THE DOCTRINE OF TERRITORIAL JURISDICTION

IN INTTERNATIONAL LAW AND ISLAMIC LAW

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بسم الله الرحمن الرحيم

الحمد لله رب العالمين
والصلاة والسلام على أفضل
المرسلين سيدنا محمد وعلى
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Abstract

Shariah is a divine law based on Divine revelation, and the *Fuqaha* have tried to determine the *Hukm* of *Sharaih* through well-established principles derived from a deep and holistic study of the Divine revelation. Therefore, it is not possible to change these principles under the changing circumstances of place, person and time. On the other hand International law is based on states' will and interests, and so it is liable to continuous changes and as a matter of fact undergone many changes whether due to the influence of the stronger states or due to the mutual interests of some influential states.

The basis of territorial jurisdiction in International law is the sovereignty of the state, while in Islamic law it is the concept of *Wilayah*, which means the capacity of the *Imam* regarding legislation and implementation of Islamic laws which is derived from the *Ummah* through the *Bayah*, and as a matter of fact it is limited to the territory of *Dar-ul-Islam*. The principle of taking into account the nationality of persons involved and affected by a crime committed out side the territorial limits of a state is also based on the concept of *Wilayah*. Within the territorial limits of *Dar-ul-Islam*, the *Imam* has an absolute *Wilayah* regarding the imposition of Islamic law on the nationals according to *Imam Abu Hanifa (RA)*, and on the non-nationals as well according to *Imam Abu Yousuf (RA)*, *Imam Muhammed (RA)*, and other *Fuqaha*.

The reason according to *Imama Abu Hanifa (RA)* is that the nationals accept the *Wilayah* while the non-nationals do not in their temporary stay in *Dar-ul-Islam*. While the reason given by the majority of *Fuqaha* is that by their temporary stay in *Dar-ul-Islam* the non-nationals (implicitly) accept the

Wilayah of *Imam*, and there is no difference then between the contract of a *Zimmi* who is a citizen of *Dar-ul-Islam* and the contract of an alien except that the first one is permanent while the later is temporary.

On the other hand the *Imam* has no capacity to impose Islamic law outside the territorial limits of *Dar-ul-Islam* except on the citizens of *Dar-ul-Islam* living outside, as it is presumed that their stay over there is temporary. This is according to majority of *Fuqaha*, and thus their affairs fall under the jurisdiction of the court in both civil and criminal matters.

Introduction

The doctrine of territorial jurisdiction in International Law is very important not only for settling of disputes but also for establishing rights and duties. Islamic Law is a divine law and as such does not know any territorial limits. The concept of *Ummah* unites the Muslims living in different parts of the world. But does Islamic law recognize the concept of territorial jurisdiction? Is there any difference between the rights and duties of Muslims living outside *Dar al-Islam* and of those living within *Dar al-Islam*?

It is well known that Muslim jurists divided the world into two territories, called *Dar-ul-Islam* and *Dar-ul-Harb*. Some have also added another territory under the name of *Dar al-'Ahd* or *Dar al-Muwada'ah*. They have also laid down different rules for these territories.

In modern period, the concept of *dar* has been somehow related to the doctrine of perpetual war. This concept forms the basis of the ideas of those scholars who believe in the perpetual war theory. On the other hand, those who deny the perpetual war theory deny the concept of *dar* as well. The former group argues that the division of the world into two hostile territories having perpetual war with each other is a permanent system envisaged by the Shari'ah. In the opinion of the latter group, the jurists made this division keeping in view the realities of their times, and, hence, it has no permanence.

This difference of opinion has its bearing upon the nature of relationship between an Islamic State and non-Muslim states on the one hand, and on the other, on the relationship of an Islamic State with Muslims living temporarily or permanently in non-Muslim territories. It has also led to differences over the legitimacy of different transactions made in non-Muslim territories.

The purpose of the present study is to elaborate the concept of *dar* as developed by the *fuqah'a and* then to compare it with the doctrine of territorial jurisdiction in

International Law. Instead of relying on secondary sources or writings of the modern scholars, the basic sources of *fiqh* have been consulted directly. This will help in understanding the relevance of the doctrine of *dar* to the contemporary world order.

In *Chapter I*, the doctrine of territorial jurisdiction in international law has been elaborated. In this regard, some important theories of International law have also been analyzed.

In *Chapter II*, the doctrine of *dar*, as elaborated and expounded by the *fuqah'a* is discussed. This *Chapter* forms the backbone of the study. The division of the world into two or three *dars* and its legal implications are analyzed in detail. The legal effects of this division on the rights and obligations of those living inside *Dar al-Islam* and outside have been elaborated. The relevance of the doctrine of *dar* to the doctrine of perpetual war is also examined.

In *Chapter III*, the relevance of the doctrine of *dar* to the contemporary world order has been discussed. The main issue that has been dealt with is whether or not the division of the world into different *dars* is a permanent division. Finally, a comparison between the doctrine of *dar* in Islamic law with the concept of territorial jurisdiction in International law follows.

At the end, a detailed *Bibliography* has been given.

CHAPTER ONE

JURISDICTION IN INTERNATIONAL LAW

1.0 Jurisdiction: Definition and Concept

To understand the definition of jurisdiction it is necessary to go into the detail of differences between prescriptive and enforcement jurisdiction, civil and criminal, concurrent and exclusive, rules of jurisdiction in public and private international law and the varying grounds on which jurisdiction has been claimed by a state. Much of the focus on this chapter, however, will be on a particular view of state jurisdiction, namely that of territoriality.

State jurisdiction means 'the power of a state under international law to govern persons and property by its municipal law. It includes both the power to prescribe rules and the power to enforce them, the latter including executive as well as judicial jurisdiction.'[1] According to another author, it denotes 'the legal competence of state officials to prescribe and enforce rules with regard to persons, things and events.'[2] Either way, jurisdiction represents the legal ability of the state to concern people, property and events through the exercise of its regulatory and enforcement powers.

In as much as jurisdiction refers to the 'power of the state to affect people, property and events'[3], through its officials and institutions, within or without its territorial limits, its meaning may appear to be simple one. However, the context in which it is used must be considered. For example, finding the basis of a state's jurisdictional capability in civil law is a less controversial matter compared to discovering it in criminal law. Specifically, when we refer to the jurisdictional ability of a state under international law, the uncertainty of the term becomes evident. In many respects, this ambiguity lead us to the fact that jurisdiction is a rather ill defined term in the context of international law. Moreover, the basis on which a state may claim jurisdiction varies significantly within public international law. Thus there are generally

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1- Harris D J, *Cases and Materials on International Law*, Sweet & Maxell, London, 2004, p. 265.
2- Collins Edward, *International Law in a Changing World*, (1969) p. 188.
3- Akehurst M, *Jurisdiction in International Law*, Routledge Press, London p. 145.

five principles on which penal jurisdiction is claimed[4] in international law, of which territoriality is most important in state practice. Although it is assumed that jurisdiction in international law is mostly territorial, but it is not a very correct statement.

Before going to find the scope of jurisdiction in international law, it would be useful to point out that jurisdiction legally may refer to two different concepts: the ability of a court to try a particular dispute or simply the right of a state to interfere with a person, object or event.[5] Thus the statement—'Under English law, the English courts have *jurisdiction* over crimes committed on board British ships on the high seas; but not normally over crimes committed abroad, even when the offender is a British citizen' refers to the ability of British courts to try an offender under English law. Whereas in the statement—'Only in limited circumstances does international law allow a state to exercise *jurisdiction* over foreign ships passing through its territorial waters or on the high seas', the jurisdiction is to interfere with an object passing through a state's territorial water, not to try the offender.

4- Dickinson, *Introductory Comment* to the *Harvard Research Draft Convention on Jurisdiction with Respect to Crime, 1935*, American Journal of International Law, Supp 443

5- Greig D W, *International Law*, Butterworths, London, 1976, p. 210.

1.1 TYPES OF JURISDICTION

It is a recognized principle of international law that states are supreme in their internal affairs. Thus each state has a limited area of domestic jurisdiction within which it can exercise its, executive and judicial powers without any intervention from any other state. Therefore, a state is generally understood to be free of international legal regulation within the area of its domestic jurisdiction. This principle draws legitimacy from Article 2 (7) of the UN Charter, which declares 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 when we examine the role of United Nations in international affairs over the years, it becomes clear that the domestic policies of states are a subject of international criticism. So, the supremacy of state is not unlimited in this context. State legislation is often subject to limitations imposed by international obligations, international human rights regulations, conventions and treaties to which a state is signatory etc. Nevertheless, the principle of domestic jurisdiction retains its validity, given the fact that state sovereignty is the foundation upon which the present international order has come into being.

However, the issue of jurisdiction becomes slightly complex where there is a foreign element involved, both, in public and private international law. Before mentioning the grounds upon which a state may raise its jurisdiction, it is necessary to distinguish between different kinds of jurisdiction.

1.1.1 Legislative Jurisdiction: (Prescriptive Jurisdiction)

Legislative or prescriptive jurisdiction refers to 'the supremacy of the constitutionally recognized organs of the state to make binding laws within its

territory.'[6] Simply, it is the capacity of a state to pass valid laws. Given the statement that international law is based on recognition of state sovereignty, a state may legislate on any issue that falls within its domestic jurisdiction. In certain circumstances, a state's legislation may even extend overseas. Thus a state may claim jurisdiction to try a foreigner for offences committed out of the country, who is said to have harmed state's interests[7] or caused injury to its nationals.[8] However, regardless of strong claims of legislative or 'parliamentary sovereignty', as in the United Kingdom, it is recognized that no state may reasonably legislate on issues that fall within the domain of another state's exclusive legislative jurisdiction. Thus any legislation by State A declaring to take over foreign companies situated in State B or declaring to change the manner in which the courts of State B functions would be considered as an unjustified obstruction of state sovereignty. It is only where there is a solid link between an event abroad and the interests of the legislating state that we find examples of extension of legislative jurisdiction to acts or events occurring beyond a state's territory[9]. One view suggests that international law requires a 'significant connection' before civil jurisdiction can be exercised extraterritorially or over aliens. Thus, according to Akehurst, a state may impose taxes on persons not residing within its territory as long as there is some real link between the state and the prospective taxpayer.[10] Similarly, in criminal law, there should be a 'real and significant' link between the offence, the offender and the state claiming jurisdiction. To determine this, one has to see the general practice of municipal courts. But the fact that municipal courts generally do not claim jurisdiction in cases where there is no clear rule of international law prohibiting jurisdiction does not help in demarcating the grounds for the jurisdiction of a state. Nevertheless, extending legislative jurisdiction beyond a state's boundaries is by no means arbitrary, and is limited in practice by the

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6- Shaw N Malcolm, *International Law*, , Routledge Press, London, p. 456.
7- Ibid, p. 484.
8- Also known as the passive personality principle: Greig D W, *International Law*, Butterworths, London, 1976, p. 213.
9- See e.g. the (US) *Omnibus Diplomatic Security and Anti-Terrorism Act, 1986* or *US v. Yunis* (No.2) (1988).
10- M Akehurst, *Jurisdiction in International Law*, Rutledge, London, p 179.

fact that a state does not have the power to enforce its laws outside its territory and that courts generally do not use foreign laws, except in limited cases where the presence of a foreign element calls for it.

1.1.2. Executive Jurisdiction: (Enforcement Jurisdiction)

Executive jurisdiction refers to the 'capacity of a state to act in enforcement of its laws and regulations within the borders of another state.'[11] Internally, a state is supreme as far as its executive powers are concerned.[12] However, it is generally accepted that state officials may not enforce the laws of their state upon foreign earth or carry out domestic functions there. Thus the exercise of police powers by a state on foreign territory is a violation of international law just like the unauthorized entry of the military forces of a state into another state. Both are acts of sovereignty and therefore can only be exercised within the territorial limits of a state. Beneath two of such cases are quoted.

(a) In 1935, Jacob Soloman, a former German citizen, was kidnapped in a car in Switzerland and then driven across the border into Germany. Upon entry into German territory, German officials arrested the individual. However, before the dispute was negotiated, Germany released Jacob Soloman and admitted at 'a German functionary had acted in an inadmissible manner.'[13]

(b) Adolf Eichman, a Nazi war criminal, popularly known as the 'Chief Executioner of the Third Reich' was abducted by a team of Mossad agents from Buenos Aires on May 11, 1960 and flown to Israel on May 21, to be tried later for war crimes. Upon a complaint to the Security Council by the Argentinian government, a resolution was adopted which said that, "the violation of the sovereignty of a Member State is

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11- Ibid, p. 456.
12- Article 2 (7), UN Charter.
13- American Journal of International Law 1935, p. 502.

incompatible with the Charter".[14] The UN Security Council asked Israel to pay damages to Argentina.[15]

1.1.3. Judicial Jurisdiction: (Enforcement Jurisdiction)

Judicial jurisdiction concerns the power of the courts of a country to try cases involving a foreign issue. The grounds upon which the courts of a state may exercise such jurisdiction differ from civil to criminal law. In civil matters, a court may claim three different grounds for exercise of jurisdiction, namely domicile, nationality or the mere presence of the defendant in the country. In criminal cases, the grounds may vary from the conventional principle of territoriality to the more controversial principle of effect doctrine. Again, the nature of the case and the country where the trial takes place may affect these grounds.[16]

14- American Journal of International Law 1961, p. 307.
15- Doc. S/4349, UNSC, June 23, 1960.
16- In civil law countries the basis of jurisdiction in civil cases is normally domicile (See e.g. Brussels Convention, 1971) while in common law countries it is the service of a writ on the defendant who happens to be within the country (See e.g. Civil Jurisdiction and Judgments Act, 1982, UK).

1.2 Basis of Jurisdiction in International Law (other than territoriality and nationality)

A state's claim to jurisdiction may be attributed to some essential elements of a state. As territory and population are two essential elements of a state, it is natural that the supremacy of a state within its **territorial boundaries** and **nationality** constitutes the basis of a state's jurisdictional ability. Therefore, situations arising in or persons within the territory of a state, irrespective of their nationality, are subject to a state's legal system; the claim to jurisdiction being only advanced on the principle of **territoriality.** Like wise, a state may apply its laws to its **nationals**, irrespective of their presence within or without a state's territory.

However, claims to jurisdiction are also made in situations arising outside a state's territory and where the persons involved are not nationals of the state claiming jurisdiction, as explained below.

1.2.1. Effect doctrine

Territorial jurisdiction may itself allow for some extraterritorial application by extending its boundaries to 'conduct outside a state's territory that is intended to have substantial effect within its territory.'[17] A claim relied on by American courts, this principle, known as the **effect doctrine**, is used more in economic issues, especially those involving anti-trust regulation, as well as in Export Control Regulations regarding sale of equipment abroad for purposes which may produce adverse effects within the state claiming jurisdiction.[18]

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[17]- Effect Doctrine: See Restatement (Third) of the Foreign Relations Law of the United States 402 (1) (c) ,1987.

[18]- One of the earliest examples of the use of effect doctrine is the US Sherman Antitrust Act, 1896. Recent examples include the freezing of Iranian assets after the Iranian Revolution in 1979 and the embargo on sale of military hardware and dual-use equipment following the nuclear tests conducted by Pakistan in 1998.

1.2.2 Passive personality principle

The **passive personality** principle is used in order to protect a country's nationals. This principle can be used to protect the nationals of a state while they are abroad including the 'activities, interests, status or relations of its nationals'[19] outside as well as within a state's territory. Thus an alien offender may be a subject of jurisdiction for having caused injury to one of its nationals, even if the event took place overseas.

1.2.3. Protective principle

Where the existence or proper functioning of a state is threatened, the **protective personality** principle can come in to play to protect a state's security. The basic principle remains that whatever happens on the territory of a state is the primary concern of the state. Extending this principle, the Restatement of the Foreign Relations Law of the United States claims 'certain conduct outside the territory of a state by persons not their national that is directed against the security of the state or against a limited class of other state interests.'[20]

1.2.4. Universality principle

Jurisdiction may be claimed for reasons other than a physical link between the offence, the offender and the state-claiming jurisdiction. Some crimes are so horrible that jurisdiction may be claimed on the basis of the crime only. In this case, states have the right to act against the person responsible for it, despite the nationality of the offender or the victim or the location of the criminal act. This principle is known as the **doctrine of universal jurisdiction**. Generally, universal jurisdiction is claimed over the custody of the person committing the offence[21] (so that enforcement remains practicable), though, as the Pinochet case illustrates, this is not always the case[22].

19- Restatement (Third) of the Foreign Relations Law of the United States, 402 (2), 1987.
20- Restatement (Third) of the Foreign Relations Law of the United States, 402 (3), 1987.
21- Harris D J, *Cases and Materials on International Law*, p. 266.
22In 2000, a Spanish judge, Juan Garzon issued arrest warrants and an extradition request for exiled Chilean dictator Augusto Pinochet, who, at the time, was undergoing medical treatment in UK. The judge asserted 'universal

Formerly, the application of universal jurisdiction was restricted to piracy, but since World War II it has expanded to include war crimes, slave trading, genocide and gross human rights violations. Lately, cyber crimes have also been included in claims of universal jurisdiction.[23]

jurisdiction over acts of genocide, hostage taking and torture while Pinochet was head of state'. See further: Johnson M Kathleen, *The Case of General Augusto Pinochet, A Legal Research Guide*, p. 27.

[23]- *Princeton Principles on Universal Jurisdiction*, p. 16.

1.3 The Territorial Basis of Jurisdiction

One of the important characteristic of any state is its territorial sovereignty. Simply stated, it means the right of a state to pass binding laws over a specific territory, within its area of control and authority, and over which it claims to have sovereignty. The state claiming sovereignty over a territory must have ownership over it, generally to the exclusion of others.[24] In other words state must have legal title to it and there must be no adverse claim posed by another state. Even when the ownership is the result of a lease agreement, as in the case of Guantanamo Bay, Cuba, the government of the lessee state cannot prevent judicial jurisdiction of its courts, as long as the state has effective control over the leased territory (i.e. the actual exercise of sovereignty).[25]

According to Max Huber, territorial sovereignty means independence over a definite territory to the exclusion of other states. This therefore implies that within the territorial limits, exclusive jurisdiction is exercised by the state over persons, property and situations arising in it.[26] However, this jurisdiction is not an absolute one. Just as a state may in certain situations exercise jurisdiction outside its territory, in other circumstances it may not have the legal authority to exercise jurisdiction within its territory. Therefore, it must be clear at the outset that jurisdiction, even when it is exercised territorially, is subject to limitations imposed by international law.

It is useful to examine the basis upon which territorial sovereignty is based, as the concept of territoriality has undergone significant changes with the passage of time. According to one author, 'the principle whereby a state is deemed to exercise exclusive power over its territory can be regarded as the fundamental maxim of classical international law.'[27] Modern international law has emerged from within the concept of territory. State authority over its territory and its sanctity has been recognized and

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24- Fawcett, J.E.S., *The Law of Nations*, p. 54.
25- *Rasul vs Bush*, Supreme Court of the United States, No 03-334, Decided June 28, 2004.
26- Starke, J. G., *Introduction to International Law*, p. 182.
27- Malcolm N Shaw, *International Law*, p. 331.

protected by legal rules established by custom, treaty and convention. Although the principle of territorial integrity is a major pillar of the present world order, but it is by no means an absolute principle. Technological and economic changes made by the era of globalization have made states interdependent. The spread of communication networks, in particular the Internet, has raised the question of "geographical indeterminacy". The cyberspace has not only brought about a financial revolution but also demolished the geographical boundaries and facilitated crime across them. The proliferation of international organizations, technological advancement, closer economic linkages, an expanding body of international regulations on issues ranging from trade to weapons proliferation and human rights have all combined reduced the boundaries of a state's 'exclusive jurisdiction'. However over-importance must not be given to these changes. It must be kept in mind that the principle of territorial sovereignty is accepted as a rule of international law.

1.3.1. Limits of territorial jurisdiction

Territorial sovereignty has both a positive and a negative aspect. The former is about the exclusive ability of a state concerning its own territory, while the latter is about the obligation to respect the ability of other states regarding their territory.[28] In the words of Edward Collins, '...the essence of distinction is contained in the concept of sovereignty, the principal corollaries of which are an exclusive jurisdiction over the territory of the state and a consultative duty of non-intervention in the area of exclusive jurisdiction of other states.'[29]

In the Island of Palmas case, Judge Huber noted that:

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[28]- Malcolm N Shaw, *International Law*, p 333.
[29]- Collins Edward, *International Law in a Changing World*, p 188.

"Sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular state."[30]

The question then arises, how is sovereignty established in the first place? Does international law give any hard and fast rule to tell when a state can set up its title to territory or withdraw it?

Since the law reflects the development of society, it has to be according to the political realities. In municipal law with a legal system for the functioning of law and society, the use of power by the state and individuals has to be within the limits dictated by the law. But, this is not the case with international law. Without the facility of courts and police power, international law had to find ways of exercising power legally and accept the reality. Thus, questions such as the one posed above have to be answered in legal-political terms.

With long-established states, the question may be answered by the fact of recognition and mutual acceptance. It is with new states that problems arise. Under classical international law, questions of territorial sovereignty are resolved by **reference to title**. This is so because all of the lawful methods accepted for the acquisition of a territory are taken from the Roman law of possession and ownership of land. Again, this is not helpful in the case of a new state. Under classical international law, in the absence of a state, i.e. a state in the full sense of the word, with sovereignty and all the accompanying characteristics, there is no legal person to claim title to territory. This problem is resolved by **reference to political realities** and **facts on the ground** rather than legal theory. Thus the problem of claiming territorial sovereignty by new states has been answered by recognition by other states. If the other players on the chessboard of

30- Malcolm N Shaw, *International Law*, p 333.

international law think that the facts on the ground are sufficient to welcome a new player on board, then recognition *de facto*, and thereby *de jure*, may be granted.

Thus recognition is important but it is not the method by which the right to territory was acquired in the first place. In the end the issue of title to territory does not depend upon whether territory was acquired by constitutional means, by agreement, by the exercise of the right of self-determination or by force; rather it depends much upon acceptance by other states of the new status as legally valid. This is not to minimize the issue of its legal nature and make it a question of fact; the legality of the mode by which territory has been acquired is often the main reason for its recognition.

Today, one of the methods by which 'territorial sovereignty' may be established in international law is by a formal recognition by the UN. Recent examples include the recognition of 'state sovereignty' for Iraq by the UN after the hand-over of power to the 'government' of Ayad Allawi by the Coalition Provisional Authority, and similarly, the recognition of the same for Afghanistan by the UN after the Bonn Conference. However, it is possible to argue that these two issues are related to the surrender of power and prior recognition of a government by other governments than the theory of state sovereignty.

1.3.2 The Principle of Territorial Jurisdiction in Civil and Criminal Matters

The principle of territoriality means the right of a state to exercise jurisdiction over persons, objects or situations arising within its territory and a corresponding obligation not to exercise jurisdiction in the territory of another state[31].

In criminal law, it refers to the principle of determining jurisdiction with reference to the location of the crime. Affirming the view that jurisdiction in public

[31]- It is, however, possible that a state may consent to the exercise of legislative or judicial jurisdiction in its territory by another state. See for example the Lockerbie case or the NATO Status of Force Agreement 1951.

international law is primarily territorial, the European Court of Human Rights in *Bankovic v. Belgium*[32] said:

> "As to the ordinary meaning of the relevant term [i.e. jurisdiction] in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the *jurisdictional competence* of a State is primarily territorial. While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant state."[33]

The Court continued:

> "Accordingly, for example, a State's competence to exercise jurisdiction over its own nationals abroad is subordinate to that State's and other State's territorial competence...In addition, a State may not actually exercise jurisdiction on the territory of another State without the latter's consent, invitation or acquiescence."[34]

Lord Macmillan, deriving territorial jurisdiction from a state's sovereignty said:

> "It is an essential attribute of the sovereignty of this realm, as of sovereign independent states, that it should possess jurisdiction over all persons and things within its territorial limits and in all causes, civil and criminal."[35]

32- *Bankovic v. Belgium* (2001) No. 52207/99, B.H.R.C.
33- Harris D J, *Cases and Materials on International Law*, Sweet & Maxell, London, p. 282.
34- Ibid.
35- Tandon L N, *International Law*, West Wiew, UK, 1990, p. 234.

The principle quoted above is said to have emerged from an Anglo-American context due to the lack of inter-state mobility and presence of water enclosures. Continental countries, however, have depended more on broader jurisdictional principles due to frequent movement of individuals between states.

a) Territorial principle in civil matters

The right of a country to exercise jurisdiction in civil matters on the basis of the presence or residence of the defendant within its territory, or prosecution for offences committed upon its soil, is only a natural result of an international system based on independence and territorial sovereignty of member states. However, at times it has been too narrowly interpreted as it is evident by the following opinion of judge J B Moore in the Lotus case:

> "It is an admitted principle of international law that a nation possesses and exercises within its own territory an absolute and *exclusive* jurisdiction and that any exception to this right must be traced back to the consent of the nation either express or implied."[36]

This may be valid to a degree in 1927, but it is a narrow view of the principle in the modern age. As discussed earlier, 'exclusive jurisdiction' is not as 'exclusive' as the name suggests. Even in the days of Justice Moore, British courts exercised jurisdiction over British nationals in respect of treason, murder, bigamy etc. irrespective of the location of the crime.

In civil matters, it is very rare for jurisdiction to be enforced by applying the sanctions of criminal law. Moreover, the issue of jurisdiction in civil rarely matters other

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36- *Lotus Case*, France v. Turkey (1927), P.C.I.J Reports, Series A, No.10, Harris D J, *Cases and Material on International Law*, p. 268.

states. Due to this some writers suggest that in civil matters international law does not play any role in describing the jurisdiction of courts.[37]

In common law countries, jurisdiction in civil matters can be said to be territorial in the sense that the usual basis for jurisdiction in civil cases is the service of a writ upon the defendant present at the time within the country, even if his presence is transient.[38] While in continental countries, the issue of jurisdiction depends on the nature of the case. Normally, the basis for jurisdiction is the habitual residence of the defendant within the state.[39] However, Denmark, Holland and Sweden also allow jurisdiction if the defendant possesses assets in the state. Here again, the presence of objects within the territory of the state is regarded as the basis of jurisdiction rather than the nationality of the defendant.

The Brussels Convention of 1971 puts some light on the basis of jurisdiction in civil law cases in the EU. Article 2 of the Convention states: "Subject to provisions of this Convention, persons domiciling in the Contracting State shall, ***whatever their nationality***, be sued in the courts of that State."[40] Thus in as far as domicile forms the basis of jurisdiction, there is an overlap with the principle of territoriality. The Article continues: "Persons ***who are not nationals*** of the state in which they are domiciled shall be governed by the rules of jurisdiction applicable to that state."[41] Article 5 of the Convention defines the situations in which a person domiciled in a contracting state may be sued in another contracting state. This is discussed under the heading of 'special jurisdiction', but indicates that the basis of jurisdiction is the habitual presence of the defendant within the territory of the state claiming jurisdiction. For example, in relations to contracts of employment, the Article says:

37- Malcolm N Shaw, *International Law*, p458, Akehurst, *Jurisdiction in International Law*, p. 171.
38- Ibid.
39- Ibid.
40- Article 2, Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1971.
41- Ibid.

"A person domiciled in a Contracting State may, in another Contracting State be sued:

(1) in matters relating to a contract, in the courts for the place of performance of the obligation in question; in matters relating to individual contracts of employment, *this place is that where the employee habitually carries out his work...*"[42]

Regarding maintenance the section continues:

(2) "in matters relating to maintenance, in the courts for *the place where the maintenance creditor is domiciled or habitually resident...*"[43]

Similarly, in relation to torts, the basis of jurisdiction is the location where the tort was committed:

(3) "in matters relating to tort, delict or quasi-delict, in the courts for *the place where the harmful event occurred.*"[44]

The same principle of jurisdiction based on domicile or location of the occurrence in dispute is applied to trusts, agencies, payment of remunerations and claims of damages and restitution.[45]

If we define the principle of territoriality as determining jurisdiction with reference to the place where the dispute arose or the offence occurred, then it seems that the basis for jurisdiction in commercial matters within the EU is territorial. It must be noted, however, that the Convention does not apply to wills, succession, matrimonial cases, bankruptcy, social security, the status of natural persons and arbitration.

Similarly, the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, which came into force in 1979 in the EU, provides territorial grounds for establishing jurisdiction. Subsection 1 and 4 of Article

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42- Article 5, Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1971.
43- Ibid.
44- Ibid.
45- Ibid.

10 of the Convention in relation to contractual obligations and torts reinforce the principle of territorial jurisdiction. Article 10 reads:

"The court of the State of origin shall be considered to have jurisdiction for the purposes of this Convention –

"(1) if the defendant had, at the time when the proceedings were instituted, his habitual residence in the State of origin...

"(4) in the case of injuries to the person or damage to tangible property, if the facts which occasioned the damage occurred in the territory of the State of origin, and if the author of the injury or damage was present in that territory at the time when those facts occurred..."[46]

Again, jurisdiction is established with reference to the location where the defendant was domiciled or where the dispute in question, such as a tort, occurred. Therefore, jurisdiction in civil cases tends to be territorial. But there are enough exceptions to this principle, in commercial matters, torts, matrimonial cases, succession, and wills etc. to prevent us from claiming that territoriality is the sole basis of jurisdiction in civil law. It is also common for courts to claim different jurisdiction similar cases, each basing its jurisdiction on different grounds.

b) Territorial principle in criminal matters

In criminal law, the reasons of close connection between a state's territory and jurisdictional competence are obvious. In this regard, Glanville Williams says:

> "There are solid reasons...for the general principal that criminal jurisdiction is linked with territory. (1) The state where a crime is committed generally has the strongest interest in punishing it. (2) It is

[46]- Article 10, Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, 1979.

in this state that the offender is likely to be found. (3) Generally, the local forum is the most convenient one, since the witnesses are probably there. (4) Legal systems differ from one another, and it would be vexatious if, say, an Arcadian visiting London had to obey two systems of law, English and Arcadian."[47]

However, this convenience may not be applicable in a wide variety of situations, especially where the interests of another state are closely involved. In those cases, jurisdiction may be claimed by states other than where the offence was committed and on more acceptable grounds, such as the effects doctrine. However, it is enough to say that the majority of criminal prosecutions occur on the basis that the crime was committed within the territory of the state. This is the principal ground for claiming jurisdiction, although not the exclusive one, as the following example shows:

An Englishman and an Italian murder a German in Denmark. So long as they are in Denmark, they can be arrested by the Danish police and put on trial in a Danish court of law. Their presence in Denmark—the location of the offence—gives the Danish court jurisdiction over them irrelevant of them being non-Danish. England and Italy can demand the deportation of their respective citizens, but they cannot interfere in the trial. Germany too can claim jurisdiction on basis of the passive personality and therefore demand deportation of the Englishman and the Italian. If the Englishman and the Italian run away to England, the English courts can try the Englishman on the basis of **personal jurisdiction**, but cannot try the Italian for English courts have no jurisdiction over murders committed by foreigners abroad. The jurisdiction of the Danish court is **territorial**, while that of the British personal (i.e. based on nationality of the offender and not the location of the offence). If German courts claim jurisdiction, it will be on the basis of the **nationality** of the victim. Thus, jurisdiction,

47- Glanville Williams, 1965, quoted in Greig D W, *International Law*, Butterworths, London, 1976, p. 214.

though usually territorial, may have other grounds. Each state party that has a 'real and considerable' connection to the situation may find reasonable grounds for jurisdiction.

The territorial concept not only include the situation described above, wherein the offence in its entirety was committed on the territory of a single state, but also situations where only a part of the offence has been committed on the territory of a state. Thus where a person fires a gun on the Spanish side of the border, killing a Portuguese on Portugal's soil, both states may claim jurisdiction. The state where the crime commenced is said to have jurisdiction under the **'subjective application'** of the territorial principle, while the other state has jurisdiction under its **'objective application'**. The Harvard Research Draft Convention of 1935,[48] while defining the grounds for territorial jurisdiction, recognized both its objective and subjective applications. Therefore the state may use territorial jurisdiction when a crime is committed 'in whole or in part' in its territory. According to the authors of the Draft Convention, a crime is said to have been committed in part within the territory 'when any essential element is consummated there'. Therefore, both, the state where the crime was initiated, and the state where the effect of the crime was felt, may claim jurisdiction.

[48]- According to Harris "The Convention was the unofficial work of a number of American lawyers. It is not binding upon any state as a treaty and it is not state practice." (Harris D J, *Cases and Materials on International Law*, p. 265) However, it has much to recommend it given the fact that it is an exhaustive study of customary international law preceding it.

1.4 Subjective and Objective Territorial Principle

(1) Subjective territorial principle

According to this principle, a state may claim jurisdiction over crimes commenced within its territory but completed abroad, or where any part of the crime was initiated within its territory but completed outside of it. The state where the crime was initiated may prosecute the offender for committing introductory acts. But as a fact this jurisdiction is optional, so states generally avoid claiming it unless a clause in the penal code specifically gives jurisdiction over introductory acts. Thus in the above example, Spanish courts may try the Spanish citizen for the offence of murder or manslaughter on the basis of subjective territoriality. However, if the court chooses to try for unlawful possession or use of firearms and not for murder or manslaughter, it will not be regarded as a claim to jurisdiction based on subjective territoriality, because the said offence was completed within Spanish territory. Murder or manslaughter was partly committed on Spanish territory for which subjective territoriality can be relevant.

The operation of the subjective territorial principle is best highlighted in *Treacy v. D.P.P*[49], where the appellant had written and posted in the Isle of Wight a letter addressed to Mrs. X in West Germany 'demanding money with threat'. Mrs. X received the letter in West Germany and chose to inform the English police instead of the West German police.[50] The appellant was subsequently arrested and charged under s. 21 (1) of the Theft Act, 1969, which provides that "a person is guilty of blackmail, if, with a view to gain, he makes unwarranted demand with menaces." Since the emphasis was on the demand (and not the 'uttering' of the demand) a controversy began in the Court of Appeal as to when a demand could said to be 'made'. The view accepted by the House of Lords was that a demand is made once it is uttered, irrespective of where and when it might be received. Lord Diplock strongly objected to the idea that "the existence in

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49- *Treacy v. Director of Public Prosecutions* (1971) A.C. 537.

50- If the case had gone on trial in Germany, the West German court would have probably relied on Objective Territoriality to claim jurisdiction.

jurisdiction in the courts of one state to try the accused for a particular crime" excluded "the jurisdiction of the courts of any other state to try the accused for his physical acts which either alone or in conjunction with their consequences constitute the crime defined." He added "it would be an unjustifiable interference with the sovereignty of other nations over the conduct of persons in their own territories if we were to punish persons for conduct which did not take place in the United Kingdom and had no harmful consequence there." According to Lord Diplock, there was no principle of international comity "to prevent parliament from prohibiting under pain of punishment persons who are present in the United Kingdom, and so owe local obedience to our law, from doing physical acts in England, notwithstanding that the consequences of those acts take effect outside the United Kingdom."[51]

However, that there are circumstances where the state where the crime was initiated has an obligation to punish the accused. Examples for this include counterfeiting of currency[52], human trafficking and illicit drug trafficking[53].

(2) Objective Territorial Principle:

According to this principle, a state gets jurisdiction over the crime if any element of the crime is completed within its territory. Judge Moore explained this principle in his opinion in the Lotus case:

"It appears to be now universally admitted that when a crime is committed in the territorial jurisdiction of one state as the direct result of the act of a person at the time corporeally present in another state, international law, by reason of constructive presence of the offender at the place where his act took effect, does not forbid the

51- Greig D W, *International Law*, p. 217.
52- See Geneva Convention for the Suppression of Counterfeiting of Currency (1929).
53- See Geneva Convention for the Suppression of Illicit Drug Traffic (1936).

prosecution of the offender by the former state, should he come within its territorial jurisdiction."[54]

There are three things to note in this statement of the objective territorial principle. First, the act committed abroad must have produced a harmful effect in the territory of the state claiming objective territoriality. Second, there must be a connecting relationship between the act (the firing of the gun in our example) and the harmful effect caused by it (death of the Portuguese man).[55] Third, the offender may be convicted by the state claiming objective territorial jurisdiction depending on the interpretation of the relevant municipal law, as illustrated by the case of R *v. Blythe*.[56] Where the accused in a letter written from Canada convinced a girl under the age of sixteen, living in the United States, to leave her father and join him in Canada. A prosecution started in Canada for the offence of 'taking a girl under the age of sixteen out of her father's control'. But as the offence was completed by the girl leaving her home—an event that occurred within the United States— so Canadian courts lacked jurisdiction to try the offence.

The case of R *v. Markus*[57] shows how slight differences in interpretation of a municipal law can affect the application of this principle. The defendant was the director of a British Company, which sold shares in a Panamanian fund to investors in West Germany. The company's agents in West Germany published brochures about future investors. Investments were made by initially sending an application form along with money to the company's offices in London. The brochures contained false and misleading information. The defendant was charged with the offence of misleading,

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54- *Lotus Case*, France v. Turkey (1927), P.C.I.J Reports, Series A, No.10, Harris D J, *Cases and Material on International Law*, pp. 268, 279.

55- That the harmful effect produced within the state claiming jurisdiction under this principle must have been a direct consequence of the act in the other state is also emphasized in the following definition of the principle by Hyde: "The setting in motion outside of a State of a force which produces as a direct consequence an injurious effect therein justifies the territorial sovereign in prosecuting the actor when he enters his domain." Therefore, for purposes of jurisdiction, there must be a real connection between the act and the injury caused thereby.

56- R *v. Blythe* (1895), C.C.C. 263.

57- R *v. Markus* (1974) All E.R. 705.

false and deceptive conduct, and thus making people *'take part or offer to take part in'* deals of property for the purpose of profits or income of the venture. The brochure was read and acted upon in West Germany. The question before the court was whether the offence took place in British jurisdiction. The defense argued that since the act of "inducing" took place outside of Britain, the court lacked jurisdiction. The court, however, was of the view that since the section referred to 'inducing a person to take part in a venture' and the 'taking part' was not complete until the form was filled and returned to London. Therefore, the offence was commenced in West Germany but completed in London and thus the defendant was convicted. However, as far as the offence of 'offering to take part in' was concerned, the offer was made in Germany, and therefore the court lacked jurisdiction for trying the defendant for making such an offer.

Extradition cases are often mentioned as evidence that where a defendant sets in motion events ending up in a crime in a state other than the state where the initial act took place, the general practice is to surrender him for trial to the state where the criminal act eventually took effect. Thus in *Hatfield v. Guay*[58], the Canadian government demanded the extradition of Mr. Hatfield on the ground that he was guilty of obtaining money by false information. Hatfield, in a statement made a fake claim before a Canadian Commissioner in Boston, U.S., for damages caused to his ship by a German torpedo. Extradition was granted, the Court observing that if there was evidence "reasonably tending to establish that Hatfield, through false and fraudulent statements set in motion in the United States, obtained the payment of money in Canada, the latter country has jurisdiction of the crime."

In the English case of R *v. Godfrey* (1923), the British police arrested the defendant on a warrant for his extradition to Switzerland. The Divisional Court accepted that the defendant could be charged in Switzerland with the crime of

58- *U.S ex. Rel. Hatfield v. Guay* (1935), decided by a US Federal District Court.

'obtaining by false pretences', which was committed, because of his initiation, by one of his partners in Switzerland. The court said that the defendant could be convicted in Switzerland if it was proved that he was responsible for setting in motion a sequence of events, which ended up in a criminal act taking effect in that country. The fact that he never left England or visited Switzerland was said to be irrelevant in deciding jurisdiction of Switzerland.

1.4.1 Distinction between the Objective Territorial Principle and the Effect Doctrine

The principle of objective territorial and the situations where conduct in one state produces adverse effects in another are different from each other. The classic statement of the effect doctrine in *US v. Aluminum Co. of America* (1945) covers situations such as the one mentioned above in *R v. Godfrey*. The Court observed:

> "...any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."

In Godfrey and similar cases, the defendant is usually a person not within the law of the state claiming objective territoriality and his conduct results in consequence within its borders. So what is the dividing line between the two principles? The distinction is that the jurisdiction in the objective territorial principle is concurrent, both states having an equal claim to jurisdiction, whereas in the effect doctrine jurisdiction is only for the state where the conduct took place. Secondly, the criminal act in the effect doctrine takes place entirely in one state and the other claims the jurisdiction. In the objective territorial principle, the act is normally initiated in one state and *takes effect*, i.e. consummated in another.

It is said that the cases illustrating the objective territorial principle only help to establish that in *normal practice*, jurisdiction is best left to the state where the crime takes effect. This does not in any way prove that such jurisdiction can be only for the state where the preparatory acts took place.[59] The case of *Treacy v. D.P.P* discussed earlier affirms this view.

59- Greig D W, *International Law*, Butterworths, London, p. 216.

1.4.2. Territorial Principle Applied on Sea: Prescriptive and Enforcement Jurisdiction

It should also be noted that the territorial principle covers crimes not only committed upon land but also upon the territorial sea and on the high seas. Interesting comments on the principle of territoriality are found in the Lotus case. In brief, on August 2nd, 1926, a collision occurred on the high seas between the French steamer Lotus and the Turkish steamer Boz- Kourt, resulting in the death of eight sailors and a passenger. When the French steamer arrived at Constantinople, the Turkish authorities arrested M. Demons, officer of the watch on board the Lotus at the time of the collision, as well as the captain of the Turkish steamer. France strongly protested against the arrest of its citizen. Turkey eventually agreed to submit the dispute to the Permanent Court of International Justice.

According to Article 15 of Lausanne Convention, which is signed both by Turkey and France, all questions of jurisdiction between the contracting parties had to be decided under the principles of international law. Thus the question before the Court was: what do the principles of international law say on this issue. The French argument was twofold. Firstly, that international law does not allow a State to take proceedings with regard to offences committed by foreigners abroad, and secondly, that international law recognized the *exclusive* jurisdiction of the State whose flag is flown on a ship on the high seas. In simple words: Turkey lacked jurisdiction. Therefore, if the incident did not occur within Turkish territory, as it obviously did not, then Turkey had to show the rule of international law, which justified its jurisdiction beyond its territory. The Court, commenting on the legality of the subject, said:

"International law governs relationship between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing

principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. *Restrictions upon the independence of States cannot therefore be presumed.*

"Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

"It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law...Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules...".[60]

In brief, although jurisdiction was primarily territorial in view of the court and States had an obligation not to exercise their enforcement jurisdiction in the territory of other States, but nothing prohibited the exercise of a State's prescriptive jurisdiction over acts, persons and property situated in the territory of another State. Within its territory a state could exercise jurisdiction, both prescriptive and enforcement, in respect of acts, which took, place abroad. Outside of its territory, it could still exercise prescriptive jurisdiction but had no right to exercise enforcement jurisdiction. In other

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60- *The Lotus Case*: France v. Turkey (1927), P.C.I.J Reports, Series A, No. 10, Harris D J, *Cases and Materials on International Law*, p. 269-270.

words, each State was independent in its own right as far this independence was consistent with that of other States, and no bar could be presumed on the independence of States unless its exercise interfered with the independence of other States. Moreover, the original rule for jurisdiction was permissibility, unless a positive rule of international law could justify otherwise. States, according to the Court, had wide powers at their discretion, which could only be limited in specific cases by demonstrating proof of a prohibitory rule of international law. The burden of proof was therefore not on Turkey to establish its jurisdiction, but on France to show a positive rule of International law, which limited Turkey's jurisdiction.

Commenting on unrestricted 'independence of states' mentioned by the Court above, Brierly states:

"...their reasoning was based on the highly contentious metaphysical proposition of the extreme positivist school that the law emanates from the free will of sovereign independent States, and from this premise they argued that restrictions on the independence of States cannot be presumed."[61]

One cannot blame the courts for following what was the popular current of legal thought in their day. However, it is confusing how one can figure out from the fact of sovereignty or independence either an absence of restrictions or the law applicable to a given set of facts, as chains are missing to connect the basis of independence to the conclusion reached by the Court.

Briely then discusses the historical roots of penal jurisdiction, which shows that the Courts view as if based more on legal fiction than historical fact:

"Further, the reasoning of the majority seems to imply that the process by which the international principles of penal jurisdiction have been formed is by the imposition of certain limitations on an originally

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61- Harris D J, *Cases and Materials on International Law*, p. 278.

unlimited competence, and this is surely historically unsound. The original conception of law was personal, and it was only the rise of the modern territorial State that subjected aliens—even when they happened to be resident in a State not their own—to the law of that State. International law did not start as the law of a society of States each of omni competent jurisdiction, but of States possessing a personal jurisdiction over their own nationals and later acquiring a territorial jurisdiction over non-nationals." [62]

Thus, according to Brierly, jurisdiction is originally personal, and has only lately become territorial, with the rise of the territorial states. This contrasting view arouses doubts about the basis of territorial jurisdiction. It means that the jurisdiction to non-resident non-nationals must be made by a proof of a valid custom of international law. This not only limits the grounds of jurisdiction, but it also reverses the burden of proof, putting it on the State claiming extra-territorial jurisdiction over non-nationals. Thus, according to Brierly, French objections to Turkish claims of jurisdiction were valid.

The Court summarizing the two views of jurisdiction said that one view advocates the principle of freedom, by which each State may legislate at its own discretion, as long as it does not conflict with a restriction imposed by international law. Whereas the other views jurisdiction as being territorial, which prevents States from extending Criminal jurisdiction of their courts beyond their frontiers. Exceptions of extra-territorial jurisdiction over nationals or over crimes concerning public safety therefore have to rest on special rules.[63]

In an amusing rejection of the latter point, the Court turned the entire French argument on its head:

62- Ibid.

63- *The Lotus Case*: France v. Turkey (1927), P.C.I.J Reports, Series A, No. 10, Harris D J, *Cases and Materials on International Law*, p269-270.

"...it must be recognized that, in the absence of a treaty provision, its correctness depends on whether there is a custom have the force of law establishing it. The same is true as regards the applicability of this system—assuming it to have been recognized as sound—in the particular case."

Supporting the view that penal jurisdiction was generally territorial, but not exclusively so, the Court argued:

"Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all of these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty."[64]

Regarding the claim of jurisdiction of the flag state over its vessels, the French government, although able to prove that jurisdiction normally followed the flag, was unable to prove that this jurisdiction was exclusive. Moreover, acts committed on the Lotus had resulted in harmful effects on the Boz-Kourt, the Turkish steamer, which was held by the Court to be an extension of Turkish territory. And the application of Turkish law on Turkish territory could in no way be challenged. It must be noted that the High Seas Convention, 1958, has rejected the view that the public-vessel of a state is part of its territory. Moreover, Article 11 (1) of the Convention stipulates that jurisdiction over sailors regarding incidents occurring on the high seas may be claimed only by the flag state or the state of which the alleged offender was a national.

64- Ibid.

Moreover, the view held on the issue of jurisdiction by the P.C.I.J in the Lotus case has been subjected to heavy criticism. The idea that states possess wide discretionary powers which can only be limited by a positive rule of international law prohibiting the action concerned is not preferred. Today the general view is the other way around. Therefore, the jurisdiction can only be claimed by reference to customary state practice, convention or a positive rule of international law.[65]

65- See e.g. the views pronounced in the *Anglo-Norwegian Fisheries Case* (1951).

CHAPTER TWO

JURISDICTION IN ISLAMIC LAW

2.1 *THE CLASSICAL ISLAMIC VIEW OF STATEHOOD*

2.1.1. The classical division of territory into *Dar-ul-Islam* and *Dar-ul-Kufr*

The most famous classical view of *Fuqah'a* الفقهاء is of the binary division of the land into what is known as *Dar-ul-Islam* [66] دار الإسلام and *Dar-ul-Kufr* [67] دار الكفر. As a start for this discussion we will try to arrive at a unanimous definition of these two abodes in the light of the views of the earlier *Fuqah'a*.

The first definition in this context is of *Imam Abu Yousuf* (RA) who says that:

> "The *Dar* الدار is considered *Dar-ul-Islam* when the Islamic laws become evident in it even if most of its population consisted of infidels, and it is considered *Dar-ul-Kufr* when infidel laws become evident in it even if most of its population happened to be Muslim".[68]

Kasani (RA) confirming it says:

> "There is no difference among our fellows that *Dar-ul-Kufr* converts into *Dar-ul-Islam* by the manifestation of Islamic laws in it".[69]

While *Abdul Qadir Al-Baghdadi* (RA) explains the same in another way, saying:

> "Any *Dar* in which Islam الإسلام is propagated by the people of the *Dar* themselves without any fear or protection of others or payment of any tax, and where the by-laws of the Muslims are imposed on the *Zimmis* الذميون -in case there was any *Zimmi* amongst them- and where *Ahl-ul-Bid'ah* أهل البدعة do not

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[66] The Land of Islam

[67] The Land of Disbelief

[68]- Abu Bakr Muhammad b. Ahmad b. Abu Sahl al Sarakhsi, *Al Mabsoot*, Dar Ihyaa al Turaath al Arabi, 3rd Ed. 2000, Beirut, v. 10 p. 144.

[69]- Alauddin Abu Bakar b. Masood al Kasani al Hanafi, *Badaa'e al Sanaa'e*, Darul Kutub al Ilmiyyah, Beirut, 2nd Ed. 1986 v. 7 p. 130.

suppress *Ahl-u-Sunnah* أهل السنة, is *Dar-ul-Islam*. And if the facts are opposite to what we have mentioned then it will be *Dar-ul-Kufr*".[70]

And *Imam Rafi'ee* (RA) makes it more clearly by stating that:

"The presence of Muslims is not a condition for the *Dar-ul-Islam*, instead it is enough for it to be in the hands of the *Imam* الإمام and that the *Imam* should be Muslim".[71]

While *Imam Ibn-Hazm (RA)* gives the reason for this division by saying:

"...Because the *Dar* is associated with the one who dominates it, has control over it and owns it".[72]

And *Ibn- Qayyem (RA)* while mentioning the view of the *Jamhoor* says:

"*Dar-ul-Islam* is the one in which the Muslims live and where Islamic laws are established, and where these laws are not established, it is not *Dar-ul-Islam* even if it was adjacent to it".[73]

And *Ibn-Murtaza Az-Zaidi (RA)* says:

"*Dar-ul-Islam* is in which the two testimonies (testimony of oneness of Allah and of messenger ship of Prophet Muhammad (peace be upon him) and the prayers are manifested, and where no infidel characteristic is apparent, not even with any sort of interpretation, except by the protection of Muslims or their contract of *Zimma* الذمة and *Istiman* الإستئمان. And *Dar-ul-Harb* دار الحرب is a

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70- Abdul Qahir b. Tahir al Baghdadi, *Kitab Usul al Deen*, Matba'ah Abdullah, Istanbul, 1246 A.H. p. 270.
71- Abdul Kareem b. Muhammad b. Abdul Kareem b. al Fazal al Qazweeni al Rafa'ee, *Al Fath al 'Azeez*, al Maktabah al Salafiyyah, 1399 A.H., v. 8 p. 14.
72- Abu Muhammad Ali b. Ahmad b, Saeed b. Hazam, *Al Muhalla bi al Athaar*, Dar al Afaq al Jadeedah, Beirut, v. 11 p. 300.
73 - Muhammad Ibn Qayyim al Jawjiyah, *Ahkam Ahl al Zimma*, Beirut, 2002, v. 1 p. 66.

place where the glory is for the infidels and they are not subjugated to Muslims by *Zimma*".[74]

Commenting on it *Imam Shawkani (RA)* says:

"The base for it is the supremacy of the word, so if the order and omission in a *Dar* is for the Muslims in such a way that any infidel present there cannot show his infidelity except for what he is allowed for by the Muslims, the *Dar* is *Dar-ul-Islam*. In such a case the appearance of the infidels' characteristics in it does not harm because it did not happen due to their power or their say, as it is evident in the case of *Zimmis* of the Jews and the Christian and those treaty holders who are living in the Muslim cities. But if the situation is reversed then (the status of) the *Dar* is also reversed".[75]

From the above quoted definitions we can conclude a principle; that *Dar-ul-Islam* is a place where the Muslims are dominant and the Islamic laws are imposed, and on the contrary to this the place where Islamic laws are not imposed is not considered as *Dar-ul-Islam* even though it may be adjacent to *Dar-ul-Islam*.

74- Mahdi Ahmad b. Yahya Ibn al Murtaza al Husainy, *Uyoon al Azhaar*, Dar al Kitab al Labnani, Beirut, 1st Ed., v. 4 p. 528,551.

75- Muhammad b. Ali b. Muhammad al Yamani al Shawkani, *Al Sayel al Jarrar al Mutadafiq ala Hadiq al Azhar*,, Darul Kutub al Ilmiyyah, Beirut, 1st Ed., v4 p546.

2.1.2 The status of the deviated *Dar-ul-Islam*

Nevertheless it is worthy to note that all of the *Fuqah'a* in their works consider even *Dar-ul-Baghi* دار البغي as a part of *Dar-ul-Islam*. And similarly the *Ahnaf* الأحناف consider any occupied territory of *Dar-ul-Islam* which is adjacent to the unoccupied *Dar-ul-Islam*, or wherever the Muslims are living under the first *Am'an* (their indigenous protection which is not dependent on the infidel laws) as *Dar-ul-Islam* as well.[76]

This is entirely opposite to what some of the modern Muslim scholars declared that all such Muslims states are *Dar-ul-Kufr* or *Dar-ul-Harb* because these states do not impose Islamic laws. But a deep look into the early *Fuqah'as*' views make it clear that although they considered such lands as *Dar-ul-Islam* they actually differentiated between that *Dar* which was initially established as *Dar-ul-Islam* and remained so and that *Dar* which was converted from it in any form.

From their views we derive that initially to declare any *Dar* as *Dar-ul-Islam* it is compulsory to implement Islamic laws in it. That is why Imam *Sarakhsee* (RA) says: "A territory does not convert to *Dar-ul-Islam* only by conquering it without the imposition of the Islamic laws"[77]. But they see that once a territory is declared as *Dar-ul-Islam* then temporary deviation of the rulers regarding the imposition of Islamic laws does not convert it back to *Dar-ul-Harb*. And it is the role of domestic laws to keep the rulers and the government on the right path. These laws are mentioned in *Fiqh* الفقهliterature in the chapters regarding *Khurooj* الخروج and insurgencies. These domestic laws have mentioned many steps to keep the government on the right path for example; positive criticism *(amr bil maroof* and *nahi anil munkar* الأمر بالمعروف والنهي عن المنكر), civil disobedience and armed conflict.

They also differentiate between what we can call a real and true *Dar-ul-Islam* and a nominal *Dar-ul-Islam*. By real and a true *Dar-ul-Islam* we mean a land where Islamic laws are

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[76] - *Badaa'e al Sanaa'e*, v. 7 p. 130.
[77] - *Al Mabsoot*, v. 10 p. 27

imposed by a Muslim ruler, whereas a nominal *Dar-ul-Islam* is that *Dar* which is occupied by the infidels but where the Muslims are in majority and still living with their first *Am'an*, or which is adjacent to a true *Dar-ul-Islam* even though the Muslims are not in majority. They consider these places as nominal *Dar-ul-Islam* because of the absence of the Islamic laws and the Muslim ruler, but for legal purposes they still categorize them as *Dar-ul-Islam* in general. The reason is that a strong possibility exists that these places convert back to a real *Dar-ul-Islam* due to the majority of the Muslim population in some of them or due to the adjacent location of the others to the real *Dar-ul-Islam* from which the Muslims can invade and liberate them, and if so the status of these *Dars* and thus the laws concerning their subjects cannot be changed till a definite situation is established.

It is easy now to understand what *Imam Abu Hanifa (RA)* meant by his statement regarding the conversion of *Dar-ul-Islam* to *Dar-ul-Harb*. He said that a *Dar-ul-Islam* may be converted to *Dar-ul-Harb* if all of the following three conditions are fulfilled:

1. If Un-Islamic laws are imposed.
2. If it is adjacent to *Dar-ul-Harb*.
3. If the Muslims are not protected by the first protection (*Aman*).[78]

Imam Sarakhsi (RA) commenting on these conditions says that actually the *Imam(RA)* kept in mind the status of absolute domination which is not possible without these three conditions. So if the territory is adjacent to *Dar-ul-Islam* it means that Muslims can any time overthrow its government. Similarly if Muslims are protected by the first *Am'an* it means that the domination of infidels is not effective.[79]

But when the deviation of *Dar-ul-Islam* from its founding principles reaches a point where the hope of its revival becomes a dream, or in other words the deviation becomes permanent, then International Islamic law plays its role and declares that state as *Dar-ul-Harb*.

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[78] - Kasani, *Badaa'e al Sanaa'e*, v. 7 p. 132.
[79] - Sarakhsi, *Al Mabsoot*, v. 10 p. 73.

In other words the *Fuqah'a* consider any *Dar-ul-Islam* as *Dar-ul-Islam* as long as the deviation is temporary in nature, but as and when it becomes permanent then it is declared *Dar-ul-Harb.*

Again we conclude that *Dar-ul-Islam* is a place where both of the following conditions or any one of them is found; the domination of the Muslims and the capacity to impose the Islamic laws.

2.1.3 The role of the society and the government in maintaining the status of the *Dar*

This debate leads us to another important issue; it is not the character of the government only which plays a role in declaring a land *Dar-ul-Harb* or *Dar-ul-Islam* but it is the nature of its society also. So if a society is an Islamic society and most of the Islamic laws are followed by the Muslims in general then the status of that land is of *Dar-ul-Islam.* And if so then the minor deviations of the government are not important because it is expected from a Muslim society that they will stop the government from its corruption and if not they may even remove the government.

However when the society reaches a level where most of the Islamic laws are violated or where the majority of the people are not Muslims then it is the government which plays a major role. So if the government is imposing Islamic laws and the rulers are Muslims themselves then it is *Dar-ul-Islam that* is because the government is expected to put the society on the right path by its power.

2.1.4 The conversion of Dar-ul-Islam to Dar-ul-Harb

There are four different views about the permanent conversion of *Dar-ul-Islam* to *Dar-ul-Kufr.*

The **first opinion** is that once a *Dar* becomes *Dar-ul-Islam* then it does not ever convert back to *Dar-ul-Kufr*. This view was chosen by some of the *Shafa'ees* الشافعيون and the *Imamiyah* الإمامية. *Ibn-Hajar (RA)* says that once a place is declared as *Dar-ul-Islam* it can never become an absolute *Dar-ul-Kufr*.[80] And *Imam Nawawee (RA)* is of the view that the *Dar* where Muslims lived once and from which they were expelled later on and over which the infidels have control now, is still *Dar-ul-Islam*.[81]

This shows that a previous domination is enough for the continuity of the status of *Dar-ul-Islam*. However the later jurists retreated from this opinion. So *Imam Nawawee(RA)* himself stated that he saw some later jurist reconciling from their positions and said that if the Muslims were not stopped from going there then it is still *Dar-ul-Islam* otherwise it is *Dar-ul-Kufr*.[82]

The **second opinion** is that *Dar-ul-Islam* becomes *Dar-ul-Harb* only by the imposition and appearance of non-Islamic laws. This view was chosen by *Imam Abu Yousuf (RA)*, *Imam Muhammed* (RA), the *Hanbalis* الحنابلة and some of the *Zaidis* الزيديون and the *M'utazilas* المعتزلة.[83] There argument is as follows:

1. Appending of *Dar* to Islam demands that Islam should be apparent there, and the appearance of Islam is only possible by imposition and establishment of Islamic laws.[84]

2. When a *Dar* becomes *Dar-ul-Islam* only by imposition of Islamic laws, so similarly any *Dar* can become *Dar-ul-Harb* only by imposing non-Islamic laws.[85]

3. Appending the land to the Muslims or to the non-Muslims is based on power and dominance, so the appearance of infidel laws in a place show that the infidels are in power, and hence the place is *Dar-ul-Harb*.[86]

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80 - Shamsuddin Muhammad b. al Abbas Ahmad b. Hamzah al Ramli, *Nihayat al Muhtaj*, v. 9 p. 268-269.
81 - Yahya b. Sharf al Nawawee, *Rowzat al Talibeen*, Damascus, 1980, v. 5 p. 433.
82 - Ibid. v. 5 p. 434.
83 - Kasani, *Badaa'e al Sanaa'e*, v. 7 p. 130, Sheikh Abdur Rahman b, Nasir al Saadi al Hanbali, Daral Hayat, Damascus, 1st Ed., *al Fatawa al Saadiyah*, p. 92, Abdullah b. Abul Qasim, *Sharh al Azhar*, Cairo, 1388 A.H., v. 4 p. 752.
84 - Kasani, *Badaa'e al Sanaa'e*, v. 7 p. 130.
85 - Ibid. v. 7 p. 130.
86 - Sarakhsi, *Al Mabsoot*, v. 10 p. 39.

The **third opinion** was adopted by the *Malikis* المالكيون and later on by the *Shafa'ees* and *Abadhiyah,* (الإباضية) which states that *Dar-ul-Islam* will not be changed into *Dar-ul-Harb* only by the imposition of non-Islamic laws or by overcoming of infidels as long as the Muslims can live over there and defend their *Deen* الدين and can perform some of the Islamic *Sha'aair* شعائر (symbolic actions) like *Azan* الأذان and *Jumm'ah* الجمعة and *Eid* العيد prayers.

Ibn-u-Arafa Al-Dasooqi (RA) says that *Dar-ul-Islam* does not convert to *Dar-ul-Harb* by the take-over and overcoming of infidels as long as the signs and symbols of Islam are found there.[87] And when *Imam Ramli(RA),*a *Shafa'ee* الشافعي jurist was asked about migration from Argon -a place in Spain where Muslims were spending their lives performing their prayers in the mosques and exhibiting the Islamic *Sha'aair* openly but ruled by a humble Christian ruler to whom they paid *Kharaj* الخراج according to their capacity- was it obligatory or not? He answered that Muslims are not bound to migrate from that place because they can perform their religious duties openly and also because the Prophet (peace be upon him) sent Usamah to Makkah on the day of *Hudaibiyyah* يوم الحديبية because he was able to practice his religion openly. Furthermore it is possible that their stay will be a cause for others to become Muslims; and also because it is *Dar-ul-Islam* and if they migrate from it, it will become *Dar-ul-Harb.*[88]

The **fourth opinion** is of *Imam Abu-Hanifa* (RA) -as it was mentioned earlier- and some of *Zaidis,* according to them *Dar-ul-Islam* converts to *Dar-ul-Harb* only when the following three conditions are fulfilled:

1) The infidels' laws are manifested over there.

2) It is not adjacent to any part of *Dar-ul-Islam.*

3) The Muslims and the *Zimmis* are not protected by the first *Am'an.*[89]

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87 - Shamsuddin Sheikh Muhammad b, Ahmad b. Arafah al Dassoqi, *Hashiat al Dassoqi,* Cairo, 1230 A.H., v. 2 p. 188.
88 - Ahmed b. Muhammad b. Hajar al Haithami, *Al Fatawa al Kubra,* Cairo, 1378, v. 4 p. 52-54.
89 - Kasani, *Badaa'e al Sanaa'e,* v. 7 p. 130, Ahmad b. Yahya al Murtaza, *al Bahr al Zakkhar,* Matbaah Dar al Sa'adah, Egypt, 1st Ed. 1948, v. 3 p. 301.

2.2 STATUS OF THE MODREN ISLAMIC CONSTITUTIONAL STATES IN VIEW OF MUSLIM SCHOLARS

There are two streams of thoughts about the status of the contemporary constitutional Islamic states. One is the natural flow of those scholars who give importance to the view of the earlier classical *Fuqah'a* and consider it an authentic interpretation of the Islamic law. They do not accept the relatively new concept of the legal personality of the state and believe that these modern states do not fulfill even the minimum requirements of *Dar-ul-Islam*, and thus all these states are *Dar-ul-Harb* in their view.

On the contrary, those scholars who have accepted the legal personality of the state -by analogy over trust property-[90], and accepted the basic role of the common man in making and dissolving of the government -by interpreting the verse (وأمرهم شورى بينهم) as consultation with all the citizens of the state-[91], and accepted the concept of more than one Muslim state, and furthermore have agreed upon the theory of *Talfeeq* التلفيق in Islamic law, thereby extending the rule of *Al-Ibaha Al-Asliyyah* الإباحة الأصلية for the Islamization of laws[92]; for them the only qualification of *Dar-ul-Islam* is that it should be written in the constitution of the state that the *Shari'ah* الشريعة will be the supreme-most. However, a state where sovereignty belongs to the common man and the parliament is considered as *Dar-ul-Harb* by these scholars.

But keeping the ground realities in view this issue is not so simple, particularly where the state has accepted the supremacy of *Shari'ah* nominally while in practice sovereignty has been given to the parliament or to a dictator, and where it prosecutes those who demand the supremacy of the constitution. Furthermore in many states special systems are designed and imposed under which it becomes impossible for the common man to use his free will to select a good Muslim *Khalifah* الخلافة. And the situation becomes more serious and complicated where

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90 - Mustafa Ahmad al Zarqa, *Al Madkhal al Fiqhi al Aam*, v. 3 p. 287

91 - Maududi, Abul 'Ala, *Islami Riyasat*, Islamic Publications, Lahore, 20th Ed., p. 398.

92 - See the Reports of the Council of Islamic Ideology.

the majority of the population is Muslim but due to their ignorance or false propaganda they, by their own free will, select those people as their rulers whose lives are spent opposing Islam.

This situation made the above two streams to flow in entirely opposite directions. The later mentioned scholars on one hand consider the state as a *Fasiq* الفاسق Muslim or in other words a deviated *Dar-ul-Islam*. According to them the addition of the clause of the supremacy of *Shari'ah* in the constitution means that the state has become Muslim in principle, and now it is the responsibility of the people to make it a true Muslim state. Just as the non-practicing Muslim is not punished with death, this deviated *Dar-ul-Islam* is not to be abolished.

On the other hand, the earlier mentioned scholars consider this philosophy as the root cause and base for all evils in the Muslim countries,[93] but they themselves then face serious problems which need to be solved. If they declare these countries as *Dar-ul-Harb* (while most of its population is Muslim) what will they do about Islamic laws (*Ahakam* الأحكام) dealing with *Dar-ul-Harb* (particularly according to *Hanafi* الحنفي School)? And if they declare these countries to be *Dar-ul-Islam*, what will be the legal position of those people who are in power and oppose the implementation of Islamic laws. Will they be considered as *Fasiq* فاسق, *Baghi* باغي or *Murtad* مرتد?

To get away with this problem is it possible to accept the concept of a mixed *Dar* as *Ibn-Taimiyah (RA)* did?[94] Or a third *Dar* likes *Dar-ul-Fisq* دار الفسق of the *Zaidiyah*?[95]

The answer will be no, because to ascertain the legal relations with the people of a particular area and to determine their rights and duties it is necessary for that territory to be considered either *Dar-ul-Islam* or *Dar-ul-Harb*.

Amongst the new scholars *Taqyy-ud-Din al Nabahany(RA)*has tried to reconcile these different perspectives; although he declares that after the collapse of the institution of *Khilafa*

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93 - *Audio Lecture* of Dr. Javed Akbar Ansari, Karachi, December 2005
94 - Taqi ud Deen Ibn Taymiyah, *Majmoo al Fatawa*, Beirut, 1970, v. 18 p. 382.
95 - Shawkani, *Al Sayl al Jarrar*, v. 4 p. 546.

there in no *Dar-ul-Islam* and all of these modern Muslim national state are *Dar-ul-Harb,* but nevertheless they are *Bilad-ul-Muslimeen* (countries of Muslim majority). Thus their defense from alien enemies is obligatory on the Muslims. In his view *Khilafa* means a public government of all the Muslims of the world established for imposition of *Hukm-e-Shar'ee* (Islamic laws) and preaching of Islam to the rest of the world, which drives its capacity and power to order and impose Islamic laws from the *Ummah* (the Muslim nation).[96]

While *Abdul Qadir 'Awdah* considers all of the modern Islamic constitutional states as part of one *Dar-ul-Islam*, provided they accept the supremacy of *Sharia'h,* according to him it is not necessary for them to come under one *Khalifa.*[97]

[96] - Taqi ud Deen al Nabahani, *Muqadimat al Dastoor*, p. 128
[97] - Abdul Qadir 'Awdah, *Al Tashreeh al Jinaee al Islami*, Cairo, 1980, v. 1 p. 275.

2.3 STATUS OF THE MODERN NON-ISLAMIC CONSTITUTIONAL STATES IN VIEW OF MUSLIM SCHOLARS

While discussing the status of the contemporary non-Muslim states in view of contemporary Muslim scholars it is important to explain the new concept of *Dar-ul-'Ahd* which was introduced as a legal and a safe way out by some of them, as an emergency exit by others, and as a dead end yet by another group. This addition of *Dar* turns the classical binary classification to a tertiary one. But before explaining this third type we will take a look at the classical views about the similar terms.

2.3.1. Important rules for the discussion

But before we discuss the concept of *Dar-ul-'Ahd it* is necessary to briefly discuss the philosophy of the *Siyar* السير and explain some of the important terms used by the *Fuqah'a*. This will help us to determine exactly the meaning of a word or a paragraph used in their text which is related to our topic particularly when any ambiguity arises. It will also help us to give preference to a view over another, as any interpretation which is against the whole philosophy of the *Siyar* or that leads to a change in the well defined terms of the *Siyar* should be rejected. It will be very wrong to take a weak view and build a huge building of a new philosophy on it, which goes against the basic theme of the *Fuqaha*, and then claim that it is what the *Fuqaha* meant.

The correct method is to base the theory on the guidance of *Qur'an* and the conduct of the Prophet (peace be upon him) and his Companions, and not to attribute to the earlier *Fuqaha* in their interpretation of *Qur'an* and *Hadith* except what they really meant. Otherwise it will lead to confusion in the work of *Fuqah'a* and will be considered as a form of intellectual dishonesty.

2.3.2 The Concept of *Dar-ul-Muwada'a*

To make the concept of *Dar-ul-'Ahd* clear it is important to discuss all the names used for similar types of *Dar* in *Fiqh* literature among which *Dar-ul-Muwada'a* دار الموادعة is the most prominent one.

Although the earlier Muslims *Fuqah'a* classically mentioned only two *Dars*, *Dar-ul-Islam* and *Dar-ul-Harb*, but they also used a third term of *Dar-ul-Muwada'a* which was some time referred to as *Dar-ul-'Ahd* also. In their books *Dar-ul-Muwada'a* or *Dar-ul-'Ahd* were never mentioned as a separate third *Dar* instead both of these terms were only used to denote a special part or type of *Dar-ul-Harb* which entered into a contract of peace with *Dar-ul-Islam*.

Muslims *Fuqah'a* have also described the legality of this contract in detail. According to them this contract is only allowed if there is an extreme need for it[98], for example when the Muslims are in a weak position and they want to gain time for preparation, or when they are busy in active conflict with another enemy, or when they hope that the people of that *Dar* will embrace Islam, or that they will become subject of the Islamic state as *Zimmis* etc.[99]

The reason for this condition is that this contract leads to a cease of *Qital* القتال (jihad) which is a continuous and obligatory duty on the Muslims in their view. However if there is a need for it then it will be presumed that this temporary ceasefire is also a type of *Qital* (cold war) because it is a kind of preparation for it.[100]

Due to this reason majority of the *Fuqaha* do not allow this contract except in extreme circumstances and only for a limited period of time which may by for a maximum of ten years.[101] But the *Hanafi Fuqah'a* and *Ibn-Qayyim* from *Hanbalis* are of the opinion that there is no limit of

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98 - Kasani, *Badaa'e al Sanaa'e*, v. 7 p. 108.

99 - Ishaq al Shirazi al Fairooz Abadi, *Al Muhazzab*, Damascus, 1370 A.H., v. 2 p. 259-260, Muhammad al Shirbini al Khateeb al Shafa'ee, *al Mughni*, Dar Ihyaa al Turaath al Arabi, Beirut, v. 10 p. 517-519.

100 - Muhammad b. Ahmad b. Abu Sahl al Sarakhsi, *Sharh al Siyar al Kabeer*, Cairo, 1972, v. 5, p. 1689

101 - Muhammad b. Idrees al Shafa'ee, *Kitab al Umm*, Darl al Marifa, Beirut, 2nd Ed., v. 4, p. 189, Fairooz Abadi, *al Muhazzab*, v. 2, p. 259-260.

time and it totally depends on the state's interest[102]. However they agree with the majority that it is only allowed when there is a real necessity. For the *Ahnaf*, another reason of it being a temporary contract is that it is of the revocable type of contracts[103].

The ultimate result of their view is that the relation between Muslims and non-Muslims is permanently based on hostility and that peace is only a temporary state. This is why *Jassas* (RA) says that there is no way for the infidels except to become Muslims or second-class citizens (*Saghireen* صاغرين), provided that they belong to those categories which can become such type of citizens. If they do not belong to such a category then only the sword will decide their fate.[104]

2.3.3 The difference between Aqd-ul-Muwada'a, Istiman and Zimma

Aqd-ul-Muwada'a عقد الموادعة and *Istiman* are both contracts in which peace is given on temporary bases, but the difference is that a contract of *Muwada'a* can only be executed by the state while the contract of *Istiman* can be executed by any male adult Muslim citizen of *Dar-ul-Islam*[105]. Secondly the contract of *Muwada'a* according to opinion of the majority is limited to ten years time[106] and according to *Ahnaf* it can be for unlimited period of time[107], while the contract of *Istiman* according to all will not be for more than one year[108].

While the difference between the contract of *Zimma* and the other two is that this one is permanent while the above mentioned are temporary in nature[109]. Secondly by the contract of *Zimma* the *Zimmi* becomes a citizen of *Dar-ul-Islam*, and so he is bound by the Islamic laws while

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102 - Kasani, *Badaae al Sanaae*, v. 7, p. 106-107, Muhammad Ibn al Qayyim al Jawjiyyah, *Zad al Ma'ad*, Abridged Version compiled by Shaykh Muhammad b. Abdul Wahhab, Lahore, v. 3, p. 364.
103 - Sarakhsi, *Al Mabsoot*, v. 10, p. 87.
104 -Abu Bakr al Jassas, Ahkamul *Quran*, Cairo, 1366 A.H., v. 3, p. 189.
105 - Nawawee, *Rawzat al Talibeen*, v. 9 p. 90.
106 - Fairooz Abadi, *Al Muhazzab*, v. 2 p. 260.
107 - Kasani, *Badaa'e al Sanaa'e*, v. 7 p. 106-107.
108 - Nawawee, *Rawzat al Talibeen*, v. 9, p. 92.
109 - Kasani,*Badaa'e al Sanaa'e*,, v. 7, p. 106.

in the other contracts there is no such binding term. This means that without the acceptance of Islamic laws a *Zimmi* cannot remain a *Zimmi*. Thirdly *Zimmis* have to pay an annual pool tax.[110]

2.3.4 Types of Zimmis in view of Shafa'ees

However the great *Shafa'ee* jurist *Muzani (RA)* has mentioned two kinds of *Zimmis;* those who are living in *Dar-ul-Islam* and those who are not living in *Dar-ul-Islam*. The difference between the two is that the first group is bound to wear a particular type of cloths, which is known *Zinnar* الزنار, and is prohibited to adopt any fashion similar to that of Muslims. It is also prohibited for them to make new places of worship or renew the old ones. While the second type is not bound to any of these restrictions[111]. This categorization has created a kind of self-contradiction in *Shafa'ee* schools. For example on one hand they say that it is necessary for a *Zimmi* to pay the pool tax and he will be bound by Islamic laws[112]. And at the same time they say that the second types of Zimmis are not citizens of *Dar-ul-Islam*, which by itself means that they will not be bound by the Islamic laws. This criticism becomes evident when we see that they consider the *Kharaj* which paid by this second category of *Zimmis* and apply all the rules of *Jizyah* on it.الجزيةis

It should also be noted that a *Zimmi* can become an owner of a land in *Dar-ul-Islam*[113], so the ownership of a land is not a base for declaring a territory *Dar-ul-Islam* or *Dar-ul-Harb*. The basic thing for initially creating a *Dar-ul-Islam* is the imposition of Islamic laws and an effective control by the Muslims.

This discussion is important in view of what we will discuss later on about the concept of *Shafa'ees* concerning *Dar-ul-'Ahd*.

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110 - Nawawee, *Al Mubazzab*, v. 2, p. 253-257.
111 - Ibid. v. 2, p. 254-255.
112 - Ibid. v. 2, p. 253.
113 - Kasani, *Badaa'e al Sanaa'e*, v. 7 p. 110.

2.3.5 The Concept of *Dar-ul-'Ahd*

In the old *Fiqh* literature we find only the concept of two *Dars*; *Dar-ul-Islam* and *Dar-ul-Harb* or *Dar-ul-Kufr*. However the modern scholars are of the view that there are three *Dars* instead of two, and the third one is *Dar-ul-'Ahd*. According to them *Dar-ul-'Ahd* means a *Dar* which has a treaty of peace with *Dar-ul-Islam* or a place conquered by the Muslims through a *Sulh* which may be of two kinds:

1) With the condition that territory will belong to the Muslims although the natives have the right to live their as long as they pay *Kharaj*. There is no doubt that by this contract the place becomes a part of *Dar-ul-Islam* and the native non-Muslim people become *Zimmis*.

2) With the condition that territory will still belong to the native people but they will have to pay *Kharaj*. In this situation the opinion of *Fuqaha* differs.

This definition of *Dar-ul-'Ahd* is closer to that of *Dar-ul-Muwada'a* discussed earlier, but the difference between the both is that *Muwada'a* is a temporary and revocable contract (according to the *Ahnaf*)[114] while this treaty of *'Ahd* عقد العهد is permanent, which means that it is not based on the rule of necessity.

These modern scholars have based their opinion on the conduct of Prophet (pbuh) and his Companions. However some of them have claimed that it was the view of *Imam Shafa'ee* (RA) also. *Abu Zahra (RA)* was the first one who made this claim[115] and later on Dr. *Wahbah al-Zuhaili*[116] and other Muslims scholars took this view from him. This view is so widely propagated that a reader who is not an expert in the classic literature of Islamic law starts to believe that this is a unanimous and known opinion of all the *Shafa'ees*.

Keeping in the view what was explained about the philosophy of the *Siyar* let us examine whether *Imam Shafa'ee* (RA) agrees with the modern scholars or not? I will quote the text on which these scholars have based their view. As a matter of fact the text is not clear in this regard, as it will

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[114] -Ibid. v. 7 p. 107.
[115] - Abu Zahra, *Al Alaqat al Duwaliyah fi al Islam*, Cairo, 1970, p. 55-56
[116] - See Wahba al Zuhaili, *Aa'saar al Harb fil Islam*.

become evident, and even if we accept that the text is clear even then it cannot be taken as the preferred opinion as it leads to self contradiction in *Shafa'ee* school of thought and also amounts to playing with the well defined terms of the *Siyar*. And at the end we will face this hard reality that the nature of *Dar-ul-'Ahd* mentioned by *Shaf 'ee (RA)* is totally different from what is portrayed by these modern scholars.

In the *Dar-ul-'Ahd* -a term derived from *Shafa'ees(RA)*book- it is necessary that its inhabitant pay *Kharaj* which must be equal or more than the ratio of the pool tax (*Jizyah*) as they have by themselves explicitly mentioned that it is a *Jizyah*. Furthermore *Imam Shafi (RA)* and *Imam Nawawee (RA)* have mentioned that imposition of Islamic laws on them is compulsory.

Imam Shafa'ee (RA) says in his famous book *Kitab Al-Umm*:

"If the *Imam* fought against a nation and did not succeed to conquer their land, and they (the infidels) requested him for a treaty of *Sulh* عقد الصلح with the condition that they will give a part of their territories or its products which will be equal or more than the *Jizyah* as a consideration; so if they belong to the category of infidels from whom taking *Jizyah* is lawful, and they have accepted it with the provision that the Islamic laws will be imposed on them, then he (*Imam*) is bound to accept their request. He is not allowed to take it from them except when they agree that the Islamic laws will be imposed on them, and when he accepts this request then he has to conclude a treaty mentioning those conditions clearly on which both the parties agreed upon between them. And it will be binding on those who come after him. This territory will be the ownership of those who made treaty of *Sulh* for it".

Then he adds further:

"If they (the Muslims) make a contract of *Sulh* with this condition that the whole territory will belong to the *Mushriks* المشركون, there is no hurdle to

make such a contract of *Sulh* with them and put a fixed *Kharaj* on them which will be either a definite thing for which they will be responsible from their wealth like *Jizyah,* or it will be a definite thing which they will pay from every product of their land provided that the collective product is equal to the *Jizyah* or more than it"[117].

What I understand from this text is that if the contract was made with the condition that the territory will belong to the infidels then the product which they will pay will be considered *Jizyah,* that's why the *Imam* insists that the product should be equal or more than the amount of *Jizyah.* And in my opinion this paragraph tells that the land has become a part of *Dar-ul-Islam* because *Jizyah* is not imposed except on a *Zimmi* and a *Zimmi* is considered a citizen of *Dar-ul-Islam.*

There are two conditions for the contract of *Zimma;* firstly that the *Zimmis* are bound to pay the *Jizyah* which will be either in the form of money or in the form of *Kharaj* if it is equal to *Jizyah,* and secondly that the Islamic laws will be imposed on them. In the above quoted paragraphs we see that *Imam Shafa'ee* (RA) has expressly mentioned these two conditions and the condition of the ownership of the land has no role in making *Dar-ul-Islam* or *Dar-ul-Harb.* However it plays an important role in determining the nature of the *Kharaj.*

If territory belongs to the *Zimmis* then the *Kharaj* will be considered *Jizyah,* and that is why *Imam Shafa'ee (RA)* insisted that it should not be less than the minimum amount of *Jizyah.* And if the territory belongs to Muslims than it will be considered a trust property of *Dar-ul-Islam* and their position will be like of the tenants, they cannot sell or mortgage this property, while in the first case they can do so.

Now I would like to quote two other important scholars of *Shafa'ee* School, namely *Ibn-Ishaq A-Shirazi* (RA) and *Imam Al-Nawawee*(RA) which will make the above statement more clear. *Imam Al-Nawawee (RA)* says:

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[117] - Shafa'ee, *Kitab al Umm*, v. 4, p. 172.

"If we entered into a contract of *Sulh* with the infidels with the condition that territory will belong to them and they will pay *Kharaj* from each *Jareeb* الجريب, it is allowed and their ownership will continue. Whatever they pay will be considered as *Jizyah* and will be spent where booty (*Fai* الفئ) is spent. ... Provided that the total product should reach an amount, which, if divided on them, every tax payer will be paying off one *Dinar* الدينار, and that they are bound to pay it whether they cultivate the land or do not. It should not be taken from the land of the child, lunatic, and woman. They can sell that property, gift it and even rent it out. And if some one gives it to a Muslim still then the *Kharaj* will be paid by the owner. ... and if they sell it to a Muslim the liability will be shifted from the product of land to the shoulder of the seller and the buyer will not be the subject of *Kharaj*. And if they become Muslims after the contract of *Sulh* the obligation of *Kharaj* will be weaved off from them ...

> If we enter into a contract of *Sulh* with them on the condition that the territory will belong to us and they will live there and will pay from every *Jareeb*, then it is a contract of lease and the payment will be considered as rent, and so they will have to pay *Jizyah* in addition to this rent, and it is not necessary for the product to reach one *Dinar*, and it will be taken from the land of the women, children and lunatics, ... they are not allowed to sell it or gift it however they can give it for (further) lease".
>
> Furthermore while discussing the responsibility of the *Imam* regarding the *Zimmis* he says:
>
> "It is the responsibility of the *Imam* to stop all those people who want to attack them if they are in *Dar-ul-Islam*. But if they have chosen *Dar-ul-Harb* for living and pay *Jizyah* then it is not the responsibility of the *Imam* to protect them"[118].

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[118] - Nawawee, *Rawzat al Talibeen*, v. 9, p. 128-129.

The above quoted paragraphs are very clear except for the last one which is somewhat ambiguous because the apparent meaning of this paragraph is that the *Zimmis* are of two types; those who are living in *Dar-ul-Islam* and those who are living in *Dar-ul-Harb.*

Exactly the same view was presented by *Abu Ishaq (RA)*, with the only difference that he used the word "those who are living in their countries" instead the word "those who are living in *Dar-ul-Harb*"[119].

2.3.6 The contradiction regarding *Dar-ul-'Ahd* and its solution

The above mentioned categorization of the *Zimmis* on the basis of place of residence leads to a contradiction in the *Shafa'ee* school and also to a change in the well-defined terms of *Siyar.* There is no differences of opinion in the *Shafa'ee* school that the *Zimmi* cannot remain a *Zimmi* without paying the *Jizyah* and without submission to Islamic laws.

Abu Ishaq A-Sherazi (RA) says: "If a *Zimmi* stops performing his obligation regarding *Jizyah* or subjugation to the Islamic laws then the contract of *Zimma* becomes void"[120]. The ultimate result of this view is either to change the definition of the *Zimmi* or to change the definition of *Dar-ul-Harb.* There is no difference of opinion that by imposition of Islamic laws in any territory it becomes a part of *Dar-ul-Islam*[121].

Now there can be three possible solutions:

(a) The first solution:

That the territory is a part of *Dar-ul-Islam* because the people have accepted subjugation to Islamic laws and accepted to pay *Jizyah* too, and by these two conditions they are citizens of *Dar-ul-Islam.*

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119 - Firooz Abadi, *Al Muhazzab*, v. 2, p. 255.
120 - Ibid. v. 2, p. 257.
121 - Kasani, *Badaa'e al Sanaa'e*, v. 7, p. 130.

(b) The second solution:

That the territory is still a part of *Dar-ul-Harb* as it appears as per the first view in *Imam Nawawee's (RA)* book. If we declare these people *Harbis* الحربيون then we have to apply all the rules concerning the *Harbis* on them. But we should not ignore the fact that they have accepted subjugation to Islamic laws and payment of *Jizyah* even though the last paragraph of *Imam Nawawee (RA)* is not clear about the subjugation of this second category of *Zimmis*.

One can presume that the subjugation to Islamic laws is a necessary condition for the first type of *Zimmis* and not for the second. If we accept this view, although the text is not clear in this regard, then the main question which we face is that why then the *Shafa'ees* have limited the contract of *Hudnah* الهدنة to ten years and bound it with the necessity. Secondly what will be the difference between *Dar-ul-Muwada'ah* and this new *Dar-ul-'Ahd*. It should be noted that *Dar-ul-Muwada'ah* is a part of *Dar-ul-Harb*, and if *Dar-ul-'Ahd* and *Dar-ul-Muwada'ah* are the same then it mean that it is also *Dar-ul-Harb* and not a third *Dar*. And we will have to apply all rules of *Dar-ul-Muwada'ah* to it, such as the condition of necessity and its limitation to a period for ten years.

(c) The third solution:

It is a third and a permanent type of *Dar*, the *Dar-ul-'Ahd* as said by some of the modern scholars. But the question is what will be the status of the people of this *Dar*? Whether they will be *Zimmis* as mentioned by all the jurists, and if they are *Zimmis*, then by which definition of the term *Zimmi*? Whether he is the one who is bound to Islamic laws as expressly mentioned by all *Shafa'ee* jurists or not? And if not (on the ground that they are the second type of *Zimmis* which we have discussed) then they have to prove that for this second type of *Zimmis* subjugation to Islamic laws is not necessary. And once again what will be the difference between *Dar-ul-Muwada'a* and this new *Dar* except that payment of *Jizyah*, which is not necessary for the first group while it is necessary for the second one.

It should also to be noted that none of the *Shafa'ee* jurists has claimed a third *Dar* as *Dar-ul-'Ahd*. If the paragraph from which we derive this concept can be interpreted in another way, why should we insist on something which leads to self contradiction in the *Shafa'ee* school. Secondly, we have to explain it according to the already settled principles and philosophy of the *Siyar*. Thirdly, the purpose for which those scholars are trying to create the third *Dar* cannot be achieved by creating this new *Dar*.

2.4 BASIS OF THE DIVISION OF 'DAR'

Another view that many of the modern scholars have adopted regarding the status of different territorial domains is based on rejecting the classical division of the early *Fuqaha.* They are of the view that this division is not based on the *Quran* and the *Sunnah* السنة. Instead it was a product of the situation of that particular time in which the *Fuqaha* wrote. The reason is that at that time all or most of the non-Islamic states were in the situation of actual war with the Muslims.

But what has misguided these scholars and lead them to this opinion is that they think that the *Fuqaha* have used these words only for determining the relation of the Muslims with the non-Muslims and that the ultimate result of this division is a perpetual war; that every state which is not a *Dar-ul-Islam* is by necessity *Dar-ul-Harb,* and thus it is the duty of Islamic state to convert it to *Dar-ul-Islam.*

This conclusion in itself may be correct or incorrect, but it is certain that the *Fuqaha* did not use these words for the above-said purpose, instead they also used it for determining the duties of Muslims living inside *Dar-ul-Islam* and those living in *Dar-ul-Harb,* and there are so many other laws that depend on this division.

Similarly they used these words to determine state responsibility inside and outside of *Dar-ul-Islam.* The *Ahnaf* also used it for defining the territorial jurisdiction of the court.

Furthermore the concept of the division of *Dar* is evident from several verses of the *Quran* and *Hadith* as listed below. Let us review the relevant *Ayaat* from the *Quran* followed by a commentary on it, then some of the *Ahadeeth* الحديث which are related to the topic.

- "Never should a believer kill a believer; but (If it so happens) by mistake, (Compensation is due): If one (so) kills a believer, it is ordained that he should free a believing slave, and pay compensation to the deceased's family, unless they remit it freely. If the deceased

belonged to a people at war with you, and he was a believer, the freeing of a believing slave (is enough). If he belonged to a people with whom ye have treaty of mutual alliance, compensation should be paid to his family, and a believing slave be freed. For those who find this beyond their means, (is prescribed) a fast for two months running: by way of repentance to Allah: for Allah hath all knowledge and all wisdom".[122]

Regarding this verse *Israeel* has narrated from *Sammak* and *Sammak* from *Ikrima* and *Ikrima* from *Ibn Abbas* that this is about a person who is a *Momin* المؤمن (Muslim) by himself but his people are non-Muslims, so he is not liable for any financial compensation i.e. the blood money (*Diyah* الدية) except releasing of a *Momin* (Muslim) slave.

Abubakar (RA) says that the verse can be meaningful only if it is about a person who accepts Islam in *Dar-ul-Harb* and is killed before he migrates to us. We say this because it is not possible to accept that it is about a *Momin* person who lives in *Dar-ul-Islam* and his relatives are non-Muslims. In that case there is no difference of opinion that his killer will have to pay the blood money to *Bait-ul-Mal* بيت المال, and this verse did not speak about the blood money of the one whose relatives are non-Muslims[123].

- "O ye who believe! When there come to you believing women refugees, examine (and test) them: Allah knows best as to their Faith: if ye ascertain that they are Believers, then send them not back to the Unbelievers. They are not lawful (wives) for the Unbelievers, nor are the (Unbelievers) lawful (husbands) for them. But pay the Unbelievers what they have spent (on their dower), and there will be no blame on you if ye marry them on payment of their dower to them. But hold not to the guardianship of unbelieving women: ask for what ye have spent

[122] - al Quran, 4:92 An-Nisa.
[123] - *Al* Jassas, Ahkamul *Quran*, v. 3 p. 215-216.

on their dowers, and let the (Unbelievers) ask for what they have spent (on the dowers of women who come over to you). Such is the command of Allah: He judges (with justice) between you. And Allah is Full of Knowledge and Wisdom".[124]

Abubakar Al-Jassas (RA) says that regarding this verse there is a variety of arguments for the dissolution of marriage between the spouses due to separation of *Dar*. Separation of *Dar* means that one of the spouses belongs to *Dar-ul-Harb* and the other one to *Dar-ul-Islam*. The problem being that the woman who migrates to *Dar-ul-Islam* becomes a citizen of *Dar-ul-Islam* while her husband is still a non-Muslim citizen of *Dar-ul-Harb*. So the *Dar* is different for both of them and Allah has ordered to separate them by saying (do not return them to the *Kuffar* الكفار).

If we presume that the marital relation between them still remains valid then it would be most suitable for her to remain with her first husband regardless of where he lives.

Knowledgeable people differ on the legal position of the *Harbi* الحربي (the citizen of *Dar-ul-Harb*) if he comes to *Dar-ul-Islam* as a Muslim.

Imam Abu Hanifa(RA) says about a *Harbi* woman who came to *Dar-ul-Islam* as a Muslim and her non Muslim husband was in *Dar-ul-Harb* that the dissolution of marriage occurs between them and she is not bound by *'Iddah* العدة.

Abu Yusuf (RA) and *Muhammad (RA)* said that she has to remain in *'Iddah* if her husband becomes Muslim, but she is not lawful for him till they make a new contract of *Nikkah* النكاح (contract of marriage), and this view was also adopted by *Surve* (RA).

There is no difference between *Dar-ul-Harb* and *Dar-ul-Islam* regarding the dissolution of marriage according to *Shafa'ee (RA)* because *Dar* has no value in this regard[125].

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124 - *Al Quran*, 60:10

125 - Al Jassas, *Ahkamul Quran*, v. 5, p. 228-229.

- "(Some part is due) to the indigent Muhajirs, those who were expelled from their homes and their property, while seeking Grace from Allah and (His) Good Pleasure, and aiding Allah and His Messenger: such are indeed the sincere ones."[126]

The *Quran* calls those Muslims who migrated from *Makkah* to *Madinah* as *Fuqara* (poor/empty-handed) although some of them had vast property in *Makkah*. The reason, according to the *Ahnaf* is that they lost ownership in that property by virtue of their migration to *Dar-ul-Islam*. Another proof of their loss of ownership is that even after the conquest of *Makkah* the Prophet (May Allah's blessings be upon him) never gave that property back to them.[127]

- A famous *Hadeeth* which is narrated by *Muslim(RA)* is as follow:

"When the Messenger of Allah (May Allah's blessings be upon him) appointed anyone as leader of an army or detachment he would especially exhort him to fear Allah and to be good to the Muslims who were with him. He would say:

'Fight in the name of Allah and in the cause of Allah. Fight against those who do not believe in Allah. Fight but do not embezzle the spoils, do not break your pledge, do not mutilate [the dead bodies] and do not kill the children. When you meet enemies who are polytheists, invite them to three courses of action. If they respond to any one of these, you also accept it and restrain yourself from doing them any harm. Invite them to [embrace] Islam. If they respond to you, accept it from them and desist from fighting against them. Then, invite them to migrate from their lands to the land of the *Muhajirs* (emigrants) and inform them that, if they do so, they shall have all the privileges and obligations of the *Muhajirs*. If they refuse to migrate, tell them that they will have the status of Bedouin Muslims and will be subjected to the

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126 - *Al Quran*, 59:8.

127 - Kasani, *Badaa'e al Sanaa'e*, v. 7, p. 130-36, Dr. Muhammad Hamidullah, *The Muslim Conduct of State*, p. 104-15; Mawdoodi, *Sood*, 281-351; *Islamic Law and Constitution*, ed. by Khurshid Ahmad, p. 185-89.

commands of Allah like other Muslims, but they will not receive any share from the spoils of war or *fay'* except when they actually fight with the Muslims [against the opponents]. If they refuse to accept Islam, demand from them the *jizyah*. If they agree to pay, accept it from them and hold your hand. If they refuse to pay the *jizyah*, seek Allah'shelp and fight them ....."[128].

The famous incident involving *Abu Busayr* and his friends establishes the doctrine of territorial jurisdiction beyond any doubt. *Abu Busayr* fled from *Makkah* due to persecution but was given back to the *Makkans* by the Prophet (May Allah's blessings be upon him) under the treaty of *Hudaybiyah*. Then, he succeeded in fleeing to a place outside the jurisdiction of the *Madinan* state on the highway to Syria. Afterwards several other Muslims fled from *Makkah* and gathered there. They formed a group[129] and started attacking the caravans of the *Makkans*. Then, the *Makkans* themselves waived the condition of the treaty of *Hudabiyah* under which Muslims were bound to give them the persons who fled from *Makkah*.[130]

These people were out of the jurisdiction of the Islamic State. The Prophet (May Allah's blessings be upon him) himself disliked this activity.[131] But he was not legally obliged to hand over these people to the *Makkans*. Even the *Hanbali* jurist *Ibn Qayyim al Jawziyah* finds a justification for the doctrine of territorial jurisdiction in this event:

"The Prophet (May Allah's peace and blessings be upon him) never violated a treaty provision. When he concluded with them a peace treaty on the condition that he would return the men [who fled from *Makkah*] he always facilitated the return of these men... When one of these men killed somebody from the *Makkans* or usurped their property he neither prohibited them nor gave

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128- Muslim b. al Hajjaj al Qushayri, *Sahih Imam Muslim,(Chap.) Kitab al Jihad wa al Siyar*, Hadith no. 3261.
129- Muhammad b. Ismael al Bukhari, *Sahih Imam Bukhari,(Chap.) Kitab al Shuroot*, Hadith no. 2529.
130- Ibid.
131- This is evident from the wording of the tradition as reported by Bukhari, the most authentic of the Hadith compilations: "Abu Busayr came and said, 'O Allah's Apostle, by Allah, Allah has made you fulfill your obligations by your returning me to them, but Allah has saved me from them.' The Prophet said, 'Woe to his mother! What excellent war kindler he would be, should he only have supporters.' When Abu Busayr heard that he understood that the Prophet would return him to them again, so he set off till he reached the seashore." (*Bukhari, Kitab al-Shuroot*, Hadith no. 2529).

compensation for that if the perpetrator was beyond his area of control and could not be reached. This was because of the fact that neither he was under his jurisdiction (*tahta qahrih*) nor did he order him, and the peace treaty put on the Prophet (May Allah's peace and blessings be upon him) the responsibility regarding damage to life and property by the acts of only those persons who were under his jurisdiction. Thus, he compensated the damage *Khalid* [*bin al-Walid*] caused to *Banu Judhaymah* and disliked this act."[132]

All of these verses of the *Quran* and *Hadith* and their commentaries show that this division is not a myth or a self-created thing of the latter *Fuqaha* and that there are lot of laws which are dependant on this division which we are going to discuss later on. However it is a fact that in the beginning no specific names were given to the territory which was not under the control of the Muslims, that's why there are different names for *Dar-ul-Islam* and *Dar-ul-Harb*. But later on the *Fuqaha* started to use the words *Dar-ul-Harb* and *Dar-ul-Kufr* for the foreign territory and *Dar-ul-Islam* for the territory which was under the control of the Muslims. These terminologies became so popular that there is consensus among the *Fuqaha* on their use. If a person does not like these words he may invent new ones but we have the right to prefer what is best from the view point of language and the classical literature, especially of those who had the knowledge of both the language and the religion. I mean the *Fuqah'a*.

132- Ibn Qayyim, *Zad al Maad*, Abridged version, p. 215-16. Sayyid Mawdoodi also finds a ground in this incident for the doctrine of territorial jurisdiction: "The Shariah dos not admit of a situation in which the Muslim people may be deemed to be absolved of the moral responsibility of the treaty entered into by their state. But the moral responsibility of the treaties of the Islamic State will devolve only on the Muslims who are citizens of the Islamic State. It will not extend or apply to those Muslims who are not citizens of the State binding itself by a treaty. That is why the Treaty of Hudaybiyah was not deemed to be binding on those Muslims of Mecca (e.g., Abu Busayr and Abu Jandal) who had not yet become citizens of the Islamic State." (*Islamic Law and Constitution*, 187).

2.5 THE EFFECTS OF THE DIVISION OF THE 'DAR'

Imam *Shawkani* (RA) is of the opinion that division of the *Dar* into *Dar-ul-Islam* and *Dar-ul-Harb* is not important from the legal point of view. His opinion may be correct from the perspective of the majority of the *Fuqaha* who do not utilize the separation of *Dar* as a principle for deriving law, but it is incorrect according to the view point of the *Ahnaf* as they have used it as a principle for deriving law. Thus a great number of their laws depend on it.

After studying the classical books we can discuss the effects of the division of the *Dar* under different headings of law, although they are not mentioned as such in these books.

1. Its effect on the dissolution of marriage

We can discuss this effect in three situations depending upon the citizenship and *Deen* of spouses:

(i) When a *Harbi* spouse migrates from *Dar-ul-Harb* to *Dar-ul-Islam* as a Muslim or as a *Zimmi*:

In this case there are further six possible situations in which dissolution of the marriage may occur between the spouses:

1. When a *Harbi* man becomes a Muslim in *Dar-ul-Harb* and then goes to *Dar-ul-Islam* and leaves his wife behind in *Dar-ul-Harb*.

2. When a *Harbi* man comes to *Dar-ul-Islam* as a *Mustamin* المستأمن and becomes a Muslim there and his *Harbi* wife remains in *Dar-ul-Harb*.

3. When a *Harbi* comes to *Dar-ul-Islam* as a *Mustamin* and later on becomes a *Zimmi* and his *Harbi* wife remains in *Dar-ul-Harb*.

4. When a *Harbi* woman becomes a Muslim in *Dar-ul-Harb* and later on goes to *Dar-ul-Islam* and leaves her *Harbi* husband behind.

5. When a *Harbi* woman comes to *Dar-ul-Islam* and later on she becomes a Muslim and her *Harbi* husband remains in *Dar-ul-Harb.*

6. When a *Harbi* woman comes to *Dar-ul-Islam* as a *Mustamin* and later on becomes a *Zimmi* and her *Harbi* husband remains in *Dar-ul-Harb.*

According to the *Ahnaf* dissolution of marriage may occur in all of the above quoted cases due to the difference of *Dar* between the spouses. While according to the majority of the *Fuqaha* dissolution occurs in some of them due to the difference of *Deen*[133].

(ii) When one of the *Harbi* spouses is brought to *Dar-ul-Islam* as a prisoner:

According to *Hanafi* laws dissolution of the marriage between the spouses occurs due to the difference of *Dar* if one of them is brought to *Dar-ul-Islam* as a prisoner[134].

(iii) When one of the spouses goes to *Dar-ul-Harb* as a *Murtad* or he/she breaches his/her contract of *Zimma.*

As it is self-evident from the heading there can be two situations in this case; firstly; when any one of the Muslim spouses becomes *Murtad* and goes to *Dar-ul-Harb*, and secondly; when any one of the non Muslim spouses breaches his contract of *Zimma* and goes to *Dar-ul-Harb.*

In first case according to *Ahnaf* dissolution of marriage occurs whether *Riddah* occurred before or after the consummation, and the wife is not liable to *'Iddah* because of difference of the *Dar.* This is the opinion of Imam *Abu Hanifa* (RA) while his disciples *Abu Yousaf* (RA) and *Muhammad* (RA) are of the view that she is liable to *'Iddah* if her husband becomes *Murtad* and leaves *Dar-ul-Islam.* As far as the second situation is concerned the dissolution of marriage between the spouses occurs due to the difference of the *Dar* according to *Ahanf*[135].

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133 - Akmaludiin Muhammad b. Abdul Wahid ibn al Humam al Iskandari, *Sharh Fath al Qadeer*, v. 3, p. 290, Al Jassas, *Ahkamul Quran*, v. 5 p. 228, Sarakhsi, *al Mabsoot*, v5 p50, Shahabuddin Ahmad al Shilbi, *Hashiyah Tabyeen al Haqaiq*, v. 2, p. 176.

134 - Akmaluddin al Iskandari, *Fath al Qadeer*, v. 3, p. 290, Sarakhsi, *al Mabsoot*, v5 p53.

135 - Sarakhsi, *Sharh al Siyar al Kabeer*, v. 5, p. 1826.

2. Effects of the division of the Dar on laws regarding maintenance

According to the *Ahnaf* the maintenance which is due to marital relation follows the *'Iddah*, so when the dissolution of the marriage occurs due to the difference of the *Dar* and the wife no longer has to spend the *'Iddah* period as mentioned above, then the husband also is defiantly not liable to pay maintenance.

We can divide the effects of the division of the *Dar* on maintenance owed due to blood relation into two parts:

a. Its effect on maintenance rights between a Muslim and a *Harbi*.

b. Its effect on maintenance rights between a *Zimmi* and *Harbi*.

In the first situation according to the majority of the *Fuqaha* the division of the *Dar* is not a pre-condition for maintenance to arise, and so the maintenance for *Usool* (parents and forefathers) is compulsory on *Fro'o* (sons and grandsons), similarly the maintenance of *Fro'o* is compulsory on *Usool* even if the *Deen* differs, whether the *Dar* is the same or different[136].

But according to the majority of the *Ahnaf* maintenance is not compulsory if their *Dar* is different[137]. Although *Imam Kasani* (RA) differentiates between the maintenance of the *Usool* and the *Fro'o*, and between other relatives; according to him difference of the *Dar* has no effect on maintenance of the *Usool* and the *Fro'o*. But as far as other relatives are concerned their maintenance is not compulsory due to the difference of the *Dar*[138].

In the second situation according to the *Ahnaf* a *Zimmi* is not liable to the maintenance of a *Harbi* or a *Mustamin* whether they are blood relatives or not[139].

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136 - Akmaluddin al Iskandari, *Fath al Qadeer*, v. 4, p. 220, *Mawahib al Jaleel*, v. 4 p. 181, Muhammad al Shirbini, *Mughni al Muhtaj*, v. 3, p. 447.
137 - Akmaluddin al Iskandari, *Fath al Qadeer*, v. 4, p. 222, Commission of Indian Ulama, *al Fatawa al Hindiyyah*, Dehli, 1970, v. 1, p. 568.
138 - Kasani, *Badaa'e al Sanaa'e*, v. 4, p. 37.
139 - Usman b. Ali al Zailai Fakhruddin, *Tabyeen al Haqaiq*, v. 3 p. 63, *al Fatawa al Hindiyyah*, v. 1, p. 568.

3. Its effect on the law relating to wills

A Muslim and a *Zimmi* can make a will for a *Mustamin* and vise it versa, but they cannot make a will for a *Harbi*, and in return a *Harbi* also cannot make a will for them. This is the view of most of the *Hanafis*, *Malikis* and *Hanbalis* although their arguments are different from each other[140]. Amongst them only the *Ahnaf* have based their theory on the rule of the difference of the *Dar*. But amongst the *Ahnaf*, *Imam Abu Hanifa* (RA) is of the view that a Muslim and a *Zimmi* cannot make a will for a *Mustamin*, given the fact that he does not consider him a citizen of the *Dar*[141].

4. Its effect on the laws regarding trusts

Islam is not a pre-condition for the person who makes a trust, nor is it so for the trustee[142]. Therefore, even a *Mustamin* can make a trust for the citizens of *Dar-ul-Islam*[143]. But there may be two possible situations where a trust is made by a *Harbi*: firstly, a trust created by a *Harbi* in *Dar-ul-Harb*, a situation which the classical Islamic law does not discuss; and secondly, a trust made by him in *Dar-ul-Islam* through his agent. In the latter case the legal implications are not different from the case of the *Mustamin*.

On the other hand according to the *Ahnaf* and some the *Shafa'ees* it is necessary for a trust made by the citizen of *Dar-ul-Islam* that its trustee also belongs to *Dar-ul-Islam*. Therefore any trust made for a *Harbi* or a *Mustamin* is not lawful because they are not citizens of *Dar-ul-Islam*[144]. While according to the *Malikis* and some other *Shafa'ees* it is lawful for a *Mustamin* but not for a *Harbi* who is living in *Dar-ul-Harb*[145].

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140 - Akmaluddin al Iskandari, *Fath al Qadeer*, v. 9, p. 355-356, Sarakhsi, *Sharh al Siyar al Kabeer*, v. 5 p. 2046, Muhammad al Kharshee, *Sharh al Kharshi*, Matba'ah Bolaq, Cairo, 1317 A.H., v. 8, p. 170, Shamsuddin al Ramli, *Nihayat al Muhtaj*, v. 6, p. 49.

141 - Kasani, *Badaa'e al Sanaa'e*, v7 p341.

142 - Akmaluddin al Iskandari, *Fath al Qadeer*, v. 5, p. 37.

143 - *Ahkam al Awqaf*, p. 332.

144 - Muhammad Amin ibn Abidin, *Hashiat al Rad al Mukhtar*, Cairo, 1366 A.H. v. 4, p. 342, Muhammad al Shirbini, *Mughni al Muhtaj*, v. 2, p. 379-380.

145 - Shamsuddin al Dasooqi, *Hashiat al Dasooqi*, v. 4, p. 226, Muhammad al Shirbini, *Mughni al Muhtaj*, v. 2, p. 380.

5. Its effect on the law of inheritance

There is no difference of opinion that an infidel cannot become a legal hire of a Muslim, and similarly according to the majority of the *Fuqaha* a Muslim cannot inherit from an infidel[146].

But in addition to this, most of the *Ahnaf* are of the view that a Muslim who did not migrate to *Dar-ul-Islam* is also not a legal hire of a Muslim who is living in *Dar-ul-Islam*[147], because inheritance is based on *Wilayah*[148] and the relationship of *Wilayah* is not possible between the Muslims living in *Dar-ul-Islam* and those living in *Dar-ul-Harb*[149]. Similarly a *Zimmi* cannot become a legal hire of a *Harbi* and vice versa due to the difference of the *Dar* but the *Harbis* inherit from each other since their *Dar* is the same[150].

6. Its effect on the law of evidence

The testimony of a *Kafir* against a Muslim is not valid according to the majority of the *Fuqaha*. But in the case of his testimony against another *Kafir* the principle of the difference of *Dar* once again plays its role according to the *Ahnaf*. Therefore a *Zimmi* can become a witness against a *Mustamin* but a *Mustamin* cannot become a witness against a *Zimmi*[151]. Similarly the testimony of Muslim against another Muslim is only accepted if both belong to the same *Dar*[152].

146 - Shawkani, *Nayl al Awtar*, v. 6, p. 193, *Sharh al Sunnah*, v. 8, p. 364.
147 - *Hashiat al Fannari*, p. 72.
148 - Ibid. p. 820.
149 - *Al Quran*, 8: 82.
150 - Sarakhsi, *Sharh al Siyar al Kabeer*, v. 5, p. 1900
151 - Ibid. v. 5, p. 1832.
152 - Ibn Aabideen, *Hashiat Ibn Aabideen*, v. 5 p. 472-473.

3.0 THE CONCEPT OF DAR-UL-HARB AND THE THEORY OF PERPETUAL WAR

Dar-ul-'Ahd was the main concept presented by the contemporary scholars as a legal *Fiqhi* الفقهي solution for the modern Islamic International law dealing with the non-Muslim states as discussed earlier. The concept of *Dar-ul-Harb,* which is still regarded as valid, also needs explanation. In what follows, an overview of the opinion of scholars about *Dar-ul-Harb* and the related issues is presented.

Modern scholars are divided into three groups on the issue of *Dar-ul-Harb* and the theory of perpetual war.

1. The first opinion

According to the first group *Dar-ul-Harb* is a land where actual war is going on and so all other lands where hostilities are not taking place are not *Dar-ul-Harb.* Furthermore, it is the right of the government of *Dar-ul-Islam* to declare which place is *Dar-ul-Harb* and which is not.

From this opinion we conclude that the division of the *Dars* is not a permanent one as we concluded earlier from the verses of the *Quran* and the *Sunnah.* And so their opinion can be regarded as a product of their own mind according to the needs of their time.

In a net shell, according to this opinion, a relation between the Muslims and the non-Muslims is based on peace and war is only a temporary phase[153].

2. The second opinion

The second group is of the classical *Fuqaha.* In their opinion this division is a permanent division. So according to them the world is divided into two permanent *Dars*: *Dar-ul-Islam* and *Dar-ul-Harb,* and thus any *Dar* which is not *Dar-ul-Islam* is *Dar-ul-Harb* and its infidel citizens who are male, adults and sound men are considered combatant whose blood and property are permissible مباح الدم والمال. However due to some compulsions and internal weaknesses of the

153 - Muhammad Munir, *Public International Law and Islamic International Law; Identical Expressions of the World Order,* Islamabad Law Review, p407

Muslims, a contract of *Muwada'a* may be concluded, its period being determined by necessity. During this time their lives and property should not be damaged as it is against the promise which has been made with them.

In a net shell, according to this view, the permanent relations between the Muslims and the non-Muslims are based on hostility and peace is a temporary phase[154].

Both of the above groups agree that a place where actual war is going on is *Dar-ul-Harb*, but the difference is about those areas where there are no active hostilities taking place. According to the first group when there is no war then the question of *Dar-ul-Harb* is irrelevant, while according to the second group even if there is no war currently taking place, it does not mean that it is not *Dar-ul-Harb*. In fact that land is *Dar-ul-Harb* and it is the duty of the Muslims to convert it into *Dar-ul-Islam*.

3. The third opinion

A third view which was presented by *Maudoodi (RA)* and is polished by Mr. Mushtaq with minor differences is that there are two *Dars*; the first one naturally being *Dar-ul-Islam*. But for the second *Dar* they categorically use the name of *Dar-ul-Kufr* instead of *Dar-ul-Harb*. They also describe the relation between the two *Dars* as permanently hostile but only theoretically (or ideologically) and not practically (or physically). And when this theoretical war converts into actual war then *Dar-ul-Kufr* also turns into *Dar-ul-Harb*.

Sayyed Maudoodi(RA) accepts that the *Fuqaha* have mentioned that the life and property of any infidel who is not a citizen of *Dar-ul-Islam* and does not have any contract of *Amaan* الأمان are not protected, which means that both are *Mubah* المباح (lawful) for the Muslims. But according to him it was not the opinion of *Imam Abu Hanifa* (RA). Instead what *Imam Abu Hanifa* (RA) meant was only that any infidel who is not living in *Dar-ul-Islam* his life and property is beyond the jurisdiction of our courts. And it was a misconception of the later *Fuqaha* who did not understand the meaning of jurisdiction and considered it equal to *Mubah*.

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154 - Muhammad Khair Haikal, *al Jihad wal Qital fi Siyasat al Shariah*, See chapter on *'illat al Qital*.

Furthermore *Maudoodi* (RA) explains that this division by itself is not fruitless as the legality of many issues depends on this division. According to him Islamic laws have three different dimensions; the first is its theoretical dimension, the second is its constitutional dimension and the third is its international dimension.

By the theoretical aspect all Muslims are bound to follow Islamic law wherever they may be. So any crime that a Muslim commits will be considered a crime and he will be punished for it in the hereafter, but as far as its legal status in this world is concerned it depends upon the place where the crime was committed. This is the dimension which is dealt with international aspect. So if it was within the territorial limits of *Dar-ul-Islam* then the criminal citizen must be awarded the due punishment by the Muslim state in this world also, and if the crime was committed outside of its territorial limits then it is not the responsibility of the state to punish the criminal[155].

A similar opinion is of the famous scholar *Taqyye-ud-Din al Nabahany* (RA) who says that *Dar-ul-Harb* is of two kinds; that which is in the state of actual war with *Dar-ul-Islam* and that which is not. The second one is further dived into two kind; the one which has a peace treaty with *Dar-ul-Islam,* and the one which has no peace treaty with it but also is not indulged in any war with it.[156]

As a conclusion I would suggest that the opinion of the first group is out of the scope of my work since they do not give importance to the work of the earlier *Fuqah'a.* As far as the opinion of the last two groups who consider the view of *Fuqaha* as an authentic interpretation of the text is concerned, I will try to elaborate and discuss *Sayyed Maudodi's* controversial views:

1) According to him the world is divided from the view point of the *Fuqaha* into *Dar-ul-Islam* and *Dar-ul-Kufr.* The later one may be at different times *Dar-ul-Harb* or *Dar-ul-Muwada'ah* or none of them. I think this concept is the creation of his own mind given the fact that in *Fiqh* literature *Dar-ul-Harb* and *Dar-ul-Kufr* are used interchangeably and are synonyms words. This conclusion has been reached after examining all those places where *Fuqaha* have used

155 - Mawdoodi, *Sood,* Islamic Publications, Lahore, p. 295-314.
156 - Nabahani, Taqiuddin, *Moqaddimat al Dastoor,* p. 450.

these words. A similar conclusion is given in the book of *Taqyye-ud-Din al Nabahany* (RA), although his opinion regarding the status of different kinds of *Dar-ul-Harb* is not different from that of *Sayyed Maudodi.*

2) He also accepts that *Fuqaha* have used these words to determine the territorial jurisdiction of the courts, which is true. But it would be incorrect to claim that it was the only aim of this division. *Ahnaf* have used it as a principle for deriving laws and thus many of their laws depend on it. I have discussed some of these in the earlier work as an example.

3) He comments that the word "لا عصمة" (no protection) used by *Imam Abu Hanifa* (RA) doesn't mean that the blood and property of a *Harbi* is lawful for the citizens of *Dar-ul-Islam.* According to *Sayyed Maudoodi,* it was a misconception of the later *Fuqaha.* I think it is an over-exaggeration about the *Hanifi* school of thought by *Maudodi* (RA) since it is not possible that scholars like *Sarakhsi, Jassas* and *Ibn Humam* (RA), who spent all of their lives finding out the essence of *Imam Abu Hanifa's* (RA) sayings, overlooked or misunderstood such a major blunder of the later jurists. One can say that the opinion of the *Ahnaf* regarding the *Harbis* is not correct, but it will be wrong to blame all the later *Hanafi Fuqaha* that they misunderstood the views of *Imam Abu Hanifa* (RA). As a matter of fact there is consensus amongst the *Fuqaha* that *Dar-ul-Harb* is a *Dar-ul-Ibaha,* by which they mean that the blood and property of every sound male adult of *Dar-ul-Harb* who has no contract of *Am'an* with *Dar-ul-Islam* is lawful for the citizens of *Dar-ul-Islam.* The only exception is when they enter *Dar-ul-Islam* as *Mustamins,* as in the contract of *Istiman,* the protection of their property and body is promised and thus their persons and property become unlawful.

As far as the opinion of the second group concerned it is true that this division is permanent. It is also correct that the permanent relation between *Dar-ul-Harb* and *Dar-ul-Islam* according to the classical *Fuqaha* is based on hostility. But it is not correct that *Fuqaha* have used these words only to determine the permanent relation between the two *Dars,* instead there are other aims also.

CHAPTER THREE

RELEVANCE OF TERRITORIAL JURISDICTION:

COMPARISON BETWEEN INTERNATIONAL AND ISLAMIC LAW

4.0 THE RELEVANCE OF 'DAR'

The discussion in the previous pages was of a theoretical nature. Let us now discuss the practical consequences of the above mentioned views in the contemporary legal system.

First of all we have to differentiate between different perspectives of the *Shari'ah*. *Shari'ah* is a divine law and hence the real sanction behind it is the fear of *Allah* and the real punishment for its violation is the one to be awarded in the hereafter. This theological perspective knows no territorial limits hence a Muslim is bound to follow the *Shari'ah* everywhere, and if he violates a rule of *Shari'ah* he will be responsible for it before *Allah* on the Day of Judgment, regardless of the place where the violation took place.

And form this perspective of faith, humanity has been divided into two different categories; those who submit to Allah's will -whom we call Muslims- and those who do not -the *Kafirs*. And thus a Muslim in any part of the world is a part of the Muslim *Ummah* الأمة and the bond of Islamic brotherhood binds a Muslim resident of a non-Muslim state with his Muslim brother in an Islamic state.

Moreover, a Muslim by virtue of his being Muslim is *Masoom,* (معصوم) i.e. protected in the sense that Allah will punish those who violate his rights in the hereafter. This is what the *Fuqaha* call *'Ismah bil-Islam* (عصمة بالإسلام) i.e. protection by virtue of Islam.

However this *'Ismah* العصمة or protection according to the *Hanafi Fuqah'a* does not necessarily mean that his right will be enforced by courts in the Islamic state. We may classify this as a principle of the municipal law of Islam.

On the other hand those who do not believe in *Islam* become another nation. And the Muslims are prohibited from establishing any brotherhood relations with them except on the basis of humanity for those who are the citizens of *Dar-ul-Islam.*

Thus the permanent relation between the Muslims and the non-Muslims is based on hostility, which may be ideological, as claimed by *Sayyed Maudoodi* (RA), or both, ideological and

actual, as is the apparent view of the classical *Fuqaha.* Therefore, an infidel can only be protected if he becomes a Muslim or if he enters into a contract of *Amaan* with Muslims either permanently or temporarily.

The temporary *Amaan* will be either *Muwada'a* or *Istiman* while the permanent one is the contract of *Zimma.* How to deal with these different categories of infidels is the subject of the international law of the *Shari'ah.*

5.0 Territorial jurisdiction in view of Shari'ah

After this brief introduction it is easy for us to discuss the territorial nature of the Islamic laws. There is more than one theory regarding the concept of territorial jurisdiction as well as the imposition of laws on the criminals in the Islamic law just like the international law.

5.1 The theory of *Abu Hanifa* (RA):

It was presented by *Abu Hanifa* (RA) which is based on two principals; Nationality and Territoriality.

1. Regarding the crimes committed in Dar-ul-Islam

According to *Abu Hanifa* (RA) any citizen of *Dar-ul-Islam* who commits a crime in the territorial limits of *Dar-ul-Islam* must be punished by the courts.

A Muslim becomes a citizen of *Dar-ul-Islam* by virtue of Islam or by his permanent stay in *Dar-ul-Islam*, while a *Zimmi* becomes a citizen of *Dar-ul-Islam* by the contract of *Zimma*.

As far as the *Mustamin* (foreigner), who is not our citizen, is concerned, his liability is limited to the crime in which he violates the personal right of other people and does not extend to the crimes against *Haqooq Allah* حقوق الله. By entering the contract of *Istiman* he does not accept submission to Islamic law *in toto*. Instead he will have to obey only those laws which are relate to him directly or concern the protection of other persons' rights, e.g. a *Mustamin* will not be punished for *Zina* الزنا or *Shrub-ul-Khamar* شرب الخمر etc. However, he will be punished for *Qazf* القذف, *Qisas* القصاص and any other crime in which he violates the right of other individuals.[157]

2. Regarding the crimes committed outside Dar-ul-Islam

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[157] - Akmaluddin al Iskandari, *Fath al Qadeer*, v. 4, p. 155-156.

For any crime which is committed by a citizen of *Dar-ul-Islam* or any other person out of the territorial limits of *Dar-ul-Islam,* the aggrieved party cannot invoke the jurisdiction of the courts of *Dar-ul-Islam*, because the basic condition for invoking the jurisdiction is the capacity of *Imam* regarding the imposition of Islamic laws in that place. Therefore, if an *Imam* has no control over a place it means that it is out of the territorial limits of *Dar-ul-Islam.* It is within the territorial limits of *Dar-ul-Islam* that the *Imam* has an absolute capacity to impose Islamic laws, whereas *Dar-ul-Harb* is a place where the *Imam* has no capacity to impose Islamic laws. Thus he is not under an obligation to impose *Shari'ah* in *Dar-ul-Harb.*[158]

The net result of this rule is that the court will not take cognizance of the offence committed in a land which was not under the control of the *Imam* during the commission of the crime, even if it becomes *Dar-ul-Islam* later on. However if a citizen of *Dar-ul-Islam*, whether he is a Muslim or a *Zimmi* (and even a *Mustamin* if he violates a personal right) commits a crime in *Dar-ul-Islam* and then flees to *Dar-ul-Harb* he will be punished whenever he comes back and should be brought before the court for trial. The reason for this being that the action occurred inside *Dar-ul-Islam*, which is the place where the *Imam* has the capacity to impose Islamic laws.[159]

3. Regarding the camps of the Muslim army

The camp of Muslim army in *Dar-ul-Harb* is also considered as a part of *Dar-ul-Islam* because the place comes under the effective control of Muslims due to the presence of the Muslim army. However any crime committed out of the place where the army is deployed does not fall within jurisdiction because the place is not *Dar-ul-Islam. Imam Abu Hanifa* (RA) also held the view that the imposition of punishment should be delayed till the army comes back to the settled *Dar-ul-Islam.*[160]

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158 - Ibid. v. 4, p. 152-153.
159 - Kasani, *Badaa'e al Sanaa'e*, v. 7, p. 131.
160 - Ibid. v. 7, p. 132.

4. *Regarding the difference between the criminal and the pecuniary liabilities*

Here I would like to draw the attention to an important point and that is: the concept of absolute territorial jurisdiction is limited to criminal liabilities only, whereas the pecuniary liabilities are not absolute but depend on the nature of the case and on the respective citizenships of the criminal and the victim.

The following cases will help to explain the above mentioned rules in *Abu Hanifa's (RA)* theory clearly:

(a) The First Case:

If a Muslim citizen of *Dar-ul-Islam* kills a Muslim citizen of *Dar-ul-Harb* who does not migrate to *Dar-ul-Islam,* the killer is not liable for *Qisas* or *Diyah* (blood money) but he has to offer *Kaffara* الكفارة in the case of an unintentional murder.

The basic reason for this according to *Kasani(RA)*is that the value of body and property are based on *Dar-ul-Islam,* given the fact that actual compensation depend upon power and effective control, which is not possible outside *Dar-ul-Islam.*[161]

(b) The Second Case:

If a Muslim citizen of *Dar-ul-Islam* kills another Muslim citizen of *Dar-ul-Islam* in *Dar-ul-Harb* after going there as *Mustamin,* the killer is responsible only for the *Diyah* (blood money).

According to *Kasani (RA)* the reason for this is that both are permanent citizens of *Dar-ul-Islam* while their stay in *Dar-ul-Harb* was temporary. However *Qisas* will not be awarded because of doubt or the impossibility of *Qisas.*[162]

(c) The Third Case:

If two Muslims who were citizens of *Dar-ul-Islam* and later on became prisoners in *Dar-ul-Harb,* and one of them killed the other, so according to *Imam Abu Hanifa (RA)*the killer is not

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[161] - Ibid. v. 7, p. 133.
[162] - *Badaa'e al Sanaa'e,* v. 7, p. 133.

responsible for any *Diyah* but has to offer *Kaffara* in the case of an unintentional murder. While according to *Abu Yousuf* (RA) and *Muhammad* (RA) he is responsible for the *Diyah* whether it is an intentional murder or unintentional murder.

Kasani (RA) while elaborating the distinction between the two opinions says the reason for the opinion of the two disciples of the *Imam (RA)* is that imprisonment was a temporary action and their position was just like two *Mustamins*. While according to *Imam Abu Hanifa (RA)*, by imprisonment in *Dar-ul-Harb* they became subjects of *Dar-ul-Harb* and so their value was abolished.[163]

If we examine these three different cases and the reasons mentioned by the *Fuqaha* we reach the following conclusions:

1. The doctrine of territorial jurisdiction according to *Imam Abu Hanifa (RA)* is an absolute principle provided that the subject is a national of *Dar-ul-Islam*.

2. The extra territorial jurisdiction of the court depends on the nature of citizenship of the criminal and the victim. If both were citizens of *Dar-ul-Islam* then the offender is liable to all pecuniary liabilities whether they arose from a criminal act or a civil wrong, but corporal punishment should not be awarded. However there is difference of opinion in the *Hanafi* School regarding the loss of citizenship of a prisoner.

5. Regarding the loss of citizenship of a prisoner

According to *Imam Abu Hanifa (RA)* if it is certain that a citizen of *Dar-ul-Islam* will return back, then his citizenship is not lost as is the case with a *Mustamin*. But if it is uncertain due to prolonged imprisonment then he looses his citizenship.[164]

6. Regarding 'Riba' in Dar-ul-Harb

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[163] - Ibid. v. 7, p. 133.
[164] - *Badaa'e al Sanaa'e*, v. 7, p. 133.

It will be also relevant here to mention the case of *Riba* الربا in *Dar-ul-Harb* between a Muslim citizen of *Dar-ul-Islam* and a Muslim citizen of *Dar-ul-Harb* since it leads to the misunderstanding that taking *Riba* from a Muslim *Harbi* is not considered a sin according to *Abu Hanifa (RA).*

In my opinion taking *Riba* from a Muslim is a sin wherever he may be. As far as the non-Muslim *Harbi* is concerned, taking *Riba* from him in *Dar-ul-Islam* is also a sin, while it is allowed in *Dar-ul-Harb*, because the blood of a non-Muslim *Harbi* is lawful, and if the blood is lawful then his property must be lawful in the first place, since property follows the blood in permissibility or sanctity. However when he comes to *Dar-ul-Islam* as a *Mustamin* his blood and property are protected due to the promise made by the Muslims.

Similarly if a Muslim goes to *Dar-ul-Harb* as a *Mustamin* the property and blood of another Muslim are not permissible for him as a rule. But if he commits any crime concerning the blood or property of a Muslim, he will not be punished for it in *Dar-ul-Islam* because he was out of the territorial jurisdiction of *Dar-ul-Islam.* He is also not liable for any compensation because the victim is not our citizen.

On the other hand the blood and property of a non-Muslim *Harbi* as a rule is lawful for a Muslim but it is protected due to the promise made by him. But if a *Harbi* gives his property to a Muslim with his consent then there is no violation of the promise.

But the property of citizens of *Dar-ul-Islam* is protected wherever they may be as a rule, and not on the basis of the promise. That is why *Riba* between two citizens whether they are Muslims or non-Muslims is not allowed.

This is what *Kasani (RA)* meant to say in his book *Badaa'e al Sanaa'e.* Actually he wanted to explain the principle of the citizenship and to differentiate it from the criminal liability which unfortunately was misunderstood.[165]

The text of *Jassas (RA)* will make it clearer. He says:

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[165] - Abdul Qadir 'Awdah, *Al Tashree al Jinaee*, Cairo, v. 1 p. 246.

"Hence it is proved, just as we have previously mentioned, that a Muslim who is a citizen of *Dar-ul-Harb* and does not migrate to us will remain a *Harbi* although his blood is unlawful.

That is why our fellows have waived the compensation from a person who destroys a property, as the *'Ismah* (unlawfulness) of blood is more important than the *'Ismah* of the property, and there is no compensation imposed on a person who kills him so his property is more liable not to be compensated. His property should be considered like the property of a *Harbi* from this viewpoint. This is why *Imam Abu Hanifa (RA)* allowed the transaction of *Riba* with such a Muslim as it is allowed with the *Harbi.*

And as far as the prisoner in *Dar-ul-Harb* is concerned *Abu Hanifa*(RA) considered him like a person who did not migrate because his stay over there is not based on *Aman* instead he is subjugated by force. And as the alien Muslim and the prisoner are equal form this aspect so they are equal in the eye of law as far as compensation is concerned. Thus their compensation is waived off from their killers".[166]

Now it should be very clear in our mind that when *Imam Abu Hanifa* (RA) says that transaction of *Riba* is allowed between a Muslim citizen of *Dar-ul-Islam* and Muslim citizen of *Dar-ul-Harb* it means that the Muslim citizen of *Dar-ul-Islam* is not liable for any compensation, but it does not mean that this transaction is not considered a sin. The reason is that when killing of a *Harbi* Muslim is prohibited then his property is also protected because the property follows the blood.

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[166] - Al Jassas, *Ahkamul Quran*, v. 3, p. 219-220.

5.2 The theory of *Abu Yousuf* (RA)

The second theory was presented by *Imam Abu Yousuf* (RA), a renowned disciple of *Imam Abu Hanifa (RA).* Its details are as follows:

1. Regarding the crimes committed in Dar-ul-Islam

According to him, under the territorial limits of *Dar-ul-Islam* no one should be immune from the criminal liability whether he is our citizen or not. Every one must be punished for his criminal act because Muslims are bound by Islam and the *Zimmis* by their contract with *Dar-ul-Islam.* As far as *Mustamins* are concerned they are bound by their contract of temporary stay in *Dar-ul-Islam.* During their stay they will be subjects to Islamic laws. So they are not different from the *Zimmis.* The only difference between the two is that the stay of one is temporary and of the other permanent.

2. Regarding the crimes committed outside Dar-ul-Islam

As far as extra-territorial jurisdiction of courts is concerned, his famous view is that the court has no extra-territorial jurisdiction regarding criminal liabilities. However if the offender and the victims were both citizens of *Dar-ul-Islam*, the offender is liable only for pecuniary liabilities which may arise from any criminal act against the Muslim citizen of *Dar-ul-Islam*, and similarly for other civil liabilities.

His second view is narrated by *Kamal Ibn Humam* (RA) from *Qazi Khan* on the authority of *Jam'i al Sagheer* that if the person killed the citizen of Dar-*ul-Islam* in *Dar-ul-Harb* he will be liable for *Qisas.*[167]

Abu Yousuf (RA) also differs form *Imam Abu Hanifa (RA)* on the issue of the Muslim citizen of *Dar-ul-Islam* who becomes a prisoner in *Dar-ul-Harb.* According to *Abu Yousuf* (RA) if

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[167] - Akmaluddin Iskandari, *Fath al Qadeer*, v. 5, p. 269.

any citizen kills him his death will be compensated by *Diyah* because his protection doesn't end with imprisonment; in other words he is still our citizen.

5.3 The theory of the *Jamhoor* (majority of the *Fuqaha)*

The third theory was presented by *Jamhoor-ul-Fuqaha* جمهور الفقهاء, i.e. *Imam Malik (RA)*[168], *Imam Shafa'ee (RA)*[169] and *Imam Ahmad (RA).*[170]

1. Regarding the crimes committed in Dar-ul-Islam

According to them every crime committed in the territorial limits of *Dar-ul-Islam* is to be met with the appropriate punishment, whether the person who committed it is our citizen or not. The same view is taken by *Abu Yousuf* (RA). The reason is that the Muslims are bound by Islam while the *Zimmis* and *Mustamins* are bound by virtue of their contracts. And the protection provided to them is on the condition that they will have to obey Islamic laws.

According to these *Fuqaha,* imposition of *Hudood* الحدود and *Qisas* punishment are compulsory while *Tazeer* التعزير is at the discretion of the *Imam.*

2. Regarding the crimes committed outside Dar-ul-Islam

These jurists also accept the doctrine of extra-territorial jurisdiction if the crime was committed by a citizen of *Dar-ul-Islam.* However, if a non-citizen commits any act which is considered as a crime according to our laws outside the territorial limits of *Dar-ul-Islam* and then he comes to *Dar-ul-Islam,* our court cannot take cognize of such a crime. However if he commits a crime in *Dar-ul-Islam* and then flees to *Dar-ul-Harb,* in such a case the court has jurisdiction to try the offender. The reason is that he was in the territorial limits of *Dar-ul-Islam* when he committed the crime. Here we do not take into consideration the person who committed the act, rather we look at the act: is it a crime or not?

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168 - Malik b. Anas al Asbahi, *Al Mudawwanah,* Matba'ah al Saadah, Egypt, 1233 A.H. v. 4, p. 425.
169 - Fairooz Abadi, *Al Muhazzab,* v. 2, p. 241-256.
170 - Muhammad al Shirbini, *Al Mughni,* v. 8, p. 401-402,473-475.

If a *Zimmi* breaches his contract of *Zimma* and goes to *Dar-ul-Harb* and he commits an act there which is a crime according to our law, or a Muslim becomes *Murtad* and flees to *Dar-ul-Harb* and he violates our laws there, the offender shall not be punished for his acts which he committed in *Dar-ul-Harb*. The reason is that when they were committing these crimes they were not our citizens. However they will be punished for all those crimes which they have committed before their migration to *Dar-ul-Harb*.

3. Regarding the camps of the Muslim army

They also consider the camp of the Muslim army as *Dar-ul-Islam* but do not differentiate between a crime committed in the camp area and a crime committed outside it.

But they differ among themselves regarding the time of the punishment. According to *Imam Malik(RA)*and *Imam Shafa'ee(RA)* the punishment should not be delayed till the return of the army to the settled land, while according to *Imam Ahamd (RA)* it should be delayed till the army returns. The same view is held by *Imam Abu Hanifa (RA)* when the crime is committed in the camp area.

6.0 APPLICATION OF THESE THEORIES IN THE MODERN WORLD

Those scholars who do not accept more than one state as an independent part of a single *Dar-ul-Islam*- unless these states accept obedience to the mother *Dar-ul-Islam* through the *Bai'yat* of the *Khalifa*- for them the application of these theories is impossible. However those scholars who have accepted these states as an independent part of one *Dar-ul-Islam* which may not necessarily be under one *Khalifa,* for them the possible application of these three theories will be as follows:

6.1 Application of the theory of *Imam Abu Hanifa (RA)*

Before we discuss the application of the theory it will be better to mention various kinds of punishments in Islamic law. We can divide these punishments into four types:

1) *Qisas* and *Diya* crimes.

2) *Hudood* crimes.

3) *T'azeer* for those crimes which are not declared crimes by the state.

4) *T'azeer* for those crimes which are declared crimes by state.

Qisas, Diya and *Hudood* crimes are just like those crimes which come under the universal jurisdiction of international law. The difference between the two is that in the case of universal jurisdiction every state has its own jurisdiction, but here the jurisdiction is applied only to those states which are a part of *Dar-ul-Islam.* Thus the victim or any other person can invoke jurisdiction of any Islamic state which imposes Islamic laws. The same applies to those *T'azeer* offences which are not declared as crimes by the state. However the president and judge have the power to pardon or commute the punishment, so the punishment of these crimes will only be awarded to the citizens or those aliens who violate the rights of an individual in the limits of that particular state.

The extra territorial jurisdiction of the court of that state in such type of crimes is similar to its jurisdiction in those crimes which occur in *Dar-ul-Harb.* If the offender and the victim are

both citizens then the court has jurisdiction, but if one of them is a citizen and other is not then the court has no jurisdiction

6.2 Application of the theory of *Imam Abu Yousuf (RA)*

This theory is different from the theory of *Imam Abu Hanifa* (RA) regarding the status of the person who comes to the concerned state on a temporary basis. The logical result of *Abu Yusuf's* theory is that he is bound to the court of that state just as the *Mustamin* is bound in *Dar-ul-Islam.*

6.3 Application of the theory of the majority of the *Fuqaha*

The view of the majority of the *Fuqaha* is different on this issue. According to them when the citizen of the concerned state commits a crime in another state which is part of *Dar-ul-Islam* but is not under the *Wilayah* of the concerned state and the crime is of the type which is declared by the state as a crime, the offender may be punished. In other words they have based their theory on the basis of nationality.

7.0 A BRIEF COMPARISON BETWEEN SHARI'AH AND LAW

7.1 Theories of the International Law

Like *Shari'ah,* in international law there is more than one theory regarding jurisdiction. I would like to compare some of them as they are very similar to the previously mentioned three theories of Islamic law on the issue.

(a) The first theory of law

As was the case with the first opinion presented by *Imam Abu Hanifa (RA),* we find that in the middle Ages the famous theory was that the law should be imposed only on the citizens.

However the difference between the two is that according to *Imam Abu Hanifa(RA)* the citizen shall not be punished for a crime outside the territorial limits of *Dar-ul-Islam,* while according to law the citizen had to be punished for the violation of law irrespective of where he committed the offence.

(b) The second theory of law

This theory was very famous till the 19th century and it is very similar to the theory presented by *Abu Yusuf (RA).* It states that law should be imposed within the territorial limits of the state whether the person who committed the crime was a citizen or not, while any crime committed outside the territorial limits of the state is beyond the jurisdiction of its courts.

(c) The third theory of law

The prevailing theory accepted as governing the law on the subject in the present age is similar to the theory presented by the majority of *Fuqaha* i.e. the *Malikis,* the *Shafa'ees* and the *Hanbalis.*

According to this theory any crime committed in the territorial limits of the state is to be met with punishment. However outside the territorial limit we shall consider the nationality of the criminal; if the criminal was a citizen of the prosecuting state then he has to be punished for the violation of its law.

This is almost identical to the theory presented by the majority of the Muslim jurists (*Jamhoor-ul-Fuqaha).* According to them the citizen shall be punished for *Hudood* crimes while the *T'azeer* crimes are left to the discretion of the state.

On the other hand outside the territorial limits of *Dar-ul-Islam* the *Imam* has no capacity to impose Islamic laws. However, regarding the citizens of *Dar-ul-Islam* living outside the *Imam* has the capacity because it is presumed that their stay in *Dar-ul-Hurb* is not permanent; this is according to the majority of the *Fuqaha*. Thus their affairs fall under the jurisdiction of the court in both criminal and civil matters.

The *Hanafi* school of thought is of the view that in fact the *Imam* has no *Wilayah*. However, if both the offender and the victim are nationals then it is presumed that he has the capacity but it is not an absolute one; only the civil liabilities or those pecuniary liabilities that arise from a criminal act fall under the jurisdiction of the court.

The issue of imprisonment is also based on this principle; according to *Imam Abu Hanifa* (RA) the *Wilayah* on nationals in a foreign territory is based on the presumption that they are not only nationals of *Dar-ul-Islam* but their permanent residence also is in *Dar-ul-Islam*. However, when this presumption is rebutted by imprisonment, automatically *Wilayah* also ends.

From this we can differentiate between the concept of citizenship in Islamic law and positive (man-made) law. In positive law it depends either on the nature of the citizen, or it depends totally on the will of the state, whether to accept his nationality or not. While in Islamic law it depends not only on the wishes of the person who wants to become a citizen but also on his actual position, that is whether he is under the capacity of the *Imam* or not.

In some cases, it is presumed that the person has given his consent. Thus if a non-Muslim woman comes to *Dar-ul-Islam* and enters in a contract of marriage with a citizen of the *Dar*, she will not be allowed to return to her country of origin after her marriage.

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