

The Concept of State under International Law and Islamic Law Perspective

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Abstract

The concept of statehood in international law is basically enumerated in the 1933 Montevideo Convention which provides four characteristics of a State in its Article 1: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States. The Montevideo criteria are so far the most frequently quoted to be the elements of statehood. However, it remains uncertain that these criteria conclusively determine the existence of statehood since there were numerous disagreement among modern writers. Although the concept of state has been well-established by the 1933 Convention, in Islam, such concept has been practiced a long time ago by the Prophet Muhammad (PBUH) and His Companions. Therefore, this article attempts to make comparison between the concept of state in the Montevideo Convention 1933 and Islamic law with reference to the Quranic verses, the practice of the Prophet (PBUH) and His Companions, and the writings of modern Islamic scholars. This article is a qualitative legal study where the data compiled through library research method. The article finds that, while both concepts are in harmonious to each other criteria-wise, but the discussion of each criterion indicates glaring differences between them since both concepts are based on different sources of law, values and underlying principles.

Keywords: International law; Islamic law; state, statehood; ummah; nations.

I. INTRODUCTION

Generally speaking, a subject of international law is a body or entity that is capable of possessing and exercising rights and duties under international law¹; in other words one who is subject of international law so as itself to enjoy rights, duties or powers established in international law, and generally the capacity to act on the international plane.² The term 'international personality' is defined as 'the capacity to be bearer of rights and duties under international law'.³ Such

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¹Dixon, M. 2007. *Textbook on International Law*. 6th Edition. New York: Oxford University Press. p. 111.

²Jennings, R & A. Watts (eds.). 1996. *Oppenheim's International Law*. 9th Edition. Vol. 1, Peace. New York: Longman. p. 119.

³Schwarzenberger, G. 1976. *A Manual of International Law*. 6th Edition. London: Professional Books. p. 53.

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definitions only tend to obscure: any person or aggregate of persons has the capacity to be given rights and duties by States, and in era of human rights, investment protection and international criminal law, everyone is at some level 'the bearer of rights and duties' under international law.⁴

Having an international personality empowers subjects of the international law the following capacities:⁵

1. the ability to make claims before international (and national) tribunals in order to vindicate rights given by international law;
2. to be subject to some or all of the obligations imposed by international law;
3. to have the power to make valid international agreements (treaties) binding in international law.
4. to enjoy some or all of the immunities from the jurisdiction of the national courts of other State.

There is almost universal agreement that States are international persons. But it is still unresolved issue whether and according to what criteria entities other than States – individuals, international and non-governmental organizations, private corporations – can become international persons and what consequences such international legal status entails.⁶ As clarified by the International Court of Justice (ICJ) in *Reparation for Injuries case*⁷, international personality is a concept giving rise to controversy. 'The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon needs of the community'.⁸

Therefore, an international person does not necessarily possess all the international rights, duties and powers normally possessed by States.⁹ Some States only possess some of the rights and duties and they are therefore only in those limited respects subjects of international law and thus only possess limited international personality.¹⁰

II. DEFINITION OF STATE

Since international law is primarily concerned with the rights and duties of States, it is necessary to have a clear idea of what a State is, for the purpose of international law.¹¹ In the sense of international law, State has not always been a clearly defined concept. At present, by 2005, there were almost 200 – to be precise, 192 States *i.e.* members of the UN, but membership of the UN is not a *prima facie* evidence that such members are States. It remains true also that non-membership of the UN does not necessarily deny that they are States. Despite the emergence of so many new States nowadays which has brought some development, such development does not always entail that it must be regulated by international law even though it is of importance in international relations.¹² As asserted by scholars that the formation of a new State is a matter of fact, not a matter of law.¹³

III. 'STATE' IN MONTEVIDEO CONVENTION 1933

The source often cited as a textual basis for statehood is the Montevideo Convention of 1933¹⁴ and, in particular, its section entitled 'On the Rights and Duties of States'. 1933 Montevideo Convention on the Rights and Duties of States did not define the term 'State', instead it laid down certain 'qualifications' of States which are more or less identical with the definition aforesaid.¹⁵ Article 1 of the Montevideo Convention enumerates four characteristics of States¹⁶:- The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.¹⁷

⁴Crawford, J. R. 2006. *The Creation of States in International Law*. 2nd Edition. New York: Oxford University Press. p. 28.

⁵*Supra*. Note 1. p. 112.

⁶Portmann, R. 2010. *Legal Personality in International Law*. Cambridge: Cambridge University Press. p. 1.

⁷*Reparation for Injuries Suffered in the Service of the United Nations Case* 1949 ICJ Rep 174, 178.

⁸*Ibid*.

⁹*Ibid*, at 179-180.

¹⁰*Supra*. Note 2. p. 120.

¹¹Malanczuk, P. 2002. *Akehurst's Modern Introduction to International Law*. 7th Edition. London: Routledge Tylor & Francis Group. p. 75.

¹²*Supra*. Note 4. p. 4.

¹³*Supra*. Note 2. p. 677.

¹⁴(1934) 165 LNTS 19 AJIL, Supp. p. 75.

¹⁵Agarwal, H. O. 1992. *International Law*. Allahabad: Allahabad Law Publishers. p. 60.

¹⁶ See *Supra*. Note 4. Chapter 2, See also *Supra* Note. 11. p. 58; Shaw, M. N. 2008. *International Law*. 6th Edition. Cambridge: Cambridge University Press. p. 198; O'Brien, J. 2001. *International Law*. London: Cavendish Publishing Ltd. p. 139; Malanczuk, P. 2002. *Akehurst's Modern Introduction to International Law*. p. 75, D.J Harris. 1998. *Cases and Materials on International Law*. p. 102, Gardiner, R.K. 2003. *International Law*. Essex: Pearson Education Ltd. p. 171, Greig, D.W. 1970. *International Law*. p. 74, TunkuSofiahJewa. 1996. *Public International Law: A Malaysian Perspective*. Vol. 1. Kuala Lumpur: Pacifica Publications. p. 53, Abdul Ghafur Hamid @ KhinMaungSein. 2009. *Public International Law: A Practical Approach*. p. 87, Dixon, M. 2007. *Textbook on International Law*. p. 115, Starke, J.G. 1972. *An Introduction to International Law*. p. 101.

¹⁷Montevideo Convention 1933 on the Rights and Duties of States, Article 1.

Pursuant to Article 1 of the Montevideo Convention 1933, that the entity aspiring to be regarded as a State must possess a permanent population; it must occupy a clearly defined territory; it must operate an effective government over the extent of its territory; and it must display capacity to engage in international relation – such capacity including the ability to fulfil international treaty obligations.¹⁸

IV. ELEMENTS OF STATE UNDER THE MONTEVIDEO CONVENTION 1933

a) Permanent Population

The term “population” means people, who occupy a defined territory. The term “people” is an aggregate of individuals of both sexes who live together as a community though they may belong to different races or creeds or cultures, or be of different colours.¹⁹ However, of the term ‘permanent population’, there is no entirely clear meaning. Obviously, it does not mean that there can be no migration of peoples across territorial boundaries, not does it mean that a territory must have a fixed number of inhabitants.

Rather, it seems to suggest that there must be some population linked to a specific piece of territory on a more or less permanent basis and who can be regarded in general parlance as its inhabitants.²⁰ Some academic writers refer permanent population as comprising a stable community or population.²¹ Who belongs to the permanent population of a State is determined by the internal law on nationality which international leaves to the discretion of States, except for a number of limited circumstances.²²

Thus, the rule relating to the nationality of that population is not determinative to statehood. Nationality is dependent upon statehood and not vice versa.²³ Since many States have a multinational composition as regards population, it would be absurd to legally require any ethnic, linguistic, historical, cultural and religious homogeneity in the sense of the antiquated political concept of the nation-State.²⁴

b) Defined Territory

Evidently, States are territorial entities. A State must have some definite physical existence that marks it out clearly from its neighbours.²⁵ It is defined by geographical area separated by borderlines from territories of other adjacent States. The minimum requirement of territory for statehood only envisages some portion of earth’s surface being identified without necessary precise definition of frontiers.²⁶ It was appropriately stated in *North Sea Continental Shelf Cases* that:

‘There is for instance no rule that the land frontiers of a State must be fully delimited and defined, and often various places and for long periods they are not.’²⁷

What matters is not the absolute certainty of the State’s territory but that the State is able to consistently control a sufficiently identifiable core of such territory.²⁸ In *Deutsche Continental Gas-Gesellschaft v Polish State*,²⁹ the German-Polish Mixed Arbitral Tribunal said:

‘In order to say that a State exists and can be recognized as such...it is enough that...[its] territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited.’

Other Scholar opined that ‘the control of territory is the essence of a State’.³⁰ This is the basis of the central notion of ‘territorial sovereignty’, establishing the exclusive competence to take legal and factual measures within that territory and prohibiting foreign governments from exercising authority in the same area without consent.³¹ Sovereignty carries

¹⁸ Grant, T. D. 1999. “Defining Statehood: The Montevideo Convention and its Discontents. 37 *Colum. J. of Transnat’l L.* 403. at 414.

¹⁹*Supra.* Note 2. p. 121.

²⁰*Supra.* Note 1. p. 115.

²¹O’Brien, J. 2001. *International Law*. London: Cavendish Publishing Ltd. p. 140. See also Brownlie, I. 1979. *Principles of Public International Law*. 3rd Edition. New York: Oxford University Press. p. 75; Greig, D. W. 1970. *International Law*. London: Butterworth & Co. (Publishers) Ltd. p. 75.

²²*Supra.* Note 11. pp. 76-77.

²³*Supra.* Note 4. p. 52.

²⁴*Supra.* Note 11. p. 77.

²⁵*Supra.* Note 1. p. 115.

²⁶Gardiner, R. K. 2003. *International Law*. Essex: Pearson Education Ltd. p. 175.

²⁷ (*Germany v Denmark and Netherlands*) 1969 ICJ Rep 4 at 32, para. 46.

²⁸ Abdul Ghafur Hamid @ KhinMaungSein. 2009. *Public International Law: A Practical Approach*. p. 88.

²⁹ (1929) 5 ILR 11 pp. 14-15.

³⁰ Shaw, M. N. (1982) “Territory in International Law”, 13 NYIL at 61-91.

³¹*Supra.* Note 11. p. 75.

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with it the right to exercise jurisdiction and this jurisdiction may be in one of a numbers of forms.³² The matter was well expressed by Judge Huber when sitting as an arbitrator in *The Island of Palmas Case*, where he observed that:

*'Territorial sovereignty...involves the exclusive right to display the activities of a State. This right has a corollary a duty; the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and war, together with the rights which each States may claim for its nationals in foreign territory.'*³³

He further added that:

*'Sovereignty in relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other States, the functions of the State.'*³⁴

c) Government

In order for a State to function as a member of the international community, it must have a practical identity. That is when the government comes into picture. The term 'government' is frequently described as a sovereign power in a State which has an exclusive control over both its territory and population therein.³⁵ In this sense, the government refers collectively to the political organs of a country³⁶ or some sort of coherent political structure and society³⁷ where there must be at least one or more persons who can act for the people and govern according to the law of the land³⁸.

The government must be 'effective' within the defined territory and exercise control over the permanent population as well as its organs of authority. The existence of effective government, with centralized administrative and legislative organs is the best evidence of a stable political community.³⁹ Therefore, the mere existence of a government, however in itself does not suffice, if it does not have effective control.⁴⁰ The extent of a governmental control is twofold; one internal and the other, external.⁴¹

Internally, the government must have the capacity to establish and maintain a legal order in the sense of constitutional autonomy. At this point, government has two aspects: the actual exercise of authority and the right or title to exercise that authority.⁴² Externally, it means the ability to act autonomously on the international level without being legally dependent on other States within the international legal order.⁴³

From these two aspects (internal and external control), it is clear that 'government' and 'independence' are closely related as criteria. Government is treated as the exercise of such authority within the territory of a State i.e. internal control whereas independence is treated as the exercise, or the right to exercise such authority with respect to other States i.e. external control.⁴⁴

The necessity for a sophisticated apparatus of executive and legislative organs has not been a primary concern of the international law in determining an effective government. In its Advisory Opinion in the *Western Sahara Case*, the ICJ said that:

*"no rule of international law, in the view of the Court, requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today."*⁴⁵

It merely requires a State as having a capable governmental authority to control the affairs of the State in the international community but it is not necessarily the government is entirely dominant in the territory.

d) Capacity to Enter into Relations with other States

³²Shaw, M. N. (1982) "Territory in International Law", 13 NYIL.at 139-140.

³³(1982) 1 RIAA 829, p. 839.

³⁴*Ibid.* p. 838.

³⁵TunkuSofiahJewa. 1996. *Public International Law: A Malaysian Perspective*. p. 53.

³⁶Garner, B. A. (ed.). 1999. *Black's Law Dictionary*. p. 703.

³⁷Shaw, M. N. 2008. *International Law*. 6th Edition. Cambridge: Cambridge University Press. p. 200.

³⁸*Supra*. Note 2. p. 122.

³⁹Brownlie, I. 1979. *Principles of Public International Law*. 3rd Edition. New York: Oxford University Press. p. 75.

⁴⁰*Supra*. Note 11. p. 77.

⁴¹*Ibid.*

⁴²*Supra*. Note 4. p. 57.

⁴³*Supra*. Note 11. p. 77.

⁴⁴*Supra*. Note 4. p. 57.

⁴⁵ (1975) ICJ Rep, pp. 43-44.

Although the new entity may have a government capable of acting on its behalf, in order for its claim to be a State to succeed, the entity itself must be accepted as capable of entering into relations with other States.⁴⁶ As a result, the existence of the entity in question as well as the indication of the importance attached to recognition by other countries. It is essential for a sovereign State to be able to create such legal relations with other units that it sees fit.⁴⁷ It is only reasonable to suppose that individual States will demonstrate their approval by recognizing the new State, that is, by formally, acknowledging its independent existence.⁴⁸

The essence of such capacity is independence⁴⁹ and it has been stressed by many jurists as the decisive criterion of statehood⁵⁰. Independence is a formal statement that the State is subject to no other sovereignty and is unaffected by factual dependence upon other States or by submission to the rules of international law.⁵¹ Independence is also regarded as the central criterion for statehood.⁵² As Judge Huber stated in the *Island of Palmas* arbitration:

*“Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of international law, have established this principle of the exclusive competence of the State in regard to its territory in such a way as to make it the point of departure in settling most questions that concerns international relations”.*⁵³

Therefore, a state must be independence before it can enter into relation with any other states.

e) Other Criteria Not Enumerated in the Montevideo Convention

At the same time, writers argue that the Montevideo definition is missing elements essential to statehood. Some possible criteria not enumerated in the Montevideo Convention have been suggested by most writers as necessary in order to determine whether an entity is or is not a State in an acceptable fashion.

As discussed above, independence definitely has a very close association with the last criterion of statehood i.e. capacity to enter into relations with other State. Though an entity may possess the attributes widely viewed as necessary to statehood, the entity may not necessarily claim to be a State.⁵⁴ According to the *Restatement (Third)*, an entity must claim to be a State for it to be a State.⁵⁵ For instance, Taiwan has the attributes often thought to make a State, it does not claim to be Taiwan, but rather the Republic of China. Few States recognize it as the Republic of China, because there is a more plausible competing claimant to that title. No States recognize it as Taiwan, because it does not claim to be Taiwan.⁵⁶

For some time, writers have argued that legality is a prerequisite to statehood. Article 2(4) of the UN Charter has clearly prohibited the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purpose of the UN. The principle that territory may not be validly acquired by the use of force is well established.⁵⁷

Recognition, the subject that raises questions in connection with several of the proposed criteria above, has itself been proposed as a criterion for statehood. Most writers today assume that recognition itself does not create statehood where an entity is not a State because it is recognized; it is recognized because it is a State.⁵⁸ However, State practice continues to suggest that recognition in certain situations can be important in the process of State creation.

Though it is not a criterion of statehood, membership in the UN is clearly related to statehood. The UN Charter provides that membership in the UN be open to ‘all...peace-loving States which accept the obligations contained in the Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.’⁵⁹ From this requirement, it can be concluded that any entity that is a member of the UN is a State and moreover the word ‘State’ occurs 34 times in the

⁴⁶Greig, D. W. 1970. *International Law*. London: Butterworth & Co. (Publishers) Ltd. p. 77.

⁴⁷*Ibid.* p. 202.

⁴⁸*Supra.* Note 47. p. 77.

⁴⁹*Supra.* Note 38. p. 202.

⁵⁰*Supra.* Note 40. p. 76.

⁵¹*Supra.* Note 38. p. 202.

⁵²*Supra.* Note 4. p. 62.

⁵³*Island of Palmas Case* (1982) 2 RIAA 829, 838.

⁵⁴*Supra.* Note p. 440.

⁵⁵ See *Restatement (Third), Foreign Relations Law of The US* (1987) s 201, Comment f.

⁵⁶See Zaid, M. S. 1998. “Taiwan: It Looks Like It, It Acts Like It, But Is It a State? The Ability to Achieve a Dream Through Membership in International Organizations”. 32 *New Eng. L. Rev.* 805. Shen, Jianming, 2000. “Sovereignty, Statehood, Self-determination, and the Issue of Taiwan”. 15 *Am. U. Int'l L. Rev.* 1101.

⁵⁷See *Case Concerning on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* 1993 ICJ Rep. pp. 325, 434-435, 440.

⁵⁸*Supra.* Note 4. p. 93.

⁵⁹Charter of the United Nations, Article 4.

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Charter. It does not follow, however, the UN membership is a prerequisite to statehood. Today, Switzerland and the Vatican City do not belong to the UN, although they are recognized as States.

Permanence may be highly relevant to statehood in some cases but may be not in others. For example, in the divided State situations, whatever the original legality of the establishment of certain of those regimes, long continuance eventually forced effective recognition of their position. Permanence is thus not a criterion of statehood in the sense of an indispensable attribute; it may be an important piece of evidence as to the possession of those attributes.⁶⁰

In modern literature, this is not often mentioned as a criterion and it has been subjected to trenchant criticism. But sometimes it is said that this criterion is associated with recognition since unwillingness or refusal to observe international law may constitute grounds for refusal to be recognized, or for such sanctions as international law allows, just as unwillingness to observe the UN Charter obligations is ground for non-admission to the UN.⁶¹ The United States Secretary of State wrote in a letter of 2 August 1877: 'If a government confesses itself unable or unwilling to conform to those international obligations which must exist between established governments of friendly States, it would thereby confess that it is not entitled to be regarded or recognized as a sovereign and independent power'.⁶²

This criterion is rooted from the US practice where Hyde states four qualifications for statehood (the first four above), but adds a fifth: '...the inhabitants must have attained a degree of civilization, such as to enable them to observe...those principles of law which are deemed to govern the members of the international society in their relations with each other'.⁶³ But the standard is subjective and tends to be applied in a discriminatory way because one State would have blamed the other State for being uncivilized rather than to admit its own non-civilization.

It could be argued that, although 'legal system' seems to be least criterion, the existence of a 'basic norm' within a State is both necessary and sufficient. Every State is determined by the basic norm of its legal order, which it does not share with other State order. This basic norm is its own; it is not, and cannot be, derived from any other States.⁶⁴

V. STATEHOOD IN ISLAMIC LAW

Islam has a different view on what constitutes State. Although the distinction between Islamic view and the view of international law on what constitutes a State is not very wide, but both views have considerable differences in terms of how they define each elements constituting a State. As previously discussed, the Montevideo Convention criteria of statehood are: (i) permanent population, (ii) defined territory, (iii) effective government and (iv) capacity to enter into relation with other States. Statehood in Islamic law which is referred as *arkan al-daulah* (basic elements of State) in most Islamic international law books, only lists down the first three of such criteria (permanent population, defined territory, and effective government) and omits the last criterion.

VI. CONCEPT OF STATE IN ISLAM

The concept of State in Islam is altogether different from the present-day concept of State. Most Muslim writers have a different opinion on the definition of State and some of them defined State as "a group of people settling in certain territory on a permanent basis, controlled by a governing body which manages their internal and external affairs" and some others defined it as "a group of individuals who settles in certain territory and has some organization which makes such individuals supreme authority".⁶⁵ Others defined State identically as "a group of individuals who inhabits on a permanent basis in a specific territory and subject to a supreme authority".⁶⁶

It seems that the definitions of State according to the Muslim scholars are derived from the international law scholars and subsequently have a similar conclusion as to decide elements of statehood *i.e.* population, territory and government. As regards the fourth criterion; capacity to enter into relation with other States, almost all Muslim authors do not include such criterion as a forming part of statehood.

VII. CONCEPT OF UMMAH (NATIONS)

⁶⁰Charter of the United Nations, Article 4.

⁶¹*Supra*. Note 4. p. 91.

⁶²*Ibid*.

⁶³*Supra*. Note 40. p. 83.

⁶⁴*Ibid*.

⁶⁵Al-Saifiy, Husamuddin. n.d. *al-Nizam al-Siyasi fi al-Islam wa al-'Alaqah al-Duwaliyyah*. Kuala Lumpur: International Islamic University of Malaysia (IIUM). p. 15.

⁶⁶Alwan, Abdul-Karim. 1997. *al-Wasit fi al-Qanun al-Duwali al-'Am*. Vol. 1. Amman: Maktabah Dar al-Thaqafah li al-Nasyrwa al-Tawz'i. p. 123.

Ummah (Arabic: أمة) is an Arabic word meaning "community" or "nation". It is commonly used to mean either the collective nation of States, or (in the context of pan-Arabism) the whole Arab world. In the context of Islam, the word *umma* is used to mean the *Commonwealth of the Believers* (*ummat al-mu'minin*), and thus the whole Muslim world. The phrase *Ummah Wahidah* in the Quran (the "One Community") refers to all of the Islamic world unified. The Quran says:

"You [Muslims] are the best nation brought out for Mankind, commanding what is righteous (*Ma'ruf*) and forbidding what is wrong (*Munkar*)".....⁶⁷

The Community in Islam is not founded on race, nationality, locality, occupation, kinship, or special interests. It does not take its name after the name of a leader or a founder or an event. It transcends national borders and political boundaries. The foundation of the community in Islam is the principle which designates submission to the will of Allah, obedience to His law and commitment to His cause.⁶⁸ In short, an Islamic community is present only when it is nourished and fostered by Islam. The Islamic community has a historic mission far beyond mere survival, sheer power, breeding, or psychological continuity. Such a mission is described in the Holy Quran as follows:

"Let there be a community (*Ummah*) among you, advocating what is good, demanding what is right, and eradicating what is wrong. These are indeed the successful".⁶⁹

Furthermore, another Verse of the Qur'an is a lesson for those who reject the concept and need of Muslim *Ummah* which says:

"And hold fast, all together, by the rope which Allah (stretches out for you), and be not divided among yourselves; and remember with gratitude Allah's favour on you; for yewere enemies and He joined your hearts in love, so that by His Grace, ye became brethren; and ye were on the brink of the pit of Fire, and He saved you from it. Thus doth Allah make His Signs clear to you: That ye may be guided."⁷⁰

In modern world, the term *Ummah* can be used in the more Western sense of nation, for example, *al-Umam al-Muttahida*, (United Nations). In fact, The Organization of the Islamic Conference (OIC) is the main organization representing the whole Muslim *Ummah* rather than the United Nations.

VIII. ELEMENTS OF STATEHOOD IN ISLAM (ARKAN AL-DAULAH)⁷¹

Although there is indeed a slight disagreement among Muslim scholar in defining State, it is possible to ascertain elements of statehood from such definitions. Like international law, Muslim writers are of the view that the existence of States is the combination of three main elements: (i) population (*الشعب al-Sh'ab*), (ii) territory (*الإقليم al-Iqlim*) and (iii) government (*ال-Tanzim al-Siyasior al-Sultah*).⁷² Each of these criteria will be further discussed.

a) Population (*al-Sh'ab*)

In Islamic classical theory, population which resides in a particular State especially in most Islamic countries can be divided into three main groups: (i) Muslims, (ii) people of the pact (*dhimmi*), (iii) people of the war (*harbi*). According to this view, Islam regulates in details in determining the relations between the three groups, and their rights and duties between each other. This classification is not however for the purpose of discrimination between Muslim and non-Muslims.

Muslims who inhabit in any Islamic States are equal in the exercise of rights and duties regardless of their origin, race, language, colour, or place of residence.⁷³ If a Muslim stays in any Islamic States and afterwards moves to another Islamic States, he will be regarded as a citizen in the new State and is accorded a complete exercise of rights. For instance, Indonesian Muslim or Indian Muslim who travels throughout the Islamic States and inhabits in any city he desires, he is to be considered as an original citizen who enjoys every political, civil, and natural rights.⁷⁴ Moreover, every Muslim, no matter what his race is, his duties are the same, thus, he is compelled to unsheathe his sword defending Muslims in wartime.

⁶⁷al-Quran. Surah *al-Imran* 3:110.

⁶⁸n.a., n.d., *Challenges Faced by Muslim Ummah and Their Solution*.

⁶⁹al-Quran. Surah *al-Imran* 3:104.

⁷⁰*Ibid.* 3:103.

⁷¹Some books refer it as '*Anasir al-Daulah*(components of States). See Alwan. 1997. *al-Wasit fi al-Qanun Al-Duwali al-'Am*. p. 124.

⁷²Al-Saifiy, Husamuddin. n.d. *al-Nizam al-Siyasi fi al-Islam wa al-'Alaqah al-Duwaliyyah*. p. 15; Alwan. 1997. *al-Wasit fi al-Qanun al-Duwali al-'Am*. p. 123.

⁷³*Supra*. Note 67. p. 16.

⁷⁴*Supra*. Note 67. p. 17.

Among the population of Islamic States is *dhimmis*. *Dhimmis* are non-Muslims who dwell permanently in Islamic States. Muslim authorities who are bound to protect their rights are prohibited to forcibly compel them to accept Islam, but they have to allow them to be free in practicing their religion provided that it does not pose a threat against peace and harmony and attack the propagation of Islam (*al-da'wah*). *Dhimmis* have total rights comparable to Muslims citizens and they are liable to pay *jizyah* (tax)⁷⁵, protected from any kind of harms and eligible to be involved in general expenditure. Hence, they have rights of trade, manufacturing and holding public position. During Abbasid Caliphate, *dhimmis* were elected in the ministerial tenure but not permissible to be an executive minister since such position was only for Muslims.⁷⁶

There is another type of population which is known as *musta'min*. *Musta'min* is a non-Muslim foreigner that enters Muslim lands for certain period of time and is legally protected by the Muslim authority. This would include merchants, messengers, and students and other groups that could be given an *aman*, or pledge of security. They usually apply for entry to Islamic land for any purpose and request for protection by granting them an *aman* (pledge of security) for their entry, stay, and exit. No Muslims are permitted to kill, capture and force them to Islam.

This is so by virtue of Surah *al-Taubah* which reads:

*'And if one of the idolaters seek protection from you, grant him protection till he hears the word of Allah, then make him attain his place of safety, this is because they are people who do not know.'*⁷⁷

b) Territory (*al-Iqlim*)

There is a distinction between territory of Islam (*daral-Islam*) and territory of war (*daral-Harb*). Territory of Islam would include all Islamic States, extended to every Muslims and there exists complete rights of aboriginal citizens. On the contrary, a territory of war is a territory which initiates to wage war against Muslims and Islam. Members of this territory are non-Muslims who regard Muslims as foreigners.⁷⁸

c) Government (*al-Tanzim al-Siyasior al-Sultah*)

It is well established that governing authority is certainly essential in forming a State, since the existence of a stable and effective government indicates that such States had its own distinct personality and sovereignty which must be respected by other States. The concept of sovereignty of State in Islam can be seen in the doctrine of *jihad* (striving or exerting of one's effort in the cause of Allah). *Jihad* does not mean 'war' but it is derived from the verb *jahad* which means "to exert, or to strive hard or to make strenuous effort"⁷⁹.

Jihad is only permissible for the purpose of fighting in the cause of Allah and in defence of the Islamic faith. However, the essence of *jihad* is never an aggressive war; rather it is a defensive war, for no other ground but in the cause of Allah. The Holy Quran ordains:

*"Permitted are those who are fought against, because they have been oppressed, and verily to succour them Allah is potent. Those who have been driven forth from their abodes without justice, except because they say: our Lord is Allah. And were it not for Allah's repelling of some by means of others, cloisters and churches, synagogues and mosques wherein the name of Allah is mentioned much, would have been pulled down. Surely Allah shall succour whosoever succoureth Him; verily Allah is strong, Mighty"*⁸⁰

This proves that Islam is also concerned on respecting the territorial sovereignty of another State since the concept of *jihad* does not permit any kind of use of force against another State but it must be resorted to use force only as a self-defence against both territory and the faith. It is harmonious to the concept of self-defence enumerated in Articles 2 and 51 of the UN Charter which allows self-defence and prohibition of the use of force.

On the other hand, in Islam also, the basic concept is that sovereignty over the universe belongs to Allah, but those mankinds, Allah's vicegerents, are vested with authority in certain spheres, as a trust, for which they are answerable and accountable to Allah. The Holy Prophet (PBUH) has said:

"Everyone of you is a steward, and everyone of you is accountable for that which is committed to his care."

⁷⁵*Jizyah* is a per capita tax levied on a section of an Islamic State's non-Muslim citizens, who meet certain criteria.

⁷⁶*Supra*. Note 67. p. 18.

⁷⁷al-Quran. Surah *al-Taubah* 9:6.

⁷⁸*Supra*. Note 67. p. 21.

⁷⁹Abdul Ghafur Hamid @ KhinMaungSein. *Islamic International Law and the Right of Self-Defence of States*. p. 3.

⁸⁰al-Quran. Surah *al-Hajj* 22:39-40.

The Concept of State under International Law and Islamic Law Perspective

As Allah's sovereignty extends over the universe, the ultimate ideal of a State in Islam is a universal federation, or confederation of autonomous States, associated together for upholding freedom of conscience, for the maintenance of peace, and for cooperation in promoting human welfare throughout the world. In pursuit of this ideal, the Islamic State, established by the Holy Prophet (PBUH), spread rapidly westward through Egypt and North Africa to Spain, and eastward through Iraq, Iran, and Central Asia to the confines of China.⁸¹

It instituted a single citizenship entailing overall allegiance to a single head of State, known as the Caliph (*Khalifa*), who was responsible for the welfare of all sections of the vast populations united and inspired by common ideals. Thus, in Islam no specific system of government is required in particular State but, as far as the history of Islam is concerned, the Caliph system is the best example of government introduced in Islam. The exercise of authority of a Caliph as the head of State is in both secular and spiritual spheres. The Holy Quran in Surah *al-Nur* says:

*"Allah has promised to those among you who believe and act righteously, that He will surely make them Successors in the earth, as He made Successors from among those who were before them; and that He will surely establish for them their religion, which He has chosen for them; and that He will surely grant them security and peace in place of their fear. They will worship Me, and will not associate anything with Me. Then whoso disobeys thereafter, they will be the rebellious ones."*⁸²

In the prophetic era, the Prophet (PBUH) himself has been elected as Imam or Head of Medina, and he was also a legislator (*mujtahid*), a statesman, an administrator, a judge, and a military commander. He also led the congregational prayers and was the supreme authority in matters connected to the religion and Revealed Law.⁸³ Therefore he had different capacities. Nevertheless, although he had the last word in political and military affairs, and as the Messenger of God, he was not obliged to consult others. He consulted his Companions in all matters other than those concerning revelation in accordance with the command addressed to him in the Quran to the effect that he should consult them in such affairs and when he had taken a decision, he should put his trust in God as the Holy Quran says:

*'Thus it is due to mercy from Allah that you deal with them gently, and had you been rough, hard hearted, they would certainly have dispersed from around you; pardon for them, and take counsel with them in the affair; so when you have decided, then place your trust in Allah; surely Allah loves those who trust.'*⁸⁴

On the other hand, Islam also recommends that the head of State is to be the representative of the people with duties and responsibilities corresponding to that of the Khalifa; but with regard to his tenure of office, the scope of his authority, and the limitations upon it, he is bound by the provisions of the Constitution in conformity with which he is elected to office and which he must uphold. In his case, also, the emphasis is upon his role as a representative of the people. The Holy Quran says:

*'O ye who believe, obey Allah and obey His Messenger and those who are in authority among you.....'*⁸⁵

It is thus clear that sovereignty in this context is vested in the people and Allah commands that such entrusted people must be obeyed. They are commanded to entrust it to those who are best fitted to discharge their responsibilities attached to it. The exercise of the franchise for the purpose of electing representatives to discharge various responsibilities of the state is thus elevated to a sacred trust. The same verse says:

*'.....Allah commands you to entrust authority into the hands of those who are best fitted to discharge it.'*⁸⁶

It is pertinent to point out that in differentiating the Islamic State and non-Islamic State, some writers added another element of statehood i.e. *tahkim al-Islam* (Islamic government). The main feature of *tahkim al-Islam* is that the State must be controlled by Muslims and mostly populated by Muslims. Islam is main religious practice and *Shari'ah* is implemented to guarantee the five foundations of life (religion, life, intellect, purity of lineage, and property). In implementing the *Shari'ah* all vices and crimes that endanger the above stated foundations would be checked. Man-made laws have been proven a failure in guaranteeing the security and dignity of the human race.

⁸¹ Muhammad Zafrulla Khan. February 1993. 'Islamic Concept of the State'. *Review of Religions*. Al-Islam. <http://www.alislam.org/library/links/00000148.html>. Accessed on November 18, 2018.

⁸²al-Quran. Surah *al-Nur* 24:55.

⁸³Javid Iqbal. n.d. 'The Concept of State in Islam - A Reassessment'. *Allama Iqbal Site*. <http://www.allamaiqbal.com/publications/journals/review/apr98/1.htm>. Accessed on November 18, 2012 at 1.02 a.m

⁸⁴al-Quran. Surah *al-Imran* 3:159.

⁸⁵al-Quran. Surah *al-Nisa* 4:59.

⁸⁶*Ibid*.

IS UMMAH (NATIONS) A STATE?

It is obvious that the concept of *Ummah* and the elements of state in Islam (*Arkan al-Daulah*) are fundamentally not in line with the concept and elements of a state as enumerated under the Montevideo Convention 1933. The concept of *Ummah*, the Community in Islam which is basically not founded on either race, nationality, locality, occupation, kinship, or special interests. Furthermore, it does not take its name after the name of a leader or a founder or an event, transcends national borders and political boundaries. The foundation of the community in Islam is the principle which designates submission to the will of Allah, obedience to His law and commitment to His cause.

This is contrary to the concept of state under the Montevideo convention where nationality, community, political boundaries and others are varied according to every "state" and should not be the same with others. If this is the case, therefore, the concept of *Ummah* is not a state. However, this contention is rebuttable since the concept of *Ummah* and the elements of state in Islam have been discussed and established more than one thousand years ago when the Prophet Muhammad P.B.U.H introduced the first constitution in the world, *Sahifah al-Madinah* (Charter of Madinah) pursuant to Article 2 of the *Sahifah al-Madinah*. On the other hand, the elements of state under the Montevideo Convention are only be made published, introduced and applied in the year of 1933, which can be said as still "green" in discussing on what constitute a state as compared to the concept of *Ummah*.

Even though the concept of *Ummah* has been established earlier than the Montevideo Convention, the fact that the concept of state based on Montevideo Convention is upheld and more popular, applicable, and accepted among the people of the world as compared to the concept of *Ummah* as introduced by the Prophet P.B.U.H., therefore the concept of *Ummah* is seen to be archaic and not practicable in the modern world.

All in all, the elements under the Montevideo Convention have been discussed long time ago and can be said to be a reflection to the concept of *Ummah*, with modifications made by the westerners as to prove that it is their idea in the first place.

IX. CONCLUSION

Islam has established the concept of *Ummah* a long time ago with a view that it can unite the people regardless of the colour, nationality and religion etc. However, this concept was later on being manipulated and altered by the international community *via* the Montevideo Convention 1933 and its other supporting principles. Many states nowadays suffer from not being recognized by the international community, especially the controlling power of the world, because of their ideology of state. Therefore, the glorious concept of *Ummah*, the values and principles laid down and practiced by the Prophet (PBUH) during His time portrayed that Islamic law concept of state is a great example on the totality of Islam as the religion of peace and harmony.

Although the concept of state according to both perspectives seem to have a harmony in their respective determining criteria, the differences between them are undeniable, judging from the sources of the law referred by the international and Islamic scholars. While the 1933 Convention finds its spirit from the practice of a particular State, decision of the international courts, and the core principles of international law recognized by States, the Islamic law bases its values and principles from the words of God in the form of revelations i.e. al Quran and Hadith and the traditions of the beloved Prophet (PBUH) and His Companions which makes the concept of state in Islamic law has more in-depth meaning, sense of God-fearing (*taqwa*), and responsibility not only towards the people but submission to Allah as His loyal servant.

REFERENCES

- [1.] Abdul Ghafur Hamid @ KhinMaungSein. 2009. *Public International Law: A Practical Approach*. 2nd Edition. Petaling Jaya: Prentice Hall Pearson Sdn. Bhd
- [2.] Agarwal. H.O. 1992. *International Law*. Allahabad: Allahabad Law Publishers
- [3.] Alwan, 'Abdul-Karim. 1997. *Al-Wasit fi Al-Qanun al-Duwali al-'Am*. Vol. 1. Amman: Maktabah Dar Ath-Thaqafah li An-Nasyrwa At-Tawzi'
- [4.] An-Nabhani, Taquuddin. 1998. *The Islamic State*. London: Al-Khilafah Publications
- [5.] Ash, W. R. 2009. "Is Palestine a "State"? A Response to Professor John Quigley's Article, "The Palestine Declaration to the International Criminal Court: The Statehood Issue"." 36 *Rutgers L. Rec.* 186
- [6.] As-Saifiy, Husamuddin. n.d.*al-Nizam As-Siyasi fi al-Islam wa al-Alaqat al-Duwaliyyah*. Kuala Lumpur: International Islamic University of Malaysia (IIUM)

- [7.] Boczek, B. A. 2005. *International Law: A Dictionary*. Maryland: Scarecrow Press, Inc
- [8.] Brownlie, I. 1979. *Principles of Public International Law*. 3rd Edition. New York: Oxford University Press
- [9.] Cassese, A. 2001. *International Law*. New York: Oxford University Press
- [10.] Cohen, R. 1961. "Concept of Statehood in United Nations Practice." 109 *U. Pa. L. Rev.* 1127.
- [11.] Crawford, J. R. 2006. *The Creation of States in International Law*. 2nd Edition. New York: Oxford University Press
- [12.] D.J Harris. 1998. *Cases and Materials on International Law*. London: Sweet and Maxwell Ltd
- [13.] Dixon, M. 2007. *Textbook on International Law*. 6th Edition. New York: Oxford University Press
- [14.] Frederick Tse-shyang Chen. 2001. "The Meaning of "States" in the Membership Provisions of the United Nations Charter." 12 *Ind. Int'l & Comp. L. Rev.* 25
- [15.] Gardiner, R. K. 2003. *International Law*. Essex: Pearson Education Ltd
- [16.] Garner, B. A. (ed.). 1999. *Black's Law Dictionary*. 7th Edition. Minnesota: West Group
- [17.] Grant, T. D. 1999. "Defining Statehood: The Montevideo Convention and its Discontents". 37 *Colum. J. of Transnat'l L.* 403
- [18.] Greig, D. W. 1970. *International Law*. London: Butterworth & Co. (Publishers) Ltd
- [19.] Jennings, R. & A, Watts. (eds.) 1996. *Oppenheim's International Law*. 9th Edition. Vol. 1, Peace. New York: Longman
- [20.] Kelsen, H. n.d. "The Pure Theory of Law and Analytical Jurisprudence". *Harvard Law Review*. Vol. 55, No. 1 (Nov., 1941).
- [21.] Louay Safi. "The Islamic State: A Conceptual Framework" *American Journal of Islamic Social Sciences* (September 1990), Vol. 7, No. 2, pp. 177-191.
- [22.] Malanczuk, P. 2002. *Akehurst's Modern Introduction to International Law*. 7th Edition. London: Routledge Tylor & Francis Group
- [23.] O'Brien, J. 2001. *International Law*. London: Cavendish Publishing Ltd
- [24.] Orlow, D. 1995. "Of Nations Small: The Small State in International Law". 9 *Temp. Int'l & Comp. L.J.* 115
- [25.] Portmann, R. 2010. *Legal Personality in International Law*. Cambridge: Cambridge University Press
- [26.] Quigley, J. 2009. "The Palestine Declaration to the International Criminal Court: The Statehood Issue", 35 *Rutgers L. Rec.* 1
- [27.] Rais Siddiqi. 2005. *Islam: Faith, State and Law*. New Delhi: Anmol Publications Pvt. Ltd
- [28.] Rutherford, L. & Sheila, B. (eds.). 2000. *Osborn's Concise Law Dictionary*. 8th Edition. New Delhi: Universal Law Publishing Co. Pvt. Ltd
- [29.] S.K. Verma, 2004. *An Introduction to Public International Law*. New Delhi: Prentice-Hall of India Pvt. Ltd
- [30.] Schwarzenberger, G. 1971. *International Law and Order*. London: Stevens and Sons Limited.
- [31.] Schwarzenberger, G. 1976. *A Manual of International Law*. 6th Edition. London: Professional Books.
- [32.] Shaw, M. N. (1982) "Territory in International Law", 13 *NYIL*
- [33.] Shaw, M. N. 2008. *International Law*. 6th Edition. Cambridge: Cambridge University Press
- [34.] Shen, Jianming. 2000. "Sovereignty, Statehood, Self-determination, and the Issue of Taiwan". 15 *Am. U. Int'l L. Rev.* 1101
- [35.] Starke, J. G. 1972. *An Introduction to International Law*. 7th Edition. London: Butterworth & Co. (Publishers) Ltd
- [36.] Tunku SofiahJewa. 1996. *Public International Law: A Malaysian Perspective*. Vol. 1. Kuala Lumpur: Pacifica Publications
- [37.] van der Vyver, J. D. 1991. "Statehood in International Law." 5 *Emory Int'l L. Rev.* 9
- [38.] Williams, G. L. (ed., 10th Edn. 1947). 2005, "Salmond on Jurisprudence". *The Modern Law Review*
- [39.] Zaid, M. S. 1998. "Taiwan: It Looks Like It, It Acts Like It, But Is It a State? The Ability to Achieve a Dream Through Membership in International Organizations". 32 *New Eng. L. Rev.* 805

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