Arbitration clauses or "Compromissory Clauses", which may be included in any international treaty, also, serve to furnish a method for the settlement of disputes between State Parties.

- (3) In 1958, Lebanon agreed to the Security Council deferment of consideration of its complaint of intervention by the United Arab Republic (Egypt) in its affairs until The League Of Arab States had an opportunity to examine the matter. It reserved, however, its right to request immediate convocation of the Security Council. After the failure of the Arab League to take a decision and on the request of Lebanon, the Security Council resumed consideration of the matter and decided to send an "Observation Group" to ensure against "illegal infiltration".
- (4) Goodrich, Hambro and Simons refer to a number of treaties concluded in the early postwar period, which implicitly or explicitly invoked the exception of "regional arrangements directed against renewal of enemy aggression", or at least could be regarded as coming under its terms. There included The Treaty Of Alliance between the Soviet Union and the United Kingdom, signed on May 26, 1942; The Treaty Of Alliance And Mutual Assistance between the Soviet Union and France, signed on December 10, 1944; The Treaty Of Friendship And Alliance between the Soviet Union and the Republic of China, signed on August 14, 1945; The Treaty Of Friendship And Alliance between France and the United Kingdom, signed on March 4, 1947; the network of bilateral mutual-assistance treaties concluded by the Soviet Union and East European States during the years 1943-48; and The Treaty Of Friendship And Alliance And Mutual Assistance between the Government of the U.S.S.R. and the Government of the Pople's Republic of China, signed on February 14, 1950.
- (5) Sura V : 48; Al-Ghunaimi also refers to Aya 66 of the same Sura, and to Suras X : 19; XI : 118 and XLII : 8.

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- (6) Sura XLIII : 33.
- (7) Sura XXII : 40.
- (8) Sura XLIX : 9.
- (9) Sura III : 64.
- (10) Al-Ghunaimi refers to Suras XVI : 125; and XXIX : 46.
- (11) Sura III : 118.
- (12) Sura LX : 8.
- (13) Sura XLIX : 9.
- (14) Sura V : 48.
- (15) Sura XI : 118-119.
- (16) Sura V : 67.
- (17) Sura XLIX : 9.
- (18) Sura XLIX : 10.
- (19) Sura III : 64.
- (20) Sura III : 67.
- (21) Sura III : 70.
- (22) Some writers add a fourth category of United Nations Regional Commissions such as the "Economic Commission For Europe" and the "Economic Commission For Asia And The Far East" established in 1947, the "Economic Commission For Latin America" established in 1948, and the "Economic Commission For Africa" established in 1958.

Chapter II : The Legality Of "War"  
And Regional Organization<sup>(1)</sup>

I. Regional Organizations Of Muslim Member States

There are three Organizations composed of Muslim Member States only, the League Of Arab States, the Organization of the Islamic Conference, and the Co-Operation Council Of The Arab Gulf States.

First: The Origins And The Establishment Of  
Regional Organizations Of Muslim Member States

1. The League Of Arab States<sup>(2)</sup>

A. It has been observed that the elements contributing to basic unity among the League Members include a common religion, language, and culture. Some writers add to these elements a shared hostility toward Israel, since 1948, which has provided a powerful motivating force for collective action.<sup>(3)</sup>

We believe that Great Britain was behind the establishment of the League,<sup>(4)</sup> and the idea of its establishment was inspired by the English<sup>(5)</sup> more than a self-expression of the constituent states.<sup>(6)</sup> In fact, Britain utilized the unity between Arab countries for two aims, to polarize the Arabs to the side of the Allies; and to maintain its control over the Arab world in the Post War period. Thus, it is not strange that Great Britain was described as the "silent partner" in the establishment of the League.<sup>(7)</sup>

B. On May 30, 1943, the Egyptian Prime Minister declared that Egypt had decided to explore the opinions of the various Arab governments independently, and then would invite them to a Conference to be held in Egypt in order to reach an agreement on the form of the Proposed Arab Union. Later, the Egyptian Prime Minister announced that a Preparatory Committee, composed of delegates of Syria, Lebanon, Transjordan, Iraq, Saudi Arabia, and Yaman, was to meet in order to prepare the Draft Pact of the Union before the Arab Conference met.

On September 25, 1944, the Preparatory Committee met in Alexandria; and on October 27, 1944, a Protocol<sup>(8)</sup> was signed by all Members except Saudi Arabia and Yaman.<sup>(9)</sup>

On March 22, 1945, the representatives of Six Arab States signed the League Pact<sup>(10)</sup> which came into force on May 11, 1945.

C. The Pact emphasized the sovereignty of every Member State, more than the Protocol of Alexandria. Among the differences between the Pact and the Protocol, we refer to the following :

1. The expression referred to in the Preamble of the Pact, i.e., "on the basis of respect for the independence and sovereignty

of these states", was not included in the Protocol. In fact, the Pact makes this "respect" the only basis for "cementing and reinforcing" the bonds of the Signatory States. This matter describes the degree of sensitivity and rivalry between the regimes of the Signatory States, or at least between some of them.

2. The expression referred to in Article 2 of the Pact, i.e., "with due regard to the structure of these states and the conditions prevailing therein", was not also included in the Protocol.
3. Moreover, Article 8 of the Pact, which was not included in the Protocol, confirms that every Member state of the League shall respect the form of government obtaining in the other states of the League, and shall recognize the form of government obtaining as one of the rights of those states, and shall pledge itself not to take any action tending to change that form.

D. The League Pact comprises a Preamble, twenty Articles and three annexes.<sup>(11)</sup> It is, regrettable, to note that the Pact ignores completely any reference to Al-Islam.<sup>(12)</sup> whether directly or indirectly, although it is the religion of most of the Arabs. Therefore, some writers consider the League a step in the evolution from Islamic solidarity to Arab solidarity.

The main Organs of the League, under its Pact and the Treaty Of Joint Defence And Economic Co-Operation approved by the League Council on April 13, 1950, and approved by the League Member States on June 17, 1950, comprise, inter alia, the League Council, the Economic Council, the Joint Defence Council and the Secretariat.

The League Council consists of representatives of the Member States. Its sessions are held usually at Ministerial Level (i.e. Ministers of Foreign Affairs), but since 1964, sessions have been held at the level of the Heads of State in addition to the Ministerial level.

The Economic Council is composed of Ministers of Economic Affairs and entrusted with the task of coordinating the economic policies of the Member States and concluding necessary agreements in this field.

The Joint Defense Council is composed of Foreign and Defence Ministers, and entrusted with taking the necessary measures to repulse any aggression directed at a Member State.

The Secretariat General consists of the Secretary-General, Assistant Secretaries and officials.

## 2. The Organization Of The Islamic Conference

Most Islamic international organizations established in the Twentieth Century were non-governmental organizations. The most

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important of these organizations are the following :

- A. Al-Mu'tamar Al-Aalami Al-Islami (The Islamic World Conference).<sup>'13'</sup>
- B. Nadwat Al-Mu'tamar Al-Islami (The Assembly Of The Islamic Conference).<sup>'14'</sup>
- C. Al-Mu'tamar Al-Islami Al-Aam (The General Islamic Conference).<sup>'15'</sup>
- D. Rabitat Al-Aalam Al-Islami (The League Of The Islamic World).<sup>'16'</sup>
- E. Al-Itihad Al-Islami Al-Aalami (The World Islamic Federation).<sup>'17'</sup>
- F. Al-Munazama Al-Islamiya Al-Dawliya (The International Islamic Organization).<sup>'18'</sup>

In the mid-sixties, Saudi Arabia led the call to establish an international Islamic block. Due to the differences among the Arab States at that time, this idea found objection from some states. The bitter defeat of the Arab States in 1967, and their desire to obtain support of public opinion of other states through diplomatic efforts, led the states who had previously objected this idea, to change their attitudes.

The steps that preceded the establishment of the Organization Of The Islamic Conference were a series of Conferences held in some Muslim states. These conferences were the following :

- A. The Conference of Kings and Heads of State and Government of Islamic States held in Rabat (Morocco) September 22-25, 1969.
- B. The First Islamic Conference of the Ministers of Foreign Affairs held in Jadda (Saudi Arabia) March 23-25, 1970.
- C. The Second Islamic Conference of the Ministers of Foreign Affairs held in Karachi (Pakistan) December 26-28, 1970.
- D. The Conference of Kings and Heads of State and Government of Islamic States held in Jadda (Saudi Arabia) during February 29 - March 4, 1972. Thirty states were participated in this Conference which adopted the Charter of this Organization.

The required ratifications to bring the Charter into force was completed by the end of 1973.<sup>'19'</sup>

According to the Charter of the Conference, there are three main Organs of this Organization, the first is the Conference of Kings and Heads of State and Government which is the supreme organ, the second is the Conference of Ministers of Foreign Affairs and the third is the General Secretariat. It is to be noted that the Secretariat, in accordance with Article 9 of the Charter of the Conference, plays a political role, Article 9 provides that :

"Within the framework of the present Charter, and at the approval of the Conference, the General Secretariat shall act to strengthen the relations of the Conference with World Islamic Organizations, and realize cooperation to serve the Islamic Objectives adopted by this Charter".

The Conference of Jadda of 1972 which adopted the Charter decided to establish some Subsidiary Organs to be attached to the General Secretariat, among these Organs, Islamic News-Agency, the Islamic Development Bank,<sup>(20)</sup> the Jihad Fund To Help The Palestinians, as well Islamic as Cultural Centres And Institutions including Islamic University.

The establishment of the Conference brought into existence for the first time in the law of international organizations a new type of organizations based on faith disregarding other characteristics of the Member States such as the geographic position, political régime and economic system. According to Article 8 of the Charter,<sup>(21)</sup> the membership of the Conference is confined to the Islamic states. The Islamic faith as a condition of membership does not make the Conference a world organization such as the United Nations, but an organization with limited membership.<sup>(22)</sup> The Charter of the Conference does not define the Islamic state. Thus, the Conference comprises states which cannot be said that they apply Al-Shari'a Al-Islamiya in the same degree, or even that the peoples of these states follow Al-Islam as a method of life in the same way. We confirm our opinion that, for the time being, there are only Muslim states, but no Islamic state exists. Therefore, the Conference must be understood as an organization of Muslim states.

### 3. Co-Operation Council Of The Arab Gulf States<sup>(23)</sup>

The G.C.C. was conceived at the Islamic Summit Conference held in Ta'if (Saudi Arabia) in January 1981. The Constituent States are Bahrain, Kuwait, Qatar, Saudi Arabia, United Arab Emirates and Oman.

The Foreign Ministers of the Six States met on February 2, 1981, in Riyadh (Saudi Arabia) to set up the organizational structure of the G.C.C. which would provide a framework for the co-ordination of all government policies between the Member States with a view to safeguarding security and stability in the Gulf.

At their first meeting at Abu Dhabi (United Arab Emirates) May 25-26, 1981, the Heads of the Six States approved the Statute of the G.C.C. on May 25, 1981.<sup>(24)</sup>

The main Organs of the G.C.C. are the Supreme Council, the Ministerial Council and the Secretariat General.

The Supreme Council is composed of the Heads of State of the G.C.C. Member States. It determines the G.C.C.'s higher policies and the basic lines along which it operates. A Conciliation Commission is attached to the Supreme Council, which is responsible for resolving existing and potential disputes among Member States; and for interpreting the

G.C.C.'s basic regulations.

The Ministerial Council is composed of the Foreign Ministers or their representatives. Its functions include, inter alia, preparing the meetings of the Supreme Council, encouraging various forms of coordination in different activities of the private sector and approving the regular reports and the administrative regulations proposed by the Secretary-General.

The functions of the General Secretariat include, inter alia, the preparation of studies especially those relating to cooperation and co-ordination; following up the implementation of Resolutions and Recommendations approved by the Supreme Council and the Ministerial Council and the preparation of progress reports on the G.C.C.'s achievements. The Secretary-General, who is appointed by the Supreme Council, must be a national of a Member State of the G.C.C.

Member States, in the Statute, emphasized the economic and social issues to the extent that it might be understood that the G.C.C. had been formed merely to provide an administrative framework to put the co-operation of the Member States, in these fields, into effect. However, we must not ignore the surrounding political atmosphere at the time when the G.C.C. was established, i.e., the Soviet intervention in Afghanistan, the Iranian Shi'i revolution, and the outbreak of war between Iran and Iraq in September, 1980. All these factors explain that the defence and security of the Gulf and of the oil installations were the main purposes of the establishment of the G.C.C. <sup>(25)</sup>

Notwithstanding their joint interest in the maintenance of the security in the Gulf, the Six Member States of the G.C.C. failed to reach an agreement on a joint defence policy. <sup>(26)</sup>

We believe that the co-operation of the G.C.C. States <sup>(27)</sup> in defence matters within the framework of a newly established regional organization, is a distinctive example of factual evolution of the G.C.C. in this regard. The reason of this importance is that the G.C.C. in its various moves toward defence and security co-operation did not produce any formal agreement which might be considered the legal basis of these moves.

## Second: Settlement Of Disputes

### 1. Settlement Of Disputes Under The League Pact <sup>(28)</sup>

Unlike the United Nations Charter, the Pact does not devote certain Article to the Principles of the League. However, the Principles of the League include, inter alia, the prohibition of the use of force for the settlement of disputes. <sup>(29)</sup>

It must also be noted that the Pact, unlike the Charter of the United Nations, does not establish a judicial organ <sup>(30)</sup> for settlement of disputes. However, Article 5 <sup>(31)</sup> prohibits the recourse to force for the settlement of disputes between Member States, and provides

disputant states with certain methods to settle their disputes, i.e., conciliation, mediation, and arbitration.<sup>(32)</sup>

The League's Council may mediate in any dispute which threatens to lead to war between Member States or between a Member State and non-Member states, with a view to bringing about reconciliation. The decision of the Council in such cases are to be taken by majority vote, but may not be considered as binding.

The Council may also act as an arbitrator in disputes which do not involve the independence of a state, its sovereignty, or its territorial integrity, should the two Contending States apply to the Council for the settlement of this dispute. The decisions of the Council in such cases shall be effective and obligatory.

Thus, the disputes which may be expected under Article 5, may be categorized in the following groups :

1. Disputes relating to the independence of a state, its sovereignty or territorial integrity.
2. Disputes relating to non of these matters.
3. Disputes which threaten to lead to war.

As regards the first group of disputes, there is nothing in Article 5 to define the meaning of "independence", "sovereignty", or "territorial integrity". Some writers are of the opinion that the League's Council may define any of these terms. We believe that the Council is prohibited from considering a dispute relating to any of these matters, even if the Contending Parties agree that such a dispute referred to it.

As regards the third group of disputes, although it is not clear who will decide whether, or not, the dispute may lead to war, we believe that the Council will consider the dispute to decide if it includes any potentiality of war.

In general, it may be said that the Arab disputes were, and still are essentially political, notwithstanding the method of settlement whether legal or political.

Some writers suggest a criterion to distinguish between the political and non-political disputes as far as the Arab disputes are concerned. The criterion depends on a certain interpretation of Article 5 of the Pact which excludes disputes relating to the independence of a state, its sovereignty, or territorial integrity from being referred to arbitration by the Council. Article 5 was interpreted as distinguishing, implicitly, between the political disputes which were excluded from arbitration; and the non-political disputes which may be referred to arbitration if the Contending Parties apply to the Council for the settlement of the dispute.<sup>(33)</sup> Other writers believe that it is hard to establish a precise demarcation line between the political and non-

political disputes. According to their opinion, Article 5 of the Pact that may be interpreted in a different way as there is nothing in the Pact prohibit the Contending Parties from applying to the Council for the settlement of a dispute even if it is considered political.

We do not agree with the latter opinion because the exclusion of political disputes from being settled by the arbitration of the Council, is a restriction not only on the Contending Parties but also on the Council itself.

It is clear from Article 5 that arbitration and mediation are the principal methods to settle the disputes between the Member States. In practice, the Syrian-Libanesese dispute of 1949 was the only case of settlement of a dispute by the arbitration of the Council. Mediation was used successfully for the first time in the dispute between North and South Yemen in 1972.

## 2. Settlement Of Disputes Under The Charter Of The Organization Of The Islamic Conference

Similar to the United Nations Charter, Article 2 paragraph B of the Charter of the Organization Of The Islamic Conference provides that disputes which may arise between Member States will be settled by pacific means such as negotiation, mediation, conciliation or arbitration. The peaceful settlement of disputes is among the Principles of the Conference.

In the same line, Article 12 of the Charter provides that :

"Any dispute which may arise relating to the interpretation, application or execution of any Article of this Charter, shall be settled peacefully in all cases through consultations, negotiations or arbitration".<sup>(34)</sup>

## 3. Settlement Of Disputes Under The Statute Of The Co-Operation Council Of The Arab Gulf States

According to the G.C.C. Statute there is a Conciliation Commission appointed by, and attached to the Supreme Council. The Commission is responsible for resolving existing or potential disputes among Member States; and for interpreting the G.C.C.'s Statute.

As an example of disputes between G.C.C. Member States, is Bahrain's territorial dispute with Qatar. The dispute flared up in April 1986, when Qatari troops landed on the disputed reef of "Fasht Ad-Dibal", and seized foreign workers from a Bahraini building site. The workers were released after 17 days.

In May 1986, it was reported that the Amir of Bahrain, Sheikh Isa Ibn Salman Al-Khalifa, travelled to the Saudi Arabian summer resort city of Ta'if for talks with the Saudi Monarch, King Fahd Ibn Abdul Aziz on the Saudi plan to resolve the dispute. Saudi Arabia, playing a major mediation role in the conflict, announced at that time that the two states had agreed to its proposal for a settlement envisaging the

pullback of forces from border zones and referring the issue to negotiations.

### Third : Joint Self-Defence Under The League Pact <sup>(35)</sup>

The rules of joint self-defence are to be found in Article 6 of the Pact; and the Joint Defence And Economic Co-Operation Treaty which was adopted, as mentioned before, on June 17, 1950, <sup>(36)</sup> and which came into force on August 22, 1952. <sup>(37)</sup>

According to Article 6 of the Pact, <sup>(38)</sup> the Member State may request, in the case of aggression, or the threat of aggression, an immediate meeting of the League Council. The Council will decide, by an unanimous vote, upon the measures to be taken against the aggressor. If the aggressor is a Member State, the vote of that Member State will not be counted in determining unanimity. The nature of measures, whether military or economic, to be applied against the aggressor is not defined. As in the League of Nations, the Council is to consider what measures would be most effective according to circumstances. It was observed that the condition of unanimous vote to determine the necessary measures to repel the aggression means that "every State has a veto right to suspend any Draft Resolution to repel the aggression against another Member State. Another defect is that the Council cannot act on its own in the case of aggression, the Victim State must resort first to the Council, otherwise the latter cannot intervene to assist the state or to apply sanctions against the aggressor.

In the opinion of Ruth Lawson, the failure of the Arab liberation army to prevent the establishment of Israel after the United Nations General Assembly had voted partition of Palestine in November 1947, proclaimed the inability of the Arab States to devise effective machinery for the co-ordination of military efforts, even with reference to a problem in which they have been in substantial agreement. Although this opinion contains a great deal of truth, we believe that the Treaty Of Joint Defence And Economic Co-Operation has great importance because it establishes the only collective defence arrangement in which no Major Power participates. <sup>(39)</sup> This Treaty asserts the principle that armed aggression against any Party is an act against all Members, and obliged each State to assist the Victim State by every appropriate means including armed force.

Apart from the Economic Council, there are four institutions established by this Treaty, which are concerned with defence matters. These institutions are :

1. The "Joint Defence Council", which is composed of Foreign and Defence Ministers of the Member States or their representatives. It functions under the supervision of the League Council. The "Joint Defence Council", is entrusted with taking the necessary measures to repel an aggression against a Member State. It also co-ordinates the defence plans of the Member States.

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2. The "Military Advisory Organization", which is composed of the Chiefs of Staff of the Member States' armies. It mainly supervises the activities of the "Permanent Military Commission". It also reviews the reports of the Commission before submission to the Council of Joint Defence.
3. The "Permanent Military Commission", which is entrusted with the institution of joint defence plans.
4. The "Arab Unified Command", which is a general Command for the joint forces to be formed in the event of military operations.

In practice, the system of joint defence, under the Pact and the Treaty Of Joint Defence And Economic Co-Operation, has been wholly ineffective against outside threats, the tripartite intervention in Egypt in 1956 and the Gulf War are clear evidences of this fact. (Iran declared in August 1988 its acceptance of the United Nations Cease-Fire Resolution No. 598). However, the record of the League in dealing with disputes and military clashes among its Member States has been slightly better than dealing with external threat. As an example of this success, the League in 1961 prevented Iraq from taking over Kuwait. First, Britain sent troops in response to Kuwait's appeal, and these were replaced by Arab troops mainly furnished by Saudi Arabia and the United Arab Republic (Egypt). The military contingents remained in Kuwait until 1963. <sup>(40)</sup>

2. Joint Self defence Under The Statute Of Co-Operation Council Of The Arab Gulf States <sup>(41)</sup>

At the establishment of the G.C.C., the Constituent Members failed to reach an agreement on a joint defence policy. But, due to the surrounding circumstances co-operation between G.C.C. Members in defence matters was increasingly developed beyond the G.C.C. Statute. This fact was confirmed for the first time in the Session of the Supreme Council held in Riad (Saudi Arabia) on November 10-11, 1981. The Supreme Council declared its opposition to the presence of foreign military bases or fleets in the region, adding that "the security and stability of the Gulf are the responsibility of its states alone". <sup>(42)</sup>

It is to be noted that the G.C.C. used, sometimes, the term "self-reliance" to express "joint self-defence". <sup>(43)</sup>

However, the evolution in defence matters within the framework of the G.C.C. may be summarised in the following points :

A. The Basis Of The Military Alliance

The G.c.c. Member States laid the basis for a military alliance in a series of meetings relating to the comprehensive joint security agreement, held between August, 1981 and November 1984.

B. The Formation Of A Joint Air Defence System

The G.C.C. Defence Ministers in a meeting held in Riad, January 25-27, 1982, had approved a recommendation made by the Chiefs of Staff for the formation of a joint air defence system based on the Saudi Arabian "Airborne Warning And Control System" (AWACS), the aircraft to be supplied under the agreement with the United States announced on October 1981. This matter was discussed again in a meeting of Defence Ministers held in Jadda (Saudi Arabia) on October 11-12, 1982.

C. The Establishment Of Gulf Arms Industry

The said meeting of Defence Ministers of January 1982, also approved a recommendation of the Chiefs of Staff on the establishment of Gulf Arms Industry. This matter was also discussed in the meeting of Defence Ministers of October, 1982.<sup>(44)</sup>

At a Session of held in Doha (Qatar), February 20-21, 1984, the Defence Ministers considered, in particular, a proposal to establish a joint arms manufacturing industry and adopt a policy of diversifying the sources of arms supplies to reduce dependence on the United States.

D. The Joint Military Exercises

A series of joint military exercises, involving land, air, and naval contingents of all G.C.C. Member States,<sup>(45)</sup> was held in October, 1984.<sup>(46)</sup>

E. The Establishment Of A Joint Defence Force

After the Fifth Session of the Supreme Council held in Kuwait in November, 1984, the Kuwaiti Deputy Prime Minister declared on November 29, 1984, that it had been agreed to establish a joint defence force as a temporary expedient which would be periodically reviewed. The establishment of this force,<sup>(47)</sup> was discussed on October 7-8, 1985, by G.C.C. Chiefs of Staff; and on October 20-21, 1985, by G.C.C. Defence Ministers.

II. Regional Organizations Of Muslim And Non-Muslim Member States

There are three Organizations which consist of Muslim and non-Muslim Member States, the South East Asia Treaty Organization, the Central Treaty Organization, and the Organization of African Unity.

First : The Origins And The Establishment Of Regional Organizations Of Muslim And Non-Muslim Member States

1. The South East Asia Treaty Organization<sup>(48)</sup>

The South East Asia Treaty Organization (SEATO), was established under the Pacific Charter and the South East Asia Collective Defence

Treaty (The Manila Treaty) to resist attacks on South East Asian States by "Communist aggressors". Both the Charter and the Treaty were signed in Manila on September 8, 1954. The Members of SEATO were Australia, France, New Zealand, Pakistan, the Philippines, Thailand, the United Kingdom and the United States.<sup>(49)</sup> The Headquarters of SEATO Secretariat was established in Bangkok.

According to Article 5 of the Manila Treaty, each Party should be represented in a Council. The Council was made responsible for consideration of matters relating to the implementation of the Treaty; and also for consultation with regard to military and other planning as circumstances might require. In March 1956, a Permanent Working Group was authorized to assist the Council, together with a full time Secretariat.

In 1973 SEATO was reorganized to reduce the military side of its work, and more attention was given to the economic and social developments of the region Members.

The Council of SEATO on September 24, 1975, agreed that in the light of the changing circumstances in the South East Asian region. SEATO should be phased out. The region Members of SEATO, except Pakistan, joined the Association of South East Asian Nations (ASEAN). SEATO was formally wound up on June 30, 1977. The Manila Treaty of 1954 remains in force between all Parties.

## 2. The Central Treaty Organization<sup>(50)</sup>

Opposed by the Arab states, the Pact of Mutual Co-Operation between Iraq and Turkey was signed at Baghdad on February 24, 1955 and entered into force on April 15, 1955. Although the Pact Signatories explicitly declared this agreement not to derogate from their prior international obligations,<sup>(51)</sup> other Members of the Arab League claimed violation of Article 10 of the League's Joint Defence Treaty. The headquarters was originally at Baghdad. The United Kingdom adhered to the Pact on April 5, 1955, Pakistan on September 4, 1955 and Iran on November 3, 1955.

Subsequent to a revolution in Iraq on July 1958, Iraq withdrew on March 24, 1959. After the Iraqi revolution, the Agreement of Co-Operation between the United States and Turkey was concluded on March 5, 1959. The Pact was renamed the Central Treaty Organization Pact (CENTO), and the headquarters was moved to Ankara since October 24, 1958. According to some writers, the appropriateness of the CENTO as a name is evident when the grouping is seen as a link between two other collective defence Organizations in which the United States and the United Kingdom participate, NATO, which also includes Turkey, and SEATO, which also includes Pakistan.

Article 6 of the Pact provides that :

"A Permanent Council at the Ministerial level will be set up to function

within the framework of the purposes of this Pact when at least four Powers become Parties to the Pact. The Council will draw up its own rules of procedures".

Other Organs of the CENTO were, the Military Committee; the Combined Military Planning Staff, which was established on 1957; and the Permanent Military Deputies Group which began work on January 1960.

In 1979, both Iran and Pakistan decided to withdraw from the CENTO, which officially ceased to operate on September 26, 1979.

### 3. Organization Of African Unity<sup>(52)</sup>

The Conference of Independent African States,<sup>(53)</sup> held in Accra (Ghana) from April 15 to 22, 1958, was the first meeting of African States.<sup>(54)</sup>

The Conference Of The Heads Of State And Government which was held in Addis Ababa (Ethiopia)<sup>(55)</sup> signed on May 25, 1963,<sup>(56)</sup> the Charter of the Organization Of African Unity (OAU).<sup>(57)</sup> The Charter of the OAU entered into force on September 13, 1963.

According to Article 4 of the Charter, "Each independent African state shall be entitled to become a Member of the Organization".<sup>(58)</sup>

Article 3 paragraph 7 of the OAU Charter affirmed a policy of non-alignment with regard to all blocks.

Article 7 of the Charter established four Principal Institutions of the OAU, the Assembly Of Heads Of State And Government; the Council Of Ministers; the General Secretariat; and the Commission Of Mediation, Conciliation And Arbitration.

## Second: Settlement Of Disputes

### 1. Settlement Of Disputes Under The Manila Treaty

In accordance with Article 1 of the Manila Treaty, the Parties undertake to settle their disputes by peaceful means, and to refrain from the threat or use of force in any manner inconsistent with the Purposes of the United Nations.

### 2. Settlement Of Disputes Under The Central Treaty Organization Pact

In accordance with Article 2 of the Pact, the Parties undertake to refrain from any interference whatsoever in each others internal affairs. They will settle any dispute between themselves in a peaceful

way in accordance with the United Nations Charter.

### 3. Settlement Of Disputes Under The Charter Of The Organization Of African Unity

Article 3 paragraph 4 of the Charter of the OAU enjoins all Member States to adhere to the principle of peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration.

Article 19 of the Charter confirms this obligation, it provides that:

"Member states pledge to settle all disputes among themselves by peaceful means and to this end decide to establish a Commission of Mediation, Conciliation And Arbitration, the composition of which and condition of service shall be defined by a separate Protocol to be approved by the Assembly of Heads of State and Government. Said Protocol shall be regarded as forming an integral part of the present Charter".<sup>(59)</sup>

The Protocol of the Commission was signed at Cairo (Egypt) on July 21, 1964.

### Third: Joint Self-Defence<sup>(60)</sup>

#### 1. Joint Self-Defence Under The Manila Treaty

Article 4 paragraph 1 of the Manila Treaty provides that :

"Each Party recognizes that aggression by means of armed attack in the Treaty area against any of the Parties or against any state or territory which the Parties by unanimous agreement may hereafter designate, would endanger its own peace and safety and agrees that it will in that event act to meet the common danger in accordance with its constitutional processes".<sup>(61)</sup>

Paragraph 3 of the same Article states that no action on the territory of a designated state or territory is to be taken except at the invitation or with the consent of the government concerned.

A Protocol, simultaneously signed with the Manila Treaty, unanimously designate for the purposes of Article 4 "the States of Cambodia and Laos and the free territory under the jurisdiction of the State of Vietnam". Cambodia and Laos at first rejected the Manila Treaty, but after 1970 accepted civil and military assistance under it.

#### 2. Joint Self Defence Under The Central Treaty Organization Pact

Article 1 of the Pact provides that :

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"Consistent with Article 51 of the United Nations Charter the High Contracting Parties will co-operate for their security and defence. Such measures as they agree to take to give effect to this co-operation may form the subject of special agreements with each other".

In accordance with Articles 2 and 5 of the Pact, the competent authorities of the Member States will determine the measures to be taken in order to ensure the realisation and effect application of the co-operation provided for in Article 1.

III, Regional Organizations Of Non-Muslim Member States

A. The European Hemisphere

We shall concentrate on the following Organizations :

- The Western European Union.
- The North Atlantic Treaty Organization.
- The Eastern European Organization established in accordance with the Treaty Of Friendship, Co-Operation And Mutual Assistance.

The Statute of the Council of Europe does not comprise any obligations related to joint self-defence, but there is a system of peaceful settlement of disputes within the framework of the Council. Therefore, we shall refer to the European Convention For The Peaceful Settlement Of Disputes.

First: The Origins And The Establishment Of Some European Organizations

1. The Western European Union<sup>(62)</sup>

The Second World War marked a decisive turn in European relations. Both during and after the War leading politicians in Western Europe did not opt for a restoration of the pre-War situation but sought a radical reorientation.<sup>(63)</sup> After the War, the idea of defensive alliance of European nations gave rise to various proposals between 1946 and 1948 for a form of Western Continental Union. These proposals were designed to ensure the security of Western Europe on the basis of the acceptance of more specific obligations relating to collective security and collective self-defence than had been entered into in 1945 under the United Nations Charter.

Actually, co-operation of political and military character was initially prompted by fear of renewed German aggression and the mounting tensions between East and West. Initiatives by British Foreign Minister Ernest Bevin led to the conclusion of the Treaty of Economic, Social And Cultural Collaboration And Collective Self-Defence. This Treaty was

signed at Brussels on March 17, 1948, by France, the United Kingdom and Benelux Countries (Belgium, Luxembourg and the Netherlands), and entered into force on August 25, 1948. The Treaty formed the basis of the Brussels Treaty Organization. The Brussels Treaty was revised and extended with four Protocols, signed on October 23, 1954,<sup>(64)</sup> and the Brussels Treaty Organization was replaced by the Western European Union (WEU) of which Federal Republic of Germany became a Member. The headquarters of the WEU is in London and Paris.<sup>(65)</sup>

The main Organs of the WEU are the Council, the Assembly, the Agency For The Control Of Armaments and the Standing Armaments Committee. The Council is composed of the Foreign Ministers of the Member States, but it may also be convened at ambassadorial level. The Assembly is composed of representatives of the Brussels Treaty Powers to the Consultative Assembly of the Council of Europe. The Agency For The Control Of Armaments is staffed by administrators and technical experts who carry out tasks of verification and supervision relating to stocks and manufacture of certain weapons, in collaboration with NATO. The Standing Armaments Committee, established by the Council in 1955, is composed of representatives of WEU's Member States. The Committee has a general mandate of co-ordination with regard to military equipment and weapons resources.

## 2. The North Atlantic Treaty Organization<sup>(66)</sup>

On April 28, 1948, the Canadian Government suggested that the Brussels Treaty Organization be replaced by an Atlantic defence system which was to include Canada and the United States. In the United States, the Truman doctrine declaring the willingness of the United States, to help the free countries of Europe marked the new trend in American peace-time diplomacy. The Vandenberg Resolution of June 11, 1948,<sup>(67)</sup> gave the Senate's approval to the United States' association with regional arrangements based on self-help and mutual aid, thus removing constitutional impediments to United States participation in a peacetime military alliance with Western Europe. The concerned negotiations started in the summer of 1948.<sup>(68)</sup> The North Atlantic Treaty was signed at Washington on April 4, 1949, and entered into force on August 24, 1949. The original 12 parties to the Treaty were Belgium, Canada, Denmark, France,<sup>(69)</sup> Iceland,<sup>(70)</sup> Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom and the United States.<sup>(71)</sup> In accordance with Article 10 of the Treaty, Turkey and Greece,<sup>(72)</sup> the Federal Republic of Germany,<sup>(73)</sup> and Spain<sup>(74)</sup> acceded to the Treaty.

NATO, according to some writers is the most highly developed of the regional defence arrangements that have been keystones of the United States post-War policy. In the opinion of Kelsen,<sup>(75)</sup> it is hardly possible to deny the possibility of interpreting the North Atlantic Treaty as a regional arrangement within the meaning of Chapter VIII of the United Nations Charter. It is not required, Kelsen believes, that the parties to the regional arrangement be geographically neighbours. It is essential only that the actions of the organization established by

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the regional arrangement be restricted to a certain area, determined in the agreement.

The structure of NATO can be divided into two parts, Civil and Military. The Civil part comprises the Council and the Defence Planning Committee. The NATO Council is the supreme body which may take the form of meeting of Heads of State,<sup>(76)</sup> a ministerial session or a session of permanent representatives. A large number of Committees have been set up under the authority of the Council either to prepare its and the Defence Planning Committee's work or to implement their directives. The Defence Planning Committee deals with the area of defence. In the Military part, the Military Committee, a subordinate to the council and to the Defence Planning Committee, is the highest military authority. It is composed of each Member State's Chief of Staff or a permanent military representative. The NATO commanders and command structure are organized directly under the authority of the Military Committee. These are the Supreme Allied Commander Europe (SACEUR), the Supreme Allied Commander Atlantic (SACLANT), and the Allied Commander In Chief Channel (CINCHAN). In addition to these commands, the Canada and U.S. Regional Planning Group is responsible to the Military Committee For Defence Plans For North America.

3. The Organization Of Warsaw Pact

The Socialist world system or what was termed "socialist block" includes, in a wider sense, all socialist states.<sup>(77)</sup> In accordance with the Report of the Central Committee at the XXVI Communist Party of the Soviet Union Congress in 1981, the "socialist community" comprises the Soviet Union and the European People's Democracies of Bulgaria, Czechoslovakia, Hungary, Poland and Romania, the German Democratic Republic, the Asian People's Democracies of Mongolia, Vietnam and Laos and finally Cuba.<sup>(78)</sup> Albania, Yugoslavia, North Korea and the People's Republic of China are regarded Socialist States outside the community.

The regional organization of Socialist States, whose centre lies in Central and Eastern Europe, has developed on the basis of bilateral system of treaties unmatched in the inter-War period in its wide compass.<sup>(79)</sup> These bilateral treaties were preceded by the "Treaty of Friendship, Co-Operation And Mutual Assistance" commonly known as the "Warsaw Pact".<sup>(80)</sup> The latter was concluded at the initiative of the Soviet Union, in Warsaw on May 14, 1955. It entered into force on June 5, 1955. The Parties to the Warsaw Pact were the Soviet Union, Albania,<sup>(81)</sup> Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and Romania.<sup>(82)</sup> The conclusion of the Warsaw Pact was a response to ratification of the Paris Accords and West German entry into NATO.<sup>(83)</sup> The Warsaw Pact according to Article 11, was originally concluded for a period of twenty years, and was automatically extended for a further ten years in 1975. At a one day Summit held in Warsaw on April 26, 1985, the representatives of the Member States of the Warsaw Pact signed a Protocol extending the period of validity of the Pact for a further twenty years.<sup>(84)</sup>

Some writers believe that the Warsaw Pact had more the characteristics of a treaty of alliance than those of the founding document of an international organization. Others are of the opinion that it is only an inchoate regional arrangement in the sense of Chapter VIII of the United Nations Charter, since the emphasis is on collective self-defence and not collective security. We believe that the Warsaw Pact is nothing but a regional arrangement in accordance with Chapter VIII of the Charter. We refer to Professor Kelsen's argument that the framers of the Charter did not anticipate that the system of collective security laid down in the Charter would not work at all, and they certainly did not intend collective self-defence as a substitute for collective security. It may also be added that Article 4 of the Pact provides that the exercise of the right of individual or collective self-defence shall be in the event of an armed attack in Europe, thus the action taken under the Pact has the character of "regional action", because it is restricted to a certain area, i.e. Europe, determined in the Pact.

The Joint Armed Forces consist of the contingents of each Warsaw Pact Member, including the entire National People's Army of the German Democratic Republic and the Soviet Forces organized into army-groups which are stationed in Czechoslovakia, the German Democratic Republic Hungary and Poland under bilateral troop agreements.

In accordance with Article 6 of the Warsaw Pact, the Political Consultative Committee, the supreme political organ, is charged with carrying out the consultations provided for under the Treaty and with the consideration of matters arising in connection with the application of the Treaty. The powers of the Committee extend to performing a general leadership function in the military sphere.

In accordance with Article 6 of the Pact, the Political Consultative Committee set up the following organs :

- A. The Permanent Commission For Foreign Policy Issues on January 26, 1956.
- B. The Joint Secretariat, on January 26, 1956.
- C. The Committee Of Defence Ministers, on March 17, 1969.
- D. The Military Council, on March 17, 1969.
- E. The Technical Committee Of The Joint Armed Forces, on March 17, 1969.
- F. The Committee Of Foreign Ministers, on November 26, 1976.

## Second : Settlement Of Disputes

### 1. Settlement Of Disputes Under The Western European Union

Article 10 of the Brussels Treaty distinguishes between justifiable disputes and other disputes. It provides for the settlement of justifiable disputes by recourse to the International Court of Justice, and for the settlement of other disputes by conciliation.

2. Settlement Of Disputes Under The North Atlantic Treaty Organization

In the Preamble to the North Atlantic Treaty, the Parties reaffirm their faith in the Purposes and Principles of the Charter of the United Nations and their desire to live in peace with all peoples and all governments.

In accordance with Article 1 of the Treaty the Parties undertake, as set forth in the Charter of the United Nations, to settle any international disputes in which they may be involved by peaceful means in such a manner that international peace and security and justice, are not endangered. The means of pacific settlement of disputes comprised in Article 33 of the United Nations Charter are negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means. To confirm their undertaking of the peaceful settlement of disputes, the Parties of the North Atlantic Treaty undertake, in accordance with the same Article 1 of the Treaty, to refrain in their international relations from the threat or use of force in any manner inconsistent with the Purposes of the United Nations.

3. Settlement Of Disputes Under The Warsaw Pact

Guided by the Purposes and Principles of the Charter of the United Nations, as declared in the Preamble, the Parties undertake in Article 1 of the Warsaw Pact to refrain in their international relations from the threat or use of force, and to settle their international disputes by peaceful means in such a manner that international peace and security are not endangered.

4. Settlement Of Disputes Within The Framework Of The Council Of Europe<sup>(85)</sup>

The peaceful settlement of disputes between states has not been specifically regulated by the Statute of the Council Of Europe. On April 27, 1957, the European Convention For Peaceful Settlement Of Disputes<sup>(86)</sup> was opened at Strasbourg for signature and ratification by Member States of the Council of Europe. The European Convention came into force on April 30, 1958 after ratification by two states.<sup>(87)</sup>

The European Convention distinguishes between legal disputes and non-legal disputes.

In accordance with Article 1 of Chapter I of the European Convention, the types of international legal disputes set out in Article 36 (2) of the Statute of the International Court of Justice shall be submitted to the said Court for judicial settlement. Article 34 provides that this obligation may not be excluded by reservation.<sup>(88)</sup>

In accordance with Articles 4 and 5 of Chapter II of the European Convention, the non-legal (political) dispute, shall be referred to a

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Permanent Conciliation Commission, previously set up by the Parties, or to an Ad Hoc Conciliation Commission constituted by the Parties, unless they agree to have recourse to arbitration directly. In the case of failure of the conciliation procedure, later arbitral proceedings will not be prejudiced. It is noted by some writers that the provisions on conciliation and arbitration have not yet become of practical importance.

In the case of mixed disputes involving both legal and non-legal questions, Article 18 provides that any Party to the dispute may refer the legal issues to judicial settlement before beginning the procedure of conciliation.

Third: Joint Self-Defence

1. Joint Self-Defence Under The Western European Union

Article 5 of the Brussels Treaty provides that :

"If any of the High Contracting Parties should be the object of an armed attack in Europe the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked all the military and other aid and assistance in their power".

It is to be noted that the obligation of collective defence in the Brussels Treaty is expressed in terms which are more forceful than those adopted in the corresponding Article of the North Atlantic Treaty.

The obligation of the Parties under the United Nations Charter, shall not be prejudiced by the Brussels Treaty, Article 6 paragraph 1 provides that :

"The present Treaty does not prejudice in any way the obligations of the High Contracting Parties under the provisions of the Charter of the United Nations. It shall not be interpreted as affecting in any way the authority and responsibility of the Security Council under the Charter to take at any time such action as it deems necessary in order to maintain and restore international peace and security".

The Parties are required to report to the United Nations Security Council any measures they may take under Article 5, Article 6 paragraph 1 provides that :

"All measures taken as a result of the preceding Article shall be immediately reported to the Security Council. They shall be terminated as soon as the Security Council has taken the measures necessary to maintain or restore international peace and security".

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2. Joint Self-Defence Under The North Atlantic Treaty Organization

Under Article 5 of the North Atlantic Treaty, an attack against one or more of the Parties in Europe or North America is to be considered an attack against them all, it provides that :

"The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic Area.

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken measures necessary to restore and maintain international peace and security".

According to Article 4, if in the opinion of any of the Parties, the territorial integrity, political independence or security of any of them are threatened, the Parties will consult together.

Article 7 asserts that the North Atlantic Treaty does not and shall not be interpreted as affecting in any way the rights and obligations under the Charter of the Parties which are Members of the United Nations, or the primary responsibility of the Security Council for the maintenance of international peace and security. In the meantime, the Parties, under Article 8, undertake not to enter into any international engagement in conflict with the Treaty.

Article 6 defines the Treaty's area of co-operation to include the territory of the Parties in North America and Europe,<sup>(89)</sup> islands under the jurisdiction of any Party in the North Atlantic Treaty area north of the tropic of cancer,<sup>(90)</sup> and vessels and aircraft of the Parties in this area. Article 2 of the Greece/Turkey Accession Protocol extends this area to include all of Turkey, the Mediterranean Sea, and forces, vessels or aircraft when in or over the area mentioned above.

3. Joint Self-Defence Under The Warsaw Pact

The Warsaw Pact is a treaty of alliance which combines co-operation for the purposes of securing peace with the affording of assistance in case of armed attack. Thus, Article 4 relating to the mutual assistance, is the central provision of the Pact, it provides that :

"In the event of an armed attack in Europe on one or more of the States Parties to the Treaty by any State or group of States, each State Party

to the Treaty shall, in the exercise of the right of individual or collective self-defence, in accordance with Article 51 of the United Nations Charter, afford the state or states so attacked immediate assistance, individually and in agreement with the other States Parties to the Treaty, by all the means it considers necessary, including the use of armed force. The States Parties to the Treaty shall consult together immediately concerning the joint measures necessary to restore and maintain international peace and security.

Measures taken under this Article shall be reported to the Security Council in accordance with the provisions of the United Nations Charter. These measures shall be discontinued as soon as the Security Council takes the necessary action to restore and maintain international peace and security".

It is to be noted that the previous Article 4 of mutual assistance is expressly restricted to the eventuality of an armed attack in Europe. Some writers note that the obligation to provide assistance to allies is, like its equivalent in the North Atlantic Treaty, expressed in rather elastic terms. An automatic provision of military assistance is not foreseen by the Treaty, which instead leaves the type and scale of the assistance as a matter for each individual ally.

Similar to the North Atlantic Treaty, Article 3 of the Pact emphasizes consultation between the Parties, it provides that :

"The Contracting Parties shall consult together on all important international questions involving their common interests, with a view to strengthening international peace and security.

Whenever any one of the Contracting Parties considers that a threat of armed attack on one or more of the States Parties to the Treaty has arisen, they shall consider immediately with a view to providing for their joint defence and maintaining peace and security".

Article 5 of the Pact establishes the duty of close military co-operation between the Parties, it provides that :

"The Contracting Parties have agreed to establish a Unified Command, to which certain elements of their armed forces shall be allocated by agreement between the Parties, and which shall act in accordance with jointly established principles. The Parties shall likewise take such other concerted action as may be necessary to reinforce their defensive strength, in order to defend the peaceful labour of their peoples, guarantee the inviolability of their frontiers and territories and afford protection against possible aggression".

## B. The American Hemisphere

The origins of the present Inter-American system for the maintenance of international peace can be traced back to the early Nineteenth Century when most of the Latin American Republics won their independence

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from Spain. As weak countries facing a hostile Europe, they sought to band together for their mutual protection. On 1826, Simon Bolivar called a Conference of Spanish American Republics at Panama where a Treaty of Confederation was drafted. It provided for mutual guarantees, the establishment of a representative assembly and procedures for the settlement of their disputes by peaceful means. Subsequently, the concern over the peaceful settlement of disputes developed to include not only those disputes that might arise among the Member States of the proposed Confederation but also disputes involving any of these countries and one or more powers outside the Confederation.

At the conclusion of the First International Conference Of American States convened by the United States and held at Washington on April 1890, the Permanent International Agency was established. That Agency has developed into the present Organization Of American States. The Conference approved the "Plan Of Arbitration" which made arbitration mandatory save in those cases involving issues which, in the sole judgment of one of the Parties, might imperil its independence. Eleven of the participating States signed a formal Treaty containing terms almost identical to the Conference draft.

According to some writers, the development of Inter-American peace and security procedures, after the Washington Conference of 1889/1890, might be divided into two phases.

The first phase, from 1890 to 1936, was characterized by efforts to devise juridical procedures for the peaceful settlement of Inter-American disputes. During this period, which culminated in the Inter-American Conference For The Maintenance Of Peace at Buenos Aires in 1936, some twelve general treaties were signed dealing with pacific settlement procedures, as well as a large number of special treaties. These treaties reflected two Latin American biases, an emphasis on the use of peaceful procedures rather than collective action for the settlement of international disputes;<sup>(91)</sup> and a proclivity toward judicial formulas as the means for achieving this end. The effectiveness of these treaties even in theory was limited. None was ratified by all American States, and most of them lacked several ratifications.

The second phase of the development of Inter-American peace and security procedures was from 1936 to 1948. In this period, the emphasis shifted from juridical formulas to the principle of consultation and the use of collective measures. The period culminated in the conclusion of the two treaties, the Inter-American Treaty Of Reciprocal Assistance, of 1947, and the Charter of the Organization Of American States, of 1948. Only 13 Member States of the Organization Of American States<sup>(92)</sup> have ratified the Bogota Pact. Nonetheless, Articles 23 to 26 of the OAS Charter - as amended by the Protocol of Buenos Aires of 1967, in force since February 27, 1970, incorporate verbatim the same provisions contained in Articles 20 to 23 of the 1948 Bogota Charter. Therefore, we shall refer to the Organization established by the Inter-American Treaty Of Reciprocal Assistance, and the Organization Of American States.

First: The Origins And The Establishment Of Some American Organizations

1. The Inter-American Treaty Of Reciprocal Assistance Of Rio De Janeiro <sup>(93)</sup>

In 1940, the Second Meeting of Consultation of Ministers of Foreign Affairs convening in Havana enacted Resolution XV, entitled "Reciprocal Assistance And Co-Operation For The Defence Of The Nations Of The Americas". In 1945, the Inter-American Conference On Problems Of War And Peace was held in Mexico City and adopted the Act Of Chapultepec which approved for the first time the "use of armed force to prevent or repel aggression". The Rio Pact was signed on September 2, 1947 at the conclusion of a special Conference held in Brazil, and it came into force on December 3, 1948. The Rio Pact brings together and makes explicit mutual security commitments agreed upon at Buenos Aires in 1936, at Havana in 1940 and at Chapultepec in 1945. To date, the American States that have ratified the Rio Pact are Argentina, Bahamas, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, United States, Uruguay and Venezuela.

In July 1975, a Conference of plenipotentiaries convened by the General Assembly of the OAS adopted the Protocol Of Amendment To The Rio Pact in San José, Costa Rica. The Protocol remains open for signature by the Contracting Parties to the Rio Pact and by Member States of the OAS that are not Parties to that Pact. An OAS Member State which signs and ratifies the Protocol but is not a Party to the Rio Pact is deemed to have signed and ratified the non-amended sections of the Rio Pact.

The Rio Pact expressly recognized the primacy of the United Nations Charter, Article 10 of the Pact provides that :

"None of the provisions of this Treaty shall be construed as impairing the rights and obligations of the High Contracting Parties under the Charter of the United Nations".

In accordance with Article 4 of the Pact, the hemisphere defence region embraces both North and South America, including Canada, Alaska, Greenland and regions of the Arctic and Antarctica. It is noteworthy that some parts of this region do not participate formally in Inter-American activities. The Protocol has been narrowed to the defence region and excludes the territory of Greenland.

The Organ Of Consultation is authorized by the Pact to determine the measures of a collective character deemed advisable to meet aggression or the threat of aggression.<sup>(94)</sup> The Organ Of Consultation is a meeting of Ministers of Foreign Affairs, or their special delegates, of those OAS Member States that have ratified the Pact.

Article 5 of the Protocol, which is to be substituted for Article 6 of the Rio Pact,<sup>(25)</sup> provides in the first paragraph that the Organ of Consultation is empowered to agree to take measures to assist a State Party if the latter is affected by an act of aggression as defined in Article 9 of the Protocol. In contrast, the second paragraph limits the role of the Organ of Consultation to one of agreeing on what steps and measures should be taken for the common defence and maintenance of hemispheric peace and security if an American State which is not a State Party falls victim to such acts of aggression.

In the case of a conflict between two or more American States, Article 7 of the Pact, requires the Organ of Consultation to ask the adversaries, without prejudice to the right of self-defence consistent with Article 51 of the United Nations Charter, to suspend hostilities and restore the status quo ante bellum (the state of affairs as it existed before a war).

## 2. The Organization Of American States

The OAS takes its origin from the International Union Of American Republics founded in 1890. This Union was merely a series of Conferences dealing with the promotion of commerce and the peaceful settlement of disputes. It was assisted by the Commercial Bureau Of The American Republics at Washington, which, in 1910, was re-named the Pan American Union.

In addition to the Conference, another high-level Organ began to meet from 1939 to consider problems arising out of the Second World War, the Meeting Of Consultation Of Ministers Of Foreign Affairs.

A third Inter-Governmental Organ was created by the Conference, the Governing Board, a permanent body in charge of the administration of the Pan American Union and of other non-political functions.

The basic principles of the OAS such as condemnation of the then so-called right of conquest, non-intervention in the internal and external affairs, legal equality of states and peaceful settlement of disputes - also originated in the pre-War regional system.

Thus, some writers believe that the OAS contrasts in three respects with other post-War regional organizations.

In the first place many of its activities as well as most of its Organs evolved during the sixty years between the first Conference of American States (1889-90) and formal establishment of the OAS. To a considerable extent, therefore the 1948 Charter restates commitments, formalizes institutional relationships, and registers processes already embarked upon.

Second, although this development in the Western hemisphere occurred without debate on the nature and methods of organization, the Inter-American experience strikingly illustrates the manner in which an

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elaborate organization with comprehensive purposes may emerge from the "functional" process of pragmatically devising institutions for the pursuit of limited goals.

Third, the Inter-American movement has characteristically accented international law, emphasizing legalistic procedures for settlement of disputes and welcoming the progressive enlargement of the scope of international law in matters ranging from the traditional rights and duties of states to the more recent and novel international concern for fundamental human rights.

The Charter of the OAS was signed at Bogota on April 30, 1948, and amended by the Protocol Of Buenos Aires of February 27, 1967.<sup>(96)</sup>

Membership of the OAS<sup>(97)</sup> is open to all independent American States. The Original Members were Twenty Latin American Republics<sup>(98)</sup> and the United States.<sup>(99)</sup> Thereafter, and in accordance with the procedure provided for in the amended Charter; Eight of the newly-independent English-speaking Caribbean States have joined the Organization.

In January 1962, the present Government of Cuba was excluded from participation in the Organs and Organization of the Inter-American system.<sup>(100)</sup>

The headquarters of the OAS is at Washington. Although the Latin American Governments are deeply committed to their regional system, they have shown due respect for their obligations under the United Nations Charter, Article 137 of the Charter of the OAS provides that :

"None of the provisions of this Charter shall be construed as impairing the rights and obligations of the Member States under the Charter of the United Nations".

The last sentence of Article 1 of the OAS Charter provides that :

"Within the United Nations, the Organization Of American States is a regional agency"; also Article 2 refers to the "regional obligations" of the OAS under the United Nations Charter.

Article 51 of the OAS Charter provides that :

"The Organization Of American States accomplishes its purposes by means of :

- a. The General Assembly;<sup>(101)</sup>
- b. The Meeting Of Consultation Of Ministers Of Foreign Affairs;<sup>(102)</sup>
- c. The Councils;<sup>(103)</sup>
- d. The Inter-American Juridical Committee;

- e. The Inter-American Commission Of Human Rights;
- f. The General Secretariat;<sup>(104)</sup>
- g. The Specialized Conferences; and
- h. The Specialized Organization".

There may be established, in addition to those provided for in the Charter and in accordance with the provisions thereof, such subsidiary organs, agencies and other entities as are considered necessary".

### Second: Settlement Of Disputes

#### 1. Settlement Of Disputes Under The Inter-American Treaty Of Reciprocal Assistance Of Rio De Janeiro

Article 2 of the Rio Pact provides that :

"As a consequence of the principle set forth in the preceding Article,<sup>(105)</sup> the High Contracting Parties undertake to submit every controversy which may arise between them to methods of peaceful settlement and to endeavor to settle any such controversy among themselves by means of the procedures in force in the Inter-American system before referring it to the General Assembly or the Security Council of the United Nations".

According to some writers, the role of the OAS in the application of the Pact demonstrates that this regional Organization has been successful with respect to the peaceful settlement of conflicts or controversies among some of its Member States. Thus, to a large extent it has fulfilled its task of maintaining the peace and security in the continent.

#### 2. Settlement Of Disputes Under The Organization Of American States

The Latin American States share a desire to settle their disputes by peaceful means. Individual states may depart from this principle in specific situations, but the weight of the Latin American Community is normally on the side of pacific settlement. The use of force in accordance with treaty provisions, is viewed as the least desirable recourse. This approach is supported by appeal to long-established principles that the Latin American States have developed as guides for their international conduct and that evoke a strong emotional response among both governments and the public. The principle of peaceful settlement is one of these.

At the Bogotá Conference in 1948, concurrently with the Charter of the OAS, the Bogotá Pact was drafted.

Article 23 of the 1948 OAS Charter provides that :

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"A special treaty will establish adequate procedures for the pacific settlement of disputes and will determine the appropriate means for their application, so that no dispute between American States shall fail of definitive settlement within a reasonable period".

That special treaty is the Bogotá Pact.<sup>(106)</sup> Its purpose was to replace the numerous earlier treaties with one consolidated instrument of pacific settlement.<sup>(107)</sup>

Article 1 of the Bogotá Pact provides that :

"The High Contracting Parties, solemnly reaffirming their commitments made in earlier international conventions and declarations, as well as in the Charter of the United Nations, agree to refrain from the threat or the use of force, or from any other means of coercion for the settlement of their controversies, and to have recourse at all times to pacific procedures".

The Bogotá Pact sets forth procedures to be followed, beginning with good offices and progressing through mediation, investigation and conciliation, and judicial settlement to compulsory arbitration.<sup>(108)</sup>

Articles 9 to 49 contain rules on good offices<sup>(109)</sup> and mediation,<sup>(110)</sup> investigation and conciliation,<sup>(111)</sup> judicial procedure<sup>(112)</sup> and arbitration.<sup>(113)</sup>

On judicial procedure, Article 31 provides that :

"In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory ipso facto, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning :

- a. The interpretation of a treaty;
- b. Any question of international law;
- c. The existence of any fact which, if established, would constitute the breach of an international obligation;
- d. The nature or extent of the reparation to be made for the breach of an international obligation".

Under Article 33, if the Parties fail to agree as to whether the Court has jurisdiction over a controversy, the Court itself shall first decide that question. If the Court, according to Article 34, finds it lacks jurisdiction for the reasons set forth in Articles 5,<sup>(114)</sup> 6<sup>(115)</sup> and 7<sup>(116)</sup> of the Treaty, it shall declare the controversy ended.

Parties are permitted to select any one of these procedures in the first instance,<sup>(117)</sup> but if that procedure fails, they are required to go as far as necessary toward a final arbitration.<sup>(118)</sup>

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As we referred before, the OAS Charter was amended in 1967 by the Protocol of Buenos Aires, and the amended Charter contains in Articles 82 to 90 new provisions on pacific settlement of disputes.

According to Article 3 of the amended OAS Charter, the Principles of the OAS includes, inter alia, "Controversies of an international character arising between two or more American States shall be settled by peaceful procedures".

Article 23 provides that :

"All international disputes that may arise between American States shall be submitted to the peaceful procedures set forth in this Charter, before being referred to the Security Council of the United Nations".

At the same time, in accordance with Article 21, the Member States undertake not to have recourse to the use of force, except in the case of self-defence in accordance with existing treaties or in fulfilment thereof.

Article 82 provides that :

"The Permanent Council shall keep vigilance over the maintenance of friendly relations among the Member States, and for that purpose shall effectively assist them in the peaceful settlement of their disputes, in accordance with the following provisions".

Article 83 provides that :

"To assist the Permanent Council in the exercise of these powers, an Inter-American Committee On Peaceful Settlement shall be established, which shall function as a subsidiary Organ of the Council. The Statutes of the Committee shall be prepared by the Council and approved by the General Assembly".

Article 84 provides that :

"The Parties to a dispute may resort to the Permanent Council to obtain its good offices. In such a case the Council shall have authority to assist the Parties and to recommend the procedures it considers suitable for the peaceful settlement of the dispute".

Article 87 provides that :

"If one of the Parties should refuse the offer, the Inter-American Committee On Peaceful Settlement shall limit itself to informing the Permanent Council, without prejudice to its taking steps to restore relations between the Parties, if they were interrupted, or to establish harmony between them".

Article 90 provides that :

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"In performing their functions with respect to the peaceful settlement of disputes, the Permanent Council and the Inter-American Committee On Peaceful Settlement shall observe the provisions of the Charter and the Principles and Standards of international law, as well as take into account the existence of Treaties in force between the Parties".

Third: Joint Self-Defence

1. Joint Self-Defence Under The Inter-American Treaty Of Reciprocal Assistance Of Rio De Janeiro

The Act of Chapultepec of 1945 represents a step towards reciprocal assistance and American solidarity before the conclusion of the Rio Pact.<sup>(119)</sup>

It is declared in Part I of the Act of Chapultepec :

"That every attack of a State against the integrity or the inviolability of the territory, or against the sovereignty or political independence of an American State, shall conformably to Part III hereof, be considered as an act of aggression against the other States which sign this Act. In any case, invasion by armed forces of any State into the territory of another trespassing boundaries established by treaty and demarcated in accordance therewith shall constitute an act of aggression".

It is also recommended in Part II of the Act :

"That for the purpose of meeting threats or acts of aggression against any American Republic following the establishment of peace, the Governments of the American Republics consider the conclusion, in accordance with their constitutional processes, of a treaty establishing procedures whereby such threats or acts may be met by the use, by all or some of the Signatories of said treaty, of any one or more of the following measures:

recall of Chiefs of diplomatic missions; breaking of diplomatic relations; breaking of consular relations; breaking of postal, telegraphic, telephonic, radio-telephonic relations; interruption of economic, commercial and financial relations; use of armed force to prevent or repel aggression".

The same Principle provided for in Part I of the Act of Chapultepec is repeated in Article 3 paragraph 1 of the Rio Pact. In fact, the Rio Pact was designed to relate juridically to the United Nations Charter. Thus, a distinction is made between procedures for dealing with armed attacks under the right of self-defence, recognized in Article 51 of the United Nations Charter, and those regarding other forms of aggression or threats to the peace which relate more directly to Articles 52 and 53 of the United Nations Charter. The central obligations of the treaty in this regard to both types of cases are set forth in Articles 3 and 6 respectively.

Article 3 of the Rio Pact provides that :

"1. The High Contracting Parties agree that an armed attack by any state against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations.

2. On the request of the State or States attacked and until the decision of the Organ Of Consultation of the Inter-American System, each one of the Contracting Parties may determine the immediate measures which it may individually take in the fulfilment of the obligation contained in the preceding paragraph and in accordance with the principle of continental solidarity. The Organ Of Consultation shall meet without delay for the purpose of examining those measures and agreeing upon the measures of a collective character that should be taken.

3. The provisions of this Article shall be applied in case of any armed attack which takes place within the region described in Article 4 or within the territory of an American State. When the attack takes place outside the said areas, the provisions of Article 6 shall be applied.

4. Measures of self-defence provided for under this Article may be taken until the Security Council of the United Nations has taken the measures necessary to maintain international peace and security".

Article 6 of the Rio Pact provides that :

"If the inviolability or the integrity of the territory or the sovereignty or political independence of any American States should be affected by an aggression which is not an armed attack or by an extra-continental or intra-continental conflict, or by any other fact or situation that might endanger the peace of America, the Organ Of Consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression, or, in any case, the measures which should be taken for the common defence and for the maintenance of peace and security of the continent".

It is to be noted that the San José Protocol of Amendment to the Rio Pact, which was adopted in 1975, makes significant amendments to Articles 3 and 6 of the Rio Pact.

Article 3 of the Protocol provides that the use of force by one state against an American State cannot be considered an armed attack against all the Contracting Parties unless the American State attacked is a "State Party". The basis of solidarity in the amended Pact, therefore, is reciprocity of obligations.

Unlike Article 6 of the Rio Pact, Article 5 of the Protocol omits the expression "aggression which is not an armed attack". The Protocol

substantially amends Article 9 of the Rio Pact.<sup>(120)</sup> The definition of aggression in Article 9 of the Protocol is the definition approved by the United Nations General Assembly in Resolution 3314 (XXIX).

## 2. Joint Self-Defence Under The Organization Of American States

It is clear that the OAS Charter reaffirms the basic principle of solidarity. The principles of the OAS include, inter alia, "an act of aggression against one American State is an act of aggression against all the American States". "Article 3 (f)". Article 27 confirms this principle, it provides that :

"Every act of aggression by a state against the territorial integrity or inviolability of the territory or against the sovereignty or political independence of an American State shall be considered an act of aggression against the other American States".

Therefore, it is of the Purposes of the OAS, according to Article 1, "to provide for common action on the part of those States in the event of aggression".

Article 28 also provides that :

"If the inviolability or the integrity of the territory or the sovereignty or political independence of an American State should be affected by an armed attack or by an act of aggression that is not an armed attack, or by an extra-continental conflict, or by a conflict between two or more American States, or by any other fact or situation that might endanger the peace of America, the American States, in furtherance of the Principles of hemispheric solidarity or collective self-defence, shall apply the measures and procedures established in the special treaties on the subject".

Article 63 provides that :

"In case of an armed attack within the territory of an American State or within the region of security delimited by treaties in force, a Meeting of Consultation shall be held without delay. Such Meeting shall be called immediately by the Chairman of the Permanent Council of the Organization, who shall at the same time call a meeting of the Permanent Council itself".

Footnotes Of Chapter II Of Part III

(1) See In English:

Charter Of The Organization Of American States of April 30, 1948, Supplement To The American Journal of International Law, Volume XLVI (1952), pp. 43-66; Agreement Between The Parties To The North Atlantic Treaty Regarding The Statuts Of Their Forces, Supplement To The American Journal of International Law, Volume XLVIII (1954), pp. 83-101; Robert Fraser (Editor), Keesing's Contemporary Archives, Volumes XXV (1979), XXVI (1980), XXVIII (1982), and XXXI (1985), passim; Frederic L. Kirgis, International Organization In Their Legal Setting, passim; Ruth C. Lawson (Editor), International Regional Organization - Constitutional Foundations, passim; H.F. Van Panhuys, L.J. Brinkhorst, H.H. Maas (Editors in Chief) and Mrs. M. Van Leeuwen Boomkamp (Co-ordinating Editor), International Organization And Integration, passim; A. LeRoy Bennett, International Organization, Principles And Issues, passim; D.W. Bowett, The Law Of International Institutions, passim; Charles S. Rhyne, International Law, passim; Julius Stone, Legal Controls Of International Conflict, passim; Jorg Manfred Mosner, Non-Aggression Pacts, pp. 34-38; Tatiana B. De Maekelt, Bogota Pact (1948), pp. 42-45; Tatiana B. De Maekelt, Inter-American Treaty Of Reciprocal Assistance Of Rio De Janeiro (1947), pp. 217-221; G.I. A.D. Draper, Regional Arrangements And Enforcement Action, pp. 1-44; T.O. Elias, The Commission Of Mediation, Conciliation And Arbitration Of The Organization Of African Unity, pp. 336-354; F.V. Garcia-Amador, Organization Of American States, pp. 276-281; Konard Ginther, European Convention For The Peaceful Settlement Of Disputes, pp. 56-58; Konard Ginther, Liberation Movements, pp. 245-249; Humphrey M. Hill, Central American Court Of Justice, pp. 41-45; Jonathan S. Ignarski, North Atlantic Treaty Organization, pp. 264-270; Hans Kelsen, Is The North Atlantic Treaty A Regional Agreement?, pp. 162-166; Majid Khadduri, The Arab League As A Regional Arrangement, pp. 756-777; Rahmatullah Khan, Regional Co-operation And Organization : Asian States, pp. 314-319; Peter Macalister-Smith, Western European Union, pp. 366-370; Hans V. Mangoldt, Arbitration And Conciliation Treaties, pp. 34-37; Boris Meissner, Regional Co-Operation And Organization : Socialist States, pp. 324-330; Boris Meissner, Warsaw Treaty Organization, pp. 359-363; Wolfgang Münch, European Defence Community, pp. 149-150; I.A. Shearer, South-East Asian Treaty Organization Organization, pp. 345-348; Mufeed Shihab, League Of Arab States, pp. 20-24; Mufeed Shihab, Cooperation Council Of The Arab Gulf States, pp. 80-82; Christian Rumpf, Central Treaty Organization, pp. 73-75; Joachim Wolf, Regional Arrangements And The United Nations Charter, pp. 289-295; Norbert Wühler, Arbitration Clause In Treaties, pp. 34-37; Emmanuel G. Bello, Organization Of African Unity, pp. 270-276; Emmanuel G. Bello, Regional Cooperation And Organization : African States, pp. 301-308; Henn Jüri Uibopun, Wars Of National Liberation, pp. 343-346.

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Islamic Conference Organization (The General Secretariat), Charter of The Organization Of The Islamic Conference; League Of Arab States, Draft Amendment To The League Of Arab States Pact; The League Of Arab States (The Secretariat General), Draft Amendment Of The League Of Arab States Pact dated 12/5/1981; Muhammad Yusuf Ulwan, International Documents (Arabic Translation), passim; Muhammad Hafez Ghanem and A'isha Rateb, Al-Munazzamat Al-Iqlimiya Ad-Dawliya Wa Al-Mutakhasisa, passim; Muhammad Talaat Al-Ghunaimi, Al-Ghunaimi Fi At-Tanzim Ad-Dawli, passim; Muhammad Al-Hussainy Meesilhy, Munazzamat Al-Wihda Al-Afriqiya Min An-Nabiatain An-Nazariya Wa At-Tatbiqiya, passim; A'isha Rateb, Al-Munazzamat Ad-Dawliya, passim; Jaber Ibrahim Ar-Rawi, Al-Munazzamat Ad-Dawliya, passim; Abdul Aziz Sarhan, Al-Usul Al-A'ama Li Al-Munazzamat Ad-Dawliya, passim; Muhammad Aziz Shukry, Al-Ahlaf Wa At-Takatulat Fi As-Siyasa Al-A'lamiya, passim; Wahid Raafat, Shuoun Al-Jami'a Al-Arabiya Ka Munazzama Iqlimiya, pp. 1-55.

(2) We shall use the expression "the League" to refer to the "Arab League".

(3) This element was very strong among the Arab States especially before the conclusion of the Peace Treaty between Egypt and Israel.

4) In a speech on May 29, 1941, Mr. Anthony Eden, the Foreign Affairs Secretary, expressed the views of his government as follows :

"This country has a long tradition of friendship with the Arabs, a friendship that has been proved by deeds not words alone. We have countless well-wishes among them, as they have many friends here. Some days ago I said in the House of Commons that His Majesty's government had great sympathy with Syrian aspirations for independence. I should like to repeat that now. But I would go further. The Arab World has made great strides since the settlement reached at the end of the last war, and many Arab thinkers desire for the Arab peoples a greater degree of unity than they now enjoy. In reaching out towards this unity they hope for our support. No such appeal from our friends should go unanswered. It seems to me both natural and right that the cultural and economic ties between the Arab countries and the political ties, too, should be strengthened. His Majesty's government for their part will give their full support to any scheme that commands general approval."

(5) On February 24, 1943, Mr. Eden declared the sympathy of his government with any movement which aimed at strengthening Arab ties, while expressing the belief, however, that the first step in such a direction should originate with the Arab themselves.

(6) After three months only from Mr. Eden's speech of February, 1943, the Egyptian government started the arrangements to invite for a Conference to reach an agreement on the form of the Proposed Arab Union.

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- (7) See J.C. Hurewitz, *Unity And Disunity In The Middle East*, International Conciliation, No. 481, p. 234; referred to in Saleh Jawad Al-Kazem, *International Organization* (in Arabic).
- (8) The main features of the Protocol is the proposal to establish the League, composed of the independent Arab States which desired to join the new organization. According to the Protocol, the purpose of the League would be to execute agreements reached by the Member States; to organize periodical meetings to re-affirm their relations and to co-ordinate their political programs, with a view to effecting co-operation between them, so as to safeguard their independence and sovereignty against any aggression; and to concern itself with the general interests of the Arab countries. The League would be governed by a Council to be known as the Council of the League. Members of the League must not resort to force in the settlement of disputes and must not pursue foreign policies harmful to the policy of the League or to one of its Members. The Council would mediate in any difference likely to bring about war between one Member Country and another Member or non-Member Country. It is clear, as stated in the Protocol, that while the Preparatory Committee recognizing the horrors of persecution undergone by Jews in Europe, it also considers Palestine one of the most important elements of the Arab countries and that the rights of the Arabs could not be harmed without danger to peace and stability of the Arab World.
- (9) The delegates of Saudi Arabia and Yaman declared that they had to submit the Protocol to their governments for approval before signature. It is to be noted also that the Palestine representative "Musa Al-Alami" did not sign.
- (10) Yaman signed the Pact on May 5, 1945. Five states of the seven signatories of the League's Pact attended the Conference of San Francisco.
- (11) The need to amend the Pact was emerged after the establishment of the League and proved through its life. Apart from a minor amendment in 1958, to the effect of changing the date of the second regular session from October to September, the Pact has never been amended. But, there were many attempts to amend the Pact, the last of them was made after the Summit Conference held at Baghdad on 1979. The recent Draft Amendment was prepared as a result of the League's Council Resolution No. 3843 adopted on June 26, 1979. The Draft was prepared by a group of Arab experts, and preceded with an explanatory introduction prepared by the General Secretariat of the League. According to the introduction, the Pact has been, factually, amended as a result of the establishment of the Permanent Political Committee of the League on October 30, 1946; and the conclusion of the Joint Defence And Economic Co-Operation Treaty on April 17, 1950. This Treaty establishes two organs, i.e., the Joint Defence Council and the Economic Council, which they are considered by the Arab Jurists as two additional organs to the League Pact. According to the said introduction, there were six

attempts to amend the Pact before the recent Draft Amendment. The first two attempts were made by Syria and Iraq, on 1951 and 1954 respectively, were aimed to replace the Arab League with another federation form. In 1955, the Secretary-General of the League prepared a Draft Amendment to the Pact. Another attempt made on 1959 by Morocco, was followed by another Draft Amendment prepared by an ad hoc committee constituted to this end. The Fifth attempt was on 1969, it came as a result to an initiative of the Third Summit Conference and the sixth attempt was in 1974, it also came as a result to an initiative of the Seventh Summit Conference. The recent Draft Amendment, after being reviewed by a committee of the Member States of the League, it consists of a Preamble and 45 Articles.

- (12) In this regard, the Pact is considered a frustration of the declared aspirations of some Arab rulers. King Abdul Aziz Ibn Saud of Saudi Arabia declared at Riad on December 15, 1943, "It is our duty as Muslims to form a Union...an Arab Union will unite us. We thank GOD that a new spirit has appeared among Muslims.
- (13) Al-Mu'tamar AL-A'lami AL-Islami (The Islamic World Conference)  
The first meeting of this organization was held in Macca in 1926, Egypt and Saudi Arabia participated in this meeting with other Muslims from the Indian sub-continent. The Conference Committee concerns with cultural, administrative, political, social, and economic affairs.
- (14) Madwat Al-Mu'tamar Al-Islami (The Assembly Of The Islamic Conference)  
The Assembly was constituted in a meeting held in Al-Quds (Jerusalem) in 1953. The meetings of this Organization were attended by the Arab and the non-Arab Muslims.
- (15) Al-Mu'tamar Al-Islami AL-A'am (The General Islamic Conference)  
It was constituted in 1955, the late Egyptian President Muhammad Anwar As-Sadat was the first Secretary-General of this Organization. It grants scholarships to foreign Muslims to study in the Egyptian universities; and establishes Islamic Centres in foreign countries. A Conference of Muslim jurists was held in Egypt in 1966 under the patronage of this Organization.
- (16) Rabitat Al-A'lam Al-Islami (The League Of The Islamic World)  
This League was established according to a Resolution of the Islamic Conference held in Macca in 1962. Its objective is to disseminate information about Al-Islam. Muslims from non-Arab States were represented in the League. It concerned itself with some activities such as the establishment of an Islamic Bank, Islamic Broadcasting Corporation and the issuing of a newspaper to publish the news of the Islamic World.
- (17) Al-Itihad Al-Islami AL-A'lami (The World Islamic Federation)  
It was established in Paris. The assistance of needy Muslims, and the dissemination of information about the Islamic civilization are among the objectives of this Federation.

(18) Al-Munazzama Al-Islamiya Ad-Dawliya (The International Islamic Organization)

It was established in the First meeting of the Afro-Asian Islamic Organization which was held at Bandung (Indonesia) in 1970.

(19) We shall use the expression "the Conference". to refer to this Organization.

(20) On August 12, 1974, Twenty-Six States signed an agreement to establish the "Islamic Development Bank".

(21) Article 8 of the Charter provides that :

"The Organization Of The Islamic Conference is composed of the States which have participated in the Conferences of the Heads of State and Government held at Rabat; and the states having participated in the Conferences of the Ministers of Foreign Affairs, signed the present Charter. Every Islamic State shall have the right to membership of the Islamic Conference. Should it desire to adhere, it shall present an application to this effect includes its desire to adopt the present Charter, such application shall be filed with the General Secretariat and submitted to the Conference of the Ministers of Foreign Affairs at its first meeting following the presentation of the application. The admission of such adherence will be effected by a decision of the Conference made by a two thirds majority of the Conference Members".

(22) That is why we study it within the framework of regional organizations, although it cannot be considered as such in the strict sense.

(23) We shall use the abbreviation "G.C.C." (Gulf Co-operation Council) to refer to the Council.

(24) In their justifications of the establishment of the G.C.C., the six Members stated that they have agreed to form it out of their "awareness of their special ties and common characteristics and the similarity of the regimes governing them on the basis of the Islamic faith"; their "belief in the common destiny and aim uniting their peoples"; their "desire to achieve co-ordination, integration and co-operation" which they believed would serve "the sublime objectives of the Arab nation"; and "a desire to continue efforts in all vital fields concerning their peoples and to achieve their aspirations for a better future and unity".

(25) As a reaction of the establishment of the G.C.C., Syria, Iraq and the Palestine Liberation Organization protested that the alliance between the Gulf States would split the Members of the Arab League into blocs of "have" and "have not" states instead of promoting unity against Israel. But in the final statement of the meeting held

in Abu Dhabi, the Six States expressed their commitment to the Pact of the Arab League, the resolutions of Arab and Islamic conferences, and the principles of non-alignment and the United Nations Charter.

- (26) In the preparatory meetings held in Abu Dhabi on May 23-24, 1981, between the Foreign Ministers of the Six States, a difference had emerged, in particular, between Oman and Kuwait, the former having proposed, inter alia, that the strait of Hormuz, through which much of the oil supply for the Western World was shipped, be defended in conjunction with Western forces, whereas the latter strongly opposed any defence arrangement with the West.
- (27) We cannot ignore that the common perils surround the Gulf States have participated in any progress reached in this regard.
- (28) According to Article 2 of the Draft Amendment of the Pact, the Principles of the League relating to the prohibition of the use of force for the settlement of disputes and the joint defence are as follows :

A. The Member States shall refrain, whether directly or indirectly, from the threat and use of force against the territorial integrity or political independence of any Member State, or in any other manner inconsistent with the objectives of the Pact. (paragraph 5)

B. The Member States shall settle their disputes by peaceful means, and act to solve them within the framework of the League. (paragraph 6)

C. The Member States shall not follow any policy contradicts the Objectives and Principles of the League; or harmful to the joint Arab interest. Treaties and agreements which have been concluded between any Member State shall not bind or restrict other Member States. (paragraph 7) Although paragraph 7 of Article 2 of the Draft Amendment has its roots in the Protocol of Alexandria of 1944, we believe it was, intentionally, drafted to be as a political argument by some Member States against their adverse Member States. The introduction to this Draft Amendment reveals that this paragraph is a direct result of the conclusion of the Camp David Agreements and later of the Peace Treaty between Egypt and Israel. We believe that the expression "joint Arab interest" is vague and raises many questions, what is the criterion of this joint interest ?; who is entitled, under the Pact, to consider and give final decisions regarding this joint interest ? and in case of difference of views between the joint Arab interest and the supreme national interest, which one of them shall prevail ? It may, also, be added that Article 2 paragraph 7 is contradictory to paragraph 2 of the same Article which establishes the Principle of sovereign equality between the Member States. Moreover, since all the League Members are, simultaneously, Members of the United

Nations, paragraph 7 of Article 2 of the Draft Amendment to the League Pact is contradictory to Article 2 paragraph 1 of the United Nations Charter which provides for the Principle of sovereign equality between the Member States of the United Nations, thus every Member State is under the obligation not to intervene in the domestic affairs of another Member State, and therefore Article 2 paragraph 7 of the Draft Amendment of the League Pact cannot be accepted because it is in conflict with the obligations of the Arab States under the United Nations Charter, the latter obligations shall prevail in accordance with Article 103 of the Charter. The last part of paragraph 7 of Article 2 of the Draft Amendment is self-evident that it was drafted to oppose the Peace Treaty between Egypt and Israel.

(29) Article 5.

(30) A Draft of an "Arab Court Of Justice" was prepared in 1951, similar to the Statute of the International Court of Justice. The proposed Arab Court was entrusted with the power to adjudicate disputes between states; and issue legal opinion. No action has been taken in this regard, but the subject-matter was raised in 1981 in the occasion of the Draft Amendment to the Pact.

(31) Article 5 provides that :

"The recourse to force for the settlement of disputes between two or more Member states shall not be allowed. Should these arise among them a dispute that does not involve the independence of a state, its sovereignty, or its territorial integrity, and should the two contending parties apply to the Council for the settlement of this dispute, the decision of the Council shall then be effective and obligatory. In this case, the states among whom the dispute has arisen shall not participate in the deliberations and decisions of the Council. The Council shall mediate in a dispute which may lead to war between two Member States or between a Member State and another state in order to conciliate them. The decisions relating to arbitration and mediation shall be taken by a majority vote".

(32) The Council intervened in the dispute concerning the withdrawal of French forces from Syria and Lebanon in 1945. However, it is unrealistic to expect a third state accepts the mediation of the Council in its dispute with a Member State of the League, especially if we note that the Member States themselves have no great trust to seek settlement of their disputes through the Council.

(33) Some writers believe that it is not justified to exclude political disputes from settlement by arbitration, because arbitration, under the Pact, is not obligatory.

(34) In practice, the Conference has tried to solve the Iran-Iraq conflict by peaceful means.

1. The Conference of Foreign Ministers decided in New York on September 26, 1980, to charge President Zia Ul-Haq of Pakistan in leading a Good Offices Committee to both Iran and Iraq. The Conference Of Kings And Heads Of State And Government held a meeting in Ta'if (Saudi Arabia), boycotted by Iran, on January 25-29, 1981. They decided to enlarge the Good Offices Committee, and also to set up an Islamic Force to implement a cease-fire if necessary. The Committee proposal, published on March 5, 1981, suggested that a truce should be observed from March 5 to 12, during which period Iraq would withdraw its troops (these operations to be, if necessary, supervised by a non-Arab Islamic Peacekeeping Force of the Conference); that both sides should agree on freedom of navigation in the Shatt Al-Arab", while a Special Committee should be set up to decide on the long-term future of the waterway; and that both sides should agree to non-interference in each other's affairs. The several attempts to find a settlement reached to a complete failure. The Conference of the Ministers of Foreign Affairs met in Baghdad on June 1-5, 1981, issued an appeal to both Iraq and Iran to "end bloodshed and endeavor to reach a just, peaceful and honourable solution" of their Conflict. After June 1981 no further attempts was made until March 1982.

2. On March 5, 1982, a negotiating team led by President Sekou Toure of Guinea, visited Iraq and then Iran; but the mission had failed in its efforts. Imam Khomeiny of Iran declared on March 9, 1982, that "peace with the criminals is a crime against Al-Islam".

3. A number of missions arranged by the Conference and the non-alignment movement likewise failed to bring both sides together in negotiation.

4. A new Mediation Committee headed by Sir Dawda Jawara, President of Gambia, met in July 18-19, 1985, to discuss the Iran-Iraq war.

5. The Conference Of Kings And Heads Of State And Government met in Kuwait in early 1987 did not accomplish an important development to solve this Conflict.

(35) Unlike Article 51 of the United Nations Charter, the Draft Amendment to the Pact did not use the term "individual and collective self-defence", but it used the terms "the right of legitimate defence", (Articles 28 and 30 paragraph 2); and "measures of joint defence" (Article 30 paragraph 2).

The system of self-defence, under the Draft, may be summarized in the following points :

1. According to Article 1 paragraph 1(B), the Objectives of the League comprise, inter alia, the guarantee of the national Arab

security and considering an aggression on any Arab state as an aggression against all of them. This Objective is confirmed by Article 30 paragraph 1. According to Article 30 paragraph 2, the right to legitimate defence shall not be prejudiced even if the aggressor is one of the League Members.

2. The Summit Conference is competent with the following :

- A. To resolve the strategy of the joint Arab work in all its fields; take decisions and measures sufficient to push this work forward, and guarantee the national security of the Arab nation. The Prime Ministers being delegated by the Summit Conference, shall co-ordinate, in private meetings, between different aspects of this strategy in the political, economic and social fields. (Article 7 paragraph 2 "A")
- B. To adopt the joint defence policy in the Arab world and its security, and guarantee its requirements. (Article 7 paragraph 2 "C")
- C. To consider any international situation relates to the Arab peace and security. (Article 7 paragraph 2 "F")

3. It is to be noted that the Ministers of Defence shall join to the Council of Ministers during the discussion of defensive matters. As regards joint defence, the Council is competent with the institution of polices and plans; (Article 10 paragraph B "1, 2, 6, 7") the constitution of organs; (Article 10 paragraph B "3, 8") and the application of sanctions. (Article 9 paragraphs 5, 6; and Article 10 paragraph B "5")

<sup>(36)</sup> This Treaty was signed by Jordan on February 16, 1952, the Jordanian Government having originally refused its adherence to it at the time of its drafting.

<sup>(37)</sup> The Syrian Professor Muhammad Aziz Shukry called this Treaty the "Arab Alliance".

<sup>(38)</sup> Article 6 provides that :

"In case of aggression or threat of aggression by a state against a Member State, the attacked or threatened with attack may request an immediate meeting of the Council.

The Council shall determine the necessary measure to repel this aggression. Its decision shall be taken unanimously. If the aggression is committed by a Member State, the vote of that State will not be counted in determining unanimity.

If the aggression is committed in such a way as to render the government of the State attacked unable to communicate with the Council, the representative of that State in the Council may request the Council to convene for the purpose set forth in the

preceding paragraph. If the representative is unable to communicate with the Council, it shall be the right of any Member State to request a meeting of the Council".

(39) For this specific reason Ruth Lawson considers the adequacy of this Treaty for defence of the area is doubtful.

(40) In his analysis of the recent situation of the Arab States, Professor Muhammad Aziz Shukry emphasizes that the scientific understanding of essential political conceptions, by all Arab States with no exception, is still incomplete or at least unclear. In his opinion, it is not untrue that the Arab States, in general, did not elevate to the level of their national responsibilities. In spite of the setback and earthquakes, they still adopt the policy of reactions not actions. He adds, unless these states coped with world incidents, the Arab security shall continue to remain in the non-eligible hands, such matter is deemed the extreme frustration for the whole Arab nation. Professor Shukry calls the Arabs to ally with themselves first; thereafter to ally with those, whom they have with them well-considered interests; otherwise it will be said in the future, there, in this spot, a stupid people lived someday, they were crushed by intelligent peoples, therefore, the latter alone deserved their existence.

See Muhammad Aziz Shukry, *Alliances And Blocs In World Politics (In Arabic)*, Kuwait, July 1978, pp. 231-235.

(41) The Charter of the Organization Of The Islamic Conference does not include any obligation relating to joint self-defence.

(42) In an extraordinary Session, the Council of the Ministers of Foreign Affairs took place on January 9, 1984, convened to discuss the implication of the December 1983 bomb attacks in Kuwait, the Council expressed its support for Kuwait, and undertook to place all available resources at the latter's disposal, so as to be able to "confront the conspiracy collectively".

The important confirmation of the exact meaning of the evolution happened in the G.C.C. in this regard, came from Kuwait's Deputy Prime Minister who declared in September, 1985, that an act of aggression against any G.C.C. State would be considered an attack on them all.

(43) In a meeting of Foreign and Defence Ministers held in Abha (Saudi Arabia) on September 18-19, 1984, the Ministers emphasized the importance of adopting a policy of self-reliance in defence matters. After its Fifth Session held in Kuwait on November 27-29, 1984, the Supreme Council expressed the need to translate the principle of self-reliance into a tangible fact.

(44) In this meeting, a proposal to establish a Gulf Multinational Force was approved by Oman and Saudi Arabia.

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- (45) The code-name of these exercises was "Peninsula Shield II".
- (46) The Chief of Staff of the United Arab Emirates announced on October 30, 1984, that plans had been drawn up for the centralization of the G.C.C. military colleges and training institutes.
- (47) This Force became commonly known as "Peninsula Shield II".
- (48) We shall use the abbreviation SEATO to refer to this Organization.
- (49) France and Pakistan later ceased to be Active Members of the SEATO.
- (50) We shall use the abbreviation CENTO to refer to this Organization.
- (51) Article 4.
- (52) See in particular the thesis of Dr. Muhammad Al-Hussainy Meesilhy on the Organization Of African Unity (in Arabic).
- (53) In 1960, 13 French territories in Africa achieved their political independence.
- (54) Egypt, Ethiopia, Liberia, Morocco, Sudan and Tunisia participated in this Conference.
- (55) The Conference was preceded by a preparatory meeting of the Council of Ministers from May 15 to 23, 1963.
- (56) 32 African States signed the Charter.
- (57) We shall use the abbreviation OAU to refer to this Organization.
- (58) Although not explicitly specified, membership of the OAU may be denied any independent state in Africa ruled by a white minority government.
- (59) According to Article 7 paragraph 4 of the Charter, "The Commission Of Mediation, Conciliation And Arbitration" is one of the principal institutions of the OAU.
- (60) The OAU Charter does not comprise obligations relating to joint self-defence between the Member States.
- (61) The understanding of the United States attached to the Treaty declares that the references to the aggression and armed attack in Article 4 shall be understood by the United States as applying only to Communist aggression, but in cases of other aggression or armed attack it will consult with the other parties as provided for in Article 4 paragraph 2.
- (62) We shall use the abbreviation WEU to refer to this Organization.

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- (63) On September 17, 1946, Sir Winston Churchill proposed as a solution for Europe's post-war problems : "to recreate the European family, or as much of it as we can, and to provide it with a structure under which it can dwell in peace, in safety and in freedom. We must build a kind of United States of Europe".
- (64) The Protocols entered into force on May 6, 1955.
- (65) The Council usually meets in London, and the Secretariat, which submits services to all organs except the Assembly, is located there. The Agency For The Control Of Armaments And The Standing Armaments Committee, together with their respective staffs are located in Paris, as is the Secretariat of the Assembly, which ordinarily meets in Strasbourg.
- (66) We shall use the abbreviation NATO to refer to this Organization.
- (67) Resolution No. 239, 80th Congress, 2nd Session.
- (68) The States participated in these negotiations were States Parties to the Brussels Treaty, the United States and Canada. Norway, Denmark, Portugal, Italy and Iceland accepted the invitation to take part in the Atlantic Alliance; Sweden and Ireland declined.
- (69) On March 10/11, 1966, France unilaterally announced in messages to the other Member States in the Organization that, although she remained bound by the North Atlantic Treaty, she intended to withdraw from the integrated commands within NATO and would require the relocation of the Organization's headquarters and installations outside the French territory.
- (70) Iceland does not participate in the Organization's integrated military structure.
- (71) The existence of Canada and the United States, and Turkey to some extent as Members of NATO may be diminished the European character of this Organization.
- (72) London Protocol Of Accession, was signed on October 26, 1951, and entered into force on February 18, 1952. It is to be noted that this accession expands the geographical scope of the Treaty to the Mediterranean sea, such matter diminishes the "North Atlantic" character of the Treaty.
- (73) Paris Protocol Of Accession, was signed on October 23, 1954 and entered into force on May 5, 1955.
- (74) Brussels Protocol Of Accession, was signed on December 10/11, 1981 and entered into force on May 30, 1982.
- (75) Some writers, such as Sir W. Eric Beckett, are of the opinion that the North Atlantic Treaty is not a regional arrangement, referred to in Kelsen's article "Is the North Atlantic Treaty A Regional

Arrangement".

- (76) In December 1957, the Council met at the level of Heads Of Government.
- (77) Some writers distinguish between "Socialist States" and "States Having Socialist Orientation". The characteristic elements of a Socialist State are the recognition of the Marxist-Leninist ideology, the supremacy of the Communist Party and a system of economic planning which is based on the pre-eminence of state property. Socialist States manifesting such characteristics exist in Europe, Asia, and America. In terms of development they are partly industrialized and partly developing states. The "States Having A Socialist Orientation" are all developing countries in Asia, Africa and Latin America.
- (78) This restricted community does not include Soviet-occupied Afghanistan, or Vietnam-occupied Kampuchea.
- (79) According to some writers these bilateral treaties served to bolster defence against external attack, thus, guaranteeing the security of the Contracting Parties. They are, therefore, best characterized as security treaties. Stalin's aim with these treaties was to secure the predominance of the Soviet Union in the eastern part of Central Europe and in Southern-Eastern Europe.
- (80) According to some writes, friendship, co-operation and assistance are invoked by the Soviet Union and her narrower circle of followers in the name of the bilateral and Warsaw pacts as constitutive elements of "Socialist Internationalism" and are seen as principles of a "Socialist International Law". The greatest emphasis is placed on mutual assistance which is expressed in the principle of fraternal or comradely help. In descending order of importance "assistance" is followed by "co-operation" and "friendship".
- (81) Under a Law passed on September 13, 1968, Albania withdrew from the Pact in protest against the armed intervention by the Soviet Union and other Member States of the Pact in Czechoslovakia in August 1968, in which Romania did not take part.
- (82) Article 9 of the Pact provides that :

"The present Treaty shall be open for accession by other states, irrespective of their social and political structure, which express their readiness, by participating in the present Treaty, to help in combining the efforts of the peace-loving states to ensure the peace and security of the peoples. Such accession shall come into effect with the consent of the States Parties to the Treaty after the instruments of accession have been deposited with the Government of the Polish People's Republic". It is clear that this Article is of theoretical value only.

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(83) The Preamble to the Warsaw Pact provides that :

"Taking into consideration...the situation that has happened about in Europe as a result of the ratification of the Paris Agreements, which provide for the constitution of a new military group in the form of a "West European Union", with the participation of a demilitarized West Germany and its inclusion in the North Atlantic bloc, thereby increasing the danger of a new war and creating a threat to the national security of peace loving states".

(84) Article 1 of the Protocol provides that :

"The Treaty Of Friendship, Co-Operation And Mutual Assistance signed in Warsaw on May 14, 1955, remains in force during the next 20 years. For those Contracting Parties which have not conveyed to the Government of the Polish People's Republic during the period of one year prior the expiration of this notification of their denunciation of the Treaty, it will remain in force for a further 10 years".

(85) The Statute of the Council Of Europe was signed at London on May 5, 1949, and came into force on August 13, 1949.

(86) We shall use the expression the "European Convention" to refer to it.

(87) The European Convention has been ratified by Twelve Member States, Six of whom did not accept Chapter III on compulsory arbitration, and one of whom (Italy) inserted a reservation excluding both conciliation and arbitration. At a later stage in two treaties signed on March 29, 1974, between Italy and Austria, Italy accepted arbitration clauses referring to Chapter III of the European Convention.

(88) The provisions of judicial settlement have been invoked as a basis for the jurisdiction of the International Court of Justice in the North Sea continental Shelf case (1969).

(89) West Berlin is implicitly included by referring to the Parties' occupation forces in Europe. Express guarantees of the security of West Berlin were given in the London Conference held on October 3, 1954.

(90) Thirty degrees latitude north.

(91) The Second International Conference Of American States, held on 1902 at Mexico City, adopted a Treaty On Compulsory Arbitration and a Protocol Of Adherence To The Hague Conventions of 1899. On subsequent occasions the Inter-American system approved recommendations and resolutions on the matter of peaceful settlement.

It is surprising that despite the traditional interest in judicial settlement, the only permanent international tribunal to have been

established in this hemisphere is the Central American Court of Justice which existed from 1907 until 1918, although from time to time proposals are made for creation of an Inter-American Court of Justice. The establishment of the Central American Court was in part attributable to the fact that five Central American Republics, Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua, had attempted, on numerous occasions in their modern history, to form a Confederation. The Convention established this Court was ratified in 1908, at which time the court came into existence. The Court, which was composed of five judges one from each republic, had its seat in Costa Rica, first in Cartago and later in San José. According to the Convention established the Court, its jurisdiction was extremely broad and allowed States, individuals and domestic institutions to appear as parties. The Court had, in addition, a compromissory jurisdiction over disputes between one Central American State and a third State or individuals. Also, the Court was competent to determine its own jurisdiction. As far as the applicable law was concerned, on questions of fact the Court was to be governed by its free judgment; and on points of law by the principle of international law. Only ten cases came before the Court during its existence, five of them involved individuals though not one of these was successful. According to some writers, the life of this court mark an important step in the development of the international judicial settlement of disputes. The Court was the first permanent international tribunal, predating the Permanent Court of International Justice by some 14 years, and it afforded individuals the possibility of bringing actions directly against foreign States.

A Conference On Conciliation And Arbitration was held in Washington the following relevant instruments were signed on January 5, 1929 : the General Convention Of Inter-American Conciliation, the General Treaty Of Inter-American Arbitration and the Protocol Of Progressive Arbitration.

In addition, the Anti-War Treaty Of Non-Aggression And Conciliation, signed at Rio De Janeiro on October 10, 1933, and still in force for a number of Latin American and European States and the United states condemns war of aggression, provides for the peaceful settlement of all disputes and controversies, and establishes an elaborate mechanical of conciliation for this purpose.

- (82) We shall use the abbreviation OAS to refer to this Organization.
- (83) We shall use the expression "the Rio Pact" to refer to it.
- (84) According to Article 8 of the Pact, these measures are, recall of Chiefs of diplomatic missions; breaking of diplomatic relations; breaking of consular relations; partial or complete interruption of economic relations or of rail, sea, air, postal, telephonic and radiotelephonic or radiotelegraphic communications.

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- (95) Article 6 of the Pact requires the Organ Of Consultations to meet at once to agree on measures to assist the victims of aggression, or if appropriate, measures for the common defence and maintenance of peace and security of the continent.
- (96) We shall refer to the Charter as amended by the Protocol.
- (97) Relations of collaboration have been maintained between the OAS and non-Member States, whether American or not, through the participation of observer from the said states in meetings of Organs of the regional Organization. These relations were strengthened when the status of the "permanent observer" was created in 1971 by the General Assembly. The following states have accredited permanent observers, Austria, Belgium, Canada, Egypt, the Federal Republic of Germany, France, Greece, Guyana, Israel, Italy, Japan, the Holy See, Morocco, the Netherlands, Portugal, Saudi Arabia, Spain and Switzerland.
- (98) They are Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela.
- (99) The United States Senate approved on August 28, 1950, the instrument of ratification subject to the following reservation:
- "That the Senate gives its advice and consent to ratification of the Charter with the reservation that none of its provisions shall be considered as enlarging the powers of the Federal Government of the United States or limiting the powers of the several states of the Federal Union with respect to any matters recognized under the Constitution as being within the reserved powers of several states".
- (100) At Punta del Este, the Foreign Ministers unanimously condemned Cuba's Marxism-Leninism as incompatible with the objectives of the Inter-American system, and agreed by two-thirds majority to exclude Cuba from participation in the Inter-American system.
- (101) According to Article 58 of the OAS Charter, there is a Preparatory Committee of the General Assembly.
- (102) According to Article 64, an Advisory Defence Committee shall be established to advise the Organ of Consultation.
- (103) The OAS Charter provides for three Councils, the Permanent Council (Article 78), the Inter-American Economic And Social Council (Article 93) and the Inter-American Council For Education, Science And Culture, (Article 99). It is to be noted that according to Article 81, the Permanent Council shall serve provisionally as the Organ Of Consultation when the circumstances

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contemplated in Article 63 of this Charter arise (an armed attack within the territory of an American State or within the region of security delimited by treaties in force).

(104) According to Article 113, the General Secretariat is the Central and Permanent Organ of the Organization.

(105) Article 1 provides that :

"The High Contracting Parties formally condemn war and undertake in their international relations not to resort to the threat or the use of force in any manner inconsistent with the provisions of the Charter of the United Nations or of this Treaty".

(106) The Preamble of the Bogota Pact states that the governments represented at the Ninth International Conference Of American American States resolved to conclude the Treaty in fulfilment of Article 23 of the OAS Charter (Article 26 of the Charter as amended by the Protocol of Buenos Aires of 1967).

(107) Article 58 of the amended OAS Charter provides that :

"As this Treaty comes into effect through the successive ratifications of the High Contracting Parties, the following treaties, conventions and protocols shall cease to be in force in respect of such parties :

- Treaty To Avoid Or Prevent Conflicts Between The American States of May 3, 1923;
- General Convention Of Inter-American Conciliation of January 5, 1929;
- General Treaty Of Inter-American Arbitration and Additional Protocol Of Progressive Arbitration of January 5, 1929;
- Additional Protocol To The General Convention Of Inter-American Conciliation of December 26, 1933;
- Anti-War Treaty Of Non-Aggression And Conciliation of October 10, 1933;
- Convention To Co-ordinate, Extend And Assure The Fulfilment Of The Existing Treaties between the American States of December 23, 1936;
- Inter-American Treaty On Good Offices And Mediation of December 23, 1936;
- Treaty On The Prevention Of Controversies of December 23, 1936.

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(108) The agreement between two or more States with a view to submitting an existing dispute to the jurisdiction of an arbitrator, and arbitral tribunal or an international court, is called *Compromis*. *Compromis*, according to some writers, exists in two forms :

First: The "Ad Hoc *Compromis*" (or "*Compromis proper*" or "*Special agreement*", which term is also used for an implementing *Compromis*), on the basis of which the parties submit a particular dispute which has arisen between them to an ad hoc or institutionalized arbitral tribunal or to an international court.

Second: The "General", "Abstract" or "Anticipated" *Compromis*, according to which states submit all or definite classes of disputes which may arise between them to an arbitral institution, a court or to an ad hoc arbitral body by concluding a general arbitration treaty or by including an arbitration, clause in a treaty. In case of the basic arbitration agreement, a further *Compromis* is needed to implement this agreement. This *Compromis* is known as an "*Implementing Compromis*", a "*Special Agreement*" or a "*Protocol of Submission*".

(109) Articles 9 and 10.

(110) Articles 11 to 14.

(111) Articles 15 to 30.

(112) Articles 31 to 37.

(113) Articles 38 to 49.

(114) Article 5 provides that :

"The aforesaid procedures, may not be applied to matters which, by their nature, are within the domestic jurisdiction of the State. If the Parties are not in agreement as to whether the controversy concerns a matter of domestic jurisdiction, this preliminary question shall be submitted to decision by the International Court of Justice, at the request of the Parties".

(115) Article 6 provides that :

"The aforesaid procedures, furthermore, may not be applied to matters already settled by agreement between the Parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty".

(116) Article 7 provides that :

"The High Contracting Parties bind themselves not to make

diplomatic representations in order to protect their nationals, or to refer a controversy to a court of international jurisdiction for that purpose, when the said nationals have had available means to place their case before competent domestic courts of the respective State".

(117) Article 3 provides that :

"The order of the pacific procedures established in the present Treaty does not signify that the Parties may not have recourse to the procedure which they consider most appropriate in each case, or that they should use all these procedures, or that any of them have preference over others except as expressly provided".

(118) Article 4 provides that :

"Once any pacific procedures has been initiated, whether by agreement between the Parties or in fulfilment of the present Treaty or a previous Pact, no other procedures may be commenced until that procedure is concluded".

(119) The Act of Chapultepec consists of a Preamble and three parts, Part I, a Declaration; Part II, a Recommendation and Part III provides that "The above Declaration and Recommendation constitute a regional arrangement for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action in this Hemisphere. The said arrangement, and the pertinent activities and procedures, shall be consistent with the purposes and principles of the general international organization [The United Nations] when established".

The Preamble of the Act provides that the American States have been incorporating in their international law, since 1890, by means of conventions, resolutions and declarations certain Principles which include, inter alia, the following Principle :

(j) The declaration that any attempt on the part of non-American State against the integrity or inviolability of the territory, the sovereignty or the political independence of an American State shall be considered as an act of aggression against all the American States (Declaration XV of the Second Meeting of the Ministers of Foreign Affairs, Habana, 1940).

(120) Article 9 of the Pact considers as aggression all acts the Organ of Consultation may characterize as such, including but not limited to :

"a. Unprovoked armed attack by a state against the territory, the people, or the land, sea or air forces of another state;

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- b. Invasion, by the armed forces of a state, of the territory of an American State, through the trespassing of boundaries demarcated in accordance with a treaty, judicial decision, or arbitral award, or, in the absence of frontiers thus demarcated, invasion affected a region which is under the effective jurisdiction of another State".

PART IV: THE JUDICIAL APPROACH TO  
The Legality Of War

Chapter I: The Judicial Approach To  
The Legality Of "War" In Muslim  
States<sup>(1)</sup>

In the inter-relations of recent Muslim states, there is no Court of Justice to settle the legal disputes among them whether under the League Of Arab States, or under the Organization Of The Islamic Conference. However, different attempts have been made to establish such Court of Justice under these two organizations.

We shall study the Draft Statutes of the Courts of Justice prepared within the framework of these two organizations as follows :

First: Towards an Arab Court of Justice.

Second: Towards an Islamic Court of Justice.

I : Towards An Arab Court Of Justice

1. Contrary to the United Nations Charter, the Pact of the League Of Arab States concluded on March 22, 1945, does not provide for the establishment of an Arab Court of Justice as one of the main Organs of the League; or even as one of its affiliated organizations. However, the authors of the League Pact conceived the establishment of this court when they drafted Article 19, which enables the amendment of the Pact for different reasons, including, inter alia, the establishment of such Court.

2. The Arab States felt the need for the existence of an Arab court of Justice to settle the legal conflicts which may arise among them and to complete the Arab regional organization in every aspect. Thus, attempts to establish such court started at the beginning of the fifties.

By virtue of the League Council Resolution 316/12 of April 13, 1950; a Committee Of Legal Experts prepared a part of a Draft Statute for the Arab Court of Justice, which was later completed by the legal department of the League. This Draft did not rally the approval of all Arab States.

3. In the mid-sixties, the General Secretariat of the League requested the views of the Arab States on a new Draft. The request concentrated on the following three matters :

- A. The jurisdiction of the Court: obligatory or discretionary.
- B. The quality of the Court : of judicial functions, or of judicial and advisory functions together.

C. The execution of the Court's judgements : which of the League's organs will be entrusted with this duty, and how ?

Within the period between October 19 and May 25, 1964, the General Secretariat of the League received replies to its questionnaire from Ten Arab States, which reflected different attitudes as indicated in the report of the Permanent Legal Committee on June 13, 1964. (2)

4. In the light of the replies received from the Arab States, the Permanent Legal Committee prepared a Draft Statute of an Arab Court of Justice based on the 1950 Draft, and the opinions of the Arab States.

The 1964 Draft prepared by the Permanent Legal Committee consists of 66 Articles divided into five parts, constitution of the Court, jurisdiction of the Court; procedures before the Court; advisory opinions; and general rules. But, this Draft had no chance to come into effect.

5. Due to various demands to reconsider the Pact of the Arab League; different Drafts, whether official or individual, were prepared, individual Drafts were prepared at official request. One of the outstanding individual Drafts was that prepared by Professor Hamed Sultan which included provisions similar to Articles 92-96 of the United Nations Charter. This Draft Statute was considered as an integral part of the Draft League Pact suggested by Professor Sultan.

In Professor Sultan's Draft Statute, the jurisdiction of the Court was discretionary, and the execution of its decisions was entrusted to the League Council.

Professor Sultan's Draft was studied by the Committee Of Experts constituted to study the amendment of the League Pact. The report of this Committee suggested the establishment of an Arab Court of Justice with obligatory jurisdiction.

The Arab League also entrusted Professor Mufeed Shihab with the duty of preparing a new Draft Statute for such Court. The Draft Statute prepared by Professor Shihab, which was submitted to the League on December 10, 1973, comprises 38 Articles not divided into parts or chapters. The Legal Department of the Arab League studied this Draft in February 1975, and in general it may be said that it was similar in its main trends to the 1950 and 1964 Drafts.

6. After the transfer of the headquarters of the Arab League from Cairo (Egypt) to Tunis (Tunisia), the League Council adopted the Resolution On Methods Of Work In The League And The Amendment Of The League Pact.

Pursuant to this Resolution, the Secretary General of the Arab League convened a meeting composed of a large number of Arab experts later known as the "Committee Of Developing The League And Amendment Of Its Pact". This Committee Of Experts and its sub-committees held

a series of meetings from 3 to 12 November, 1979. AT these meetings, the experts agreed to the establishment of an Arab Court of Justice to be considered as one of the main organs of the League, its Statute to be an integral of the Pact, and its jurisdiction to be obligatory for the States who accepted. The Draft amendment of the League Pact, which comprised five Articles, settled the three aforementioned matters, the jurisdiction of the court, quality of the court, and method of execution of its judgments. The details were left to the Draft Statute of the Court.

### The Draft Statute Of The Arab Court Of Justice

The Draft Statute was prepared by the General Secretariat of the Arab League, and like all other Drafts, was inspired by the Statute of the International Court of Justice. This Draft comprises 50 Articles divided into five Chapters.

Chapter One: Organization of the Court (Articles 2-16).

Chapter Two: Judicial competence of the Court (Articles 17-21).

Chapter Three: Procedures (Articles 22-45).

Chapter Four: Advisory Opinions (Articles 46-49).

Chapter Five: Amendment of the Statute (Article 50).

We shall refer to the main rules of the Draft Statute in the following points :

1. General.
2. The Constitution of the Court.
3. The Functions of the Court.

#### 1. General

A. Article 1 determines the status of the Court in the League system, it provides that :

"The Arab Court of Justice established by the Pact, the principal judicial organ of the League of Arab States, shall be constituted and function in accordance with the provisions of the present Statute".

B. The Draft Statute does not determine the Seat of the Court, this matter is left to the Supreme Council for determination in accordance with Article 10.

C. According to Article 23, the official language of the Court shall be the Arabic language.

D. As regards the amendments of the Statute, Article 50 of the Draft provides that :

"1. Amendments of the present Statute shall be effected by the same procedure as is provided for amendments in the League Pact.

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2. The Court shall have the power to propose such amendments of the present Statute as it may deem necessary, through written communications to the Secretary General of the League, for consideration in conformity with the previous paragraph".

2. The Constitution Of The Court

A. Nine judges shall compose the body of the Court in accordance with the conditions of Article 2 of the Draft which provides that :

"1. The Court shall be composed of nine independent judges elected from among citizens of the Member States, of high moral character who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are persons of recognized competence in international law, regardless of their nationality.

2. No two of the Members of the Court may be nationals of the same State. A candidate who for the purposes of membership, could be regarded as a national of more than one State shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights".

B. According to Article 3 paragraph 1 of the Draft Statute, the judges of the Court shall be elected by ballot from a list of persons nominated by the Member States.

C. As provided in Article 3 paragraph 5, in the event of more than one national of the same State obtaining the necessary majority of votes, the eldest of them shall be considered elected".

D. According to Article 4 paragraph 1 , the judges shall be elected for six years renewable for one time, provided however, that the term of office of three judges shall expire at the end of two years and the term of office of other judges shall expire at the end of four years.

The judges whose term of office are to expire at the end of two and four years shall be chosen by drawing lots effected by the Secretary General of the League.

E. The Court shall elect its President and Vice-President and a Registrar, Article 9 paragraph 1 and 2 provides that :

"1. The Court shall elect its President and Vice-President for two years renewable once.

2. The Court shall appoint its Registrar and an appropriate number of officials".

F. The judges shall, according to Article 8, before taking up their duties, take the following oath before the Court in open :

"I swear by ALLAH the Almighty to exercise the duties of my job truly and honestly, impartially and conscientiously".

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G. Article 12 of the Draft Statute provides that :

- "1. The quorum must be attained at all sittings.
2. Subject to the condition that the number of judges, sitting does not drop below seven, the Rules of the Court<sup>(3)</sup> may provide for allowing one or more judges, according to circumstances and in rotation , to be dispensed from sitting.
3. All questions shall be decided by simple majority of the judges".

H. As provided in Article 13, judges of the nationality of each of the Parties shall not have the right to sit in the case before the Court.

I. Article 6 of the Draft Statute includes some obligations relevant to the judges, it provides that :

- "1. No judge may :
  - a. exercise any political or administrative function, public or private.
  - b. engage in any occupation of professional nature.
  - c. act as agent, counsel or advocate in any case.
  - d. participate in the decision of any case in which he has previously taken part as agent, counsel or advocate for one of the Parties or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.
2. Any doubt about the previous paragraph of this Article shall be settled by the judgment of the Court".

J. The Court and the judges enjoy privileges and immunities according to the Draft Statute. Article 7 paragraphs 1 and 2 provides that :

- "1. The judges shall enjoy, in territories of the Member States; diplomatic privileges and immunities.
2. The Court shall enjoy in the territories of its Member States, such privileges and immunities as are necessary for the fulfilment of its purposes and carrying out its functions. Its officials, experts, witnesses, and representatives of the Contesting States before the Court shall similarly enjoy such privileges and immunities as are necessary for the independent and free exercise of their functions".

3. The Functions Of The Court

According to the Draft Statute, the Court has two main functions,

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judicial and advisory as follows :

A. The Judicial Function Of The Court

1. Similar to the Statute of the International Court of Justice, only States, according to Article 17 of the Draft Statute, may be Parties to the Statute of the projected Court. The Court shall, according to Article 18 of the Draft Statute, be open to the States Parties to the present Statute, if they accept its jurisdiction.

2. The jurisdiction of the Court is comprised in Articles 20 and 21 of the Draft Statute, Article 20 provides that :

"1. The jurisdiction of the Court comprises all legal disputes among the Parties concerning, in particular, the following matters :

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the separation to be made for the breach of an international obligation.

2. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the judgment of the Court".

Article 21 deals with the declarations of the States Parties relating to the jurisdiction of the Court, it provides that :

"1. The jurisdiction of the Court comprises all cases which the Parties refer to it and all matters provided for in treaties in force.

2. The States Parties to the present Statute may at any time declare that they recognize the jurisdiction of the Court in all legal disputes in relation to any other State Party to the present Statute accepting the same obligation.

3. The declarations relating to the jurisdiction of the Court shall neither be made unconditional, nor on the condition of reciprocity on the part of several or certain States, or for a certain time".

3. Article 22 of the Draft Statute determines the law to be applied by the Court, it provides that :

"The Court is to decide, in accordance with the League Pact and international law, such disputes as are submitted to it, it shall apply :

- a. multilateral and bilateral treaties establishing rules expressly recognized by the Contesting States;

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- b. Arab and international custom;
- c. the general principles of Al-Shari'a Al-Islamiya;
- d. the general principles of law established in the legal systems of different States;
- e. subject to the provisions of Article 42,<sup>(4)</sup> judicial decisions and the writings of the most highly qualified law jurists of the various States, as subsidiary means of the determination of the rules of law.

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

4. The Court shall, according to Article 26 paragraph 1, have the power to indicate, if it considers that circumstances so require, any provisional measure which ought to be taken to preserve respective rights of either Party.

5. As provided in Article 37 of the Draft Statute, should a State consider it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.

6. Article 41 provides that :

"Subject to the provisions of Article 12 of this Statute, all questions shall be decided by the simple majority of judges present".

7. As for the binding force of the Court's decision, Article 43 provides that :

"The decision of the Court has no binding force except between the Parties and in respect of that particular case".

8. According to Article 44 of the Draft Statute, the judgment is final and without appeal. However, an application for revision of a judgment may be made only when the Court has ruled on a matter not required by the Parties in the case, or when the judgment is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the Party claiming revision, always provided that such ignorance was not due to negligence. The application for revision must be at latest within six months of the date of the judgment, or of the date of the discovery of the new fact. Unless the Court decides to the contrary, the judgment shall not be suspended as a result of the application for revision. No application for revision may be made after the lapse of ten years from the date of judgment.

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B. The Advisory Function Of The Court

1. The Court may, according to Article 47 paragraph 1 of the Draft Statute, give an advisory opinion on any legal question at the request of whatever body or specialized agency in accordance with Article 22 of the Pact.

2. In the exercise of its advisory functions, the Court shall, according to Article 49 of the Draft Statute, further be guided by the provisions of the Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.

II : Towards An Islamic Court Of Justice

The proposal to establish an Islamic Court of Justice within the framework of the Organization Of The Islamic Conference was made by His Highness Sheikh Jaber Al-Ahmad As-Sabah the Amir of Kuwait in 1980.

In 1981, the Third Summit Conference of the Organization Of The Islamic Conference adopted Resolution 11/35 (Summit) which provides for the establishment of an International Islamic Court of Justice.

The Thirteenth Islamic Conference of Foreign Ministers held in Niame (Niger) from 22 to 26 August, 1982, adopted Resolution No. 26.

By this Resolution, the Conference of Foreign Ministers decided that the Seat of the Court shall be the City of Kuwait, the capital of the State of Kuwait. The Conference of the Foreign Ministers also requested the Secretary General of the Islamic Conference Organization to convene a meeting of delegated experts from all Member States within a period not exceeding three months from the date of adoption of the aforementioned Resolution, to prepare a Draft Statute of the Islamic Court of Justice for submission to the Fourteenth Conference of Foreign Ministers of the Member States.

The Draft Statute Of The Islamic Court Of Justice

The Draft Statute of the Islamic Court of Justice comprises 50 Articles divided into 9 Chapters as follows :

Chapter I: The establishment of the Court and its Seat (Articles 1-2)

Chapter II: The constitution of the Court and its membership (Articles 3-9)

Chapter III: Members of the Court (Articles 10-12)

Chapter IV: Organization of the Court (Articles 13-21)

Chapter V: Judicial disputes (Articles 22-25)

Chapter VI: The jurisdiction of the Court (Articles 26-30)

Chapter VII: Procedures (Articles 31-42)

Chapter VIII: Advisory opinions (Articles 43-47)

Chapter IX: Amendments of the Statute (Articles 48-50)

Similar to our study of the Draft Statute of the Arab Court of Justice, we shall refer to the main rules of the Draft Statute of the Islamic Court of Justice in the following points :

1. General
2. The Constitution of the Court
3. The Functions of the Court

#### 1. General

A. Article 1 of the Draft Statute provides that :

"The International Islamic Court of Justice is the principal judicial organ of the Organization Of The Islamic Conference based on Al-Shari'a Al-Islamiya (The Islamic Law), and shall function, independently, in accordance with the provisions of the present Statute".

This Article is similar to Article 1 of the Draft Statute of the Arab Court and also Article 1 of the Statute of the International Court of Justice, in the confirmation that either of the two projected courts or the International Court is the principal judicial organ of the Organization. The difference is the emphasis of the Draft Statute of the Islamic Court on Al-Shari'a Al-Islamiya as a basis of the projected Court.

B. Article 2 provides that :

"a. The Seat of the Court shall be established at...

b. The Court may, if necessary, sit and exercise its functions in any Member State of the Organization".

This Article does not specify the Seat of the Court as Article 10, paragraph 1 of the Draft Statute of the Arab Court, but we referred to the Resolution 26 of August 26, 1982 adopted by the Thirteenth Conference of Foreign Ministers of the Member States which specified the city of Kuwait as the seat of the Court.

C. Article 29 provides that :

"a. Arabic, the language of the Holy Qur'an, shall be the first language of the Court; Arabic together with English and French shall be the accredited official languages.

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b. The Court shall, at the request of a Party to a dispute, authorize an unofficial language, provided this Party bear the financial burdens of translation into one of the official languages.

c. The Court shall deliver its judgment in the three official languages, the Court shall determine which of these texts is authentic.

The English and French are the official languages of the International Court of Justice according to Article 39 paragraph 1 of its Statute, and the Arabic is the official language of the proposed Arab Court according to Article 23 of the Draft Statute. But since Arabic is not the prevailing language in the Member States of the Organization Of The Islamic Conference, English and French were added to the official languages of the proposed Islamic Court.

D. Article 48 provides that :

"a. Amendments to the present Statute shall be effected in accordance with the same rules that applied to its adoption.

b. The Court shall have the power to propose such amendments to the present Statute as it may deem necessary, through written communications to the Secretary General for consideration, in conformity with the usual practice.

c. The Secretary General shall transfer to the Court any proposals concerning amendments to the present Statute, for comments".<sup>(5)</sup>

2. The Constitution Of The Court

A. Article 3 of the Draft Statute provides that :

"a. The Court shall consist of 11 members.

b. No two of the members may be nationals of the same State.

c. If a member elected has more than one nationality, he shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights".

The number of the judges of the proposed Islamic Court is eleven, but according to Article 2 of the Draft Statute of the Arab Court, the number of judges of the proposed Arab Court is nine, and according to Article 3 of the Statute of the International Court, the number of judges is fifteen. Under the Draft Statutes of the Arab and Islamic Courts, it is not permissible to elect two judges of the same nationality; while Article 2 of the Statute of the International Court provides for the election of a body of independent judges regardless of their nationality.

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B. Article 4 provides that :

"A member of the Court to be elected, must be an upright Muslim of high moral character, and a citizen of a Member State of the Organization, not less than forty years old; and must be among the scientists of recognized competence, or among experts in international law, who possesses the qualifications required in his respective country for appointment to the highest advisory or judicial offices".

This Article is distinguished from Article 2 paragraph 1 of the Draft Statute of the Arab Court, and Article 2 of the Statute of the International Court, because it requires a minimum age limit, and a certain religion in the person who will be elected as judge of the Court. In fact, the requirement of a certain religion in the candidate is logical and legally justified, since it is an Islamic Court works within the framework of the Islamic Organization. The Court itself, according to Article 1 of the Draft Statute is based on Al-Shari'a Al-Islamiya, and as it will be later seen, Al-Shari'a Al-Islamiya is the principal source of law to be applied by the Court, in accordance with Article 28 of the Draft Statute.

C. Article 5 provides that the members of the Court shall be elected by the Islamic Conference of Foreign Ministers from a list of nominated persons. Article 5 (e) provides that the Islamic Conference of Foreign Ministers shall bear in mind in the elections of the members of the Court, the regional distribution and linguistic representation of Member States.

If we refer to Article 3 of the Draft Statute of the Arab Court, we do not find such linguistic consideration in the election of the judges of the Court, simply because all the Member States of the Arab League are Arabic-speaking countries. Article 9 of the Statute of the International Court refers to two considerations in the election of the judges, the representation of the main forms of civilization, and of the principal legal system of the world. In fact, the last two considerations are not applicable to the Islamic Court, because the Member States belong to one civilization and one legal system, the Islamic civilization and the Islamic legal system.

D. Article 6 of the Draft Statute provides that :

"a. The members of the Court shall be elected for six years renewable; the term of office of five judges elected at the first election shall expire at the end of three years, and the term of office of the rest of them shall expire at the end of six years.

b. The members whose term of office are to expire at the end of the initial period of three years shall be chosen by drawing lots effected by the Secretary General immediately after the first election has been completed". (e)

E. Article 13 paragraph A and B provides that :

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- "a. The Court shall elect the President and Vice-President for three years; they shall not be re-elected.
- b. The Court shall appoint its Registrar, and may provide for the appointment of officers as may be necessary".<sup>(7)</sup>

F. Article 11 of the Draft Statute provides that :

"Each member of the Court shall, of the first open session, take the following oath :

"I swear by ALLAH the Almighty to fear ALLAH alone in the exercise of my duties, and shall follow, impartially, what is required by ALLAH's Shari'a, and be bound by the provisions of of the present Statute".

Article 8 of the Draft Statute of the Arab Court, also provides for an oath to be made by the judge before carrying out his duties. The distinction between the two oaths, is the emphasis in the Draft Statute of the projected Islamic Court on the fear of ALLAH and the respect of Al-Shari'a in carrying out the duties, but in both oaths ALLAH is the witness. According to Article 20 of the Statute of the International Court, the judge before taking up his duties make a declaration in open Court that he will exercise his powers impartially and conscientiously.

G. According to Article 15 of the Draft Statute :

"a. The full Court shall sit except when it is expressly provided otherwise in the present Statute.

b. Subject to the condition that the number of judges sitting, during the delivery of judgments, does not drop below nine, the President of the Court may allow one or more members in rotation, to be dispensed from sitting, in accordance with the Rules of the Court".<sup>(8)</sup>

H. Article 18 paragraphs A and B provides that :

"a. The States Parties to any case before the Court shall retain the right to have their own judges sitting together with other members of the Court and participate in the delivery of judgement, on the same footing with all members, whether in the constitution of the Court or in the Chambers.

b. If these Parties have members of their nationalities, they sit in Court or in the Chambers, if they do not have members, they shall appoint judges to be chosen from the nationalities of Member States provided that they meet the conditions required for the membership of the Court".

These provisions are similar to those of Article 31 paragraphs 1, 2 and 3 of the Statute of the International Court.<sup>(9)</sup> We

believe that Article 13 of the Draft Statute of the Arab Court is preferable than the aforementioned provisions because it states that judges of the nationality of each of the Parties shall not have the right to sit in the case before the Court.

I. Article 20 provides that :

"a. The Court shall work out, its Rules including rules and principles of carrying out its functions.

b. The Rules of the Court may provide for assessors to sit with the Court or with any of its Chambers, without the right to vote".<sup>(10)</sup>

J. In the exercise of their duties, the judges shall refrain from certain actions, Article 10 of the Draft Statute provides that :

"No member of the Court may :

a. exercise any political or administrative function;

b. exercise any activity not in conformity with the dignity of the judiciary or its independence;

c. act as counsel, agent, advocate or arbitrator in any case, or engage in any other occupation of a professional nature;

d. participate in the decision of any case in which he has previously taken part as a member of a national or international Court, or of a commission of enquiry, or in any other capacity.

The Court shall settle every dispute which may arise from the application of this Article".<sup>(11)</sup>

K. The privileges and immunities of the proposed Islamic Court and its members are comprised in Article 12 which provides that :

"a. The International Islamic Court Of Justice, its members and Seat shall enjoy in the territories of the Member States such privileges and immunities provided for in the Treaty of Privileges And Immunities of the Organization Of The Islamic Conference of 1976.

b. The General Secretariat of the Islamic Conference shall conclude with the Host Country, an agreement to regulate the relationship between the Court and the Host Country taken into consideration the international rules Governing privileges and immunities".<sup>(12)</sup>

### 3. The Functions Of The Court

Similar to the proposed Arab Court, the projected Islamic Court, according to its Draft Statute, has two main functions, judicial and advisory, as follows :

A. The Judicial Functions Of The Court

1. Similar to the Draft Statute of the Arab Court (Article 17) and the Statute of the International Court (Article 34 (1)) only States may be Parties to cases before the Organization. But, whereas the Draft Statute of the Arab Court makes no exception from the rule comprised in Article 18 of the Draft Statute which provides that the Court shall be open to the States Parties to the Statute if they accept its jurisdiction; Article 35 paragraph 2 of the Statute of the International Court provides that :

"the conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the Parties in a position of inequality before the Court".

Also, the Draft Statute of the Islamic Court makes possible to every State to be Party to cases before the Court, in accordance with the conditions comprised in Article 22 which provides that :

"a. Only States Parties to the Organization may be Parties to cases before the Court.

b. Any State, who declare in advance that it will be bound by the judgments of the Court without prejudice to the equality among the Contracting Parties, may be Party to cases before the Court, if accepted by the Parties to the dispute; the Court shall then fix the amount which that State or States not Parties to the Organization, is to contribute towards the expenses of the Court".

2. The jurisdiction of the Court is dealt with in Article 26 of the Draft Statute which provides that :

"The jurisdiction of the Court covers :

- a. cases which the Parties to the Organization Of The Islamic Conference agree to refer to it;
- b. cases which a treaty or convention in force provides for reference to it;
- c. the interpretation of a treaty, or bilateral or multilateral convention;
- d. any question of international law;
- e. the existence of any fact which, if established, would constitute a breach of international obligation;
- f. the nature or extent of the reparation to be made for the breach of an international obligation".<sup>(13)</sup>

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The method of the recognizing of the jurisdiction of the Court is stated in Article 27 which provides that :

"a. The Member States of the Organization may declare, without special agreement, that they recognize as compulsory ipso facto the jurisdiction of the Court in all legal disputes which may arise between them and any State accepting the same obligation.

The declaration referred to above may be made unconditionally, or on condition of reciprocity on the part of a certain State or several States, or for a certain time.

Such declaration shall be deposited with the Secretary General of the Organization Of The Islamic Conference, who shall transmit copies thereof to the Registrar of the Court and to the Member States of the organization.

b. The Court shall settle every dispute which may arise about its jurisdiction".<sup>(14)</sup>

3. Article 28 determines the law to be applied by the Court, it provides that :

"a. Al-Shari'a Al-Islamiya is the principal source of which the judgment of the International Islamic Court of Justice based.

b. The Court shall be guided by international law and international agreements bilateral or multilateral, international custom in force, the general principles of law, or judgments of international Courts".

We believe that this Article is the most important privilege which distinguishes the Draft Statute of the Islamic Court, from the proposed Arab Court and the International Court of Justice. It is very astonishing that Article 22 of the Draft Statute of the Arab Court makes the principles of Al-Shari'a Al-Islamiya, and not its norms, a third source of law to be applied by the Court, especially that all Arab States are Muslim States. This Article 22 followed to a great extent Article 38 of the Statute of the International Court. Another characteristic of Article 28 of the Draft Statute of the Islamic Court, paragraph B of this Article makes sources other than Al-Shári'a Al-Islamiya of secondary importance and for the guidance of the Court only.

4. The Court shall, according to Article 34 paragraph A, have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either Party.<sup>(15)</sup>

5. As provided for in Article 24 of the Draft Statute, should a Member State of the Organization consider that it has an interest of a legal motive which may be affected by the decision in the case before the Court, it may submit a request to the Court to be permitted to intervene.<sup>(16)</sup>

6. Article 38 paragraphs C, D and E provides that :

"c. All questions shall be decided by the simple majority of judges present, and in the event of an equality of votes, the President or the judge who acts in his place shall have a casting vote.

d. The judgment shall state the reasons on which it is based, and contain the names of the judges who have taken part in the decision.

e. If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion". (17)

7. As regards the binding force of the Court's decision, Article 39 of the Draft Statute provides that :

"The decision of the Court has no binding force except between the Parties and in respect of that particular case".

In this regard, this Article is similar to Article 43 of the Draft Statute of the Arab Court, and Article 59 of the Statute of the International Court.

8. Articles 40 and 41 of the Draft Statute of the Islamic Court are similar to Article 44 of the Draft Statute of the Arab Court; and Articles 60 and 61 of the Statute of the International Court.

As regards the projected Islamic Court, Article 40 paragraph 1 of the Draft Statute provides that :

"a. The judgment is final and without appeal".

Also Article 41 paragraphs A, D and E provides that :

"a. An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the Party claiming revision always provided that such ignorance was not due to negligence.

d. The application for revision must be made at the latest within six months of the discovery of the new fact.

e. No application for revision may be made after the lapse of ten years from the date of the judgment".

### B. The Advisory Function Of The Court

1. The Court may, according to Article 43, give an advisory opinion on legal questions not relating to a dispute before it, at the request of a Member State, or of whatever body may be authorized in accordance with the Charter of the Organization Of The Islamic Conference.

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According to Article 47 paragraph 1 of the Draft Statute of the Arab Court, only a body or a specialized agency of the Arab League, is authorized to request an advisory opinion from the Court. This is similar to what is provided for in Article 65 paragraph 1 of the Statute of the International Court. Only, under the Draft Statute of the Islamic Court, a Member State of the Organization Of The Islamic Conference is entitled to request the Court for an advisory opinion.

2. In the exercise of its advisory function the Court shall, in accordance with Article 46, further be guided by the provisions of the Statute to the extent to which it recognizes them to be applicable".

This Article is similar to Article 49 of the Draft Statute of the Arab Court and Article 68 of the Statute of the International Court.

Footnotes Of Chapter I Of Part IV

(1) See In English:

Ezzeldin Foda, *The Projected Arab Court Of Justice*, passim.

See In Arabic:

*The Organization Of The Islamic Conference, Draft Statute Of The Islamic Court Of Justice; The League Of Arab States (The General Secretariat), Draft Statute Of The Arab Court Of Justice prepared by Dr. Mufeed Mahmud Shihab, September 1977; The League Of Arab States (The general Secretariat), Draft Statute of The Arab Court Of Justice; Abdul Khaleq An-Nawawi, Al-Alaqa Ad-Dawliya Wa An-Nuzum Al-Qada'iyah Fi Al-Shari'a Al-Islamiya*, passim.

(2) Three of the Ten States replied that there is no need of the establishment of the Court. Six States approved to the establishment of the Court but with optional jurisdiction only. One State accepted the obligatory jurisdiction.

Few States also approved on the advisory function of the Court in addition to its judicial function. The majority of States approved on the judicial function of the Court within its jurisdiction only.

As for the execution of the Court's judgments, some States ignored the reply to this question. The majority of States approved to entrust the League Council with this duty.

(3) Article 16 of the Draft Statute provides that :

"1. The Court shall frame Rules for carrying out its functions. In particular, it shall lay down Rules of Procedure".

2. The Court shall frame Rules for its Secretariat".

(4) Article 42 provides that :

"1. The judgment shall state the reasons on which it is based, and it shall also contain the names of judges who have taken part in the judgment.

2. If this judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

3. The judgment shall be signed by the President and by the Registrar. It shall be read in open Court, due notice having been given to the agents".

(5) Amendments to the Statute of the Arab Court are comprised in Article

50 of the Draft Statute; Articles 69 and 70 of the Statute of the International Court Of Justice provides for the procedures of its amendment.

'6) Article 4 paragraph 1 of the Draft Statute of the Arab Court provides for the election of the members of the Court. Such matter is comprised in Article 13 paragraphs 1 and 2 of the Statute of the International Court.

'7) The election of the President and Vice-President of the Court; and the appointment of the Registrar are comprised in Article 9 of the Draft Statute of the Arab Court and in Article 21 of the Statute of the International Court of Justice.

'8) The sitting in the Court in full, and the possibility to reduce the number of judges are comprised in Article 12 of the Draft Statute of the Arab Court; and in Article 25 of the Statute of the International Court.

'9) Article 31 paragraphs 1, 2 and 3 of the Statute of the International Court provides that :

"1. Judges of the nationality of each of the Parties shall retain their right to sit in the case before the Court.

2. If the Court includes upon the Bench a judge of the nationality of one of the Parties, any other Party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided for in Articles 4 and 5.

3. If the Court includes up the Bench no judge of the nationality of the Parties, each of these Parties may proceed to choose a judge as provided for in paragraph 2 of this Article".

'10) Article 16 of the Draft Statute of the Arab Court, and Article 30 of the Statute of the International Court provide for the "Rules of the Court" in each of them.

'11) The obligation of the judges of the Court to refrain from certain acts, is provided for in Articles 16 and 17 of the Statute of the International Court.

'12) Article 7 of the Draft Statute of the Arab Court provides for the privileges and immunities of the Court and its judges; while Article 19 of the Statute of the International Court provides for privileges and immunities of judges only.

'13) The jurisdiction of the Court is comprised in Articles 20 and 21 of the Draft Statute of the Arab Court; and in Article 36 of the Statute of the International Court.

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- '14) The recognition of the jurisdiction of the Court is comprised in Article 21 paragraphs 2 and 3 of the Draft Statute of the Arab Court; and in Article 36 paragraphs 2, 3, 4 and 5 of the Statute of the International Court.
- '15) The right of the Court to take provisional measures is provided for in Article 26 of the Draft Statute of the Arab Court; and in Article 41 of the Statute of the International Court.
- '16) The right to intervene in a case before the Court is provided for in Article 37 of the Draft Statute of the Arab Court; and in Articles 62 and 63 of the Statute of the International Court.
- '17) The decision of the Court and its reasons and separate opinions of judges are comprised in Article 41 of the Draft Statute of the Arab Court; and in Articles 55, 56 and 57 of the Statute of the International Court.

Chapter II: The Attitude Of The  
International Tribunals Relating To  
The Legality Of War<sup>(1)</sup>

General

In general, it may be said as Friedman did, that any war-like conduct beyond the standards generally accepted as proper by the community of nations can be a war crime. As noted by Telford Taylor, the international - from the outset - has been more successful in framing rules than establishing tribunals of general jurisdiction for their enforcement. The Nuremberg and Tokyo Courts were internationally constituted, but their jurisdiction was limited to nationals of the defeated powers. The endeavors to establish an International Criminal Court under the United Nations, were not successful. The consequence has been to leave enforcement of the war crimes in the hands of the individual countries, and this means that war crimes trials are bound to be either *proceedings* by national authorities against their own citizens, or against enemy individuals that have fallen into their hands.

After the First World War, only few trials of war crimes were held by the German Supreme Court in Leipzig, but ended with light sentences.

After the Second World War, and apart from the trials conducted by the International Military Tribunal, according to the London Agreement of 1945; twelve other trials of major war criminals were held, after the Nuremberg trial, in the United States zone of occupation.<sup>(2)</sup>

These Trials, called the Subsequent Proceedings, were held under international authority; and had as their legal basis Control Council Law No. 10, promulgated on December 20, 1945, by the Zone Commanders of the Four Powers occupying Germany.

In addition, thousands of Germans and Japanese were tried by various national courts, either military or civilian, for conventional war crimes of all types. National Courts in Belgium, Denmark, Greece, Holland, Poland and Russia tried Germans for atrocities committed in those countries during occupation.

Some years after the end of the Second World War, the Federal Republic of Germany began a program of prosecutions of individuals who had been guilty of criminal conduct under the guise of official Nazi activities. According to some writers, this was not a war crimes program because the most part of crimes, for which prosecutions were instituted, were committed by German nationals against other German nationals in German territory. Such offences are punished under the domestic laws of the country concerned. The misunderstanding arose because many of the offences prosecuted fell within the category of crimes known as "crimes against humanity" (Genocide).

During the hostilities in Korea, the United Nations Command had

identified and held for trial for violations of the law of war a large number of North Koreans who were prisoners of war. Because of the provisions of the armistice that ended hostilities, all the prisoners of war so identified and held were repatriated without trial or punishment.

The Eichmann trial raised a debate around the legality of the Israeli abduction of Eichmann,<sup>(3)</sup> or the legality of the trial itself.

On May 11, 1960, Eichmann was abducted from Buenos Aires, Argentina. After signing a letter purporting to consent to trial in Israel, he was removed to Israel by members of the Israel Secret Service. On May 23, 1960, the Prime Minister of Israel announced that Eichmann had been found and would be put on trial for his part in the Nazi program for the extermination of the Jews of Europe (the Nazi "Final Solution of the Jewish Problem"). The trial of Eichmann by the District Court of Jerusalem began on April 11, 1961. Eichmann was charged with offences under the Nazi and Nazi Collaborators (Punishment) Law 5710 of 1950.<sup>(4)</sup> Section 8 of this law excludes the defence of "superior orders" otherwise available under Section 19 (b) of the Criminal Code Ordinance of 1936, where an act is done "in obedience to the order of a competent authority which he (the accused) is bound by law to obey, unless the order is manifestly unlawful". The trial continued until August 14, 1961, the District Court of Jerusalem found Eichmann guilty, and he was sentenced to death. Eichmann appealed to the Supreme Court of Israel on the grounds of :

1. the lack of jurisdiction under international law;
2. the psychological incapacity of the Judges of the District Court of Jerusalem to give him a fair trial; and
3. the error of the District Court in finding that he played a part greater than that of a minor official in the acts alleged.

In 1962, the Supreme Court rejected Eichmann's appeal.

It is clear from the above that the different circumstances of this case were unusual. Eichmann was forcefully and illegally abducted from Argentina by agents of the Israeli Government; he was tried under statutes enacted by and before courts constituted by a government which had not been in existence when the offences charged had been committed; Jerusalem was geographically and culturally remote from the scene of the alleged crimes, and the court was a creature of a State organized and governed by the very people against whom the crimes had been committed; and the statutes punishing these offences were not of general application, but were directly exclusively to "Crimes against Jews".<sup>(5)</sup>

In the opinion of Mehrish, the Eichmann judgment was the reply to the fundamental ethical requirement which comes from the past and is addressed to the future. He believes that the contribution of the Eichmann trial is important in the following respects :

**Firstly:** The Eichmann's trial has brought to the forefront the ethical postulate of the punishment of Genocide.

**Secondly:** It revealed the obstacles and the problems which present day international reality raises in the establishing of an effective restraint of Genocide.

**Lastly:** It contributed to the development of the international punishment of Genocide.

Taylor is of the opinion that the circumstances which surrounded the trial were so questionable as to outweigh the positive aspects of the case, and recommended that Eichmann be sent to West Germany for trial.

We believe that the Eichmann trial is illegal, at least for the following reasons :

1. The Israeli Court had no jurisdiction according to the principle ex injuria jus non oritur.
2. The Court had also no jurisdiction, according to the American doctrine "fruit of the poisonous tree", according to which a thing acquired by illegal means must be restored to its original owner.
3. The Israeli law applied ex post facto law. (6)

Due to the Vietnam War, the United States was "tried" for war crimes in Vietnam by a tribunal constituted of the British philosopher Bertrand Russell. (7) Among these war crimes, the incident at the hamlet of My Lai, in which more than one hundred South Vietnamese men, women and children were killed by American soldiers during a "search and destroy" mission conducted in March 1968. As a result of this incident, a number of individuals have had charges preferred against them. Some of the accused were tried and acquitted, and one, an officer, was found guilty of premeditated murder and sentenced to life imprisonment at hard labour.

In 1972, Bangla Desh wanted to try Pakistani military personnel under its custody for war crimes alleged to have been perpetrated by Pakistani soldiers from March to December 1971 in East Pakistan. (Bangla Desh).

In the following we shall explain the attitude of the international tribunals established after the Second World War towards the resort to war (jus ad bellum); and the breach of the laws and customs of warfare (jus in bello). But, before that, we shall refer, in brief, to the evolution of the idea of punishment of war crimes before and after the First World War; and lastly we shall refer to the different attempts, under the United Nations, towards an International Criminal Court. Thus, we shall discuss the following points :

1. The evolution of punishment of war crimes before the First World War.

2. The evolution of punishment of war crimes after the First World War.
3. The attitude of the international tribunals, after the Second World War, towards resort to war and violation of the laws and customs of warfare.
4. The endeavors towards an International Criminal Court.

#### I. The Evolution Of Punishment Of War Crimes Before The First World War

According to Friedman, there were war crimes trials in medieval times by military court-martials and heraldic courts under the chivalric code. Mercenaries were frequently tried for engaging in military acts without formal war having been declared.

In the Nineteenth Century, military tribunals asserted the power to try their own soldiers and those of the enemy that fell in their hands for violating the law of war.

The American army also tried a number of its soldiers who committed atrocities during the Phillipines insurrection of 1899-1902. A private commission later investigated certain of the charges made against American troops and found that they were largely true.

#### II. The Evolution Of Punishment Of War Crimes After The First World War

After the First World War, the Allies appointed a "Commission On The Responsibility Of The Authors Of The War And On Enforcement Of Penalties" to investigate and recommend action on war crimes.

In its report, the Commission recommended war crimes trials before national courts (of the victors) and when appropriate, before a high tribunal that would be inter-Allied in composition. The report contemplated trials for violations of the laws or customs of war, and for crimes against humanity. Failure to take the necessary action to prevent or end violations of the laws or customs of war would itself constitute a war crime. (e)

Article 227 of the Versailles Treaty demanded that the German Kaiser, Wilhelm II, be tried before an international tribunal. Article 228 of the Treaty contained the German recognition of the right of the Allies to bring to trial before national or international military tribunals persons accused of having committed acts in violation of the laws or customs of war, and the undertaking of the German Government to hand over all persons accused of violating the laws of war to be tried by military tribunals. If crimes were committed against more than one national group, a mixed military court composed of representatives from each of the powers involved would hear the case. The Versailles Treaty contained no provision for trials for the offence of crimes against

humanity, and only indirectly, in the charges against the former Kaiser, was there provision for a trial for the offence of crimes against peace.

On February 3, 1920, the Allies submitted to the German Government the names of 896 alleged war criminals that they wanted tried in accordance with Article 228. The Germans reported to the Allies that their own courts could conduct the trials and the Supreme Court of the Reich at Leipzig would apply international law in trying the cases. On February 13, 1920, the Allies consented and gave the Germans a list of 45 names to be tried before the Leipzig Court (Reichsgericht). The Germans agreed to try 12 of the 45 persons on the Allies list. On the other hand, the Netherlands, where the Kaiser had taken refuge, refused the Allies request for extradition, he was never tried.

### III. The Attitude Of The International Tribunals, After The Second World War, Towards Resort To War And The Violation Of The Laws And Custom Of Warfare.

#### A. Preliminary Remarks

1. According to Quincy Wright, international law has permitted a state to exercise jurisdiction over acts committed by aliens abroad either on the ground that such acts endanger the prosecuting state's security, or on the ground that they endanger all states or their nationals. The jurisdiction of military commissions over offences against the law of war, of prize courts against contraband carriers and blockade runners, of admiralty courts against pirates, and of criminal courts against offences defined in general international conventions or customary international law are of this character.

2. As regards the over-all development of international penal law, the post-Second World War trials witnessed the first attempts to state and apply legal principles relating to the initiation of war itself - the "crime against peace" in cases of "aggressive war" - and numerous decisions dealing with the scope and degree of individual responsibility for violations of the laws of war.

3. In his assessment of the national practices of the Four Powers responsible for the Nuremberg Charter and trial, before the Nuremberg International Military Tribunal, Schwarzenberger noticed that excepting the approximation to the Nuremberg Principles in the Army Field Manual of the United States, the legal policies adopted in the other instruments and manuals can hardly be described as an implementation of the Nuremberg Principles.

4. However, the post-Second World War era had established important precedents for the development of international law concerning the definition of certain crimes, particularly that of aggressive war, and concerning the criminal liability of individuals acting in the name of a state, under official orders, or as members of criminal conspiracies or

organizations. According to some writers, the trials for war crimes are now so much a part of the law of war that they may be expected after any conflict that ends with one side victorious and the other defeated. No one since the Second World War has been sentenced for committing the crime against peace, notwithstanding the fact that many wars have occurred. Prosecution and punishment seem only possible in the case of unconditional surrender.

5. The International Law Commission prepared and formulated the Nuremberg Principles. The Commission limited itself to the substantive Principles as distinct from procedural matters. These Principles are :

- a. Personal responsibility for crimes under international law.
- b. The irrelevance, for purposes of international responsibility, of justifications under municipal law.
- c. International responsibility of Heads of State and government officials.
- d. The exclusion of orders as an absolute defence.
- e. Affirmation of the right to a fair trial.
- f. Specification of crimes under international law as war crimes, crimes against peace, including participation in a common plan or conspiracy for the attainment of these objects, and crimes against humanity.
- g. The establishment of complicity in any of the crimes enumerated under (f) as a separate crime under international law.

B. The International Military Tribunal For The Trial Of German Major War Criminals (The Nuremberg Tribunal)<sup>(9)</sup>

1. The intention of the Allies to mete out punishment to those guilty of war crimes began early in the Second World War as follows :

a. On January 13, 1942, the St. James Declaration was signed by the government in exile of nine European states that were then occupied by the Nazis. The Declaration promised to punish "through the channel of organized justice" those responsible for war crimes.

b. On October, 1943, representatives of seventeen of the Allied States, including all the Major Powers except the Soviet Union, met in London and established the "United Nations War Crimes Commission". Among the functions assigned to the commission were the formulation and implementation of the general measures necessary to ensure the detection, apprehension, trial and punishment of persons accused of war crimes.<sup>(10)</sup> The Commission was chiefly concerned with such crimes as

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mistreatment of prisoners of war, atrocities against civilians, inhuman treatment of concentration camp inmates, execution of hostages, and other killing of non-combatant peoples in the captured states.

c. On November 1, 1943, the Moscow Declaration was signed, in which the United States, Great Britain and the Soviet Union stated that at the time of granting of an armistice to Germany, those German officers and men and members of the Nazi Party responsible for atrocities, massacres, and execution in occupied areas would be sent back to the countries in which their acts had been committed for trial and punishment "according to the laws of these liberated countries and of the Free Governments which will be erected therein", and that those "major criminals" whose offences had no particular geographical location would be punished by a joint tribunal of the Allied governments.

d. On July 26, 1945, the Potsdam Declaration with respect to Japan was signed by the United States, Great Britain and China, and later adhered to by the Soviet Union. The Declaration stated that "stern justice shall be meted out to all war criminals including those who have visited cruelties upon our prisoners".

e. On August 8, 1945, at the conclusion of the war, representatives of the United States, the United Kingdom, the Soviet Union and the provisional government of France signed the London Agreement annexed to which a Charter for the "International Military Tribunal For The Trial Of German Major War Criminals"; the Tribunal would try War Criminals whose offences had no particular geographical location. Nineteen other governments later adhered to the London Agreement.

It is to be noted that, after the Second World War, the British and American governments switched their First World War positions on the question of war crimes. President Roosevelt was insistent on an international war crimes tribunal to try the German and Japanese leaders; while the British Cabinet opposed this idea. The Russians joined the Americans in pressing for a war crimes trial.

2. The changes worked out by the London Conference included :

- a. Crimes against peace - the planning and waging an aggressive war.
- b. War crimes - murder or ill-treatment of civilians or prisoners of war, wanton destruction of cities, killing of hostages.
- c. Crimes against humanity - murder, deportation, enslavement of ethnic or national groups.

In addition, provision was made for certain groups to be declared criminal organizations - members of which could be found guilty of war crimes simply for belonging to them.

3. The London Charter authorized a Committee consisting of the chief prosecutors of each of the Four Powers to prepare the indictment and

present the evidence on the basis of the law set forth in the Charter.

On October 18, 1945, the Tribunal held its first public meeting in Berlin and received the indictment from the Committee. The indictment was lodged against Twenty Four former Nazi leaders,<sup>'11'</sup> charging them with numerous crimes against peace, conventional war crimes, crimes against humanity and conspiracy; and charging a number of groups and organizations (the Secret State Police "Gestapo"; the Security Service of the Reich-leader SS "SP"; and the Schutzstaffeln of the Nazi Party "SS") with being criminal in nature. All subsequent sessions of the Tribunal, beginning on November 20, 1945, were held in the palace of Justice at Nuremberg.

4. As referred before, the constituting instrument of the Nuremberg Tribunal is a multilateral agreement, i.e., the London Agreement of 1945. Jescheck argues that the Tribunal conceived itself to be a duly constituted international court; while in reality it was an inter-Allied occupation court, since Germany had not agreed to the creation of such an international entity.

We are inclined to favour the opinion of Schwarzenberger who believes that the validity of the Nuremberg proceedings in relation to Germany, rests on Germany's debellatio and the Allied co-imperium there established.

5. The Nuremberg Tribunal consisted of four members, each with an alternate. The members and alternates were to be appointed by the Four Parties to the London Agreement. The presence of all four members of the Tribunal or the alternate for any absent members was necessary to constitute a quorum.

6. All proceedings of the Tribunal were to be conducted in English, French, Russian, and German as the language of the accused.

7. Under the London Charter of 1945, neither the Tribunal nor its members could be challenged by the Prosecution, the accused or their counsel. On this basis, the Tribunal overruled at the very start of its proceedings a motion, submitted by all the Defence Counsels, on the lack of its jurisdiction over the accused.

According to Schwarzenberger, the exercise of war crimes jurisdiction, at Nuremberg, was the exercise of territorial jurisdiction under an Allied co-imperium over post-War Germany.

Under the London Charter, it was provided that the official position of an accused as Head of State or official in a government department was not to be considered as freeing him from responsibility or as a circumstance mitigating punishment.

8. The Nuremberg trial continued until October 1, 1946, in its judgment, three of the individual defendants were acquitted;<sup>'12'</sup> twelve were sentenced to death by hanging;<sup>'13'</sup> three were sentenced to life imprisonment, and four were sentenced to imprisonment for terms ranging

from ten to twenty years.<sup>(14)</sup> The Tribunal also declared that "the SS" (Black Shirts) and its subsidiary "the SD" (the Gestapo), and the Leadership Corps of the Nazi Party were criminal. The other four organizations included in the indictment, i.e., "the SA" (Brown Shirts), the Reich Cabinet and the General Staff and High Command were acquitted without prejudice to the individual liability of members. The decision of the Tribunal was unanimous except the Soviet judge who dissented from the acquittals, from the refusal of the Tribunal to sentence the defendant Rudolf Hess to death, and from the decision of the Tribunal not to declare the Reich Cabinet and the General Staff and High Command of the German armed forces to be criminal organizations.

The Control Counsel for Germany considered applications for clemency for most of these convicted but did not grant them and carried out executions of those sentenced to death on October 16, 1946 with the exception of Martin Borman who had not been found and Herman Goering who had succeeded in committing suicide before the execution.

### C. The International Military Tribunal For The Far East (The Tokyo Tribunal)

1. On January 19, 1946, the United States Army General Douglas MacArthur, Supreme Commander for the Allied Powers in Japan issued a Charter for the International Military Tribunal For The Far East For Trial Of Major War Criminals in that area which closely followed the London Charter of 1945 except some differences such as the constitution of the Tribunal and the possibility of mitigation of punishment due to the official position held by the defendant. The Tokyo trial took place from May 3, 1946, to November 12, 1948.

2. Twenty Eight member of the Japanese government were indicted in Tokyo in fifty five count indictment.<sup>(15)</sup> Charging crimes against peace, in planning and waging war in Asia and the Pacific; crimes against humanity; and conventional war crimes such as atrocities against prisoners of war, civilian population.

3. According to Schwarzenberger, the legal basis of the Tokyo Tribunal is, similar to the Nuremberg Tribunal, a consensual basis. General MacArthur acted on authority delegated to him by four of the Allied Powers at war with Japan, the United States, the United Kingdom, the Soviet Union and China. In this case, the State apparatus survived, and Japan's unconditional surrender<sup>(16)</sup> provided a consensual basis for any action that might be considered to exceed the jurisdiction granted by international law to a belligerent occupant.

4. The Tokyo Tribunal consisted of eleven members nominated by their governments and appointed by General MacArthur, There were no alternates. The participant States in the Tribunal were, Australia, Canada, China, France, India, the Netherlands, New Zealand, the Phillipines, the Soviet Union, the United Kingdom and the United States. At the Tokyo Tribunal, the majority of all members - six out of eleven -

sufficed to constitute a quorum.

5. At the Tokyo Tribunal, the trial and related proceedings were to be conducted in English and in Japanese, the language of the accused.

6. The Charter of the Tokyo Tribunal did not contain any provision corresponding to that in the London Charter of 1945 which provides that neither the Tribunal nor its members could be challenged by the Prosecution, the accused or their counsel. However, similar attempts made by the Tokyo Defence proved unsuccessful.

But, under the Charter of the Tokyo Tribunal, the official position held by a defendant at the time of the alleged offence, as well as the fact that he had acted pursuant to the orders of his government or of a superior, could be considered in mitigation of punishment. It was decided not to arraign the Emperor of Japan, before the Tokyo Tribunal.

7. Of the twenty five defendants against whom sentences were judged, seven were sentenced to be executed by hanging; sixteen to life imprisonment and two to lesser terms of imprisonment.

The "Cold War", which emerged after the judgment had been delivered, brought about a fundamental change with respect to German and Japanese war criminals. Soon afterwards, the prisoners began to be discharged.

#### D. The Attitude Of The Nuremberg Tribunal Towards Resort To War And The Violation Of The Laws And Customs Of Warfare

##### First: The Attitude Of The Nuremberg Tribunal Towards Resort To War

1. Article 6 paragraph (a) of the London Charter of 1945, defines crimes against peace as "planning, preparation, initiation or waging of war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing...".

Thus crimes against peace consist of the following acts :

- a. Planning a war of aggression, or a war in breach of international treaties, agreements or assurances.
- b. Preparation of such a war.
- c. Initiation of such a war.
- d. Participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

In a separate paragraph at the end of Article 6, it is further provided that leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit war crimes in the strict sense, crimes against peace or crimes against humanity, are to be held responsible for all acts performed by any persons in the execution of any such plan. It is to be noted that neither the definition in the London Charter, nor the judgment of the Nuremberg Tribunal requires as elements of crimes against peace that war crimes or crimes against humanity be associated with them.

According to Brownlie, it is difficult to distinguish planning and preparation. He presumes initiation, strictly speaking, involves a policy decision which would separate it from preparation, planning, and waging a war of aggression. Acts of participation in the planning of specific wars were par excellence a basis of guilt. Also, the phrase "waging" is vague unless the preceding words "planning and preparation" provide a guide to the position the accused must hold to be responsible for "waging" a war of aggression.

The defendants were charged in count two with the crimes against peace as defined in the London Charter; and in count one with the common plan or conspiracy to commit any of the other crimes. According to Finch, the gravity of the charges against the defendants under counts one and two rests upon two premises :

- a. that aggressive war has been outlawed by the community of states, and
- b. that acts committed in planning or waging of such a war are now international crimes for which individuals may be criminally punished.

2. The London Charter specified that the official position of a defendant as Head of State or as a responsible government official would not be considered as a ground for either freeing him from responsibility or mitigating his punishment.

Also, the London Charter specified that the fact that a defendant had acted pursuant to the order of his government or a superior would not free him from responsibility but might be considered in mitigation of punishment.

3. The judgment of the Nuremberg Tribunal was that the planning and waging of an aggressive war was an international crime and could be punished by the Tribunal. Although at that time no definition for the international law concept of aggression existed; and although the judgment itself did not specify the meaning of wars of aggression by the German Reich against Poland, France, Great Britain, Denmark, Norway, Belgium, the Netherlands, Luxembourg, Yugoslavia, Greece, the Soviet Union and the United States.

The main arguments the Nuremberg judgment depended are :

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a. The acts prohibited by the Hague Convention IV of 1907 were crimes punishable as offences against the laws of war. The Nuremberg Tribunal considered those who wage aggressive war are doing that which is equally illegal, and of much greater importance than a breach of one of the rules of the Hague Convention.

b. The Nuremberg Tribunal condemned the war of aggression, it described the act of initiating a war of aggression as the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.

c. The Nuremberg Tribunal referred to statements, declaring aggressive war an international crime in a draft treaty - the proposed Treaty of Mutual Assistance of 1923 - and an unratified Treaty - the Geneva Protocol for the Pacific Settlement of International Disputes of 1924, as an evidence of the change in convictio juris. <sup>17</sup>

d. Article 227 of the Peace Treaty Of Versailles of 1919 which provides for the constitution of a special tribunal which was to be composed of representatives of five of the Allied and Associated Powers whose task it was to be to try the former German Kaiser for a supreme offence against international morality and the sanctity of treaties.

e. As regards the Pact Of Paris, in the opinion of the Nuremberg Tribunal, this was a necessary implication of the Pact, "The solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing".

Schwarzenberger criticized all these arguments. In the opinion of Finch, the Tribunal failed to take into consideration or give due weight to the attitudes of the prosecuting government towards the events cited by the Tribunal at the time they took place. For example, the prompt recognition of the annexation of Austria by Germany, and the failure of the League of Nations to act upon a protest filed by the Mexican Government demanding that the obligations of the League Covenant be enforced at that time.

The counter arguments of Schwarzenberger in response to the arguments of the Nuremberg Tribunal are, in the same order, as follows :

a. The Hague Convention IV of 1907 is concerned with jus in bello, and not with breaches of jus ad bellum. In the Convention, the legality of aggressive war is taken for granted, and so is the lack of any tests in international law regarding the legality of war between subjects of international law.

b. The description of the act of initiating a war of aggression as the supreme international crime does not explain how action, reprehensible for generations in terms of any community morality, was transformed in the post-1919 period into a criminal act.

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c. As regards the reference to the Treaty Of Mutual Assistance of 1923 and the Geneva Protocol of 1924, the answer of Schwarzenberger is that if a treaty is subject to ratification, it is not binding until this has happened.

Finch says that unratified protocols can not be cited to show the acceptance of their provisions.

d. As regards the reference of Article 227 of the Treaty Of Versailles of 1919, Schwarzenberger argues that the Nuremberg Tribunal invited an argument a contrario by its (the Tribunal) addition that in Article 228 of the Treaty of Versailles, Germany had expressly recognised the right that the Allied Powers to bring before military tribunals persons accused of having committed "acts in violation of the laws and customs of war", i.e., war crimes in the strict sense of the term.

e. As regards the Pact Of Paris, Schwarzenberger refers to five cases in which resort to war, under the Pact, remains lawful, these cases are :

- as an exercise of the right of self-defence;
- as an instrument of international policy;
- + in relations between Contracting Parties and Third States;
- against Parties in breach of the Pact;
- by way of reservations, such as the United States and British Monroe Doctrines.

Schwarzenberger argues that while it is self-understood that a breach of the Pact Of Paris is a breach of a treaty, and any breach of a treaty constitutes an international tort, the further legal consequence attached to acts of aggression, that is, that they are crimes akin to war crimes in the strict sense, does not necessarily follow from the illegality of a breach of treaty. Whether this is so or not depends on the intention of those who have established such a consensual quasi-order.

In addition to the above, Finch argues that the Pact itself makes no distinction between aggressive, defensive, or other kinds of war but renounces all wars. The Pact also does not mention sanctions to be enforced other than the statement in the Preamble that "any Signatory Power which shall hereafter seek to promote its national interests by resort to war should be deprived of benefits furnished by this Treaty". This provision is not imperative but conditional in the discretion of each Signatory.

4. Further criticism of the Nuremberg trial may be added. As noted by some writers, from the very outset the post-Second World War program for the punishment of war criminals was vigorously attacked and vigorously defended on both political and legal grounds. In the

following, we shall refer to these arguments :

a. The defence argued that to apply ex post facto laws in a criminal trial, and to judge one's own case would transgress fundamental principles of justice. The ex post facto principle means that a crime can only be regarded a violation of a law in existence at the time of its perpetration. According to Quincy Wright, it is a commonly asserted principle of international law that international agreements bind only the Parties and cannot adversely modify the legal position of non-parties. Wright noted that the Nuremberg Tribunal did not deny this principle but failed to find that any rights of third parties, either Germany or the individual defendant, had been violated by the terms of the London Charter establishing its jurisdiction, procedure, and law.

The same meaning was expressed by Finch who said, the Charter, being an international legislative act, is subject to the same objection against ex post facto legislation.

The ex post facto argument was directed primarily at crimes against peace and at some of the crimes against humanity.

b. The Nuremberg Tribunal failed to apply the maxim *nullum crimen sine lege*,<sup>(18)</sup> *nulla poena sine lege*.<sup>(19)</sup> According to Stone, this maxim embodies a value-judgment centuries old in Western civilization, and traceable to Greek and Roman days. In its full wording and strict sense, the maxim condemns not only explicit retroactive punishment, but also the concealed form of punishment for acts criminal by analogy only. Its purport, therefore, is to require precise advance description of the acts punishable and the range of punishments.

But, Stone decides that there is clearly no principle of international law embodying the maxim against retroactivity of criminal law. Even therefore, he continues, if the Nuremberg Charter indictment and judgment grossly violated the maxim that would still constitute no legal objection to them. This would still leave the question whether it was an ethical violation, especially as concerns the counts for aggressive war-making and for crimes against humanity.

5. Quincy Wright refers to the idea that the Four Powers acting in the interest of the United Nations had the right to legislate for the entire community of Nations, though given some support by Article 5 of the Moscow Declaration of November 1, 1943, and by Article 2 paragraph 6 of the Charter of the United Nations,<sup>(20)</sup> was not referred to by the Tribunal. The Preamble of the Agreement of August 8, 1945, however, declares that all the Four Powers in making the Agreement "act in the interests of all the United Nations" and invited any government of the United Nations to adhere, and nineteen of them did so. Since the Charter of the United Nations assumed that the Organization could declare Principles binding on non-Members, it may be that the United Nations in making the Agreement for the Nuremberg Tribunal intended to act for the Community of Nations as a whole, thus making universal international law.

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We believe that no state has the right to legislate for the entire Community of Nations, this makes this state as a guardian over a community of minor states which is contrary to the first Principle provided for in Article 2 paragraph 1 of the United Nations Charter, according to which "The Organization is based on the Principle of the sovereign equality of all its Members". Therefore, to "act in the interests of all the United Nations" as provided for in the Preamble of the London Agreement of 1945, must always be subject to the provisions of the Charter, especially those relating to the Purposes and Principles of the Organization.

We believe that the obligation not to initiate aggressive wars against other states apart from the obligation under the United Nations Charter to refrain from the threat or use of force in international relations - rests on a different basis.

Although it cannot be said that an unratified treaty such as the Geneva Protocol of 1924, establishes obligations on the States Signatories; but at the same time this situation cannot be interpreted as giving to every Signatory State, the right to initiate war against another Signatory State.

The question to be asked is whether or not a state has the right to initiate war against another state in the absence of a treaty or customary obligation, in the strict sense, to this effect? In other words, is the state entitled to threaten the existence of other states by initiating aggressive wars, in the absence of a legal obligation to the contrary?

What will be the destiny of the weak states, indeed the whole Family of Nations if we accept this hypothesis?

What will be the destiny of mankind if we give a state a carte blanche to initiate aggressive wars against other states in the absence of a formal obligation?

We believe that there is a duty on every state to respect the existence of other states, against its own right to exist. The content of this duty is the obligation to refrain from resort to aggressive war in violation of the right of existence of other states. In other words, there is an implied obligation in this regard on every state, as a result of the right of every state to exist. Also, we believe that the criminal nature of the illegal resort to war, and the right to punish this crime may be considered as an extension of the right of self-defence against this illegal resort to war.

However, according to Quincy Wright, the general opinion that aggressive war and mass massacre are crimes has been recognized in formal international law, and that law has been sanctioned by trial and punishment of many of the guilty.

Second: The Attitude Of The Nuremberg Tribunal Towards The Violation Of The Laws And Customs Of Warfare

1. Article 6 paragraph (b) of the London Charter of 1945, defined war crimes as including murder, ill-treatment, or deportation of civilians to forced labour or for any other purpose, wanton destruction of cities, towns or villages, and devastation not justified by military necessity.

2. It is well established that international law allows the enemy to punish war criminals, even after the cessation of hostilities, and the London Charter only repeated here what is generally accepted international law.

3. As noted by Schwarzenberger, whether the rules of warfare formed a part of international customary law or were codified in conventions, they were so elementary that the Nuremberg Tribunal was fully justified in treating them as having, by 1939, been "recognized by all civilized nations". Breaches of rules such as those laid down in the Hague Convention IV of 1907 and the Geneva Red Cross Conventions of 1929 constitute the traditional type of war crime. The Nuremberg Tribunal considered that violations of these provisions constituted crimes for which the guilty individuals were punishable is well settled to admit of argument.

4. The Defence before the Nuremberg Tribunal submitted that the territories which had become incorporated into Germany,<sup>(21)</sup> the law of the belligerent occupation ceased to apply there. The Nuremberg Tribunal left it open whether such a doctrine, even if established, could apply in favour of an aggressor. It held, however, that, under international customary law, unilateral annexation was ineffective so long as there was an army in the field attempting to restore the occupied territories to a dispossessed sovereign. This finding was, according to Schwarzenberger, in complete accordance with established practice and Doctrine.

5. The London Charter of 1945 states that, superior orders do not provide absolute immunity. If, in the interest of justice, this is required, this defence is admitted in mitigation of guilt. Schwarzenberger notices that the London Charter is more lenient than is required by the laws of war. However, the Nuremberg Tribunal decided that superior orders, even to a soldier, cannot be considered in mitigation where crimes as shocking and extensive have been committed consciously, ruthlessly and without military excuse or justification.

In the opinion of Finch, the maxim respondeat superior works in two directions. If a subordinate successfully pleads the rule the liability for the commission of the crime is not extinguished but is transferred to the superior who issued the order. The military and naval officers convicted at Nuremberg were found upon the evidence to be personally responsible for the signature or issuance of orders that violated the laws and customs of war. Had their contention that they acted upon the

orders of Hitler been accepted as a valid defence, the rule respondeat superior would have served as a reductio ad absurdum (the method of disproving an argument by showing that it leads to an absurd consequence) the purpose of frustrating the law. Upon such a theory it would have been impossible to punish anyone for the crimes of this war.

### E. The Attitude Of The Tokyo Tribunal Towards Resort To War And The Violations Of The Laws And Customs Of War

#### First: The Attitude Of The Tokyo Tribunal Towards Resort To War

1. According to Article 5, the Charter of the Tokyo Tribunal defined crimes against peace as, planning, preparation, initiation or waging of a declared war or uncleaned war of aggression, or a war in violation of international law, treaties, agreement or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing. The indictment contained a multiplicity of counts. <sup>(22)</sup>

Article 6 of the Charter on the "Responsibility Of The Accused" provides that :

"Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires".

2. Following the Nuremberg Tribunal, the Tokyo Tribunal held that initiation of a war of aggression constitutes the supreme international crime. Some judges of the Tribunal, in their dissented judgments contested this conclusion. In the opinion of one of them "Justice Rolling" there is no legal basis for the criminality of aggressive war in either the Pact Of Paris or in customary international law. <sup>(23)</sup>

In analysing the attitudes of the judges in this regard, Solis Horwitz observed : <sup>(24)</sup>

"Not all judges were content to rest their conclusions upon the legal effect of the Pact Of Paris. The President, while accepting the majority view of the Pact, assigned as a separate reason the emergence of a customary international law, and although his position is not too clearly enunciated, he also seemed to find a basis for his conclusion in natural law. In his view, international law might be supplemented by rules of justice and general principles of law. Rigid position was no longer in accordance with international law and the natural law of nations was equal in importance to the positive or voluntary".

3. In general, the Tokyo Tribunal applied criteria of responsibility

similar to those applied by the Nuremberg Tribunal. Thus, those who were not in a position to influence the making of policy were not convicted of crimes against the peace. Planning and preparing were equated with conspiracy, and initiating war was not considered separately from waging war. The nature of the conspiracy was also similar to that charged in the indictment at Nuremberg and responsibility for participation was assessed in much the same way.

#### Second: The Attitude Of The Tokyo Tribunal Towards The Violation Of The Laws And Customs Of Warfare

1. In the Charter of the Tokyo Tribunal, war crimes in the strict sense was described as "conventional war crimes", and defined as violation of the laws and customs of warfare including breaches which are declaratory of the laws of war.

2. Similar to the Nuremberg Tribunal, the Tokyo Tribunal pointed out that the war crimes *stricto sensu* indicted before it, did not concern controversial issues which might be doubtful in an age of increasingly inhuman and indiscriminate warfare. In the indictment, the emphasis was put on acts of wholesale murder and ill-treatment of prisoners of war, and plunder of occupied territories.

3. The Tokyo Tribunal recognized the criminal responsibility for conventional war crimes of the authorities who had known about them, could have prevented them, and had command responsibility. Many of the accused were sentenced on count of the indictment, which charged that they deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches of the laws of war. As noted by Röling, this criminal responsibility for failure to act was not later recognized in the Geneva Conventions of 1949. It is now inserted in the provisions of Protocol I additional to these Conventions which was adopted in 1977.

### IV. The Endeavors Towards An International Criminal Court Of Justice

#### A. Historical Evolution

The idea of punishment of individuals for acts which world opinion regards as peculiarly destructive of international peace and order has its deep roots in history.

1. As noted by Ferencz, since the times of Phoenicians and the Vikings, piracy has been condemned as a crime against the law of nations. Pirates, as "hostes humani generis",<sup>(25)</sup> could be tried by any country.

2. It is also noted that with the development of rules for humanitarianism in war, as reflected in Francis Lieber Code of 1863, the Brussels Declaration of 1874, the creation of the Red Cross in Geneva, and the Hague Conventions of 1899 and 1907, many states recognized that

violations of the customs of war should be treated as war crimes.

3. After the First World War, the committee Of Jurists which drafted the Statute of the Permanent Court of International Justice in 1920 recommended also the establishment of an International Criminal Court; but the Assembly of the League of Nations pronounced the plan premature. (26)

4. During the two World Wars period, some private drafts of an International Criminal Court were prepared :

- a. A draft was adopted by the Inter-Parliamentary Union at its Washington Conference in 1925.
- b. Another draft was adopted by the International Law Association adopted at its Vienna Conference in 1926.
- c. The International Association For Penal Law, at its meeting in Brussels in 1926, adopted a Resolution for setting up an international jurisdiction for the punishment of certain violations of the law of nations.

These drafts were later deposited officially with the Secretary-General of the League of Nations. The common element in these drafts was the proposal to convey criminal jurisdiction upon the Permanent Court of International Justice through the creation of a Criminal Chamber.

5. The Convention On The Prevention Of Terrorism of 1937, which was never ratified, provides for trial of the offenders.

6. In its Resolution 260 (III) of December 9, 1948, the United Nations General Assembly invited the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with Genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions. Article 6 of the Genocide Convention of 1948 provides for an International Penal Tribunal. (27)

7. The International Law Commission decided by a majority vote, at its Second Session at Geneva from June 5 to July 29, 1950, that the establishment of an international judicial organ for the trial of persons charged with Genocide and other crimes, is desirable and possible.

8. On December 12, 1950, the United Nations General Assembly decided to name a Committee of Representatives of some Member States (28) to meet in Geneva on August 1, 1951, for the purpose of preparing one or more preliminary Draft Conventions and Proposals Relating to the Establishment and the Statute of an International Criminal Court.

9. The said committee met at Geneva from 1 to 31 August, 1951, and prepared a Draft Statute for an International Criminal Court. (29)

10. In 1951 and 1953, the United Nations appointed a Special Committee on International Criminal Jurisdiction to draft statutes for an International Criminal Court, but work was postponed pending preparation of a Code Of Offences Against Peace And Security Of Mankind.

### B. The Purpose Of An International Criminal Court

The purpose of an International Criminal Court is not only the retribution for serious crimes against international public order, and international law; but also the deterrence of potential law-breakers, whether the Court is permanent or ad hoc. However, as noted by Quincy Wright, the tribunals proposed or actually established were in most cases ad hoc.

### C. Some Legal Problems Of The Establishment Of An International Criminal Court

The important legal problems which may arise out of the establishment of an International Criminal Court are as follows :

1. The Procedure for establishing the Court, under the United Nations system, may be by the amendment of the United Nations Charter, by a Resolution of the General Assembly or by an international convention adopted by the Contracting States. The Committee established by the International Law Commission, referred to above, preferred the first procedure, i.e., the amendment of the Charter.

Quincy Wright believes that such amendment is impracticable, he prefers the second procedure, i.e., a Resolution of the General Assembly. To explain his view he says that the fears that the Court in that case could only be a subsidiary organ of the Assembly and limited to the competence of the Assembly which probably lacked power to administer justice, are of doubtful validity. He submits a twofold argument, first, legislative bodies have often established courts though they themselves lack power to administer justice, such as the General Assembly which established the United Nations Administrative Tribunal; and second, it seems probable that the Assembly's broad powers to encourage the progressive development of international law and the peaceful adjustment of situations permits it to establish an International Criminal Court.

We believe that it is more suitable to amend the Statute of the International Court of Justice, and confer the Court with an international penal jurisdiction, although some writers, such as Mehrish, believe that the Court is not the proper forum to implement control, by law, of all methods of mass destruction and acts of inhumanity. In the opinion of Mehrish, the Statute of the International Court of Justice was not designed for the penal jurisdiction and its amendment would be difficult.

But, the International Court of Justice, the main judicial Organ of

the United Nations, is already in existence. Its permanent existence makes the administration of justice more available than in the case of creation of a new judicial body. The recent Court is the continuation of the Permanent Court of International Justice, thus, it has a long-established judicial traditions, and its body as a whole represents the main forms of civilization and the principal legal systems of the world according to Article 9 of its Statute. The so-called impracticability of the amendment of the Statute is in our opinion an illusion. The main point in the whole matter is the substance, and not essentially the procedure, if the idea of international Criminal justice is accepted by the Member States of the World Community or most of them, then the procedure will be of secondary importance.

The American writer Finch is of the opinion to delegate the International Court of Justice with such functions and jurisdiction of the Nuremberg Tribunal as might seem appropriate to this principal judicial Organ of the United Nations. Ferencz is also of the opinion to amend the Statute of the International Court of Justice to create an International Criminal Chamber.

2. The concept of state sovereignty is an obstacle against the jurisdiction of the Court. According to Quincy Wright, it is a rule of international law that no state can be sued without its consent; consequently a Court designed to have jurisdiction over states cannot function without consent of all states subject to its jurisdiction.

After the Nuremberg and Tokyo Trials, the individual responsibility of war criminals is not disputed; but at the same time and according to Quincy Wright, international law seems to permit any state to exercise criminal jurisdiction over individuals whom it has in its custody, whatever their nationality or wherever the crime was committed, if they are charged with an offence against international law. Also, according to Quincy Wright, there are theoretical and practical grounds for excluding the concept of criminal liability from artificial persons such as states and corporations.

3. The definition of the offences to be punished by the Court. In both Charters of the Nuremberg and Tokyo Tribunals, crimes against peace, war crimes and crimes against humanity were declared to be punishable under international law. However, the extent of these offences will be determined by the states who accept the jurisdiction of the court. It is necessary that the procedure to be followed for the establishment of a new judicial body or conferring a criminal jurisdiction to the International Court of Justice, must not include any reservations of whatever nature.

4. The law to be applied by the court raises the need to adopt a Code Of International Criminal Law. The International Law Commission has been drafting such Code, stated the Principles of the Nuremberg Trial, and produced a Draft Code Of Offences Against Peace And Security. The crime of Genocide has also been defined in a Convention which came into force on January 12, 1951.

Footnote Of Chapter II Of Part IV

(1) See In English:

The New Encyclopaedia Britannica, Volume XIX, *passim*; Leon Friedman (Editor), The Law Of War, *passim*; Dietrich Schindler and Jiri Toman, The Laws Of Armed Conflicts, *passim*; William W. Bishop, International Law, pp. 996-1018; Ian Brownlie, International Law And The Use Of Force By States, pp. 167-213; B.N. Mehrish, War Crimes And Genocide, pp. 1-104; Chris N. Okeke, Controversial Subjects Of Contemporary International Law, *passim*; L. Oppenheim, International Law, Volume II (Disputes, War And Neutrality), pp. 566-588; Georg Schwarzenberger, International Law As Applied By International Courts And Tribunals, Volume II (The Law Of Armed Conflict), pp. 467-523; Julius Stone, Legal Controls Of International Conflict, pp. 324-379; Hans Erhard, The Nuremberg Trial Against The Major War Criminals And International Law, pp. 223-245; Tom J. Farer, The Laws Of War - 25 After Nuremberg, pp. 5-54; Benjamin B. Ferencz, International Criminal Court, pp. 99-101; George A. Finch, The Nuremberg Trial And International Law, pp. 20-37; George A. Finch, Draft Statute For An International Criminal Court, pp. 89-98; Hans-Heinrich Jescheck, Nuremberg Trials, pp. 50-57; Hans-Heinrich Jescheck, War Crimes, pp. 294-298; Robert G. Neumann, Neutral States And The Extradition Of War Criminals, pp. 495-508; Vespasian V. Pella, Toward An International Criminal Court, pp. 37-68; Bert V.A. Rolling, Tokyo Trial, pp. 242-245; F.B. Schick, The Nuremberg Trial And The International Law Of The Future, pp. 770-794; Telford Taylor, The Nuremberg War Crimes Trials, pp. 243-370; Quincy Wright, The Laws Of Nuremberg Trial, pp. 38-72; Quincy Wright, Proposal For An International Criminal Court, pp. 373-395.

See In Arabic:

Muhammad Yusuf Ulwan, International Documents (Arabic Translation); *passim*; Yunus Al-Azzawi, Mushkilat Al-Masuliya Al-Jina'iyah Ash-Shakhsiya Fi Al-Qanun Ad-Dawli, *passim*; Abdul Wahhab Humad, Al-Ijram Ad-Dawli *passim*; Hameed As-Saadi, Muqqadima Fi Dirasat Al-Qanun Ad-Dawli Al-Jina'i, *passim*; Hasanain Ibrahim Saleh Ubaid, Al-Qadda'a Ad-Dawli Al-Jina'i, *passim*; Hasanain Ibrahim Saleh Ubaid, Al-Jarima Ad-Dawliya, *passim*; Abbas Mahmud Al-Aqqad, Hitler Fi Al-Mizan, *passim*; Muhammad Mohyee Eddin Awad, Dirasa Fi Al-Qanun Al-Jina'i Ad-Dawli, *passim*; Gamal Eddin Al-Uttaifi, Nahwa Muhakama Jina'iyah Li Mujrimin Al-Harb Al-Israeliyyin, pp. 181-219.

(2) These trials were also held in Nuremberg. The London Charter stated that national or "occupation" courts would still have the power to try war crimes in addition to the trials conducted by the International Military Tribunal.

(3) In a note of June 3, 1960, to the Government of Argentina, Israel attributed the capture to a "volunteer group" and expressed its regret if it had "violated Argentine law and interfered with matters within the sovereignty of Argentina".

'4) Section 1 (a) of the law provides that :

"A person has committed one of the following offences :

1. done, during the period of the Nazi regime, in an enemy country, an act constituting a crime against the Jewish people;
2. done, during the period of the Nazi regime, in an enemy country, an act constituting a crime against humanity;
3. done, during the period of the Second World War, in an enemy country, an act constituting a war crime;

is liable to the death penalty.

"crime against the Jewish people means any of the following acts, committed with intent to destroy the Jewish people in whole or in part :

- (I) Killing Jews;
- (II) Causing serious bodily or mental harm to Jews;
- (III) Placing Jews in living conditions calculated to bring about their physical destruction;
- (IV) Imposing measures intended to prevent births among Jews".

"Crime against humanity means any of the following acts : murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population, and persecution on national, racial religious or political grounds".

"War crime means any of the following acts : murder, ill-treatment or deportation to forced labour or for any other purpose, of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas; killing of hostages; plunder of public or private property; wanton destruction of cities, towns or villages; and devastation not justified by military necessity".

Section 3(a) provides that :

"A person who during the period of Nazi régime, in enemy country, was a member of or held any post or exercised any function in, any enemy organization, is liable to imprisonment for a term not exceeding seven years".

Section 3(b) defines "enemy organization" as

"a body of persons which, under Article 9 of the Charter of the

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International Military Tribunal annexed to the Four-Power Agreement of August 8, 1945, on the trial of the major war criminals, has been declared, by a judgment of that Tribunal, to be a criminal organization".

(5) In a seminar held in the State Information Department, Cairo (Egypt), in 1962, two Egyptian international lawyers, Professor Muhammad Hafez Ghanem and Professor Boutrus Ghali adopted the opinion of the illegality of Eichmann's trial taking into account the aforementioned circumstances.

(6) According to Black's Law Dictionary, ex post facto law is, "a law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed".

(7) Of course, this is a legal farce, and not an actual trial.

(8) The United States representatives on the Commission dissented from the portions of the report that referred to crimes against humanity, to the conclusion that Heads of States should be liable to criminal prosecution, and to the conclusion that special measures should be adopted to deal with those responsible for the war.

The Japanese representatives made a reservation to the conclusion which Heads of State would be held criminally responsible for political acts; and they did not concur in the provision making failure to act to prevent or end violations of the laws or customs of war an affirmative offence.

(9) According to Schwarzenberger, the term "Tribunal" denotes two features of the International Military Tribunals of Nuremberg and Tokyo, their ad hoc and judicial character.

(10) A Far Eastern sub-commission was subsequently established and performed similar functions in Chung-King, Szechwan Province, China.

(11) The Tribunal decided that Gustav Krupp von Bohlen und Halbach, who had been indicted, was too sick to be tried; that Martin Borman, who had not been found should be tried in absentia; that Rudolph Hess, who was alleged to be suffering from loss of memory, was not in such a condition as to prevent his trial; and that Julius Streicher was not in such a mental condition as to prevent his trial. One defendant, Robert Lay, committed suicide while in custody. Thus, only Twenty One defendants were present in person during the trial. It was reported that Hess has committed suicide in his prison in summer 1987.

(12) Those were Schacht, von Papen, and Fritzsche.

(13) Those were Goering, von Ribbentrop, Jodl, Borman, Kaltenbrunner, Rosenberg, Frank, Frick, Streicher, Sankel, Keitel and Seyss-Inquart.

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- (14) Those were Hess, Funk, Doenitz, Raeder, von Schirach, Speer and von Neurath.
- (15) Two of the defendants died during the course of the trial, and one was declared unfit to stand trial.
- (16) Japan, unconditionally, surrendered on September 2, 1945.
- (17) According to Schwarzenberger, "convictio juris sive necessitatis" means conviction of the existence of a legal duty or a necessity creating such a duty.
- (18) It means that "no crime without a pre-existing law making the act a crime".
- (19) It means that "no punishment without a pre-existing prohibitory rule".
- (20) Article 2 paragraph 6 of the United Nations Charter provides that :
- "The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles  
.....
6. The Organization shall ensure that States which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security".
- (21) During the Second World War, Germany incorporated by unilateral actions parts of the territories of Poland, Belgium, France and Yugoslavia and the whole of Danzig and Luxembourg.
- (22) The counts contained in the indictment were as follows :
- Count One charged conspiracy to have Japan, either alone or with other countries, wage wars of aggression against any country or countries which might oppose her purpose for securing the military, naval, political and economic domination of east Asia and of the Pacific and Indian Oceans and their adjoining countries.
  - counts Two to Four charged conspiracy to have Japan wage aggressive war against named countries.
  - Count Five charged all the accused with conspiring with Germany and Italy to have Japan, Germany and Italy mutually assist each other in aggressive warfare against any country which might oppose them for the purpose of having these three nations acquire complete domination of the entire world, each having special domination in its own sphere.
  - Counts Six to Seventeen charged all accused except Shiratori

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- with having planned and prepared aggressive war against named countries.
  - Counts Eighteen to Twenty Six charged all accused with initiating aggressive war against named countries.
  - Counts Twenty Seven to Thirty Six charged all accused with waging aggressive war against named countries.
  - Counts Twenty Seven to Thirty Six charged all accused with waging aggressive war against named countries.
- (23) But he found other basis in international law for trying the defendants such as bellum justum doctrine.
- (24) Referred to in, B.N. Mehrish, War Crimes And Genocide - The Trial of Pakistani War Criminals, Oriental Publishers, Delhi, 1972, pp. 64-65.
- (25) It means "the enemies of all mankind".
- (26) Article 227 of the League Pact, as referred before, required Germany to surrender the Kaiser for trial before a special Allied Tribunal.
- (27) Article 6 of the Genocide Convention of 1948 provides that :
- "Persons charged with Genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".
- (28) This committee was constituted of representatives of Australia, Brazil, China, Cuba, Denmark, Egypt, France, India, Iran, Israel, the Netherlands, Pakistan, Peru, Syria, the United Kingdom, the United States and Uruguay.
- (29) The main features of the proposed court are :
1. The Court is to be "permanent", but it is not anticipated that the nine judges constituted the Court will devote full time to it.
  2. The Draft Statute provides for the following organs :
    - a. A "Committing Authority", organized like the court, to certify whether the evidence justifies indictment of the person accused.
    - b. A "Prosecuting Attorney", to be chosen after such certificate

had been issued.

- c. A "Board Of Clemency", with powers of pardon, parole and suspension or reduction of sentences.
3. Judgment and sentences require a majority of the judges participating. In other decisions of the Court a tie is to be dissolved by the vote of the presiding judge.
4. Dissenting opinions are allowed.
5. Decisions may be revised on discovery of new and decisive facts.

THE EPILOGUE

The Epilogue : Conclusions

War As A Phenomenon

War is a phenomenon connected with the existence of man. It has existed since the creation of man, and is still exists to-day. War is not connected with a specific race or certain degree of civilization. It has existed among several human races in different historical circumstances regardless of the degree of civilization. But, it is to be noted that the continuous progress of man was accompanied by a continuous development of different types of weapons, delivery systems and military techniques. Due to this advance, weapons have become more destructive, and war more comprehensive to the extent that it affects the whole human environment. Moreover, the damages of modern weapons which have not been used yet, will lead, if used, to a real and maybe the last disaster in the history of man.

Failure Of The International System To Achieve World Peace

The human progress was also accompanied by a similar progress in systems of positive law (man-made law) whether at the domestic or international levels. At international level, since the beginning of this century, certain restrictions were imposed on the use of certain weapons (jus in bello); the recourse to war (jus ad bellum) has become subject to certain restrictions as well. Under the United Nations system, the threat or use of force in international relations is prohibited. The international criminal responsibility, after the Nuremberg and Tokyo Trials, has been acknowledged.

Despite this legal advance, war as a phenomenon continues to exist even after the inception of the United Nations, the Gulf War is a tangible example of this fact.

Thus, the aspirations of the Preamble of the United Nations Charter "to save succeeding generations from the scourge of war . . . ." and "to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in common interest" have vanished. The undertaking of the United Nations Members, according to Article 43 of the Charter, to make available to the Security Council, in accordance with a special agreement or agreements, armed forces, assistance and facilities; and the establishment of a Military Staff Committee according to Article 47 of the Charter, has never put into practice.

However, the system of the United Nations cannot be blamed. The United Nations is at its best "a centre for harmonizing the actions of nations in the attainment of (its) common ends" according to Article 1 paragraph 4 of the Charter. The United Nations is, by no means, a supra-national Organization. Therefore, it is necessary to seek another alternative more efficient than the contemporary international system.

THE EPILOGUEThe Islamic Trend

Among the theories of the Islamic trend, one theory calls for the establishment of an Islamic World State applying Al-Shari'a Al-Islamiya. The establishment of a world state is not a modern idea or, as it seems to a great many people a sort of Utopia, unrealistic and imaginative. Within the Islamic thought, the establishment of an Islamic World State does not mean necessarily that all its inhabitants become Muslims, because freedom of belief is an important Islamic principle. According to the Holy Qur'an, "there is no compulsion in religion".

According to the Islamic conception, the essential principle in Al-Islam is tawhid (unity). This unity is sought first of all in the unification of the inward and outward life of the human being. Al-Islam contains within itself all religions which preceded it. Al-Islam is the only religion which requires its followers to believe in all the great religions of the world, revealed by ALLAH, which preceded it. According to the Islamic perspective, ALLAH did not send different truths through His many prophets, but different expressions and forms of the same fundamental truth of tawhid. In fact, Al-Islam is the generic term applicable to every revealed religion provided that religion was not altered by men. In this sense, all revealed religions may be considered Al-Islam. Al-Islam is a universal message which reaffirms what all the prophets have asserted over the ages, the Oneness of ALLAH.

According to this theory of the Islamic trend, the World State should apply Al-Shari'a Al-Islamiya. As said before, Al-Islam is the religion of tawhid, and all its functions, whether social or spiritual, are aimed towards the realization of this tawhid. Being the last of ALLAH's revealed religions, it symbolically reinstates man in his primordial state of wholeness in which the temporal and spiritual authorities are united into one body. In order to return man to his original state of wholeness, Al-Islam unites the spiritual and temporal powers, historically, in the person of the Holy Prophet Muhammad (peace be upon him), and eternally in Al-Shari'a Al-Islamiya to which the Muslim Community must adhere in order to attain salvation.

Al-Islam formulated one basic law for the whole world, and the Holy Prophet Muhammad (peace be upon him), was made a Prophet unto the entire humanity. His Prophethood was not meant for any particular nation or country or period; his message is for all peoples and for all ages. The earlier codes were abrogated by the advent of Muhammad (peace be upon him) who gave the world a complete code of life. Neither is any prophet to appear in the future, nor is any religious code going to be revealed till the Doomsday.

ALLAH has revealed Al-Shari'a to man so that he may reform himself and his society. The existence of Al-Shari'a in the world is due to the compassion of ALLAH for His creatures. He has enacted an all-encompassing law for them to follow and thereby to gain felicity in both this world and the Hereafter. Al-Shari'a is thus ideal for the human society and the individual, it provides meaning to all human activities and an integral human life. To live according to Al-Shari'a is to live according

to the Divine Will, according to a norm which ALLAH has willed for man. It is essential to note that Al-Islam is the only course free of the consequences of human desires, human weakness and human self-interest legislating for the benefit of the individual, his family and community. The Ordainer of the Islamic system of life is ALLAH Almighty, the LORD of all mankind. He does not legislate for His Own sake, or of one category of mankind in preference to another, or one race in preference to another.

### The Duty To Establish The Islamic World State

According to this Islamic theory, the establishment of an Islamic World State applying Al-Shari'a Al-Islamiya is a legal duty laid on Muslims because the Muslim, unless he follows his Divine Law, his assumption to be a Muslim is considered null and void. This opinion substantiates its attitude by the following :

First : The Holy Qur'an decides that ALLAH is the Owner of Sovereignty, therefore it is intuitive that ALLAH has the sole right to rule; and the Holy Qur'an decides that the execution of commands of others than ALLAH shall be considered invalid. ALLAH says, "Say : O ALLAH ! Owner of the Sovereignty ! Thou givest sovereignty unto whom Thou wilt, and Thou withdrawest sovereignty from whom Thou wilt. Thou Exaltest whom Thou wilt, and Thou abasest whom Thou wilt. In Thy hand is the good. Lo ! Thou art Able to do all things".<sup>(1)</sup>

Second : Pursuant to the foregoing, the human being is deprived of the right to legislate, because he is a creature, slave and governed. His own concern lies in following Al-Shari'a which is ordained by the Owner of Sovereignty. Ofcourse, Al-Islam gave man the right of interpretation and arriving at conclusions provided he endeavours to do so within the limits prescribed by ALLAH. Al-Islam also gives the believers the right to organise their affairs unless these affairs are subject to an express rule of ALLAH or of the Holy Prophet Muhammad (peace be upon him). This organization must observe the spirit of Al-Shari'a. In the Holy Qur'an, ALLAH says, "And speak not that which your own tongues qualify [as clean or unclean]";<sup>(2)</sup> and He also says, "[Saying] : Follow that which is sent down unto you from your LORD, and follow not protecting friends beside Him".<sup>(3)</sup>

Third : The sound and just government in ALLAH's earth, is that government established and governed by the law revealed by ALLAH to His prophets, this government is called Al-Khilafa. In the Holy Qur'an, ALLAH says, "We sent no messenger save that he should be obeyed by ALLAH's leave".<sup>(4)</sup>

Fourth : All different endeavours made by any government to establish a régime on the basis of legislation other than the legislation revealed by ALLAH to His Prophet Muhammad (peace be upon him) will be considered illegal. In the Holy Qur'an ALLAH says, "And obey not him whose heart We have made heedless of Our remembrance, who follweth his own lust and

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whose case hath been abandoned". (5)

Thus, according to this opinion, the endeavour to constitute a government which establishes the religion of Al-Islam and applies Al-Shari'a is not only a legal matter, but also an objective to be sought by all Muslims everywhere. Therefore, the Muslims who are under a legal obligation to enforce Al-Shari'a and to recognize no authority other than their own, are required to call to Al-Islam by persuasion. If Al-Islam is willingly accepted, this means the transformation of dar al-harb into dar Al-Islam. If Al-Islam is not willingly accepted by non-Muslims, or if they fail to pay jizya; then it is incumbent on the Islamic State to declare "Jihad Fi Sabeel ALLAH" (Strife In The Way Of ALLAH). Thus, Jihad is the method to achieve the objective of the Islamic State, i.e., the application of Al-Shari'a Al-Islamiya.

The Islamic State And The Pax Islamica

The eventual objective of the Islamic State is to extend the scope of application of Al-Shari'a Al-Islamiya to the whole world. In this way, peace (Pax Islamica) can be achieved through the application of the Islamic justice represented in Al-Shari'a. Thus, Pax Islamica is the eventual objective of Al-Islam. Consequently, Jihad is not an objective per se, it is only an instrument to achieve Pax Islamica.

Since Jihad is the instrument of Al-Islam is to secure world peace, this means, from a legal point of view, the continuity of the state of war between the Islamic State (dar Al-Islam) and non-Islamic States (dar al-harb); but this does not mean the continuity of actual hostilities between the two parties.

Thus, we have two conceptions of world peace. The Islamic conception of the establishment of an Islamic World State applying Al-Shari'a Al-Islamiya as the absolute justice of ALLAH, and the instrument to establish this World State is Jihad. The other conception is that of contemporary international law. This conception is based on the existence of a world society divided into several states enjoying legal (not actual) equality of status, and each of them enjoying sovereignty. The method to secure world peace in this conception is the prohibition of the threat or use of force in international relations. Consequently the substance and method are different in these two conceptions of world peace, each of them belonging to a different legal system.

However, we believe that it is possible to eliminate or at least minimize the acuteness of the difference between the two conceptions of world peace as follows :

1. Jihad is the lege ferenda of Al-Shari'a, the ideal to be sought by the Muslims. Jihad is subject to the different circumstances of the Islamic State and the consideration of the Khalifa. In this regard, it

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be recalled, that Jihad has different meanings, the fighting of the unbelievers is only one of them.

2. The Islamic State will not initiate Jihad against non-Islamic states, if it is possible to arrive at Pax Islamica by other means. Jihad, as said before, is not an objective per se.

3. The existence of the state of war, in the legal sense, between the Islamic State and the non-Islamic states does not mean necessarily the existence of actual fighting between the two parties. Besides, it does not mean the impossibility of peace relations between Muslims and non-Muslims. As said before, it is possible to conclude a temporary peace treaty between the Islamic State and non-Islamic states, the duration of which not to exceed ten years, but it is possible to renew it for further period or periods, according to the consideration of the Khalifa.

4. Even in the case of actual fighting between the Islamic State and non-Islamic states, it is possible to resort to different methods, especially the judicial, to settle disputes between the two parties. The Islamic State, at the outset of the Eighth Century, resorted to the judicial methods to settle disputes between Muslims and non-Muslims, in the case of the people of Samarqand who complained to the Khalifa Umar Ibn Abd Al-Aziz that the Muslims had conquered their country treacherously. A Muslim judge decided to revert to the status quo ante bellum or the state of affairs as it existed before war.

From all the above, it is not impossible to achieve non-hostile relations based on mutual understanding and good faith.

Footnotes Of The Epilogue

- <sup>(1)</sup> Sura III : 26; see also Suras III : 154; VII : 54; VII : 111; XVIII : 26; XL : 12.
- <sup>(2)</sup> Sura XVI : 116.
- <sup>(3)</sup> Sura VII : 3; see also Suras IV : 60; V : 44.
- <sup>(4)</sup> Sura IV : 64; see also Aya 105 of the same Sura; and Sura V : 49, 50.
- <sup>(5)</sup> Sura VIII : 28; see also Sura IV : 65, 115.

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