

# REFUGEE LAW IN ISLAM

*\*Dr. Muhammad Munir*

## ***Abstract***

This paper focuses on the role of Islamic tradition of *hijrah* and *aman* and the law and practice relating to forced migration and refugee protection in the Muslim world. It concludes that there is contradiction between the Islamic tradition of *hijrah* and *aman* and the law and practice relating to forced migration and the protection of refugees in the Muslim world. The rich heritage of Islam in the field of migration law and refugee protection has been abandoned throughout the Muslim world today. In the past, Islam made a great contribution to the humanization of internal and international relations in the Muslim world. It could play this role even today and could prompt a much-needed humanization of some branches of international law. Given the current importance of this issue, Muslim states must urgently need to revive the Islamic concepts of *hijrah*, *aman*, and asylum in order to contribute to the improvement of modern refugee law and to make it more protective for refugees and forced migrants in general.

## ***Introduction***

Regulation of relations between the Muslim state and non-Muslim states is one of the core areas of *Siyar* or the Islamic law of nations. The main sources of *Siyar*, i.e., the Qur'an and the *Sunna* have elaborate rules on the law of war, peace, the formation of treaties, and trade. *Siyar* also deals extensively with rebels and apostates and has a set of binding rules for guiding the Islamic state; how to deal with the non-Muslim citizens of a Muslim state; how to deal with foreigners, especially businessmen from the non-Muslim nations who visited the Muslim entity for business or individuals or communities who requested asylum or protection from Muslim individuals or State; immunity of envoys; territorial jurisdiction and a host of other issues. Classical Muslim jurists have given elaborate rules in their treatises about the relations of Muslim and non-Muslim states and communities. In classical Islamic law the area of Islamic law that regulates relations between the Muslim State with non-Muslim States is known as *siyar* (Islamic international law). Refugee law in Islam is not an area in which the Muslim state and the non-Muslim states have much to do. It is rather the citizens of the Muslim state and the citizens of non-Muslim states that are involved in this area of Islamic law. The most comprehensive classical treatise dealing with all the issues

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\* *Chairman, Department of Law, International Islamic University, Islamabad, Pakistan*

of Islamic International law (*siyar*) is *Kitab al-Siyar al-Kabir* by Muhammad b. al-Hasan al-Shaybani (d.189/804).<sup>1</sup>

There are 57 Muslim member states in the Organization of Islamic Conference (OIC)<sup>\*</sup> located in Africa, Asia, and Europe.<sup>2</sup> Muslim communities are found all over the world as minorities. Currently, Muslims are more than 1.66 billion.<sup>3</sup> The world is experiencing armed conflicts and persecution of persons at an alarming rate. This is more so in the Muslim world which seems at present to be a world of armed conflicts and forced displacements, or in other words, “*dar al-hrub wa al-muhajirin*” a (world of wars and refugees). Uprooted persons are refugees, asylum-seekers, and internally displaced persons (IDPs). Refugees and asylum-seekers move involuntarily from one country to another seeking protection from persecution or fleeing insecurity and violence whereas displaced persons move involuntarily within the national borders. Refugees are governed by refugee law in particular.

According to the United Nations High Commission for Refugees (UNHCR) as of June 2009 there were 42 million uprooted people. They included 16 million refugees outside their countries and 26 million other displaced internally.<sup>4</sup> The 57 Member states of the OIC were host to 9.4 million refugees and persons of concern to the UNHCR. This figure does not include the more than four million Palestinian refugees in Lebanon, Syria, Jordan, the West Bank and Gaza, who fall within the mandate of the United Nations Relief and Works Agency (UNRWA), the Kashmiri refugees who migrated to Pakistan and the internally displaced persons (IDPs) within Pakistan.

Islamic law relating to asylum-seeking and forced displacement or what is known in Islamic history as *hijrah* law are quite different from modern refugee law. Islamic law gives more protection to asylum-seekers and refugees (*mustaminun*), but it is rarely referred to or invoked today. If the Islamic laws of asylum and *hijrah* are taken into consideration, it could significantly solve the refugee problems all over the world and especially within the Muslim states. This would also help in understanding Islam differently. Unfortunately, today Muslim states do not apply Islamic law to deal with refugees and asylum-seekers. This

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<sup>\*</sup> Renamed as Organisation of Islamic Cooperation on June 28, 2011.

work analyses Islamic law regarding refugees and asylum-seeking.<sup>5</sup> It also refers to international refugee law on forced migration.

### ***The Concept of Hijrah and Asylum-seeking in Islam***

The term *hijrah* (immigration) and its derivatives are mentioned 27 times in the Qur'an to mean "to abandon." The term *hijrah* comes from the Arabic word *hajara* which means to abandon, to migrate, to break ties with someone. In *Shari'ah* it means "migration in the path of Allah"<sup>6</sup> and is very often used to designate the fact of fleeing from a state governed by the infidels in order to join the Muslim community. Asylum is very important in Islamic history and law and is linked with the obligation to search for security and protection. Immigration marked the Muslim community since its beginning. The Prophet (peace be upon him) sent some of his followers to Abyssinia to protect them from the persecutions of the infidels of Makka.<sup>7</sup> However, the concept of *hijrah* is primarily discussed with reference to the Prophet's (peace be upon him) persecution and flight in September 622 from Makka to Yathrib, the city of his mother, later named Madina. That marks the beginning of the Islamic era which does not start with the Prophet's (peace be upon him) birth or the date when he received revelation, but with his *hijrah* to Madina. Those who migrated to Madina were called *muhajirin* (the immigrants) and those who gave them good support were called *ansar* (the supporter). Some Muslims, however, remained in Makka and practised their faith in secret. Others stayed back because they were sick, infirm or unable to migrate for other reasons. Referring to this episode, the following verses urged the Muslims in Makka to join the Community:

Verily, as for those whom the angels take (in death) while they are wronging themselves (as they stayed among the disbelievers even though emigration was obligatory for them), they (angels) say (to them): "We were weak and oppressed on the earth." They (angels) say: "Was not the earth of Allah spacious enough for you to emigrate therein?" Such men will find their abode in Hell – What an evil destination! Except the weak ones among men, women and children who cannot devise a plan, nor are they able to direct their way. These are they whom Allah is likely to forgive them, and Allah is Ever Oft-Pardoning, Oft-Forgiving.<sup>8</sup>

Historically this migration was stopped after Makka was conquered in the 8<sup>th</sup> year after the Prophet's *hijrah* to Madina. According to Imam Abu Zahra, migration is not necessary for Muslims except when there is a genuine excuse.<sup>9</sup> He argues that "all those Muslims who live in a country where a Muslim is humiliated or where he cannot practise his religion or where he is not treated according to Islamic laws then, it is obligatory for him to migrate to a land where he can strengthen the Muslims."<sup>10</sup> He asserts that a Muslim is accountable if he preferred humiliation and luxurious life outside the land of Muslims and that it is better for him to live poor with dignity under Islam rather than to live a prosperous life with humiliation.<sup>11</sup> This is, however, the ambivalent characteristic of the pre-modern age. The reason is that today one-third of all Muslims live in non-Muslim countries.<sup>12</sup> In his treatment of the issue of Muslim minorities in non-Muslim states, Khaled Abu El Fadl argues that "The rulings and decisions of pre-modern Muslim jurists will not necessarily resolve the dilemmas facing Muslim minorities. They do, however, provide examples of ethical choices made in response to particular historical challenges."<sup>13</sup>

### ***The Concept of Aman***

Muslim jurists discuss the term "*Al-Aman*" while explaining verse 9:6 of the Holy Qur'an. According to Kamal ibn al-Humam, *al-Aman* is a type of *muwada'a*."<sup>14</sup> "Because by virtue of it hostilities are suspended like *muwada'a*" says the author of '*Enayat 'ala al-Hidaya*."<sup>15</sup> *Aman* is "safe conduct" or "assurance of protection" and may be given by a Muslim citizen or by an *Imam* or his deputy to a private citizen coming from a non-Muslim State/territory. According to *fuqha*, *aman* – whether given by a free man or slave, man or women<sup>16</sup> – usually covers a small group of people which may be upto 10 people, or a small caravan, or a fort. So, if a Muslim says, to his adversary, "Lay down your weapon first and fear not," he has given him an assurance of protection, he must not be killed and must be returned to his place of security. Refuge or *aman* is of two types: general, which is for all people; and particular, which is for one or a few persons. The first one is also called *hudnah* (peace treaty). The majority of jurists agree that to give general *aman* is only the right of the *Imam* or his delegate. However, they disagree in relation to the particular *aman*. So, the majority agrees with particular *aman* but a few jurists, such as Ibn Majishun and Ibn Habib of the Maliki school, claim

that such an *aman* would be valid only if ratified by the *Imam* or his deputy. Other Maliki jurists disagree with them. According to Ibn Juzi, another leading Maliki jurist, “The *Imam* and Muslims must abide by the *aman* granted by a Muslim to a non-Muslim, or a group of them [non-Muslims], as long as there is no harm in it. It does not matter whether it is beneficial or not.”<sup>17</sup> Refuge (asylum) is covered by the Qura’nic verse. God says:

And if anyone of the *Mushrikun* (polytheists, idolaters, pagans, disbelievers in the Oneness of Allah) seeks your protection, then grant him protection so that he may hear the Word of Allah (the Qur’an), and then escort him to where he can be secure, that is because they are men who know not.<sup>18</sup>

Imam Awza’i was once asked about this verse: “And where is his place of security; do you think if he says my place of security is in Constantinople, we should take him there?” Awza’i answered, “If he reaches one of their fortresses or one of their strongholds, this would be his place of security.” He was then asked, “What if the polytheists are met by a Muslim patrol in their country before they reach their place of security?” he answered, “The patrol should not stand in their way.” He was then asked about the enemy who enters Muslim land under a safe conduct which is valid until his return and, on the way back to his country, climbs a mountain within his own territory but is forced by strong winds to return to Muslim land. If the enemy then says, “I am here under safe conduct, what should be done?” Awza’i answered, “I am of the opinion that he is entitled to remain protected by the safe conduct.”<sup>19</sup>

The Prophet is reported to have said, “*Aman* given by Muslims is allowed. So, if anyone violated the protection granted by a Muslim, he [the violator] is cursed by God, angels and all the people.”<sup>20</sup> Ibn Hajr in his commentary on this *hadith* says, “It is prohibited (*haram*) for a Muslim to interfere in the *aman* given by his fellow Muslim.”<sup>21</sup> The Prophet approved the protection given by Umm Hanni to two men on the day Makka was conquered. These men were the relatives of her husband but violated the terms of general amnesty granted to the Makkans.<sup>22</sup>

*Aman* may be given by Muslims to non-Muslims and by non-Muslims to Muslims. At the time of ‘Umar, the Second Caliph, during a war, a Persian soldier took shelter at the top of a tree. A Muslim soldier

told him in Persian cum Arabic “*matrasi*” (don’t be afraid). His adversary thought that he was given a pledge and protection and came down. Sadly, he was killed by the Muslim soldier. The matter was reported to the Caliph, who warned the commander, saying “[A]s God is my witness, if I hear anyone has done this I shall cut his neck.”<sup>23</sup>

According to Shaybani if the Muslim commander informed, or wrote, or sent a messenger to the enemy besieged in a fort telling them not to accept the *aman* if given to [them] by a Muslim individual because his *aman* is invalid, then, if they accepted the *aman* granted to them by an individual Muslim, they will become prisoners of war (POWs). He argues that it does not mean that *aman* cannot be granted by an individual Muslim but it is because they [the besieged non-Muslims] did not follow the notice given to them by the Muslim commander.<sup>24</sup> Shaybani further argues “If a person entered a Muslim state with *aman* and killed a Muslim intentionally or without intention, or committed robbery, or spied on the Muslims and sent it [the information] to the polytheists, or raped a Muslim or a non-Muslim women [non-Muslim citizen of the Muslim state], or committed theft, then none of these amount to breach of his *aman*.”<sup>25</sup> Similarly, he will be given the punishment of *hadd* if he [person given *aman*] accuses an innocent Muslim of illegal sex.”<sup>26</sup> Finally, no death penalty will be awarded to a Muslim or a non-Muslim [citizen of a Muslim state] for killing a *musta’min* [person given pledge] but the killer has to pay blood money to his relatives and will be imprisoned.<sup>27</sup> Shaybani has dealt with this topic in minute details in 25 chapters, i.e. chapters 42-50 of volume I and chapters 51-67 of volume II of his *Kitab al-siyar al-kabir* (magnum opus study of *siyar*).<sup>28</sup> Going into the details is beyond the scope of this work.

There have been many occasions when *aman* was granted by the Muslims to an individual who brought victory for them. Ibn Nuhas<sup>29</sup> mentions in his book that in the year 20 the battle of Tastur happened. Abu Musa al Ash’ari had laid siege to the fortified city for over a year. The Persian general al-Hurmuzan was fortified in there. A Persian man came to Abu Musa and told him if he promised him and his family protection he would guide him to a secret entrance into the city. Abu Musa gave him protection and sent with him Majza’ah bin Thawr. They entered through a hidden underground spring of water, swimming through it until they surfaced in the city. They entered the city and

Majza'ah travelled through it until he learned its map. The Persian man also pointed out to him the Persian general Hurmuzan. Majza'ah returned and was sent along with 35 men to conquer the city. The thirty five men swam through the spring and entered into the city at night. They fought courageously and the Persians surrendered. Al Hurmuzan became a Muslim and settled in Madina.

No *aman* (asylum) or covenant of security can be given to apostates (*murtadoon*) since they are regarded as rebels who defy the authority of Islamic state. Muslim jurists have discussed elaborate rules for what a *musta'min* (the secured) can bring, take back, buy or sell or for how long can he stay.

The jurists have formulated certain limitations concerning the property which a *harbi* may acquire. Abu Yusuf writes:

The *Imam* should forbid an enemy person who comes to us, whether with *aman*, or as messenger of a foreign prince, to take with him slaves, weapons and other commodities which could strengthen the enemy to attack Muslims. Concerning clothes, wares and similar things, their exportation is not forbidden.<sup>30</sup>

Ibn Rushd (d. 1126), based the *aman* on the fact that the Prophet had purchased goats from a non-Muslim shepherd who came to him. He gave a list of commodities that the *harbi* could not buy weapons, iron, elegant clothes, copper and horses.<sup>31</sup>

The Islamic concept of *hijrah* is broader than the definition of refugees given in article 1 of the Geneva Convention relating to the Status of Refugees of 28 July 1951. This article describes refugees only as persons forced to flee persecution for specific and limited reasons and who otherwise would not have found it necessary to migrate. This Convention, which now represents the universal charter of refugee law, defines a refugee as any person who,

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

Islam considers asylum as a right of the asylum-seekers, a duty for those who are requested for it, and a general and comprehensive form of protection. It is religious, territorial and to some extent diplomatic. Modern international as well as national laws do not give individuals the right to grant or be granted asylum. Both set of modern laws reserve this right for the State, which is free to grant or refuse asylum to those who seek it. Nationals cannot choose their foreign hosts and expect them to grant protection, even if they are from the same origin but with different nationalities. Today, only the State has the right to decide to whom refugee status will be granted. In Islamic law and traditions, any person (even a non-Muslim) fleeing and seeking protection has the right to enter an Islamic community and ask for protection (*aman*). This person can seek asylum from State leaders or from common individuals (men or women, Muslims, or non-Muslims) living within the Islamic community or *dar al-Islam* (the world where Islamic law applies). These individuals have the right to protect asylum-seekers equally.

In a sense, seeking asylum is a duty. Muslims are not obliged to live in places where there is injustice and persecution and they are urged by Islam to leave these places and seek protection elsewhere.

Moreover, Muslims cannot close their doors to persons seeking protection. It is their duty to grant asylum. It is the duty of the political leaders of the Islamic communities, but is also the duty of any person living in *dar al-Islam*, regardless of race, sex, social, or political status.

All forced migrants who are in need of protection should be granted *aman* (refuge or asylum) if they seek it. They can seek asylum from within *dar al-Islam*. They may also come from *dar al-harb* (the world where Muslim law does not apply). Muslims are encouraged to protect non-Muslim asylum-seekers as a way of introducing them to Islam. Non-Muslim refugees, however, are not obliged to adopt Islam and, as is clear in verse 6 of *Surah Al-Tawbah* of the Qur'an, are granted the status of "protected persons" in *dar al-Islam*. Asylum-seekers are not even obliged to prove that they have been persecuted before fleeing and should be granted asylum only upon their own request. However, asylum-seekers should not have committed crimes before seeking asylum, as all crimes should be punished, and there is no distinction in Islam between political and non-political crimes.



Once asylum is granted to any person, protection or *aman* should be general, and refugees should benefit from all the rights guaranteed to nationals. These include the right to work, the right to education, the right to free movement, the right to do business, and the right to family reunification. Moreover, *aman* is not limited in time and the departure of the “protected” or *mustaman* from *dar al-Islam* or the place of his/her residence will depend on the individual’s decision. This is the equivalent of voluntary repatriation in modern international law. However, it may be presumed that the rules on *aman* as found in classical texts of Islamic law are only about the situations in which individuals or small groups seek protection among the Muslim community. The situations in which there is mass influx of population because of war between non-Muslim neighbouring state and another state (not the Muslim state) or in case of a civil war within the non-Muslim state itself, Muslim jurists may have to devise new rules or modify the old ones to cover these situations.

Islam reaffirms old Arab traditions and customs relating to granting asylum and refugee status (*al-himaya* in Arabic) and adopts principles relating to the granting of religious asylum or sanctuary. Some places kept their pre-Islamic sacred characteristics (such as the Ka‘abah in Makka), and others became sacred, such as the cities of Makka and Madina, the house of the Prophet and the houses of his successors and of religious leaders. Many verses of the Qur’an recommend respecting a sanctuary.<sup>32</sup>

Islam reaffirms the tradition of granting territorial asylum by any individual or by Muslim leaders to asylum-seekers looking for protection. This kind of asylum was called *istijara* or *talab al-jiwar* (asking for assistance from a neighbourhood or assistance from a community). Islam also reaffirms the pre-Islamic Arab tradition of protecting non-Muslim messengers and merchants (and their collaborators), who come for a short period to *dar al-Islam*. In pre-Islamic times, this kind of protection was called the protection of the mission, a kind of diplomatic protection in modern terms. In Islamic theory, in short, asylum is a human right both for asylum-seekers and for their hosts. By comparison, the protection guaranteed to refugees and forced migrants under modern law is more limited and restrictive.

***Limitations of Modern International Refugee Law***

Modern international refugee law and law on forced migration comprise the international instruments relating to human rights, migrant workers, and refugees. These documents include the Universal Declaration of Human Rights of 10 December 1945, the two international Covenants of Civil and Political Rights and on Economic, Social and Cultural Rights of 16 December 1966, the 1951 Refugee Convention and the United Nations Convention on the Protection of the Rights of All Migrants and the Members of their Families of 18 December 1990. These instruments are universal, regional, and national. As stated earlier, modern refugee law does not consider asylum-granting as a right of individuals; it is the right of the state only. In addition it does not concern all forced migrants but only a few of them who are well defined in Article 1 of the 1951 Convention. Many persons are consequently excluded from its protection and therefore from asylum.

Modern refugee law does not protect IDPs as there are no binding international instruments relating to them in particular. The Guiding Principles on Internal Displacement, prepared in 1998 by Special Representative of the Secretary General for IDPs, Francis Deng, apply to such persons, but these principles are not binding on states.

Modern international refugee law excludes some categories of persons who are not covered by the 1951 Refugee Convention from international protection. For example, Article 1D declares that the 1951 Convention will not apply to persons “who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.” This is the case of over 3 million Palestinian refugees who receive assistance (and not protection) from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). On the other hand some refugees need special attention, such as women and children. Women, especially Muslim women have special needs as refugees, but these are rarely taken into account by modern refugee law or state practice.

***Modern Law of Asylum is Mainly a Right of the State***

Refugees lack protection from their countries of origin and are in need of international protection. They are usually fleeing persecution and insecurity and in need to find a safe place to live. That is why they seek asylum. Modern refugee law has no provision to the effect that to be

granted asylum is a right of asylum-seekers. The 1951 Convention does not mention asylum in its provisions. Only the Universal Declaration of Human Rights deals with asylum. Article 4 of UDHR states that, “everyone has the right to seek and enjoy in other countries asylum from persecution.” The term ‘enjoy’ does not mean in any case the automatic grant of asylum. The same article adds, however, that “this right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.” Unfortunately no exact definition of a ‘political crime’ exists in international law. It is left to states to decide on the definition of political and non-political crimes and in state practice, a crime is rarely considered to be political.

The crux of the matter is that granting or refusing asylum is the exclusive right of the state. The only obligation for the state is that an asylum-seeker will not be forcibly returned to any country where his/her life could be in danger, according to article 33 of the 1951 Refugee Convention. Consequently, all forced migrants in the world are not really protected by modern refugee law. Only some of them are granted protection. In Muslim states, which since the 1990s, have become the centre of all types of migration, refugees in many cases are neither protected by the limited modern refugee law nor by Islamic law relating to *hijrah* and *aman*. It is very disappointing that in the 21<sup>st</sup> century era of globalization there are often gaps in the legal frameworks of both Muslim and non-Muslim states when it comes to the subject of asylum and the protection of refugees and IDPs.

***Legal Status of Afghan Refugees in Pakistan: A Legal Vacuum***

Afghanistan produced massive refugee movements during the 1980s. The problem began in April 1978, when a group of urban intellectuals led by Nur Mohammad Taraki seized power and attempted to establish a communist state. They introduced wide-ranging social reforms which were resented by the deeply Islamic traditional rural population they were intended to benefit. The communist regime was backed by the then Soviet Union and it responded very harshly to Afghans who opposed the regime. Writing in 1987 Dupree and Dupree described this state of affairs in this way:

Religious, political, and intellectual elites were jailed or executed; ground attacks and aerial bombings destroyed

villages and killed countless numbers of the rural population. It is estimated that between 50,000 and 100,000 people disappeared or were eliminated ... from April 1978 to December 1979.<sup>33</sup>

Afghans began fleeing to neighbouring Pakistan and Iran and by August 1978, some 3,000 has sought refuge in Pakistan; by early 1979, this figure has risen to over 20,000.<sup>34</sup> In late December 1979, the then Soviet Union, fearing the loss of an important ally to its southern border, invaded Afghanistan, triggering a massive exodus of refugees. Within weeks, over 600,000 Afghans fled to Pakistan and Iran. Refugees continued to flee Afghanistan throughout the rest of the decade. By December 1990, UNHRC estimated that there were over 6.3 million Afghan refugees in neighbouring countries, including 3.3 million in Pakistan and three million in Iran. By this time, Afghans had come to constitute the largest refugee population in the world.

In Pakistan, the refugees were mostly ethnic Pashtuns, and they sought refuge mainly in Pashtun-dominated parts of Pakistan. More than 300 'refugee villages' were established by UNHCR, and the majority of the refugees lived in these villages. However, they were free to move anywhere in the country and find any type of job. By contrast, in Iran, most of the Afghan refugees were ethnic Tajiks, Uzbeks and Hazaras, with only a small number of Pashtuns. Most refugees in Iran spread out to towns and cities throughout the country.<sup>35</sup>

The government of Pakistan has been tolerating refugees and asylum-seekers on its soil, though Pakistan has not ratified the refugee Convention and does not have domestic legislation on asylum. Since the beginning, refugees, whether Afghans or others, are living in a legal vacuum. On the one hand Pakistan has accepted the millions of Afghans who flooded in since 1979 as *prima facie* refugees – granted refugee status as a group without individual assessments; on the other hand they do not actually have any legal standing in Pakistan. According to the strict interpretation of Pakistan's domestic law refugees are viewed as illegal immigrants.<sup>36</sup> In the absence of ratification of the 1951 refugee Convention by the government of Pakistan, relevant domestic laws are not in accordance with international refugee law. The entry, stay and movement of all foreigners is regulated by the Foreigners Act No. XXXI of 1946. This law has been amended many times and the most recent

amendment of the Foreigners (Amendment) Ordinance No. XXV of 10 July 2000, which contains, inter alia, draconian provisions in respect of foreigners contravening its rules (imprisonment up to three years/fine) or knowingly entering into Pakistan illegally (imprisonment up to ten years and fine). However, Pakistan generally tolerates the pressures of recognized refugees pending the identification of a durable solution for them outside the country of asylum.<sup>37</sup> The economic and geopolitical considerations of the region are the main reasons of Pakistan's reluctance in ratifying the refugee Convention. It is high time for Pakistan to reconsider its stance on ratifying the 1951 refugee Convention to fill in the gaps in legal regime about the status of refugees on its soil.

### **Conclusion**

The law and practice relating to forced migration and to refugees in the Muslim world are today far less protective of refugees than as conceived according to the Islamic *hijrah* and *aman* traditions. The rich heritage of Islam in the field of migration law and refugee protection is in some respects of great significance to the international community. This tradition has been abandoned, for no plausible reason, throughout the Muslim world today. In the past, Islam made a great contribution to the humanization of internal and international relations in the Muslim world. It could play this role even today and could prompt a much-needed humanization of some branches of international law. Given the current importance of this issue, Muslim states must urgently need to revive the Islamic concepts of *hijrah* and *aman* in order to contribute to the improvement of modern refugee law, and to make it more protective for refugees and forced migrants in general. Unfortunately, the Muslim world today is divided into many nation-states; is governed in the majority of cases by secular law; and very often, there is no or little respect for human rights.

Islam must be evaluated with reference to its tenets and humanitarian principles and not with reference to the conduct of some extremist groups or extremist ideology. Today the gap between theory and practice is very deep in the Muslim world, which leads to misconceptions and misunderstanding about Muslims, Islamic law and Islam in general. As a result, this issue is worthy of further research and assessment in both the Islamic and international contexts.

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### References

1. The book is only available with a commentary by Imam Sarkhasi. See, Muhammad b. al-Hasan al-Shaybani, *Kitab al-Siyar al-Kabir*, commentary Muhammad b. Ahmad Abu Bakr al-Sarkhasi, ed., Abdullah M. Hasan al-Shafi'i (Beirut: Dar al-Kotob al-'Ilmiya 1997) five volumes. Shaybani has a total of 199 pages dedicated to this topic in his book. These are 1:175-257 and 2:3-120. For a brief introduction to Islamic International Law, its origin, definitions, its sources, and its place in international law today, see, Muhammad Munir, "International Islamic Law: *Siyar*", *Research Papers*, VII: 1-2 (2007), 923-240.
2. See, <[http://www.oic-un.org/about\\_oic.asp](http://www.oic-un.org/about_oic.asp)> (last accessed 21/03/2010).
3. See, <<http://www.islamicpopulation.com/>> (last accessed 21/03/2010).
4. See, Antonio Guterres, "World Refugee Day: 42 million uprooted people waiting to go home", available at <<http://www.unhcr.org/4a3b98706.html>> (accessed 21/03/2010). The data was collected at the end of 2008 and is a bit old. The total number of uprooted people must be slightly more than this.
5. Some literature regarding Islam and the refugee problem is available. For example, *Refugee Survey Quarterly* published by the University of Oxford has dedicated a special issue to this topic which has many articles as well as relevant documents. Of special importance in that issue are: Khadija Elmadmad, "Asylum in Islam and in Modern Refugee Law", *Refugee Survey Quarterly*, 27 (2008), 51-63; Muhammad Nur Manuty, "The Protection of Refugees in Islam: Pluralism and Inclusivity", *Refugee Survey Quarterly*, 27 (2008), 24-29; Volker Turk, "Reflections on Asylum and Islam", *Refugee Survey Quarterly*, 27 (2008), 7-14. Another notable work is Sami Aldeeb Abu-Sahlieh, "The Islamic Conception of Migration", *International Migration Review*, 30:1 (spring, 1996), 37-57. Ahmed Abou-El-Wafa, *The Right to Asylum between Islamic Shari'ah and International Refugee Law: A Comparative Study*, trans. Shahat Mansour (Riyadh: UNHCR, 2009). The last publication is a comprehensive treatment of refugee law and Islamic law.

6. See, Anwer Mahmoud Zanaty, *Glossary of Islamic Terms: Arabic – English* (Cairo: ‘Ain al-Shamsh University, 2006), 94.
7. It is mentioned that the Prophet (peace be upon him) sent a message with the Muslims inviting the king to embrace Islam which he accepted. See, Muhammad Hamidullah, 1985: 100.
8. 4.97-99.
9. Muhammad Abu Zahra, *Zahra al-Tafaseer* (Cairo: Dar al-Fikr al-Arabi, n.d), 4:1821.
10. Ibid., 4:1818. However, according to Muhammad Asad, this *hijrah* (exodus or migration) has a moral connotation – namely, man’s “exodus” from “evil towards God – and does not necessarily imply the leaving of one’s homeland in the physical sense.” Asad, *The Message*, 124, n. 124.
11. Abu Zahrah, *Zahra al-Tafaseer*, 4:1819.
12. See, M. Ali Kettani, *Muslim Minorities in the World Today* (London: Mansell Publishing, 1986), 18.
13. Khaled Abu El Fadl, “Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries”, *Islamic Law and Society*, 1:2 (1994), 141-187 at 187. The issue needs systematic studies in terms of the realities of our times rather than in the realities of the past.
14. Kamal ibn al-Humam, *Fath al-Qadeer Sharh al-Hidayah*, (Beirut: Dar al-Fikr, n. d.) 2<sup>nd</sup> edn., 5: 462.
15. Akmal ud Din M. b Mahmood al-Babarti, *Al-‘Enaya ‘ala al-Hidaya with Fath al-Qadeer*, (Beirut: Bolaq, 1316), 5:462.
16. According to Maliki, Shafi’i and Hanbali schools of thought *aman* can be granted by a slave man as well. See, Muhammad ibn Ahmad ibn Juzi, *Qawaneen al-Ahkam al-Shar’iyya wa mas’il al-furu’ al-fiqhiyyah*, (Beirut: Dar al-Elm lil malayeen, 1974), 173; Abu Ishaq Ibrahim Al-Shirazi, *al-Muhazzab*, (Cairo: Matba’ al-Halabi, n. d.), 2:235; ‘Abdullah b Ahmad Ibn Qudamah, *Al-Mughni*, (Beirut: Dar al-kitab al’Aarabi, 1972), 10:432. The Hanafites stipulate that a free man or woman (among the individuals) can grant *aman* but not a slave. See, Burhanuddin al-Marghinani, *Al-Hidaya*, (Cairo: Dar al-Ehia al-Tourath al-Arabi, n.d.), 2:382.
17. Ibn Juzi, *Qawaneen*, 173.

18. Qur'an 9:6. The quotations from the Qur'an in this work are taken from Muhammad Taqi-ud-Din al-Hilali & Muhammad Mushsin Khan, *Translation of the Meaning of the Noble Qur'an in the English Language* (Madinah: King Fahd Complex, n.d.) unless otherwise indicated. Muhammad Asad comments on the literal use of the words "seeks to become thy neighbour" and says, that it is a metaphorical expression denoting a demand for protection, based on the ancient Arabian custom (strongly affirmed by Islam) of honouring and protecting a neighbour to the best of one's ability. Muhammad Asad, *The Message of the Qur'an*, (Wiltshire: Dar Al-Andalus, 1984, repr. 1997), 256.
19. As quoted in Ahmed Zaki Yamani, "Humanitarian International Law in Islam: A General Outlook", *Michigan Yearbook of International Legal Studies*, 7 (1985), 204.
20. Muhammad ibn Isma'el al-Bukhari, *Sahih Bukhari*, ed., Muhammad Daib, (Beirut: Dar ibn Kathir, 1987), 3<sup>rd</sup> edn., 3:1160, hadith no. 3008; Ahmad ibn Ali ibn Hajr, *Fath al-Bari Sharh Sahih al-Bukhari*, ed., Ahmad ibn Hajr al-Asqalani, (Beirut: Dar Ma'rifah, 1379), 4: 81; Muslim ibn al-Hajjaj al-Nisapuri, *Sahih Muslim*, ed., M. Fu'ad Abdul Baqi, (Beirut: Dar Ehya al-Torath al-Arabi, n. d.), 2: 999, hadith no. 1371.
21. Ibn Hajr, *Fath*, 4:86.
22. Bukhari, *Sahih*, hadith no. 357; Ibn Hajr, *Fath*, 1:469; Muslim, *Sahih*, 1: 498, hadith no. 336. These two men were fighting Khaled ibn al-Waleed, thereby losing the terms of general amnesty but were granted *aman* by Ummi Hanni.
23. Badruddin 'Ayni, *Umdah Al-Qari Sharh Saheeh al-Bukhari*, (Cairo: Idarat Al-Taba at Al-Muneeriya, n.d.), XV: 94. According to Shaybani, 'Umar wrote to his commander in Iraq that if anyone gave pledge to any enemy soldier by using, *inter alia*, the Persian words '*matrasi*', then these words are binding. See, Shaybani, *Siyar al-Kabir*, 1:199.
24. Shaybani, *ibid.*
25. Shaybani, *ibid.*, 1:214.
26. *Ibid.*, 215.
27. *Ibid.*, 216.



28. See, Shabani, *Kitab al-Siyar al-Kabir*, along with commentary by Sarkhasi, 1:175-257 and 2:3-120.
29. Abi Zakariya al-Dimishqi ibn Nuhas, *Mashari' al-Ahswaq ila Masar'i al-'Ushaaq*, ed., Idrees M. Ali & M. Khalid Istanbuli, (Beirut: Dar al-Bash'ir, 1983), 981.
30. Abu Yusuf, *Kitab al-Karaj*, ed. M. Ibrahim al-Banna (Peshawar: Maktaba Faruqiyya, n.d.), 232.
31. Abul Walid Muhammad Ibn Rushd, *Bidaya al-Mujtahid* (Cairo: Mustafa al-Badi Press, n.d.), 2:613-614.
32. See, the Qur'an 14:35-36 and 2:125.
33. L. Dupree and N. Hatch Dupree, "Afghan Refugees in Pakistan", 1987 *World Refugee Survey*, US Committee for Refugee, Washington DC, 1988, 17.
34. When the refugees first arrived in Pakistan, UNHCR did not have an office in the country. The refugees turned to the United Nations Development Programme (UNDP) for help. UNDP in turn asked UNHCR for funds to provide temporary assistance to the needy cases. The Government of Pakistan formally requested the UNHCR for assistance. The UNHCR sent in two missions to Pakistan and raised US \$15 million to assist the refugees. Finally, in October 1979 the organization opened an office in Islamabad. See, UN Information Centre for Pakistan, News Release 22/79, 25 Oct. 1979, 100/PAK/AFG, F/HCR 11.2.
35. Many of them were conscripted to fight in the war against Iraq which began in September 1980. See, UNHCR, *The State of the World's Refugees: Fifty Years of Humanitarian Action* (Oxford: Oxford University Press, 2000), 116.
36. The UNHCR worked with a 55-member Parliamentary Commission for Human Rights, drawn from all parties in the then National Assembly and the Senate, to draft amendments to the current law that was proposed for debate in Parliament. The idea behind the proposed amendments was to incorporate a definition of refugee in Pakistani law and to exempt asylum seekers from the punitive provisions of the Foreigners Act 1946. See, UNHCR, "Boosting refugee protection in Pakistan" (Islamabad: UNHCR, 2006), 2 available at <[www.file:///H:\UNHCR\Pakistan.htm](http://www.file:///H:\UNHCR\Pakistan.htm)> (last accessed 20/5/2006). However, efforts of the UNHCR never materialized.

The UNHCR has tried the dissemination of Refugee law through the signing of MOUs with educational institutions. On 4th July 2004, it signed an agreement with International Islamic University, Islamabad for the dissemination of Refugee law. The present author played the main role on behalf of International Islamic University. Similarly, in the same year, the UNHCR signed an agreement with Allama Iqbal Open University for the launch of a three-month distance-learning certificate course on refugee law. Moreover, the UNHCR has been expanding its network of Assistance and Legal Aid Centers (ALACs) throughout Pakistan.

37. The official policy of Pakistan towards Afghan refugees at the height of their influx may be summarized in two principles, namely, 'humanity' and 'Islamic brotherhood'. Although, the government of Pakistan used the words 'Islamic brotherhood', these were never elaborated and the concepts of *hijrah* or *aman* were never officially mentioned. Another reason for welcoming the Afghans was to train them to fight against the Communists and Soviet forces in Afghanistan. See, Barnett R. Rubin, *The Fragmentation of Afghanistan: State Formation and Collapse in the International System* (Karachi: Oxford University Press, 2<sup>nd</sup> edn. 2003) and George Crile, *Charlie Wilson's War: The Extraordinary Story of the Largest Covert Operation in History* (New York: Groove Press. 2003), *Charlie Wilson's War* is also digitized.