LEGAL STATUS AND CONSEQUENCES OF REBELLION IN ISLAMIC AND MODERN INTERNATIONAL LAW: A COMPARATIVE STUDY

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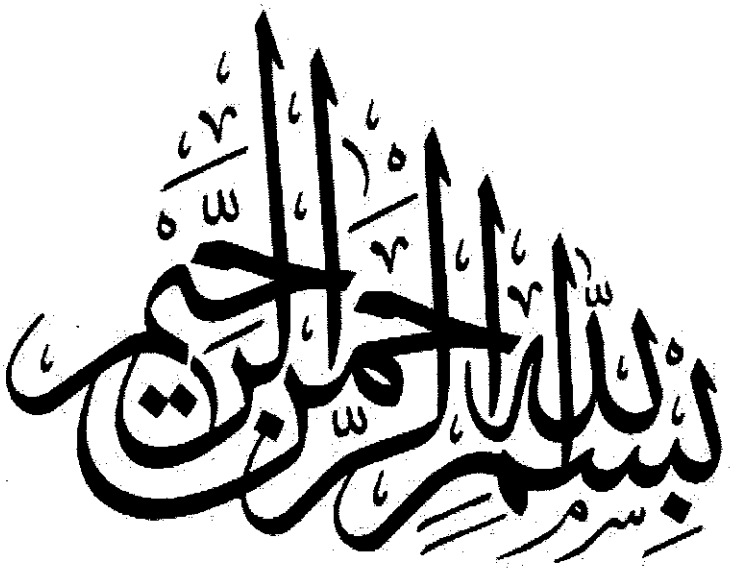
بسم الله الرحمن الرحيم

For My Mother

With Love and Affection

ACCEPTANCE BY THE VIVA VOCE COMMITTEE

TITLE OF THESIS:

Legal Status and Consequences of Rebellion in Islamic and Modern International Law: A Comparative Study

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I, **Sadia Tabassum**, hereby declare that this dissertation is original and has never been presented in any other institution. I, moreover, declare that any secondary information used in this dissertation has been duly acknowledged.

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ACRONYMS

AP I	First Protocol of 1977 Additional to the Geneva Conventions of 1949
CAT	Convention against Torture and Other Forms of Inhuman and Degrading Treatment, 1984
GC I	First Geneva Convention of 1949
GC II	Second Geneva Convention of 1949
GC III	Third Geneva Convention of 1949
GC IV	Fourth Geneva Convention of 1949
GWOT	Global War on Terror
HR	Hague Regulations of 1907
IAC	International Armed Conflict
ICC	International Criminal Court
ICCPR	UN International Covenant on Civil and Political Rights, 1966
ICJ	The International Court of Justice
ICRC	The International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law

ISAF	International Security and Assistance Force
LOAC	The Law of Armed Conflict
NATO	The North Atlantic Treaty Organization
NIAC	Non-international Armed Conflict
PMC	Permanent Mandates Commission
POW	Prisoner of War
UNO	United Nations Organization
UNSC	United Nations Security Council

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CONTENTS

ABSTRACT

Muslim jurists expounded and developed the law on rebellion in quite detail and their work offers solutions to many serious problems faced by the contemporary international legal regime regarding non-international armed conflicts, such as determining the existence of an armed conflict, acknowledging the combatant status for rebels, application of the criminal law of the land during rebellion and legal consequences of the *de facto* authority of the rebels in a territory.

Unfortunately, however, as the Orientalists ignored or undervalued the works of the Muslim jurists, they generally negated the existence of the Islamic law on rebellion and held that Muslim jurists generally preached obedience to authority. The present dissertation digs out the Muslim legal discourse on rebellion and finds that debates on the legality (*jus ad bellum*) of rebellion are found in the works on creed, or greater law (*al-fiqh al-akbar*), while detailed exposition of the conduct of hostilities and legal consequences of rebellion (*jus in bello*) exists in the books of law-proper (*fiqh*).

The contemporary international legal regime is based primarily on the perspective of states, which it deems as 'legal persons', and Resultantly it offers little incentive to 'non-state actors', such as rebels, to abide by the law governing hostilities. Moreover, international law traditionally addressed only states but now it has succeeded in piercing the corporate veil of the states and addressing the individuals directly. Islamic law, on the other hand, has been addressing the individuals from day one. Hence, the Islamic law can contribute a lot in

developing and improving the contemporary regime about the so-called non-international armed conflicts (NIACs).

The contemporary regime considers state as the basic unit and regards rebellion the cause of disorder in the system. Moreover, as the contemporary system believes in the sovereignty of states and prohibits interference in the internal affairs of states, it does not concern itself with the legality of rebellion, unless rebellion or civil war poses a threat to international peace. Self-determination and liberation struggle are seen from the same perspective. Islamic law also prohibits disorder and disdains bloodshed and mischief. It, however, makes it obligatory on Muslims to individually and collectively strive for enjoining good and forbidding evil. Thus, it recognizes a limited right for the community to forcibly remove an unjust ruler or a usurper.

For regulating the conduct of hostilities, Islamic law provides an objective criterion for distinguishing rebels from bandits. It not only recognizes combatant status for rebels but also determines the necessary corollaries of their *de facto* authority of the rebels in the territory under their effective control. Thus it helps reduce the sufferings of civilians and ordinary citizens during rebellion and civil wars. At the same time, Islamic law asserts that the territory under the *de facto* control of the rebels is *de jure* part of the parent entity. It, therefore, answers the worries of those who fear that the grant of combatant status to rebels might give legitimacy to their struggle.

INTRODUCTION

In his doctoral dissertation on the Islamic law on rebellion, Khaled Abou El Fadl (b. 1963) defines rebellion as "the act of resisting or defying the authority of those in power".[1] He says that rebellion can be in the form of "passive non-compliance with the orders of those in power" as it can be in the form of "armed insurrection".[2] The position taken in the present dissertation, however, is that passive non-compliance to those in power is not rebellion. Not only that but also every violent opposition to government or state cannot be termed rebellion. Rather, there are some other conditions which turn a 'law and order problem' into rebellion. Hence, there is a need to clearly determine the legal status of the various forms of opposition to political authority.

Statement of the Problem

Muhammad Hamidullah (d. 2002), a renowned scholar of Islamic law and jurisprudence, in his monumental work on Muslim international law titled *The Muslim Conduct of State* mentions five different terms about violent opposition to government namely, insurrection, mutiny, war of deliverance, rebellion and civil war. He is of the opinion that if opposition to government is directed against certain acts of government officials it is *insurrection*, the punishment for which belongs to the law of the land,[3] but if the insurrection is intended to

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[1] Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge: Cambridge University Press, 2001), 4.

[2] Ibid.

[3] Muhammad Hamidullah, *Muslim Conduct of State* (Lahore: Sheikh Muhammad Ashraf, 1945), 167.

overthrow the legally established government on unjustifiable ground, it is *mutiny* and if it is directed against a tyrannical regime on just ground, it is called *war of deliverance*.[4] Obviously the distinction between mutiny and war of deliverance is based on subjective assessment as one and the same instance of insurrection may be deemed mutiny by some and war of deliverance by others. Hence, this distinction serves no useful purpose. The point is simply this: that as opposed to insurrection, the purpose of mutiny and war of deliverance is not just to get rid of some government officials but to overthrow the government.

Hamidullah mentions the next stages in the violent opposition to government or state under the titles of rebellion and civil war. He says that when insurrection grows more powerful to the extent of occupying some territory and controlling it in defiance of the home government, it is called *rebellion*, which may convert into *civil war* if the rebellion grows to the proportion of a government equal to the mother government.[5]

The early Muslim jurists also gave detailed description of the rulings of Islamic law regarding violent opposition to government. They used three terms for this purpose: *ḥirābah*, *baghy* and *khurūj*. The term *ḥirābah* is used for a particular form of robbery on which *ḥadd* punishment is imposed.[6] *Baghy* literally means disturbing peace and causing mischief (*fasād*) in the land.[7] In legal parlance, it denotes rebellion against a *just* ruler (*al-imām al-'adl*).[8] The term

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[4] Ibid.

[5] Hamidullah, 167-68.

[6] 'Alā' al-Dīn Abū Bakr b. Mas'ūd al-Kāsānī, *Badā'i' Ṣanā'i' fi Tartīb al-Sharā'i'*, ed. 'Ādil 'Abd al-Mawjūd and 'Alī al-Mu'awwaḍ, (Beirut: Dār al-Kutub al-'Ilmiyyah, 1997), 9:360. In Islamic law, *ḥadd* is a fixed penalty the enforcement of which is obligatory as a right of God. Ibid., 177.

[7] This is when it is used in conjunction with the preposition *'alā*. See for detailed literal analysis: Abū 'l-Faḍl Jamāl al-Dīn Muḥammad Ibn Manẓūr al-Ifrīqī, *Lisān al-'Arab* (Beirut: Dār Ṣādir, 1968), 4:323.

khurūj, literally "going out", was originally used for rebellion against the fourth caliph 'Alī (God be pleased with him) and those rebels were specifically termed as *Khawārij* (those who went out). Later, however, the term was used particularly for rebellions of various leaders among the household (*ahl al-bayt*) of the Prophet (peace be on him) against the tyrannical Umayyad and Abbasid rulers.[9] In other words, the term *khurūj* was used for just rebellion against unjust rulers.

However, the just and unjust nature of the war is a subjective issue on which opinions may differ. That is why the Muslim jurists developed the code of conduct for rebellion irrespective of whether the rebellion is just or unjust. It is for this reason that the two terms *khurūj* and *baghy* came to be used interchangeably.[10] Thus, *khurūj* and *baghy* attract the law of war, while *ḥirābah* is dealt with under the criminal law of the land.[11]

As far as the contemporary international legal regime is concerned, it primarily deems rebellion an internal affair of a state in which it does not allow other states to interfere. The Charter of the United Nations Organization (UNO), however, gives the UN Security Council the authority to take appropriate action for maintaining and restoring international peace whenever the so-called internal affairs of a state constitute a threat to international

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[8] Muḥammad Amīn b. 'Ābidīn al-Shāmī, *Radd al-Muḥtār 'alā 'l-Durr al-Mukhtār Sharḥ Tanwīr al-Abṣār*, ed. 'Ādil Aḥmad 'Abd al-Mawjūd and 'Alī Muḥammad Mu'awwaḍ (Riyadh: Dār 'Ālam al-Kutub, 2003), 3:308.

[9] For instance, the revolt of Zayd b. 'Alī, the great grandson of 'Alī, is called *khurūj* not *baghy*.

[10] It is for this reason that in the Chapters on *Siyar* in the Ḥanafī manuals the section entitled "*Bāb al-Khawārij*" mentions the rulings of Islamic law regarding rebellion irrespective of whether the rebellion is just or unjust.

[11] See Section 8.2 below.

peace.[12] Sometimes when a state faces insurgency, it invites other states to support it in its counter-insurgency operations.[13] Other states may even unilaterally intervene on 'humanitarian' grounds when it thinks that a state is persecuting its own population, though the legality of such 'humanitarian intervention' remains contentious.

Rebellion may or may not be illegal from the perspective of international law, but once there is a rebellion there also have to be some rules for regulating the conduct of hostilities. The contemporary international legal regime for this purpose, the so-called international humanitarian law (IHL), has primarily been developed keeping in view the perspective of states. Hence, it is faced with some serious lacunae. For instance, states generally do not acknowledge the existence of an armed conflict within their boundaries even when they face strong secessionist movements.[14] Then, it is difficult to make non-state actors comply with the rules of IHL as they consider it binding on states only. Most importantly, the contemporary regime does not accord combatant status to insurgents and that is why even when they abide by the law of war, they remain subject to the criminal law of the state against which they take up arms.

As far as Islamic law on rebellion is concerned, following Hamilton Gibb (d. 1971), most of the modern scholars, both Muslims and non-Muslims, have assumed that Islamic law

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[12] Article 39 of the UN Charter mentions three grounds on the basis of which the UN Security Council can use military force against a state. These grounds are: act of aggression, breach of international peace and threat to international peace. Article 2 (7) declares that the Security Council can interfere in the internal affairs of the states when these internal affairs cause threat to international peace.

[13] The classical example is the invitation of the Babrak Karmal regime in Afghanistan to the Union of Soviet Socialist Republics in 1979.

[14] There are two major reasons for this. One, states do not want other states and international organizations to interfere in such a situation. Two, states consider insurgents to be criminals and law-breakers. They fear that acknowledging *belligerent* status for insurgents may give some sort of legitimacy to their struggle.

does not recognize the right of the community to remove an unjust ruler. Abou El Fadl presented a somewhat different thesis but his over-skepticism regarding the authenticity of the Prophetic traditions as well as the manuals of Islamic law leads him to conclusions, which cannot be accepted by mainstream Muslim scholarship. Hence, there is a need to present purely Muslim perspective based on the use of proper sources of Islamic law applying the methodology of the Muslim jurists.

As early as the second/eighth century, Muslim jurists had developed a detailed law on rebellion. One of the reasons was that Muslim community saw revolutions and rebellions very early on and Muslim jurists could not ignore issues and questions relating to these upheavals. Answers to these questions are found in books of "greater law" (*al-fiqh al-akbar*) as well as books of "law-proper" (*al-fiqh*). However, as shown in the present dissertation, the former dealt with issues of *legality* of taking up arms against government while the latter generally dealt with issues of *conduct* of hostilities during such an uprising. Orientalists' misgiving about lack of Islamic law on rebellion stems from ignoring this basic fact.

Framing of Issues

Following are some of the important issues which will be analyzed in this dissertation:

1. Does Islamic law recognize the right of the community to remove an unjust ruler or system of government?
2. If yes, what are the restrictions on the exercise of this right?

3. Does Islamic law provide any yardstick for distinguishing rebellion from "internal disturbances" and "law and order problems"?
4. What are the legal differences between bandits and rebels?
5. What are the important lacunae in the contemporary international legal regime on rebellion?
6. How can Islamic law help in improving the contemporary international legal regime on rebellion?
7. If combatant status is recognized for rebels, does it imply granting legitimacy to rebellion?
8. What are the legal consequences of accepting *de facto* authority of the rebels on a piece of territory? In particular, what is the legal status of the decisions of the courts of rebels?
9. Are rebels bound by the treaties concluded by the parent-state with other parties? Conversely, is the state bound by the treaties concluded by the rebels with other parties?
10. What are the legal consequences of the distinction which Islamic law draws between rebels who are Muslims and rebels who are non-Muslims?

Outline of the Study

Work on the present dissertation started initially as part of the "*Siyar* Project" of the Islamic Research Institute, Islamabad. Dr. Zafar Ishaq Ansari, the then Director-General of the

Institute, gathered some great scholars of Islamic law who had worked on various aspects of *Siyar* (Islamic law about relations with non-Muslims and rebels in times of war and peace).[15] As part of that project, I worked on expounding the law on rebellion in Muslim legal discourse. The outcome was then published in the form of two articles, one dealing with the legality (*jus ad bellum*) of rebellion and the other dealt with the conduct of hostilities (*jus in bello*) of rebellion.[16] The present dissertation builds upon that work and provides an in-depth analysis and comparative study of the Islamic legal discourse and the contemporary legal regime on rebellion.

The dissertation has been divided into three major parts. The first part reviews the literature and frames issues for analysis in the dissertation. The second part examines issues of *jus ad bellum* or legal status of rebellion in Islamic theology, law and contemporary international legal regime. The third part elaborates the *jus in bello* or the law of conduct of hostilities for rebellion in Islamic legal discourses as well as the contemporary international humanitarian law.

The first part comprises three chapters. Chapter one gives an overview of the texts of the Qur'ān and the *Sunnah* which directly deal with the issue of rebellion and, thus, shows the basis for the overwhelming interest of Muslim jurists in expounding the law on rebellion. Chapter two reviews the works of the modern scholars - Muslims and non-Muslims – who

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[15] They included Dr. Mahmood Ahmad Ghazi, Professor Imran Ahsan Khan Nyazee, Dr. Muhammad Tahir Mansoori, Dr. Muhammad Munir and Dr. Muhammad Mushtaq Ahmad. I was made the Secretary/Coordinator of this forum.

[16] Sadia Tabassum, "Recognition of the Right to Rebellion in Islamic Law with Special Reference to the Hanafī School," *Hamdard Islamicus* 34 (Oct 2011): 55-91; *idem*, "Combatants, Not Bandits: The Status of Rebels in Islamic Law," *International Review of the Red Cross* 93 (2011): 121-139.

hold that Islamic law does not have a detailed regime about rebellion and that the Muslim jurists generally taught obedience to authority. This chapter shows that Western scholars as well as those Muslim scholars who were influenced by their work have generally focused on 'non-legal' sources and ignored the proper manuals of law. Chapter three, then, examines some of the significant classic works on theology, philosophy, art, political theory as well as proper manuals of law that deal with the issue of rebellion from various perspectives. This Chapter shows that the Muslim jurists discuss the *jus ad bellum* of rebellion in their works on theology (*al-fiqh al-akbar*) and examine the *jus in bello* of rebellion in the proper manuals of law (*al-fiqh*) where they either devote a section (*Bāb al-Khawārij*) to it within the chapter of *siyar* or elaborate it in a separate chapter under the title of *Kitāb al-Baghy*.

The second part also consists of three chapters. Chapter four expounds the issues about rebellion in Western political philosophy as well as international law and examines these issues in relation to the concepts of natural rights, anarchism, legal positivism, sovereignty and self-determination. Chapter five, then, explores the works on Muslim theology and creed for finding out principles of the Islamic *jus ad bellum* for rebellion. It shows that issue such as the necessity of political setup, the essential conditions for the ruler, the validity of the rule of usurpers, the multiplicity of Muslim political setups, the validity of armed resistance to unjust rulers and the like are discussed by Muslim jurists and theologians in great detail in the manuals of creed, not law. Chapter Six, then, focuses on manuals of law and shows that the principles and foundations of the view of Abū Ḥanīfah for the right of the

community to forcibly remove an unjust ruler. It also shows that these principles and foundations have been fully recognized and upheld by the Ḥanafī School.

The third part again comprises three chapters. Chapter seven presents an overview of the contemporary international legal regime about conduct hostilities during the so-called 'non-international armed conflict' and highlights a few significant problems and gaps found in this regime. Chapter eight examines the principles of Islamic law regarding the status of rebels and how they are distinguished from ordinary criminals and gangsters. The last chapter expounds the provisions of Islamic law about legal consequences of the *de facto* authority of rebels in the territory under their control.

Methodology

The methodology for deriving the rules and principles of Islamic law and applying them on contemporary issues has been elaborated in detail in the third chapter of the dissertation. In a nutshell, the dissertation presumes – contrary to what many contemporary scholars contend – that every school of Islamic law represented a distinct legal theory and an internally coherent system of interpretation. It further presumes as a necessary corollary of the previous presumption that mixing up the views of the jurists belonging to different schools leads to analytical inconsistency. Hence, the dissertation primarily focuses on the expositions of the Ḥanafī School only. Views of the jurists of other schools have, therefore, only briefly been mentioned in footnotes. There is only exception from this: the views of Imām Juwaynī and

Imām Ghazālī, the two great Shāfi'ī jurists, have been explained in a bit detail in chapter six of the dissertation for the reasons mentioned there.

As for the research methodology adopted in the dissertation, suffice it to say that it is a combination of the descriptive, analytical and comparative methodologies which best suit the kind of qualitative research undertaken in the present dissertation.

CHAPTER ONE: ROOTS OF THE DISCOURSE ON REBELLION IN ISLAMIC LAW

INTRODUCTION

Islamic international law – or *Siyar* – has been proving to deal with the issue of rebellion, civil wars and internal conflicts in quite detail. Every manual of *fiqh* has a chapter on *Siyar* that contains a section on rebellion (*khurūj/baghy*).[17] Some manuals of *fiqh* have separate chapters on rebellion.[18] The Qur'ān, the primary source of Islamic law, provides fundamental principles not only to regulate warfare in general but also to deal with rebellion and civil wars.[19] The *Sunnah* of the Prophet (peace be on him) elaborates these rules[20] and so do the conduct and statement of the pious Caliphs who succeeded the Prophet (peace be on him), these Caliphs especially 'Alī (Allah be pleased be with him), laid down the norms which were

[17] Thus, *Kitāb al-Siyar* in *Kitāb al-Aṣl* of Muḥammad b. al-Ḥasan al-Shaybānī contains a section (*Bāb*) on *khurūj*. (Majid Khaduri, *The Islamic Law of Nations: Shaybānī's Siyar* (Baltimore: John Hopkins Press, 1966), 230-54). The same is true of other manuals of the Ḥanafī School.

[18] This is the case with *al-Kitāb al-Umm* of Muḥammad b. Idrīs al-Shafi'ī. This encyclopedic work of Shafi'ī contains several chapters relating to *siyar*, and one of these chapters is *Kitāb Qitāl Ahl al-Baghy wa Ahl al-Riddah*. (Muḥammad b. Idrīs al-Shafi'ī, *al-Kitāb al-Umm*, ed. Dr. Aḥmad Badr al-Dīn Ḥassūn (Beirut: Dār Quṭaybah, 2003), 5:179-242). The later Shafi'ī jurists followed this practice. Thus, *al-Muhadhdhab* of Abū Isḥāq Ibrāhīm b. 'Alī al-Shīrāzī also contains a separate chapter on *baghy* entitled *Kitāb Qitāl Ahl al-Baghy*. (Abū Isḥāq Ibrāhīm b. 'Alī al-Shīrāzī, *al-Muhadhdhab fi Fiqh al-Imām al-Shafi'ī* (Beirut: Dār al-Ma'rifah, 2003), 3:400-423).

[19] Sūrat al-Ḥujurāt gives directives for dealing with *baghy*. (49:9-10). Muslim jurists further discuss the issues relating to *baghy* while analyzing the implications of the religious duty of *al-amr bi 'l-ma'rūf wa al-nahy 'an al-munkar* (enjoining right and forbidding wrong). See, for instance, Abū Bakr al-Jaṣṣās, *Aḥkām al-Qur'ān* (Karachi: Qadīmī Ḳutubkhāna, n. d.), 1:99-101 and 2:50-51.

[20] See, for instance, traditions in *Kitāb al-Imārah* in *al-Saḥīḥ* of Muslim b. al-Ḥajjāj al-Qushayrī.

accepted by the Muslim jurists who in time developed detailed rules.[21] Islamic history records several instances of rebellion in its early period and that is why rebellion has always been an issue of concern for the jurists. Furthermore, the jurists were very conscious about the obligations of both factions during rebellion because Islamic law deems both warring factions as Muslims.[22] Significantly, rebellion from Muslim perspective is not only a question of law, but it also involves serious issues of faith as well as interpretation of historical events.

Hence, this Chapter first focuses on the Qur'ānic verses about rebellion and how they are interpreted by the jurist, particularly those belonging to the Ḥanafī School. Then, it examines the Prophetic traditions about rebellion after which it shows how the divide on legal and constitutional issues developed into disagreement on issues of creed and faith resulting in creating various Muslim sects.

1.1 The Qur'ānic Verses Relating to Rebellion

The Qur'ān is the primary source of Islamic law and as such the jurists refer to several verses of the Qur'ān while analyzing issues relating to rebellion. Abou El Fadl tried to explain "the doctrinal foundations of the laws of rebellion" by concentrating on four verses of the Qur'ān,

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[21] The illustrious Ḥanafī jurist Abū Bakr Muḥammad b. Abī Sahl al-Sarakhsī in his analysis of the Islamic law of *baghy* asserts at many places that "'Alī (May God be pleased with him) is the *imām* in this branch of law." (*Al-Mabsūṭ* (Bairūt: Dār al-Kutub al-'Ilmiyyah, 1997), 10:132. See Section 2.2.2 of this dissertation for more details.

[22] The Qur'ān calls both the warring factions as "believers" (Qur'ān, 49:9) and 'Alī (God be pleased with him) is reported to have said regarding his opponents: "These are our brothers who rebelled against us." From this, the jurists derive this fundamental rule of the Islamic law of *baghy*. (Sarakhsī, *al-Mabsūṭ*, 10:136)

namely, the two "*baghy* verses" (Qur'ān, 49:9-10)[23] and the two "*ḥirābah* verses" (Qur'ān, 5:33-34).[24]

Surprisingly enough, he does not relate the issue of rebellion to the verses about the religious and legal duty of enjoining right and forbidding wrong (*al-amr bi 'l ma'rūf wa al-nahy 'an al-munkar*).[25] The fact remains that in Muslim history the discourse on rebellion, more often than not, revolved around this important duty and that is why the Ḥanafī jurists particularly discuss the issue of rebellion against unjust ruler under the doctrine of enjoining right and forbidding wrong.[26] Similarly, the juristic analysis of the issues relating to rebellion always revolve around the notion of mischief or corruption in land (*fasād fī 'l-arḍ*) and as such it becomes all the more necessary to examine the Qur'ānic notion of *fasād*.

Hence, the analysis here focuses on these four categories of the Qur'ānic verses, namely, the verses about *fasād*, *ḥirābah*, *baghy* and *al-amr bi 'l ma'rūf wa al-nahy 'an al-munkar*.

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[23] Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge: Cambridge University Press, 2001), 37-47.

[24] Ibid., 47-60.

[25] These verses include *inter alia*: Qur'ān, 3:104, 110 and 114; 5:79; 9:67 and 112; and 22:41.

[26] Jaṣṣās, 1:99-101. See also: Abū 'l-Faḍl Shihāb al-Dīn al-Sayyid Maḥmūd al-Ālūsī, *Rūḥ al-Ma'ānī wa Tafsīr al-Qur'ān al-'Aẓīm wa 'l-Sab' al-Mathānī* (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 1405), 4:22. Abou El Fadl himself acknowledges this fact (*Rebellion and Violence*, 61). He also commented upon the traditions which emphasize the duty of enjoining right and forbidding wrong. (Ibid, 123). However, he proposes that "these verses and the reports surrounding them require a separate study." (Ibid., 61 fn. 120).

1.1.1 The Duty of Enjoining Right and Forbidding Wrong

According to the Qur'ānic teachings, it is the duty of every Muslim[27] as well as of the Muslim community and the ruler[28] to enjoin right and forbid wrong. The Qur'ān mentions it as a distinctive characteristic of Muslims that they command good and forbid evil while the hypocrites (*munāfiqīn*) enjoin wrong and forbid right.[29] Muslims are required, however, to perform this obligation with wisdom (*ḥikmah*)[30] and not to despair in face of difficulties during the performance of this obligation.[31] The Qur'ān also warns Muslims that if they do not fulfill his obligation and Resultantly the society gets corrupted, God's wrath will not only befall those specific persons who commit the evil acts but also those who do not prohibit them from committing these acts.[32] The Qur'ān also mentions among the crimes of Banī Isrā'īl that they abandoned this important obligation due to which God's wrath befell them.[33] This Divine punishment and wrath need not always be in the form of a natural disaster or catastrophe. According to the Qur'ān, mutual conflict in various sections of a society in which people kill each other is also a form of this Divine punishment.[34]

The famous Ḥanafī jurist of the fourth/tenth century Abū Bakr al-Jaṣṣās al-Rāzī (d. 370 AH/980 CE) has gone into great details of how Abū Ḥanīfah, the founder of the Ḥanafī School, relies on the verses and traditions about the duty of enjoining right and forbidding

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[27] Qur'ān 41:33-36; 16:125.
[28] Qur'ān, 3:104; 22:41.
[29] Qur'ān, 9:67.
[30] Qur'ān, 16:125.
[31] Qur'ān, 31:18.
[32] Qur'ān, 8:25.
[33] Qur'ān, 5:79.
[34] Qur'ān, 6:65.

wrong for justifying effort to forcibly remove an unjust ruler. This will be discussed in detail in Chapter Six of this dissertation.

1.1.2 The Qur'ānic Notion of Mischief (*Fasād*)

Perhaps, the most elaborate discussion on the Qur'ānic usage of the phrase *fasād fi 'l-arḍ* is found in *al-Jihād fi 'l-Islām* of Mawlānā Abū 'l-A'lā Mawdūdī (d. 1979), a great Muslim reformer of the twentieth century. While explaining the details of the Islamic law of war, he divides jihad into two broad categories: defensive (*mudāfi'ānah*) and reformative (*muṣliḥānah*).[35] He asserts that the reformative jihad is waged for the purpose of combating persecution (*fitnah*) and disorder (*fasād*).[36] Then, he explains the situations that fall either in *fitnah* or *fasād*.[37] He says that literally *fasād* denotes anything in excess and thus it signifies every unjust or evil act.[38] However, asserts Mawdūdī, Qur'ān generally applies this term on mischief and disorder at the community level.[39] In this regard, he identifies as many as eleven different instances of the Qur'ānic usage of the term *fasād*.[40] It may, however, be noted here that Mawdūdī does not include in this list some other instances of *fasād* mentioned in the Qur'ān. Most important of these usages are:

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[35] Abū 'l-A'lā Mawdūdī, *al-Jihād fi 'l-Islām* (Lahore: Idārah Tarjumān al-Qur'ān, 1974), 53, 85.

[36] Ibid., 104-105.

[37] Ibid., 105-117.

[38] Ibid., 109.

[39] Ibid.

[40] These include policy of racism and "ethnic cleansing" adopted and enforced by Pharaoh against the Israelites, imperialistic policies of the ancient Arab tribe of 'Ād, indulgence in homosexuality and unnatural lust, corrupt trade practices, wanton destruction and putting hurdles in the way of Allah thereby making it difficult for people to accept the message of the Prophets. Ibid., 5:62-64.

1. The offence of *ḥirābah* which the Qur'ān has explicitly declared as *fasād*;[41]

2. *Fasād* as one of the causes for the death punishment;[42] and

3. Most importantly for our purpose, Mawdūdī does not mention rebellion here.

Significantly, Mawdūdī includes the law enforcing action against the criminals and the war against rebels within the scope of defensive jihad.[43] The net conclusion is that *fasād* is a generic term which includes every violation of the Divine law. For the sake of clarity, therefore, it is important to highlight the difference in the legal consequences of the different kinds of *fasād*.

In *Sūrat al-Mā'idah*, the Qur'ān says that death punishment is permissible only for two offences, namely murder and *fasād*.[44] In the same *Sūrah*, however, the Qur'ān mentions four different kinds of punishments for another category of *fasād* called *ḥirābah* by jurists.[45] Then, for curbing some categories of *fasād*, the Qur'ān prescribes war.[46]

Now, the problem with the wider doctrine of *fasād* as expounded by Mawdūdī is that it prescribes jihad, defensive or reformative, as the solution for all the various categories of *fasād*.[47] As opposed to this, the jurists, particularly the Ḥanafīs, distinguished between these various categories of *fasād* and their legal consequences. Thus, they held that some of these

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[41] Ibid., 5:33-34.

[42] The other being the offence of intentional murder. See Qur'ān 5:32. In this regard, one may also refer to a well-known tradition of the Prophet (peace be on him) which mentions three grounds for death punishment: intentional murder, unlawful sexual intercourse by a married person and apostasy.

[43] Mawdūdī, *al-Jihād fi 'l-Islām*, 70-77. See for a detailed analysis of the views of Mawdūdī and its comparison with those of Hamidullah and Wahbah al-Zuḥaylī: Muhammad Mushtaq Ahmad, "The Scope of Self-defence: A Comparative Study of Islamic and Modern International Law", *Islamic Studies* 49 (2010): 155-194.

[44] Qur'ān 5:32.

[45] Ibid., 5:33-34.

[46] Ibid., 22:40 and 2:251.

[47] Amīn Aḥsan Iṣlāḥī (d. 1997), a renowned exegete of the twentieth century, went to other extreme of bringing all the various forms of *fasād* under the umbrella concept of *ḥirābah*. (*Tadabbur-i-Qur'ān* (Lahore: Fārān Foundation, 2001), 2:505-508). See for a detailed criticism of this view: Muhammad Mushtaq Ahmad, "The Crime of Rape and the Ḥanafī Doctrine of *Siyāsah*", *Pakistan Journal of Criminology*, 6 (2014): 161-192.

categories would attract the law of war;[48] many of them might be regulated by the general criminal law of the land under the doctrine of *siyāsah*;[49] while only a few of them would be covered by the special criminal law of the land – *qiṣāṣ* and *ḥudūd*.[50]

Hence, from the perspective of the Muslim jurists there are two doctrines of *fasād fi 'l-arḍ*: wider that covers all the various forms of *fasād* mentioned in the Qur'ān and the *Sunnah* or covered by the general principles of law; and narrower doctrine of *fasād* which distinguishes between the various categories of *fasād* and their legal consequences. The jurists emphasize that the different kinds of *fasād* should be treated differently.

1.1.3 *Ḥirābah* (Robbery) as A Form of Mischief

In *Sūrat al-Mā'idah*, much of which was revealed in 6 AH/627 CE,[51] the Qur'ān mentions a particular form of mischief and prescribes four different kinds of punishments for it:

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[48] Rebellion attracts this rule. That is why the jurists devote specific sections to the rules about rebellion in the chapters regarding the law of war (*siyar*).

[49] The famous Ḥanafī jurist Ibn Nujaym defines *siyāsah* as "the act of the ruler on the basis of *maṣlaḥah* (protection of the objectives of the law), even if no specific text [of the Qur'ān or the *Sunnah*] can be cited as the source of that act." (Zayn al-'Ābidīn b. Ibrāhīm Ibn Nujaym, *al-Baḥr al-Rā'iq Sharḥ Kanz al-Daqā'iq* (Beirut: Dār al-Ma'rifah, n. d.), 5:11). The jurists validated various legislative and administrative measures of the ruler on the basis of this doctrine. For instance, the *farāmīn* of the Mughal Emperors or the *qawānīn* of the Ottoman Sulṭāns were covered by the doctrine of *siyāsah*. This authority of the ruler, however, is not absolute. The jurists assert that if the ruler uses this authority within the constraints of the general principles of Islamic law, it is *siyāsah 'ādilah* and the directives issued by the ruler under this authority are binding on the subjects. However, if the ruler transgresses these constraints, it amounts to *siyāsah ẓālimah* and such directives of the ruler are invalid. (Ibn 'Ābidīn, *Radd al-Muḥtār*, 6:20). See for details of the doctrine of *siyāsah* the monumental work of the illustrious Imām Aḥmad b. 'Abd al-Ḥalīm Ibn Taymiyyah: *al-Siyāsah al-Shar'iyyah fi Iṣlāḥ al-Rā'ī wa al-Ra'iyyah* (Jeddah: Majma' al-Fiqh al-Islāmī, n.d.).

[50] See for a detailed analysis of these various categories of crimes and their legal consequences: Imran Ahsan Khan Nyazee, *General Principles of Criminal Law* (Islamabad: Advanced Legal Studies Institute, 1998).

[51] Abū 'l-Ḥasan 'Alī b. Aḥmad al-Wāḥidī, *Asbāb Nuzūl al-Qur'ān* (Bairut: Dār al-Kutub al-'Ilmiyyah, 1411/1991), 191; Jalāl al-Dīn 'Abd al-Raḥmān b. Abī Bakr al-Suyūṭī, *Lubāb al-Nuqūl fi Asbāb al-Nuzūl* (Bairut: Mu'assasat al-Kutub al-Thaqafiyyah, 1422/2002), 97.

> The only reward of those who make war upon Allah and His Messenger and strive to make mischief in the land is that they will be killed or crucified or have their hands and feet on alternate sides cut off or will be expelled out of the land. This is their disgrace in the world; and in the hereafter theirs will be an awful doom.[52]

Abou El Fadl has gone into great details of how this offence is related to rebellion.[53] However, for the jurists, particularly those belonging to the Ḥanafī School, this offence was confined to highway robbery and they distinguished rebels from robbers and bandits.[54] This distinction had significant political implications. For instance, this necessitated that rebels must not be treated like ordinary criminals and gangsters.[55] It further necessitated declaration of war and acknowledging a state of war between the rebel group and the government forces.[56]

Furthermore, although the verse uses the letter *aw* (or) between the four different kinds of punishments, the jurists held that it did not give discretion and option to the ruler or the judge to choose between the various punishments; on the contrary, they held that these four different punishments were prescribed for four different grades of highway robbery.[57]

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[52] Qur'ān, 5:33-34. The translation of all the verses in this dissertation is from the abridged version of *Tafhīm al-Qur'ān* of Sayyid Abū 'l A'lā Mawdūdī translated and edited by Zafar Ishaq Ansari. *Towards Understanding the Qur'ān* (Leicester: The Islamic Foundation, 2006). Slight changes have been made on the basis of my understanding of the original.

[53] Abou El Fadl, 47-60.

[54] Kāsānī, 9:360.

[55] See Chapter 8 of this dissertation for details.

[56] This is what governments generally do not want to acknowledge. See Chapter 7 of this dissertation for details.

[57] Kāsānī, 9:366-71.

Thus, they held that death punishment could only be given to robbers if they committed murder during robbery.[58] They also declared that the offence of *ḥirābah* was a *ḥadd* offence which meant that it could be established only through a very strict standard of evidence.[59] Thus, by standardizing the parameters of this offence, the jurists blocked the way of arbitrary application of these strict punishments to political opponents.

Of late, some of the scholars have again been trying to widen the scope of the offence of *ḥirābah* by bringing within its fold all the various forms of *fasād*.[60] If accepted this change will not only demolish the whole edifice of Islamic criminal law as developed by centuries of juristic scholarship but also it will give devastating powers to the rulers for curbing political opposition and silencing criticism.

1.1.4 Rebellion between Mischief and Duty

The verses of *Sūrat al-Ḥujurāt* directly address the issue of rebellion and civil war:

> If two parties of the believers happen to fight, make peace between them. But then, if one of them transgresses against the other, fight the one that transgresses until it reverts to Allah's command. And if it does revert, make peace between them with justice, and be equitable for Allah loves the equitable. Surely, the believers are none but brothers unto one another, so set things right between your brothers, and have fear of Allah that you may be shown mercy.[61]

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[58] Ibid., 369.
[59] Ibid., 366. See for details about the characteristic features of the *ḥudūd* punishment: Ibid., 9:248-50.
[60] Islahi, *Tadabbur-e-Qur'ān*, 3:505-508.
[61] Qur'ān, 49:9-10.

These verses make it clear that in case of mutual fighting between two Muslim groups, other Muslims should not remain indifferent.[62] Rather, the verses impose a positive duty on other Muslims to try to resolve the conflict amicably.[63] Furthermore, if it is proved that one of the groups is committing aggression against the other, Muslims must support the group which is on the right side against the aggressor.[64]

It may be mentioned here that some of the scholars, particularly those belonging to the Ḥashwiyyah[65] and the Ahl al-Ḥadīth[66], were of the opinion that in case of mutual conflict between two Muslim groups, other Muslims should remain impartial and should not participate in war.[67] They asserted that the word '*qātilū*' (fight) in these verses did not refer to

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[62] See for a detailed exposition of the rules and principles of Islamic law on this issue: Jaṣṣās, 3:595-98. In his commentary on Qur'ān 49:9, the famous Anadalusian commentator of the Qur'ān Abū 'Abdillāh Muḥammad b. Aḥmad al-Qurṭubī (d. 671 AH/1273 CE) says: "This verse establishes the obligation of fighting against those who are definitely known to have committed rebellion against a Muslim ruler or against any Muslim on unjust ground. It also proves that the opinion those people is wrong who disallow fighting against Muslims on the basis of tradition of the Prophet which equates fighting against Muslims with *kufr* (infidelity). Had fighting against such Muslims been *kufr*, it would imply that Allah commanded us to commit *kufr*. Allah is exalted!" (*Al-Jāmi' li Aḥkām al-Qur'ān* (Beirut: Mu'assasat al-Risālah, 1427), 16:316). Abū Bakr Ibn. al-'Arabī, the famous Mālikī jurist, says: "This verse is the basic source for the validity of fighting against those Muslims who take up arms on the basis of a *ta'wīl*. The Companions relied on this verse and the leading figures of Muslims referred to it [while fighting against such people]." (*Aḥkām al-Qur'ān* (Beirut: Dār al-Ma'rifah, n.d.), 4:1717).

[63] Jaṣṣās, 3:595.

[64] Qurṭubī, 16:316-17.

[65] Hashwiyyah is another name of the fatalists (Jabriyyah). (Muḥammad b. 'Abd al-Karīm al-Shahristānī, *al-Milal wa 'l-Niḥal* (Beirut: Dār Maktabat al-Mutanabbī, 1992), 1:85).

[66] Literally, the "people of Ḥadīth". They were scholars who stuck to tradition and opposed rationalism in matters of faith as well as law. Thus, they appeared as a group distinct both from the Mu'tazilah, who subdued faith to reason, and the Ahl al-Ra'y (literally, the "people of reason"), who used to interpret the meaning of individual texts of the Qur'ān and the *Sunnah* in the light of the general principles of law. See for a scholarly analysis of the difference in the approaches of the Ahl al-Ḥadīth and the Ahl al-Ra'y: Imran Ahsan Khan Nyazee, *Theories of Islamic Law: The Methodology of Ijtihād* (Islamabad: Islamic Research Institute, 1994), 143-73.

[67] Jaṣṣās, 3:595. See also: Qurtubi, 16:316-17; Ālūsī, 26:172-73.

war, but to the use of a little force, such as beating with sticks and shoes.[68] They pointed out that these verses were revealed when two Muslim groups used sticks and shoes against each other.[69] Similarly, they refer to the fundamental rule of Islamic law regarding the prohibition of the willful murder of Muslims and of waging war against them.[70] They also refer to many traditions of the Prophet (peace be on him) which prohibited support to any group during such a conflict.[71] They also argued that during the conflicts in the early Muslim history, many of the prominent Companions of the Prophet (peace be on him) did not support any of the parties to the conflicts.[72]

In his analysis of this debate, Jaṣṣās elaborated some very important legal principles and explained the true purport of these verses. He says:

> The verses *prima facie* require that the group, which is committing transgression, must be fought until it agrees to resolve the conflict in accordance with the Divine law. This rule is general and includes every kind of fight. Hence, if that group [which has committed aggression] can be controlled by the use of minor force, such as beating with sticks and shoes, the use of excessive force will not be permissible. However, if it cannot be controlled by lesser force than sword, the verses *prima facie* require that they should be

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[68] Jaṣṣās, 3:595. See also: Abū Ja'far Muḥammad b. Jarīr al-Ṭabarī, *Jāmi' al-Bayān* (Cairo: Maṭba'at Muṣṭafā al-Bābī, 1954), 26:80.

[69] Abū 'Abdillāh Muḥammad b. Ismā'īl al-Bukhārī, *al-Jāmi' al-Saḥīḥ, Kitāb al-Ṣulḥ, Bāb Mā Jā' fi 'l Iṣlāḥ bayn al-Nās*, Ḥadīth No. 2494; Suyūṭī, *Lubāb al-Nuqūl*, 197-198. See also: Abū 'Abd al-Raḥmān Muqbil b. Hādī al-Wādi'ī, *al-Saḥīḥ al-Musnad min Asbāb al-Nuzūl* (Cairo: Maktabah Ibn Taymiyyah, 1987), 198.

[70] Qur'ān, 4:92-93; *Bukhārī, Kitāb al-Fitan, Bāb Qawl al-Nabī: Man Ḥamal 'alaynā al-Silāḥ fa-lays minnā*, Ḥadīth No. 6543.

[71] *Bukhārī, Kitāb al-Manāqib, Bāb 'Alāmāt al-Nubuwwah fi 'l-Islām*. Ḥadīth No. 3334; Muslim b. al-Ḥajjāj al-Qushayrī, *al-Saḥīḥ, Kitāb al-Fitan wa Ashrāṭ al-Sā'ah, Bāb Nuzūl al-Fitan ka Mawāqi' al-Qaṭar*, Ḥadīth No. 5138.

[72] Jaṣṣās, 3:595-596; Ṭabarī, *Jāmi' al-Bayān*, 26:80

> fought with sword. No one has the authority to limit the implications of the verses to beating with sticks and shoes when the aggressor group continues to commit transgression. This is one of the necessary corollaries of the duty of enjoining right and forbidding wrong.[73]

In other words, as one of the implications of the obligation of enjoining right and forbidding wrong is to fight an unjust ruler. Another implication of this obligation is wage war against those who rebel against a just ruler.

As far as the reports of *sabab al-nuzūl* (occasion of revelation)[74] are concerned, explains Jaṣṣās, they cannot restrict the implications of the verses to a specific occasion.[75] Further, asserts Jaṣṣās, even on that occasion lethal weapons would have been used, had the fighters also used such weapons. However, as they only used sticks and shoes, only sticks and shoes were used against them in response.[76] Regarding the conduct of the Companions, Jaṣṣās says:

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[73] Ibid. See also: Ālūsī, 26:172-73; Qurtubi, 16:316-17.

[74] The Qur'ān was revealed to the Prophet (peace be on him) gradually in about twenty-three years. The knowledge of the historical context in which particular verses of the Qur'ān were revealed to the Prophet (peace be on him) is called the Science of *Asbāb al-Nuzūl* (literally, causes of revelation). For ascertaining this historical context, the scholars not only look at the specific traditions of this particular genus, but also to the *Sīrah* literature and, more importantly, to the internal evidence of the Qur'ānic verses and chapters. Sometimes, a problem arises as to how to reconcile between the internal evidence of the verses and the external reports of *Asbāb al-nuzūl*. For instance, the internal evidence may place the verses in the Makkan period and the *Asbāb al-nuzūl* traditions may place these in the Madīnan period, and vice versa. Similarly, more traditions than one are sometimes reported for one set of verses. Each of these cannot be a "cause" of revelation. Scholars of the Qur'ānic Sciences have, therefore, always asserted that the *Asbāb al-nuzūl* traditions should not be interpreted literally. Rather, some of these may well explain the "application" of the verses to concrete historical facts instead of explaining the "actual causes" of revelation. Furthermore, they also assert that the general rules mentioned in the verses cannot be restricted to the specific situations mentioned in the tradition, except where the internal evidence or other stronger arguments specify the rule to a particular space-time context. See for details: Badr al-Dīn al-Zarkashī, *al-Burhān fi 'Ulūm al-Qur'ān* (Beirut: Dār al-Fikr, 1988), 1:45-60.

[75] Jaṣṣās, 3: 596.

[76] Ibid. See also: Ṭabarī, *Jāmi' al-Bayān*, 26:80.

> 'Alī (God be pleased with him) accompanied by some prominent Companions, including those who participated in the Battle of Badr[77], fought rebels with sword. And in his wars, 'Alī was on the right side. Further, none opposed him on this issue, except those who rebelled against him and those who followed these rebels.[78]

For those Companions who did not participate in the wars against rebels, Jaṣṣās points out that they did not consider these wars as unlawful. "Perhaps, they did not fight because they thought that the ruler and his forces could overwhelm the rebels and that they did not need their support."[79]

The Prophetic traditions which prohibit taking sides in civil wars of Muslims, will be discussed below along with other traditions, which make it obligatory on Muslims to fight against the aggressors.

1.2 The Prophetic Traditions on Rebellion

The *Sunnah* of the Prophet (peace be on him) further elaborates these Qur'ānic commandments. In this Section, first the traditions about the 'grades' of the duty of enjoining

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[77] Among the Companions of the Prophet (peace be on him) those who participated in the famous Battle of Badr have a distinct and prominent position. They are deemed the torchbearers of justice, righteousness and truth.

[78] Jaṣṣās, 3:595-96.

[79] Ibid., 3:597. Sarakhsī mentions another possibility as well: "It is said that Ibn 'Umar and other companions (Allah be pleased with them) remained in their homes [and did not participate in war against rebels]. Perhaps, they considered themselves exempted from the obligation because of illness or some other lawful excuse, and the obligation of participation in war is imposed only on those who have the capability of participation." (*Al-Mabsūṭ*, 10:136)

right and forbidding wrong will be examined. After this, the traditions dealing with obedience to unjust rulers will be analyzed.

1.2.1 Three Grades of the Struggle to Change the Evil

An important question regarding the duty of enjoining right and forbidding wrong is whether every Muslim has the authority to use force while performing this obligation. A famous tradition of the Prophet (peace be on him) mentions three 'grades' of this obligation:

> If someone among you [Muslims] observes an evil, he should change it by force. If he does not have the capability for this, he should change it by raising voice against it. If he cannot do even that, he should have the determination in heart [to change it], and this is the least category of faith.[80]

Here, the first grade is to 'change'[81] the evil forcibly; the second grade is to change it by raising voice against it; and the third grade is that even if one remains silent, he should have the determination to change the evil. The third grade of the duty is, no doubt, the least demand of the faith of every Muslim. As far as the second grade is concerned, the *fuqahā'* mention that there is a *rukhṣah* (exemption) for a Muslim to remain silent if he is sure that the person committing evil will cause him harm.[82] However, the text of this as well as other

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[80] *Muslim, Kitāb al-Īman, Bāb Bayān Kawn al-Nahy 'an al-Munkar min Īmān*, Ḥadīth No. 70

[81] The word used in the tradition is *falyughayyirhu*, which not only means that Muslims should 'forbid' evil but also that they should change it and replace it with good.

[82] Abū Bakr Muḥammad b. Abī Sahl al-Sarakhsī, *Sharḥ Kitāb al-Siyar al-Kabīr*, ed. Ismā'īl Ḥasan al-Shāfi'ī (Beirut: Dār al-Kutub al-'Ilmiyyah, 1997), 1:116.

traditions proves that *'azīmah* (original rule) in such a situation is to raise voice against the evil and face the consequences with patience. Thus, the jurists assert that if this person is murdered, he will get the reward of *shahādah* (martyrdom).[83]

The first grade of the duty of changing evil, mentioned in this tradition, is to change it by the use of force. The most important principle in this regard is that a person can use force for this purpose only against those people over whom he has the *wilāyah* (legal authority).[84] Thus, if a person regards something as evil, he can call it evil and can raise voice to mold public opinion against it. However, he does not have the authority to stop it forcibly.[85] He can use force only against those over whom he has the legal authority and in that case, too, the use of force has to remain within the legal limits.[86] For stopping others forcibly, he has to ask those having the *wilāyah* over them.[87]

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[83] Ibid.

[84] See for a detailed analysis of the doctrine of *wilāyah*: Abū 'l-'Abbās Aḥmad b. Idrīs al-Qarāfī, *al-Iḥkam fi Tamyīz al-Fatāwā 'an al-Aḥkām wa Taṣarrufāt al-Qādī wa al-Imām* (Beirut: Dār al-Bashā'ir al-Islāmiyyah, 1416 AH), 121.

[85] Thus, if a Muslim causes damage to the musical instrument of another Muslim, he is under an obligation to pay damages (*ḍamān*). (Abū Bakr Burhān al-Dīn al-Marghīnānī, *al-Hidāyah Sharḥ Bidāyat al-Mubtadī* (Beirut: Dār al-Fikr, n.d.), 3:307) However, he shall pay damages only for the value of the raw material not of the manufactured instrument because the use of musical instrument is prohibited under Islamic law. (Ibid.)

[86] The illustrious jurist-cum-philosopher Abū Ḥāmid Muḥammad b. Muḥammad al-Ghazālī (d. 505 AH/ 1111 CE) in his monumental treatise on Islamic Jurisprudence *al-Mustasfā* says: "As far as the prerogative of enforcing commands is concerned, it is available only to the One Who has the creation (*al-khalq*) and the authority (*al-amr*). This is because only the commands of the owner (*al-mālik*) are enforced on the owned (*al-mamlūk*). As there is no owner but the Creator, only He has the authority to issue binding commands. When the Prophet (peace be on him), the ruler, the master [of a slave], the Father and the husband issue a command and make an act obligatory, that act does not become obligatory by virtue of their command, but because Allah has made their obedience obligatory." (*Al-Mustasfā min 'Ilm al-Uṣūl* (al-Madīnah al-Munawwarah: Islamic University, n.d.), 1:275-76)

[87] "To use force for enjoining right is the authority of the rulers because they have the capacity to enforce the decisions. Others can enjoin right only by raising their voice." Marghīnānī, 3:307.

Yūsuf al-Qaraḍāwī (b. 1926), a renowned contemporary scholar of Islamic law, in his recent study of the Islamic law of war titled *Fiqh al-Jihād: Dirāsah Muqārinah li-Aḥkāmih wa Falsafatih fi Ḍaw' al-Qur'ān wa 'l-Sunnah* enumerates four conditions for using force for the purpose of changing the evil with force:

1. That there is a consensus on the act being evil; hence, if scholars disagree on the legality of an act, it cannot be changed with force;
2. That the evil act is committed openly; as such it is not permissible to enter into private premises for the purpose of changing the evil with force;
3. That force must be used only at the time of the commission of the evil act, not before or after the commission of the act; and
4. That the use of force does not result in causing greater evil.[88]

Qaraḍāwī gives details of each of these conditions citing the Qur'ānic verses, the Prophetic traditions and the juristic opinions.[89]

It is strange, however, that Qaraḍāwī does not mention the condition of *wilāyah* in this regard and asserts that use of force for this purpose by individuals in their private capacity is not allowed by the contemporary laws. The fact is that this condition is prescribed by Islamic law also and the jurists discuss the implications of such acts of private individuals under the doctrine of *iftiyāt 'alā ḥaqq al-imām* (encroaching on the right of the ruler).[90]

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[88] Qaraḍāwī, *Fiqh al-Jihād: Dirāsah Muqārinah li-Aḥkāmih wa Falsafatih fi Ḍaw' al-Qur'ān wa 'l-Sunnah* (Doha: Qatar Foundation, 2008), 2:1040-41.

[89] Ibid., 1041-53.

[90] See for details the entry on "*iftiyāt*" in *al-Mawsū'ah al-Fiqhiyyah* (Kuwait: Wizārat al-Awqāf wa al-Shu'ūn al-Islāmiyyah, 1986), 5:280-81.

Thus, for instance, the Ḥanafī jurists hold that if an enemy combatant deserved death punishment after he was captured and he was killed by a Muslim soldier, the act will not attract the law of *qiṣās*;[91] however, no one shall execute the prisoner unless he is specifically authorized by the ruler for this purpose;[92] if an unauthorized person executes the prisoner, the ruler may award him reasonable punishment for committing *iftiyāt*.[93]

When a private person for the purpose of changing the evil takes the law into his own hands, other legal consequences may also follow. For instance, if a Muslim causes damage to the musical instrument of another Muslim, he is under an obligation to pay damages (*ḍamān*) even if the use of musical instrument is prohibited for a Muslim.[94]

1.2.2 Obedience to an Unjust Ruler: Two Modes of Behavior

On the issue of obedience to an unjust ruler, there are two sets of traditions, which stress two apparently conflicting modes of behavior.[95] The first set of traditions requires of Muslims to stay with the *jamā'ah* (Muslim community) and forbids them from dividing it.[96] Some traditions condemn separation from the *jamā'ah* in most severe terms.[97] In this category, we may also place those traditions in which Muslims are prohibited from taking up arms against

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[91] Sarakhsī, *Sharḥ Kitāb al-Siyar al-Kabīr*, 3:124-126.

[92] Ibid., 2:197.

[93] Ibid., 3:126.

[94] Marghīnānī, 3:307. However, he shall pay damages only for the value of the raw material not of the manufactured instrument. (Ibid.)

[95] Abou El Fadl calls these traditions of "obedience and counter-obedience" (*Rebellion and Violence*, 118).

[96] *Bukhārī, Kitāb al-Fitan, Bāb Kayf al-Amr Idhā lam Takun Jamā'ah*, Ḥadīth No. 6557

[97] Ibid., *Bāb Qawl al-Nabī Ṣallallāh 'alayh wa Sallam: Satarawn ba'di Umūran Tunkirūnahā*, Ḥadīth No. 6531.

other Muslims,[98] or which prohibit Muslims from taking the oath of allegiance to a new claimant of the governmental authority in the presence of an already existing ruler.[99] In some traditions, Muslims are prohibited from revolt against their ruler even if he is unjust.[100] The traditions, which prohibit Muslims from supporting any group in civil war, also fall in this category.[101]

In the second set of traditions, Muslims are prohibited from obeying those commands of the ruler which are explicitly against the norms of the Sharī'ah.[102] Similarly, Muslims are encouraged to raise their voice against the unlawful commands of the ruler and it has been termed as "the best form of jihad" (*afḍal al-jihād*).[103] This rule, as elaborated earlier, is linked with the wider concept of enjoining right and forbidding wrong. Hence, Muslims are under an obligation to support the just ruler against the unjust rebels. The true purport of the tradition which prohibits Muslims from supporting any warring faction is explained by Jaṣṣās in these words:

> In these traditions *fitnah* means a war in which various groups fight for worldly gains or on ethnic and parochial grounds and none of them fights under the command of a just ruler whose obedience is obligatory. As opposed

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[98] *Musnad Aḥmad, Bāqī Musnad al-Mukthirīn, Bāqī al-Musnad al-Sābiq*, Ḥadīth No. 8009.

[99] *Muslim, Kitāb al-Imārah, Bāb Idhā Buyi' li-Khalifatayn*, Ḥadīth No. 3444.

[100] Ibid., *Bāb Khiyār al-A'immah wa Shirārihim*, Ḥadīth No. 3447.

[101] *Bukhārī, Kitāb al-Manāqib, Bāb 'Alāmāt al-Nubuwwah fī 'l-Islām*, Ḥadīth No. 3334; *Muslim, Kitāb al-Fitan wa Ashrāṭ al-Sā'ah, Bāb Nuzūl al-Fitan ka Mawāqi' al-Qaṭar*, Ḥadīth No. 5138.

[102] *Muslim, Kitāb al-Imārah, Bāb Wujūb Ṭā'at al-Umarā' fī Ghayr Ma'ṣiyah wa Taḥrīmihā fī Ma'ṣiyah*, Ḥadīth No. 3423.

[103] Abū Dawud Sulaymān b. al-Ash'ath al-Sijistānī, *al-Sunan, Kitāb al-Malāḥim, Bāb al-Amr wa al-Nahy*, Ḥadīth No. 3781.

> to this, when it is established that one of the groups is a transgressor (*bāghiyah*) and the other is on the right side (*'ādilah*) under the command of the ruler, it is obligatory on every Muslim to support the ruler and his forces against the transgressors and to deem it an act that will surely bring reward for him.[104]

Sarakhsī begins his commentary on *Bāb al-Khawārij* in these words: "Know that when *fitnah* occurs between Muslims, it is obligatory on every Muslim to remain aloof (*ya'tazil*) from the *fitnah* and to stay at home."[105] After this, however, he explains that Muslims must support the ruler if it is established that those who took up arms against him are on the wrong side.

> When Muslims are united under the command of one ruler whom they trust, and there is peace in the society, then if a group of Muslims rebel against the ruler, it is obligatory on everyone capable of fighting to fight under the command of the Muslim ruler against these rebels.[106]

Hence, a holistic view of these various sets of traditions leads to the conclusion that's Islamic law requires of Muslims to raise their voice against the unjust commands of the ruler and to disobey such commands, but at the same time it stresses upon the unity of Muslims and prohibits mischief. As such, forceful removal of an unjust ruler cannot be permitted unless

[104] Jaṣṣās, 3:597.
[105] Sarakhsī, *al-Mabsūṭ*, 10:132.
[106] Ibid.

the expected mischief in the attempt to do so is lesser than the mischief coming from the unjust ruler.[107]

1.3 Creed, History and Law

Abou El Fadl rightly points out:

> In the field of rebellion, Muslim jurists also responded to theological demands, e.g. how does one declare rebellion to be a crime without suggesting that some of the most esteemed Companions of the Prophet were criminal? Significantly, however, they also worked within an inherited legal culture that imposed its own logic and language.[108]

This political divide among Muslims was expressed in religious language[109] and, thus, with the passage of time these various political groups converted into religious sects each having its own set of beliefs as well as its own concept of the legitimate political authority. In time, three major groups were to emerge among Muslims; *the Ahl al-Sunnah wa al-Jamā'ah*, the Shī'ah and the Khawārij.

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[107] Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aur Baghāwat Islāmī Sharī'at aur Bayn al-Aqwāmī Qānūn kī Roshnī mayn* (Gujranwala: al-Sharia Academy, 2008), 21.

[108] Abou El Fadl, 21.

[109] Muhammad Abū Zahrah, *Ta'rīkh al-Madhāhib al-Islāmiyyah fī 'l-Siyāsah wa 'l-'Aqa'id wa Ta'rīkh al-Madhāhib al-Fiqhiyyah* (Cairo: Dār al-Fikr al-'Arabī, n.d.), 21-24.

1.3.1 The Right to Rule the Muslim Community

The Shī'ah believe that Muslim community cannot live in accordance with the norms of Islam unless it is led by a rightful successor of the Prophet (peace be on him). In their opinion, it was so important an issue that it could not be left for people to decide. Hence, they assert that succession to the Prophet (peace be on him) was to be declared by him through an explicit text (*naṣṣ*).[110] While various Shī'ah sub-groups disagree on the question of the legitimate authority, they all agree on one point: that the successor of the Prophet (peace be on him) is to be from among the descendants of 'Alī (God be pleased with him). The Khawārij, on the other hand, were anarchists in essence[111] and some of them took the extreme position of asserting that political setup (*imāmah*) was not at all necessary.[112]

The Ahl al-Sunnah, or the Sunnīs, were of the opinion that a political setup is necessary for enforcing various provisions of Islamic law.[113] For this reason, they put several conditions for the eligibility of a person to become the ruler of the community. However, unlike the Shī'ah, they did not deem it necessary that the Prophet explicitly declared the

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[110] This is known as the doctrine of *Imāmah*. (Shahristānī, 1:146) Among the Shī'ah, the Zaydiyyah hold that the Prophet (peace be on him) did not name his successor, but mentioned his characteristics. (Ibid., 1:153). The Shī'ah Imāmiyyah, on the other hand, believe that the Prophet mentioned his successor by name and the same is done by each Imām in his turn. (Ibid., 1:162)

[111] Shihāb al-Dīn Aḥmad Ibn Ḥajr al-Haytamī (d. 973 AH/1566 CE), the famous sunnī jurist of the tenth/sixteenth century, summarizes the arguments of the Khawārij in these words: "Establishing governmental setup brings harm as it makes the commands of the ruler binding on the subjects even though both are equal and as such it results in mischief (*fitnah*). Moreover, the ruler is not infallible (*ma'ṣūm*) from infidelity and sins. If he is not removed, he inflicts harm on people and overthrowing him is not possible without bloodshed." Ibn Ḥajr al-Haytamī, *al-Ṣawā'iq al-Muḥriqāh 'alā Ahl al-Rafḍ wa 'l-Ḍalāl wa 'l-Zandaqah* (Cairo: al-Maṭba'ah al-Maymaniyyah, 1312 AH.), 1:26).

[112] The Najdāt, the followers of Najdah b. 'Uwaymir, were of the opinion that establishment of political setup was not a requirement of the sharī'ah but a dictate of the practical needs. (Abū Zahrah, *Al-Madhāhib al-Islāmiyyah*, 122).

[113] Haytamī, 1:25.

name of his political successor. Rather, they were of the opinion that political leadership was dependent upon the support of the Muslim community. In other words, only that person was entitled to caliphate who would command the confidence of the community.[114]

1.3.2 Divergent Views on the Legal Status of the Usurper

Sunnīs, Shī'ah and Khawārij also disagree on the legal status of a ruler who does not fulfill the required conditions or who later on becomes disqualified due to violation of fundamental conditions.

The Khawārij took the position that a Muslim who commits a major sin (*kabīrah*) becomes infidel.[115] Thus, in their opinion, a usurper (*ghāṣib*) is not a legitimate ruler and he must be removed from his office by the use of force, if necessary.[116] Similarly, a legitimate ruler who later becomes unjust (*ẓālim*) or sinner (*fāsiq*), is not qualified and must be removed.[117] Rebellion (*khurūj*) against unjust rulers and usurpers is, thus, obligatory according to the Khawārij.[118]

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[114] Notwithstanding this, the Ahl al-Sunnah generally asserted that the caliph should be from the tribe of the Quraysh. (Ibid., 132-135) In fact, this has been explicitly mentioned in various traditions of the Prophet (peace be on him). (*Bukhārī, Kitāb al-Aḥkām, Bāb al-Umarā' min Quraysh*, Ḥadīth no. 6606; Aḥmad b. Hanbal al-Shaybānī, *al-Musnad, Bāqī Musnad al-Mukthirīn, Musnad Anas b. Mālik*, Ḥadīth No. 16249). In the tenth/sixteenth century when the Ottoman Turks established their caliphate, many Sunnī jurists felt compelled to re-examine their position. See Section 2.4.1 of this dissertation for a review of the work of the famous Indian scholar-cum-politician Mawlānā Abū 'l-Kalām Āzād (d.1958) titled *Mas'ala-e-Khilāfat* [The Issue of Caliphate]. This issue bothered many Muslims thinkers in the fourteenth/twentieth century. See, for instance, Sayyid Abū 'l-A'lā Mawdūdī, *Tafhīmāt* (Lahore: Islamic Publications, 1978), 129-152; Amīn Aḥsan Iṣlāḥī, *Islāmī Riyāsat* (Lahore: Dār al-Tadhkīr, 2002).

[115] Ibn Ḥazm, 1:113.

[116] Ibid.

[117] Ibid.

[118] Ibid.

The Shī'ah also had strong reservations regarding the legitimacy of the usurpers and unjust rulers.[119] However, they disagreed on the legitimacy or obligation of *khurūj* against such rulers. While some of the leading figures among the various Shī'ah groups revolted against the Umayyads and the Abbasids, such as Muḥammad b. al-Ḥanafiyyah, Zayd b. 'Alī and Muḥammad Dhū 'l-Nafs al-Zakiyyah, the imāms of the Twelver Shī'ah never revolted against any ruler.[120] This was either because they could not express their beliefs regarding rebellion[121], or because they were of the opinion that rebellion would result in a greater evil than the evil of the continued existence of an unjust ruler.[122] If it was this latter consideration, their view was not different from that of the great Sunnī jurist Abū Ḥanīfah al-Nu'mān b. Thābit (d. 150/767).

The Sunnī jurists accepted the rule of usurpers firstly because in their opinion a Muslim remains Muslim even if he commits *kabīrah*, and secondly because they concluded that rebellion results in bloodshed and anarchy, which is a greater evil. Some of them went to the extreme of asserting that any attempt to remove an unjust ruler is *fitnah* (mischief). Thus,

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[119] Ibid., 1:147ff.

[120] For the Sunnī perspective of the struggle of Ḥusayn b. 'Alī (God be pleased with them both) against the Umayyad Caliph Yazīd, see Section 2.4.1 of this dissertation.

[121] This is known as the Shī'ah doctrine of *taqiyyah*, a dispensation allowing believers to conceal their faith when under threat, persecution or compulsion. (Ibn Ḥazm, 1:145).

[122] This is how the Sunnī scholars interpret the conduct of these Imāms.

they preached passive obedience to tyrants.[123] As opposed to them, Abū Ḥanīfah strongly advocated the right of the community to remove an unjust ruler.[124]

In view of this variety of approaches of the Muslim jurists, it is surprising to see modern scholars generally denying the existence of "the right to rebellion" in the Islamic legal discourses. This will be analyzed in a bit detail in the next Chapter.

CONCLUSIONS

Rebellion has always remained an issue of concern for Muslim jurists because the Qur'ān and the Prophetic *Sunnah*, the primary sources of Islamic law, prohibit mischief and disorder and make it obligatory on Muslims to strive for bringing peace and order to society and for establishing a just legal and political system. Thus, rebellion not only involves issues of law and politics but also those of creed and faith.

The Qur'ānic verses dealing with rebellion can be divided into four categories: (a) those enjoining the duty of commanding good and forbidding wrong; (b) those prohibiting mischief and disorder in society; (c) those prescribing punishment for bandits; and (d) those dealing specifically with rebellion and civil war. The first two sets of verses are variously interpreted by government forces and rebels to allege that the other party is committing mischief which it is under a legal obligation to curb. The third and the fourth sets of verses

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[123] The famous Ḥanafī jurist Abū Bakr al-Jaṣṣās severely criticizes passive obedience to the tyrants and points out its bad effects on Muslim society (*Aḥkām al-Qur'ān*, 2:50-51). This attitude led people to accept the rule of tyrants as their fate. See for details of the doctrines of Jabriyyah (fatalists): Ibn Ḥazm, 1:84-90.

[124] The position of Abū Ḥanīfah on these issues shall be examined in detail in Chapter 5 of this dissertation.

led the jurist to distinguish between bandits and rebels and develop different sets of rules for them. These verses have been elaborated with the help of the Prophetic traditions which, on the one hand, explain the grades and stages of the duty of enjoining good and forbidding wrong and, on the other, prescribes various modes of behavior for dealing with various forms of mischief, disorder and tyranny.

Muslim history records events of rebellion and civil war from very early on. The conduct of the Companions in these conflicts became one of the major sources for the jurists who were working on developing detailed law of rebellion and civil wars. These issues influenced not only law and politics but also creed and faith and that is why many of these issues are discussed in greater detail in the books of creed than in the books of law.

CHAPTER TWO: MODERN DISCOURSE ON THE ISLAMIC LAW OF REBELLION

INTRODUCTION

Despite the fact that Muslim juristic discourses show a variety of approaches to the issue of forceful removal of an unjust ruler, following Hamilton Gibb (d. 1971), the famous historian of Orientalism, most of the modern scholars – both Muslims and non-Muslims – have generally presumed that Islamic law does not recognize the right of the Muslim community to forcibly change an unjust ruler. This Chapter first examines the thesis forwarded by Gibb and generally accepted by modern scholars on the non-existence of the right to rebellion in the Islamic legal discourses. After this, it reviews the works of some of the leading Muslim scholars in the post-colonial world on the Islamic law of rebellion. It shows that the Muslim discourse has always shown a variety of approaches towards the issue of rebellion and authority of usurpers.

2.1 REBELLIONS IN EARLY ISLAMIC HISTORY

Muslims were politically united during the lifetime of the Prophet (peace be on him).[1] After his death, initially some disagreement arose among Muslims on the issue of his political successor, but this disagreement was soon resolved and the community accepted Abū Bakr

[1] By this it is meant that Muslims had only one ruler when they lived under the political authority of the Prophet (peace be on him). This, however, does not detract from the fact that a number of Muslims lived in territories that did not form part of the abode of Islam.

(God be pleased with him) as the first caliph.[2] Muslims remained politically united during the period of the second caliph 'Umar (God be pleased with him) and for a long time during the caliphate of the third caliph 'Uthmān (God be pleased with him).[3] Later, political opposition to 'Uthmān (God be pleased with him) turned into rebellion and in the year 35 AH/655 CE the rebels martyred him.[4] This was a major turning point in Muslim history as it affected the development of Muslim theology, law and history and many different ways, almost permanently.

2.1.1 The Beginning and End of Civil War

'Alī (God be pleased with him) was not willing to become caliph but he accepted this responsibility only to save Muslims from chaos and anarchy.[5] Some of the provinces, particularly Syria where Mu'āwiyah (God be pleased with him) was governor, refused to take oath of allegiance to 'Alī (God be pleased with him) unless the latter would execute to the murderers of 'Uthmān (God be pleased with him).[6]

This was the beginning of political division among Muslims which turned into theological disagreements with the passage of time. Those who supported 'Alī (God be

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[2] Muḥammad Ibn Sa'd.al-Zuhrī, *Kitāb al-Ṭabaqāt al-Kabīr* (Cairo: Maktabat al-Khānjī, 2001), 3:166-68; Abū Ja'far Muhammad Ibn Jarīr al-Ṭabarī, *Ta'rīkh al-Umam wa al-Mulūk*, ed. Muhammad Abū 'l-Faḍl Ibrāhīm (Cairo: Dār al-Ma'arif, 1382/1962), 3:203-23.

[3] Abū 'l-Fidā' 'Imād al-Dīn Ibn Kathīr, *al-Bidāyah wa 'l-Nihāyah* (Cairo: al-Maṭba'ah al-Maymaniyyah, 1910), 7:168.

[4] Ibid., 7:188.

[5] Ṭabarī, *Ta'rīkh*, 5:152.

[6] Ibn Kathīr, 7:230.

pleased with him) were called Shī'ah, literally "supporters".[7] As explained in Chapter Six of this dissertation, belief in the imamate of 'Alī (God be pleased with him) gradually became the distinctive feature of the Shī'ah theology and it had its impact on the right to rebellion against the rulers belonging to the Umayyad and the Abbasid clans.[8]

'Alī (God be pleased with him) had to fight wars to curb rebellion and in the year 37 AH/357 CE he was forced to conclude a compromise settlement (*taḥkīm*)[9] with Mu'āwiyah (God be pleased with him). This compromise was severely criticized by some people who equated it with infidelity and polytheism. These people were called Khawārij (those who abandoned allegiance to the ruler) and 'Alī (God be pleased with him) had to fight several wars against them.[10] It is the conduct of 'Alī (God be pleased with him) during his wars with Khawārij which the Muslim jurists consider the primary source of the Islamic law of rebellion.[11]

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[7] Abū Zahrah, *al-Madhāhib al-Islāmiyyah*, 21-24. See for a different view, S. H. M. Ja'fari, *The Origins and Early Development of Shi'a Islam* (Karachi: Oxford University Press, 2000).

[8] See Section 6.1.1 of this dissertation.

[9] Ibn Kathīr, 7:273. Although the word *taḥkīm* is generally translated as "arbitration", it is preferred here to translate it as "compromise settlement". The arbitrators need not settle a dispute through ascertaining the legal rights of the parties; instead, they may ask the parties to relinquish part of their legal rights in order to have a peaceful solution. The more famous, though unauthentic, reports about *taḥkīm* after the battle of Siffin suggest that the arbitrators were to decide whether 'Alī or Mu'āwiyah was entitled to caliphate. But the authentic reports, though less famous, suggest that the arbitrators found peaceful solution because they asked Mu'āwiyah not to pursue his demand of *qiṣāṣ* and asked 'Alī not to demand oath of allegiance. (Abū Bakr Ibn. al-'Arabī, *al-'Awāṣim min al-Qawāṣim fi Taḥqīq Mawāqaf al-Ṣaḥābah ba'd Wafāt al-Nabiyy* (Cairo: Maktabat al-Turāth al-Islāmī, 1998), 174-76). A few skirmishes took place between the two sides in the far off areas after which they concluded another peace settlement in the year 40 AH. In this treaty, the parties agreed on non-intervention in each other's territory. No war took place between 'Alī and Mu'āwiyah after this. (Ibn Kathīr, 7:322) Thus, *taḥkīm* in essence was a compromise.

[10] See for an analysis of the influence of the political disagreements on the development of the Kharijite doctrines: Abū Zahrah, *al-Madhāhib al-Islāmiyyah*, 61-65.

[11] See Section 2.2.2 below.

In the year 40 AH/660 CE, a Khārijī fanatic martyred 'Alī (God be pleased with him).[12] He was succeeded by his son al-Ḥasan (God be pleased with him) who concluded an agreement with Mu'āwiyah (God be pleased with him) and thereby abandoned the caliphate in his favour.[13] Thus, Muslims again became politically united.

2.1.2 Other Revolts during the Period of the Companions (God be pleased with them)

For some time the political opposition was quieted. However, serious differences arose when Mu'āwiyah (God be pleased with him) nominated his son Yazīd as his successor.[14] Many groups revolted against Yazīd.[15] His forces martyred al-Ḥusayn, the son of 'Alī (God be pleased with them), in Karbalā' in the year 63 AH/683 CE.[16]

Later, during the period of the Companions (God be pleased with them) several other rebellions broke out against the Umayyad rulers. The most important of these was the rebellion of 'Abdullāh b. al-Zubayr (God be pleased with them) who claimed caliphate in the same year (61 AH/690 CE) and established his rule in Hijaz.[17] One of the significant incidents in this regard was the "Battle of al-Ḥarrah" in the year 63 AH/683 CE when the Umayyad forces brutally attacked Madina, the City of the Prophet (peace be on him), killing many

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[12] Ibn Kathīr, 7:326.

[13] Ibid., 8:21.

[14] Ibid., 8:228.

[15] Ibid., 8:251.

[16] Ibid., 2:64-65. Later, many descendants of 'Alī, mostly through Ḥasan and Ḥusayn (God be pleased with them), revolted against the Umayyad and the Abbasid rulers. Notable among them are: Zayd b. 'Alī, the grandson of Ḥusayn who rebelled against the Umayyad ruler Hishām and Nafs Zakiyyah, the great-grandson of Ḥasan who rebelled against the Abbasid caliph Manṣūr. It is historically established that Abū Ḥanīfah supported both these rebellions. See Chapter Six of this dissertation for details.

[17] Ṭabarī, *Ta'rīkh*, 5:494.

Companions (God be pleased with them) and ravaging the City.[18] After this, the Umayyad forces attacked Makkah but as Yazīd suddenly died the campaign was halted.[19] Later, the fifth Umayyad Caliph 'Abd al-Malik b. Marwān (d. 86 AH/705 CE) sent troops under the command of al-Ḥajjāj b. Yūsuf (d. 95 AH/714) to besiege Makkah and to kill Ibn al-Zubayr (God be pleased with him). After a long and bloody battle, finally the Umayyad forces martyred Ibn al-Zubayr (God be pleased with him) in 73 AH/692 CE.[20]

Some of the opponents of the Umayyads also tried to gather forces against the rulers under the leadership of 'Alī Zayn al-'Ābidīn (d. 95 AH/713 CE), the son of al-Ḥusayn (God be pleased with them), but he refused after which they gathered around Muhammad (d. 81 AH/700 CE), a step brother of Ḥusayn and son of 'Alī from a concubine of Banu Ḥanīfah which was why he was called Muḥammad b. al-Ḥanafīyyah.[21] Although Ibn al-Ḥanafīyyah himself did not participate in war against the Umayyads, al-Mukhtār b. Abī 'Ubaydah al-Thaqafī (d. 67 AH/687 CE) gathered people claiming Muḥammad as the new "imām" and succeeded in killing almost all the major characters responsible for the murder of Ḥusayn.[22]

[18] Ibid., 485-93.
[19] Ibid., 499.
[20] Ibid., 6:186-93.
[21] Ibid., 6:5-38.
[22] Ibid., 6:38-66.

2.2 Conduct of the Companions (God be pleased with them) during Revolts

It is well known that all the Sunnī schools of law, particularly the Ḥanafī School, consider the consensus of the Companions as a binding source of Islamic law.[23] The Ḥanafīs acknowledges binding character even for the conduct of a single Companion.[24] If the Companions disagree on an issue, they choose one of the opinions on the basis of compatibility with other principles of law recognized by the School.[25] Hence, on the issue of rebellion also the jurists consider the conduct of the Companions for deriving detailed legal rules.

2.2.1 Different Trends

During the civil war and later revolts, some of the Companions participated in war supporting one or the other side. For instance, many of them supported 'Alī (God be please with him) in his wars against other Companions as well as against other rebels and Khawārij.[26] Some of the Companions fought against him on various pretexts though they finally abandoned war against him and reached a compromise settlement.[27] A third group of Companions remained aloof from all wars between the Companions.[28]

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[23] Abū Bakr Muhammad Ibn Abī Sahl al-Sarakhsī, *Tamhid al-Fuṣūl fi 'l-Uṣūl (Uṣūl al-Sarakhsī)* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1414/1993), 1:318-19.

[24] Ibid., 2:105-17.

[25] Ibid.

[26] For example, the famous Companions 'Ammār b. Yāsir and Abū Musa al-Ash'ari (God be pleased with them) were active supporters of 'Alī (God be pleased with him).

[27] For example many Companions fought against 'Alī (God be pleased with him) under the leadership of 'A'ishah (God be pleased with her) in the famous Battle of the Camel but latter submitted to his rule.

[28] The most famous among them was 'Abdullāh b. 'Umar (God be pleased with them).

None of the Companions supported the killing of Ḥusayn and 'Abdullāh b. al-Zubayr and all of them deemed their killing a serious violation of the law.[29] However, on various grounds many of them disagreed with the strategy of Ḥusayn and Ibn al-Zubayr against the Umayyads, while some of them supported these revolts.[30]

Hence, the conduct of the various Companions is cited as a source, and even as binding precedent, by the jurists for substantiating their respective positions. This will be explained in the Chapters to follow.

2.2.2 The Conduct of 'Alī (God be pleased with him)

The Ḥanafī jursits derive the rules of rebellion and civil wars primarily from the conduct of 'Alī (God be pleased with him). In both *Kitāb al-Aṣl*[31] and *al-Siyar al-Ṣaghīr*,[32] Shaybānī begins the Section on Rebels (*Bāb al-Khawārij*) with several precedents of 'Alī (God be pleased with him). Explaining the reason for this, Sarakhsī says:

> In this chapter, 'Alī (God be pleased with him) is the imām. He fought [the rebels] and declared that he was ordered [by the Prophet] to do so. Thus, he

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[29] See for detailed reports about these brutalities and the reaction of the Companions (God be pleased with them): Ṭabarī, *Ta'rīkh*, 5:400-67, 551-63, 6:187-93.

[30] Some of the Companions who in 64 AH/684 CE started movement for retaliation of the murder of Ḥusayn were led by Sulayman b. Surad al-Khuza'i (God be pleased with him) who was among the stunch supporters of 'Alī (God be pleased with him). See for details of this movement: Ibid., 6:551-63. The Companions followed similar trends at the time of the incident of Ḥarrah and the rising of Mukhtār. See for a detailed analysis of the historical data about the position of the Companions during civil wars: Muḥammad Maḥzūn, *Taḥqīq Mawāqif al-Ṣaḥābah fi 'l-Fitnah min Riwāyāt al-Imām al-Ṭabarī wa 'l-Muḥaddithīn* (Cairo: Dār al-Salām, 1428/2007).

[31] Khadduri, 230-232.

[32] Mahmood Ahmad Ghazi, *Shorter Book on Muslim International Law* (Islamabad: Islamic Research Institute, 1998), 75-81.

said: 'I have been ordered to fight those who abandon obedience [to the ruler], who broke their oath [of allegiance] and who are unjust.'[33]

The first precedent Shaybānī mentions is reported by Kathīr al-Ḥaḍramī who saw some Khawārij in the Grand Mosque of Kūfah some of whom were abusing 'Alī (God be pleased with him) and one of them swore to kill him. Ḥaḍramī captured that one, while the rest of them ran away. He brought him to 'Alī and reported what he had observed there. 'Alī asked the accused about his name and then ordered his release. Ḥaḍramī was astonished by this and he asked 'Alī as to why he released a person who wanted to kill him. 'Alī replied: "Should I kill the one who did not kill me?"[34] The second precedent quoted by Shaybānī is regarding the 'Alī's treatment of those Khawārij who were raising slogans in the Grand Mosque against him during his Friday sermon. 'Alī said to them:

We shall never prohibit you from entering the mosques of Allah to mention Allah's name there; we shall never deny you [your share] in the *fay'*,[35] so long as you join hands with us; and we shall never fight you until you attack us.[36]

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[33] Sarakhsī, *al-Mabsūṭ*, 10:132.

[34] Ibid., 10:133.

[35] *Fay'* is the term for the goods captured from the opponents without using force against them, such as the tribute they pay after concluding a peace treaty with Muslims. It is distinguished from *ghanīmah* in that the latter is the term used for the goods captured in a military campaign and. Moreover, moveable property is generally included in *ghanīmah* while immoveable property is included in *fay'*. The rule for *fay'* is that it will go to the *bayt al-māl* and will be used for the benefit of all Muslims (Qur'ān 59:7) within *dār al-Islām*. As for *ghanīmah*, the rule is that one-fifth of it will go to the *bayt al-māl* while the rest will be distributed among the *mujāhidīn* (Qur'ān 8:41). Muḥammad Rawwās Qal'ajī, *Mu'jam Lughat al-Fuqahā'* (Karachi: Idārat al-Qur'ān, n.d.), 335 and 351.

[36] Sarakhsī, *al-Mabsūṭ*, 10:133.

From these precedents, the jurists derive a fundamental general rule of the Islamic law of rebellion that a person accused of rebellion cannot be punished for rebellion unless he actually commits an act of rebellion.[37] These precedents also show that if the rebels support the government during its war against foreign invasion, they will be given the same rights and privileges as other Muslims are given.[38] Furthermore, these precedents establish the rule that the purpose of war against rebels is to curb rebellion, and not to exterminate rebels.[39]

Another rule derived from the conduct of 'Alī (God be pleased with him) is that the ruler must exhaust the peaceful means first and that he should use force only as a last resort. Sarakhsī says:

> It is reported that 'Alī (God be pleased with him) sent Ibn 'Abbās (God be pleased with him) to the people of Ḥarūrā' and he negotiated with them and asked them to repent. This is better because the purpose may be achieved without war through advice and warning. Hence, it is better to negotiate before war because poison is the last of the medicines.[40]

The famous Shāfi'ī jurist Abū Isḥāq al-Shīrāzī further elaborates this rule in the following words:

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[37] Ibid. Sarakhsī further explains that if the ruler has credible information that some people are planning rebellion, he can take pre-emptive measures and can imprison them till the situation is controlled. Ibid.

[38] Ibid., 10:133-134.

[39] Sarakhsī says: "this precedent proves that the purpose of fight against rebels is to repel their attack." (Ibid., 10:134).

[40] Ibid., 136.

> The ruler should not initiate war unless he asks them [the rebels] about their grievance. If they mention an unjust decision, he should change that decision. If they refer to a problem that can be solved without war, he should solve it. And if they challenge the legitimacy of the ruler, he should answer their arguments. All these are the corollaries of the obligation of making peace and Allah says: 'make peace between them [the warring faction].'[41]

These and other precedents of 'Alī (God be pleased with him) helped the jurists develop the detailed rules of the Islamic law of rebellion.

2.3 Orientalists on Islamic Law of Rebellion

Modern scholars have generally denied the existence of the right to rebellion in Islamic law.[42] Hamilton Gibb, the foremost proponent of this theory, interprets the development of the Muslim juridical discourse on rebellion in the light of the historical factors.

2.3.1 Gibb's Thesis

The main points of his theory are summarized below:

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[41] Abū Isḥāq Ibrāhīm b. 'Alī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shafi'ī* (Beirut: Dār al-Ma'rifah, 2003), 3:400-401.

[42] See, for instance, H. A. R. Gibb, "Constitutional Organization" in Majid Khadduri and Herbert J. Liebesny (eds.), *Origin and Development of Islamic Law* (Washington DC: Middle East Institute, 1955), 1- 15. Abou El Fadl, a contemporary scholar and authority on the Islamic law of rebellion, summarizes "the most basic formulation" of the accepted thesis in the following words: "Muslim jurists moved from the absolute realm of political idealism to an absolute realm of political realism" *Rebellion and Violence*, 8.

1. Initially Muslim jurists laid down very strict conditions for the position of caliph and they envisaged a single *imām* (ruler) for the Muslim community who could be removed by the community if he became unjust.[43]
2. Later, Muslim jurists were compelled by the Khawārij's anarchist revolts to deny the right to rebel against an unjust ruler.[44]
3. By the fifth/eleventh century, when the Buwayhids[45] and the Fatimids[46] had gained ascendancy to power, the Shāfi'ī jurists Abū 'l-Ḥasan al-Māwardī (d. 450/1058), in order to defend the Abbasid caliphate, recognized the legitimacy of the authority of the usurpers in the provinces on the condition that they pledged allegiance to the caliph.[47] Thus, he made obedience to usurpers a moral and legal obligation.[48]
4. By the time of the Shāfi'ī jurist al-Ghazālī (d. 505/1111), the Saljūq[49] power was established in Baghdad and Ghazālī had to reconcile the temporal powers of the Saljūq sulṭāns to the religious authority of the caliph.[50]
5. The Shāfi'ī jurist of the eighth/fourteenth century, Ibn. Jamā'ah (d. 733/1332), who worked as a judge under the Mamlūks[51] when the Mongols had already destroyed the Abbasid caliphate, equated power with legality.[52]

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[43] Gibb, "Constitutional Organization", 6-14.

[44] Ibid., 15.

[45] Buwayhids, or *Āl Buwayh*, belonged to a Persian Shī'ah tribal federation whose conquest of Persia and capture of Baghdad in 333 AH/945 CE ended the Abbasid caliphate's political power. Although the Abbasids retained the office of caliph, real power henceforth lay with chief emirs, the first of whom was Ahmad b. Buwayh.

[46] The Fatimids, or *al-Fāṭimiyyūn*, were the Ismā'īlī Shī'ah who established their caliphate in Egypt and ruled from 296 AH/909 CE to 566 AH/1171 CE. The caliphate was based originally in the Tunisian city of "Mahdiyyah", before establishing the Egyptian city of Cairo in 358 AH/969 CE, which thereafter became their capital.

[47] Gibb, "Constitutional Organization", 18-19. Gibb has written a detailed analysis of al-Māwardī's political thought in "al-Māwardī's Theory of the Caliphate", *Islamic Culture II* (1937), 291-302. See also: Montgomery Watt, *Islamic Political Thought* (Edinburgh: Edinburgh University Press, 1973), 101-102.

[48] Gibb, "Constitutional Organization", 15.

[49] The Saljūq were a Turco-Persian Sunnī Muslim dynasty that ruled parts of Central Asia and the Middle East from the 11th to 14th centuries.

[50] Gibb, "Constitutional Organization", 19. Ann Lambton argues that Ghazālī was more concerned with the threat of internal strife (*fitnah*) than the external invasion of the Crusaders. (Ann K. S. Lambton, *State and Government in Medieval Islam: An Introduction to the Study of Islamic Political Theory: The Jurists* (Oxford: Oxford University Press, 1981), 109).

This thesis has generally been accepted by modern scholars,[53] although some of them have tried to modify it slightly.

2.3.2 The Modified Version of the Thesis

Hanna Mikhail asserts that while Muslim jurists felt compelled to accept the political reality, they persistently declared that the ruler must fulfill the requirements of justice and religion.[54] Mikhail agrees with Gibb in declaring that with the passage of time Muslim jurists started preaching quietism and prohibiting rebellion.[55] He, however, points out that Abū Ḥayyān al-Andalusī (d. 754 AH/1353 CE) in the eighth/fourteenth century argued in favor of use of force against unjust ruler, but Mikhail considers it an exception calling Abū Ḥayyān "a voice in the wilderness".[56]

The main flaw in this thesis is that it ignores the classical manuals of law. Muslim jurists, particularly the Ḥanafīs, developed a detailed law of rebellion as early as the

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[51] The Mamlūk Sulṭānate was a regime composed of Mamlūks who ruled Egypt and Syria from the mid-thirteenth to the early sixteenth century.

[52] Gibb, "Constitutional Organization", 23. Gibb assumes that Ibn Jamā'ah abandoned law in favor of secular absolutism.

[53] Fazlur Rahman also accepts this theory and emphatically asserts that Islam does not have law of rebellion. He is of the view that initially some "activist tendencies" might have existed but later on these became extinct due to the quietist doctrine of the Murji'ah and the Muslim jurists persistently prohibited any rebellion against the rulers. Fazlur Rahman, "The Law of Rebellion in Islam" in Jill Raitt (ed.), *Islam in the Modern World: 1983 Pain Lectures in Religion* (Columbia, MO: University of Missouri-Columbia, n. d.). Lambton further extends this theory by asserting that neither the Shi'i nor the Sunnī jurists discussed rebellion in detail. (*State and Government in Medieval Islam*, 263). This is a strange assertion because, as shown in Chapter 3 of this dissertation, even in the second/eighth century Muslim jurists had developed a detailed law of rebellion.

[54] Hanna Mikhail, *Politics and Revelation: Māwardī and After*, (Edinburgh: Edinburgh University Press, 1985), 28.

[55] Ibid., 38.

[56] Ibid., 50.

second/eighth century. Thus, *Kitāb al-Aṣl* of Muḥammad b. al-Ḥasan al-Shaybānī (d. 189/805), a great jurist of all time who compiled the six basic text of the Ḥanafī School, contains a chapter on *Siyar* or the law of war.[57] This chapter contains detailed exposition of the law of rebellion in a separate section under the title of *Bāb al-Khawārij*.[58] The same is true of Shaybānī's other book *al-Siyar al-Ṣaghīr*, which contains a precise summary of the position of the Ḥanafī School on the issues relating to war.[59] Muḥammad b. Idrīs al-Shāfi'ī (d. 204 AH/819 CE), the founder of the Shāfi'ī School and a student of Shaybānī, devoted a separate chapter to the law of rebellion in his *magnum opus* titled *al-Kitāb al-Umm*.[60]

Ignoring these basic sources of Islamic law and relying heavily on secondary sources have led scholars to speculations and wrong conclusions. For instance, accusing Māwardī of legalizing the rule of usurpers in the fifth/eleventh century ignores not only the *legal* distinction between *de facto* and *de jure* authority, but also overlooks the historical fact that Muslim jurists have always accepted some legal consequences of the *de facto* authority of usurpers even when they simultaneously denied legitimacy to their rule. Moreover, Māwardī himself mentions the same conditions and pre-requisites for the ruler which the earlier jurists had laid down.[61] The same is true of Ghazālī.[62] Hence, the view of Bernard Lewis is more

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[57] Khadduri and Abou El Fadl have raised doubts on Shaybānī's authorship of *Siyar* of *Kitāb al-Aṣl*. This view, however, does not carry any weight. See below for criticism.

[58] Khadduri, *The Islamic Law of Nations*, 230-253.

[59] Ghazi, 75-81. The same is true of other manuals of the Ḥanafī School.

[60] This encyclopedic work of Shafi'ī contains several chapters relating to *siyar*, and one of these chapters is *Kitāb Qitāl Ahl al-Baghy wa Ahl al-Riddah*. (Shafi'ī, *al-Kitāb al-Umm*, 5:179-242). The later Shafi'ī jurists followed this practice. Thus, *al-Muhadhdhab* of Shīrāzī also contains a separate chapter on *baghy* entitled *Kitāb Qitāl Ahl al-Baghy* (3:400-423).

[61] Māwardī, *al-Aḥkām al-Sulṭāniyyah*, 5.

[62] See Chapter 5 of this dissertation for details.

convincing as he asserts that the two approaches of passive obedience to rulers and rebellion against unjust rulers existed simultaneously throughout early Islamic history.[63]

2.3.3 Ignoring the Legal Texts

Another serious flaw in this thesis is that it ignores the work of those jurists who advocated the right of rebellion against unjust rulers. For instance, Abū Bakr al-Jaṣṣāṣ (d. 370/981), the famous Ḥanafī jurist of the fourth/tenth century, linked the right to rebellion against unjust ruler to the religious and legal obligations of enjoining right and forbidding wrong (*al-amr bi 'l-ma'rūf wa 'l-nahy 'an al-munkar*) and severely criticized those who preached passive obedience to unjust rulers.[64] It is important to note that Jaṣṣāṣ does not call it his personal opinion. Rather, he cites it as the legal position of Abū Ḥanīfah, the founder of the Ḥanafī School.[65] The same is the opinion of Burhān al-Dīn al-Marghīnānī (d. 593/1197), author of the famous Ḥanafī manual *al-Hidāyah*,[66] as well as the later Ḥanafī jurists.[67] Thus, to consider Abū Ḥayyān as "a voice in the wilderness" is not correct.[68]

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[63] Bernard Lewis, *The Political Language of Islam* (Karachi: Oxford University Press, 1987), 92. However, Lewis also declares that later Muslim jurists preached obedience to rulers, be just or unjust (Ibid., 100), and finally they accepted doctrine of passive obedience. *Islam in History: Ideas, People and Events in the Middle East* (Chicago: Open Court, 1993), 314.

[64] Jaṣṣāṣ, 1:99-101.

[65] Ibid.

[66] Marghīnānī, 3:101.

[67] As explained in detail in Chapter 6 of this dissertation, 'Alā' al-Dīn b. Aḥmad al-Ḥaskafī (d. 1088/1677), a renowned Ḥanafī jurist of the later times, asserts that when a just government official becomes unjust, his removal becomes obligatory. Muḥammad Amīn b Ibn 'Ābidīn al-Shāmī (d.1252/1836) explicitly states that this has been the established opinion of the Ḥanafī School. Jaṣṣāṣ also asserts that the same is the rule for the caliph because the Ḥanafī School does not distinguish between the legal position of the caliph and that of the government officials (1:99).

[68] It is also worth noting that the thesis ignores the rich variety of juristic opinions in Islamic law and primarily relies on the views of the jurists of only one school (Māwardī, Ghazālī and Ibn Jamā'ah all belonged to

Importantly, Gibb, Mikhail and other scholars also did not use the "proper" legal sources. This will be explained in a bit detail in the next Chapter.

2.4 Works of the Modern Muslim Scholars

In the aftermath of the First World War (1914-1918 CE), the Muslim world saw the demise of the Caliphate and almost the whole of the Muslim world was dominated by the colonial powers. Many Muslim scholars worked on the need of a world caliphate as well as of the permissibility or prohibition of multiple Muslim states. After the Second World War (1939-1945 CE), when many Muslim territories gained independence, some of the renowned Muslim scholars worked on Islamic political thought generally as well as on the Islamic doctrine of jihad and in that context they also worked on the Islamic law regarding rebellion and civil wars. Thus, a rich literature on the issue has come into existence. Some of the significant works in this regard are examined here.

2.4.1 Āzād on the Necessity of Caliphate

During World War I, when it became clear to the Indian Muslims that the British Empire and her allies wanted to abolish the caliphate after the end of the war, they started a movement for saving the caliphate despite the fact that India never remained part of the Ottoman Empire. It was in the context of the "Khilāfat Movement" that Abū al-Kalām Āzād (d. 1958), the renowned scholar and politician of India, wrote the famous book titled *Mas'ala-e-*

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the Shāfi'ī School). Abou El Fadl also highlights that Mikhail did not distinguish between theological and legal works. *Rebellion and Violence*, 13.

Khilāfat.[69] In this book, Āzād tries to prove that establishing a caliphate is a religious obligation of Muslims and that it was a sin for Muslims to live without a caliph.[70] He further tries to prove that Islamic law does not allow Muslims to have more rulers than one.[71] In this context, he accumulates arguments against the legitimacy of rebellion and also tries to prove that Ḥusayn b. 'Alī (God be pleased with them), the grandson of the Prophet (peace be on him), did not intend to rebel against a caliph.[72] In his opinion, when Ḥusayn went out toward Kufah, the caliphate of Yazīd was not yet established and that when he came to know about the establishment of the Yazīd's caliphate he intended to withdraw but the force of the events compelled him to fight for saving his life and that of his companions.[73]

2.4.2 Mawdūdī on the the Right to Remove an Unjust Ruler

As noted earlier, Mawdūdī gave a detailed theory of jihad in his monumental work *al-Jihād fi 'l-Islām* and in that context elaborated the Qur'ānic notion of *fasād* (mischief).[74] It was, however, in a separate series of articles initially published in Monthly "Tarjumān al-Qur'ān", of which Mawdūdī was the editor, and later compiled in a book titled *Tafhīmāt* that Mawdūdī

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[69] The book was first published in 1919 and numerous reprints have been published since then.

[70] Abū 'l-Kalām Āzād, *Mas'ala-i-Khilāfat* (Lahore: Maktaba-i-Jamal, 2006), 19-69.

[71] Ibid., 70-97.

[72] Ibid., 98-99.

[73] Ibid., 99. Āzād is of the opinion that there were two stages in the struggle of Ḥusayn (God be pleased with him). When he went out of Madīnah, the caliphate of Yazīd had not established and many important cities had not yet taken the oath of allegiance to him. However, when Ḥusayn (God be pleased with him) reached near Kūfah, it became apparent to him that the people thereof had bowed to the rule of Yazīd. At that point, he decided to return to Madīnah, but the government forces encircled him and forced him to fight till he was martyred. "At the battlefield of Karbalā', Ḥusayn was not an aspirant of *khilāfah* and he was not fighting for this purpose. Rather, his position was position was that of saintly and innocent person whom the government forces wanted to arrest without a legal ground. He resisted his arrest and wanted to set an example of the patience and forbearance of the truth in front of the powerful and forces of tyranny."

[74] Mawdūdī, *al-Jihād fi 'l-Islām*, 105-117.

specifically dealt with the issue of legality of rebellion against an unjust ruler. In one of his articles titled "Mas'ala-e-Khilāfat mayn Imām Abū Ḥanīfah kā Maslak [The Legal Position of Imām Abū Ḥanīfah on the Issue of Caliphate]", Mawdūdī accumulates a heap of evidence to prove that Abū Ḥanīfah upheld the right of the community to remove an unjust ruler by force, if necessary, provided the reSulṭānt *fasād* (mischief) is lesser than the continued *fasād* of the ruler.[75] In this regard, he primarily relies on the exposition of the great Ḥanafī jurist Abū Bakr al-Jaṣṣās al-Rāzī. When some of his critics objected to this and quoted some passages from another great Ḥanafī jurist Abū Bakr Muḥammad b. Abī Sahl al-Sarakhsī which apparently suggested that the Ḥanafī School did not allow rebellion, Mawdūdī replied in another detailed article titled "Khurūj kay Bāray mayn Imām Abū Ḥanīfah kā Maslak [The Legal Position of Imām Abū Ḥanīfah on the Issue of Rebellion]".[76] In this article, he took the position that Abū Ḥanīfah's position was different from what later became the official position of the Ḥanafī School. This is a very important issue and it will be analyzed in detail in Chapters Six of this dissertation.

2.4.3 Hamidullah on the Conduct of Hostilities in Internal Wars

Muhammad Hamidullah (d. 2002), a contemporary of Mawdūdī and among the pioneers in the field of Muslim international law in the twentieth century, came up with an analysis of the actual conduct of hostilities during rebellion and civil wars in his monumental work *The*

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[75] Abū 'l A'lā Mawdūdī, "Mas'ala-e-Khilāfat mayn Imām Abū Ḥanīfah kā Maslak", in *Tafhīmāt*. Lahore: Islamic Publications, 1978. 3:269-299.

[76] Abū 'l A'lā Mawdūdī, "Khurūj kay Bāray mayn Imām Abū Ḥanīfah kā Maslak", in *Tafhīmāt* (Lahore: Islamic Publications, 1978) 3:300-320.

Muslim Conduct of State.[77] Hamidullah divided this work into four major parts: introduction, peace, hostility and neutrality.[78] The introductory part contains eleven chapters; discussion on peaceful relations are covered in six chapters; the third part devoted to hostile relations is the longest part as it contains twenty-six chapters; and the final part on neutrality has five chapters. The discussion on "lawful wars" is found in the third part of the book on hostile relations. Here, he divides lawful wars into five kinds: defensive wars, continuation of previous hostilities, sympathetic wars, punitive wars and idealistic wars. For our purpose, the most important of these categories is that of "punitive wars". He gives this title to those wars which were fought "against hypocrites, apostates, rebels and those who refuse to pay *zakāh* as well as those who committed a breach of the treaty of peace."[79]

In other words, he looks at the issue of rebellion from the perspective of the state and allows it to take "punitive action" against the rebels. He does not elaborate if there is a situation in which Islamic law allows rebellion against an unjust rule. He, however, gives interesting details of the rules about actual conduct of hostilities during rebellion and civil wars which will be analyzed in Chapter Six of this dissertation.

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[77] Hamidullah, 155.

[78] In the same way, he divides his Urdu work on modern international law. This, in fact, is based on the structure of the classic work of Oppenheim on international law. See: Lassa Francis Oppenheim, *International Law: A Treatise* (London: Longman, 1912).

[79] Hamidullah, 156.

2.4.4 Faraj on the Duty to Remove the Usurpers

A very important booklet on the issue, *al-Farīḍah al-Ghā'ibah* (the Neglected Duty),[80] of removal of an unjust ruler appeared in 1981 written by Muhammad 'Abd al-Salam Faraj, one of the assassins of the Egyptian President Anwar al-Sadat. The book summarizes the arguments of those who consider it obligatory to take up arms against an unjust ruler. It is a very powerful work and has influenced the militants across the Muslim world.[81] Relying on the fatwa of Imām Ibn Taymiyyah against some Mongol rulers of his time, Faraj argues that the same fatwa is applicable *a fortiori* on the corrupt rulers who claim to be Muslims.[82]

Faraj stresses that Muslims have neglected this duty and it has caused many problems for them.[83] He forcefully asserts: "Any group of people that rebels against any single precept of the clear and established judgments of Islam must be fought... even if the members of the group pronounce the Islamic Confession of Faith."[84] He clearly ascribes apostasy to these rulers: "The Rulers of this age are in apostasy from Islam... They carry nothing from Islam but their names."[85] His conclusion is: "To obey such a person is no longer obligatory, and the

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[80] The title of the original text was *Jihād: al-Farīḍah al-Ghā'ibah*. It has been translated into English by Johannes J. G. Jansen under the title of *The Neglected Duty* (New york: Macmillan, 1986). A recent translation has been made with annotated notes by Abū Umamah under the title *Jihad: The Absent Obligation* (Birmingham: Maktabah al-Ansaar, 2000). It is this latter version which has been used in the present dissertation.

[81] That is the reason why some of the renowned Western scholars have devoted much of their energy to studying this booklet. See, for instance: John Kelsay, *Islam and War: A Study in Comparative Ethics* (Louisville: Westminster/John Knox, 1993). See also: *Idem*, *Arguing the Just War in Islam* (Cambridge: Harvard University Press, 2007).

[82] Faraj, 30-36.

[83] Ibid., 16-20.

[84] Ibid., 24.

[85] Ibid., 25 ff.

Muslims have the duty to revolt against him and depose him, to put a just leader in his place when they are able to do so."[86]

Basic problem with this thesis is that it is based on the approach of direct access to the texts of the Qur'ān and the *Sunnah* and ignoring the detailed expositions of the jurists. Some of the works of the jurists are taken randomly and used arbitrarily. This simplistic approach has many serious flaws which will be analyzed in detail in the next Chapter.

2.4.5 Qaraḍāwī's Critique of the Legal Justification for Rebellion

Sheikh Yūsuf al-Qaraḍāwī (b. 1926), one of the most influential contemporary scholars of Islamic law and jurisprudence, recently came up with his *magnum opus* on the Islamic law of armed conflict entitled *Fiqh al-Jihād: Dirāsah Muqārinah li-Aḥkāmih wa Falsafatih fi Ḍaw' al-Qur'ān wa 'l-Sunnah*. In this work he devotes a chapter to the "Fiqh of the Violent Groups".[87] After analyzing the various aspects of the legal position of these groups, Qaraḍāwī summarizes a list of their arguments:

1. These rulers have become apostates;[88]
2. According to the fatwa of Ibn Taymiyyah it is obligatory to take up arms against such rulers;[89]
3. These rulers have been installed by non-Muslim powers to serve their interests;[90]

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[86] Ibid., 47.
[87] Qaraḍāwī, 2:1029-1067.
[88] Ibid., 1031-1032.
[89] Ibid., 1032.
[90] Ibid., 1032-1033.

4. These rulers come up with laws against the Divine law;[91]
5. Non-Muslims living in Muslim territories have terminated the contract of *dhimmah*;[92]
6. Non-Muslim tourists are not protected because their states have waged war against Muslims.[93]

Qaraḍāwī then explains the flaws in this legal position and highlights the following significant aspects in this regard:

1. Misunderstanding the Islamic law about jihad and relations with non-Muslims;[94]
2. Misunderstanding the principles of Islamic law about relations with the people who concluded the contract of *dhimmah* with Muslims;[95]
3. Misapplying the doctrine of preventing evil and promoting good;[96]
4. Ignoring the conditions for permissibility of revolt against the ruler;[97] and
5. Violating the principles of Islamic law for ascribing apostasy to Muslims.[98]

These points are very important and each one of them needs a separate analysis. In the course of this study, these arguments and their counter-arguments will be examined in detail.

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[91] Ibid., 1033.
[92] Ibid., 1034.
[93] Ibid.
[94] Ibid., 1035-1038.
[95] Ibid., 1038-1040.
[96] Ibid., 1040-1053.
[97] Ibid., 1053-1063.
[98] Ibid., 1063-1066.

2.4.6 Khaled Abou El Fadl on Irregular Warfare and Islamic Law

Abou El Fadl (b. 1963), a renowned contemporary scholar, in his *Rebellion and Violence in Islamic Law* has undertaken an in-depth and thorough study of rebellion and other related forms of violence in the Islamic legal discourses.[99] He is not convinced by the thesis of Orientalists about the absence of the discourse on rebellion in Islamic law and observes that "this view has resulted in certain conclusions about the right to rebellion and the treatment of rebels in Islamic jurisprudence, which are largely inaccurate."[100] He stresses upon the need to conduct a thorough examination of the *aḥkām al-bughāh* (legal rules about rebels) in the manuals of Islamic law (*fiqh*).[101] This is a very important contribution to the study of the right to rebellion in Islamic law and it has far reaching implications. This has led Abou El Fadl to some startling conclusions. Yet there are some serious problems in his methodology and thesis which will be examined in detail in the next Chapter.

CONCLUSIONS

This brief analysis of some of the significant works of the Muslim scholars of the twentieth century clearly shows the rich variety of approaches towards the issue of resistance and revolt against an unjust ruler and it establishes the point that the thesis generally accepted by Orientalists that Muslims generally preached passive obedience to tyrants and usurpers is based on wrong assumptions. Obedience to authority, passive non-compliance with the

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[99] This work is based on his PhD dissertation which was titled: *The Islamic Law of Rebellion*.

[100] Abou El Fadl, 12.

[101] Ibid., 8 and 20-23.

unlawful commands of the rulers, pacific efforts to bring positive change in the system and forceful removal of the unjust ruler or replacing the unjust system – all these various modes of behavior are found with a variety of shades. Hence, the monolithic approach of Orientalists is not tenable.

This variety of approach is found not only in the earliest stages of Islamic history when Muslims had to see civil war and then a series of rebellions and revolutions, but also in the twentieth century when Muslims were facing colonial regimes and even in the twenty-first century when Muslims face new forms of imperialism and the voices of resurgent Islam are getting louder.

The next Chapter presents an overview of the classical manuals regarding rebellion to find out if the same variety can be found in these manuals are not.

CHAPTER THREE: CLASSICAL WORKS ON ISLAMIC POLITICAL ORDER AND ISSUES OF METHODOLOGY

INTRODUCTION

Scholars working on issues about Islamic polity in the modern world have generally ignored books of law-proper (*fiqh*) and instead focused either on works of political theory – titled as *al-Aḥkām al-Sulṭāniyyah* – or literary works (*adab*), while the fact remains that books of law (*fiqh*) as well as of 'greater law' (*al-fiqh al-akbar*), i.e. theology and scholastics, contain rich treasures of rules and principles about Islamic polity. Hence, this Chapter first categorizes the various sources on Islamic polity into four basic categories and gives a brief review of some of the major works in all these categories. After this, it identifies problems in the methodology of the modern scholars working on Islamic polity and explains the methodology adopted in the present dissertation for deriving detailed rules of Islamic law from the books of Islamic law-proper and for extending them to contemporary issues.

3.1 FOUR KINDS OF WORKS ON ISLAMIC POLITICAL ORDER

As noted in the previous Chapter, orientalists who worked on Islamic polity did not use the "proper" legal sources.[1] Ann Lambton (d. 2008), the famous British historian, divides the literature on Islamic polity into three categories:

[1] A brief review of their works has been given in the previous Chapter. See Section 2.3 of this dissertation.

> Broadly speaking three main formulations can be distinguished; the theory of the jurists, the theory of the philosophers and the literary theory, in which I would include primarily, mirrors for princes, but also the expositions of the administrators, since these are put forward mainly in literary works, and the scattered observations of historians on the theory of state.[2]

This categorization has generally been accepted by modern scholars.[3] Now, the fact is that books titled *al-Aḥkām al-Sulṭāniyyah*, such as the one written by Māwardī, are not books of law proper even when their authors were great jurists in their own right.[4] Abou El Fadl rightly asserts that the proper sources for understanding the views of the jurists on rebellion are sections on *Aḥkām al-Bughāh* in the classical manuals of *fiqh*, which have generally been ignored by the scholars.[5] Moreover, works of creed and theology - *al-fiqh al-akbar* - also contain significant discussions on the issues of *imāmah* (polity), conditions for the *Imām* (ruler), multiplicity of rulers, rebellion and the like. Hence, the present Section shall briefly review some of the major works in all these four categories.

3.1.1 Literary and Philosophical Works

Since the classical work of Marshall Hodgson (d. 1968), presumably the most influential American historian of Islam, titled *The Venture of Islam: Conscience and History in a*

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[2] Lambton, xvi.
[3] See, for instance, Kelsay, 43-44.
[4] Nyazee, *Theories of Islamic Law*, 12 at fn 12.
[5] Abou El Fadl, 8.

Civilization of the World,[6] modern scholars have paid attention to the study of the works of *adab* (literary works).

> Set over against the ideals especially of the Sharī'ah-minded Muslims was what may be summed up under the heading *adab*, the worldly culture of the polite classes. While the Muslim courtier, administrator, or intelligent landowner paid due honour to the aspirations of the professional Muslims, most of their efforts were devoted to living out a very different pattern from what the latter approved. Their etiquette, their conversation and fine arts and literature, their ways of using poetry and music and even religion, and their whole social pattern of position and privilege, with its economic and political institutions and its politics, formed a distinct set of genteel standards, prevailing among Muslims and non-Muslims of wealth and position.[7]

Hodgson has given interesting details about how the *adab*-genre came into existence in the form of poetry, prose and works about courts' etiquette.[8] As a part of the same series, some works of the nature of "mirrors for princes" also appeared. Hodgson traces its origins to Ibn al-Muqaffa' (d. 760) who not only translated from Persian into Arabic some interesting related works, such as *Kalīlah wa Dimnah*, stories of two jackals who would advise the lion-

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[6] Much of the material of this work was initially published in 1958 in *A History of Islamic Civilization* and in a three-volume work titled *An Introduction to Islamic Civilization* published in 1958-59. Later, the work was published with the title of *The Venture of Islam* in 1961. The edition used in this dissertation contains three volumes published in 1974. Sub-title of the first volume is: *The Classical Age of Islam*; sub-title of the second volume is: *The Expansion of Islam in the Middle Period*; while sub-title of the third volume is: *The Gunpowder Empires and the Modern Times*. The discussion on the *adab* is found in the first volume.

[7] Marshall G. S. Hodgson, *The Venture of Islam: Conscience and History in a Civilization of the World* (Chicago: The University of Chicago Press, 1974), 1:239.

[8] Ibid., 1:444-472.

king,[9] but also suggested to the 'Abbasid Caliph Abū Ja'far al-Manṣūr to establish orders of the religious scholars and the political leaders headed by the Caliph.[10]

Siyar al-Mulūk of Niẓām al-Mulk Abū 'Alī Ḥasan b. 'Alī Ṭūsī (d. 1092)[11] and *Naṣīḥat al-Mulūk* of Abū Ḥāmid Muḥammad b. Muḥammad al-Ghazālī (d. 505/1111),[12] both in Persian, represent good examples of this mode of writing. Ghazālī's book, for instance, is divided into seven chapters and an appendix. The first three chapters are about the conduct and character of the rulers, ministers and officers, respectively.[13] The fourth chapter talks about the courage and bravery of the rulers[14] while the fifth and the sixth chapters deal with wisdom and wise people.[15] The last chapter talks about the good and bad women[16] while the appendix explores the nature and instincts of women.[17]

Another significant - though non-legal - genre was that of *falsafah* (philosophy). Hodgson asserts:

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[9] The work which was originally composed in Sanskrit was translated into Persian perhaps in the era of Nushirvan (d. 579 CE), also known as Khosrow I/Chosroes I, the famous Prsian Emperor of the Sasanid dynasty. Later, it has been translated into many languages.

[10] Hodgson, 285.

[11] Niẓām al-Mulk Abū 'Alī Ḥasan b. 'Alī Ṭūsī, *Siyar al-Mulūk*, ed. Hubert Darke, (Tehran: Tarjama-wa-Nashr-e-Kitāb, 1962).

[12] Abū Ḥāmid Muḥammad b. Muḥammad al-Ghazālī, *Naṣīḥat al-Mulūk*, ed. Jalal Huma'i, (Tehran: Kitābkhana-e-Tehran, 1950).

[13] Ibid., 39-105.

[14] Ibid., 106-119.

[15] Ibid., 120-143.

[16] Ibid., 144-150.

[17] Ibid., 151-159. The famous Shāfi'ī jurist Abū 'l-Ḥasan 'Alī b. Muḥammad b. Ḥabīb al-Māwardī (d. 450 AH/1058 CE) is more famous for his work on political theory titled *al-Aḥkām al-Sulṭāniyyah*. Although he also wrote a book of the literary genre under the title of *Naṣīḥat al-Mulūk* (Kuwait: Maktabat al-Falāḥ, 1403/1983).

> Independent, both of the prophetic-monotheistic and of the imperial traditions, was the highly self-conscious tradition of *Falsafah*. This was an inclusive term for the natural and philosophical learning of the Greek masters. Some other elements from the Greek traditions had a place in the developing Islamicate culture, but it was only in this intellectual sphere that Greek tradition was supreme.[18]

Leading figure among the *faylasūfs* (philosophers) for the purposes of works on political order was Abū Naṣr al-Fārābī (d. 950). His *Ārā' Ahl al-Madīnah al-Fāḍilah wa Muḍāḍḍatuhā* (Opinions of the Inhabitants of the Virtuous City and Their Opposites) was influenced by Plato's *Republic* though he tried to make it somewhat acceptable to Islamic ideals.[19]

Works on *falsafah* are also related in another way: their influence on *kalām*, the branch of knowledge that deals with issues of creed, faith and theology. Thus, Muslim scholars generally discuss questions about political system within the manuals of *kalām*, also called *al-fiqh al-akbar* or greater law.

Issues such as the necessity of political order, whether the ruler is Divinely appointed or by the consent of the people, multiplicity of the rulers, conditions for the ruler, lack of an essential condition by an existing ruler or an aspirant, are discussed in the books of creed although to a modern reader they may not seem to be theological issues.[20]

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[18] Hodgson, 239.

[19] See the introductory note of Albīr Naṣri Nādir, Professor of Philosophy in the University of Lebanon to Fārābī's book: *Ārā' Ahl al-Madīnah al-Fāḍilah wa Muḍāḍḍatuhā* (Beirut: Dār al-Mashriq, 1968), 11-23.

[20] Some of the important works of creed dealing with such issues will be examined in Chapter 5 of this dissertation.

3.1.2 Works on Political Theory

Apart from the works on *adab* and *falsafah*, there are works on political theory whose authors were well-known jurists but still they are not books of law-proper; they may be called books of 'political theory'.

Three important works may be briefly referred to here: two works bearing the same title *al-Aḥkām al-Sulṭāniyyah* by Abū al-Ḥasan 'Alī al-Māwardī (d. 1058), a Shāfi'ī jurist, and Abū Ya'lā, a Ḥanbalī jurist, who were contemporaries, and the third one titled *al-Siyāsah al-Shar'iyyah fī Aḥkām al-Rā'ī wa al-Ra'iyyah* by Aḥmad Ibn 'Abd al-Ḥalīm Ibn Taymiyyah al-Ḥarrānī, again a Ḥanbalī jurist.

Al-Māwardī, like other jurists generally, presumes that appointing a ruler is a legal requirement[21] and that the law allows only one caliph.[22] Further, in line with the tradition of the jurists, he mentions conditions for the caliph[23] and modes of his appointment deemed valid by the law.[24] However, keeping in view the existence in his age of the various autonomous Sulṭāns who owed formal allegiance to the caliph, Māwardī goes into details of how this could be deemed justified within the constraints of the law.[25] Almost the same line of argument is adopted by Abū Ya'lā.[26]

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[21] Abū 'l-Ḥasan 'Alī b. Muḥammad b. Ḥabīb al-Māwardī, *al-Aḥkām al-Sulṭāniyyah wa al-Wilāyāt al-Dīniyyah*, ed. Aḥmad Mubārak al-Baghdādī (Kuwait: Maktabat Dār Ibn Qutaybah, 1409/1989), 5.

[22] Ibid., 10-11.

[23] Ibid., 5.

[24] Ibid., 6-7.

[25] Ibid., 27-29.

[26] Abū Ya'lā al-Farrā' Muḥammad b. al-Ḥusayn al-Ḥanbalī, *al-Aḥkām al-Sulṭāniyyah* (Makkah: Jāmi'at Umm al-Qurā, 1432/2011).

By the time of Ibn Taymiyyah, however, the caliphate had already been demolished and there were numerous autonomous rulers in different parts of the Muslim world. Hence, Ibn Taymiyyah had to come up with a solution that could be acceptable to those who wanted to work within the constraints of Islamic law.[27]

An important work of this genre by a great jurist which discusses various aspects of the *jus ad bellum* of rebellion is *Ghiyāth al-Umam fi 'ltiyāth al-Ẓulam* by Imām al-Ḥaramayn al-Juwaynī (d. 578 AH/1085 CE), the great Shāfi'ī jurist who revived the Shāfi'ī School and reformed its legal theory.[28] Juwaynī gives too many details about the prerequisites and qualification of the ruler, multiplicity of rulers, resistance and rebellion against an unjust ruler and other related issues. This work contains invaluable material about the legal status and consequences of rebellion and some of this material will be used and analyzed in Chapter Five of this dissertation.

As works of this genre were not books of 'law-proper', they lack so many important details which the jurists discuss in the manuals of *fiqh*. For instance, while Māwardī negates the legality of multiplicity of caliphs and as such disallows rebellion, he does not discuss the details of conduct of hostilities in case of rebellion; they are discussed in books of *fiqh* in the Chapters on *Siyar* or Chapters on *Baghy*.

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[27] Aḥmad Ibn 'Abd al-Ḥalīm Ibn Taymiyyah al-Ḥarrānī, *al-Siyāsah al-Shar'iyyah fi Iṣlāḥ al-Rā'ī wa al-Ra'iyyah*, ed. 'Alī b. Muḥammad al-'Imrān (Jeddah: Majma' al-Fiqh al-Islāmī, n. d.).

[28] Nyazee has shown that it was Juwaynī who reconstructed and revived the Shāfi'ī theory and made it possible for his student Ghazālī to expound the concepts of *maṣlaḥah* and *maqāṣid al-sharī'ah*. *Theories of Islamic Law*, 189-230.

3.1.3 Manuals of Islamic Law (*Fiqh*)

Imām Abū Ḥanīfah al-Nu'mān b. Thābit (d. 150/767), the founder of the Ḥanafī School, is credited with systematically developing the discourse on Islamic law and getting prepared the manuals of Islamic law dealing with all the branches of the legal system. As Abū Ḥanīfah had a specific position about the conditions and qualification of the ruler and about resistance and rebellion, his views as recorded by his disciples in the manuals of Islamic law need detailed analysis and this will be done in Chapter Six of this dissertation.

The Ḥanafī sources, as well as some historical sources, narrate that Abū Ḥanīfah got recorded his views about relations of Muslims and non-Muslims as well as Muslims *inter se*, particularly in times of war, in manuals titled *Siyar*.[29] These views of Abū Ḥanīfah were not accepted by all. In particular, his opinion about the legality of armed resistance against the usurpers was the target of criticism.[30] Imām 'Abd al-Raḥmān al-Awzā'ī (d. 157 AH/774 CE), the great jurist of Syria who also had close links with the rulers, wrote a detailed critique of the *Siyar* of Abū Ḥanīfah.[31] In response, Imām Abū Yūsuf Ya'qūb b. Ibrāhīm al-Anṣārī (182 AH/798 CE), the great disciple and successor of Abū Ḥanīfah in his School, wrote a rejoinder to Awzā'ī under the title of *al-Radd 'alā Siyar al-Awzā'ī*.[32] Imām Muḥammad b. al-Ḥasan al-Shaybānī (189 AH/805 CE), the second great disciple of Abū Ḥanīfah who compiled and

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[29] For a detailed analysis of this issue see the introduction to the chapters on *Siyar* taken from Shaybānī's *Kitāb al-Aṣl* by Khadduri, 22-26. For critical evaluation of some of the views of Khadduri see the introduction to Shaybānī's *al-Siyar al-Ṣaghīr* by Ghazi: 31-32.

[30] See for details Chapter 5 of this dissertation.

[31] The text of Awzā'ī's work is found in the form of excerpts in the works of Abū Yūsuf and Shāfi'ī mentioned below.

[32] Abū Yūsuf Ya'qūb b. Ibrāhīm al-Anṣārī, *al-Radd 'alā Siyar al-Awzā'ī*, ed. Abū 'l-Wafā' al-Afghānī (Hyderabad: Lajnat Iḥyā' al-Ma'ārif al-Nu'māniyyah, n.d.).

recorded the basic texts of the Ḥanafī School, gave more time and energy to the study of *Siyar* and wrote at least three specific books on *Siyar*. Later, jurists of other schools also concentrated on this area of Islamic law and now almost every manual of Islamic law has a chapter or chapters dealing with issues of *Siyar*. Some of the significant works on *Siyar* will be briefly reviewed here.

It is debatable if Abū Ḥanīfah, indeed, wrote a manual on *Siyar*. It is, however, definitely established that he dictated his views to his disciples who recorded them in their own way. As far as the *Siyar* of Awzā'ī is concerned, passages of this work are found in the rejoinder written by Abū Yūsuf as well as in the work of Imām Muḥammad b. Idirs al-Shāfi'ī (d. 204 AH/819 CE), the great jurist who founded his own school of law.[33]

When Khadduri compiled and translated some of the works of Shaybānī on *Siyar*, it was generally believed that it was the work on which Imām Abū Bakr Muḥammad b. Abī Sahl al-Sarakhsī (d. 483 AH/1090 CE), a great jurist of the Ḥanafī School whose work is deemed the most authentic exposition of the Ḥanafī law, wrote his detailed commentary under the title of *Sharḥ Kitāb al-Siyar al-Kabīr*.[34] One reason for this common belief was the fact that Khadduri gave the sub-title of "*Shaybānī's Siyar*" to his work. As the commentary of Sarakhsī and the text extracted by Khadduri do not match in order and presentation, many

[33] Shāfi'ī, 15:237-251.

[34] Two editions of this work have been published so far. The first one is edited by Ṣalāḥ al-Dīn al-Munajjid (Cairo: Maṭba'at Miṣr, 1957). The second one is edited by Ḥasan Ismā'īl al-Shāfi'ī (Beirut: Dār al-Kutub al-'Ilmiyyah, 1997). It is this latter one which has been used in the present dissertation.

scholars doubted the authenticity and status of the work of Sarakhsī. Abou El Fadl is one of them. This issue will be taken up later in this Chapter.[35]

It may be noted at this point, however, that what Khadduri edited and translated was part of one of the works of Shaybānī: *al-Aṣl*.[36] Khadduri's work contains three chapters from this great compendium, and on many counts the oldest complete manual, of Islamic law.[37]

Many scholars believe that *al-Siyar al-Ṣaghīr* was written earlier but a comparison of the texts of this work and that of the Chapter on *Siyar* from *Kitāb al-Aṣl* shows that the former is a summary and précis of the latter.[38] This work has been edited and translated by Mahmood Ahmad Ghazi (d. 2010), a great Pakistani scholar who remained the President of the International Islamic University Islamabad, under the title of *Shorter Book on Muslim International Law*. Sarakhsī's commentary on this work of Shaybānī is found in the tenth volume of *al-Mabsūṭ*.

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[35] See Section 3.1.4 below.

[36] These are chapters on *Siyar*, *Kharāj* and *'Ushr*.

[37] Books written before *al-Aṣl* were either not books of law-proper (such as *al-Muwaṭṭa'* of Imām Mālik b. Anas) or did not contained all chapters of law (such as *Kitāb al-Kharāj* of Abū Yūsuf). Some of the chapters of *al-Aṣl* were edited by Afghani and were published in Hyderabad, India, in five volumes. A chapter on *ḥiyal* (legal devices) was edited by Joseph Schacht. The chapters on sales were edited by Abraham L Udovich. A few chapters were edited by Shafīq Shaḥātah. However, the whole compendium was not edited till quite recently. Muḥammad Boynukālin has recently edited the whole of *Kitāb al-Aṣl* in twelve bulky volumes (Beirut: Dār Ibn Ḥazm, 2012).

[38] Imran Ahsan Khan Nyazee (b. 1945), a great contemporary scholar and authority on the Ḥanafī law and jurisprudence, has shown that *al-Siyar al-Ṣaghīr* represented an earlier example of the special genre of law manuals which were later called *mukhtaṣar* or *matn*. (See his Introduction to the English translation of Marghīnānī's *al-Hidāyah: The Guidance* (Bristol: Amal Press, 2006), xiv.

As far as *al-Siyar al-Kabīr* is concerned, it is a separate work of Shaybānī which he wrote in the final years of his life.[39] Sarakhsī dictated a detailed commentary on this work which is published in five volumes.

Each of these works contain discussions on various rules about rebellion and civil wars, but they generally deal with the *jus in bello* or *adab al-qitāl* (rules governing the conduct of hostilities) while issues of *jus ad bellum* or *'illat al-qitāl* (ratio or legality of war) are seldom discussed in these manuals. For instance, the legality or prerequisites of armed resistance are only briefly touched in these manuals while rules about the enemy persons and property, rules of engagement, conquered or occupied territory, captives and other related issues are discussed at length in these manuals.

3.1.4 Over-skepticism of Abou El Fadl

The work of Abou El Fadl is marred by over-skepticism mars about the manuals of *fiqh*, particularly of the Ḥanafī School. Thus, he is not sure if Shaybānī indeed wrote the chapter on *Siyar* in *Kitāb al-Aṣl*.[40] For this, he relied heavily on the work of Khadduri.[41] The arguments, or the doubts, are summarized below:

1. The oldest existing manuscript of the chapter on *Siyar* is from 638/1240.
2. Some of the views are too advanced to have been written in Shaybānī's time.

[39] Sarakhsī, *Sharḥ Kitāb al-Siyar al-Kabīr*, 1:3; Ghazi, 321-32.
[40] Abou El Fadl, 144.
[41] Ibid., 144-145.

3. Sarakhsī wrote a commentary on the *Siyar* of *Kitāb al-Aṣl* under the title of *Sharḥ al-Siyar al-Kabīr*, but Sarakhsī was dictating from his memory while in prison.
4. Discrepancies in Khadduri's text and Sarakhsī's text are too great to consider these as one text.

His conclusion is that "additions have been made to the original text representing late Ḥanafī legal views."[42]

This view cannot be accepted by any serious student of Islamic law. *Kitāb al-Aṣl* is one of the sixth texts known as the *Ẓāhir al-Riwāyah* and the jurists of the Ḥanafī School have always considered these texts as the most authentic record of the legal position of the School. Non-existence of earlier manuscripts is not an argument, particularly when generations of jurists throughout Muslim history always deemed Shaybānī to be the author of these texts without any shadow of doubt. Moreover, there is a heap of corroborative evidence about the authorship of Shaybānī. These include Shaybānī's other texts, particularly *al-Siyar al-Ṣaghīr*, which is an exact summary of the chapter on *Siyar* of *Kitāb al-Aṣl*. Importantly, Abou El Fadl does not doubt Abū Yūsuf's authorship of *Kitāb al-Kharāj*,[43] and the text of this book records the views of the Ḥanafī School similar to those found in the *Siyar* of *Kitāb a-Aṣl*.[44] Similarly, Abou El Fadl is sure that Shāfi'ī wrote *al-Kitāb al-Umm*.[45] This book also records the views of the Ḥanafī School prevalent at the time of Shāfi'ī, which corroborates the views expressed in

[42] Ibid., 145.
[43] Ibid., 141.
[44] Ibid., 142-144.
[45] Ibid., 147.

the *Siyar* of *Kitāb al-Aṣl*. Hence, the view expressed by Khadduri and Abou El Fadl that some of the views in *Siyar* of *Kitāb al-Aṣl* are highly developed and as such could not have been written by Shaybānī is not tenable. It not only underestimates the genius of that great jurist but also ignores the way schools of Islamic law developed.[46]

It is also strange that Abou El Fadl would repeat the mistake committed by Khadduri in considering the *Siyar* of *Kitāb al-Aṣl* as *al-Siyar al-Kabīr* and Sarakhsī's *Sharḥ* as its commentary. This wrong supposition led them reach the wrong conclusions. It is true that Khadduri's text is different from Sarakhsī's text, but the reason is obvious: Sarakhsī's *Sharḥ* is not the commentary on the *Siyar* of *Kitāb al-Aṣl*. As noted earlier, there are three different works of Shaybānī on *Siyar* which have somehow been confused here:

1. Chapter on *Siyar* in *Kitāb al-Aṣl*. Khadduri edited this text and translated it into English.
2. *Al-Siyar al-Kabīr*. This is a detailed and comprehensive treatise on all the important aspects of the law of war. The text of this book is preserved in Sarakhsī's *Sharḥ*.[47]
3. *Al-Siyar al-Ṣaghīr*. When al-Hakim al-Shahid al-Mirwazi (d. 334 AH/945 CE), a famous Ḥanafī jurist of the fourth/tenth century, edited the six books of *Ẓāhir al-Riwāyah* and came up with an abridged version – *al-Kāfi fi furū' al-Ḥanafiyyah* or

[46] See Section 3.2 below.

[47] Ghazi says that a on the orders of the Ottoman Caliph Sulṭān Maḥmūd Khān, a Turkish jurist Muḥammad Munīb Ayntābī translated *al-Siyar al-Kabīr* into Turkish language and wrote a short commentary on it as well (Ghazi, 32). He asserts that the commentary entitled *al-Tafsīr al-Masīr fi Sharḥ Kitāb al-Siyar al-Kabīr* is found in manuscript form in the library of Shaykh al-Islam 'Ārif Ḥikmat and that the Turkish translation of the text was published in 1825. (Ibid.) It is also worth noting that in *al-Fatāwā al-Hindiyyah*, the chapter on *Siyar* heavily relies on the text of *al-Siyar al-Kabīr*. Ḥasan al-Shāfi'ī generally gives references to the relevant passages of *al-Fatāwā al-Hindiyyah*.

simply *al-Mukhtaṣar al- al-Kāfi* – he actually summarized the four of these texts and instead of summarizing the two books on *Siyar* he preserved the text of *al-Siyar al-Ṣaghīr*.[48] Sarakhsī dictated to his students a detailed commentary – *al-Mabsūṭ* – on *al-Kāfi*. Thus, *Kitāb al-Siyar* in *al-Mabsūṭ* contains the commentary of Sarakhsī on Shaybānī's *al-Siyar al-Ṣaghīr*.[49] Ghazi extracted the text of *al-Siyar al-Ṣaghīr* from various manuscripts of *al-Kāfi* and edited and translated it into English. As pointed earlier, a comparison of the text of *al-Siyar al-Ṣaghīr* and that of the *Siyar* of *Kitāb al-Aṣl* proves that *al-Siyar al-Ṣaghīr* is a precise summary of the *Siyar* of *Kitāb al-Aṣl*.

Hence, there is no reason to doubt Shaybānī's authorship of the *Siyar* of *Kitāb al-Aṣl*. Moreover, we find no reason to consider the views expressed in Sarakhsī's commentary as the solitary views of Sarakhsī. Rather, Sarakhsī's commentary is an authoritative description of the principles of the School. Sarakhsī was among the *mujtahidīn fi 'l-masā'il*[50] whose task was to elaborate the principles established by the earlier jurists and to bring new cases under these principles. Therefore, the Ḥanafī jurists have always deemed his commentary to be the authoritative statement of the principles of the School.[51]

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[48] Ghazi, 33-34.

[49] At the end of this chapter, Sarakhsī says: "Here ends the commentary on *al-Siyar al-Ṣaghīr*." (*Al-Mabsūṭ*, 10:151).

[50] See Section 3.2 below for brief description of the various grades of jurists in the Ḥanafī School.

[51] Moreover, it also seems unrealistic to assume that Sarakhsī dictated from his memory his thirty-volume commentary on the text of *al-Kafi*, five-volume commentary on the text of *al-Siyar al-Kabīr* and two-volume description of the principles of the School (*Uṣūl al-Sarakhsī*). As Ghazi suggests, his students might have gathered around his prison cell with books in their hands and they might have been reading the text and Sarakhsī would give his explanatory comments (Ghazi, 32). The same practice still prevails in the traditional *madāris*.

3.2 Issues of Methodology

After this brief overview of the various genres of works on the Islamic law of rebellion, it is time now to settle some of the issues regarding methodology for examining these works and for drawing certain conclusions. This Section will first briefly review the methodology used by the Western scholars after which it will examine the methodology adopted by Abou El Fadl in in his monumental work on the Islamic law of rebellion. Finally, it will explain the methodology used and applied in this dissertation.

3.2.1 Methodology of Western Scholars

The first thing that mars the works of most of the Western scholars on Islamic political theory and system is the influence of their preconceived notions and biases. As Edward Said (d. 2003) has shown,[52] the tradition of Orientalism was closely linked with the larger enterprise of colonialism and as such classical works of Orientalists on Islamic law, such as those of Ignaz Goldziher, Joseph Schacht and N. J. Coulson,[53] have characteristics of that colonial mindset and traces of Orientalist stereotypes about Islamic law.

One example of this mindset is that of the presumed 'evolution' and 'historical development' because of which sometimes these scholars raise doubts about the authenticity

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[52] See the monumental work of Edward Said (d. 2003), *Orientalism* (London: Penguin, 2003). The book was first published in 1978 by Routledge & Kegan Paul Ltd.

[53] Ignaz Goldziher, *Introduction to Islamic Law and Theology*, trans. A. R. Hamori (Princeton: Princeton University Press, 1981); Joseph Schacht, *Origins of Muhammadan Jurisprudence* (Oxford: Oxford University Press, 1953); *idem*, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1964); Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964); *idem*, *Conflicts and Tensions in Islamic Jurisprudence* (Chicago: University of Chicago Press, 1969).

of the some of the works of the earlier jurists.[54] They just cannot believe how a jurist of the eighth century could come up with a refined legal argument which by the norms of evolution could not be possible before the twelfth or thirteenth century.[55]

Moreover, as noted earlier, most of the Western scholars while working on the Islamic political system have focused on a few selected works and developed the thesis of "passive obedience" to authority ignoring the works of other jurists who argued for resistance against unjust rulers and usurpers.

This trend continues in the modern world where another factor has further caused problems, namely, mixing the views of the jurists belonging to various schools on the presumption that all the various schools of Islamic law followed one "common legal theory".[56] This has resulted in causing analytical inconsistencies as well as misgivings about Islamic law and jurisprudence.[57]

Apart from these problems in the treatment of the Islamic legal literature, the works of many of the Western scholars are based on doubts about not only the interpretation of the Qur'ānic verses and Prophetic traditions but also about the authenticity of the Qur'ānic text and the historicity of the Prophetic traditions. Resultantly, doubts have also been raised

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[54] This is evident in the work of Abou El Fadl. See section 3.2.2 below.

[55] As shown above in section 3.1.4, it is on this presumption that Abou El Fadl doubts the authorship of Shaybānī for the chapters on *Siyar* edited by Khadduri.

[56] For views of Orientalists on mixing the views of various schools, see: Schacht, *Introduction to Islamic Law*, 106; Coulson, *A History of Islamic Law*, 196-201. For detailed criticism on this issue from the perspective of legal theory, see Imran Ahsan Khan Nyazee, *The Secrets of Uṣūl al-Fiqh: Rules for Issuing Fatwās* (Islamabad: Advanced Legal Studies Institute, 2013), 68-77.

[57] Nyazee, *The Secrets of Uṣūl al-Fiqh*, 9-18.

about the authenticity of the manuals of *fiqh* and, thus, every foundation of the "Muslim perspective" has been shaken.

Influence of these various traits of the Orientalist approach is found not only in the Western tradition of the so-called "academic" and "objective" study of the Islamic literature but also in the works of many renowned Muslim scholars in the contemporary world. Abou El Fadl is an example.

3.2.2 Presumptions of Abou El Fadl

One of the most serious problems with the work of Khaled Abou El Fad is that he is over-skeptic about the *Sunnah* of the Prophet as an authentic source of law. Although he does not accept the theory of Joseph Schacht regarding the fabrication of the *aḥādīth* by the later generations,[58] yet he does seem influenced by some of the components of Schacht's theory when he says: "It is certainly true that jurists are painfully dependant on precedent and authority. However, while they may reorganize, and *selectively* emphasize and deemphasize certain precedents over others, they do not *usually* invent them."[59]

As this passage shows, he does believe that Muslim jurists sometimes, though not usually, invented precedents.[60] It is, perhaps, this over-skepticism regarding traditions which led him to declare that there are two sources of the Islamic law of rebellion: the conduct of

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[58] "The type of reconstructive or revisionist work that Schacht and others have done and do with Islamic law is not consistent with the way law develops." (Ibid., 22, fn 59).

[59] Ibid. (emphasis added).

[60] Thus, while discussing the "obedience and counter-obedience traditions", he says: "it is very likely that both types of tradition *appeared* contemporaneously." Ibid., 120 (emphasis added). At another place, he observes that the tradition about disobedience to unlawful commands "was put into the form of an interesting narrative." Ibid., 121.

'Alī b. Abī Ṭālib (Allah be pleased with him) and the Qur'ān.[61] He does not cite the *Sunnah* of the Prophet (peace be on him) as a source of law. Of course, this position is not acceptable to Muslim jurists.

Moreover, the idea that Muslim jurists *selectively* emphasized or de-emphasized precedents is also misleading because it suggests that they did this on subjective basis. The fact is that the various schools of Islamic law had developed various principles for preferring one precedent to the other and for reconciling between apparently conflicting precedents. The Ḥanafī School in particular developed a coherent theory of general principles of law. Unfortunately, as noted earlier, scholars have paid very little attention to the methodology of the jurists before Shāfi'ī.

It was also noted above that Abou El Fadl, relying on the work of Khadduri, raises doubts about the authenticity of the manuals of the Ḥanafī School. Apart from over-skepticism about the *Sunnah* and the manuals of *fiqh*, there is a serious problem in the methodology adopted by Abou El Fadl as his thesis is primarily based on the notion of "historical development" or "evolution", which overlooks the nature of the "schools of law" (*al-madhāhib al-fiqhiyyah*). This point is explained below.

3.2.3 Methodology of the Present Dissertation

The methodology used in the present dissertation is based on the presumption that every school of Islamic law represents a distinct legal theory and system of interpretation and that

[61] Ibid., 34.

the jurists of a school work within a coherent and internally consistent legal system.[62] In every school of Islamic law, particularly in the Ḥanafī School, there are grades of jurists so that the jurists of a lower grade have to accept, and build upon, the principles established by the jurists of the upper grades.[63] Hence, contrary to what Abou El Fadl and some contemporary scholars believe, the later jurists of the Ḥanafī School could not deviate from the principles established by the earlier jurists.

In the Ḥanafī School, for instance, Abū Ḥanīfah, the founder of the School, is on the top of the hierarchy and is called *mujtahid fī 'l-Shar'* or *mujtahid muṭlaq*.[64] Abū Yūsuf, Shaybānī and a few other jurists are included in the second grade of jurists and are known as the *mujtahidīn fī 'l-madhhab* who were to exercise *ijtihād* within the confines of the *madhhab* (school).[65] Jaṣṣāṣ and Sarakhsī are among the *mujtahidīn fī 'l-masā'il* or *aṣḥāb al-takhrīj*.[66] Their task was to explain the principles established by the *mujtahid fī 'l-shar'* (Abū Ḥanīfah) and

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[62] For this, the present dissertation primarily relies on the work of Nyazee, particularly his *Theories of Islamic Law*, *Islamic Jurisprudence* and *The Secrets of Uṣūl al-Fiqh*.

[63] Nyazee, *The Secrets of Uṣūl al-Fiqh*, 24-26. See also: Muḥammad Amīn Ibn 'Ābidīn al-Shāmī, *Sharḥ 'Uqūd Rasm al-Muftī* (Lahore: Suhail Academy, 1396/1976), 6-8.

[64] The task of *mujtahid muṭlaq* was three-fold: to identify the sources of law and to ascertain the priority order of the sources; to develop a coherent theory of interpretation based on various principles of interpretation (*qawā'id uṣūliyyah*); and to derive detailed rules of law from the determined sources through the use of *qawā'id uṣūliyyah*. These detailed rules would be covered by general principles of law (*qawā'id fiqhiyyah*). (Ibn 'Ābidīn, *Sharḥ 'Uqūd*, 7. See also Nyazee, *Islamic Jurisprudence*, 333-353).

[65] Thus, they could not disagree with Abū Ḥanīfah on the sources of law or on the priority order of these sources. Had they disagreed with him on this issue, they would not have remained Ḥanafīs. Similarly, they followed Abū Ḥanīfah in most, if not all, of the principles of interpretation. However, they could disagree with him on the detailed rules of law and as such on the *qawā'id fiqhiyyah*. For instance, Abū Yūsuf and Shaybānī agreed with Abū Ḥanīfah that the courts of the Islamic territory lacked jurisdiction to punish a person for violation of the rights of a citizen of the Islamic state beyond its territorial limits. (Sarakhsī, *Al-Mabsūṭ*, 10:104). Abū Yūsuf, however, disagreed with Abū Ḥanīfah and Shaybānī on the liability of a Muslim for violation of Islamic law beyond the territorial limits of the Islamic territory. While Abū Ḥanīfah and Shaybānī were of the opinion that the courts of the Islamic state lacked jurisdiction in this case, Abū Yūsuf held that the courts could exercise jurisdiction. One may say that Abū Yūsuf acknowledged the principle of active nationality in this case. (Ibid.)

[66] Ibn 'Ābidīn, *Sharḥ 'Uqūd*, 7-8; Nyazee, *Islamic Jurisprudence*, 335.

mujtahidīn fi 'l-madhhab (such as Abū Yūsuf and Shaybānī). They also had the authority to ascertain the established and preferred opinion (*ẓāhir al-madhhab*) if there were more than one opinion reported from the earlier jurists.[67] Thus, these jurists stand between the earlier and the later jurists. The *aṣḥāb al-takhrīj* also further extended the principles established by the earlier jurists through the methodology of *takhrīj* or "reasoning from principles".[68]

As such, if by development it is meant that the principles are further refined and extended to new cases, such developments did take place in the Ḥanafī School, or in any other School for that matter. However, if development means that the later jurists changed the well-established principles of the school, this notion cannot be accepted.

Another point worth consideration is that the present dissertation is based on the views of the Ḥanafī School only because mixing of the opinions of the jurists belonging to different schools leads to analytical inconsistency as each school represents a full-fledged and internally coherent legal theory and system of interpretation. For instance, the Ḥanafī theory deems the implications of the general word (*'āmm*) definitive (*qaṭ'ī*) while the Shāfi'ī theory deems it probable (*ẓannī*).[69] The Ḥanafī theory deems *istiḥsān* a valid tool for resolving conflicts within the legal system while the Shāfi'ī theory does not accept it.[70] Tacit consensus (*ijmā' sukūtī*), particularly of the Companions (God be pleased with them), is a binding source

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[67] Ibn 'Ābidīn, *Sharḥ 'Uqūd*, 8.

[68] See for details of the methodology of *takhrīj*: Nyazee, *Islamic Jurisprudence*, 339-353.

[69] Sarakhsī, *Uṣūl*, 1:132-51; Abū Ḥāmid Muḥammad b. Muḥammad al-Ghazālī, *al-Mustaṣfā min 'Ilm al-Uṣūl* (Beirut: Dār Iḥyā' al-Turath al-'Arabī, n.d.), 2:20-48.

[70] Sarakhsī, *Uṣūl*, 2:200-206; Ghazālī, *al-Mustaṣfā*, 1:213-222.

of law in the Ḥanafī theory while the Shāfi'ī theory does not deem it a valid consensus.[71] There are hundreds of other principles which collectively result in reaching a particular conclusion on a particular legal issue. Hence, accepting the Ḥanafī view in one case and taking the Shāfi'ī view in another, and sometimes doing this in the components of a single issue, violates the virtue of integrity.[72] Scholars who do this "pick and choose" generally accept the two basic presumptions of the Orientalists, namely, that the various schools of Islamic law followed a "common" theory and that *uṣūl al-fiqh* had no influence on the development of *fiqh* as much of *fiqh* was developed by Abū Ḥanīfah and other jurists before even Shāfi'ī was born whom they deem as the "master-architect" of *uṣūl al-fiqh*.[73]

One last point about the methodology used in this particular dissertation is the difference between the sources of law for the *mujtahid* (the jurist who lays down the law for the first time) and for the *faqīh* (the jurist who extends the law already expounded by the *mujtahid* on the basis of the principles used by the *mujtahid*).[74] The sources of law generally mentioned in the books of *uṣūl al-fiqh*, such as the Qur'ān, the *Sunnah*, consensus of the jurists, analogy and so on, are sources for the *mujtahid*, while the sources for the *faqīh* are the manuals of the school which, like the jurists of the school, have its own hierarchy and grading.

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[71] Sarakhsī, *Uṣūl*, 1:303-310. Ghazālī, *al-Mustasfā*, 1:160-162.

[72] See for details the monumental work of Ronald Dworkin (d. 2014): *Law's Empire* (London: Harvard University Press, 1986).

[73] Coulson, 53-62. See for criticism on this issue: Nyazee, *Theories of Islamic Law*, 175-76.

[74] This distinction is based on the work of Nyazee: *Islamic Jurisprudence*, 335-42.

Thus, in the Ḥanafī School the most authentic manuals of law are those titled *Ẓāhir al-Riwāyah*.[75] These are six books composed by Shaybānī, the disciple of Abū Ḥanīfah.[76] The most authentic and authoritative commentary on the *Ẓāhir al-Riwāyah* is *al-Mabsūṭ* of Sarakhsī.[77] Then, there are various *mutun* (authoritative texts) of the School composed by great jurists of the School.[78] The most authoritative *matn* is that of *Bidāyat al-Mubtadī* composed by Burhān al-Dīn 'Alī b. Abī Bakr al-Marghīnānī (d. 593 AH/1197 CE) who then also wrote brief notes for explaining this *matn*.[79] These notes are called *al-Hidāyah*.[80] Then, there are various commentaries (*shuruḥ*) on these *mutun* and on *al-Hidāyah*.[81] After these texts and their commentaries, there are glosses (*ḥāshiyah*) on the various commentaries.[82] While glosses and commentaries help in understanding the texts – and the official position of the School – in case of a conflict the text has priority over the commentary and the commentary has a priority over the glosses.[83]

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[75] Ibn 'Ābidīn, *Sharḥ 'Uqūd*, 6-8.

[76] These are: *al-Aṣl*, *al-Ziyādāt*, *al-Jāmi' al-Kabīr*, *al-Jāmi' al-Ṣaghīr*, *al-Siyar al-Kabīr*, *al-Siyar al-Ṣaghīr*.

[77] Ibn 'Ābidīn, *Sharḥ 'Uqūd*, 15-16.

[78] Ibid, 11-15. See also: Nyazee, *The Guidance*, xix-xxiii.

[79] In this *mutn*, Marghīnānī combined the two earlier – and most authentic – *mutun*, namely, *al-Jāmi' al-Ṣaghīr* of Shaybānī and *Mukhtaṣar al-Qudūrī* of Abū 'l-Ḥusayn Aḥmad b. Muḥammad al-Qudūrī (d. 428 AH/1036 CE).

[80] Marghīnānī also wrote a detailed commentary on his *mutn* under the title of *Kifāyat al-Muntahī*, but it is not published. It said that Marghīnānī summarized *Kifāyah* for his grandson and gave it the title of *al-Hidāyah*.

[81] Among the numerous commentaries of *al-Hidāyah*, the later jurists generally preferred the one written by Kamāl al-Dīn Ibn al-Humām al-Iskandarī (d. 861 AH/1457 CE) titled *Fatḥ al-Qadīr* (Cairo: Dār al-Kutub al-'Arabīyyah, 1970).

[82] For example, Muḥammad b. 'Abdillāh al-Tamartāshī (d. 1004 AH/1596 CE) wrote the *matn* called *Tanwīr al-Abṣār*. On this *matn*, 'Alā' al-Dīn Muḥammad b. 'Alī al-Ḥaṣkafī (d. 1088 AH/1677 CE) wrote commentary titled *al-Durr al-Mukhtār*. Later, Ibn 'Ābidīn (d. 1252 AH/1836 CE) wrote glosses on this commentary under the title of *Radd al-Muḥtār*.

[83] In chapter six of this dissertation, some of the issues on which Ḥaṣkafī disagreed with Tamartāshī will be explained with the help of the glosses of Ibn 'Ābidīn. See section 6.3 of this dissertation.

The works most often referred to in this dissertation are *al-Mabsūṭ* of Sarakhsī, *al-Hidāyah* of Marghīnānī and *Badā'i' al-Ṣanā'i' fi Tartīb al-Sharā'i'* of 'Alā' al-Dīn Abū Bakr b. Mas'ūd al-Kāsānī (d. 587 AH/1191 CE). For ascertaining the views of the other schools, an attempt has been made to use similar manuals which these respective schools consider as authentic.

CONCLUSIONS

Questions about Islamic political system have been examined from various perspectives and have been recorded in literary works, philosophical treatises, works on political theory and works on theology as well as works on law-proper. In these classical works, issues of the *jus ad bellum* of rebellion have generally been discussed in books of theology while those of the *jus in bello* of rebellion have been examined in the books of law-proper. However, Western scholars and many modern Muslim scholars generally overlooked the manuals of theology as well as those of Islamic law proper and have focused on works of other genres. Even when books of law-proper have been used sometimes, the presumption of these scholars is that jurists of various schools followed a common legal theory and as such they pick and choose between the views of the jurists belonging to various schools.

The present dissertation presumes that every school of law represented a distinct and internally coherent legal theory and thus it will primarily rely on the expositions of the Ḥanafī School. However, views of the other schools will also be discussed briefly for the sake of comparison. For ascertaining the official position of the Ḥanafī School, as well as other

schools, an effort an effort will be made to rely only on the manuals which are placed on the top of the hierarchy of manuals of the School.

CHAPTER FOUR: REBELLION AND THE INTERNATIONAL LEGAL ORDER

INTRODUCTION

International law as developed by the nation-states system traditionally disapproved rebellion as it deemed it the cause of destabilizing the system, but emphasis on human rights has led to recognizing self-determination as one of the most fundamental norms of the international legal order, thus providing basis for a limited the right to rebellion. The present chapter first examines the legal and philosophical foundations of the right to rebellion in the contemporary international legal order which is based on the notion of 'nation-states'. After this, it gives a thorough analysis of the legal provisions developed by the nation-state system for regulating the use of force. Then, it focuses on the *jus ad bellum* of rebellion against government as well as against state and concludes that international law initially considers rebellion against a government an internal issue of a state and, thus, beyond the scope of international law, but it becomes an international issue when an international actor gets involved in it,[1] or when it poses threat to international peace, or when it converts into a liberation movement.

[1] As shown in section 4.3.3 below, this generally happens in two ways: when the government facing rebellion invites other states to help it in curbing rebellion or when other states intervene on 'humanitarian grounds'.

4.1 NATION-STATE SYSTEM, SOVEREIGNTY AND HUMAN RIGHTS

International law or "the law of nations", as it was earlier called,[2] is a product of the nation-state system. Hence, this section first briefly discusses the origins of the nation-state system and, then, focuses on the characteristic features of this system insofar as they are related to the legal status of rebellion. After this, it shows how the nation-state system was transplanted in the twentieth century in the non-European world which resulted in recognizing some new rights which were previously not acceptable to the nation-state system. The most important of these rights is that of self-determination.

4.1.1 From the Holy Roman Empire to the Nation-states

During the so-called medieval period - or "the middle ages"[3] - Europeans were somehow loosely united - both religiously and politically - by the Holy Roman Empire.[4] It was this Empire which in the eleventh century launched the series of wars called "crusades" against

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[2] Jeremy Bentham is accredited with coining the term "international law". Before him, the phrase "the law of nations" was in vogue which, in turn, was based on the notion of *jus gentium* used in Roman law. See for details about the history of the modern nation-state system and international law: Peter Malanczuk, *Akehurt's Modern Introduction to International Law* (New York: Routledge, 2002), 9-35; Malclom N. Shaw, *International Law* (Cambridge: Cambridge University Press, 2008), 13-42.

[3] The period between the division of the Roman Empire in the fifth century and the conquest of Constantinople by Muslims in 1453 CE is termed as the "middle ages" as it lies in the middle of the two risings of Europe.

[4] The Roman Empire got divided into Eastern and Western parts in 476 CE. After this, the Eastern/Byzantine Empire continued to flourish. It was this Empire which had encounters with Muslims in their early history. Thus, Muslims succeeded in taking Jerusalem and other parts of the 'Holy Land' from the Byzantine Empire during the reign of 'Umar (God be pleased with him). The Western Empire fell into the darkness of ignorance. After a long period, the church and the political authority succeeded in making an alliance when Pope Leo III designated Charlemagne, who was the contemporary of Hārūn al-Rashīd (d. 193 AH/809 CE), as the Emperor of the Holy Roman Empire on December 25, 800 CE.

Muslims for "liberating" the Holy Land.[5] The crusades brought Muslims and European Christians into direct contact and Resultantly Muslim sciences and knowledge reached Europe.[6] Muslim works on Greek philosophy also greatly helped several intelligent Europeans in questioning many of their assumptions and beliefs. This, in turn, resulted in the movement for "reformation" of religion.[7] The "reformed" or "protestant" churches not only weakened the authority of the Pope but also shook the foundations of the Holy Roman Empire.

As religion no longer remained a uniting force, the Europeans had to seek some new bases for binding people together and the result was in the form of *nationalism*.[8] People belonging to a distinct ethnic origin, speaking a distinct language, believing in a distinct religious dogma and living on a specific piece of land emerged as a "nation" distinct from other nations.[9] These nations not only fought with each other on various – religious and non-religious – grounds but also tried to get independence from the Holy Roman Empire. The

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[5] The series of wars initiated when Pope Urban II issued a verdict to this effect in 1095 CE. In 1099, the Crusaders succeeded in capturing Jerusalem and other parts of the Holy Land. In 1148, Ṣalāḥ al-Dīn al-Ayyūbī re-conquered Jerusalem. The next five waves of Crusades proved complete failures and by 1291 the last fortress of Crusaders fell to the Muslims. See for details: Thomas Asbridge, *The First Crusade: A New History: The Roots of Conflict between Christianity and Islam* (New York: Oxford University Press, 2004).

[6] This influenced European thought in many different ways and one of the most obvious effects was on the laws of war and peace.

[7] For details about the movement of reformation of religion, see: R. Po-chia Hsia (ed.), *The Cambridge History of Christianity: Reform and Expansion 1500-1660* (Cambridge: Cambridge University Press, 2007); Alister E. McGrath, *The Intellectual Fathers of the European Reformation* (Oxford: Blackwell Publishing, 2004). See also: S.L. Greenslade (ed.), *Cambridge History of the Bible from Reformation to the Present Day* (Cambridge: Cambridge University Press, 2008).

[8] See for details: Charles Tilly (ed.), *The Formation of the National State in Europe* (Princeton: Princeton University Press, 1975); Michael Mann (ed.), *The Rise and Decline of the Nation State* (Oxford: Basil Blackwell, 1990); Sverker Gustavsson and Leif Lewin, *The Future of the Nation State: Essays on Cultural Pluralism and Political Integration* (New York: Routledge, 2004).

[9] Nationalism cause many serious problems for Muslim intelligentsia. See, for instance: Abū 'l-A'lā Mawdūdī, *Mas'ala-i-Qawmiyyat* (Lahore: Islamic Publications, 1990).

seventeenth century Europe saw the bloody Thirty-Year War and finally peace was brought through concluding the Treaty of Westphalia in 1648 CE.[10] The most important consequence of this treaty was the demise of the Empire and the emergence of several independent 'nation-states'.[11] Thus, the Peace of Westphalia is considered the starting point of the modern nation-state system in Europe.

For the next two centuries, this system - and the reSulṭānt 'law of nations' - remained confined to European Christian states and non-European world was essentially considered *terra nullius*, a territory that had no owner and could be annexed by occupation.[12] Thus the age of colonialism started which continued for the next three centuries.[13]

4.1.2 Colonial and Post-Colonial World

After the end of World War I in 1918, most of the colonies were placed under the so-called 'mandate' system.[14] This system was based on the principle of 'tutelage', which meant that

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[10] See for details: Geoffrey Treasure, *The Making of Modern Europe 1648–1780* (New York: Routledge, 2003).

[11] See Section 4.1.4 below for details about how the concept of sovereign nation-states changed with the passage of time.

[12] "There is also no doubt that the concepts of international law prevailing at this time served to facilitate the process of colonization. Sovereignty could be acquired over *terrae nullius*, territory allegedly belonging to nobody, a notion applied to areas throughout the world lacking a strong central power able to resist conquest. If resistance happened to occur, either treaties with local rulers were available as legal instruments, or war could be used." Malanczuk, 19.

[13] It was only in 1856 CE that Turkey, a Muslim but semi-European, state was acknowledged some rights as it was admitted to the concert of Europe. In 1905, Japan was also acknowledged some right and, thus, for the first time the operation of international law was extended to a non-European and non-Christian state.

[14] For details of the relationship between the Mandate System, colonialism and the international legal order, see: Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004), 115-194. After a detailed analysis, Anghie concludes: "Colonialism was central to the constitution of international law and sovereignty doctrine... The rhetoric of the 'civilizing mission'... was such an indispensable part of the imperial project. This mission furthered itself by postulating an

these territories were given under the guardianship of the victors because people of these territories were not competent for self-rule and the mandatory powers were to civilize them and hand over power to them after making them capable of self-rule.[15] Thus, the age-old colonialism was given a legal cover, with the difference that now mandate territories were not considered part of the territory of the mandatory power.[16]

There were three types of mandate territories:

- Territories termed as 'A' Mandates were to be given the choice of selecting their guardian or mandatory power. The role of the mandatory power was "rendering of administrative advice and assistance...until such time as they are able to stand alone." Arab territories of the former Ottoman Empire were placed under this category but they were never given the choice of selecting their colonial master.[17] The Mandate for Syria was given to France and for Iraq, Palestine and Trans-Jordan to UK. The Mandate for Palestine was conditioned by an undertaking given to the Jews by the British

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essential difference – what might be termed 'a cultural difference' -- between the Europeans and non-Europeans, the Spanish and the Indians, the civilized and the uncivilized." Ibid., 310.

See also: Malanczuk, 327-332. See also: Martin Dixon, *Textbook on International Law* (London: Blackstone, 2000), 24-27; D. J. Harris, *Cases and Materials on International Law* (London: Sweet and Maxwell, 1998), 125-26. For a landmark judgment on the legal issues arising out of this system, see: *International Status of the South West Africa Case*, ICJ 1950 Rep 128.

[15] The distorted concept of "the white man's burden"!

[16] Thus, although India had become 'British India' in 1857, Palestine did not become part of the British Empire even when it was given in British mandate.

[17] When Emir Al-Feisal of Iraq went to Paris to express his views he was not even heard.

government in 1917 to establish in Palestine "a national home for the Jewish people."[18]

- Greater part of Germany's African possessions was given the status of 'B' mandates. These territories were considered unfit for administrative autonomy. The mandatory power was to prohibit slave trade and arms trafficking in these territories. Moreover, B mandates were declared open to all League members for trade purposes.[19]
- Under 'C' mandates, Germany's possessions of South West Africa and Germany's Pacific islands were placed. The mandate for the African territories was given to the Union of South Africa and for the Pacific islands to Australia, New Zealand and Japan. They were under the sole control of the mandatory power. Other League members had no rights of trade in these territories.[20]

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[18] The infamous 'Balfour Declaration'. The British Foreign Secretary Arthur James Balfour was among the staunch supporters of Zionism, although he was not a Jew. In 1920, he presented to the League of Nations the draft Palestine Mandate, which contained the commitment of the Balfour Declaration. In 1922, he was made a peer, and in that capacity he always defended the pro-Zionist policy of the British government in public statements as well as speeches in the House of Lords. In justifying the mandate before the House of Lords, he mentioned the atrocities committed by the Christians against the Jews and stressed upon the need 'to wash out an ancient stain upon our own civilization'. In 1925, he visited Palestine to lay foundation stone of the Hebrew University on Mount Scopus. His niece Mrs. Blanche, who also wrote his biography, worked closely with Dr. Weizmann and the Zionist Executive in London. The Israeli government has named several towns and streets after him in recognition of his efforts. (John Comay, *Who's Who in Jewish History after the Period of Old Testament* (New York: Routledge, 1995), 36-37).

[19] The whole of Tanganyika was given to UK, except for two western provinces, which adjoining the Belgian Congo, were given to Belgium, and the southern port of Kionga, which was given to Portugal. The Cameroons and Togoland were divided between France and UK.

[20] Importantly, people of B and C Mandates could not be enrolled in the army of the Mandatory Power.

The Covenant established a Permanent Mandates Commission (PMC), which was given supervisory authority.[21] The PMC consisted of 9 members, majority of which were nationals of non-mandatory powers.[22] The PMC was to receive its information from the annual reports submitted to it by the mandatory powers, from questioning their representatives and from petitions submitted by the inhabitants of the mandate territories. However, such petitions could only be submitted through the mandatory power.[23]

At the time of the formation of the United Nations, there were seventy-four 'non-self-governing territories' in the world wherein almost a third of the world's population lived under colonial regimes. Regarding these people, the Charter established the principles that "the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories."[24] The Charter also established the International Trusteeship System[25] and the Trusteeship Council[26] to monitor certain territories, known as "Trust Territories".[27]

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[21] Covenant of the League, Article 22.

[22] In 1929, however, a German national was also added raising the number to 10.

[23] Reports by the mandatory powers were not submitted regularly. The PMC also could get information from other League bodies but it never visited the Mandate Territories nor dispatched investigation commissions to them. It practically became an agent of the League Council.

[24] UN Charter, Article 73.

[25] Ibid., Chapter XII (Articles 75-85)

[26] Ibid., Chapter XIII (Articles 86-91)

[27] A total of eleven territories were placed under this system which were formally administered under Mandates from the League of Nations, or were separated from countries defeated in the Second World War, or were voluntarily placed under the system by States responsible for their administration. For details, see: Harris, 125-26.

In the aftermath of World War II, most of these mandate territories gradually got independence and obtained the status of "sovereign states".[28] Thus, the nation-state system was artificially transplanted in Asia, Africa and other parts of the world. As many of these new states got independence from colonial regime as a result of armed liberation struggle, the right to "self-determination" became the central theme of rebellions and civil wars. Those fighting against colonial, racist or alien domination were hailed in the colonies as heroes and torch-bearers of commendable human values, while the same people were termed criminals, bandits and miscreants by the colonial masters. Hence, the famous adage: "One man's terrorist is another's freedom fighter!"[29]

International law about rebellion, thus, has two parallel principles which sometimes clash with each other: the right of all people to live in accordance with their own beliefs, values and aspirations - the so-called right to self-determination - and the need of a stable international legal order for smooth functioning of the system. The former may instigate secession and anarchy, while the latter may lead to worst form of tyranny and persecution. Legal and political philosophers have been trying to strike a balance between these apparently conflicting legal principles. This will be explained in the next sections of the chapter.

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[28] Egypt, Iraq, Syria and Algiers are just a few examples.

[29] Bhagat Singh, the famous Indian is a glaring example who is hailed as a great freedom-fighter by Indians but who was punished as a serious criminal by the British government in India.

4.1.3 Hobbes or Locke: Stability or Freedom?

Thomas Hobbes (d. 1679), the famous English philosopher of the seventeenth century who believed that state came into existence as a result of a 'social contract', had seen the evil effects of disorder, anarchy and disintegration[30] and, thus, strongly advocated a strong state – which he calls 'leviathan', or a monster – that could ensure peace, stability and order so that the lives of all its citizens are saved.[31] John Locke (d. 1704), another Englishman who expounded a different version of the social contract theory, instead tried to restrict the unbridled powers of the state by emphasizing on individual's freedom and liberty.[32] It is these two apparently opposing considerations which affect the whole discourse in international law on rebellion or liberation movements. While both Hobbes and Locke shared some basic presumptions, they reached quite different conclusions.

Hobbes believed in the existence of a "state of nature" where no superior-subordinate relationship existed at the political level and, thus, everyone was free. This absolute freedom and the lack of a superior authority, in the opinion of Hobbes, led to a war of all against all till everyone was tired of it and, Resultantly, all agreed to surrender their freedom to the "state" which alone should have coercive powers. As everyone submitted to this leviathan,

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[30] Hobbes witnessed the rule of the dictator Oliver Cromwell (d. 1658) and the violence before and after that. These events influenced his thought and he wanted to establish peace at any cost.

[31] Thomas Hobbes, *Leviathan or the Matter, Form and Power of a Commonwealth Ecclesiastical and Civil*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1996). See for a detailed exposition of the views of Hobbes, see: Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of A Political Symbol* (London: Greenwood Press, 1996).

[32] Locke's *Second Treatise* is particularly important in this regard. See John Locke, *Second Treaties of Government*, ed. C.B. Macpherson (Cambridge: Hackett Publishing Co., 1980). See also: Paul Kelly, *Locke's Second Treatise of Government: A Reader's Guide* (New York: Continuum, 2007).

nobody could rise up against the state, argued Hobbes. Moreover, in the opinion of Hobbes, the state was not a party to the "social contract" and was, thus, under no contractual obligations towards the other party – the individuals who had surrendered their freedom to the state for securing their lives.

As opposed to this, Locke believed that the state of nature provided happiness and joy to all people as they could enjoy natural freedom and natural rights given to them by the law of nature.[33] It was only after some people starting abusing their natural freedom that problems arose, asserted Locke. Moreover, when finally people decided to enter into a social contract and constitute a political setup, expounded Locke, they did not surrender all of their freedom. Rather, in the opinion of Locke, people surrendered some of their rights to the state on the condition that the state – which was a party to the contract – must protect the rest of their rights. Thus, Locke's social contract put certain obligations on the state which if not fulfilled allowed individuals to rise up against it and change the system or replace it with another – more just – order. Locke, thus, created room for recognizing a "limited right to rebellion."[34]

The ideas of Locke greatly influenced the American political and legal philosophy and his ideas were embodied in the American Declaration of Independence as well as in the Constitution of the USA. Thomas Jefferson wrote in the Declaration of Independence:

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[33] Locke says: "The state of nature has a law of nature to govern it, which obliges everyone: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions." *Second Treatise*, 9.

[34] See for details: Donald L. Doernberg, "We the People: John Lock, Collective Constitutional Rights and Standing to Challenge Government Action," *California Law Review* 73 (1985): 52-118.

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness – that to secure these rights, government are instituted among men, deriving their powers from the consent of the governed, that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to affect their safety and happiness.[35]

These ideas are also reflected in several documents and declarations regarding human rights, particularly the right to self-determination and, as shown below, they form the basis for legitimizing armed liberation struggle against tyrannical and oppressive regimes.[36]

4.1.4 The Changing Notions of Sovereignty

The system that came into existence as a result of the Treaty of Westphalia stood on the notion of "sovereignty."[37] Although the concept of sovereignty was debated by political and legal philosophers much before this, the Treaty of Westphalia recognized this concept for the various entities in a peculiar way – the so-called "Westphalian sovereignty". This notion of

[35] American Declaration of Independence, para 1. The US Supreme Court in *Saving and Loan Association v Topeka* declared: "There are.... rights in every free government beyond the control of the state. A government, which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all a despotism...."

[36] See Section 4.3.1 below.

[37] For a detailed discussion on the evolution of the concept of sovereignty with special focus on issues relating to rebellion and insurgency, see: Anghie, *op. cit.* See also: M.P. Ferreira-Snyman, "The Evolution of State Sovereignty: A Historical Perspective," *Fundamina* 12 (Apr 2006), 1-28; also available at: www.uir.unisa.ac.za/bitstream/handle/.../Fundamina%20Snyman.finaal.pdf (last accessed August 20, 2015).

sovereignty essentially included two ideas: "territoriality and the exclusion of external factors from domestic structures of authority." The present section briefly discusses some of the important approaches toward sovereignty in international law and how they affected the international legal regime about rebellion.

The first systematic exposition of the notion of sovereignty is ascribed to the famous French philosopher of the sixteenth century Jean Bodin (d. 1596) who gave a detailed analysis of this notion in his famous treatise *Les Six Livres de République* (Six Books of the Commonwealth).[38] For Bodin, sovereignty essentially meant absolute and sole power of law making within a particular territory which did not tolerate any other law-creating agent above the sovereign. This supreme power could not be restricted, in the opinion of Bodin, even by a 'constitution' and his sovereign was above positive law. He, however, accepted the supremacy of the laws of God and natural law.[39]

Some of the Spanish philosophers who preceded Hugo Grotius, the so-called 'Father of international law', considered examined the relationship of *jus gentium* (law of nations) with the concept of sovereignty. For instance, Francisco de Vitoria (d. 1492) asserted that *jus gentium* was the product of the man's rational nature and was thus common to all mankind. He, thus, argued for subjecting the power of the state to the common good of the world

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[38] Jean Bodin, *Six Books of the Commonwealth*, tr. M.J. Tooley (Oxford: Basil Blackwell, 1955).

[39] Ferreira-Snyman, 5. As noted above, Hobbes' 'leviathan' was all powerful and thus he went even farther than Bodin by stating that a sovereign was not bound by anything and had a right over everything, including religion. See for details: Hobbes, *De Cive: Philosophical Rudiments Concerning Government and Society*, ed. Howard Warrender (Oxford: Oxford University Press, 1983). As opposed to this, Samuel Pufendorf (d. 1694), another classical authority, denied omnipotence to sovereign and asserted that sovereignty did not mean absolute power. Thus, for Pufendorf sovereignty could be constitutionally restricted. Ferreira-Snyman, 6.

community.[40] Alberico Gentili (d. 1608), another influential Spanish jurist-cum-philosopher, thought that *jus gentium* was not just a 'law between states'; rather, he considered it a 'universal law' and Resultantly he recognized the right of other states to intervene with armed force when this law was violated. In other words, Gentili subjected the state's sovereignty to the norms of international law.[41] This, indeed, was an important contribution.

These ideas of the Spanish philosophers greatly influenced the thought of Grotius (d. 1645) who like them subjected the states' sovereignty to the norms of the law of nations. He believed that *jus gentium* was based partly on *jus voluntarium* (voluntary law) and partly on *jus naturae* (law of nature).[42] Thus, for Grotius, it was not only the consent of states which brought into existence the norms of international law but also over above the consent of the states there was the law of nature that bound all states. Significantly, Grotius – though himself a devout Christian theologian – separated the law of nature from theology and based it solely on reason.[43]

It was in this background that the Treaty of Westphalia which brought an end to the Thirty-Year War recognized sovereignty for various entities. Thus, it acknowledged equality for states irrespective of their Catholic or Protestant beliefs as well as their monarchical or

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[40] See for details about how the views of Vitoria influenced the development of the international legal order: Anghie, 13-30.

[41] Ferreira-Snyman, 7-8.

[42] See for details: Hugo Grotius, *The Rights of War and Peace*, ed. Richard Tuck (Indianapolis: Liberty Fund, 2005).

[43] See for an analysis of the views and influence of Grotius: Richard Tuck, *Political Thought and the International Order From Grotius to Kant* (New York: Oxford University Press, 1999).

republican form of government. Simultaneously, it made it obligatory on states to protect the peace reached through this Treaty, thus, also recognizing the 'duty to cooperate'.[44]

The rise of legal positivism in the eighteenth and nineteenth centuries further strengthened the notion of sovereignty as absolute power as legal positivism regarded state as the source of all laws and rejected the idea of a superior law of nature. Thus, the famous English philosopher of the nineteenth century Jeremy Bentham (d. 1832) who is also credited for coining the term "international law" believed that international law was not 'law-proper". The same was the view of his famous disciple John Austin (d. 1859).

In the twentieth century, however, the trend changed as the notion of absolute sovereignty was deemed a threat to international peace. Resultantly, the 'dualist' approach toward international law advocated by Austin and others was attacked by the theory of 'monism' expounded by some renowned legal philosophers, such as Hans Kelsen (d. 1973). Kelsen expounded the supremacy of the norms of international law by envisaging a hierarchy of norms in which the norms of international law were placed on the top of the hierarchy. He argued that as states believe in equality of each other's legal orders, this necessitates recognition of a *grundnorm* which was higher than the respective *groundnormen* of the individual states because equality of national systems was possible only by assuming a higher authority that bestowed equality on states.

Sir Hersch Lauterpacht (d. 1960), a contemporary of Kelsen, also criticized the consent-based model of international law expounded by legal positivists. For Lauterpacht,

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[44] Ferreira-Snyman, 10.

sovereignty was "an artificial personification of the metaphysical state" and, hence, it had no real essence and was just "a bundle of rights and powers accorded to the state by the legal order." Thus, he also believed that sovereignty was divisible and could be restricted.

Three significant trends in the twentieth century further eroded the notion of absolute sovereignty. These are: the growing emphasis on human rights law and the emergence of individuals as subjects of international law; development of international criminal justice system which helped in piercing the corporate veil of state and holding individuals – even serving heads of states – criminally responsible before international criminal tribunals; and emphasis on "common good" and "common interests" which require states to submit to the norms of international law and sacrifice part of their sovereignty.

These developments have greatly influenced the law regarding the use of force, particularly the use of force by a state against its own population. Till the first half of the twentieth century, this could be termed as an 'internal affair' of a sovereign state in which other states could not interfere. However, the second half of the twentieth century saw many instances of the so-called "humanitarian intervention" and in the twenty-first century sovereignty is generally deemed as "responsibility to protect".

4.2 *JUS AD BELLUM* OR THE LEGALITY OF WAR

International law relating to armed conflicts is divided into two main branches: the law of resort to war (*jus ad bellum*), and the law of conduct of war (*jus in bello*). The former gives rules about the legality or illegality of wars, while the latter governs the conduct of hostilities

irrespective of whether a particular war is legal or illegal.[45] The present chapter focuses only on the legality of rebellion from the perspective of international law. As far as law about the conduct of hostilities during rebellion is concerned, it will be examined in detail in the third part of this dissertation.[46]

4.2.1 From Just Cause to Sovereign Prerogative

For quite a long time, the law of war in the West was based on the notions of Christian morality.[47] Early Christians did not permit use of force even in private self-defense because they were instructed by Jesus Christ to "turn the other cheek".[48] Hence, for Christians, war

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[45] See for a historical and legal description of these terms: Robert Kolb, "Origin of the Twin Terms *jus ad bellum/jus in bello*", *International Review of the Red Cross* 79 (1997): 553-562. For an analysis of the significance of distinction between these two spheres of law, see: Jasmine Moussa, "Can *Jus ad Ballum* Override *Jus in Bello*? Reaffirming the Separation of the Two Bodies of the Law" *International Review of the Red Cross*, 90 (2008): 963-990.

[46] See chapters seven to nine of this dissertation.

[47] Oppenheim (d. 1919) who is deemed an authority on international law explicitly asserts in his classical treatise: "There is no doubt that the Law of Nations is a product of Christian civilization. It originally arose between the States of Christendom only, and for hundreds of years was confined to these States. Between Christian and Mohammedan nations a condition of perpetual enmity prevailed in former centuries. And no constant intercourse existed in former times between Christian and Buddhistic States. But from about the beginning of the nineteenth century matters gradually changed. A condition of perpetual enmity between whole groups of nations exists no longer either in theory or in practice. And although there is still a broad and deep gulf between Christian civilization and others, many interests, which knit Christian States together, knit likewise some non-Christian and Christian States" (Oppenheim, 30-31). He further says that entities outside the dominion of the law of nations are to be dealt with in accordance with the principles of Christian morality: "The Law of Nations as a law between States based on the common consent of the members of the Family of Nations naturally does not contain any rules concerning the intercourse with and treatment of such States as are outside that circle. That this intercourse and treatment ought to be regulated by the principles of Christian morality is obvious. But actually a practice frequently prevails which is not only contrary to Christian morality, but arbitrary and barbarous" (Ibid., 34).

[48] The Gospel According to St. Matthew, 5:39. This is part of a long sermon called the "Sermon on the Mount" in which Jesus Christ explains his basic teachings and their relationship with the Torah.

was never justified on moral grounds.[49] In the fourth century, however, when the Roman Emperor Constantine the Great embraced Christianity, it was no more possible to act on this notion of morality. At that critical juncture of history, St. Augustine of Hippo (d. 430) came up with the notion of "just war".[50]

Augustine interpreted the Christian notion of "charity," or turning the other cheek, in such a way that war for the purpose of saving the oppressed people from persecution became a necessary corollary of charity and, hence, a highly commendable moral act. A Christian emperor was thus permitted to take upon himself the obligation to save the oppressed ones from oppression and bear all the difficulties with patience. As far as wars against idolaters and heretics were concerned, they were always deemed "just" because they were meant to protect the city of God as well as the people of God.[51] Henceforth, wars were categorized either as just or unjust. Just war was the one which had a "just cause". Just cause meant 'a right denied or a wrong inflicted'. This became the basis for moral and legal justification of wars and all the debates on the *ratio* of war.[52]

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[49] See for a detailed analysis: James Turner Johnson, *The Holy War Idea in Western and Islamic Traditions* (University Park: Pennsylvania State University Press, 1997).

[50] See for details on the various aspects of the just war theory in Christian and Muslim traditions: John Kelsay and James Turner Johnson (eds.), *Just War and Jihad* (Westport: Greenwood, 1991); James Turner Johnson and John Kelsay, eds., *Cross, Crescent, and Sword* (Westport, Conn.: Greenwood, 1990). See also: John Kelsay: *Arguing the Just War in Islam* (Harvard: Harvard University Press, 2007).

[51] Augustine asserts: "Just wars are usually defined as those which avenge injuries, when the nation or city against which warlike action is to be directed has neglected either to punish wrongs committed by its own citizens or to restore what has been unjustly taken by it. Further, that kind of war is undoubtedly just which God Himself ordains."

[52] See for relevance of the just war theory to conflicts in the contemporary world: James Turner Johnson, *Morality and Contemporary Warfare* (New Haven: Yale University Press, 1999). See for different perspective: Oliver O'Donovan, *The Just War Revisited* (Cambridge: Cambridge University Press, 2003).

At the end of the Middle Ages, when the Holy Roman Empire was facing disintegration and people had started thinking independently of religious dogma, Grotius came up with a modified version of the just war theory which emphasized that it was the state which would determine if a just cause of war existed. In another words, although a just cause was still needed, yet the focus shifted from the cause to the authority for determining the cause.[53]

In the post-Westphalia Europe when nation-states were deemed sovereign, the significance of a just cause got further diminished and when in the nineteenth century the notion of sovereignty was coupled by legal positivism, the governing idea was not so much a just cause as the "sovereign right to resort to war".[54] Henceforth, no war was deemed illegal, although states continued to give various explanations for their adventures and these explanations gradually developed into various 'doctrines' such as self-defense, reprisal, hot pursuit and the like.[55]

4.2.2 General Prohibition of the Use of Force

The Covenant of the League of Nations 1919 put certain conditions on the right to resort to war though it did not outlaw war.[56] In 1928, a pact was concluded between USA and France,

[53] Malanczuk, 307.
[54] Ibid., 307-08.
[55] Ibid., 311-17.
[56] Articles 10-16 of the Covenant of the League of Nations, 1919.

known as the Pact of Paris, also called "the Kellogg-Briand Pact",[57] which prohibited war as a means for settling international disputes:

> The high contracting parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.[58]

It, however, did not prohibit the so-called 'force short of war'.[59] Article 2 (4) of the UN Charter 1945 prohibited not only war but also the threat or use of force.

> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.[60]

Although there are two different interpretations of this Article,[61] it is generally agreed upon that this Article goes a step forward as it prohibited not only war but also threat or use of force.[62] The Charter explicitly permits use of force in two cases, namely, in self-defense and

[57] Later, other states also became party to this Pact and it got general acceptance. It was on this basis that in 1945 German officials could be tried in the famous Nuremberg Tribunals for initiating war of aggression or committing 'crimes against peace'.

[58] Article 1, General Pact for the Renunciation of War, 1928.

[59] Malanczuk, *Akehurst's Modern Introduction*, 309.

[60] Article 2 (4), Charter of the United Nations Organization, 1945.

[61] The so-called "restrictive" and "permissive" interpretations of the law. See for details: Malanczuk, 309-310.

[62] Dixon, 296-99.

collective use of force under the authority of UN Security Council.[63] These will be briefly explained below.

4.2.3 Exceptional Uses of Force

Chapter VII of the UN Charter (Articles 39-51) envisages for the first time a system of collective security.[64] The Charter gives the UN Security Council (UNSC) the 'primary' responsibility of maintaining and protecting the international peace. Decisions of the Security Council in this regard are binding on all members of the UN.

The system of collective security is triggered in any of the following three cases:

1. When a state commits an act of aggression against;
2. When a state commits a breach of the peace; or
3. When there is a threat to the peace.

After the UNSC determines the existence of any of these three grounds, it may impose the so-called 'soft sanctions', such as economic and arms embargo, cutting off of diplomatic ties and the like, or keeping in view the gravity of the situation it may decide military action against the state(s) concerned.

It was envisaged originally that the UN would have an international force at its disposal for which purpose all the member states were required to conclude agreement(s) with the UNSC. This, however, could not materialize because of the so-called 'cold war' between

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[63] A third exception mentioned in Article 107 allowing use of force against ex-enemy states in World War II is now obsolete.

[64] For details see: Dixon, 313-24; Harris, 873-907.

the super powers.[65] The system was first tested during the Korean War 1950-51. As Soviet Union had boycotted the UNSC, the US and her allies in the UNSC invoked Article 39 holding North Korea responsible for breach of the peace.[66] In the absence of Soviet Union another resolution was passed, which called upon all members to furnish necessary support to South Korea to repel the attack.[67] This was an adaptation of the Charter on the part of the UNSC as it *authorized* a 'coalition of the willing' to use force.[68] It further authorized the forces to use the UN flag and asked the US to report 'as appropriate' to the Council.

No further action in this regard could be taken by the UNSC because of the Soviet veto. Hence, the US and her allies had to obtain a kind of moral legitimacy through passing a resolution on "uniting for peace" by the UN General Assembly (UNGA).[69] The same procedure was adopted in 1956 at the time of the Suez Canal Crisis, when due to the British and French veto the UNSC was unable to take any action.[70] The UNGA was successful enough to persuade France, UK and Israel to pull back from the Suez. The resolution was again used in 1980 when USSR invaded Afghanistan.[71]

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[65] Thomas M. Frank, Director Center for International Studies, New York City Law School, who is a proponent of the permissive interpretation, says: "This noble plan for replacing state self-help with collective security failed because it was based on two wrong assumptions: first, that the Security Council could be excepted to make speedy and objective decision as to when collective measures were necessary. Second, that states would enter into the arrangement necessary to give the Council an effective policing capability." (Thomas M. Franck, "When, if ever, May States Deploy Military Force Without Prior Security Council Authorization?" *Singapore Journal of International and Comparative Law* 4 (2000): 362-76).

[66] SC/Res/82 (1950).

[67] SC/Res/83 (1950).

[68] SC/Res/84 (1950).

[69] GA/Res/377 (V) (1950). See for details: Harris, *Cases and Materials*, 891-94.

[70] Harris, 861-63.

[71] Ibid., 844-46

During the cold war era, thus, the UNSC could not succeed in authorizing the use of force, but it could sparingly impose non-military sanctions.[72] The end of cold war brought new hopes for the revival of the original scheme of Collective Security. This, however, did not happen, although there has been an excessive use of the 'authorization' procedure as well as of non-military sanctions and peacekeeping missions. Interestingly, it is the Council, which is now taking the lead both in authorizations as well as in peacekeeping missions.[73]

The post-cold war authorizations show that the scope of international law and international organizations, especially the UN, is further widening and there is little left in the so-called 'internal affairs' of states, as many a times the use of military force was authorized in what were previously thought of as 'internal affairs' of states.[74] This new

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[72] For instance, in 1968 it imposed comprehensive mandatory sanctions on Southern Rhodesia (SC/Res/235). In 1977, it imposed arms embargo on South Africa (SC/Res/418), although repeated attempts to widen the scope of these sanctions failed due to veto of either UK or US. Attempts to impose sanctions on Israel failed due to the same reason.

[73] The very first, and perhaps the most successful, instance of authorization in this new era is the First Gulf War 1990-91 (SC/Res/660 and SC/Res/678). See for details: C. Warbrick, "The Invasion of Kuwait by Iraq", *International and Comparative Law Quarterly*, 40:2 (1991), 482-92. See also: C. Gray, "After the Cease-fire: Iraq, the Security Council and the Use of Force", *British Yearbook of International Law*, 65 (1994), 135-174. In 1992, the Council authorized the *ad hoc* 'coalition of the willing', the United Nations Protection Force (UNPROFOR), in the former Yugoslavia (SC/Res/743). It also authorized the NATO to use necessary force there. In June 1993, by another resolution the UNPROFOR was authorized to use force for the protection of civilian population in the Bosnian 'safe areas' (SC/Res/836). The mandate was extended to Croatia in 1994 (SC/Res/958). By yet another resolution in 1995 the task was given solely to the NATO with the parties' nominal agreement (SC/Res/1031). In 1997, the Council authorized another protection force to restore order in Albania (SC/Res/1101 and 1114).

[74] For instance, in November 1992, the Council, on the report of the Secretary General, authorized the United States, and any other 'willing', to use 'all necessary means' through an *ad hoc* United Nations Task Force (UNITAF) to achieve certain specified objectives in Somalia (SC/Res/794). Later, through another resolution it authorized the replacement of the American forces with multinational coalition forces (UNOSOM II) without direct US participation and with an expanded peace and security mandate (SC/Res/814). By yet another resolution it authorized the use of force against a Somali leader (SC/Res/837). Yet another example is the 'exceptional' authorization in 1994 of a multinational coalition of the willing to use 'all necessary means' to facilitate the departure from Haiti of the military leadership that had overthrown its democratically elected government (SC/Res/940). In 1997, the Council authorized the use of force by the armed forces (ECOMOG) of

practice also confirms the conclusion that the phrase 'threat to the peace' as used in Art 39 is not limited to military situations.[75]

It is worth noting here that although the UNSC condemned the 9/11 attacks and required the Taliban regime to fulfill certain demands,[76] it did not *authorize* the use of force against Afghanistan.[77] Later, however, when the Taliban regime in Afghanistan was toppled, a legal cover was provided to the International Security and Assistance Force (ISAF).[78] Similarly, although the UNSC warned the Iraqi government of serious consequences if it would not cooperate with the UN inspectors, it did not authorize the US and UK to use force for enforcing the UNSC resolutions.[79] After the Saddam regime was overthrown, the UNSC provided legal cover to the new setup.

The right to self-defense is mentioned in the UN Charter in the context of the system of collective security. Thus, the last provision of Chapter VII says: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken

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the economic Community of West African States to end the argued of the Liberian civil war (SC/Res/1116). In 1999, the Council authorized yet another 'coalition of the willing' to use 'all necessary means' to support the people of East Timor in the vindication of their right to self-determination (SC/Res/1264).

[75] Dixon, 314.

[76] SC/Res/1368 and 1371 (2001).

[77] N. D. White, Professor of International Law in the University of Nottingham, points out that a SC resolution could be deemed to have authorized the use of force only if referred to the powers of the SC under Chapter VII of the Charter and then allows the use of "all necessary means" or measures, sometimes mentioning the phrase "including the use of force". See for details: N. D. White, "The Legality of Bombing in the Name of Humanity," *Journal of Conflict and Security Law*, 5 (2000): 27–43.

[78] The force was initially given mandate through SC/Res/1386 (2001).

[79] SC/Res/687 (1991). See for details: N. D. White and Cryer, "Unilateral Enforcement of Resolution 687: A Threat Too Far?", *California Western International Law Journal* 29 (1999), 243-82.

measures necessary to maintain international peace and security."[80] Those who prefer a stricter and narrower interpretation of this exception hold that the self-defense in the post-Charter period has been confined to situation of an ongoing armed attack. However, there are many who hold that the pre-Charter customary right to self-defense remains intact and that the Charter did not abrogate the earlier law.[81]

A detailed exposition of this issue is beyond the scope of the present dissertation.[82] It may be noted, however, that customary international law allowed the use of force in self-defense in all situations where the following conditions were fulfilled:

1. That there was an imminent threat;
2. The threat was so overwhelming that it could not be avoided by other alternative means; and
3. That force used was proportionate to the threat.[83]

If these conditions were fulfilled the right to self-defense could be exercised even before the other party could launch an attack – the so-called pre-emptive self-defense – and even in the

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[80] UN Charter, Article 51.

[81] Malanczuk, 311-17.

[82] See for a detailed analysis of the scope of self-defense in the contemporary international legal regime as well as in Islamic law: Ahmad, "The Scope of Self-defense", 155-94.

[83] In 1837, British military forces caught *The Caroline,* an American ship, while it was berthed in an American port and then sent her over the Niagara Falls. The US officials caught some of the persons involved in the incident. When the British attempted to release one of these persons, the then US Secretary of State Daniel Webster indicated that Great Britain had to show "a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation." Further, he pointed out that it had to be established that, after entering the United States, the armed forces "did nothing unreasonable or excessive; since the act justified by the necessity of self-defense must be limited by that necessity and kept clearly within it." Harris, 848.

absence of an armed attack, such as 'economic aggression' or 'hostile propaganda' which necessitated armed attack for the protection of a state's interests.[84]

Some of the scholars argue that because of the emergence of the weapons of mass destruction (WMDs) and also because of the failure of the system of collective security as originally envisaged by the UN Charter, states must be acknowledged to have this wider customary right of self-defense because they agreed to a restricted right only on the condition of a successful system of collective security.[85] The issue, however, remains contentious.

4.3 Rebellion, Liberation and Secession

Given this context of the nation-state system and its legal regime about the use of force, rebellion against a government within a state originally is deemed an 'internal issue' in which other states must not interfere. However, this internal affair becomes an issue of international concern when other states - legally or illegally - get involved in rebellion or when the international community considers rebellion a threat to international peace. Sometimes rebellion aims at 'liberation' of a community or 'secession' of a part of the territory of an existing state. This is necessarily an international issue but the extent to which international law allows liberation and secession remains to be ascertained. Hence, it becomes important to examine the nature and scope of the right to self-determination.

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[84] See, for details: Dixon, 299–308.
[85] Franck, 362.

4.3.1 Self-determination and International Law

International legal discourse on the right to self-determination started in the context of resistance to colonialism.[86] In 1917, the US President Woodrow Wilson said in the context of the future peace settlement after World War I:

> We believe first, that every people has a right to choose the sovereignty under which it shall live: second, that the small states of the world have a right to enjoy the same respect for their sovereignty and for their territorial integrity that the great and powerful nations expect and insist upon: third, that the world has a right to be free from every disturbance of its peace that has its origin in aggression and disregard of the right of peoples and nations.[87]

In fact, the whole issue of self-determination revolves around these three basic principles:

- Right of people to self-rule;
- Sovereign equality of all states big or small; and
- Conviction that disrespect for the rights of people results in threats to the peace.

Lenin is also considered among the supporters of the right of self-determination as he supported the idea of secession from a state on the basis of this principle. The Soviet

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[86] For a detailed study of how the right of self-determination emerged in international law see: Antonio Cassese, *Self-determination of Peoples* (Cambridge: Cambridge University Press, 1995). See also: Christopher, O. Quaye, *Liberation Struggle in International Law* (Philadelphia: Philadelphia University Press, 1991).

[87] K. K. Kulshrestha, *A Short History of International Relations* (Lahore: Good Reads, n. d.), 10. Wilson further said: "No peace can last, or ought to last, which does not accept the principle that governments derive all their just powers from the consent of the governed, and that no right anywhere exists to hand people from sovereignty to sovereignty as if they were property." (Ibid., 14).

Constitution, thus, recognized the right of secession for the constituent republics.[88] The US Secretary of State Lansing termed Lenin's concept as destructive to "the stability of the future world by applying the self-determination principle to the colonial world."[89] Hence, after World War I the principle of self-determination was sacrificed at the altar of the interests of the colonial powers. This was despite the fact that World War I was called the "war of self-determination".[90]

After World War II, the struggle for independence in the colonial and mandate territories got momentum and right of self-determination gradually established as one of the most fundamental human rights of all human beings. Although some of the colonial powers like Belgium tried to remove the provisions about self-determination from the UN Charter, they could not succeed in doing so because of the opposition of the developing countries.[91] The net result was, however, a compromise between the conflicting opinions of the developed and developing states. Thus, the Charter, one the one hand, mentions as one of the objectives of the UN is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate

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[88] Article 4 of the Constitution of the USSR, 1924, declared: "Each one of the member republics retains the right to freely withdraw from the Union". However, it was practically impossible for a republic to secede till very recently when after the humiliating defeat in Afghanistan the Union was weakened.

[89] Cassese, 132.

[90] Ibid., 11.

[91] Ijaz Hussain, *Kashmir Dispute: An International Law Perspective* (Islamabad: Quaid-e-Azam University, 1998), 143.

measures to strengthen universal peace."[92] On the other hand, it also explicitly prohibits intervention in the 'internal affairs' of states.[93]

The struggle for independence and freedom gained momentum in the 1950's and several territories got independence from the colonial rule. "Believing that the process of liberation is irresistible and irreversible and that, in order to avoid serious crises, an end must be put to colonialism and all practices of segregation and discrimination associated therewith", the General Assembly adopted a resolution in 1960 known as "Declaration on Granting Independence to Colonial Territories and Peoples".[94] This is a landmark resolution that called for speedy end to the evils of colonialism and emphasized that denial of the right to self-determination results in "increasing conflicts" which "constitute a serious threat to world peace." This declaration gave new strength to freedom struggles in different parts of the world.[95]

In 1970, the General Assembly passed yet another landmark resolution known as "Declaration on Principles of International Law, Friendly Relations and Co-operation among

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[92] Article 1 (2) of the UN Charter. This is coupled by recognition of the 'sovereign equality' of all states, big or small. (Ibid., Article 2 (1)).

[93] "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 this principle shall not prejudice the application of enforcement measures under Chapter VII." (Article 2(7))

[94] GA/Res/1514 (XV) (1960) The Resolution was adopted by 89 votes to 0, with 9 abstentions. The abstaining states were Australia, Belgium, Dominican Republic, France, Portugal, South Africa, Spain, the UK and the USA.

[95] Many scholars argue that self-determination became 'right' only after the passing of this resolution and that prior to this it was only a political philosophy. In fact, this Declaration continues to be reference point in the General Assembly's de-colonization efforts. (See *The Western Sahara Case*, 1975 ICJ (Advisory Opinion) Rep 12. But see also Calvert, *The Falkland Island Crisis: the Rights and Wrongs*.)

States in accordance with the Charter of the United Nations".[96] This resolution recognized the right to self-determination as one of the fundamental principles of international law.[97] It, however, emphasizes that this should not be taken as free license for interference in the internal affairs of other states:

> Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State. Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.[98]

Significantly, the resolution also mentions the "modes" of implementing the right of self-determination. "The establishment of a sovereign and independent state, the free association or integration with an independent state, or the emergence into any other political status freely determined by a people, constitute modes of implementing the right of self-determination by that people."[99]

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[96] GA/Res/2625 (XXV) (1970).

[97] Other principles recognized in the resolution are: the general prohibition on the threat or use of force; settlement of international disputes by peaceful means; non-intervention in matters within the domestic jurisdiction of any state; the duty of states to co-operate with one another in accordance with the Charter; the principle of sovereign equality of States; and the principle that States shall fulfill in good faith the obligations they assumed in accordance with the Charter.

[98] GA/Res/2625 (XXV) (1970), Principle of the Prohibition of the Use of Force, paras 7-8. In fact this was a kind of balance between the viewpoints of the developing and the developed states.

[99] Ibid., Principle of Equal Rights and Self-determination, Para 4.

In the context of disintegration of Yugoslavia, the EC Arbitration Commission[100] tried to strike a balance between the dictates of self-determination and the need of a stable international order. Thus, it declared that the right of self-determination certainly existed beyond the colonial context, particularly for the people of a territory that is part of an existing federal state, provided they could achieve the factual prerequisites for statehood identified in the Montevideo Convention.[101] This may encourage the secessionist movements, at least in the federal States, but by insisting on the prerequisites of statehood, the Commission placed a practical limitation on self-determination that would allow the federal authorities to lawfully prevent secession.

As for the ethnic or religious groups within a unitary state or within territories formerly part of federal states, the commission recognized some sort of 'second level' self-determination, in that their culture, social organization and religious preferences should be respected by the state of which they are part. The Canadian Supreme Court in the *Case Concerning Questions Relating to Secession of Quebec from Canada* expressed the same view.[102]

Self-determination can be achieved through peace as well as through armed struggle. The next section focuses on issues of *jus ad bellum* arising out of armed liberation struggle.

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[100] Report of the EC Arbitration Commission on Yugoslavia, [1993] 92 ILR 162. See for a detailed analysis: Alain Pellet, "The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-determination of Peoples", *European Journal of International Law* 3 (1992), 178-185.

[101] Article 1 of the Montevideo Convention on Rights and Duties of States, 1933, put the following four essentials for statehood: a) A permanent population; b) A defined territory; c) a government; and d) a capacity to enter into relations with other states.

[102] The court was asked to rule on the legitimacy under Canadian law and international law of a possible declaration of independence by Quebec. In the court's view, there was no right of secession under international law of a political sub-unit of an existing state, provided that the central authorities respected the 'internal' self-determination of the ethnic group. *Case Concerning Questions Relating to Secession of Quebec from Canada,* 16 IDLR (4th) 385.

4.3.2 Insurgency, Terrorism and War

Bard E. O'Neill, Professor of International Affairs at the National War College, Washington, D.C., defines insurgency in these words: "A struggle between a non-ruling group and the ruling authorities in which the non-ruling group consciously uses *political resources* (e.g., organizational expertise, propaganda, and demonstrations) and *violence* to destroy, reformulate, or sustain the basis of legitimacy of one or more aspects of politics"[103] He uses the word 'legitimacy' "to determine whether the existing aspects of politics are considered moral or immoral - right or wrong - by the population or selected elements thereof. By 'aspects of politics' he means "the political community, the political system, the authorities and policies."[104] Further, political community "is, for the most part, equivalent to the state";[105] political system means "the salient values, rules, and structures that make up the basic framework guiding and limiting the making and execution of binding decisions";[106] values are "general ideas of the desirable", such as equality, liberty and individualism, whereas rules encourage desired pattern of behavior such as "prohibition of private property" which supports the value of equality.[107]

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[103] Bard E. O'Neill, *Insurgency and Terrorism: Inside Modern Revolutionary Warfare*, (Brassey's (US), Inc., New York, 1990), 13. See for further details: Mao Tse-tung, *On Guerrilla Warfare*, trans. Samuel B. Griffith, (Fredrick A. Praeger, New York, 1962); Edward E. Rice, *Wars of the Third Kind*, (University of California Press, Berkeley, 1988); Bernard B. Fall, *Street without Joy*, (Stackpole Books, Harrisburg, 1963); Ted Robert Gurr, *Why Men Rebel?*, (Princeton University Press, Princeton, 1988).

[104] O'Neill, 13.

[105] Ibid.

[106] Ibid., 14.

[107] Ibid.

Thus, while some groups may consider specific individuals illegitimate ruler because their behavior is inconsistent with existing values or because they are considered corrupt, ineffective, oppressive or, to use the Islamic terminology, unjust. If this were the case the insurgents would try to seize the top decision-making offices without changing the system.[108] Finally, insurgents may resort to violence to change existing social, economic, or political policies that they believe discriminate against particular groups in the population.[109]

As for the modes of violence used by insurgents, O'Neill identifies three such modes, namely, terrorism, guerrilla war and conventional war.[110] He defines terrorism in the following way: "Terrorism is a form of warfare in which violence is directed primarily against non-combatants (usually unarmed civilians), rather than operational military and police forces or economic assets (public or private)."[111]

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[108] Ibid., 16.

[109] Ibid., 17.

[110] Ibid., 24.

[111] Ibid. He further observes: "There actions are familiar, consisting of such things as assassinations, bombings, tossing grenades, arson, torture, mutilation, hijacking, and kidnapping... Although such terrorism has generally occurred within the borders of the state whose community, political system, authorities, or policies have become the focus of insurgent violence, there has been an increasing tendency since the mid-1970s to strike at targets outside the country. Because these acts are carried out by autonomous, non-state actors, they have been referred to as *transnational terrorism* to distinguish them from similar behavior on the part of individuals or groups controlled by sovereign state (*international terrorism*)." (Ibid.) Among the most widely accepted definitions of terrorism is the one given by Higgins, former judge of the ICJ: "Terrorism is merely a convenient way of alluding to activities, whether of states or of individuals, widely disapproved of, and in which either the methods used are unlawful, or the targets protected, or both." The definition given by Brian Jenkins is also deemed very useful: "All terrorist acts are crimes. Many would also be violations of the rules of war, if a state of war existed. All involve violence or the threat of violence, often coupled with specific demands. The targets are mainly civilians. The motives are political. The actions generally are designed to achieve maximum publicity. The perpetrators are usually members of an organized group, and unlike other criminals, they often claim credit for the act... And, finally, it is intrinsic to a terrorist act that it is usually intended to produce psychological effects far beyond the immediate physical damage. One person's terrorist is everyone's terrorist." See, for details, Alex Obot-Odora, "Defining International Terrorism", *Murdoch University Electronic Journal of Law* 6 (1999) available at: www.murdoch.edu.au/elaw/issues/v6n1/obote-odora61_notes.html (Last accessed: 15-8-2015).

The most familiar kind of violence used by insurgents, however, has been *guerrilla warfare*. The essence of guerrilla warfare is "highly mobile hit-and-run attacks by moderately armed groups that seek to harass the enemy and gradually erode his will and capability."[112] Guerrilla warfare differs from terrorism because its primary targets are the government's armed forces, police or their support units and, in some cases, key economic targets rather than unarmed civilians.

O'Neill observes: "Like terrorism, guerrilla warfare is a weapon of the weak." It is decisive only where the government fails to commit adequate resources to the conflict. In many cases, therefore, to achieve success it has been necessary to combine guerrilla warfare with terrorism or to make a transition into the *conventional warfare*, i.e., the direct confrontation large units in field. [113] As shown above, debates in the UN General Assembly about the right to self-determination and liberation struggle generally revolved around the idea that "one man's terrorist is another's freedom fighter". O'Neill, however, rightly points out that liberation is an end and terrorism is one of the means to achieve this end.[114]

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[112] O'Neill, 25. Mao Tse-tung, the Chinese guerilla legend, described the guerrilla tactics in these words: "Guerrilla strategy must be based primarily on alertness, mobility, and attack. It must be adjusted to the enemy situation, the terrain, the existing lines of communication, the relative strengths, the weather, and the situation of the people... In guerrilla warfare, select the tactic of seeming to come from the east and attacking from the west; avoid the solid, attack the hollow; attack; withdraw; deliver a lightning blow, seek a lightning decision. When guerrilla engage a stronger enemy, they withdraw when he advances; harass him when he stops; strike him when he is weary; pursue him when he withdraws. In guerrilla strategy, the enemy's rear, flanks, and other vulnerable spots are his vital points, and there he must be harassed, attacked, dispersed, exhausted, and annihilated." Mao Tse-tung, *On Guerrilla Warfare*, trans. Samuel B. Griffith, (Fredrick A. Praeger, New York, 1962), 41.

[113] O'Neill, 26.

[114] "*[T]errorism* is highly politicized and emotive term. Nobody wants to admit that his or her group or the group he or she supports engages in terrorism. As a result, groups that carry out terrorist actions call themselves "freedom fighters". From our perspective, the dichotomy between terrorist and freedom fighter is false one because the term *freedom fighter* has to do with ends (e.g., the secessionists goal of freeing one's people

Till quite recently, terrorism was deemed a crime to be dealt with under criminal law, not the law of war. Thus, after the 9/11 incidents when the US led coalition against terrorism launched the so-called *global war on terror* it was based on a changed nature of war and crime. It is, however, beyond the scope of the present dissertation to dig out this issue in detail.[115] The next section, therefore, focuses on the involvement of other states in insurgency and liberation struggle and the relevant principles of international law in this regard.

4.3.3 Intervention by Other States

The first presumption about rebellion and civil wars is that they are *not unlawful* under international law, because international law deems them an internal affair of a state in which it does not allow other states to interfere.[116] As noted above, the UN Charter prohibits not only other states but also the Organization itself to interfere in the internal affairs of a state, but it allows interference when the so-called internal affairs of a state constitute a threat to international peace.[117]

Sometimes when a state faces insurgency, it invites other states to support it in its counter-insurgency operations. This may cause some more serious problems because when a civil war breaks out in a state and there appear several claimants of authority, it is difficult to

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from control by another or the egalitarian aim of freeing workers peasants from the oppression of an exploitative political system), while *terrorism* connotes means. Hence, one can be a freedom fighter who uses terrorism to achieve his purposes" Ibid., 27.

[115] Those interested in the issue of the applicable legal regime on the so-called war on terror may read: Sadia Tabassum, "Determining Legal Regime for the War on Terror", *The Journal of Law and Society* 44 (2013): 29-66.

[116] Dixon, 305.

[117] UN Charter, Article 2 (7) read with Article 39.

ascertain objectively as to who represents the legitimate authority. "One state's civil war is another state's small rebellion, which friendly States can help suppress."[118]

Thus, the Soviet invasion of Afghanistan was considered unlawful by most of the members of the UN because they did not consider the Karmal regime to be legitimate. Thus, in their opinion, Soviet Union was interfering in the internal affairs of Afghanistan. As opposed to this, the Soviet Union contended that the Afghan government under Karmal was competent to invite foreign assistance against insurgents.

Intervention in the 'internal affairs' of another state may take the form of supporting rebels against the legitimate government, or supporting one or more claimants of authority in a civil war situation. The 'legitimate' government may consider such a support to rebels as 'indirect' aggression. Classical example is that of the US support to contras against the Nicaraguan regime.[119] Some states may even call it 'state-sponsored terrorism' or simply 'state terrorism'.[120] From the perspective of *jus in bello*, or the law of conduct of hostilities, such an intervention *internationalizes* the non-international armed conflict.[121]

A more contentious form of interference in other states is the so-called 'humanitarian' intervention. States have recourse to this plea when it uses force in the territory of another

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[118] Dixon, 305.

[119] See the famous judgment of the International Court of Justice (ICJ) on this issue: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* 1984 ICJ Rep 392. See also: John L. Hargrove, "The Nicaragua Judgment and the Future of the Law of Force and Self-defense," *American Journal of International Law* 81 (1987), 135-43; Harris, 824-42.

[120] See Section 4.3.5 below.

[121] See chapter seven of this dissertation for a discussion on how the law of conduct of hostilities deals with the problems and issues arising out of this situation.

state in order to protect the human rights of individuals in that "target" state.[122] Usually the individuals who are protected through such intervention are citizens of the target state and force is used in the territory of the target state without the consent of its government.[123] Even those scholars who interpret the ban on the threat and use of force quite literally have serious doubts about the legality of such interventions.[124]

However, it is equally true that if such interventions are not allowed, results would be disastrous in certain cases. A humanitarian catastrophe may also constitute a "threat to the peace," which is a valid basis for the collective use of force under the authority of the UN Security Council.[125] Moreover, the state committing atrocities against her citizens cannot take the plea that these are her internal affairs because even the so-called internal affairs of a state can constitute a threat to international peace and consequently action under Chapter VII of the UN Charter becomes necessary.

Now, if neither the system of collective security as envisaged originally by the UN Charter is working nor is the necessary authorization from the Security Council forthcoming, should the catastrophe be allowed to happen? Conversely, if states were allowed

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[122] See, for details, Ian Brownlie, "Humanitarian Intervention" in J., N. Moore, *Law and Civil War in the Modern World* (New York: John Hopkins, 1974); R. Lillich, "Forcible Self-help by States to Protect Human Rights," *Michigan Law Review* 82 (1984), 1620. See also, Dixon, 308-10; Harris, 872-73; and Franck, 371-76.

[123] Thus, Indian intervention in the former East Pakistan in 1971, Tanzania's intervention in Uganda in 1979 and NATO's widespread bombing of Serbia in 1998-99 were "justified" under this doctrine, although there were some other explanations as well.

[124] Dixon writes: "Indeed, unless we again read Art 2 (4) very literally or assume that it has been "remodeled" by some overriding state practice, 'humanitarian intervention' runs directly counter to the whole purpose of Art 2(4) and many General Assembly resolutions adopted in the last 50 years. This is especially true when we realize that it is nearly always necessary to remove the offending government, or at least seriously compromise its freedom of action (as with Serbia), in order to stop the violation of human rights. Such a result would surely be against the 'political independence' of the 'target' state and it is no answer that the purposes so achieved are themselves an aim of the UN Charter" (Dixon, 309).

[125] This has been explained in Section 4.3.3 above.

to intervene on humanitarian grounds would it not nullify the ban on the use of force and lead to disruption in the international system?[126] Has the system been remodeled because of the emergence of some new customs?[127]

Hence, humanitarian intervention by a competent international organization, such as the UN, is perfectly legitimate. Unilateral intervention by a state or group of states on humanitarian grounds is, however, open to debate. What state practice shows is that it is initially illegal but international community may retroactively grant legitimacy to it in some cases. Hence, the legitimacy of such interventions depends upon the assessment and judgment of the international community.

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[126] Kofi Annan, the Secretary General of the UN, has rightly pointed out: "To those for whom the greatest threat to the future of the international order is the use of force in the absence of a Security Council mandate, one might ask, not in the context of Kosovo but in the context of Rwanda, if, in those dark days and hours leading up to the genocide, a coalition of States has been prepared to act in defense of the Tutsi population, but did not receive prompt Council Authorization, should such a coalition have stood aside and allowed the horror to unfold? To those for whom the Kosovo action heralded a new era when States and groups of States can take military action outside the established mechanisms for enforcing international law, one might ask: is there not a danger of such interventions undermining the imperfect, yet resilient, security system created after the second World War, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents and in what circumstances?" 54 GOAR, 4th Plenary Meeting, 20 September 1999, A/54/PV 4, 2 as quoted in Franck, 373. White, however, indicates another possibility, namely, to get authorization from the UN General Assembly where no member has the right to veto and where decisions are made on the basis of majority. See, for this interesting thesis: White, 27–43.

[127] While some instances of "humanitarian" intervention, such as the Indian intervention in East Pakistan in 1971 and the Tanzanian Intervention in Uganda to oust Idi Amin's regime in 1979, went with less or no condemnation, the Soviet invasion of Hungary and the US invasion of Grenada were severely condemned by the international community. Vietnam's claim to have the right to intervene on humanitarian grounds in Cambodia in 1978 was specifically rejected by the overwhelming majority of states in the UN debates. See for details: Franck, "Military Force without Prior Security Council Authorization?," 373–74.

CONCLUSIONS

Today, if emphasis on sovereignty of states prohibits the international community from supporting a rebel group, the notions of 'threat to peace' and 'humanitarian intervention' provides legal cover for the involvement of the UN as well as powerful states in rebellions and civil wars. Moreover, if a seceding group fulfills the ingredients of statehood, it gets the necessary capacity for entering into the comity of nations as a new member. Resultantly, the original prohibition of rebellion has given way to permissibility

CHAPTER FIVE: THE LEGALITY OF REBELLION AND ISLAMIC THEOLOGY

INTRODUCTION

Muslim discourse on political and constitutional issues is primarily found in the works on theology and creed because questions related to the institution of imamate on which various sects got divided were expressed in religious vocabulary. The views of Abū Ḥanīfah al-Nu'mān b. Thābit (d. 150 AH/767 CE), the founder of the Ḥanafī School, on issues of constitutional law as recorded in manuals of creed show that he considered probity (*'adālah*) an essential condition for the one who leads the Muslim community and Resultantly he denied legitimacy to the rule of an unjust person although he acknowledged the legal consequences of the *de facto* authority of such a person if he effectively established his control over Muslim population and territory. Thus, he recognized the right of the Muslim community to forcibly remove an unjust ruler if it did not amount to a greater mischief than the continued rule of such a ruler.

The present chapter first examines the views of Abū Ḥanīfah as recorded in the manuals of creed ascribed to him or compiled by renowned Ḥanafī jurists and, then, analyzes the views of two prominent jurists of the Shāfi'ī School – Imām al-Ḥaramayn Abū al-Ma'Alī 'Abd al-Malik b. 'Abdillāh al-Juwaynī (d. 478 AH/1085 CE) and his disciple the illustrious Abū Ḥāmid Muḥammad b. Muḥammad al-Ghazālī (d. 505 AH/1111 CE) – because, as shown

in Chapter Two of this dissertation, Orientalists generally rely on the views of the Shāfi'ī jurists to substantiate the view that Muslim jurists preached passive obedience to usurpers and unjust rulers.

5.1 WORKS OF THE ḤANAFĪ THEOLOGY

Among the works on theology composed by jurists of the Ḥanafī School, foremost is the *matn* of *al-Fiqh al-Akbar* which is ascribed to the founder of the School Abū Ḥanīfah.[1] While some scholars doubt his authorship of this *matn*, it is agreed upon that the issues related to the institution of imamate mentioned in this *matn* was undoubtedly the creed of Abū Ḥanīfah.[2] Another important *matn* composed by Imām Abū Ja'far Ahmad b. Muḥammad b. Salāmah al-Azdī al-Ṭaḥāwī (d. 321 AH/933 CE), a leading jurist and authority of the School, is titled *al-'Aqīdah al-Ṭaḥāwiyyah*.[3] Some of the significant passages from these two texts are briefly analyzed here.

5.1.1 *Al-Fiqh al-Akbar* and the Political System of Islam

Al-Fiqh al-Akbar, or Greater Law, is the title which initially was given to the study of creed and theology. The definition of *fiqh* ascribed to Abū Ḥanīfah is: "A person's knowledge of his

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[1] Muḥammad 'Abd al-Sattār al-Kirdarī, *Manāqib al-Imām al-A'ẓam* (Hyderabad: Dā'irat al-Ma'ārif al-Nu'māniyyah, 1321 AH), 2:108. It is a historically established fact that Abū Ḥanīfah excelled in scholastics and theology before turning to study law.

[2] Muḥammad Abū Zahrah, *Abū Ḥanīfah: Ḥayātuhu wa 'Āthāruhu wa Ārā'uhu wa Fiqhuhu* (Cairo: Dār al-Fikr al-'Arabī, 1369/1947), 86-189. See also: Abū 'l-A'lā Mawdūdī, *Khilāfat-o-Mulūkiyyat* (Lahore: Idāra-i-Tarjumān al-Qur'ān, 2003), 230.

[3] Al-Qāḍī 'Alī b. 'Alī Ibn Abī al-'Izz al-Dimashqī, *Sharḥ al-'Aqīdah al-Ṭaḥāwiyyah* (Beirut: Mu'assasat al-Risālah, 1411/1990).

rights and obligations (*ma'rifat al-nafs mā lahā wa mā 'alayhā*)."[4] This definition included scholastics. Later, however, as *fiqh* was confined to issues pertaining to "acts", the Ḥanafī jurists modified this definition as: "A person's knowledge of his rights and obligations relating to conduct (*'amalan*)."[5]

This Section examines some of the significant passages from the *matn* of *al-Fiqh al-Akbar* ascribed to Abū Ḥanīfah.

5.1.1.1 Obligation of Establishing Political Order

The first issue about political order framed in *al-Fiqh al-Akbar* is whether or not appointing a ruler and establishing political order is an obligation? If yes, whether this obligation arises from reason (*'aqlan*) or revelation (*sam'an*)? The position adopted by Abū Ḥanīfah is that revelation makes it obligatory on people to establish political order.[6] The second issue is how

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[4] Ṣadr al-Sharī'ah 'Ubaydullāh b. Mas'ūd al-Bukhārī, *al-Tawḍīḥ fi Ḥall Ghawāmiḍ al-Tanqīḥ* (Beirut: Dār al-Kutub al-'Ilmiyyah, n.d.), 1:10. Sa'd al-Dīn Mas'ūd b. 'Umar al-Taftāzānī, *al-Talwīḥ fi Kashf Ḥaqā'iq al-Tanqīḥ* (Beirut: Dār al-Kutub al-'Ilmiyyah, n.d.), 1:20. This wonderful work of Ṣadr al-Sharī'ah (d. 747 AH/1346 CE) is a commentary on the *matn* of *al-Tanqīḥ* which he had composed on the basis of the *Uṣūl* of Fakhr al-Islam Muḥammad b. Muḥammad b. al-Ḥusayn al-Bazdawī (d. 493 AH/1100 CE), a great Ḥanafī jurist and contemporary of Sarakhsī who was greatly influenced by Sarakhsī. In *al-Tawḍīḥ*, Ṣadr al-Sharī'ah tried to incorporate the discussions in *al-Maḥṣūl fi 'Ilm Uṣūl al-Fiqh* of Fakhr al-Dīn al-Rāzī (d. 606 AH/1210 CE), a Shāfi'ī jurist, and *Muntahā 'l-Wuṣūl wa 'l-'Amal fi 'Ilmay al-Uṣūl wa 'l-Jadal* of Ibn Ḥājib 'Uthmān b. 'Umar (d. 647 AH/1249 CE), a Mālikī jurist. Sa'd al-Dīn Mas'ūd b. 'Umar al-Taftāzānī (d. 791 AH/1398 CE), a great Shāfi'ī jurist, then wrote a commentary on the *matn* of *al-Tanqīḥ* and its commentary *al-Tawḍīḥ*. This commentary of Taftāzānī is titled *al-Talwīḥ fi Kashf Ḥaqā'iq al-Tanqīḥ*. These works of Ṣadr al-Sharī'ah and Taftāzānī greatly influenced the later jurists belonging to various schools of Islamic law

[5] Ṣadr al-Sharī'ah, 1:10. The Shāfi'ī jurists define *fiqh* as: "Knowledge of the legal rules pertaining to conduct that have been derived from their specific evidences (*Ādillatihā al-tafṣīliyyah*)." Badr al-Dīn Muḥammad b. 'Abdillāh al-Zarkashī, *al-Baḥr al-Muḥīṭ fi Uṣūl al-Fiqh* (Kuwait: Dār al-Ṣafwah, 1992), 21. For a discussion on the meaning of *dalīl tafṣīlī* and how this definition of *fiqh* is problematic from the perspective of the Ḥanafī legal theory, see: Nyazee: *Islamic Jurisprudence*, 26-32.

[6] Al-Mullā 'Alī b. Sulṭān Muḥammad al-Qārī, *Minaḥ al-Rawḍ al-Azhar fi Sharḥ al-Fiqh al-Akbar* (Beirut: Dār al-Bashā'ir al-Islāmiyyah, 1419/1998), 410. The commentator of the text adds the following explanatory note to this ruling: "They have a consensus on the obligation of appointing a ruler. The disagreement relates

Interestingly, Qārī suggests that the opinions are not conflicting and that they can be reconciled: "It is obvious that the statement of al-Ḥujjah [i.e., Ghazālī] can be interpreted in a way that it becomes compatible with the position of the other Ahl al-Sunnah. Think about it!"[14] This is very important for the purpose of understanding the approach of the jurists to the issue of rebellion and civil war. This will be discussed and analyzed in the next Chapter of this dissertation.

5.1.1.3 Requisite Qualification for the Ruler

For qualification of the ruler, Abū Ḥanīfah prescribes two essential conditions: that he must be a Qurayshite[15] and that he must have the capacity for absolute and complete legal authority (*al-wilāyah al-muṭlaqah al-kāmilah*).[16] As explained by Qārīs, this means that he must be Muslim, free, male, sane and major.[17]

It is important to note that according to Abū Ḥanīfah, a ruler does not lose authority (*lā yan'azil*) due to sin or tyranny.[18] Qārī explains this by asserting:

> These two features were apparent in the rulers after the [*Rashidūn*] Caliphs and despite this the Patriarchs (*al-Salaf*) submitted to their rule, established the Friday and Eid prayers with their permission and did not consider rebellion against them permissible.

[14] Ibid.

[15] Ibid., 412. As opposed to the Shī'ah theologians, Abū Ḥanīfah does not deem it essential that he must be a Hāshimī or 'Alawī or that he must be *ma'ṣūm*. Ibid., 412-13.

[16] Ibid., 413.

[17] Ibid., 413-14.

[18] Ibid., 414.

> Hence, this was a consensus of them on considering the rule of those becoming sinners and tyrants valid; rather, they deemed it valid *ab initio*.[19]

As to why many of the Companions and their Followers did not rebel against the usurpers, Qārī has the following explanation:

> Undoubtedly they feared the likes of Yazīd, al-Ḥajjāj and Ziyād and it was not possible to rise up against the tyrant adversaries as it would result in various forms of *fasād*. It is for this reason that Ibn 'Umar (God be pleased with him) used to prohibit Ibn al-Zubayr (God be pleased with him) from claiming caliphate although none disagrees that he was more deserving and more capable than the tyrant rulers.[20]

This line of argument has generally been adopted by the later jurists while disapproving armed resistance against usurpers; that this results in *fasād* and bloodshed. This will be further examined in next Chapter.

5.1.1.4 Legal Authority of An Unjust Ruler

An interesting point, however, may be discussed here. This relates to the legal authority (*wilāyah*)[21] of a sinner. Shāfi'ī is reported to have declared that the ruler loses authority when

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[19] Ibid.

[20] Ibid.

[21] *Wilāyah* means the authority granted by Islamic law to a person to make decisions on behalf of another person. If such an authority is granted by the owner of the right himself, it is called *wakālah* (agency). As opposed to *wakālah* which is 'delegated authority', *wilāyah* is granted by the law, such as the authority it granted to the guardian of a minor to buy or sell property for him or to conclude marriage contract for him. See for details of the doctrine of *wilāyah* for the purpose of the marriage contract: Kāsānī, 3:338-389. See also: Nyazee, *Outlines of Muslim Personal Law* (Islamabad: Advanced Legal Studies Institute, 2012), 287-292.

he commits sin or injustice and that the same is the rule for every judge and governor.[22] The fundamental principle for Shāfi'ī is that the one who does not care for himself, cannot care for others.[23] As opposed to this, Abū Ḥanīfah holds that a sinner does not lose *wilāyah* because otherwise even a sinner Father would lose the authority to conclude marriage contract for his minor daughter.[24]

The jurists, then, go into further details if the ruler (or the judge) was pious at the time of his appointment but later became sinner, or if a just ruler turns into unjust, whether he loses authority or not and whether his judgments and decisions are valid and enforced or not? These issues would be further discussed in the next Chapter. It may be noted here, however, that all of them agree that even if such a ruler (or judge) does not lose authority (*lā yan 'azil*), he deserves removal (*'azl*).[25]

A question may be raised here: if he deserves removal, how is that done? A possible answer is: he may be removed by *ahl al-ḥall wa 'l-'aqd*, the electoral college that elected him.[26] What if even that is not possible? Can he be removed by the use of force? As noted above, the jurists would not allow this as it amounts to *fasād*. But if the continued existence of the

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[22] Qārī, 414.

[23] Shams al-Dīn Muḥammad b. al-Khaṭīb al-Shirbīnī, *Mughnī al-Muḥtāj ilā Ma'rifat Ma'ānī Alfāẓ al-Minhāj* (Beirut: Dār al-Ma'rifah, 1418/1997), 3:209. Qārī notes: "What is written in the manuals of the Shāfi'ī jurists is that the judge loses authority due to committing a sin while the ruler does not lose it. This distinction is based on the fact that if he loses authority and it becomes obligatory to appoint someone else in place of him, it provokes serious conflict because the ruler, as opposed to the judge, has great power (*al-shawkah*)." (Qārī, 414.) This exposition of the official view of the Shāfi'ī School is correct. See, for instance: Shirbīnī, 4:509.

[24] Qārī, 414. See for a detailed discussion: Kāsānī, 3:349-52.

[25] Qārī, 415.

[26] This issue is explained in next chapter in detail.

usurper is deemed greater evil, can he be removed through the lesser evil of rebellion? *Al-Fiqh al-Akbar* is silent on these issues. So, it is time to turn to *al-'Aqīdah al-Ṭaḥāwiyyah*.

5.1.2 *Al-'Aqīdah al-Ṭaḥāwiyyah* and the Prohibition of Rebellion

Undoubtedly Ṭaḥāwī was a leading jurist of the Ḥanafī School and he is deemed an authority on the position of the School as well as that of Abū Ḥanīfah and his disciples. At the beginning of this text called *al-'Aqīdah al-Ṭaḥāwiyyah*, he explicitly asserts:

> This is the creed of the *Ahl al-Sunnah wa 'l-Jama'ah* according to the doctrine of the jurists of the community Abū Ḥanīfah al-Nu'mān b. Thābit al-Kufi, Abū Yūsuf Ya'qūb b. Ibrāhīm al-Anṣārī and Abū 'Abdillāh Muḥammad b. al-Ḥasan al-Shaybānī (God be well-pleased with them all), as they believed in the roots of the religion and as they worshipped the Lord of the worlds.[27]

This creed has some very significant points about the way Abū Ḥanīfah and his disciples interpreted the history and conduct of their predecessors, including Companions and Followers, and how they looked at the various rulers after the Prophet (peace be on him) and the Rightly-guided Caliphs. It also shows how they looked at the various doctrinal differences of the various groups such as Khawārij and Shī'ah. Some of these points will be elaborated in the next Chapter. However, the passages directly relevant to rebellion against unjust rulers will be examined here.

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[27] Ibn Abī al-'Izz, 13.

Ṭaḥāwī reports the creed of Abū Ḥanīfah and his disciples regarding apostasy and abandoning of faith by a Muslim: "A person does not leave faith except by disavowing what brought him into it."[28] Thus, a sinner remains Muslim according to this creed, as opposed to the creed of the Khawārij and Mu'tazilah.[29] This had important implications for rebellion against an unjust ruler. Even if he does injustice, he remains Muslim and, thus, retains *wilāyah* for other Muslims.[30]

This is further substantiated by another element of this creed: "We accept the performance of prayer behind any of the People of the *Qiblah*[31] whether righteous or sinful, and we perform the funeral prayer over any of them when they die."[32] As a necessary corollary of this, it is also stated that taking up arms against any of these Muslims is prohibited, except where the law makes it obligatory: "We do not accept raising the sword against anyone from the people of Muḥammad, peace and blessings be upon him, except for those upon whom it is obligatory to fight."[33]

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[28] Ibid., 458.

[29] See for detailed discussion on this and related issue and the views of the various school: Ibid., 432-59.

[30] Ibid., 524-29.

[31] *Ahl al-Qibla*, which literally means "people of the same direction of prayer", is the term used for all those who profess faith in the basic tenets of Islam and do not profess faith in contradictory beliefs. In other words, this term is used as equivalent of "Muslims". In the early period of Islamic history, the direction of prayer was a distinguishing factor between Muslims and non-Muslims. Initially, Muslims used to offer prayer towards *Bayt al-Maqdis* in Jerusalem, which distinguished them from the Arab pagans. Later, when they were ordered to offer prayers towards *Ka'bah* in Makkah, they got distinguished from the Jews and Christians. Thus, the Prophet is reported to have mentioned it among the characteristic features of Muslims that they offer prayers towards the *Ka'bah* (*Bukhārī, Kitāb al-Ṣalāh, Bāb Istiqbāl al-Qiblah*). See for detailed discussion on the meaning and implication of *Ahl al-Qiblah*: Ibn Abī al-'Izz, 426-27. For discussion on not ascribing infidelity to *Ahl al-Qiblah* see: Ibid., 432-59.

[32] Ibn Abī al-'Izz, 529.

[33] Ibid., 539.

This creed essentially prohibits not only the use of force against an unjust ruler but also against those who resist such a ruler as the prohibition is imposed on both factions of Muslims. However, the exception is very important: "except for those upon whom it is obligatory to fight." Who are they? Unjust rulers? Or rebels? Or both? The next point in the creed says:

> We do not allow rebellion against our rulers or those in charge of our affairs even if they are unjust, nor do we wish evil for them, nor do we refuse to follow them. We hold that obedience to them is part of obedience to Allah the Exalted and therefore obligatory as long as they do not command us to commit sins. We pray for their right guidance and pardon.[34]

Again, here the exception is very significant: "as long as they do not command us to commit sins". What if they do command us to commit sins? The next point in the creed may shed some light on the nature and true purport of this prohibition: "We follow the *Sunnah* and the *Jama'ah* and we abandon deviation, differences and division."[35] As noted above, the emphasis is on keeping order and peace and avoiding bloodshed and mischief. But again, a question may arise: what if the continued existence of an unjust ruler leads to greater mischief and a group of Muslims can come up with an alternative and better leadership through the use of force? Can it be permitted as a lesser evil then?

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[34] Ibid., 540.
[35] Ibid., 544.

These questions are important because the next point in the creed makes it obligatory on Muslims to love just people and hate the unjust people: "We love the people of justice and honesty; and we hate the people of injustice and treachery."[36] What are, then, the practical implications of this love for justice and hate for injustice? An attempt will be made in the next Chapter to find answers to these questions from within the manuals of the Ḥanafī School. It is time now to turn to an important treatise of a great and influential Shāfi'ī jurist, Juwaynī.

5.2 Islamic Political Order: Views of Juwaynī and Ghazālī

Juwaynī was undoubtedly one of the most influential Shāfi'ī jurists whose work shaped in many ways the discourse on Islamic legal theory as well as law. His masterpiece on the questions related to imamate is titled *Ghiyāth al-Umam fi 'ltiyāth al-Ẓulam*.[37] Some of the contemporary scholars believe that, as opposed to the jurists who preceded him who always advocated one central caliphate for the whole of the Muslim world, Juwaynī justified and argued for the validity of multiplicity of Muslim rulers. A detailed examination of this work, however, reveals that this is not correct and that Juwaynī did not deviate from the position which the Muslim jurists generally adopted about the necessity of a single caliphate. He, however, acknowledged the consequences of the *de facto* authority of the persons who

[36] Ibid., 546.

[37] The edition used in the present dissertation is edited by 'Abd al-'Aẓīm al-Dīb (Cairo: Maktabat Imām al-Ḥaramayn, 1401/1981).

effectively controlled various parts of the Muslim world. For this purpose, he primarily relied on the doctrine of necessity.

This Section examines and analyzes the views of Juwaynī and Ghazālī on the questions raised above to show their position is not different from that of Abū Ḥanīfah as described in the previous Section.

5.2.1 The Obligation of Establishing Political Order

Juwaynī first mentions the opinion of the jurists generally that appointing the ruler is obligatory.[38] After this he severely criticizes the opinion of Abū Bakr al-Aṣamm who does not consider it obligatory. Juwaynī asserts that his opinion has no value because all scholars and schools before him had reached a consensus on the obligation of appointing the ruler.[39]

However, asserts Juwaynī, there is a little disagreement on the source of this obligation. Thus, the overwhelming majority of the scholars holds that it is the revealed law which makes it obligatory, while a few Shī'ah scholars consider that it is obligatory because of the dictates of the reason.[40] Juwaynī points out that this disagreement is based on two different views about whether or not it is obligatory on God to do what is best for the people.[41]

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[38] Juwaynī, 22.
[39] Ibid., 22-24.
[40] Ibid., 24-25.
[41] Ibid., 25-26.

5.2.2 Removal of A Ruler

Juwaynī says that if the ruler loses some of the essential conditions, he automatically loses authority (*inkhala'a*) and even if he regains that quality he does not become the ruler unless he is reappointed.[42] For instance, if he apostatizes, he no more remains the ruler even if he re-embraces Islam unless he is reappointed.[43] The same is true if he becomes insane.[44]

What if he becomes *fāsiq* or unjust? Juwaynī reports that some of the jurists apply on him the same rule as that applicable on the ruler becoming apostate or insane,[45] while other jurists hold that he does not automatically lose authority but it becomes obligatory on the *ahl al-ḥall wa 'l-'aqd* to remove him.[46] Juwaynī says that this does not relate to minor or rare instances of sins because the ruler need not be *ma'ṣūm* (immune from sins) and such a person is prone to committing sins; hence, holding that he does not remain ruler and that he needs to be reappointed after he repents, practically leads to demolishing the political order altogether.[47] However, if the mischief is greater, it needs to be controlled:

> In cases where his sins continue, his aggression is widespread, the mischief is obvious, the possibility of reform is not there, the rights and the *ḥudūd* are suspended, security vanishes, misappropriation is established, the tyrants get power, the oppressed does not find way to have justice enforced on the oppressors, the disorder leads to serious problems and threat of external aggression, this grave situation must be controlled.[48]

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[42] Ibid., 98.
[43] Ibid., 98-99.
[44] Ibid.
[45] Ibid., 100.
[46] Ibid., 100-101.
[47] Ibid., 101-105.
[48] Ibid., 106.

As for the way to remove such a ruler, Juwaynī is of the view that this shall be done by those having the authority for concluding the contract of *imāmah*, i.e., the *ahl al-ḥall wa 'l-'aqd*.[49] They shall remove the existing ruler and shall appoint the new ruler "who shall then deal with the former as he should deal with the rebels".[50] This, of course, necessitates "power" (*shawkah*).[51]

It is also worth noting that the *ahl al-ḥall wa 'l-'aqd* cannot remove a ruler without his losing an essential condition because the contract of *imāmah* is *lāzim*, i.e., it cannot be unilaterally terminated.[52] Whether the ruler can abandon the *imāmah* is a contentious issue. Juwaynī reports that some of the jurists do not allow this because they deem this contract *lāzim* for him as well,[53] while some of the jurists allow this on the basis of the precedent of al-Ḥasan b. 'Alī (God be pleased with them both) who abdicated the caliphate and none of the Companions objected to this.[54] Juwaynī is of the opinion that he cannot do this unless he knows that this is beneficial for Muslims.[55]

5.2.3 Prohibition of Appointing Two Rulers at One Time

Juwaynī first mentions the basic rule: that if one ruler can control the whole of the Muslim territory, it is not permitted to have two rulers.[56] He reports the consensus of all schools on

[49] Ibid., 126.
[50] Ibid.
[51] Ibid.
[52] Ibid., 128.
[53] Ibid.
[54] Ibid., 129.
[55] Ibid., 129-130.
[56] Ibid., 172.

this issue.[57] He also notes that the very purpose of the *imāmah* is lost if more rulers than one are appointed.[58]

After this, Juwaynī talks about situations where one ruler may not be able to take care of all Muslims and control the whole of the Muslim territory.[59] In such a situation, reports Juwaynī, some of the Shāfi'ī jurists permitted appointment of another ruler in the territory separated from the main Muslim territory.[60] The basis for this opinion, as explained by Juwaynī, is protection of the interests of Muslims.

Juwaynī personally does not accept this opinion in its generality. Rather, he mentions many details which further restrict this permissibility.[61] Thus, he asserts that if the contract of *imāmah* has already been concluded for a person on the presumption that he will control the whole of the territory and later a cause comes into existence which prevents him from doing so, those people whose affairs cannot be regulated by this Imām must not be left in chaos and anarchy; rather they should appoint an *amīr* (leader) for themselves who would regulate their affairs and would enforce Islamic law on them.[62]

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[57] Ibid.

[58] Ibid., 172-174.

[59] The causes he mentions for this are: (a) large territory; (b) the spread of Islam in pieces of land which are not connected to each other or in islands far away from each other; (c) some people embracing Islam in a territory beyond the reach of the ruler; (d) a territory of non-Muslims becoming an obstacle between two parts of the Muslim territory because of which the ruler is not able to take care of the Muslims beyond the non-Muslim territory. Ibid., 174-175.

[60] Ibid., 175.

[61] Ibid., 175-179.

[62] Ibid., 176.

Importantly, Juwaynī does not at all accept this *amīr* as the Imām for those people and asserts that when the normal situation is restored, he along with his people must surrender to "the imām":

> This appointed *amīr* does not become imam. When the obstacles disappear and it becomes possible for the Imām to take care of these people, this *amīr* and his people must accept the rule of the Imām and must surrender to him. The Imām should accept their excuse and should control their affairs. Thus, he may retain the one appointed by them on that position if he deems it proper. If, however, he wants to remove him, the decision lies with him and all must accept it.[63]

The second possibility mentioned by Juwaynī is that the contract of *imāmah* has not been concluded for any person and people of one territory appoint one *amīr* and those of another territory appoint another *amīr* none of whom controls the whole of the Muslim population and territory, none of these *amīrs* is Imām "because Imām is the one who regulates the affairs of all Muslims."[64] Here again, Juwaynī denies the permissibility of two imams even when he accepts the rule that Muslims of different territories have their *amīrs*. He identifies *ḍarūrah* (necessity) as the basis for the validity of the rule of these *amīrs*: "I do not deny the permissibility of the appointment of two *amīrs* and the enforceability of their rule in accordance with Islamic law as it is based on necessity. However, this is a period when no

[63] Ibid.
[64] Ibid., 177.

Imām exists."[65] Juwaynī further asserts that if somehow the Imām is appointed, both the *amīrs* must surrender to him who would then take appropriate decision about them.[66]

He further explains the rules about the various possible situations of the appointment of two imams at one time. Thus, he mentions the general rule that if two imams are elected in two different parts of the world and those appointing them did not know about each other, the rule is that none of them is legally entitled as imam.[67] He argues that the jurists do not allow appointment of two judges with general authority in one territory although if they disagree the dispute can be settled by reference to the Imām who has superior authority over both of them. Hence, *a fortiori* two imams with general authority cannot be permitted.[68]

Now, if it happens that two imams are appointed and the contract of *imāmah* was concluded for them at one time, none of them becomes imam. If, however, one of them was appointed earlier, he becomes the Imām and the other's appointment is invalid. If the time is not known, or cannot be proved by evidence, it will be presumed that both were concluded at one time and hence both will be deemed invalid.[69]

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[65] Ibid.
[66] Ibid., 177-178.
[67] Ibid., 178.
[68] Ibid., 178-179.
[69] Ibid., 179.

5.2.4 A World without the Imām

For Juwaynī one of the most important purposes of writing this treatise was to explain the principles of Islamic law about situations when no person could be deemed Imām of the Muslim world.

The first point he makes is that although the condition of being a Qurayshite has been prescribed by the Prophet (peace be on him), yet if a Qurayshite fulfilling other essential conditions is not available and there is a non-Qurayshite who fulfills the other essential conditions, the latter deserves appointment as Imām "because the purposes of the *imāmah* are not dependent on belonging to a particular clan."[70] If a Qurayshite who fulfills the other essentials is appointed and later a non-Qurayshite is found who is better than the Qurayshite, the Imām shall not be deposed because the *imāmah* of the *mafḍūl* (person fulfilling minimum qualification) in the presence of the *afḍal* (the best of all those who fulfill the requisite qualification) is permitted.[71] If, on the other hand, a non-Qurayshite is appointed and later on an *afḍal* Qurayshite is found, the *imāmah* may be handed over to the Qurayshite provided it does not amount to *fasād*.[72]

What about the condition of knowledge and the skill and power of exercising *ijtihād*? Again, Juwaynī asserts that this is an essential condition but if no person fulfills it, people cannot be left in anarchy. Hence, a person who is otherwise qualified for *imāmah* except that

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[70] Ibid., 308.
[71] Ibid., 309.
[72] Ibid., 309-310.

he is not a *mujtahid* may be appointed as Imām and he will take guidance from scholars of Islamic law.[73]

After this, Juwaynī reaches the most important issue for the purpose of the present dissertation, namely, what is the rule when the aspirant of the *imāmah* lacks the condition of *taqwā* (piety) or the Imām later on becomes *fāsiq* (sinner)? Appointing an unjust ruler or the ruler becoming unjust are examples of this larger issue.

Juwaynī says that in the absence of a pious and just person if a person is found who can run the affairs of the *imāmah* but he openly indulges in sins and he cannot be trusted, his appointment is not permitted at all because it goes against the very purpose of appointing the imam.[74] After explaining this fundamental rule, however, Juwaynī talks about a situation of extreme necessity (*iḍṭirār*) when the Muslim territory faces foreign invasion and no pious leader could be found.[75] In such a situation of duress and necessity, Muslims are compelled to appoint a sinner for the purpose of mobilizing the forces to defend the community.[76] Thus, if he consumes wine or commits some other major sins but still remains anxious to defend Muslims and he has the capability to do so, he will be appointed if a better person could not be found.[77]

This discussion paves the way for analyzing the validity of the rule of usurper.

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[73] Ibid., 310-311.
[74] Ibid., 311.
[75] Ibid.
[76] Ibid., 311-312.
[77] Ibid., 312.

5.2.5 The Rule of the Usurper

Usurper is the one who comes into power without being appointed by those having authority for this purpose.[78] Juwaynī visualizes three possibilities in this context:

1. When a person has *shawkah* (dominance) and he fulfills the requisite conditions for *imāmah*;
2. When a person having *shawkah* does not fulfill the requisite conditions but he has the capability (*kifāyah*) of running the affairs of *imāmah*; and
3. When no person fulfills the requisite conditions or has the *kifāyah*.[79]

5.2.5.1 *Shawkah* along with Fulfillment of Conditions

For the first situation, Juwaynī mentions two possibilities:

a. That the *ahl al-ḥall wa al-'aqd* do not exist in which case such a person will be deemed the rightful imam;[80] and
b. That the *ahl al-ḥall wa al-'aqd* exist. In such a situation, if many persons fulfill the requisite conditions, none of them becomes Imām unless the *ahl al-ḥall wa al-'aqd* conclude the contract of *imāmah* for him.[81] If, however, only one person fulfills the requisite conditions he does not need appointment by the *ahl al-ḥall wa al-'aqd* provided he dominates the territory and people obey him.[82]

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[78] Ibid., 316.
[79] Ibid., 316-317.
[80] Ibid., 317.
[81] Ibid.
[82] Ibid., 317-319.

In other words, in this last situation, validity of *imāmah* depends, after fulfilling the requisite conditions, on dominance (*shawkah*) and obedience (*ṭā'ah*).[83] Thus, if he does not have *shawkah*, he should invite people to obey him. If they do so, his *imāmah* is established.[84]

If they do not obey him, or those obeying him do not constitute *shawkah*, some of the jurists do not consider him the Imām although they hold that people commit sin by not providing him enough support.[85] Other jurists hold that he is the Imām even if people do not obey him and thereby commit sin.[86] Juwaynī prefers this view although he admits that the first opinion also carries weight.[87]

A corollary of this is that if such a person keeps aloof from people and do not invite them to accept his *imāmah*, he commits one of the most serious sins.[88] Moreover, the jurists hold by a consensus that he does not become the Imām if he does not invite people to obey him.[89]

If many people fulfill the requisite conditions and one of them dominates the land without being appointed by the *ahl al-ḥall wa al-'aqd*, he cannot be considered *fāsiq* if he did so for the purpose of establishing order and peace.[90] Some of the jurists consider him the Imām even if the *ahl al-ḥall wa al-'aqd* do not conclude the contract of *imāmah* for him.[91] However, Juwaynī says that this rule is applicable when only one person fulfills the requisite

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[83] Ibid., 319-320.
[84] Ibid., 321.
[85] Ibid., 322.
[86] Ibid., 322-323.
[87] Ibid., 323.
[88] Ibid., 324.
[89] Ibid.
[90] Ibid., 324-325.
[91] Ibid., 326.

conditions, while in this situation many persons are qualified for the purpose and as such the contract of *imāmah* must be concluded to validate the *imāmah* of one of them.[92]

It can be safely concluded that *shawkah* validates *imāmah* with two conditions:

1. That the person having *shawkah* fulfills the requisite conditions of *imāmah*; and
2. That he alone fulfills these conditions.

5.2.5.2 *Shawkah* and the Lack of A Requisite Condition

A person having *shawkah* may be the one who does not fulfill the requisite conditions but he has the *kifāyah* (skill) for the *imāmah*. Juwaynī visualizes two situations for such a person's coming into power:

1. When no person fulfilling the requisite conditions exists; and
2. When such a person exists.

In the first situation, if the person having *shawkah* is appointed by *ahl al-ḥall wa al-'aqd*, he is considered Imām and his orders are deemed valid and enforced.[93] If, on the other hand, he captures power on the basis of his *shawkah*, his legal position is similar to the first kind of usurpers.[94]

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[92] Ibid. Juwaynī cites in support of this view the oath of allegiance made by Ḥasan and Ḥusayn in favor of Mu'āwiyah (God be pleased with them).

[93] Ibid., 328.

[94] Ibid.

Juwaynī goes into great details for explaining the basis of this rule with the help of the doctrine of *al-amr bi 'l-ma'rūf wa al-nahi 'an al-munkar* (promoting good and preventing evil).[95]

5.2.5.3 *Kifāyah* (Skill) in the Absence of *Shawkah* (Dominance)

Juwaynī is of the opinion that it is almost impossible to visualize a situation when no person has the *kifāyah* for running the affairs of the government but he accepts the possibility that persons having *kifāyah* may lack *shawkah*.[96] He asserts that such a person cannot become the Imām as he lacks the power to enforce his writ.[97]

What are people supposed to do in such a situation? Juwaynī says that some of the rules of Islamic law can be enforced by individuals and they should take up this responsibility as a necessary corollary of the duty of 'promoting good and preventing evil'.[98] On this basis, he says that one of the most important aspects of this duty is that people having power must try to suppress the miscreants.[99]

However, asserts Juwaynī, certain rules require *wilāyah* (legal authority) for their enforcement, such as concluding the contract of marriage for minors and virgin girls and administering the property of the orphans.[100] He points out that people cannot be asked not

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[95] Ibid., 328-354.

[96] Ibid., 385-386.

[97] Ibid., 386.

[98] Ibid., 486. Juwaynī gives the examples of establishing Friday prayer, sending troops for jihad and enforcing the qiṣāṣ punishments. It may be noted that the Ḥanafī jurists deem them the duties of the imām.

[99] Ibid.

[100] Ibid., 387. It is well known that according to the Shāfi'ī jurists an adult virgin girl cannot conclude her contract of marriage and it is her *wali* who concludes it for her.

to conclude contract of marriage. Hence, he goes into great details in explaining that in such a situation scholars of Islamic law get the authority for this purpose.[101]

He further builds upon this foundation and says that if people belonging to different lands cannot agree on one scholar, they must have recourse to the scholar of their land.[102] If one land has many scholars, the best of them should be the leader and in case of dispute it should be settled through casting lot.[103]

From all this, Juwaynī finally concludes that if a person has *shawkah* and he can enforce his writ but he is not expert of Islamic law, he is deemed the governor (*wālī*) and he has all the necessary authorities (*wilāyāt*) but he should take guidance from experts of Islamic law.[104]

5.2.6 Ghazālī's Summary of the Views of Juwaynī

Ghazālī, a great disciple of Juwaynī, summarized, refined and built upon the ideas of Juwaynī not only in legal theory and law but also in theology.[105] On the question of political order

[101] Ibid., 388-391.
[102] Ibid., 891.
[103] Ibid.
[104] Ibid., 392.
[105] Nyazee has shown that the revival of the Shāfi'ī legal theory was made possible because of the great works of Juwaynī and Ghazālī (*Theories of Islamic Law*, 195-97). Nyazee has also given details of how these two great jurists were influenced by the works of the great Ḥanafī jurist Abū Zayd al-Dabbūsī (d. 430 AH/1039 CE). See for details of how the works of Dabbusi form the basis for the theory of *maqāṣid al-Sharī'ah* (objectives of Islamic law): Nyazee, *Islamic Legal Maxims* (Islamabad: Advanced Legal Studies Institute, 2013), 70-75.

and related issues, Ghazālī gives his conclusions in a precise and accurate manner in a booklet titled *al-Iqtiṣād fī 'l-I'tiqād*.[106]

5.2.6.1 Legal Obligation of Establishing Political Order

Ghazālī establishes the legal obligation of establishing political order in the following manner using his skills as a great logician:

Major premise: establishing religious order is required by the Lawgiver, the Prophet (peace be on him);

Minor premise: this order cannot be established without a ruler who is habitually obeyed;

Conclusion: The Lawgiver requires appointing a ruler who is habitually obeyed.[107]

As far as the major premise of this argument is concerned, Ghazālī proves it in the following manner:

Major premise: religious order is not established without temporal order;

Minor premise: temporal order is not established without a ruler who is habitually obeyed;

Conclusion: religious order is not established without a ruler who is habitually obeyed.[108]

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[106] Hujjat al-Islam Abū Ḥāmid Muḥammad b. Muḥammad al-Ghazālī, *al-Iqtiṣād fī 'l-I'tiqād*, ed. Muṣṭafā 'Abd al-Jawād 'Umrān, (Cairo: Dār al-Baṣā'ir, 2009).

[107] Ibid., 504.

[108] Ibid. 505.

At this point, Ghazālī answers an objection: religious and temporal affairs are contradictory and establishing one destroys the other. The Answer is: "all temporal affairs do not contradict religion; rather, some of the temporal affairs are necessary for religion."[109] This he establishes with the following argument:

Major premise: religious order, which necessitates recognition of God and His worship, is not possible without bodily health and security;

Minor premise: bodily health and security, including life and property, is not possible without a ruler who is habitually obeyed;

Conclusion: religious order is not established without a ruler who is habitually obeyed.[110]

From these various syllogisms, Ghazālī draws the following conclusion:

> Hence, temporal order is a prerequisite of religious order; ruler is necessary in temporal order; and religious order is necessary for achieving success in the Hereafter which is definitely the purpose for which the Prophets were sent. Resultantly, appointing the ruler is a religious obligation which can never be abandoned.[111]

5.2.6.2 Qualification and Conditions for the Ruler

After this, Ghazālī turns to the qualification and conditions for the ruler and first makes the statement which distinguishes the *Ahl al-Sunnah wa 'l-Jamā'ah* from the *Shī'ah Imāmiyyah*: "Specifying through a text (*naṣṣ*) a person just because of personal liking is not possible and he

[109] Ibid., 505-506.
[110] Ibid., 506.
[111] Ibid.

must have some distinctive characteristics which distinguish him from other people."[112] He, then, enumerates these distinctive features and divides them into two categories: personal qualities and appointment by a person or institution having authority.[113] Personal qualities are meant for ensuring the required capability and knowledge for the task and these essentially mean the conditions prescribed by the law for persons exercising judicial authority.[114] However, points out Ghazālī, the ruler has one additional condition which the law specifically stipulates for him and not for judges, namely, his being a Qurayshite.[115]

As there may be more Qurayshites than one who fulfill these conditions, it becomes essential that there must be a person or institution which has the authority of appointing someone as the ruler.[116] For this purpose, Ghazālī imagines three possibilities:

1. Specification by the Prophet (peace be on him) through a text;
2. Nomination by an existing ruler of a person from among his offspring or any other clan of the Quraysh; and
3. Delegation by a person or persons having power and dominance over people.[117]

5.2.6.3 Validity of the Rule of Usurper

From this point, Ghazālī turns to the rule of the usurper who, while fulfilling other conditions, captures the institution of *imāmah* through power and dominance without being

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[112] Ibid., 506-507.
[113] Ibid., 507.
[114] Ibid.
[115] Ghazālī, *al-Iqtiṣād fī 'l-I'tiqād*, 507.
[116] Ibid.
[117] Ibid.

appointed by the particular institution. Ghazālī comes up with the same argument as explained by Juwaynī and other jurists: resisting such a person results in bloodshed and mischief which must be avoided.[118]

Then, he turns to a proposition which is very important for the purpose of the present dissertation: if the purpose of the institution of *imāmah* is establishing peace and order and this can be done by a usurper who does not fulfill the condition of knowledge required for judicial authority but who can seek guidance from jurists, is it obligatory to resist and remove him or does the law require obedience to him? Ghazālī's answer to this question strikes at the heart of the issue:

> Our opinion is that we definitely believe in the obligation of his removal, if it is possible to replace him with a person who fulfills all the conditions and this is done without causing war and bloodshed. However, if this is not possible without war and bloodshed, it becomes obligatory to obey him and his rule will be deemed established.[119]

5.2.6.4 Situation of Necessity and Choosing the Lesser Evil

Then, Ghazālī raises another question: can the condition of *'adālah* be waived in the same way as the condition of knowledge is waived? His answer is: "The condition of knowledge has not been waived; rather, its absence is tolerated as necessity renders permissible what is

[118] Ibid., 507-508.
[119] Ibid., 508.

ordinarily prohibited."[120] This situation of necessity is explained by Ghazālī by envisaging the consequences of declaring that the *imāmah* has not been established: "Judges would lose their authority; all legal authorities [and appointments] (*wilāyāt*) would be deemed invalid; marriages [concluded by such authorities] would be deemed void; all the decisions of the executive authorities in all the territories would be unenforced; rather, all people would be committing sin."[121]

In such a situation, the jurists had to choose one of the three possible options:

1. Prohibit people from marriages and all transaction the validity or enforcement of which depends on judicial authority; this is impossible and leads to worst kind of chaos and anarchy;
2. Allow them marriages and other transactions but hold that they commit sin even if because of necessity they would not be deemed lawbreakers (*lā yuḥkamu bi-fisqihim*);
3. Hold that the *imāmah* is established on the basis of necessity even if some if its conditions are not fulfilled.[122]

Ghazālī holds that this last of the options, even if not ideal, is the lesser evil: "As compared to the farthest (*ab'ad*), the farther (*ba'īd*) is deemed nearer; and the lesser of the evils is good – relatively – and it is obligatory on a prudent person to choose it."[123]

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[120] Ibid., 508-509.
[121] Ghazālī, *al-Iqtiṣād fī 'l-I'tiqād*, 509.
[122] Ibid.
[123] Ibid.

These passages from Ghazālī clearly proves that the later jurists did not "waive" the conditions for the ruler, as imagined by Gibb and other Western scholars; rather, they "tolerated" the absence of some of the conditions on the basis of the doctrine of necessity. It is well-established that necessity only temporarily allows a prohibited act and that too within the parameters of the necessity. The original rule remains in the field and it remains obligatory on the subjects to try to get out of the situation of necessity and restore the application of the original rule.[124]

CONCLUSIONS

According to the creed of Abū Ḥanīfah, establishing political order is a religious obligation and probity is an essential condition for Muslim ruler. Hence, an unjust person is not entitled to rule the Muslim community. Muslims are under an obligation to establish justice and order in the society and this obligation necessitates rising up against an unjust ruler. However, the attempt to forcibly remove such a ruler should not be made if it is supposed to cause greater mischief, although Muslims remain under an obligation to raise voice against the injustices of the ruler. Till such time as the unjust ruler is removed, or he abandons injustice, the community should obey his lawful commands, particularly in matters affecting the collective life of the community.

This shows that Abū Ḥanīfah, while denying legitimacy to an unjust ruler, accepted the consequences of *de facto* authority for him under the doctrine of necessity using the

[124] See for details about the concept of necessity in Islamic law: Nyazee, *Islamic Legal Maxims*, 179-189.

principle of choosing the lesser of the two evils. The great Shāfi'ī jurists Juwaynī and Ghazālī shared this view on the same bases.

The next chapter examines the manuals of law-proper in the Ḥanafī School to show that the Ḥanafī School officially accepted this position of Abū Ḥanīfah in recognizing the limited right to rebellion if it did not lead to greater mischief.

CHAPTER SIX: THE LEGALITY OF REBELLION AND MANUALS OF ISLAMIC LAW

INTRODUCTION

The creed of Abū Ḥanīfah explained in the previous chapter had significant implications for the legal right of the Muslim community to forcibly remove an unjust ruler if peaceful means failed to improve the situation and, as such, as it is well-established that Abū Ḥanīfah personally advocated this right. Some scholars, however, assert that the official position of the Ḥanafī School is different from that of Abū Ḥanīfah on this issue. This chapter, therefore, first examines the sources about the views of Abū Ḥanīfah to find out the legal foundations on which Abū Ḥanīfah built this right for the Muslim community and then analyzes the classical manuals of the Ḥanafī School so as to ascertain if the School recognized and accepted these legal foundations or not. After this, it thoroughly examines the work of Ibn ʿĀbidīn, presumably the greatest of the later Ḥanafī jurists, to see how the later jurists examine the *jus ad bellum* of rebellion.

6.1 ABŪ ḤANĪFAH AND REBELLION AGAINST UNJUST RULERS

This section first examines the implications of the creed of Abū Ḥanīfah for the right of the Muslim community to forcibly remove an unjust ruler. Then, it tries to find out the legal foundations on which this right is based after which it surveys the historical sources to see

how Abū Ḥanīfah conducted himself during various rebellions in his lifetime. Finally, it tries to determine from the conduct of Abū Ḥanīfah the prerequisites for exercising this right.

6.1.1 Implications of Abū Ḥanīfah's Creed

As noted earlier, the problem of rebellion involves issues of creed, history as well as law and politics. Abou El Fadl rightly points out:

> In the field of rebellion, Muslim jurists also responded to theological demands, e.g. how does one declare rebellion to be a crime without suggesting that some of the most esteemed Companions of the Prophet were criminal? Significantly, however, they also worked within an inherited legal culture that imposed its own logic and language.[1]

The answers of Abū Ḥanīfah to the questions relating to theological aspects of this issue are recorded in his *al-Fiqh al-Akbar*. Thus, as noted in previous chapter, he declared that a Muslim who commits a major sin does not abandon faith and as such a *fāsiq* (sinner) is not deemed *kāfir* (unbeliever). The famous Ḥanafī jurist of the third/ninth century, Abū Ja'far al-Ṭaḥāwī (d. 321 AH/933 CE) who was among the *mujtahidīn fi 'l-masā'il*, affirms this position of the Ḥanafī School when he says: "A person does not leave faith except by disavowing what brought him into it."[2] Similarly, about the fate of a sinner Muslim, Abū Ḥanīfah declared: "We do not say that a believer cannot be condemned to hell nor do we say that a *fāsiq* will remain in hell forever."[3] Ṭaḥāwī elaborates this in the following words:

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[1] Abou El Fadl, 21.
[2] Ibn Abī al-'Izz, 458.
[3] Qārī, 229.

> We do not pass judgment about any of the *Ahl al-Qibla* if he would necessarily go to the paradise or hell, nor do we label them with disbelief (*kufr*), polytheism (*shirk*) or hypocrisy (*nifāq*) unless they commit an explicit act of the sort, and we leave the matter of their intentions to Allah.[4]

Regarding the successors of the Prophet (peace be on him), Abū Ḥanīfah declared:

> The best person after the Prophet (peace be on him) is Abū Bakr al-Ṣiddīq, then 'Umar b. al-Khaṭṭāb, then 'Uthmān b. 'Affān, then 'Alī b. Abī Ṭālib (Allah be pleased with them all). All of them were on the right path and remained on the right path all through their life.[5]

About all of the Companions, Abū Ḥanīfah declared: "We mention the Companions with praise only."[6] Ṭaḥāwī elaborates this doctrine in the following words:

> We love all the Companions of the Prophet (peace be on him), but we do not excessively love just one of them and we do not express disapproval of (*lā natabarra'*) any of them. We do not like those people who hate the Companions or say bad words about them. We do not mention the Companions except with praise.[7]

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[4] Ibn Abī 'l-'Izz, 529.

[5] Qārī, 182-86. See also: Ibn Abī 'l-'Izz, 698-727. It may be noted here that Abū Ḥanīfah personally loved 'Alī more (Kirdarī, 2:72) and personally did not prefer between 'Alī and 'Uthmān. (Sarakhsī, *Sharḥ Kitāb al-Siyar al-Kabīr*, 1:111). The same was the opinion of Mālik b. Anas, the founder of the Mālikī School. (Ibn. 'Abd al-Barr al-Andalusī, *al-Istī'āb fi Ma'rifat al-Aṣḥāb* (Cairo: Maktabah Nahḍah, 1960), 2:467).

[6] Qārī, 209.

[7] Ibn Abī 'l-'Izz, 689.

Despite this, Abū Ḥanīfah openly declared that in all his wars, 'Alī was on the right side.[8] This is a very crucial point in ascertaining the position of Abū Ḥanīfah and this will be further explained in Section 6.1.3 below.

Mawdūdī explains the consequences of the theological position taken by Abū Ḥanīfah in the following words:

> This creed meant that the community had full trust in the early Muslim society established by the Prophet (peace be on him). The community accepts all the decisions made by that society through consensus or majority. It accepts the legal and the constitutional status of the caliphs elected successively by that society as well as of the decisions of those caliphs. Furthermore, it accepts the whole knowledge of the *sharī'ah* transmitted from the members of that society (Companions) to the Muslim community through generations.[9]

How this creed helped in creating the legal right of the community to forcibly remove an unjust ruler? This is elaborated below.

6.1.2 Legal Foundations of Abū Ḥanīfah's Position

It is well-known that Abū Ḥanīfah held that "prayer is valid be it performed in the leadership of a pious person or a sinner."[10] Did it mean that he did not stipulate the condition of being just (*'adl*) for the ruler? Many sources record his position that he explicitly stipulated this

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[8] Kirdarī, 2: 71-72. See also: al-Muwaffaq b. Aḥmad al-Makkī, *Manāqib al-Imām al-A'ẓam Abī Ḥanīfah* (Ḥyderabad: Dā'irat al-Ma'ārif al-Nu'māniyyah, 1321 AH), 2: 83-84.

[9] Mawdūdī, *Khilāfat-o-Mulūkiyyat*, 236

[10] Qārī, 227.

condition for the ruler.[11] This was the reason why he opposed all the Umayyad and Abbasid rulers of his time, except 'Umar b. 'Abd al-'Azīz.[12] What, then, was the legal principle on which Abū Ḥanīfah based his legal position?

It is a well-established principle of the Ḥanafī law that *'adālah* is an essential condition for the witness.[13] It is also a well-established principle of the Ḥanafī law that all the conditions for the witness must also be present in the *qādī* (judge).[14] Hence, the jurists always cite *'adālah* among the conditions for the judicial post.[15] Did Abū Ḥanīfah stipulate this condition for witness and judge and not for *khalīfah* (ruler)?

Jaṣṣās refutes this claim and forcibly asserts that Abū Ḥanīfah does not distinguish between the legal position of *qādī* (judge) and *khalīfah* (ruler) insofar as the condition of *'adālah* is prescribed for both:

> There is no difference, for Abū Ḥanīfah, between *qādī* and *khalīfah* as far as the stipulation of *'adālah* is concerned; he holds that *fāsiq* can neither become judge nor ruler in much the same way as neither the testimony of such a person is accepted nor his narration of a tradition of the Prophet (peace be on him). And how can he become *khalīfah* when even his narration is unacceptable and his orders are unenforced![16]

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[11] Makki, 2: 100.

[12] See Section 6.1.3 below for details.

[13] Marghīnānī, 3:117.

[14] Ibid., 101.

[15] Ibid.

[16] Jaṣṣās, 1:99. He quotes several incidents from the life of Abū Ḥanīfah to substantiate this claim. See Section 6.1.3 below.

Jaṣṣās, then, explains the basis for another rule of the Ḥanafī law which is sometimes misunderstood:

> People may have misunderstood, if they did not intentionally ascribe a false statement to Abū Ḥanīfah and the rest of the Iraqi jurists, two rules one of which says that if the judge himself is just and he is given judicial authority by an unjust ruler, his orders are enforced and his decisions are valid; and the other rule says that offering prayer behind such rulers is valid even if they are sinners and tyrants.[17]

In other words, Abū Ḥanīfah distinguished between the *de facto* and *de jure* authority of the unjust ruler.

Jaṣṣās, then, cites the conduct of the famous judge Shurayḥ b. al-Ḥārith al-Kindī who served under the Rightly-guided Caliphs as well as the Umayyad rulers:

> Shurayh remained a judge in Kufah during the governorship of al-Ḥajjāj [b. Yūsuf], while no one among the Arabs or among the descendants of Marwān [b. al-Hakam] was worse in tyranny, disbelief and sin than 'Abd al-Malik [b. Marwān] and none among the governors of 'Abd al-Malik was worse in tyranny, disbelief and sin than al-Ḥajjāj![18]

He further cites the conduct of some great Companions (God be pleased with them) who would accept the grants (*waẓā'if*) of the Umayyad rulers because they were legally entitled to such grants. Thus, he quotes 'Abdullāh b. 'Umar (God be pleased with him) saying to the

[17] Jaṣṣās, 100.
[18] Ibid.

Umayyad ruler: "I am not going to ask anything from you but I will also not return to you what Allah gives me through you."[19]

Jaṣṣās also points out that this position of Abū Ḥanīfah was well-known to other jurists as well who took a different position. Thus, he quotes 'Abd al-Raḥmān al-Awzā'i, the famous Syrian jurist and contemporary of Abū Ḥanīfah, who said: "We could bear all statements of Abū Ḥanīfah, except his statement regarding rebellion against unjust rulers." [20]

Another important foundation on which Abū Ḥanīfah based the community's right to remove the unjust ruler with force was the religious and legal duty of enjoining right and forbidding wrong. Abū Ḥanīfah himself narrated a tradition in this regard to the famous jurist of Khurāsān Ibrāhīm al-Sā'igh: "The best of the martyrs is Ḥamzah b. 'Abd al-Muṭṭalib and the one who stood against an unjust ruler enjoining right and forbidding wrong and [resultantly] he was killed."[21] It was after his discussion with Abū Ḥanīfah that Ibrāhīm stood against the Abbasid governor Abū Muslim Khurāsāni and was martyred.[22]

Jaṣṣās while explaining the position of Abū Ḥanīfah elaborates how some people who preach passive obedience to unjust rulers and who consider rising up against them as *fitnah* (mischief) have caused greater harm to Muslims than their adversaries. It seems imperative to reproduce this long quote from Jaṣṣās as it candidly elaborates the rationale of the position taken by Abū Ḥanīfah about how the duty of enjoining right and forbidding wrong leads to removal of unjust ruler by war, if necessary:

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[19] Ibid.
[20] Ibid.
[21] Ibid., 1:99.
[22] For details of the discussion between Abū Ḥanīfah and Ibrāhīm al-Sā'igh, see Section 6.1.3 below.

> These people rejected war against the unjust group and enjoining right and forbidding wrong using weapon. They called enjoining right and forbidding wrong as mischief when it necessitates the use of weapon and war against the unjust group. This despite the fact that they heard what Allah Most High said about such people: "Fight against the group which transgresses till it returns to the law of Allah"; and the word [*qātilū*: fight] includes war using sword and other things. They hold that the ruler must not be prohibited from tyranny, injustice and killing without a legal cause and that the non-rulers would be prohibited verbally or forcibly without using weapons. Thus, they caused more harm to *ummah* than its adversaries as they prevented people from fighting the unjust group and from prohibiting the ruler from tyranny and injustice. This led to the dominance of the evildoers, rather the Magians and the enemies of Islam. Resultantly, borders became unsafe; injustice prevailed; cities have been destroyed; religious and worldly interests have been defeated; and heretics (*al-Zanādiqah*), extremism (*al-Ghuluww*) and following of belief in two gods (*al-Thanawiyyah*) as well as al-Khurramiyyah and al-Mazdakiyyah, got dominance. All this has been placed on them because of their abandoning the duty of enjoining right and forbidding wrong and preventing the ruler from injustice. Help is sought from Allah![23]

A question arises here: what was the conduct of Abū Ḥanīfah against the unjust rulers of his time, both from among the Umayyads and the Abbasids? This will be discussed in the next Section.

[23] Jaṣṣās, 2:50-51.

6.1.3 Abū Ḥanīfah and the Umayyad and Abbasid Rulers

It is well-known that Abū Ḥanīfah was born in 80 AH/699 CE and died in 150 AH/767 CE. If one focuses on the era from 95 AH/713 CE, when Abū Ḥanīfah was fifteen, till he died in 150 AH, he saw the rule of nine Umayyad rulers and two Abbasid rulers (al-Saffāḥ and al-Manṣūr).[24] This period saw many rebellions the most important of which was the Abbasid rebellion in 132 AH/750 CE which succeeded in overthrowing the Umayyad dynasty and establishing the Abbasid rule. By that time, Abū Ḥanīfah was fifty-two and had already attained the status of the greatest jurist of Iraq and had gathered a great number of following. That was why the second Abbasid caliph Abū Ja'far al-Manṣūr (d. 158 AH/775 CE) tried his best - sometimes offering a key-post and sometimes using coercive means - to win over Abū Ḥanīfah.[25]

Already the Umayyad Governor Yazīd b. 'Umar b. Hubayrah had failed in 130 AH/748 CE despite severe persecution to win the loyalty of Abū Ḥanīfah whose love with the descendants of 'Alī (God be pleased with him) and whose stance about the rightfulness of 'Alī (God be pleased with him) in all his wars was well-known.[26] Thus, when in 122 AH/740 CE Zayd b. 'Alī (God bless him), the son of 'Alī Zayn al-'Ābidīn (God bless him) from a concubine, revolted against the Umayyad caliph Hishām b. 'Abd al-Malik (d. 125 AH/743

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[24] Abū Ḥanīfah was born in 80 AH/699 CE. Thus, Abd al-Malik b. Marwān (r. 65-85 AH/685-705 CE) was the ruler when Abū Ḥanīfah was born. In 95 AH/713 CE, Walid b. Abd al-Malik (r. 85-96 AH/705-715 CE) was the ruler. The Umayyad dynasty was overthrown in 132 AH/750 CE. By that time nine rulers had changed. Abū Ḥanīfah died in 150 AH/767 CE during the reign of the second Abbasid caliph Manṣūr (r. 136-158 AH/754-775 CE).

[25] Makki, 2:172-178.

[26] Abū Zahra, *Abū Ḥanīfah*, 41-42.

CE), everyone knew that the loyalty of Abū Ḥanīfah was with Zayd against the ruler.[27] When Zayd was martyred, all his supporters – including Abū Ḥanīfah – were bitterly persecuted by the Umayyads.[28]

Now when Manṣūr, the Abbasid caliph, tried to win over Abū Ḥanīfah and failed in so doing, he also started persecuting him.[29] The tension escalated when in 145 AH/762 CE Muḥammad b. 'Abdillāh Dhu al-Nafs al-Zakiyyah, the great grandson of Ḥasan b. 'Alī (God be pleased with them), revolted against Manṣūr.[30] Everyone knew that Abū Ḥanīfah was supporting the revolutionaries and that he even gave them financial aid.[31] Not only that, Abū Ḥanīfah publicly supported the cause of the revolutionaries by criticizing the tyrannical policies of the ruler and his officers.[32] When the revolution failed and Nafs Zakiyyah was martyred, Manṣūr turned to Abū Ḥanīfah and other supporters of the revolution and targeted them with the worst kind of persecution. Abū Ḥanīfah died in prison. Some sources report that he was poisoned.[33]

Now the question is: when Abū Ḥanīfah was actively and publicly supporting the cause of the revolutionaries against the unjust rulers, why he personally did not participate in rebellion? Rather, why he tried to prevent rebellion instead? The reasons for this became

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[27] Jaṣṣās, 1:81; Makki, 1:260.

[28] Makki, 2:21-24.

[29] Ibid., 2:173-74.

[30] See for detailed reports about the revolt of Zayd b. 'Alī: Ṭabarī, *Ta'rīkh*, 6:155-263.

[31] Kirdarī, 2:71-72; Makki, 2:83-84; Jaṣṣās, 1:99.

[32] Most importantly he convinced Ḥasan b. Qahtubah, the commander-in-chief of the Abbasid forces, not to send troops against Nafs Zakiyyah. Kirdarī, 2:22.

[33] Abū Zahra, *Abū Ḥanīfah*, 54-59.

clear when Abū Ḥanīfah personally explained them to one of the revolutionaries against the Abbasids – Ibrāhīm al-Sā'igh.

6.1.4 Prerequisites of Rebellion: Dialogue of Abū Ḥanīfah and Ibrāhīm al-Sā'igh

Forceful removal of an unjust ruler, more often than not, involves bloodshed and war which is why those who are concerned with right and wrong have to calculate which of the two evils should be deemed a lesser evil: the continued existence of the unjust ruler or the expected bloodshed in the effort to remove him. They also have to see if the unjust ruler can be replaced by a just ruler, i.e., do the rebels have the alternate leadership? These are questions on which opinions may differ and this is exactly why Abū Ḥanīfah's calculation differed from that of some of his contemporaries who opted for rebellion, such as Zayd b. 'Alī, Nafs Zakiyyah and Ibrāhīm al-Sā'igh.

'Abdullāh b. al-Mubārik (d. 180 AH/797 CE), one of the famous scholars of hadith and a disciple of Abū Ḥanīfah, narrates that when Abū Ḥanīfah heard of the martyrdom of Ibrāhīm he wept so much that we feared his death. After he absorbed that shock he said very good words about Ibrāhīm and said: "This is what I feared about him." He, then, explained that Ibrāhīm would come to Abū Ḥanīfah many a times arguing on the issue of enjoining right and forbidding wrong till they both agreed that preventing an unjust ruler from injustice was obligatory. At that point, said Abū Ḥanīfah, Ibrāhīm asked him to come forward so that he would take oath of allegiance to him and they would start movement for

toppling the unjust [Abbasid] regime. Abū Ḥanīfah, then, explained the reason for his refusal to do so:

> He invited me to one of the rights of God [obligatory duties of the believers], but I prevented him from this and told him: if a man alone would rise for this, he would be killed and things would not improve for people; however, if he finds good supporters and a man who should lead them and who can be trusted in matters of the religion of Allah, then there is no other way.[34]

Abū Ḥanīfah further said that Ibrāhīm would come to him and demand of him to lead the revolution. In response, Abū Ḥanīfah would say:

> This is a wrong which cannot be corrected by an individual. Even the Prophets would not do it till it was imposed on them from the heavens. This obligation is unlike the other obligations which can be performed by an individual, while if he rises up for performing this obligation he will shed his blood and will render himself for being killed and I am afraid he will be responsible for abetting his own killing. When such a person is killed, others will not have the courage to risk their lives. Hence, one has to wait.[35]

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[34] Jaṣṣās, 2:49.
[35] Ibid., 2:49-50.

Thus, while Abū Ḥanīfah in principle agreed on the obligation of the removal of an unjust ruler he did not personally participate in rebellion because, in his opinion, its pre-requisites were not fulfilled. These included:

- That the rebels could offer the alternative leadership which fulfilled the conditions prescribed by the law;
- That the rebels have enough power to replace the government; and
- That the bloodshed caused by rebellion is a lesser evil as compared to the continued existence of the unjust ruler.

6.2 Legal Position of the Ḥanafī School

Some scholars have raised doubts about the legal position of the Ḥanafī School on the right of the community to rise up against an unjust ruler. Mawlānā Mawdūdī, though himself an advocate of this right and wrote in detail on the position of Abū Ḥanīfah, admitted the possibility that the position of the Ḥanafī School might be different from that of Abū Ḥanīfah. This Section analyzes the views of the Elders of the Ḥanafī School so as to determine the official position of the School on the limited right to rebellion recognized by Abū Ḥanīfah.

6.2.1 Position of Abū Ḥanīfah or the Ḥanafī School?

Mawdūdī first wrote an article on the views of Abū Ḥanīfah about political order.[36] In this article, he expressed almost the same view as presented in Section 6.1 above. However, when some scholars objected to this view citing some of the provisions of the Ḥanafī jurists which apparently conflicted with this position, Mawdūdī opined that the Ḥanafī School might have a different position than the personal opinion of Abū Ḥanīfah on this issue.[37]

While it is true that the position of Abū Ḥanīfah and that of the Ḥanafī School do not necessarily coincide, this interpretation is not to be adopted unless it is based on some strong arguments. The presumption is that the position of Abū Ḥanīfah is the position of the Ḥanafī School. Ibn 'Ābidīn and other jurists writing on the principles of the Ḥanafī School about determining the official position of the School have explicitly asserted that primarily the School follows the opinion of the Imam.[38]

Secondly, it is also worth consideration that the manuals of the School have preserved for later generations the difference of opinion between Abū Ḥanīfah and his disciples on

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[36] The title of the article is "Mas'ala-e-Khilāfat men Imām Abū Ḥanīfah kā Maslak" and it was first published in Monthly "Tarjumān al-Qur'ān" in August-September 1963. Later, it was published in a collection of the articles of Mawdūdī titled: *Tafhīmāt* (Lahore: Islamic Publications, 1978), 3:269-299. It was also published as a chapter in his book *Khilāfat-o-Mulūkiyyat* (Lahore: Idāra-e-Tarjumān al-Qur'ān, 2003), 245-276.

[37] He expressed this view in another article titled "Khurūj ke Bāray men Imām Abū Ḥanīfah kā Maslak". Again, it was first published in Tarjumān al-Qur'ān, November 1963-January 1964. Later, it was also published in *Tafhīmāt*, 3:300-320.

[38] Qāḍīkhān Fakhr al-Dīn al-Ḥasan b. Manṣūr, *Fatāwā Qāḍīkhān fi Madhhab al-Imām al-A'ẓam Abī Ḥanīfah al-Nu'mān* (Quetta: Maktabah Rashidīyyah, n. d.), 1:9; Ibn 'Ābidīn, *Sharḥ 'Uqūd*, 17-20

thousands of issues, but nowhere in the basic texts of the School a difference of opinion on this issue has been recorded.[39]

Thirdly, whenever the School adopted a view other than that of the Imam, the Elders of the School mention details about why they prefer the view of the disciples instead of that of the Imam. No such explanation is found in the authoritative manuals of the School.[40] The position of Abū Ḥanīfah on rebellion was well-known and still if none of the basic manuals of the School refutes gathers arguments against this position, the presumption that the same is the position of the School holds ground.

Fourthly, and most importantly, the basic texts of the School have plenty of evidence supporting the position of Abū Ḥanīfah, while those passages – mostly found in the works of the later jurists – can be easily accommodated with the position of Abū Ḥanīfah. In any case, if there is a conflict, the views of the later jurists have to be interpreted in the light of the position of Abū Ḥanīfah, not vice versa.[41] This is to be done in the next section.

6.2.2 Recognizing the Foundations for the Right to Rebellion

Jurists of the Ḥanafī School have not only followed the position of Abū Ḥanīfah regarding the rightfulness of 'Alī (God be pleased with him) in all his wars but have also accepted the

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[39] The manuals of the school do not mention any difference of opinion between Abū Ḥanīfah and his disciples on the foundations on which Abū Ḥanīfah developed the right of the community to remove an unjust ruler. See Section 6.2.2 below.

[40] For instance, the School preferred the view of the two disciples on the issue of crop-sharing (*muzāra'ah*) and the jurists discussed this disagreement in quite detail. Marghīnānī, 4:337. The same is true of their disagreement on charitable trust (*waqf*). Ibid., 3:15-16. No such discussion is found on the issue of rebellion against an unjust ruler or the condition of *'adālah* for ruler, judge or witness.

[41] Qādikhan, 1:9; Ibn 'Ābidīn, *Sharḥ 'Uqūd*, 17-20.

two foundations on which Abū Ḥanīfah built up the right of the community to forcibly remove the unjust rulers, namely, the condition of *'adālah* for the ruler and the obligatory duty of enjoining right and forbidding wrong.

Thus, Jaṣṣās, in the fourth/tenth century, explicitly asserts:

> 'Alī (Allah be pleased with him) accompanied by some prominent Companions, including those who participated in the Battle of Badr[42], fought rebels with sword. And in his wars, 'Alī was on the right side. Furthermore, none opposed him on this issue, except those who rebelled against him and those who followed these rebels.[43]

The same position is taken by Sarakhsī, in the fifth/eleventh century, when he says:

> Allah sent His Prophet (peace be on him) with four swords. With one sword, he himself fought the Arab pagans; ... with the second sword, Abū Bakr fought the apostates; ... with the third sword, 'Umar fought the Magians and the People of the Book; ... and with the fourth sword, 'Alī fought the anarchists, the rebels and the iniquitous..."[44]

Marghīnānī, in the sixth/twelfth century, further elaborates this point and says:

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[42] Among the Companions of the Prophet (peace be on him) those who participated in the famous Battle of Badr have a distinct and prominent position. They are deemed the torchbearers of justice, righteousness and truth.

[43] Jaṣṣās, 3:595-96.

[44] Sarakhsī, *al-Mabsūṭ*, 10:4.

> It is valid to accept appointment on judicial post from an unjust ruler as it is valid to accept appointment from a just ruler because many Companions accepted appointment on judicial posts from Mu'āwiyah (Allah be pleased with him) while 'Alī (Allah be pleased with him) was on the right side in his conflicts with Mu'āwiyah.[45]

As far as the condition of *'adālah* is concerned, Sarakhsī mentions it among the three fundamental conditions for capacity to testify (*ahliyyat al-shahādah*).[46] It is also well-established position of the School that the capacity for judicial post (*ahliyyat al-qaḍā'*) depends on capacity to testify. Marghīnānī says:

> The validity of judicial post is based on the validity of testimony as both of them are forms of *wilāyah* (legal authority). Hence, everyone having the capacity of testimony has the capacity of becoming a judge, and whatever condition is prescribed for testimony is also prescribed for the judicial post.[47]

He further asserts that if a judge is *'adl* at the time of his appointment but later becomes *fāsiq* (corrupt) by taking bribe, he does not automatically lose his post but he deserves removal. "This is the official position of the School (*Ẓāhir al-madhhab*) and this is what our Elders (God bless them) hold."[48]

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[45] Marghīnānī, 3:111.
[46] Sarakhsī, *al-Mabsūt*, 16:113. The other two are intellect (*'aql*) and memory (*ḍabṭ*).
[47] Marghīnānī, 3:117.
[48] Ibid., 3:101.

As for the rule that judicial appointment by an unjust ruler is valid, it has already been explained above that it is based on distinction between *de jure* and *de facto* authority. Moreover, as noted earlier, the same has been the position of Abū Ḥanīfah as well.

An important aspect of this issue is that judicial as well as governmental authority are forms of the duty of enjoining right and forbidding wrong[49] and this is one of arguments on which the Ḥanafī School relies for validating the appointments on judicial posts by rebels who are presumed unjust (*ahl al-baghy*). Thus, Sarakhsī asserts unequivocally:

> Decision on the basis of justice and repelling injustice from the oppressed is a corollary of the duty of enjoining right and forbidding wrong, which is obligatory on every Muslim. However, the subjects cannot perform this duty as it is impossible for them to enforce their decisions. Hence, when it becomes possible for a person because of the power of the one who appointed him, he must decide in accordance with what is obligatory on him, irrespective of whether the one who appointed him is unjust or just, because the condition for [the validity of] the appointment was the possibility [of enforcing the decisions] which is available now.[50]

This principle is further substantiated by another significant ruling of the Ḥanafī School which is the one related to destroying the musical instruments belonging to a Muslim. The *Bidāyat al-Mubtadī*, the most authentic text of the Ḥanafī School, declares that a person doing so is liable to pay damages. *Al-Hidāyah*, which is the most authentic commentary of *Bidāyah*, while explaining this rule asserts: "Enjoining right with force (*bi 'l-yad*) is for the rulers

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[49] Ibid., 3:103.

[50] Sarakhsī, *al-Mabsūṭ*, 10:138.

because they have power (li-qudratihim)."[51] Thus, the School recognizes the validity of the use of force for enjoining right if a person has the power for so doing, i.e., if he can enforce it without causing greater mischief. This is exactly how Abū Ḥanīfah explained his position to Ibrāhīm al-Sā'igh, as noted earlier.

Finally, Sarakhsī while explaining the concepts of *'azīmah* (original rule) and *rukhṣah* (exemption) asserts that originally the law requires of a Muslim to enjoin right and forbid wrong even if it risks his life, although it also gives exemption of remaining silent.

> A Muslim is permitted to prohibit other Muslims, who are sinners, from committing wrong even if he is sure that they would not abandon that wrong and would kill him. Indeed, this is the original rule (*wa huwa al-'azīmah*), although it is permitted for him to take the exemption of remaining silent (*wa yajūz lahu al-tarakhkhuṣ bi 'l-sukūt*).[52]

This clearly establishes that what Abū Ḥanīfah did was the original rule, the *'azīmah*, while others may have opted to take benefit of the exemption, the *rukhṣah*.

This point becomes even clearer when one looks at how the Elders of the School interpreted the conduct of the Companions (God be pleased with them) who did not take sides during civil war. For instance, Sarakhsī says: "The interpretation of what has been reported of Ibn 'Umar and other Companions (God be pleased with them) that they stayed in

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[51] Marghīnānī, 3:307.

[52] Sarakhsī, *Sharḥ Kitāb al-Siyar al-Kabīr*, 1:116.

their homes is that he did not have capability (*ṭāqah*) of fighting while this is obligatory on the one who has this capability."[53]

In the same way, the Elders of the School have asserted that if two factions of Muslims are at war with each other, other Muslims must side with the faction which is on the right side. As for the traditions which prohibit Muslims from taking sides in such a situation, they hold that these traditions relate to the situation where one does not know which of the two factions are on the right side, or where one knows that none of them fights for religion.[54]

6.3 Ibn 'Ābidīn's Exposition of the Ḥanafī Law on Rebellion

Some of the scholars who are of the opinion that the position of the Ḥanafī School was different from that Abū Ḥanīfah cite some passages of the later jurists. Hence, it is imperative to examine such passages in the light of the analysis of 'Allāmah Ibn 'Ābidīn al-Shāmī who was undoubtedly the greatest of the later jurists of the Ḥanafī School.

Ibn 'Ābidīn wrote glosses (*ḥawāshī*) on the *al-Durr al-Mukhtār* of 'Alā' al-Dīn al-Ḥaṣkafī, which was the *sharḥ* (commentary) of the *matn* (text) of *Tanwīr al-Abṣār* composed by al-Tamartāshī. The discussion here is from *Kitāb al-Jihād, Bāb al-Bughāh.*

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[53] Sarakhsī, *al-Mabsūṭ*, 10:132.
[54] Ibid. See also: Jaṣṣās, 3:597.

6.3.1 Who is a "Just Ruler" and Who are "Rebels"?

Tamartāshī defines rebels (*bughāh*) in the following words: "They are the people who go out of the obedience of a just ruler without a just cause."[55] What Ḥaṣkafī add to this is really significant: "Hence, if they have a just cause, they are *not* rebels. The details of this are in *Jāmi' al-Fuṣūlayn*."[56] Ibn 'Ābidīn adds a gloss to the phrase "just ruler" (*al-imām al-ḥaqq*): "It apparently includes the usurper (*mutaghallib*)[57] because after his rule is established and his domination completes, it is not permitted to rise against him, as the jurists have explicitly said."[58] The reason for prohibiting this was the fear of greater mischief, as Ibn 'Ābidīn explains later. This is also substantiated by an important quote from *al-Durr al-Muntaqā*: "This was in the period of the earlier jurists. In our time the rule is decided by the dominance as everyone seeks the worldly benefits. Hence, the just and the unjust are not known."[59] The jurist appears to be saying that as everyone is fighting for worldly gains, without being bothered by religious and moral considerations, the just or unjust nature of the movement has lost importance; what remains important is dominance; hence, it will be unjust to rise up against a dominant group as it leads to anarchy; however, if those rising up gets dominance, it will be unjust for others then to rise up against them.

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[55] Ibn 'Ābidīn, *Radd al-Muḥtār*, 6:411.

[56] Ibid.

[57] As explained in the previous chapter, *mutaghallib* is the one who assumes political power through dominance without being elected by the Electoral College or nominated by the existing ruler.

[58] Ibn 'Ābidīn, *Radd al-Muḥtār*, 6:411.

[59] Ibid.

This is important because, as noted above, those who rise up against the ruler could be termed *bughāh* only if they unjustly rise up against a just ruler. This necessitates discussion on the just or unjust cause of the movement against the government.

6.3.2 Rebellion "Without a Just Cause"

Ibn 'Ābidīn explains that the rebels having no just cause means: "in actual reality" (*fi nafs al-amr*). "Otherwise, the legal condition is their belief in their having a just cause for in the absence of this they are criminals (*luṣūṣ*)."[60] At this point, Ibn 'Ābidīn quotes the important passage from *Jāmi' al-Fuṣūlayn* to which Ḥaṣkafī referred:

> When Muslims are united under the leadership of one ruler and they live under him with peace and a group of believers rise up against him; then, if they did so because of an injustice which he did to them, they are not rebels and he is under an obligation to abandon injustice to them and do justice to them. In such a situation, *people should not support the ruler* against them as it will be supporting in injustice. They should also not support the other group against the ruler[61] because it is supporting them in rising up against the ruler. However, if they rise up without an injustice to them on the part of the ruler, but because of their claim to the prior right to rule and authority and they say: we have the right to rule; then, they are rebels. In this case, everyone who is capable of fighting is under an obligation to support the ruler against these rebels as they have been cursed in the words of the Lawgiver.[62]

[60] Ibid.
[61] Ibn 'Ābidīn's note on this: "This needs further discussion as explained later." Ibid., 6:412.
[62] Ibid., 6:411-412.

Ibn 'Ābidīn cites this passage with approval, except for the rule that ordinary Muslims "should also not support the other group against the ruler" and asserts that this needs some clarification.[63] See section 6.3.5 below for a discussion on this important point.

6.3.3 Three Categories of Those Who Rise Up against the Ruler

Ḥaṣkafī categorizes those who take up arms against government into three categories: bandits, rebels and Khawārij.[64]

Ibn 'Ābidīn, on the authority of Ibn al-Humām and other jurists, divides bandits into two kinds: "Those who rise up without having a just cause, be they have resistance power or not, and they forcibly take the property of Muslims, kill them and make the highway unsafe; second is such a group of people who lack resistance power but they claim to have a just cause."[65] Hence, the absence of either resistance power or just cause will make the group bandits while the combination of these two characteristics will make them rebels.[66] As for Khawārij, Ḥaṣkafī says:

> They are the people having resistance power who rise up against the ruler on the basis of a justification as in their view the ruler is on the wrong side because of committing infidelity or sin according to their interpretation. They deem our blood and property permissible, enslave our women and declare the Companions of our Prophet (peace be

[63] Ibid., 6:412.
[64] Ibid.
[65] Ibid.
[66] This point will be further elaborated in chapter eight of this dissertation.

on him) were infidels. Their legal position is that of the rebels by the consensus of the jurists.[67]

Ibn 'Ābidīn adds to this that if the rebels ascribe infidelity to the ruler, they are Khawārij even if they do not ascribe infidelity to the Companions (God be pleased with them):

> Apparently, this is a definition of the Khawārij who rose up against 'Alī (God be pleased with him) because the distinguishing factor between rebels and Khawārij is that they [the Khawārij] believe in the permissibility of [shedding] the blood of Muslims and enslaving their children because of their [presumed] infidelity, as children cannot be originally enslaved without infidelity.[68]

He further explains this by citing other sources that "rebels" (*bughāh*) is a general term which includes both of these groups. "Otherwise, 'rebellion' (*baghy*) and 'going out' (*khurūj*) are found in both groups. That is why 'Alī (God be pleased with him) said about Khawārij: our brothers rebelled against us."[69]

After this, the text discusses the lawful modes of appointment of the ruler and in that context examines the validity of the rule of usurpers.

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[67] Ibn 'Ābidīn, *Radd al-Muḥtār*, 6:412-13.
[68] Ibid., 412.
[69] Ibid.

6.3.4 Modes of Acquiring Political Power

Tamartāshī gives the basic rules about the appointment of the ruler and the role of dominance (*qahr*) in this regard in the following words:

> The ruler becomes the ruler by oath of allegiance by the elders and the elites; and also by the fact that his rule is enforced on his subjects due to the fear of his dominance and supremacy. Hence, if people give him the oath of allegiance but his rule is not enforced because of his weakness, he does not become the ruler. Similarly, when he becomes the ruler and his rule is validated, he does not lose office [due to injustice] till he retains power and dominance. But if he loses dominance, he also loses office because of injustice.[70]

Ibn 'Ābidīn first adds to it the following important passage from *al-Musāyarah* of Ibn al-Humām:

> The contract of *imāmah* is established either when the khalifah nominates his successor, as Abū Bakr (God be pleased with him) did, or when a group of scholars or People of Opinion and Policy give him oath of allegiance. Al-Ash'ari is of the opinion that the oath of allegiance by one scholar who is among the well-known People of Opinion is enough provided it is done in the presence of witnesses to avoid the possibility of denial. The Mu'tazilah require at least five persons. Some of the Ḥanafīes prescribe oath of allegiance by a group without specifying a number.[71]

After this he cites another passage from the same source:

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[70] Ibid., 414.
[71] Ibid.

> If the conditions of knowledge and sagacity are lacking in the one rising for the rule and denying the rule to him will cause uncontrollable mischief, we acknowledge the establishment of his rule so that it does not resemble the one who constructs a palace and destroys a city. When another usurper over powers the existing usurper and sits on his place, the previous usurper gets removed and the second one becomes the ruler. It is obligatory to obey the ruler irrespective of whether he is just or unjust, provided he does not go against the *Shar'*.[72]

From this Ibn 'Ābidīn concludes that ruler is appointed by three modes, "but the third mode is about the usurper even if he does not fulfill the conditions of the *imāmah*."[73] This issue has already been discussed in detail in the previous chapter.

At the end of this discussion, while commenting on the necessity of enforcement of the rule, Ibn 'Ābidīn highlights a point which is very important for the purpose of this dissertation:

> Even in the presence of the oath allegiance enforcement of his decisions is a condition. It is also a condition in the presence of nomination, as is obvious. Rather, a person becomes a ruler by dominance, enforcing his decisions and control in the absence of the oath of allegiance and nominations, as you have come to know.[74]

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[72] Ibid.
[73] Ibid.
[74] Ibid.

Hence, primarily it is dominance and prevalence which give *de facto* validity to any ruler. What if a ruler loses this supremacy? This leads us to the next important, perhaps the most important, issue for the purpose of this dissertation.

6.3.5 Grounds on Which the Ruler Deserves Removal

As noted in previous section, Tamartāshī asserts that an unjust ruler loses his office due to injustice if he also loses dominance. To this, Ibn 'Ābidīn adds an important passage from *Sharḥ al-Maqāṣid*:

> The contract of *imāmah* is terminated by the factors that are not compatible with the purpose of *imāmah*, such as apostasy, continued insanity or his becoming imprisoned with no hope of release. The same is the effect of the disease because of which he loses his memory. Similar is the effect when he becomes blind, deaf or dumb. The same is the rule when he removes himself because he cannot protect the interests of Muslims, even when this is not obvious but only he feels like that. The abdication of al-Ḥasan [b. 'Alī, God be pleased with them] should be deemed to be on this basis. When he removes himself without a cause, there is disagreement on its effect as is the case with his losing his office by committing a sin. Most of the jurists hold that he does not lose office by this and this is the preferred view in the School of al-Shāfi'ī and Abū Ḥanīfah (God have mercy on them both). From Muḥammad there are two narrations. However, *all have a consensus that he deserves removal in this case.*[75]

[75] Ibid., 415.

Ibn 'Ābidīn, then, cites Ibn al-Humām who adds that "he deserves removal, provided it does not amount to mischief (*fasād*)."[76] Even more explicit and more important is the text which he cites from *Sharḥ al-Mawāqif*:

> The *ummah* has *the right to remove and depose the Imām* on the basis of any cause that makes it obligatory, such as when something is found in him which deteriorates the affairs of Muslims and is destructive to religious matters, in the same way as they have the authority to appoint and authorize him for managing and improving these affairs. If his deposing leads to mischief, the lesser of the two evils will be borne.[77]

This is exactly what Abū Ḥanīfah had been asserting throughout and this is how he explained his position to Ibrāhīm al-Sā'igh.

Finally, Ibn 'Ābidīn comes up with another important and explicit passage from *Fatḥ al-Qadīr* of Ibn al-Humām:

> It is obligatory on everyone capable of fighting to fight in support of the ruler, except when the rebels show what makes it permissible for them to fight against the ruler, such as the fact that he did a very manifest injustice to them, or to others. In such a situation, *it is obligatory on them to support the rebels* till the ruler does justice to them and abandons injustice. However, the rule will be different if the injustice is not manifest, such as when he imposed on them some of the taxes which the ruler has an authority to impose and for which he can lawfully cause harm to some individuals for the purpose of repelling a general harm to people.[78]

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[76] Ibid.
[77] Ibid., 416.
[78] Ibid.

Indeed, this is the crux of the matter. This clearly explains the point that the later jurists did not deviate from what the Elders of the School as well as the Founder of the School had determined and that they stuck to the official position of the School in letter and spirit.

CONCLUSIONS

This survey of the historical and legal sources about the views of Abū Ḥanīfah and the official position of the Ḥanafī School on the right of the Muslim community to forcibly remove an unjust ruler shows that this right was a corollary of the creed which Abū Ḥanīfah had been preaching throughout his life. It also shows that the roots of this right are found in the doctrine of enjoining right and forbidding wrong which, according to the Ḥanafī law, is a universal obligation. However, Abū Ḥanīfah prescribed some prerequisites for the exercise of this right to ensure that it does not result in creating greater mischief. The same has been the position of the Ḥanafī School which has been misinterpreted sometimes to prove that the School denies this right altogether. The net conclusion is that the School, like its founder, recognizes a "limited" right of rebellion for the community which could be exercised only as a last resort and as a lesser evil. God knows best.

CHAPTER SEVEN: REBELLION AND INTERNATIONAL HUMANITARIAN LAW

INTRODUCTION

International humanitarian law (IHL), also called the law of armed conflict (LOAC), which regulates the conduct of hostilities during an armed conflict, is primarily based on the perspective of states which is why it not only denies combatant status to non-state actors but also it does not have as detailed rules for non-international armed conflicts (NIAC) as it has for international armed conflicts (IAC).[1] This is evident from the fact that among the four bulky Geneva Conventions (GCs) of 1949 only one article – the so-called "Common Article 3" (CA3) – deals with NIAC and the rest of the provisions of these Conventions are primarily meant for IAC. Hence, the legal regime about NIAC faces many serious problems today. The present Chapter first gives a brief overview of the law of armed conflict and then focuses on the legal regime about NIAC for identifying problems in this regime which can be solved with the help of the works of Muslim jurists who developed the Islamic law on rebellion in great detail.

[1] IAC denotes a conflict between two or more states or between state and a recognized liberation struggle. NIAC, on the other hand, involves hostilities between government armed forces and organized armed groups or between such groups within such state. Hans-Peter Gasser, *Introduction to International Humanitarian Law* (ICRC, 1997), 4-8.

7.1 *JUS IN BELLO* OR THE LAW FOR REGULATING THE CONDUCT OF HOSTILITIES

International law relating to the threat or use of force is studied from two different perspectives: the law of resort to war (*jus ad bellum*), and the law of conduct of war (*jus in bello*). The present section gives a brief overview of the latter.

7.1.1 Historical Development of IHL

Undoubtedly, since time immemorial human beings have been observing some rules for regulating the conduct of hostilities. Every religion, particularly Judaism, Christianity and Islam, put various restrictions on different aspects of war. Philosophers and statesmen in different parts of the globe in different periods also contributed to this. Resultantly, some rules have obtained a kind of universal acceptance. However, the so-called "international humanitarian law," which is a product of the modern nation-state system, does not have a very long history primarily because the nation-state system itself has very short history.[2] It was only in the second half of the nineteenth century that the need for the adoption of some rules of conduct of war was felt. Henry Dunant (d. 1910), a Swiss businessman, is considered the pioneer in this regard. He saw the scene of the battlefield of Solferino in 1859 and was shocked by the agony the wounded soldiers.[3] He proposed action on two levels.

i. To establish an *organization* to assist wounded military personnel; and

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[2] Details about the emergence of the modern nation-state system have been discussed in Chapter Four of this dissertation.

[3] It is reported that within less than 15 hour time there were around 38,000 casualties — dead and wounded. Most of the wounded persons died because of the absence of medical treatment.

ii. To conclude an *international covenant* to guarantee the protection of the wounded on the battlefield.

Thus, the International Committee of the Red Cross (ICRC) was established in 1863 and the first treaty on the protection of the wounded military personnel signed in 1864 in Geneva.[4]

In the Hague Conference of 1899, international protection was extended to the wounded, sick and shipwrecked members of armed forces *at sea*. In the 1907 Hague Conference, several conventions were adopted to limit warfare to attacks on military installations. The main purpose of these conventions was to protect the non-combatant and civilian population from the calamities of war.

In 1925, *Geneva Gas Protocol* was adopted.[5] This Convention further extended the scope of the Hague Conventions. In 1929, *Prisoners of War* were also placed under the protection of the law of Geneva.

In 1948, after the catastrophe of WWII, the UN General Assembly passed the *Convention on the Prohibition of the Crime of Genocide*. In 1949, with the efforts of the ICRC, four Geneva Conventions were adopted, each on a particular subject.

GCI: *On the Care of the Wounded and Sick Members of the Armed Forces in the Field*;

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[4] Full title of the Convention was: *The Geneva Convention for th Amelioration of the Condtion of the Wounded and Sick in Armed Forces in the Field 1864*. Other individual who worked hard for developing this branch of international law include Professor Francis Leiber (d. 1872) and Professor Fredrick De Martins (d. 1909). Leiber was considered the most knowledgeable person of his times in the field of international law. He wrote the famous guideline for American troops, which is considered a source for the four conventions adopted at the Hague Conference of 1899. De Martins was professor of international law at the University of St. Petersburg. He wrote the preamble to the fourth convention at the Hague Conference in 1907, which is one of the basic sources of the two additional protocols to the Geneva Convention 1949.

[5] Full title of the convention was *Geneva Gas Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases and of Bacteriological Methods of Warfare*.

GCII: *On the Care of the Wounded and Sick Members of the Armed Forces at Sea*;

GCIII: *On the Treatment of the Prisoners of War*; and

GCIV: *On the Protection of Civilian Persons in Time of War.*[6]

The four Geneva Conventions have been adopted and ratified by all States. Hence, they can be said to have embodied the universally accepted norms of international law.

The technological advancements not only enhanced the dangers of catastrophes but also raised the hopes for more protection of the non-combatants. Moreover, the process of de-colonization gave rise to new forms of warfare. Armed liberation struggles and guerilla warfare in the third world posed several new problems. Then, there were several civil wars during the cold war era. All these factors paved the way for the adoption of new rules.

Switzerland again took the initiative and convened a Diplomatic Conference in Geneva in 1974. Two new treaties were drafted from 1974 to 1977. They are called *Protocols Additional to the Geneva Conventions*. Most of the States have ratified one or both of these Protocols and the ICRC is pressing hard the rest of the States to ratify them. Protocol I relates to *International Armed Conflicts* including *Wars of Liberation*[7], while Protocol II relates to *Non-International Armed Conflicts* or civil wars.

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[6] There does not exist a specific convention for aerial attacks. But Section 49 (3) of the Additional Protocol I to the Geneva Conventions 1977 (Protection of Victims of International Armed Conflicts) extends the scope of these provisions to aerial attacks as well. It says: "The provisions of this section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air."

[7] Art 1(4) of the Additional Protocol I to the Geneva Conventions

It is also worth-noting that with the passage of time there have appeared some customary rules besides the treaty law. These customary rules and the four Geneva Conventions along with the Additional Protocols form today the bulk of international law relating to the conduct of war.

It is important to note here that IHL is not applicable to situations of internal disturbance or problems of law and order.[8] The reason is obvious: IHL is the law that regulates "armed conflict"; it is not criminal law; hence, it is applicable only on situations of armed conflicts. Identifying an armed conflict, particularly the so-called non-international armed conflict, and distinguishing it from situation of internal disturbance is, however, not an easy task. This is explained in detail in Section 7.2.1 below.

7.1.2 General Principles of IHL

While there may be thousands of detailed rules codified in various instruments or substantiated by state-practice, scholars of IHL generally cite a few basic principles on which these thousands of rules are based.

Foremost among these principles is that of 'humanity'. It puts restrictions on the means and methods of warfare[9] and prohibits targeting civilian population and property.[10]

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[8] See Article 1 (2) of the Second Additional Protocol.

[9] Under this principle, the use of various weapons is prohibited. These include, *inter alia*, weapons of mass destruction, such as chemical weapons, biological weapons and nuclear weapons. Similarly, employing those weapons which may indiscriminately harm the combatants and non-combatants is also prohibited. Article 51, Protocol I Additional to the Geneva Conventions of 1949 (AP I). The litmus test for identifying a lawful weapon is whether the damage resulting from its use can be limited to specific military objects. Article 22 of the

Attacking and killing the enemy combatants is, however, not prohibited but attacks on people who *hors de combat* (those who no longer take part in combat) are strictly prohibited.[11]

The principle of humanity necessitates 'distinction' on the one hand between civilians and combatants and on the other between civilian and military objects.[12] Resultantly, it also prohibits 'indiscriminate attacks'.[13] Nevertheless, if military operation is conducted against a lawful object, but 'incidental loss' is caused to some civilian population or property, such

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Hague Regulations IV, 1907, states that "[t]he right of belligerents to adopt means of injuring the enemy are not unlimited", while Article 23 of the said Regulations prohibits the use of poisons or poisoned weapons, arms, projectiles or any other materials or techniques which cause superfluous injury. See for details, Peter A. Ragone, "The Applicability of Military Necessity in the Nuclear Age", *Journal of International Law and Politics* 16 (1984): 704-708; also, Hamutal Esther Shamash, "How Much is Too Much? An Examination of the Principle of *Jus in Bello* Proportionality", *Israel Defense Forces Law Review* 2 (2005): 110-113.

[10] See generally: Geneva Convention IV for the Protection of Civilian Persons in Time of War. The main object of this Convention is to confine military operations to military objects and to immune civilians during armed conflict. Articles 51 and 52, AP I.

[11] Article 41, AP I. A person is recognized as *hors de combat* who falls into the hands of adversary; indicates obviously his intention to surrender; or becomes unconscious or is otherwise incapable of defending himself. A soldier who is incapable of taking part in combat or wishes to surrender has to lay down his arms and raise his hands, or wave a white flag and come out of the shelter with hands raised. The surrender in these various ways, however, must be unconditional. The only right that the person who is surrendering can claim is that the status of POW is to be accorded to him. See for details, Commentary on Article 41 of AP I (Geneva: International Committee of the Red Cross, 1987).

[12] Articles 48, 51(2) and 52 (2), AP I. The principle of 'distinction' as laid down in Article 48 of Additional Protocol I is recognized as a rule of customary international law. Moreover, there are examples of national legislation, for instance Italy, Azerbaijan and Indonesia, which make it an offence to attack civilians directly. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (New York: Cambridge University Press, 2009), 26. Article 52 (2) of the AP I, defines military objects as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage". In addition, Articles 48 and 51 of the same Protocol provide for the general protection of civilians and their property.

[13] Article 51, AP I. Indiscriminate Attacks are those which are not directed against a specific military object; or the use of such means and methods which could not be directed against a specific military object, that is, the harmful effect whereof may extend to civilians and their property; or the incidental loss to civilians, or civilian objects, or a combination thereof arising out of an attack would be excessive in relation to the military advantage expected to be introduced by that attack. See for details, Commentary on Article 51 of AP I (Geneva: International Committee of the Red Cross, 1987).

damage is considered "collateral damage"[14] and is not considered a violation of IHL, provided all the necessary precautionary measures were taken.[15]

The principles of humanity and distinction collectively give rise to another important principle, namely, proportionality, which means that force should be used proportionate to the military objective. This principle has been embodied in API.[16] Causing superfluous injury to the enemy combatants is prohibited on the same basis.[17]

In addition to the abovementioned principles, IHL recognizes the doctrine of military necessity whereby it allows targeting military objects.[18] The roots of doctrine of military necessity as a justification for deviation from IHL are found in the principle *Kriegsraison geht vor Kriegsmanier*, that is to say, "necessity in war overrules the manner of warfare".[19]

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[14] The phrase "collateral damage" has not been used in the Geneva Conventions and the Protocols Additional thereto. However, the concept is well found in IHL. See, for instance, especially in Article 51 and 57 of AP I. However, the phrase has been used in *San Remo Manual*. This Manual is not an international treaty, but a useful document prepared by experts of international humanitarian law to work as a guideline or draft proposal. Article 13(c) of San Remo Manual defines "collateral casualties or collateral damage" as "the loss of life of or injury to, civilians or other protected persons, and damage to or the destruction of the natural environment or objects that are not in themselves military objectives". For a detailed introduction of the manual, visit: http://www.icrc.org/eng/resources/documents/misc/57jmst.htm (Last Accessed: 04-05-2012).

[15] Article 57 and 58, AP I. During military operation, constant care should be taken to spare civilians and their properties. It should be clarified before attacking an object that is neither civilian object nor subject to any special protection, and all necessary precautions should be taken in choice of means and methods of operation to avoid incidental loss of civilians life, property or combination thereof, which would be in relation to the direct military advantage). See also: Article 46 of the San Remo Manual.

[16] Article 51(5)b and 57(2)(a)iii, b, AP I. See for details, Shamash, *op. cit.*

[17] Article 23 of the Convention II with Respect to the Laws and Customs of War on Land, 1899. See also Article 35(2), AP I.

[18] See generally, Convention IV with Respect to the Laws and Customs of War on Land, 1907. As war entails destruction and harm, therefore, what constitutes a military object may change during the course of combat; after the destruction of some military objects, the enemy will use some other installations, sometimes even civilian objects, for the same purpose. The use of new installations, even if they were used heretofore by civilians, renders them military objectives and a legitimate target for attack. Other justifications which states mostly rely upon are: self-defence, reprisals and reciprocity. See Ragone, 701.

[19] Michael N. Schmitt, "Military Necessity and Humanity in International Law: Preserving the Delicate Balance", *Virginia Journal of International Law* 50 (2010): 795-839. This principle is equivalent of a principle of

The doctrine has been approached in two diametrically opposite ways, namely, "*Kriegsraison*"[20] and "positivist approach".[21] As far as the *Kriegsraison* interpretation is concerned, it gives a superior status to military necessity; the laws of war can be overruled by the excuse of military necessity. In other words, it is the commander on battlefield who, while considering the demands of a military situation, can decide whether his forces should abide by the laws of war and to what extent.[22]

Francis Lieber, on the other hand, gives a "positivist interpretation" of the doctrine by asserting: "Military necessity as understood by modern civilized nations, consists in the necessity of those measures which are *indispensable* for securing the ends of war, and which are *lawful* according to the modern law and usages of war."[23] Yet another limitation on the doctrine of military necessity he imposes is: "Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or

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Islamic law which states that "necessity permits acts, which are prohibited in ordinary situations". However, in Islamic law too this general allowance is restricted by other principles, such as, "what became permissible due to an excuse becomes prohibited when the excuse is removed" and "necessity does not nullify the legal rights of others". See chapter 2 below.

[20] This is sometimes referred to as "*Clausewitzian* approach". See for details, Scott Horton, "Kriegsraison or Military Necessity? The Bush Administration's Wilhelmine Attitude Towards the Conduct of War", *Fordham International Law Journal* 30 (2006): 575-598.

[21] Ragone, 702-704.

[22] Ibid.

[23] U.S. Dept. of War, *General Order No 100, Instructions for the Government of Armies of the United States in the Field,* Article 14 (1863). Emphasis added. Many other scholars advocate this positivist interpretation of the doctrine. Major William Gerald Downey, Jr. of the US army has stated that the doctrine allows only regulated violence not forbidden by laws and customs of war to force the complete submission of the enemy. Jordan J. Paust has given a similar view that as per this doctrine only those measures are allowed, which are not prohibited by international law and customs (William Gerald Downey, "The Law of War and Military Necessity," *American Journal of International Law* 47 (1953): 251).

wounding except in fight, not of torture to extort confession."[24] Consequently, this approach to the laws of war obligates to construe the doctrine in a way that upholds the prohibitory effect of the laws of war, even in a state of necessity.

7.1.3 Humanizing Warfare

The law of armed conflict is called 'humanitarian' law because it has tried to bring humanity to warfare. There are various aspects of this. For instance, it puts restrictions on the right to participate in war by putting certain conditions for the status of 'combatant'.[25] Then, it puts restrictions on the means and methods of warfare.[26] There are detailed rules about the prohibited means[27] and methods[28] of warfare. It distinguishes between the lawful and unlawful targets. Furthermore, it recognizes rights for the victims of warfare.[29] Finally, it criminalized various violations during war and, thus, paved the way for development of international criminal law.[30] Resultantly, IHL has proved that *all* is *not* fair in war.

Some significant aspects of this regime which relate to the issue of rebellion and civil wars are elaborated in the next section.

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[24] U.S. Dept. of War, *General Order No 100, Instructions for the Government of Armies of the United States in the Field,* Article 16 (1863).

[25] GCIII, Article 4 A.

[26] The so-called "Hague Law" puts restrictions on the means and methods of warfare, while "Geneva Law" protects victims of warfare. In some instruments both aspects of IHL are found side by side. The First Additional Protocol is an example.

[27] CCW or Convention on Conventional Weapons is an example which prohibits the use of certain conventional weapons during armed conflicts.

[28] Perfidy is one of the prohibited methods of warfare. See Article 37 of the First Additional Protocol.

[29] These include civilians, prisoners of war as well as those placed *hors de combat*.

[30] See for a good general introduction to international criminal law: Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2013).

7.2 The Concept of Non-International Armed Conflict

As noted above, IHL primarily identifies two kinds of conflicts: international and non-international. The distinction is based on the fact whether the conflict occurs between two or more states or within the boundaries of one state. The distinction is important from various aspects, particularly from the perspective of the applicable legal regime. This section first examines notion of armed conflict and then after briefly discussing the concept of 'international armed conflict' it focuses on the rules about 'non-international armed conflicts' as they directly relate to the issue of rebellion.

7.2.1 Defining an "Armed Conflict"

Article 2 common to the four Geneva Conventions says:

> [T]he present Convention shall apply to all cases of *declared war* or of *any other armed conflict* which may arise between two or more of the High Contracting Parties, *even if the state of war is not recognizes* by one of them.[31]

Hence, the Geneva Conventions are applicable when war is declared even if no bullet is fired. This rule is applicable even if a party to an armed conflict does not acknowledge the state of war. What if none of the parties is acknowledging the state of war?[32] To avoid this problem,

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[31] Article 2, Para 1 (emphasis added.)

[32] For example, in early 1950's, during the conflict between the Netherlands and Indonesia, the former refused the POWs status to the Indonesian infiltrators on the ground that none of the parties to the conflict had acknowledged a state of war.

the drafters of the 1954 Hague Convention on the Protection of Cultural Property rephrased the last part of this sentence in this way: "even if the state of war is not recognizes *by one or more of them.*"[33]

Article 2 common to the four Geneva Conventions further lays down: "The Convention shall also apply to all cases of *partial or total occupation* of the territory of a High Contracting party, even if the said occupation meets with no armed resistance."[34] Thus, partial or total occupation of the territory of a state also comes within the scope of "armed conflict".

Prior to the Geneva Conventions 1949, generally the term "war" was used in international law. Initially, when states were considered sovereign, declaration of war was considered to be the sovereign right of states.[35] Hence, no war initiated by a state was illegal. However, to avoid the legal consequences of a "state of war", sometimes a state would say that it used force but was not at war. This was called "force short of war".[36] Article 1 of the Pact of Paris 1928 prohibited war as a means for settling international disputes.

> The high contracting parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.[37]

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[33] Article 18, Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954

[34] Ibid., Para 2 (emphasis added.)

[35] See for details: Martin Dixon, *International Law* (London: Blackstone, 2000), 294-96; D. J. Harris, *Cases and Materials on International Law* (London: Maxwell, 1991), 817-24.

[36] Ibid.

[37] Article 1, General Pact for the Renunciation of War, 1928

It, however, did not prohibit force short of war. Article 2 (4) of the UN Charter 1945 prohibited not only war but also the threat or use of force.

> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.[38]

It goes a step forward as it prohibited not only war but also threat or use of force. However, the Charter allows use of force in two cases, namely, in self-defense and as collective use of force under the authority of UN Security Council.[39]

As noted above, the Geneva Conventions use the phrase "armed conflict". Now the question is: why was this phrase used instead of the term "war"?

> The fact remains that thus far, the qualification of a situation as an armed conflict has largely been left to the discretion and the good faith of the parties concerned and to their perceived interest in respecting their treaty obligations. Yet the objective formula accepted in 1949 represent a significant improvement over the previous situation, in that it provides third parties- such as states not involved in the conflict, organs of the United Nations and, in practice, first and foremost the ICRC- with a tool for exerting pressure on the parties to apply the treaties.[40]

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[38] Article 2 (4), Charter of The United Nations, 1945

[39] See Chapter VII (Articles 39-51) of the UN Charter.

[40] Frits Kalshoven, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (Geneva: International Committee of the Red Cross, 2001), 39

Additional Protocol I of 1977 added a new category to international armed conflicts. Thus, while it first declares that this Protocol "shall apply in the situations referred to Article 2 common to those Conventions,"[41] it clarifies in the next para:

> The situations referred to in the preceding paragraph including armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, and enshrined in the Charter of the United Nations and declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[42]

Armed liberation struggle – or use of force for the right of self-determination – can be of two types:

1. When there is total or partial occupation of the territory of a state and people of the occupied territory start armed liberation struggle against the occupying forces;
2. When a group of people in a state take up arms against the government in order to secede from it.

The former is undoubtedly an international issue. However, the latter is generally considered an internal issue by the concerned state. A detailed analysis of this issue is

[41] Article 1(3), AP I
[42] Ibid., Article 1 (4)

beyond the scope of the present dissertation.[43] However, it may be mentioned briefly here that the right to self-determination of the people under colonial or any form of alien domination is an international issue. The same is the case of the people for whom the UN Security Council has specifically recognized this right. These communities have the 'first-level' right to self-determination, which simply means that they are entitled to complete independence and statehood.[44] Apart from these communities, other people striving for self-determination have the 'second-level' of this right i.e. they are entitled to the protection of their culture and identity and may seek 'internal autonomy' but not complete independence.[45] Sometimes, the second-level right of self-determination may turn into the first-level of this right.[46]

It may also be noted here that sometimes as a result of occupation the government of a state is toppled, but a "government in exile" is formed in another state. This government in exile continues its struggle to liberate its homeland. This struggle is also an international armed conflict. Those who participate in it are entitled to combatant status and when captured are considered POWs.[47]

What about the so-called *non-international* armed conflicts?

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[43] *See* for details: Muhammad Mushtaq Ahmad, "Use of Force for the Right of Self-determination in International Law and the Sharī'ah: A Comparative Study," (LLM Thesis, International Islamic University Islamabad), 2006.

[44] Ibid., 112-14. *See* also: Thio Li-ann, "Resurgent Nationalism and the Minorities Problem: The United Nations and the Post-Cold War Developments", *Singapore Journal of International Law*, 4 (2000), 300-61

[45] Ibid.

[46] Ibid.

[47] Article 4 A (3), GC III includes among the categories of POWs "[m]embers of regular armed forces who profess allegiance to *a government or an authority not recognized* by the Detaining Power." (Emphasis added.)

7.2.2 Conflicts "Not of an International Character"

Article 3 Common to the four Geneva Conventions (hereinafter CA3) gives some "minimum humanitarian standards" for "conflicts not of an international character occurring within the territory of a high contracting party".[48] However, the Article does not give a definition of such a conflict. The ICRC and scholars of international law, therefore, use various 'indicators' for distinguishing such a conflict from law and order problems or situations of internal disturbance. For instance, the ICRC 'Opinion Paper' of March 2008 provides the ICRC's definition for identifying the existence of a NIAC. This paper, which is based on jurisprudence, doctrine, state practice,[49] defines NIACs as:

> *protracted armed confrontations* occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach *a minimum level of intensity* and the parties involved in the conflict must show a minimum of organization.[50]

The 'indicators' used for this purpose include, *inter alia*:

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[48] See for a detailed exposition of the law relating to NIAC: Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: Oxford University, Press, 2014). The present section heavily relies on this source.

[49] International Committee of the Red Cross, "How is the Term "Armed Conflict" Defined in International Humanitarian Law?" (New Delhi: ICRC, 2012), 903-09. Jurisprudence in this context means decisions of the international courts and tribunals, while doctrine refers to expositions of the highly qualified jurists and practice means state-practice.

[50] ICRC, "Armed Conflict," 909.

1. Armed forces take full control of the matter and police and other law enforcing agencies disappear from the scene;
2. Resistance groups are well organized and establish their own setup on a piece of land in defiance of the legitimate government;
3. Sometimes the conduct of a state signifies the existence of armed conflict, such as when it formally declares war, or it gives the status of belligerents to the resistance group, or takes the issue to the UN Security Council.[51]

Sometimes when nationals of a state fall into the hands of a warring faction within another state, the former state generally asks the latter state to take necessary steps for the protection and release of these captives. Thus, it generally avoids negotiating with the warring faction. However, if the situation is more serious and the group is absolutely out of the control of the government, other states may feel compelled for its own interests to hold direct negotiations with that group. This may be deemed an acknowledgement of 'the state of belligerency' in that state.[52]

The Regulations for Civil War 1900 prepared by the Institute of International Law declared that states should not acknowledge belligerent status for a warring faction unless it fulfill three conditions:

1. That the faction has occupied a piece of territory;

[51] Jean S. Pictet et al (eds.), *Commentary on the Geneva Convention I* (Geneva: International Committee of the Red Cross, 1952), 49-50

[52] Ibid.

2. That it has established a *de facto* government in that territory in defiance of the central government;
3. That those who fight for the group are well disciplined and are under a responsible command which can ensure their compliance with the rules and customs of war.[53]

In a nutshell, conflicts not of an international character "are armed conflicts, with armed forces on either side engaged in hostilities–conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country."[54]

7.2.3 Two Categories of Non-international Armed Conflict

Additional Protocol II, which also relates to NIAC gives a more restricted definition for the purpose of its scope of application which is why scholars of IHL generally categorize NIAC into two categories of "CA 3 NIAC" and "APII NIAC". For the purpose of application of APII to a situation of NIAC, there needs to be a relatively higher threshold of violence:

> This Protocol... shall apply to all armed conflicts which are not covered by Article 1 of the [First] Protocol and which take place in the territory of a High Contracting Party *between its armed forces and dissident armed forces* or other *organized armed groups* which, under *responsible command*, exercise such *control over a part of its*

[53] Article 8, Regulations for Civil War 1900. *See* for further details: *Commentary on the Additional Protocols*, 1320-22.

[54] *Commentary on Geneva Convention IV*, 36

territory as to enable them to carry out *sustained and concerted military operations* and to implement this Protocol.[55]

The next para excludes internal disturbances from the scope of the application of this Protocol: "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."[56]

Hence, for the purpose of the applicable legal regime, there are three different stages of violence within the boundaries of a state:

1. "Sporadic" acts of violence which are the concern of the law-enforcing agencies, such as police, even if paramilitary or military forces are invited to aid in law enforcing operations;
2. However, when the tension escalates and violence turns into an "armed conflict" as explained in Section 7.2.2 above, the application of the law of armed conflict begins and CA3 provides minimum humanitarian standards for dealing with such situation;
3. When the situation further worsens because the armed resistance against the state is led by an organized group which can carry on sustained military operations,

[55] Article 1 (1) of APII (Emphasis added).
[56] Ibid., Article 1 (2) (Emphasis added).

such situations of protracted violence are governed by APII, provided the state concerned is a party to APII.[57]

The first of these situations is an issue of criminal law of the land, not of the law of armed conflict. It is worth noting that criminal law of the land applies to the next two stages as well even if the law of armed conflict, such as CA3 or APII along with customary rules and general principles of IHL, become applicable to these situations. In other words, in the second and third situations criminal law of the land applies parallel to the law of armed conflict. This is the basis of the most serious problems faced by those who are concerned with minimizing destruction of war. This is explained in the next section.

7.3 LACUNAE IN THE LEGAL REGIME ABOUT NIAC

Since its inception in the nineteenth century Europe, the primary concern of IHL has been to regulate the conduct of hostilities in international armed conflicts. Very little effort has been made to develop detailed rules for non-international armed conflicts.[58] That is why the legal regime dealing with non-international armed conflicts faces many serious issues today. Three important issues are examined here.

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[57] This proviso is important because unlike the Geneva Conventions which have been ratified by all states of the world, the Additional Protocols have not yet been ratified by many states. However, it is worth noting that some of the provisions of these Protocols were taken from customary law while some of them may have converted into custom with the passage of time. Hence, such provisions being rooted in customary law would bind all states.

[58] Detentions during NIAC are primarily governed by the domestic law though the general principles of IHL and the provisions of the relative customary and treaty law are also applicable. As opposed to this, detentions in IAC are primarily the concern of IHL and the Third Geneva Convention gives detailed provisions about it.

The first issue is that states generally do not acknowledge the existence of an armed conflict within their boundaries. Even when they face strong secessionist movements, they call it a "law and order" problem and an "internal affair". The second issue is how to make non-state actors comply with *jus in bello* when international law is generally considered binding on states only? The third issue is that of status determination of insurgents. Is there any difference between ordinary law-breakers and insurgents? Can insurgents be treated on equal footing with combatants in international armed conflicts?

7.3.1 Denial of the Existence of a Non-international Armed Conflict

A serious problem about governing the NIAC is denial by states of the existence of a conflict within their territory. There are two major reasons for this. One, states do not want other states and international organizations to interfere in such a situation. Two, states consider insurgents to be criminals and law-breakers and they fear that acknowledging belligerent status for insurgents may give some sort of legitimacy to their struggle.[59] As there is no consensus on the objective criteria for determining the existence of such a conflict and states shield behind the cover of sovereignty[60] it becomes very difficult for institutions such as the ICRC to convince states to abide by their obligations under IHL in such situations.[61]

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[59] For details see: Antonio Cassese, "The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts," In Antonio Cassese (ed.), *Current Problems of International Law* (Giuffre, 1975), 287-89.

[60] For a discussion on the notion of sovereignty and its implications, see chapter four of this dissertation.

[61] For the Role of the ICRC in NIAC, see Article 3 Common to the Four Geneva Conventions and Article 18 of AP II.

This is coupled by the fear on the part of the states that other states may start interfering in their "internal affairs".[62] Hence, even when a state deploys armed forces to curb an uprising, it tries to cover it as a 'law enforcing operation' against 'miscreants' and criminals. This is also one of the reasons why some of the states did not as yet ratify the Second Protocol (APII). Pakistan, for instance, did not ratify APII. The same is true of India.[63]

It is true that if the situation worsens, the states come out of the 'state of denial' to face the reality. By that time, however, a lot of destruction may already have taken place.

7.3.2 Ensuring Compliance by Armed Groups

Enforcing IHL becomes more difficult in the case of those resistance movements which deny the legitimacy of the very existence of a state. Such movements generally do not recognize that they are bound by the treaties concluded by the state against which they are up in arms and from which they want to secede. From a purely legal perspective, this stance may not carry much weight and they may be considered, notwithstanding their claim to the contrary, legally bound by the treaties signed by the state from which they want to secede because until

[62] For a discussion on this issue from the perspective of *jus ad bellum*, see chapter four of this dissertation.

[63] The USA ratified APII but did not ratify API. This may explain the reasons for non-ratification of one or both.

they succeed in secession they are deemed part of the state. Yet it is practically very difficult, and in some cases impossible, to convince a secessionist movement on this point.[64]

Some scholars point out that apart from treaty rules, there are many rules of customary law which are equally applicable to non-international armed conflicts and which are binding on non-state actors as well.[65] The problem with customary rules, however, is that they are generally vague and open-ended and are subject to different interpretations. Moreover, insurgents find little attraction in complying with IHL because even when they accept these restrictions, they are deemed criminals and are considered liable to punishment under the law of the land. This is coupled by the fact that non-international armed conflicts are generally asymmetric in nature in which a weaker insurgent group fights against a stronger military adversary.[66] This leads to the third, and perhaps the most important, issue of status determination of insurgents.

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[64] International Committee of the Red Cross, "Improving Compliance with International Humanitarian Law: Background Paper for Informal High-level Expert Meeting on Current Challenges to International Humanitarian Law", Cambridge, June 25-27, 2004. See also: Michelle L. Mack, "Compliance with International Humanitarian Law by Non-State Actors in Non-International Armed Conflicts", http://www.reliefweb.int/rw/lib.nsf/db900sid/AMMF-6SYHW3/$file/Harvard-Nov2003.pdf?openelement (Last accessed: June 28, 2010).

[65] Ibid. The ICRC has prepared a comprehensive compilation of customary IHL based on a thorough study of state-practice. See for details: Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005).

[66] For an analysis of the issues relating to asymmetric conflicts, see: Andreas Paulus and Mindia Vashakmadze, "Asymmetrical War and the Notion of Armed Conflict: A Tentative Conceptualization", *International Review of the Red Cross* 91 (2009): 95-125.

7.3.3 Status of Rebels: Combatants or Criminals?

IHL recognizes the status of combatants who participate in hostilities on behalf of a state in an IAC.[67] As they are allowed to take part in combat, they are given a 'license to kill or wound' the enemy combatants. They cannot be punished for mere participation in armed conflict or even for acts of violence during an armed conflict unless they commit a violation of the laws and customs of war.[68] When combatants are captured, they are given the status of prisoners of war (POWs) who are protected by the Third Geneva Convention.

As opposed to this, those taking part in hostilities in NIAC are not given the status of combatants and when captured they are not given the status of POWs.[69] This is because primarily these people are dealt with under the law of the land, under which they are considered criminals and lawbreakers, particularly when they take up arms against the state. That is why non-state actors find little, if any, attraction in complying with the rules of IHL in NIAC.

The ICRC has been conducting research on this issue and many proposals have been discussed. In June 2004, the ICRC prepared a Background Paper for Informal High-level

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[67] Article 4 A, Third Geneva Convention; Article 43, Protocol I Additional to the Geneva Conventions.

[68] The Rome Statute of the International Criminal Court, 1998, gives the Court the jurisdiction to try and punish those involved in the commission of four kinds of crimes: crimes against humanity, war crimes, genocide and aggression. The Court has started functioning since July 2002.

[69] The First Additional Protocol prohibits attacks on civilians, except when they directly participate in hostilities. (Article 51, AP1). As there is no combatant in non-international armed conflicts, all persons are deemed civilians. Hence, only those directly participating in hostilities can be targeted. It may be noted here that international humanitarian law divides all people to either of the two categories: combatants and civilians. In the global war on terror, America and her allies captured many people around the world and denied them the status of both the combatants as well as of civilians. They termed them *unlawful combatants*, an intermediary category between combatants and civilians. This is in gross violation of the norms of IHL. See for a detailed analysis of this issue: Sadia Tabassum, "The Problem of Unlawful Combatants: A Hard Case for International Humanitarian Law", (LLM Thesis, International Islamic University Islamabad, 2008.)

Expert Meeting on Current Challenges to International Humanitarian Law. This paper, entitled "Improving Compliance with International Humanitarian Law", discusses this issue in depth. Identifying a "significant obstacle", it says:

> [A] significant obstacle to better implementation of humanitarian law by non-state actors in internal armed conflicts is that they have little legal incentive to abide by the norms. The domestic law of all states prohibits, i.e., criminalizes, the taking up of arms against the government, which means that those directly participating in hostilities in a non-international armed conflict will be penalized even if they comply with international humanitarian law. This leaves the armed groups with little motivation to adhere to international humanitarian law in practice, as they know they will likely face maximum penalties for mere participation in hostilities.[70]

The ICRC Background Paper contains some suggestions to redress this issue. One of the suggestions is to get some "concessions" from the states for the insurgents. "In order to provide a greater incentive to members of armed groups to comply with international humanitarian law, states might consider the possibility of a *grant of immunity* from prosecution or *amnesty* for acts of mere participation in hostilities."[71] The problem with this suggestion is that granting such concessions is considered a discretionary power of the state. As noted above, states generally do not acknowledge the existence of a conflict within its boundaries for the fear of giving legitimacy to insurgent groups. How, then, can one expect

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[70] International Committee of the Red Cross, "Improving Compliance with International Humanitarian Law: Background Paper for Informal High-level Expert Meeting on Current Challenges to International Humanitarian Law", Cambridge, June 25-27, 2004, 4

[71] Ibid.

states to give concessions to insurgents? This can happen only when a state facing insurgency concludes that it cannot overwhelm the insurgents and, thus, it strives to achieve the goal of "national reconciliation" by granting general amnesty or other concession to the insurgents.[72]

Recognizing the discretionary nature of these concessions, the ICRC Background Paper proposes that "states might also consider committing themselves to a *mandatory amnesty* for acts of mere participation in hostilities".[73] Again, a question arises as to how this amnesty can be made *mandatory*? It cannot be done unless states "commit themselves" to it. Hence, the problem remains unsettled. Yet another suggestion was to get a unilateral statement from the insurgents that they consider themselves bound by IHL.[74] However, as noted above, in the absence of any incentive for insurgents it is very difficult to get such unilateral statements from them. One important benefit which insurgents can get by their compliance with *jus in bello* is that it molds public opinion in their favor and puts immense pressure on the government.

Some scholars have suggested that the only way to solve this issue is to abolish the dichotomy of international and non-international armed conflicts. They suggest that this dichotomy is the main obstacle to compliance with IHL in the contemporary world where the distinction between international and non-international armed conflicts has been blurred by many factors, particularly by the interventions of third states in civil wars – the so-called

[72] Perhaps for the same reason, the Pakistani government is considering the proposal to grant general amnesty to Baloch insurgents. www.dailytimes.com.pk/default.asp?page...14-12-2009_pg1_1 (Last accessed: June 28, 2010).

[73] ICRC, "Improving Compliance with International Humanitarian Law", 5.

[74] Ibid., 7.

"*internationalized* non-international armed conflicts".[75] Moreover, the activities of transnational *non-state actors*, such as al-Qaeda, further aggravate the problem.[76] Finally, the US led *global war on terror* has made this distinction irrelevant and redundant.[77]

However, as this suggestion requires drastic changes in the existence legal regime, it has not yet obtained general acceptance and a majority of scholars still stick to the age old distinction between international and non-international armed conflicts.[78]

CONCLUSIONS

The humanitarian law of armed conflict is an effort by the international community to minimize sufferings during war and to bring wars within the constraints of humanity. The primary addressees of this law are states and, thus, it imposes a duty on states to ensure compliance with it by their forces. As the bulk of this law is based on the perspective of states, it denies the combatant status to rebels who take up arms against a state. Resultantly, non-state actors and armed groups find little attraction in fulfilling the obligations which this law imposes on all parties to a conflict. The ICRC and the academia are, therefore, stressing

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[75] James G. Stewart, "Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict", *International Review of the Red Cross* 85 (2003): 313-350.

[76] Marco Sassoli, "Transnational Armed Groups and International Humanitarian Law", Occasional Papers Series, Program on Humanitarian Policy and Conflict Research, Harvard University, 2008.

[77] Gabðr Rona, "Interesting Times for International Humanitarian Law: Challenges from the "War on Terror" ", *The Fletcher Forum of World Affairs* 27 (2003): 55-74. See also: Tabassum, "The Problem of Unlawful Combatants," 38-47.

[78] Rogier Bartels, "Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide between International and Non-international Armed Conflicts", *International Review of the Red Cross* 91 (2009): 35-67.

upon developing more detailed legal regime for regulating non-international armed conflicts and for filling the gaps in the existing regime.

The next chapter will show how the works of the Muslim jurists on the legal status of rebellion can provide help in this regard.

CHAPTER EIGHT: ISLAMIC *JUS IN BELLO* AND REBELLION

INTRODUCTION

Muslim jurists hold that a powerful group which has capability to offer resistance to government forces is entitled to the combatant status if this group interprets the provisions of Islamic law in a way that presumably justifies its struggle against the government. Thus, resistance capability coupled by a presumed justification triggers the law of war while mere resistance capability in the absence of such a justification makes the members of this group subject to the criminal law of the land. This chapter examines the exposition of the Muslim jurists about implications of acknowledging combatant status for rebels. Like the *jus ad bellum* of rebellion, the detailed rules of *jus in bello* are also based on the conduct of 'Alī (God be pleased with him) in his wars against those who resisted his rule.

8.1 OPERATION OF THE LAW OF REBELLION

Is rebellion an issue of criminal law or the law of war? Are rebels liable to be punished by criminal courts or should they be fought against by the armed forces? What distinguishes rebels from bandits and robbers? Questions like these have been examined by Muslim jurists in detail because not only the Qur'ānic verses deal with the crime of robbery separately and distinctly from the phenomenon of rebellion[1] but also there were detailed Prophetic

[1] See Section 1.1 of this dissertation for detail.

traditions about how to regulate the conduct of hostilities during rebellion and civil war.[2] Moreover, the Companions (God be pleased with them) had to face civil war and rebellion[3] and their conduct, particularly the conduct of the Fourth Caliph 'Alī (God be pleased with him), forms the basic source of the detailed law of rebellion.

8.1.1 Criminal Law or the Law of War?

It was noted earlier that rebellion on unjust grounds is covered by the concept of *fasād* (mischief) which Islamic law prohibits and, thus, the duty of enjoining right and forbidding wrong requires Muslims to curb this mischief. Further, if the ruler was unjust the duty of enjoining right and forbidding wrong would require Muslims to try to remove him because in that case it was the ruler who would indulge in mischief.[4] The two important forms of mischief explicitly mentioned in the Qur'ān are *ḥirābah*[5] or armed robbery and *baghy*[6] or rebellion. In both of these, a strong group of people take up arms in defiance of the law of the land and challenge the writ of the government. However, as noted earlier, *ḥirābah* is dealt with as a crime and the criminal law of the land is applied those who commit this crime,[7]

[2] Some of these traditions have been examined in Section 1.2 of this dissertation.

[3] See Sections 2.1 and 2.2 of this dissertation. See also Section 8.3 below.

[4] The Qur'ānic doctrine of *fasād fi 'l-arḍ* was discussed in detail in chapter one of this dissertation.

[5] Qur'ān, 5: 33.

[6] Ibid., 48:9-10.

[7] The Ḥanafī jurists generally mention the rules of *ḥirābah* (robbery) in the chapter of *sariqah* (theft). See, for instance, Sarakhsī, *al-Mabsūṭ*, 9:134 ff. Some of them, however, mention the rules of *ḥirābah* in a separate chapter. For instance, Kāsānī in *Badā'i' al-Ṣanā'i'* first mentions the crimes of *zinā* and *qadhf* in *Kitāb al-Ḥudūd* (Kāsānī, 9:176-274), after which he mentions the crime of theft in *Kitāb al-Sariqah* (Ibid., 275-359), and then he elaborates the rules of *ḥirābah* in *Kitāb Quṭṭā' al-Ṭarīq* (Ibid., 360-375). After this, he begins an elaborate discussion of the law of war in *Kitāb al-Siyar* (Ibid., 376-549). In this *Kitāb al-Siyar*, he devotes the final section (*faṣl*) to the rules of *baghy* (Ibid., 543-549).

while *baghy* is governed by the law of war and those committing *baghy* are dealt with as combatants.[8] The next section gives details of this crucial distinction.

8.1.2 *Mana'ah* (Resistance Capability) and *Ta'wīl* (Interpretation of Law)

The litmus test for determining the existence of *baghy* and for distinguishing it from *ḥirābah* is whether or not those taking up arms against the government challenge the legitimacy of the government or the system. While the bandits do not deny the legitimacy of the government or the system, the rebels consider themselves to be the upholders of justice and claim that they are striving to replace the existing illegitimate and unjust system with a legitimate and just order. In technical terms, it is said that the rebels have *ta'wīl*.

The jurists hold that the *ta'wīl* of the rebels may not necessarily be right; rather, even when the presumption is that their *ta'wīl* is wrong, they are dealt with as militants, not as ordinary criminals.[9] Explaining the meaning of *ta'wīl*, Ibn 'Ābidīn says:

> That is to say, they interpret an evidence against its apparent meaning; as happen to Khawārij from among the troops of 'Alī (God be pleased with him) who rose against him believing him and other Companions along with him to have committed infidelity as he submitted to the decision of the arbitrators about the war between him and Mu'āwiyah and they said: 'none to decide except Allah'. Their position is that the one committing a major sin is infidel and because of some doubts about arbitration

[8] See Section 8.2 below.

[9] It was noted in chapter seven that the *ta'wīl* of the rebels needs to be right "in actual reality"; otherwise, the legal condition is their belief in their having a just cause, which may not be right actually.

(*taḥkīm*) they considered it a major sin. Details of their arguments along with rejoinder to them are found in the manuals about creed.[10]

As for *mana'ah* or resistance capability, Ibn 'Ābidīn explains it as "dominance on their people so that the one wanting to capture them is not able to do so."[11] Some of the jurists mention "dominating a city". However, Ibn 'Ābidīn gives the following explanation which is very important:

> Apparently, the mention of "city" is by reference to what generally happens because the law looks at their gathering and forming a fighting group and that does not happen except in a place where their dominance can be proved; this generally happens in a city. Hence, if they gather in desert [in the same way], the rule is the same. Ponder![12]

The net conclusion is that there are two ingredients of rebellion:

1. That a powerful group establishes its authority over a piece of land in defiance of the government; and
2. That this group challenges the legitimacy of the government.[13]

The question as to who will decide whether the *ta'wīl* of these insurgents is valid or not, is not the concern of the jurists. They concentrate only on the code for the conduct of hostilities (*ādāb al-qitāl*) in rebellion irrespective of whether that rebellion is just or not. Thus, the jurists hold that even if the *ta'wīl* of the rebels is invalid, it is deemed sufficient to suspend

[10] Ibn 'Ābidīn, *Radd al-Muḥtār*, 6:414.
[11] Ibid.
[12] Ibid.
[13] Sarakhsī, *al-Mabsūṭ*, 10:136.

major part of criminal law as well as the law of torts. This aspect of the law will be further elaborated in the next section.

8.2 Operation of Criminal Law on Rebels

Bandits have resistance capability but no interpretation of law that presumably justifies their struggle; rebels have both. It was noted in chapter six that Khawārij also have resistance capability and a presumed legal justification for their movement, but over and above that they have a belief about the infidelity of their adversaries. Khawārij may cause serious issues of concern for theologians, but from the perspective of law, the jurists do not distinguish between Khawārij and rebels and apply the same law on them. Hence, in the remaining part of this dissertation the distinction between Khawārij and rebels has been ignored. An important corollary of the distinction between bandits and rebels is that criminal law is differently applied on rebels as compared to bandits. This section examines this issue and also addresses the question if recognizing the combatant status and the ceasing the normal operation of criminal law gives some kind of legitimacy to the rebellion?

8.2.1 Different Spheres of Islamic Criminal Law

As opposed to English Law in which crimes are generally considered violations of public rights, Islamic law divides crimes into four different categories depending on the nature of the right violated:[14]

a) *ḥadd* is a specific crime deemed as violation of a right of God;[15]

b) *ta'zīr* is a violation of the right of an individual;[16]

c) *qiṣāṣ*, including *diyah* and *arsh*, is deemed a violation of the mixed right of God and of individual in which the right of individual is deemed predominant;[17] and

d) *siyāsah* is deemed a violation of the right of the community.[18]

The nature of the rights involved determines the application of various rules and principles of Islamic criminal law. Thus, the *ḥadd* penalties cannot be pardoned by the ruler because they are deemed the rights of God and which is why only God can pardon these penalties.[19] Similarly, the ruler does not have the authority to pardon the *ta'zīr* punishments, although the aggrieved individual or his legal heirs can pardon, or conclude compromise, with the offender.[20] The same is the case with the *qiṣāṣ* punishments.[21] One may consider the part of

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[14] See for details: Imran Ahsan Khan Nyazee, *General Principles of Criminal Law: Western and Islamic*, Islamabad, Advanced Legal Studies Institute, 1998.

[15] The *ḥadd* of *qadhf* (false imputation of committing illicit sexual intercourse) is deemed a mixed right of God and of individual but the right of God is deemed predominant. Kāsānī, 9:250.

[16] Ibid., 273.

[17] These punishments are the rights of God and as such the limits of the punishments are deemed "fixed", but as the right of the individual is predominant the aggrieved individual or his/her legal heirs can pardon, or conclude compromise with, the offender.

[18] Ibn 'Ābidīn, *Radd al-Muḥtār*, 6:19-21.

[19] Kāsānī, 9:248-250.

[20] Ibid., 9:273-274.

[21] Ibid.

criminal law covering *ḥadd*, *ta'zīr* and *qiṣāṣ* and *diyah* as rigid because the government has little role to play in this part of the law. The ruler can, however, pardon or commute a *siyāsah* punishment because it is deemed a right of the community for which the ruler acts guardian and agent.

As shown below, when resistance capability (*mana'ah*) is coupled by presumed justification (*ta'wīl*), i.e., when rebellion is there, the criminal law relating to the first three categories of rights cease to apply. It is only the part of criminal law relevant to the right of the community (*siyāsah*), which remains applicable during rebellion. Importantly, this part of criminal law is flexible as the government can pardon or commute the punishments. This becomes the basis for pronouncement of general amnesty for rebels as well as for concluding peace settlements with them.

8.2.2 Suspension of the Rigid Part of Criminal Law

The first significant rule on the issue is given by Shaybānī in the following words: "When rebels repent and accept the writ of the government, they would not be punished for the damage they caused [during rebellion]."[22] Explaining this rule, Sarakhsī says:

> That is to say, they would not be asked to compensate the damage they caused to the life and property [of the adverse party]. He means to say: when they caused this

[22] Sarakhsī, *al-Mabsūt*, 10:136. The Shāfi'ī jurist Shīrāzī says: "If a prisoner among the rebels accepts the authority of the government, he shall be released. If he does not accept the authority of the government, he shall be imprisoned till the end of the hostilities after which he shall be released on the condition that he shall not participate in war." (Shīrāzī, 3:404).

> damage after they had organized their group and had attained resistance capability (*mana'ah*). As for the damage they caused before this, they would be asked to compensate it because [at that stage] the rule was to convince them and to enforce the law on them. Hence, their invalid interpretation (*ta'wīl*) would not be deemed sufficient to suspend the rule of compensation before they attained resistance capability.[23]

Shaybānī himself mentions a similar rule when he says: "When those who revolt lack resistance capability, and only one or two persons from a city challenge the legitimacy of the government and take up arms against it, and afterwards seek quarter (*amān*), the whole law will be enforced on them."[24] Sarakhsī explains this ruling in these words: "because they are like robbers, and we have already explained that when presumed legal justification (*ta'wīl*) lacks resistance capability (*mana'ah*), it has no legal effect [it cannot suspend the rule of compensation]."[25]

Shaybānī has further stated it explicitly that even if the government and the rebels conclude a peace treaty on the condition that the rebels would not be asked to compensate the damage they caused before they attained resistance capability, this condition would be invalid and the law would be enforced on them.

> If the rebels had caused damage to life and property before they revolted and fought, and after revolting they conclude a peace treaty on the condition that this damage

[23] Sarakhsī, *Al-Mabsūṭ*, 10:136
[24] Ibid., 141. The same is the preferred opinion of the Shāfi'ī school. (Shīrāzī, 3:406)
[25] Sarakhsī, *Al-Mabsūṭ*, 10:141.

should not be compensated, this condition will be invalid and the rules of *qiṣāṣ* and of compensation for damage of property will be applied on them.[26]

It does not amount to treachery. Rather, accepting this condition will amount to violating some fundamental norms of Islamic law. Hence, this stipulation is deemed *ultra vires* and as such null and void. Sarakhsī elaborates the principle behind this rule in the following words:

> Because this compensation is binding on them as a right of the individual [whose life or property was damaged] and the ruler does not have the authority to waive the rights of individuals. Hence, the stipulation from their side regarding the suspension of the rule of compensation is invalid and ineffective.[27]

However, as mentioned above, they will not be asked to compensate the damage they caused after attaining resistance capability in the same way as non-Muslim combatants are not asked to compensate the damage they caused during war even after they embrace Islam. Sarakhsī says:

> After they attained resistance capability, it became practically impossible to enforce the writ of the government on them. Hence, their interpretation – though erroneous –

[26] Ibid., 138. The Shāfi'ī jurists have a slightly different approach. Shīrāzī says: "If the rebels or the government forces cause harm to each other's life and property out of active hostilities (*fī ghayr al-qitāl*), compensation (damān) is obligatory... If the government forces cause harm to the life and property of the rebels during war, no compensation will follow... If the rebels cause harm to government forces during war, there are two opinions... The preferred opinion is that no compensation will follow." (Shīrāzī, 3: 405-06). This rule is applicable when the rebels had already attained *mana'ah*. If they cause any harm before attaining *mana'ah*, they will be forced to compensate. (Ibid. 3:409) The rule will be the same when they have *mana'ah*, but lack *ta'wīl*. (Ibid.).

[27] Sarakhsī, *al-Mabsūṭ*, 10:139.

would be effective in suspending the rule of compensation from them, like the interpretation of the people of war [non-Muslim combatants] after they embrace Islam.[28]

Sarakhsī also quotes the precedent of the Companions of the Prophet (peace be on him) in this regard. Imām Ibn Shihāb al-Zuhrī, the famous Follower (*Tābi'ī*) of the Companions, reports the verdict which enjoys the consensus of the Companions as regards the time of civil war between Muslims:

> At the time of *fitnah* (civil war) a large number of the Companions of the Prophet (peace be on him) were present. They laid down by consensus that there is no worldly compensation or punishment for a murder committed on the basis of an interpretation of the Qur'ān, for a sexual relationship established on the basis of an interpretation of the Qur'ān and for a property damaged on the basis of an interpretation of the Qur'ān. And if something survives in their hands, it shall be returned to its real owner.[29]

It must be noted here that the suspension of the criminal law or of the worldly punishment does not imply that the acts of rebels were lawful. Shaybānī asserts that if the rebels acknowledge that their interpretation is invalid they will be advised to compensate the damage they caused, although legally they cannot be forced to do so. "I will advise them by way of

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[28] Ibid., 136

[29] Ibid. Shīrāzī also quotes the same precedent (Shīrāzī, 3:406). Muwaffaq al-Dīn Ibn. Qudāmah al-Maqdisī, the famous Ḥanbalī jurist, says: "When the rebels could not be controlled except by killing, it is permissible to kill them and there is no liability of sin, compensation or expiation on the one who killed them." (*Al-Mughnī Sharḥ Mukhtaṣar al-Khiraqī* (Riyadh: Maktabat al-Riyāḍ al-Ḥadīthah, 1981), 8: 112). He further says: "And the rebels also do not have the obligation to compensate the damage they caused to the life and property during war." (Ibid., 8:113).

fatwā to compensate the damage they caused to life and property. But I will not legally force them to do so."[30] Sarakhsī explains this ruling by saying:

> Because they are believers in Islam and they acknowledge that their interpretation was invalid. However, the authority of enforcing the law on them vanished after they attained resistance capability. That is why they will not be legally compelled to compensate the damage, but they would be given *fatwā* (religious advice) because they will be responsible before God for this.[31]

As opposed to rebels, a gang of robbers who possess resistance capability but lack interpretation is forced to compensate the damage and is punished for the illegal acts. Sarakhsī says:

> Because for gangsters resistance capability exists without interpretation, and we have already explained that the rule is changed for rebels only when resistance capability is combined with interpretation; and that the rule of compensating the damage is not changed when one of these exists without the other.[32]

Thus, Islamic law acknowledges some important rights for those fighting in a civil war or – to use the IHL terminology – non-international armed conflict.[33]

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[30] Sarakhsī, *al-Mabsūṭ*, 10:136.
[31] Ibid.
[32] Ibid., 142. It was noted above that the same is the position in the Shāfi'ī school. (Shīrāzī, 3:409).
[33] Hamidullah, 167-68

8.2.3 The Question of Legitimacy

Does acknowledging combatant status to rebels give legitimacy to rebellion? The answer is an emphatic "no"! The combatant status, as noted earlier, is given to all those who participate in war irrespective of whether or not they are on the right side in war. For instance, the contemporary law of armed conflict gives combatant status to all the forces of the parties to the conflict even if one party is committing aggression, which is illegal, and the other is fighting in self-defense which is legal. Similarly, the jurists acknowledge combatant status for rebels when their resistance capability is coupled with an interpretation of law which presumably justifies their struggle even if "in actual reality" that may not justify it.[34] Rather, even when the jurists assert that the interpretation of the rebels is erroneous, they acknowledge combatant status for them, provided their erroneous interpretation is coupled by resistance capability. Sarakhsī may be quoted here again:

> After they attained resistance capability, it became practically impossible to enforce the writ of the government on them. Hence, their interpretation – though erroneous – would be effective in suspending the rule of compensation from them, like the interpretation of the people of war [non-Muslim combatants] after they embrace Islam.[35]

[34] Sarakhsī, *Al-Mabsūṭ*, 10:136.
[35] Ibid.

It was also noted above that this rule has been established by the consensus of the Companions of the Prophet (peace be on him).[36] Furthermore, as explained in chapter one, primary source for the Islamic law on rebellion is the conduct of 'Alī (God be pleased with him) who recognized combatant status of those who rebelled against him, although the interpretation of those rebels was undoubtedly erroneous. The conclusion is that acknowledging combatant status for the rebels does not give legitimacy to the struggle of the rebels against the government.

This is further explained by the fact that the jurists deem *dār al-baghy* (territory under the control of rebels) part of *dār al-Islām* (territory under the control of Muslims/parent state) even after the rebels establish their *de facto* control over that territory.[37] In other words, even though the jurists acknowledge the necessary corollaries of the *de facto* authority of the rebels in *dār al-baghy*, yet they do not give *de jure* recognition to this authority. This point will be further elaborated in chapter nine.

8.3 Conduct of Hostilities during Rebellion

Muslim jurists distinguish between the *jus ad bellum* and *jus in bello* regarding wars and conflicts. The books and chapters on *siyar* generally contain brief discussion on the legality of war and give details about the actual conduct of hostilities. The same holds true of the

[36] Ibid.

[37] According to the Ḥanafī jurists, if a person seizes the property of another person in one *dār* and takes it to another *dār*, he becomes the owner of that property. (Ibid., 10:62). However, if a person takes such property from *dār al-'adl* to *dār al-baghy*, or vice versa, he does not become the owner thereof "because the *dār* of *ahl al-'adl* and *ahl al-baghy* is one". (Ibid., 135).

discourse on rebellion. The chapters or sections on rebellion in the *fiqh* manuals briefly analyze the legality or illegality of rebellion but give detailed rules and principles about conduct of hostilities during rebellion, irrespective of whether the *ta'wīl* of the rebels is valid or invalid. Some significant aspects of this discourse are examined here.

8.3.1 Persons and Property of Rebels

Shaybānī cites an important declaration of 'Alī (God be pleased with him) which he issued on the day of the War of the Camel:[38] "Do not pursue anyone who leaves the battlefield. Do not execute any prisoner. Do not kill any injured person. No veil is to be lifted. No property is to be taken."[39] Sarakhsī explaining the first prohibition expounds an important principle of *jus in bello* regarding rebellion:

> When the people of justice [government forces] fight the people of transgression [rebels],[40] the people of justice must not pursue those who leave the battlefield because we fight them for repelling their transgression and that has been repelled when they

[38] The War of the Camel is the well-known War between the followers of 'Alī (God be pleased with him) and those who refused to owe allegiance to him unless the murderers of 'Uthmān (God be pleased with him) were punished. The opponent forces were led by 'A'ishah (God be pleased with her), the mother of the believers, who was riding a camel which was why this was called the War of the Camel. See for detail about this war: Ṭabarī, *Ta'rīkh*, 4:456-555.

[39] Sarakhsī, *al-Mabsūṭ*, 10:134.

[40] "The people of justice" is the phrase used for the supporters of the government on the presumption that the ruler upholds justice and that those who took up arms against him are committing transgression. This does not mean that the ruler and his supporters are necessarily just or that the rebels are necessarily transgressors. Rather, as the law of rebellion has primarily been derived from the conduct of 'Alī (God be pleased with him) and undoubtedly he was on the right side, his supporters were called people of justice and his opponents were termed as people of transgression. Otherwise, as explained in chapters 5 and 6, sometimes the ruler is unjust and those who resist him are just and the law makes it obligatory on masses to support the just resistance against the unjust ruler.

> ran away from the battlefield. However, this rule is applicable when they do not have a group from which they may seek shelter. When they have such a group, their retreaters will be pursued because they did not abandon transgression when they left the battlefield after being defeated; rather, they ran away for getting support from that group.[41]

Sarakhsī explains in the same way the second rule as both are based on the same principle. He cites the example of 'Alī (God be pleased with him) who would release prisoners only after they would swear not to take up arms again.[42] Sarakhsī, thus, establishes that the final decision on the fate of the prisoner remains with the ruler who would decide in accordance with the principle of *maṣlaḥah*.[43]

As for the third rule, Sarakhsī explains that it meant prohibition of enslaving the women (as well as children) of the rebels.[44] Similarly, he explains the fourth rule by asserting that the rules of *ghanīmah* (war booty)[45] are not applicable to the property of the rebels and that they remain in the ownership of the original rulers.[46] Shaybānī cites another precedent of 'Alī (God be pleased with him) for this purpose:

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[41] Sarakhsī, *al-Mabsūṭ*, 10:134.

[42] Ibid.

[43] Ibid.

[44] Sarakhsī, *al-Mabsūṭ*, 10:134.

[45] *Ghanīmah* is the term used for the goods captured in a military campaign and. Moreover, moveable property is generally included in *ghanīmah* while immoveable property is included in *fay'*.

[46] Sarakhsī, *al-Mabsūṭ*, 10:134.

> It has reached us from 'Alī (God be pleased with him) that he threw whatever his troops had captured from the people of Nahrawān[47] to an open ground. Thereafter whosoever recognized his property took it. The last thing that was recognized to be belonging to someone was cooking pot of iron and the owner took it.[48]

What about the weapons captured from rebels? Shaybānī holds that the weapons shall be retained till rebellion is curbed after which they shall be returned to their owners.[49] Similarly, if perishable goods are captured from rebels, they may be sold but their price shall be kept safe and shall be returned to the owners of the goods after rebellion is curbed.[50]

Government may conclude peace treaty with rebels if it deems it better for the interests of Muslims,[51] but it cannot take any property in consideration thereof.[52] This is a corollary of the principle of non-application of the rules of war booty to the property of rebels mentioned above. If a rebel after getting quarter enters the territory under the control of the government forces, his life and property shall be protected in the same way as the life and property of a non-Muslim visitor (*musta'min*) are protected.[53] Hence, if he is killed, *qiṣāṣ* cannot be taken from the murderer though *diyat* shall be imposed.[54]

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[47] The people of Nahrawān were a group of the *Khawārij* against whom 'Alī (God be pleased with him) had to fight a battle at a place in Iraq known as Nahrawān.

[48] Sarakhsī, *al-Mabsūṭ*, 10:135.

[49] Ibid., 135.

[50] Ibid., 135.

[51] Ibid., 136.

[52] Ibid.

[53] Ibid., 140. The jurists divided non-Muslims into three basic categories: *ḥarbī*, *musta'min* and *dhimmī*. *Ḥarbī* was a non-Muslim who was a permanent resident of a territory beyond the territorial limits of *dār al-Islām*. This did not mean that he was deemed an "enemy" *by definition*, as Bernard Lewis (b. 1916), the 'guru of the neo-cons', asserts in his *Political Language of Islam* (Karachi: Oxford University Press, 1987), 77. Rather, this term is equivalent to "alien" in common law. Sometimes a *ḥarbī* could convert to *muharib* in the same way as an alien can become "alien enemy." *Ḥarbī* could enter *dār al-Islām* only after concluding a contract of peace (*amān*)

Dead bodies of the rebels shall be buried though the government forces shall not offer funeral prayer for them.[55] This, again, is based on the precedent of 'Alī (God be pleased with him) who buried the rebels after the Battle of Nahrawān but did not offer funeral prayer for them.[56] However, the near relatives of the rebels from among the supporters of the government are permitted to offer funeral prayer for them, provided rebellion has been curbed.[57] Cutting the heads of the rebels and showing it to people is mutilation which the Prophet (peace be on him) prohibited. Rather, as narrated by 'Alī (God be pleased with him), mutilation even of mad dog is prohibited.[58] Those killed among the forces or supporters of the government are acknowledged the status of martyrs (*shuhadā'*) and, thus, they shall not be given coffin and shall not be given ablution, although their funeral prayer shall be offered after which they shall be buried.[59] This is how 'Alī (God be pleased with him) did with those

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with an individual Muslim or the Muslim community through the authorized officials. (See for details of the doctrine of *amān*: Kāsānī, *Badā'i' al-Ṣanā'i'*, 9:411-458.) After the contract of *amān*, the position of the *ḥarbī* would change to that of a *musta'min* (literally, the one who seeks *amān*). If a *ḥarbī* or a *musta'min* would wish to become a permanent resident of the *dār al-Islām*, he was required to conclude a contract of perpetual peace, called *dhimmah* with the government of the *dār al-Islām*. In that event, he would be called *dhimmī*. A *ḥarbī* could not enjoy the protection (*'iṣmah*) of Islamic law because the courts of the Islamic territory lacked jurisdiction on him. (On the application of the principle of territorial jurisdiction in the Ḥanafī jurisprudence, see: Ahmad, "The Notions of *Dār al-ḥarb* and *Dār al-Islam*", 5-37.) Certain legal duties were imposed only on *dhimmis* and not on *musta'mins*. For example, the law regarding the *ḥudūd* punishments was not applicable to *musta'mins*, although *dhimmis* could be subjected to *ḥudūd* punishments, except the punishment for drinking wine and intoxication. See, Kāsānī, 9:187–189 and 214.

[54] Sarakhsī, *al-Mabsūṭ*, 10:140. This is because of the operation of *shubhah* (mistake of law) which is an obstacle for the punishment of *qiṣāṣ*, though not for *diyah*. This *shubhah* exists in case of the people of transgression as well as aliens, while it does not exist in case of the people of justice as well as those non-Muslims who concluded the treaty of perpetual peace with Muslims and thereby obtained the right of permanent residence in the Muslim territory. Hence, if a *dhimmī* is killed by a Muslim, the murderer is liable to *qiṣāṣ* punishment. See for details: Kāsānī, 10:246-260.

[55] Sarakhsī, *al-Mabsūṭ*, 10:139.

[56] Ibid.

[57] Ibid.

[58] Ibid.

[59] Ibid.

who were killed from among his forces.[60] This is also what 'Ammār b. Yāsir, who supported 'Alī (God be pleased with them), had ordained in his will.[61]

Government must not take help from non-Muslims against rebels, except when their joint forces are commanded by the government.[62] Thus, if the government forces are defeated and they are pushed to the territory of a non-Muslim people, these forces must not take help from those non-Muslims because in such a situation the command is in the hands of non-Muslims.[63] Thus, Islamic law treats rebellion as "internal affair" of Muslims in which "outsiders" must not be allowed to intervene. As noted in chapter one and chapter six of this dissertation, other Muslims must not remain silent spectators; rather, they must try to make peace between the warring factions.

8.3.3 Distinction between Muslim and Non-Muslim Rebels

The Ḥanafī jurists do not apply the law of rebellion to rebels when all the rebels are non-Muslims. They apply it to rebels only when the non-Muslim rebels are joined by Muslim rebels, or when all the rebels are Muslims. In the first case, when all the rebels are non-Muslims, the jurists apply the ordinary code of war on them, which is applicable to other

[60] Ibid.
[61] Ibid.
[62] Ibid., 141.
[63] Ibid.

alien enemies (*ahl al-ḥarb*).[64] The jurists discuss this issue under the concept of termination of the contract of perpetual protection (*'aqd al-dhimmah*).[65]

According to Islamic law, there exists a contractual relationship between the Muslim government and the non-Muslim residents of *dār al-Islām*. By concluding the contract of *dhimmah*, the Muslim ruler guarantees the protection of life and property as well as freedom of religion to non-Muslims who agree to abide by the law of the land and to pay *jizyah* (poll-tax). The jurists hold that the contract of *dhimmah* is terminated only by any of the following two acts: firstly, when a *dhimmī* becomes permanently settled outside *dār al-Islām*;[66] and secondly, when a strong group of non-Muslims having enough *mana'ah* rebels against the Muslim government.[67]

Thus, the contract of *dhimmah* is not terminated by any of the following acts:

- refusal to pay *jizyah*;[68]
- passing humiliating remarks against Islam or the Qur'ān;
- committing blasphemy against any of the Prophets (peace be on them);
- compelling a Muslim to abandon his religion; and
- committing adultery with a Muslim woman.[69]

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[64] Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, 4:164.

[65] Kāsānī, 9:464-448.

[66] In modern parlance, one may say that Islamic law does not acknowledge the concept of "dual nationality" It may be noted here that the Pakistani law also does not acknowledge this concept. See Section 14 of the Pakistan Citizenship Act, 1951.

[67] A third factor is also mentioned, namely, embracing Islam. (Kāsānī, 7:112) This, of course, this is not a cause for the loss of the right to permanent residence in *dār al-Islām*.

[68] See for details about *jizyah*: Kāsānī, 9:439-464.

[69] Ibn al-Humām, *Fatḥ al-Qadīr*, 4:381. Jurists, other than the Ḥanafīs, hold that the contract of *dhimmah* is terminated by any of these acts, although some of them hold that the contract is terminated only

The jurists consider these as crimes punishable under the law of the land.[70] Non-Muslims who permanently settle outside *dār al-Islām* are treated like ordinary aliens,[71] while rebels are treated in the same manner as ordinary non-Muslim enemy combatants.[72] It may be noted here that termination of the contract of *dhimmah* by some of the non-Muslims does not affect the legal status of those who did not terminate it.[73]

The net conclusion is that both the Muslim and non-Muslim rebels are treated like combatants and the law of war in its totality is applied on them. However, if some or all of the rebels are Muslims, the law puts some more restrictions on the authority of the government. For instance, targeting women and children is prohibited both in the general law of war as well as in the special law of *baghy*, while the rules of *ghanīmah* applicable on the property of the enemy are not applicable to the property of rebels.[74]

The combatant status acknowledged by Islamic law for rebels, both Muslims and non-Muslims, offers a great incentive to the rebels to comply with the law of war. Because of this status, the general criminal law of the land is not applied to them. In other words, they can be punished only when they violate the law of war. Furthermore, the additional restrictions in case of Muslim rebels can also be accepted by the international community as general rules

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when it was mentioned in the contract that must avoid these acts. (Ibn Qudamah, *Al-Mughnī*, 8:525; Shams al-Dīn Muḥammad b. Muḥammad al-Khaṭīb al-Shirbīnī, *Mughnī al-Muḥtāj ilā Sharḥ al-Minhāj* (Beirut: Maṭba'at al-Ḥalbī, 1933), 4:258).

[70] Ibn al-Humām, 4:381.

[71] Marghīnānī, 2:405.

[72] Sarakhsī, *Sharḥ al-Siyr al-Kabīr*, 4:164; Ibn al-Humām, 4:382.

[73] Ibn al-Humām, 4:253; Shirbīnī, 4:258; Ibn Qudamah, 8:524.

[74] Sarakhsī, *Al-Mabsūṭ*, 10:137. Shīrāzī says that the additional prohibitory rules of the code of rebellion are applicable to non-Muslims who support Muslim rebels. (Shīrāzī, 3:406-07)

applicable to all rebels through an international treaty.[75] Finally, as the Islamic law on rebellion is part of the divine law, Muslim rebels cannot deny the binding nature of this law and they cannot take the plea that the law has been laid down through treaties to which they are not party.

Islamic law acknowledges the necessary corollaries of the *de facto* authority of the rebels in the territory under their control. This is advantageous in so far as it provides further incentive to the rebels to comply with the law of war. This is an important issue and it will be discussed in detail in chapter nine.

CONCLUSIONS

The objective criterion of "*mana'ah* plus *ta'wīl*", or resistance capability coupled by a presumed justification for overthrowing the government, gives rebels the status of combatants and distinguishes them from bandits. Rebellion is primarily an issue of the law of war and that is why apart from the general power of the government to administer justice (*siyāsah*), the rigid part of criminal law – *ḥudūd*, *qiṣāṣ* and *ta'zīr* – as well as the law about compensation for damage to life and property (*damān*) are suspended during rebellion. In this way, Islamic law offers a significant incentive to rebels for complying with the law of war thereby reducing the sufferings of civilians and ordinary citizens during rebellion and civil wars. Simultaneously, however, Muslim jurists hold that *de facto* control of a territory by

[75] Islamic law allows the Muslim ruler to conclude treaties with non-Muslims for regulating the conduct of hostilities and for putting restrictions on the authority of the parties to the treaties. Sarakhsī, *Sharḥ Kitāb al-Siyar al-Kabīr*, 1:210-214.

rebels does not necessarily give as *de jure* recognition to the rule of the rebels over that territory thus answering the worries of those who fear that the grant of combatant status to rebels may give legitimacy to their struggle for overthrowing the government.

As for the implications of the *de facto* authority of rebels in IHL and Islamic law, they shall be discussed the in the next chapter.

CHAPTER NINE: RIGHTS AND OBLIGATIONS OF THE REBELS

INTRODUCTION

Recognition of the combatant status for rebels not only gives the rebels some privileges but also imposes on them certain obligations, particularly after they occupy a piece of land and establish their *de facto* authority as occupying power. The present chapter first examines the issue of providing support to rebels by Muslim or non-Muslim inhabitants of the Muslim territory and the implications of this support for the right of inheritance. Then, it analyzes in detail some significant aspects of the *de facto* authority of rebels in the land under their occupation after which it examines the question if acknowledging these consequences of the *de facto* authority of rebels accords them some kind of legitimacy.

9.1 PROVIDING SUPPORT TO REBELS

For the supporters of the government, the so-called 'people of justice', those who take up arms against the government are rebels and 'people of transgression' and as such they must not provide any kind of support to rebels.[1] Similarly, the non-Muslim inhabitants of the Muslim territory – the 'people of covenant' – are supposed to abide by the terms of their

[1] This is because Islamic law prohibits Muslims from supporting injustice and tyranny. "help one another in righteousness and piety, but do not help one another in sin and transgression." (Qur'ān, 5:2). The Prophet (peace be on him) once asked his Companions: "Support your brother whether he is an oppressor or an oppressed one." They asked about how to help an oppressor? He replied: "by preventing from oppressing others." *Bukhārī, Kitāb al-Maẓālim wa 'l-Ghaṣab, Bāb A'in Akhāka Ẓāliman aw Maẓlūman*, Hadith no. 2264. In one of the narrations, the wording is: "You prevent him from oppression; this is your support to him." *Tirmidhī, Kitāb al-Fitan, Bāb Mā Jā' fi al-Nahy 'an Sabb al-Riyāḥ*, Hadith no. 2181.

covenant and are thus not allowed to support the rebels.[2] But what are the rights and duties of the Muslim and non-Muslim supporters of the rebels who believe that their struggle is justified? What are the implications and legal consequences of their support to rebellion? What are the duties of the people of justice if a non-Muslim power attacks the people of transgression, or vice versa? Muslim jurists have analyzed these and related questions is quite detail. Some significant principles will be explained here.

9.1.1 Support to Rebels by the 'People of Justice'

'People of justice' must not give any kind of support to the 'people of transgression' because this contradicts their conviction about rebels being people of transgression. It is on this basis, as shown in chapter eight, that it is prohibited for people of justice to offer funeral prayer for the people of transgression.[3]

What if a person from among the people of justice joins the people of transgression and he leaves behind his family and property? Does his marriage contract remains intact and the lady remains his wife? If yes, he must be acknowledged the right to take his wife along. Shaybānī cites a precedent of 'Alī (God be pleased with him) to support this contention. Thus, when one of his supporters joined the rebels and later came to take his wife along, 'Alī (God be pleased with him) told him: "You are the one who has been supporting our

[2] However, if they do support the Muslim rebels, their covenant is not broken. See section 10.1.3 below.

[3] See Section 8.3.2 of this dissertation.

adversaries!" He asked: "Will this prevent you from doing justice to me?" He replied: "No."[4] The underlying principle for this rule is that the territories under the control of the two factions are deemed part of one 'domain' (*dār*) and, thus, the rule of breaking up of the marriage tie because of separation in two domains is not applicable on them.[5]

On the same principle it is held that the property of such person which he leaves behind in the territory of justice shall remain in his ownership. This is contrary to the one who permanently settles in the 'territory of war' (*dār al-ḥarb*) as his wife is released of the marriage tie and his property is distributed among his legal heirs because he is legally deemed dead. Sarakhsī explains this distinction in these words: "Legal death is established when both physical as well as legal separation in two different domains takes place. That is not found here because the territory of the people of transgression and that of the people of justice both form part of the domain of Islam."[6]

9.1.2 Implications for the Right of Inheritance

It is a well-known rule of Islamic law that the murderer does not inherit the one whom he murders.[7] Is the same rule applicable to the mutual killings of the people of justice and the people of transgression? The jurists hold that a person from among the people of justice should avoid killing his relatives from among the people of transgression. However, if he does

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[4] Sarakhsī, *al-Mabsūṭ*, 10:143.

[5] Ibid. For a discussion on the implications of this and similar rules about recognition and legitimacy of rebellion, see Section 10.3 below.

[6] Sarakhsī, *al-Mabsūṭ*, 10:143.

[7] Marghīnānī, 4:443.

so, he shall remain entitled to inherit him because this is not 'killing without legal justification' (*qatl bi-ghayr ḥaqq*).[8]

What if a rebel kills a relative from among the supporters of the government? As the rebels fight on the basis of an interpretation of law (*ta'wīl*) which presumably gives justification to their struggle, the rule of deprivation from inheritance is not applicable to them as well.[9] However, if the killer admits the error of his interpretation of law, he is deprived of inheriting the one whom he murdered.[10] Marghīnānī lucidly explains the underlying principle of this rule in the following words:

> This is because the law needs either enforcement [by others] (*ilzām*) or self-imposition (*iltizām*). The latter does not exist because of belief in permissibility due to [that particular] interpretation [of law]. The former also does not exist because of the lack of legal authority (*wilāyah*) due to the resistance capability [of the rebels] (*mana'ah*). This legal authority exists before [the rebels' getting] resistance capability, while self-imposition exists in the absence of the particular interpretation of law because of belief [in Islam].[11]

However, the people of justice will believe this rebel to be a sinner as "there is no resistance capability before the Lawgiver!"[12]

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[8] Sarakhsī, *al-Mabsūṭ*, 26:60-61.
[9] Marghīnānī, 2:413.
[10] Ibid.
[11] Ibid.
[12] Ibid.

9.1.3 Support to Rebels by the 'People of Covenant'

It was noted in chapter eight that the covenant of the resident non-Muslims is not breached by their providing support to Muslim rebels.[13] Shaybānī declares that they remain 'people of covenant' despite supporting, or participating in, rebellion in much the same way as the rebels remain Muslims despite rebellion:

> If the rebels seek support in their war from a group of the people of covenant and they fight in their support, this does not constitute violation of their covenant. Do you not see that this act of the rebels is not deemed negation of their faith (*īmān*)? In the same way, this act does not breach the peace treaty (*amān*) of the people of covenant.[14]

Sarakhsī explaining this principle asserts:

> This is because the rebels are Muslims, as Allah Most High calls the two warring factions with the title of believers when He Most High says: "When two factions of the believers fight." 'Alī (God be pleased with him) said: "They are our brothers who transgressed against us." Hence, those who sided with them from among the people of covenant do not negate their undertaking of abiding by the laws of Islam in matters other than rituals and they do not lose the status of being the people of the domain of Islam. Therefore, their covenant is not broken by this act and they are like the [Muslim] rebels in what they do during war because they fight under their command. Thus, their position is like that of the rebels in what they do.[15]

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[13] See section 8.3.3 f this dissertation.
[14] Sarakhsī, *al-Mabsūṭ*, 10:136.
[15] Ibid.

However, if the people of covenant alone rebel, without joining Muslim rebels, or when Muslims are not in a commanding position, the rule will be different, as noted in chapter eight.

9.1.4 Attack on Rebels by the 'People of War'

As a general rule, it is not allowed for the people of justice to support rebels in war. Hence, if during a war between the people of justice and rebels a person from among the people of justice is killed while he is on the side of the rebels, neither *qiṣāṣ* nor *diyah* will be imposed on the one who killed him, as is the case when a person is killed while he is on the side of non-Muslims, "because he wasted his life (*ahdara damahu*) when he joined the rebel forces."[16] However, when rebels are attacked by non-Muslim troops, every capable Muslim is under an obligation to support the rebels.[17] The basis for this obligation is that even after rebellion, the rebels are deemed Muslims, as noted above.[18] Shaybānī says that this obligation is imposed even on those people of justice who temporarily go to the rebel territory: "The same obligation is imposed on those the people of justice who happen to be in the territory of rebels when it was attacked by the enemy. They have no option but to fight for protecting the rights and honor of Muslims."[19] Sarakhsī in his usual authoritative style explains the principle behind this ruling in these words:

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[16] Sarakhsī, *al-Mabsūṭ*, 10:140.
[17] Ibid., 10: 107
[18] Ibid.
[19] Ibid.

> Because the rebels are Muslims. Hence, fighting in support of them gives respect and power to the religion of Islam. Moreover, by their fighting the attackers, they defend Muslims from their enemy. And defending Muslims from their enemy is obligatory on everyone who has the capacity to do so.[20]

This obligation is coupled by the prohibition of seeking support of non-Muslims, residents or aliens, against Muslims, as noted in chapter eight.[21] Hence, the mutual conflict of Muslims is deemed an "internal affair" of the Muslim community in which non-Muslims must not be allowed to interfere.

9.2 *De Facto* Authority of Rebels

If the rebels after acquiring resistance capability and having a presumed justification of their armed struggle occupy a piece of territory and establish their control there – the NIAC in which APII would be applicable – what are the legal consequences of their *de facto* authority in that territory? In the previous chapter, some of the basic principles of the contemporary law of armed conflict about belligerent occupation and their necessary implications have been discussed. This section will show how the Muslim jurists expounded various aspects of the *de facto* authority of rebels in the territory under their control.

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[20] Ibid.

[21] Shīrāzī, 3: 404; Muḥammad b. 'Arafah al-Dasūqī, *Ḥāshiyah 'alā al-Sharḥ al-Kabīr* (Cairo: 'Īsā al-Bābī, 1934), 4:299; Manṣūr b. Yūnus al-Buhūtī, *Kashshāf al-Qinā' 'an Matn al-Iqnā'* (Beirut: 'Ālam al-Kutub, 1983), 6:164.

9.2.1 Authority as Occupying Power or Usurpers (*Mutaghallibīn*)

Rebels by definition are people of transgression. That is to say, they are presumed to have committed transgression and as such they are not deemed *'adl* (trustworthy). Resultantly, it is assumed that their leader lacks one of the essential conditions for legitimate rule, namely, *'adālah* (trustworthiness). Still if he successfully establishes his authority on a piece of territory, the jurists concede for him the same *de facto* authority which they acknowledge for a usurper (*mutaghallib*). The principles of law relevant to the rule of a usurper have been analyzed in detail in chapters five and six.[22]

An important principle recognized therein is that if resistance to the authority of the usurper would cause more bloodshed and mischief, it is better not to rise up against him although the original rule of enjoining right and forbidding wrong remains operative and, thus, if a person rises up against the usurper (leader of the rebels in this case) and he is killed, he is deemed a martyr and not guilty of causing his own death or committing suicide.[23] The guiding principle in this regard is that one has to choose the lesser of the two evils: mischief that may be caused by rising up against the usurper or mischief which results from tolerating his rule.[24] In any case, obedience to a usurper is permitted only in lawful matters. None of his unlawful commands is to be obeyed even if it results in facing torture or death.[25]

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[22] See particularly Sections 5.2.5, 5.2.6 and 6.3.

[23] Sarakhsī, *Sharḥ Kitāb al-Siyar al-Kabīr*, 1:116.

[24] See section 6.1.4 of this dissertation.

[25] "It is obligatory on a Muslim to listen to his ruler and obey him in all that he likes or dislikes, except when he is commanded to commit a sin; so, when he is commanded to commit a sin, he must not listen and must not obey" *Muslim, Kitāb al-Imārah, Bāb Wujūb Ṭā'at al-Umarā' fi Ghayr Ma'ṣiyah wa Taḥrīmihā fi Ma'ṣiyah,*

Shaybānī while expounding the principles of law about the legal consequences of coercion (*ikrāh*) in *Kitāb al-Ikrāh* mentions some interesting rulings about the authority of the usurpers as well as rebels and their appointed officials.

The first principle in this regard is that if a person coerces another through 'perfect coercion' (*ikrāh tāmm*),[26] the latter is deemed a 'tool' (*ālah*) in the hands of the former and, thus, the act is ascribed to the former even if apparently it is committed by the latter;[27] on the other hand, if coercion was 'imperfect' (*nāqiṣ*), the act shall be ascribed to the one who actually commits it (*mubāshir*), not to the one who 'caused' it (*mutasabbib*).[28]

The second important principle is that coercion, like necessity (*ḍarūrah*), makes some of the prohibited acts permissible but it is not a free license; rather, some acts remain prohibited even in necessity and under coercion.[29]

The detailed rules about coercion and the authority of the usurper are based on the interplay of these two principles. Thus, for instance, if an official appointed by a usurper (an unjust ruler or a rebel leader) is asked to forcibly take property from someone, the original rule is that this is prohibited and this original rule remains operative even in necessity and coercion.[30] However, if the official is facing 'perfect coercion,' he shall be deemed a 'tool' in

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Hadith no. 3423; "No obedience to any creature in what amounts to disobedience to Allah Most High." *Musnad Aḥmad, Musnad al-'Asharah al-Mubashsharīn bi 'l-Jannah, Musnad 'Alī b. Abī Ṭālib*, Hadith no. 1041.

[26] Perfect coercion denotes threat to life or limb, while imperfect coercion does not reach that threshold. See for details: Kāsānī, 10:103.

[27] Ibid., 113.

[28] Ibid., 114.

[29] See for details: Ibid., 105-109.

[30] Sarakhsī, *al-Mabsūṭ*, 24:91.

the hands of the usurper and the "liability [for compensation] (*damān*) is on the one who issued the command (*al-āmir*)".[31]

Here, the jurists ascertain the parameters of 'perfect coercion' and hold that coercion shall be deemed effective only when it is 'compelling' (*mulji'*);[32] and it cannot be so unless the following three conditions are fulfilled:

- That the one facing coercion apprehends that the one coercing him shall enforce his threat;
- That the one facing coercion apprehends that the one coercing him has the capability to enforce his threat; and
- That the one facing coercion apprehends that the one coercing him shall forthwith enforce his threat if his command is not complied with.[33]

Sarakhsī – who himself was facing worst persecution at the hands of such officials of a usurper[34] – while elaborating these conditions gives some important principles of the liability of the supporters of usurpers:

> This case makes it clear that the supporters of the usurpers (*a'wān al-ẓalamah*) have no excuse in snatching the property of the people. A usurper sends his official to snatch property from people. The official executes his command as he fears punishment from the usurper if he does not comply with his order. This is no excuse for him, except when the usurper is personally present there. When he is far away from the usurper,

[31] Ibid.
[32] Ibid., 48.
[33] Ibid.
[34] Sarakhsī was imprisoned in a pit for fourteen years for issuing a fatwa denouncing a decision of the governor.

> this is no excuse. However, when a delegate of the usurper is with him who will take him to the usurper if he does not comply with his order, this is like the one who is personally supervised by the usurper because the one under the control of the delegate is similar to the one who is under the control of the usurper personally.[35]

Another important rule in this regard is that such an official who is facing perfect coercion is still under an obligation to have the intention of returning the property to the real owner if and when he would be capable of so doing because the usurper does not possess knowledge about his intentions.[36] In other words, one has to keep it in mind that this is a prohibited act, sin and crime.

These rules are relevant for those who deem these rebels as people of transgressions and their leader as a usurper. As for the people who accept the validity of their interpretation of law and consider the ruler unjust, they have no option but to obey their leader except when he gives a manifestly unlawful command. This has already been explained in chapters five and six in detail.

9.2.2 Decisions of the Courts of Rebels

The jurists discussed various aspects of the authority of the courts in the 'territory of transgression.' Here, three significant points of this debate will be examined.

First, is it allowed for a person qualified to be a judge to accept appointment on the post of a judge under the authority of the rebels when this person himself denies the

[35] Sarakhsī, *al-Mabsūt*, 24:91.
[36] Ibid., 92.

legitimacy of the authority of the rebels? The answer provided by the jurists is that such a person should accept this post and decide the cases in accordance with the provisions of Islamic law even if he does not accept the legitimacy of the appointing authority. Shaybānī says:

> If rebels take control of a city and, from among the people of that city, appoint as a judge someone who does not support them, he shall enforce *ḥudūd* and *qiṣāṣ* and shall settle the disputes between people in accordance with the norms of justice. He has no other option but to do so.[37]

The underlying principle of this rule has been explained in detail in chapter six. In this regard, the jurists generally cite the precedent of the famous Qādī Shurayḥ who accepted appointment as a judge not only from Caliph 'Umar b. al-Khaṭṭāb (God be pleased with him), but also acted as a judge in Kūfah during the tyrannical rule of the Umayyad Caliph 'Abd al-Malik b. Marwān and the governorship of al-Ḥajjāj b. Yūsuf.[38]

Another precedent quoted by the jurists is that 'Umar b. 'Abd al-'Azīz (God have mercy on him), the famous Umayyad Caliph who tried to restore the system of the 'rightly-guided caliphs' (*al-khulafā' al-rāshidīn*), did not reappoint the judges who had been appointed by the preceding Umayyad Caliphs who were considered to be tyrants.[39] It was explained in chapter six that this rule of the Ḥanafī law does not legitimize the rule of the 'transgressor'

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[37] Ibid., 10:138. Ibn Qudāmah, the Ḥanbalī jurist, says: "When rebels appoint a judge who is qualified for the post, his legal position is similar to the judge of the central government." (*Al-Mughnī*, 8: 119).

[38] Jaṣṣās, 1:99.

[39] Sarakhsī, *al-Mabsūṭ*, 10:138

and it does not nullify the condition of *'adālah* (trustworthiness) for the ruler. Rather, the two issues are dealt with separately by the Ḥanafī jurists. In other words, they distinguish between the *de facto* and *de jure* authority. This will be further elaborated in Section 9.3 below.

The second issue is the validity of the decisions of the courts of rebels in the territory of transgression. The jurists have laid down the fundamental principle that if a judge of the territory of transgression sends his decision to a judge of the territory of justice, it will not be accepted by the latter.[40] Sarakhsī mentions two reasons for this rule:

1. That for the courts of the territory of justice, rebels are sinners (*fussāq*) and the testimony and decisions of those who commit major sins are unacceptable. In other words, the courts of territory of transgression have no legal authority to bind the courts of the territory of justice.
2. That the rebels do not accept the sanctity of the life and property of the people of the territory of justice. Hence, there is a possibility that the court of territory of transgression may have decided the case on an invalid basis.[41]

However, if the judge of the territory of justice after reviewing the decision of the judge of the territory of transgression concludes that the case was decided on valid legal grounds, such

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[40] Ibid., 10:142, The Shāfi'ī jurists hold that it is better for the judge of *ahl al-'adl* not to accept the decision of the judge of *ahl al-badgy*. However, if he accepts it and decides accordingly, the decision will be enforced. (Shīrāzī, 3:407). The Ḥanbalī jurists also have the same position (Ibn Qudāmah, 8:120).

[41] Shīrāzī says that the decisions of the judge of the rebels will not be enforced only if he does not believe in the sanctity of the life and property of *ahl al-'adl*. (Shīrāzī, 3:407).

as when he knows that the witnesses were not rebels, he would enforce this decision.[42] If it is unknown whether the witnesses were rebels or not, the court of the territory of justice would still not enforce this decision "because for the one who lives under the authority of the rebels, the presumption is that he is also among them. Hence, the judge [of the territory of justice] will act on this presumption unless the contrary is proved."[43] The net conclusion is that decisions of the courts of the territory of transgression will not be enforced by the courts of the territory of justice unless, after a thorough review of the decision, the latter concludes that it is a valid decision.

The third issue covers the legal status of the decisions of the courts of the territory of transgression after the people of justice recapture that territory. Shaybānī says:

> Rebels take control of a city and appoint a judge there who settles many disputes. Later on, when the central government recaptures that city and the decisions of that judge are challenged before a judge of the people of justice, he will enforce only those decisions which are valid.[44]

[42] Sarakhsī, *al-Mabsūṭ*, 10:138.

[43] Ibid.

[44] Ibid., 10:142. The Shāfi'ī jurists are of the opinion that decision of the rebel courts shall not be overturned even after the territory recaptured by the central government because such decisions are presumed to be based on *ijtihād*. (Shīrāzī, 3:407).

It is worth noting that this rule is applicable only when someone brings the decision of the rebel courts for review by the court of the people of justice. Hence, generally the decisions of the courts of territory of transgression are not reopened.[45]

Now if such decisions are valid according to one school of Islamic law and invalid for another school, such decisions will be deemed valid even if the judge of the people of justice belongs to the school which considers it invalid, "because the decision of a judge in contentious cases [where the jurists disagree] is enforced."[46] It means that only those decisions of the courts of territory of transgression will be invalidated which are against the consensus opinion of the jurists.

It may be noted here that this rule is applicable where the judge is a *mujtahid* (a jurist who has a full-fledged legal theory of his own); a *muqallid* judge who follows the legal theory of a *mujtahid* has to decide in accordance with the principles of that *mujtahid*.[47]

9.2.3 Collection of Revenue by Rebels

If rebels collect revenue, that is to say *kharāj*[48], *zakāh*[49], *'ushr*[50] and *khumus*[51], from people living in the territory under their control, the people of justice cannot collect that revenue again

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[45] In English Jurisprudence, this is known as the doctrine of "past and closed transactions". There is an interesting example of this doctrine in the Pakistani judicial history when some judges of the Supreme Court "rebelled" against the then chief justice Sajjad Ali Shah and finally it was concluded that after the so-called *Judges Case* (*Al-Jehad Trust v Federation of Pakistan* PLD 1996 SC 324), Justice Shah was not qualified to continue as chief justice because he was not the most senior judge of the Supreme Court. However, the cases decided by Justice Shah as "*de facto* Chief Justice" were not reopened on the bases of the doctrine of past and closed transactions. (*Malik Asad Ali v Federation of Pakistan*, 1998 SCMR 15; See also: Hamid Khan, *Constitutional and Political History of Pakistan* (Karachi: Oxford University Press, 2001), 274-75).

[46] Sarakhsī, *al-Mabsūṭ*, 10:142. See also: Ibn Qudāmah, 8:120.

[47] See for a discussion on this issue: Kāsānī, 9:104-109. See also: Imran Ahsan Khan Nyazee, *The Unprecedented Analytical Arrangement of Islamic Laws* (Islamabad: Federal Law House, 2010), 35-36.

even if they later regain control of that territory.[52] The reason mentioned in the famous Ḥanafī text *al-Hidāyah* is that "because the rulers can collect revenue only when he provides security to his subjects and [in this case] he failed to provide them security."[53] Here, an important issue is discussed by the jurists. From the perspective of Islamic law, *zakāh* and *'ushr* are not only categories of revenue, but are also acts of worship (*'ibādah*).[54] That is why a question arises as to whether those who paid *zakāh* and *'ushr* to rebels would be *liable before God* to pay it again to the legitimate authority (the people of justice). The answer is that they would be liable before God only if the rebels do not spend this revenue in the heads prescribed by the law.[55]

9.2.4 Peace Treaty of Rebels with a Foreign Power

Peace treaty in Islamic law is deemed a category of the larger doctrine of *amān* (quarter).[56] One of the fundamental principles of *amān* is that every Muslims has the authority to grant

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[48] *Kharāj* is the term used for the tribute paid by non-Muslims to the Muslim government through a peace settlement (Qal'aji, 194). This includes *jizyah* (Ibid., 164).

[49] *Zakāh* is the revenue collected from the savings of rich Muslims at the rate of 2.5% per annum. It is also deemed an act of *'ibādah* (ritual worship). (Ibid., 233).

[50] *'Ushr* is 10% tax levied on the crops of Muslims in un-irrigated land. If the crops are in an irrigated land, the rate is 5%, and in that case it is called *nisf al-'ushr* (half of 10%). (Ibid., 312).

[51] *Khumus* is the 20% revenue levied on minerals (*ma'ādin*) and buried treasures (*kunūz*). (Ibid., 201)

[52] Marghīnānī, 2: 412. The Shāfi'ī jurists have a different approach. They say that *zakāh* will not be recollected, while *jizyah* will be recollected and for *kharāj* there are two opinions. (Shīrāzī, 3:407). The same is the position of the Ḥanbalī jurists. (Ibn Qudamah, 8:118-119).

[53] Marghīnānī, 2:412.

[54] Sarakhsī mentions eight different categories of the right of God (*ḥaqq Allāh*) and explains that *zakāh* falls in the category of pure worship (*'ibadah mahdah*), while *'ushr* is primarily a financial liability which also carries an element of worship (*ma'unah fihā ma'nā al-'ibādah*). Sarakhsī, *Uṣūl*, 2:289-90.

[55] Marghīnānī, 2:412.

[56] Kāsānī divides *amān* into two basic categories: *amān mu'abbad* (also called *dhimmah*) and *amān mu'aqqat* (Kāsānī, 9:411) The former is a treaty of perpetual peace whereby the non-Muslim party agrees to pay

amān to an individual or even a group of non-Muslims, provided that the one who grants *amān* forms part of a strong group that possesses resistance capability.[57] This *amān* granted by an individual Muslim binds all Muslims.[58] Hence, all Muslims are duty bound to protect the life and liberty of the one to whom an individual Muslim or a group of Muslims granted *amān*.[59]

On the basis of these principles, the jurists explicitly stated that if rebels conclude a peace treaty with some non-Muslims, it will not be allowed for the people of justice to fight those non-Muslims in violation of that peace treaty.[60] However, if the peace treaty is concluded on the condition that the non-Muslim party will support the rebels in their war against the people of justice, this treaty will not be deemed a valid *amān* and the non-Muslims will not be considered *musta'mīn* (those who sought quarter from Muslims). Sarakhsī explains this in the following words:

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jizyah to Muslims and gets entitled to the right of permanent residence in the Domain of Islam and Muslims guarantee them the protection of life and liberty. The latter is further divided into *amān ma'rūf* (ordinary *amān*), which is accorded to those who want to enter the Domain of Islam temporarily, and *muwāda'ah* (peace treaty), which is concluded with a foreign group of non-Muslims who are willing to establish peaceful relationship. *Muwāda'ah* may either be for a specific time period (*mu'aqqatah*) or it may be without a specific time period (*muṭlaqah*). (Ibid., 424).

[57] That is why a Muslim prisoner in the custody of the enemy or a Muslim trader in foreign land cannot grant *amān*. (Sarakhsī, *Sharḥ Kitāb al-Siyar al-Kabīr*, 1:213)

[58] Ibid., 201.

[59] However, a Muslim ruler has the authority to prohibit his subjects from granting *amān* in a particular situation and if someone grants *amān* after this prohibition, it will have no validity. (Ibid., 227). Moreover, a Muslim ruler has also the authority to terminate the *amān* granted by one or more of his subjects, but he cannot take any action against those to whom *amān* was granted unless he gives them a notice of the termination of *amān* and provides them with an opportunity to reach a place where they deem themselves safe (*ma'man*). (Ibid., 2:229).

[60] Sarakhsī, *al-Mabsūṭ*, 10:141. Not only that, the jurists also assert that even if the rebels seize the property of these *ahl al-muwāda'ah* in violation of the peace treaty, the central government should not buy this property from them. Rather, it would advise the rebels to return the property to the rightful owner. If the rebels surrender, or the government overpowers them, the government will be bound to return the property to the rightful owner. (Ibid.)

> Because *musta'min* is the one who enters the Domain of Islam after pledging not to fight Muslims, while these people enter the Domain of Islam for the very purpose of fighting those Muslims who support the people of justice. Hence, we know that they are not *musta'minīn*. Furthermore, when *musta'minīn* [after entering the Domain of Islam] organize their group in order to fight Muslims and take action against them (Muslims), this is considered a breach of *amān* on their part. Therefore, this intension [to fight Muslims] must invalidate the *amān* from the beginning.[61]

In this passage, it is important to note that Sarakhsī considers the territory of rebels as part of the Domain of Islam and builds his arguments on this presumption. In other words, although rebels have established their *de facto* authority over this territory, yet in the contemplation of law this is deemed part of the Domain of Islam. This issue is examined in detail in the next section.

9.3 The Question of Legitimacy

Does all this imply legitimacy to the struggle of the rebels for overthrowing the government? If yes, will it not lead to anarchy and disorder? These and related questions bothered Muslim jurists in much the same way as they trouble scholars of the law of armed conflict in the contemporary world. The present section examines various aspects of this issue and presents the approach adopted by the Ḥanafī jurists to deal with it.

[61] Ibid., 10:143. The same is the opinion of the Shāfi'ī and Ḥanbalī jurists Shīrāzī (3:406) and Ibn Qudāmah (8:121), respectively, give the same argument.

9.3.1 An Issue of *Jus ad Bellum*, Not of *Jus in Bello*

In chapter four of this dissertation, the distinction between *jus ad bellum* and *jus in bello* has been explained. Recognizing or denying combatant status is an issue of *jus in bello* which does not affect the issue of legality or illegality of war. Thus, the contemporary law of armed conflict gives combatant status to all the forces of the parties to the conflict even if one party is committing aggression, which is illegal, and the other is fighting in self-defense which is legal.[62] The same approach is adopted by the Muslim jurists.

Hence, they acknowledge combatant status for rebels when their resistance capability is coupled with an interpretation of law which presumably justifies their struggle even if "in actual reality" that may not justify it.[63] Rather, even when the jurists assert that the interpretation of the rebels is erroneous, they acknowledge combatant status for them, provided their erroneous interpretation is coupled by resistance capability. Sarakhsī may be quoted here again:

> After they attained resistance capability, it became practically impossible to enforce the writ of the government on them. Hence, their interpretation – though erroneous – would be effective in suspending the rule of compensation from them, like the

[62] Ibid., 10:143. For the views of the Shāfi'ī and Ḥanbalī jurists see: Shīrāzī, 3:406 and Ibn Qudāmah, 8:121.

[63] Sarakhsī, *al-Mabsūṭ*, 10:136.

interpretation of the people of war [non-Muslim combatants] after they embrace Islam.[64]

It was also noted above that this rule has been established by the consensus of the Companions of the Prophet (peace be on him).[65] Furthermore, as explained in chapter one, primary source for the Islamic law on rebellion is the conduct of 'Alī (God be pleased with him) who recognized combatant status of those who rebelled against him, although the interpretation of those rebels was undoubtedly erroneous. The conclusion is that acknowledging combatant status for the rebels does not give legitimacy to the struggle of the rebels against the government.

9.3.2 Distinction between *De Facto* and *De Jure* Recognition

In the contemporary international legal regime, when a party gives *de facto* recognition to another party, it implies that the former is acknowledging as a matter of fact the exercise by the latter of effective control over a certain territory. This does not necessarily mean that this control is legal. *De facto* recognition is usually done where doubts remain as to the long-term viability of the government. As opposed to this, *de jure* recognition implies accepting the legitimacy of the authority of that government on the territory under its effective control.[66]

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[64] Ibid.
[65] Ibid.
[66] See for details: Shaw, 382-88.

Interestingly, Muslim jurists maintain similar distinction between the effective control over a territory by the rebels and the legitimacy of their struggle. Thus, they deem territory of transgression (territory under the control of rebels) part of the Domain of Islam (territory under the control of Muslims/parent state) even after the rebels establish their *de facto* control over that territory. Thus, it is a well-known rule of the Ḥanafī law that if a person seizes the property of another person in one territory and takes it to another territory, he becomes the owner of that property.[67] However, if a person takes such property from the territory of justice to the territory of transgression, or vice versa, he does not become the owner thereof "because the territory of the people of justice and that of the people of transgression is one".[68] This shows that although the jurists acknowledge the necessary corollaries of the *de facto* authority of the rebels in the territory of transgression, yet they do not give *de jure* recognition to this authority.

This is further substantiated by another rule about the concept of *amān* (quarter/safe passage). As elaborated in detail in chapter five, Muslim jurists deemed it obligatory to have one caliph for the whole of the Muslim world but they recognized multiplicity of rulers

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[67] Sarakhsī, *al-Mabsūṭ*, 10:62. Sarakhsī explains the principle in the following words: "Forcibly taking possession [of property] is illegal only when it relates to a legally protected property (*māl ma'ṣūm*) and the basis for *'iṣmah* (legal protection) is *iḥrāz* (safe custody) the basis for which is *dār* and not *dīn*. This is because of the fact that *iḥrāz* by virtue of *dīn* only occurs where one believes that one should abide by the *Sharī'ah* and that its violation is a sin. Obviously, this does not apply to non-believers. For them, *iḥrāz* takes place only when the property is brought to *dār al-Islām* because it [that is, *dār al-Islām*] physically defends [its residents] from external attacks. So when the property is protected because of *iḥrāz* in *dār al-Islām* it cannot be owned by virtue of mere possession. However, when this protection is removed because of the absence of *iḥrāz* in *dār al-Ḥarb*, he who possesses it becomes its owner." For a detailed discussion the principle of "territorial jurisdiction" as expounded by the Ḥanafī jurists, see: Ahmad, "The Notions of *Dār al-ḥarb* and *Dār al-Islam*," 5-23. For discussion on the principles of jurisdiction in the contemporary international legal regime, see: Shaw, 452-90.

[68] Sarakhsī, *al-Mabsūṭ*, 10:135.

controlling various part of the Muslim territory on the basis of necessity.[69] Still they never deemed it necessary for Muslims of one territory to seek *amān* while entering another territory of Muslim,[70] except – of course – when the two territories were at war with each other.[71]

CONCLUSIONS

Muslim jurists developed a detailed and comprehensive code of conduct of hostilities for regulating situations of civil wars and rebellions and this code can help a great deal in filling gaps found in the contemporary international legal regime regarding non-international armed conflicts. A significant aspect of this code is that although it recognizes necessary implications of the *de facto* authority of rebels it does so without passing judgment about the legitimacy of

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[69] See particularly Section 5.2.3 of this dissertation.

[70] For instance, Muslims of India were not required to seek *amān* before entering Turkey although these territories were ruled by different rulers. The status of an Indian Muslim in Hijaz was not that of a *musta'min*.

[71] Thus, the jurists talk about *muwada'ah* or peace treaty between the people of justice and the people of transgression (Sarakhsī, *al-Mabsūṭ*, 10:135). They, however, explicitly hold that no money can be taken in consideration of such a treaty because it amounts to taking *Kharāj* from Muslims which can be taken only from non-Muslims (Ibid., 135-136). Hence, it is a well-established rule of Islamic law that a Muslim cannot be deemed *musta'min* in Muslim territory. One may compare this rule with the *Law of Return* in Israel. The Israeli parliament enacted this law in 1950. It lays down the fundamental principle that every Jew has a right to settle in Israel, although the Minister of Interior can refuse any such application on the basis of some stated grounds. In 1962, the Israeli Supreme Court decided an interesting case about the identification of a 'Jew.' Brother Daniel was a Jew by birth but during the Nazi persecution he was hidden in a Catholic convent where he was baptized and became a monk. In 1958, he was sent to a monastery in Haifa. He applied for Israeli citizenship on the basis of being a Jew. The Court declared that under the religious law of Judaism even an apostate does not cease to be a Jew. However, the Law of Return, in the opinion of the Court, was a secular law and it had to be interpreted in accordance with the intention of the Legislature. Hence, Brother Daniel could not get citizenship under the Law of Return. He became a naturalized citizen. In 1970, the law was amended and a partial definition of "Jew" was incorporated in it as one who was born of a Jewish mother and had not adopted another faith. John Comay, *Who's Who in Jewish History* (New York: Routledge, 1995), 90–91. It is, therefore, very strange that some of the contemporary scholars try to assert on the basis of 'necessity' that a Muslim can be deemed *musta'min* in a Muslim territory. See Wahbah al-Zuḥaylī, *Āthār al-Ḥarb fi al-Fiqh al-Islāmī* (Cairo: Dār al-Fikr, 1981), 283-84.

their struggle against the government and thus it answers the worries of those who fear that it may lead to anarchy and disruption of the world order. It is high time for Muslim scholars and intelligentsia to make a case for developing the contemporary international legal regime in line with the principles of Islamic law.

CONCLUSIONS AND RECOMMENDATIONS

From Islamic perspective, rebellion involves issues of creed, law and politics. The right to rule the Muslim community is not just a constitutional issue but also it stems in the worldview based on the faith of the Muslim community. That is why issues regarding the establishment of a political order, qualification of the ruler, grounds for his removal, legality of taking up arms against him and the like are discussed in manuals of creed or 'greater law'. Manuals of 'law-proper' only briefly discuss the issue of legality and instead focus on the consequences of *de facto* authority and the actual conduct of hostilities during internal strife and wars within Muslim community. In their expositions of the Islamic political system, however, Orientalists generally ignored the manuals of 'greater law' and 'law-proper' and focused on works like *al-Aḥkām al-Sulṭāniyyah* written by later jurists to explain the actual working of the system. This resulted in creating several confusions and misgivings about Islamic political system in general and the law on rebellion and resistance to tyrants in particular.

Several verses of the Qur'ān and traditions of the Prophet (peace be on him) prohibit mischief and disorder and make it obligatory on Muslims to enjoin good and forbid evil. These verses are used both by government forces and rebels to justify their position. Thus, each side claims to be upholding righteousness and justice and alleges that the other side is committing mischief which must be curbed by the use of force. This led the Muslim jurists, on the one hand, to find out legal consequences of the *de facto* authority of the ruler irrespective whether he is qualified to rule or not and, on the other, to chalk out the rules and

principles of Islamic law applicable on conflicts within Muslim community irrespective of who among the warring factions is on the right side.

As Muslim history records several events of rebellion and civil wars in the very early stage and the Companions of the Prophet differently conducted themselves during these conflicts, the Muslim heritage shows a rich variety of approaches towards the issue of resistance and revolt against an unjust ruler. This renders the monolithic approach of Orientalists untenable as they preached that Muslim jurists generally adopted the approach of passive obedience to usurpers. On the contrary, various modes of behavior – such as obedience to authority, passive non-compliance with the unlawful commands of the rulers, pacific efforts to bring positive change in the system and forceful removal of the unjust ruler or replacing the unjust system – are found within Muslim heritage at any given time and place.

As issues of the *jus ad bellum* of rebellion are generally discussed in the manuals of creed, Western scholars and many modern Muslim scholars generally overlooked them. Moreover, when some of them focused on manuals of law proper where the *jus in bello* of rebellion is elaborated, they pick and choose between the views of the jurists belonging to various schools presuming that jurists of various schools followed a common legal theory. The present dissertation, on the other hand, primarily relies on the expositions of the Ḥanafī School as it presumes that every school of law represented a distinct and internally coherent legal theory.

Before analyzing the *jus ad bellum* of rebellion in Islamic law, the dissertation examined this issue from the perspective of the contemporary international legal regime. For this purpose, it overviewed the origins and development of this regime and identified some basic features of the nation-state system, such as sovereign equality of states, legal personality for states, prohibition of interference in the internal affairs of states and threat to peace as a ground for interference by the international community. The *jus ad bellum* of rebellion in the contemporary international legal regime is based on interplay between these notions. Thus, international law does not concern itself with the legality of rebellion or civil war unless it poses a threat to international peace. Rebellion also becomes a concern of international law when it converts into struggle for the right to self-determination – or liberation struggle. The discourse on the right to self-determination in international law revolves around two main themes: the right of the people to live their life the way they want (emphasized by the third world countries); and the need to maintain order in the international community (advocated by the Western nations). The UN resolutions on this issue try to reach a compromise by prohibiting the use of force against those who struggle for their right to self-determination and simultaneously prohibiting support to secessionist movements in other states. Some states have been claiming the right of humanitarian intervention where a government commits atrocities against its own people but the legality of such intervention remains contentious. In any case, when a seceding group practically fulfills the ingredients of statehood and some of the states give recognition to it, the original prohibition of rebellion gives way to

permissibility and the new entity is allowed entry into the comity of nations as a full-fledged member. The example of the former units of the federal state of Yugoslavia proves this.

The Islamic discourse in the manuals of theology and creed on the legality of taking up arms against the ruler revolves around the concepts of prohibition of mischief and disorder and obligation of commanding good and forbidding evil. Abū Ḥanīfah, the founder of the Ḥanafī School, holds that an unjust person or the one who commits major sins is not entitled to rule the Muslim community. However, as the attempt to forcibly remove such a ruler may lead to bloodshed and disorder, Abū Ḥanīfah did not allow such an attempt unless it could be proved that it was the lesser of the two evils. Moreover, Abū Ḥanīfah was of the view that all the lawful commands of such an unjust ruler must be obeyed till he remained in power. Thus, although Abū Ḥanīfah denied legitimacy to an unjust ruler, he accepted the consequences of *de facto* authority for such a ruler under the doctrine of necessity.

The manuals of law-proper in the Ḥanafī School show that the Ḥanafī School officially accepted the foundations of the position of Abū Ḥanīfah in recognizing the limited right the community to remove an unjust ruler. The right stems from the concept of commanding good and forbidding evil which, according to the Ḥanafī law, is a universal obligation. However, like other obligations, it also has some prerequisites as well as legal obstacles which must be observed in order to avoid greater mischief.

As for the *jus in bello* of rebellion in the contemporary law of armed conflict, it is still in its rudimentary form because the bulk of this law is based on the perspective of states. That is the reason why it denies the combatant status to rebels who take up arms against a state.

The works of the Ḥanafī jurists on rebellion, on the other hand, is much more developed and refined and it can provide immense help in developing the contemporary legal regime. Thus, the issue of distinction between the scope of operation of criminal law and the law of war is resolved by the Ḥanafī jurists by using the objective criterion of "*mana'ah* plus *ta'wīl*", or resistance capability coupled by a presumed justification for overthrowing the government. From the perspective of the Ḥanafī law, rebellion is primarily governed by the law of war and that is why the law about *ḥudūd*, *qiṣāṣ*, *ta'zīr* and the law of damages (*damān*) are not applicable during rebellion. This becomes a significant incentive for rebels to comply with the law of war. This, however, does not mean acknowledging legitimacy of the struggle of the rebels because, like the contemporary IHL, Islamic law gives the rules of conduct of hostilities irrespective of the *jus ad bellum* considerations. Muslim jurists also analyzed in great details the necessary implications of the *de facto* authority of rebels in the territory under their effective control. These include, *inter alia*, collection of revenue by rebels, decisions of the rebel courts, conclusion of treaties with foreign powers by rebels. This work of the jurists can greatly help in developing a detailed law of NIAC in the contemporary world.

It is high time for Muslim scholars and intelligentsia to make this work of the jurists knows to the world so that contemporary international legal regime about NIAC is improved in accordance with the principles of Islamic law.

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