INTERNATIONAL ISLAMIC UNIVERSITY ISLAMABAD

FACULTY OF SHARIAH AND LAW

Use of Force for the Right of Self-determination in International Law and Sharī'ah: A Comparative Study

Supervised by:

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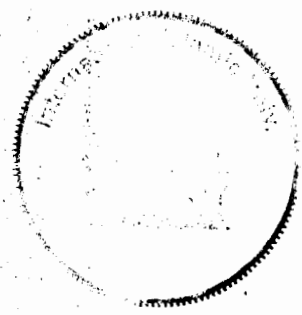

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It is certified that we have read the dissertation submitted by Muhammad Mushtaq Ahmad entitled *Use of Force for the Right of Self-determination in International Law and Sharī'ah (A Comparative Study)* as a partial fulfillment for the award of degree of LL.M. (Sharī'ah). We have evaluated the dissertation and found it up to the requirement in its scope and quality for the award of the degree.

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Dedicated to My Late Mother

"Our Lord! And make them enter the Gardens of Eden, which Thou hast promised them, with such of their fathers and mates and descendants as do right. Lo! Thou, only Thou, art the Mighty, the Wise."

(Qur'ān 40:8)

ABSTRACT

International community recognizes self-determination as one of the *inalienable* rights of all human beings, as demonstrated candidly by the UN Charter and several of the General Assembly and Security Council resolutions as well as international conventions. Despite this, there exists a lot of controversy about the legitimacy of armed liberation struggle and of support thereto. Generally, the developed states term these as terrorism while developing states try to exclude them from the scope of terrorism. Hence, we lack a consensus definition of terrorism. This issue is significant for Muslims because it directly relates to the doctrine of Jihād. Moreover, several Muslim territories got independence because of armed liberation struggle and others are still striving for it. The OIC has persistently declared that liberation struggle cannot be termed terrorism.

The doctrine of Jihād as expounded by the fuqaha' envisages a just world order based on respect for human rights and human values. Armed liberation struggle is also covered by the doctrine of Jihād. Islam has given the status of martyrdom to the one, who dies while defending his life, honor or property. It also makes it obligatory upon Muslims to give moral, diplomatic as well as military support to those, who are target of persecution and tyranny. On the other hand, it lays great emphasis on fulfilling treaty obligations even at the cost of material loss. It regulates the laws of war – both the *jus ad bellum* and the *jus in bello* – in a manner that makes Jihād clearly distinct from terrorism.

There is no necessary and direct relationship between terrorism and armed liberation struggle. It is the violation of certain rules of the *jus ad bellum* or the *jus in bello* that converts liberation struggle into terrorism. Terrorism is not as elusive as it apparently seems. It can be easily defined if the preconceived notions and biases are set aside. This is evident from the fact that there exists a kind of implied consensus in the international community about the *ingredients* of terrorism even if we lack a consensus *definition*.

CONTENTS

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Most of all, I am deeply indebted to my supervisors, Professor Imran Ahsan Khan Nyazee and Professor Dr. Muhammad Tahir Mansoori, for generously providing all possible support, advice and guidance. Professor Nyazee's inspiring discussions greatly influenced the shape and contents of this work. Dr. Mansoori's long experience in research had been an invaluable asset.

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My late mother could not see her dream coming true in the form of this dissertation. I can never claim to have fulfilled the duties I owe her. However, what I can present to her soul as a humble gift is this dissertation. I dedicate it to her.

INTRODUCTION

The doctrine of Jihād has always been the target of the critics of Islam. Even in the early days of Islam, when the non-believers were defeated in several battles, they severely criticized the holy Prophet (May Allāh's blessings be upon him) for his being indulged in such "worldly affairs". Similarly, during colonial period the critics of Islam tried to show that Islam is a "militant" religion, which believes in coercive means for converting non-believers to Islam. During the Cold War period the attitude of the West got changed. Jihād was thought to be the best means for coping with the threat of communism. But after the disintegration of the USSR the whole scenario got changed. Now, Jihād was deemed a threat to the "values of freedom, democracy and civilization" upheld by the West. Equating Jihād with terrorism is not a new phenomenon but after the 9/11 attacks on the World Trade Center and Pentagon this issue has got prime importance for both the Western and Islamic intelligentsia. There are several confusions regarding both these terms and the recent debates have further complicated the problem.

There is a lack of consensus among modern Muslim scholars about the nature and purpose of Jihād. Some consider it a tool for the propagation of Islam and supremacy of Muslims over the whole of the world. This gives an aggressive interpretation of the doctrine of Jihād. Others are of the opinion that Jihād is for the purpose of "defense" only. But the nature and scope of the right of self-defense remains obscure and debatable. Even the earlier jurists differed about the cause of war – *'illat al-qitāl*. Some considered disbelief – *kufr* – and the others aggression – *muḥārabah* – as the cause of war. This in turn led to disagreement over the basis of relations between a Muslim and non-Muslim state. There is also controversy over the legitimacy of treaties of perpetual peace, other than the contract of *dhimmah*, with non-Muslims. Similarly, permanent residence in a non-Muslim territory is also a contentious issue. This in turn necessitates critical analysis of the concept of *dār al-Islām* and *dār al-ḥarb*. Then, despite the general agreement over the rules for

the conduct of war there are some issues, such as treatment of the Prisoners of War, which need careful analysis.

Unless these issues are settled the legitimacy of armed liberation struggle will remain controversial. Distinction between Jihād and terrorism also depends upon answers to these questions. Moreover, one has to have a clear concept about what constitutes terrorism.

It is aptly remarked that terrorism is not easily defined. While this may be true but one can grasp the essential ingredients of terrorism. For this purpose, the various definitions of terrorism in national laws of different states – such as the UK, USA, Israel, India and Pakistan – may be analyzed. Similarly, efforts to define terrorism on international level are of great help. Definitions given by different scholars of various nationalities and origins may also be considered as secondary sources.

After this the legitimacy of armed liberation struggle can be judged. There is almost a consensus that states do not have the right to use force against people striving peacefully for self-determination. But it remains to be ascertained that whether or not these people have the 'right' to take up arms and use force for vindication of their right if they are forcefully deprived and "to seek and receive support".

The developed states are unwilling to acknowledge the legitimacy of armed liberation struggle, which is insisted upon by the developing states. The General Assembly resolutions (such as the Declaration of the Principles of International Law 1970, Measures to Prevent International Terrorism 1972, the Consensus Definition of Aggression 1974, Resolution against State Terrorism 1984) are a kind of compromise between these two different, rather conflicting, views. Thus, these resolutions emphasize the principle of non-interference. They also condemn instigating seditionist movements in other states. But because of the presence of a great majority of developing states in the Assembly these resolutions also explicitly legitimize liberation struggles and support thereto. They also prohibit the use of force by states against people striving for self-determination. These resolutions are evidence of customary international law and, therefore, the prohibition is

established in customary law as well. It means that this prohibition binds even those States who voted against these resolutions because customary law binds all States.

The foremost objective of the study is to define both "Jihād " and "Terrorism" in clear terms so as to judge the legitimacy of armed liberation struggle in the light of the norms of *Sharī'ah* as well as International Law. The study will greatly help in formulating a viable and sound strategy for pursuing our foreign policy goals one of which is support of the oppressed people. Only after having clear concept about Jihād and terrorism as well as legitimacy of armed liberation struggle will we be able to formulate detailed policy for achieving our objectives in foreign policy. This will also help in improving our relations with our neighbor states and international community in general. Moreover, we will be able to present our case before the world community in a more scientific and logical manner.

The study has been divided into two parts: *Liberation Struggle in International Law* and *Liberation Struggle in Sharī'ah*. Each part consists of three chapters.

Chapter I discusses the nature and scope of the right of self-determination in international law. For this purpose, the origin of the right of self-determination has been traced in the Pre-UN Charter international law. This is followed by a discussion of the scope of the right of self-determination in the Post-Charter law. Then, different classes of people entitled to the right of self-determination have been discussed. After this, there is a discussion about the modes for implementation of the right of self-determination. Finally, recent trends of equating liberation struggle with terrorism have been analyzed.

Chapter II analyzes the norms of international law relating to the threat or use of force. The law of resort to war and the law of conduct of war have been dealt with separately to avoid confusions. The scope of self-defense in the pre-Charter and post-Charter law has also been anlyzed. Then, the system of collective security envisaged by the UN Charter has been dealt with in detail. Some dubious cases of the use of force, which are deemed lawful by some states and unlawful by others, have also been analyzed.

Norms of international humanitarian law about different kinds of armed conflicts, non-combatant immunity and POWs as well as about different means of warfare have also been analyzed. Then, there is a discussion about different crimes and international tribunals.

Chapter III combines the conclusions of the first two Chapters and analyzes the legitimacy of the use force with regard to the right of self-determination. So, first of all, the nature and meaning of 'liberation struggle' has been analyzed followed by a discussion over the means and methods of violence frequently used in liberation struggles as well as different kinds of support provided to the liberation struggle.

Use of force in relation to the right of self-determination has been analyzed from three different, though interrelated, aspects. First, whether or not the state authorities are allowed to use force against people striving for their right to self-determination. Second, whether it is legitimate for those who are forcibly deprived of their right to self-determination to use force for vindication of their right. Third, whether it is legitimate to provide moral, diplomatic and military support to liberation struggle.

After this there is a discussion about terrorism and liberation struggle.

Chapter IV discusses the *Sharī'ah* framework for rights. Then, the position of the right of self-determination within that framework has been analyzed. There is also a discussion about the institution of slavery in Islam.

Chapter V discusses the norms of the *Sharī'ah* regarding warfare. To avoid any misunderstandings and analytical inconsistencies, it was deemed preferable to analyze the law of resort to war separately from the law of conduct of war. Moreover, the views of modern scholars have been anlyzed separately from the views of the fuqaha'. An inquiry has also been made into the division of the world into two territories – *dār al-Islām* and *dār al-kufr*. The scope of defense in Islamic Law has also been analyzed in detail and a comparison is made with the pre-Charter and post-Charter international law.

There is also a discussion about the authority as well as the need to declare Jihād. The position of Jihādī Organizations has also been analyzed. Issues such as non-combatant immunity, means of warfare, and treatment of the war captives have also been dealt with. There is a detailed discussion about the norms of the *Sharī'ah* regarding treaties of peace with non-Muslims.

Chapter VI combines the conclusions reached at in Chapters IV and V. It discusses armed liberation struggle from the perspective of the *Sharī'ah*. First of all, legitimacy of liberation struggle of Muslims living under non-Muslim regime is discussed. In this regard, legitimacy of permanent residence of Muslims in a non-Muslim state as well as their legal obligations have also been analyzed. The strategy for peaceful struggle has also been dealt with.

After this, legitimacy of Jihād by Muslims in a non-Muslim state without having a government of their own has been discussed in detail. There is also an analysis of the different modes for implementation of the right of self-determination. Then, the issue of liberation struggle of non-Muslims from Muslims' rule is analyzed. In this regard, issues such as different modes by which non-Muslims acquire citizenship of Islamic State, nature of the contract of *dhimmah* and rights of non-Muslim citizens of Islamic State have been discussed followed by analysis of the different modes of internal autonomy given to non-Muslims. Then, there is a discussion on termination of the contract of *dhimmah* by non-Muslims as well as by Islamic State and effects of such termination followed by an analysis of the rights acknowledged by the *Sharī'ah* for rebels.

Then, the Conclusions of the thesis are recorded, which are followed by two appendices. Appendix I contains the instructions of the holy Prophet (May Allāh's blessings be upon him) and of Abū Bakr (May Allāh be pleased with him) to the commanders of Muslim troops. They embody some basic rules about Islamic law of conduct of war.

Appendix II contains excerpts from the thesis of Ibn Qayyim al-Jawzīyah about the validity of peace treaties with non-Muslims for unspecified period of time.

At the end, a detailed bibliography is given.

PART I

LIBERATION STRUGGLE IN INTERNATIONAL LAW

CHAPTER I:

RIGHT OF SELF-DETERMINATION IN INTERNATIONAL LAW

1.1 RIGHT OF SELF-DETERMINATION BEFORE THE UNO

Self-determination as a right came out as a result of resistance to colonialism.[1] In the context of resistance to colonialism, self-determination embodies three basic ideas:

- 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.

1.1.1 Woodrow Wilson

As early as 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

[1] For a detailed study of how the right of self-determination emerged in international law see: Umozurike, *Self-determination in International Law* (Philadelphia, 1972); Ofuatey Kodjoe, *The Principle of Self-determination in Law and Practice* (The Hague, 1982); A. Cassese, *Self-determination of Peoples* (Cambridge, 1995); H. Hannum, *Autonomy, Sovereignty and Self-determination: The Accommodation of Conflicting Rights* (Pennsylvania, 1990); Hannum, (ed.), "*Minorities, Indigenous Peoples and Self-determination*", in Henkin and Hargrove (eds.), *Human Rights: An Agenda for the Next Century* (American Society of International Law, 1994); Christopher, O. Quaye, *Liberation Struggle in International Law* (Philadelphia, 1991); Emerson, *Self-determination*, 65 AJIL, 1971, pp 459-75; R., McCorqudale, "*Self-determination: A Human Rights Approach*", 43 ICLQ 857 (1994). See also: Martin Dixon, *Textbook on International Law* (hereinafter referred to as *International Law*), Fourth Edition 2000, Blackstone Press Limited; D. J. Harris, *Cases and Materials on International Law* (hereinafter referred to as *Cases and Materials*), Fourth Edition, Sweet & Maxwell, London, 1991.

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."[2]

Wilson also stressed that peace at international level cannot establish without recognizing the right of self-determination:

"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."[3]

In January 1918, Wilson put forward his famous fourteen points in which he advocated some degree of the right of self-determination for some nations. Thus, he demanded the 'freest opportunity' of autonomous development for the peoples of Austria and Hungary. He also demanded evacuation of the territories of France, Belgium, Russia, Romania, Serbia and Montenegro. Similarly, he declared that the 'Turkish portions' of the then Ottoman Empire should be assured a 'secure' sovereignty. He also pleaded for the erection of an independent Polish state.[4]

1.1.2 Lenin and the Soviet Constitution

Lenin is also considered among the supporters of the right of self-determination. In 1917, the Soviets wanted to apply this principle to the colonies in Asia and Africa as well as to the nationalities in Europe.[5] Lenin supported the idea of secession

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[2] Kulshrestha, K. K., *A Short History of International Relations* (hereinafter referred to as *International Relations*), Lahore, n. d., p 10

[3] Umozurike, *Self-determination in International Law*, p 14

[4] Ibid.

[5] Lenin, *Collected Works*, as quoted in Raḥmānullah Khan , *Kashmir and the United Nations* (Delhi, 1969), p 81

from a state on the basis of this principle. He wanted the unconditional and immediate liberation of colonies without compensation.

The Soviet Constitution also recognized the right of secession for the constituent republics.[6] However, it was practically impossible for a republic to secede till very recently when after the humiliating defeat in Afghanistan the Union became weakened.

It may also be mentioned here that the Americans also emphasized the 'right' of the colonial powers and that is why they severely criticized Lenin. 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."[7] 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".[8] It is these double standards of the Western World that characterize their policy with regard to self-determination.[9]

1.1.3 Treaty of Versailles 1919

In the Treaty of Versailles 1919, the principle of self-determination was incorporated to some extent. Thus, the Saar Basin was provisionally severed from Germany as 'compensation for the wrong done to France' but there was to be plebiscite after 15 years. This plebiscite was actually held in 1935 and majority of the people decided to accede to Germany. Similarly, Northern and Central Schleswig - taken from Denmark in 1864 - were also given the opportunity to decide about their future through a plebiscite. The Northern zone voted in favor

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[6] Article 72

[7] R. Lansing, *Papers Relating to the Foreign Relations of the US*, as quoted in A. Cassese, *Self-determination of Peoples* (Cambridge, 1995), p 132

[8] *Self-determination in International Law*, p 11

[9] As will be seen later, even after World War II, the Western Powers opposed this right claiming that it is menacing for the stability of the international system. See Sections 1.5 and 3.2.4.3 of this dissertation.

of Denmark and the Central zone in favor of Germany. Another plebiscite was held in Upper Silesia, which was then divided between Germany and Poland.[10]

1.1.4 Covenant of the League of Nations and the Mandate System

Covenant of the League of Nations 1919 incorporated some of the Wilsonian points and took another step forward in the process of recognizing the right of self-determination.

Most of the occupied territories were placed under the Mandate System.[11] This system was based on the principle of tutelage, which meant that some territories were given under the guardianship of the Victors. They were not owners of those territories. They had to civilize people of these territories, make them capable of self-rule and then hand over power to them.[12] 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 colonial power.

There were three types of Mandate Territories:

1. 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.[13] 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 government in 1917 to establish in Palestine 'a national home for the Jewish people'[14].

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[10] *International Relations*, p 3

[11] For details of the Mandate System see: Ibid. pp 24-27; *Cases and Materials*, pp 125-26. See also *International Status of the South West Africa Case*, ICJ 1950 Rep 128

[12] One may see in this system the distorted concept of "the White Man's Burden".

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

[14] 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

2. 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. B Mandates were declared open to all League members for trade purposes. 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 to Portugal. The Cameroons and Togoland were divided between France and UK.
3. 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. 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.[15] The PMC consisted of 9 members, majority of which were nationals of non-mandatory powers. In 1929, a German national was also added raising the number to 10. 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. But such petitions could only be submitted through the Mandatory Power. Moreover, reports by the Mandatory Powers were not submitted regularly. The PMC also could get information from other League

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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* (Routledge, New York, 1995), pp 36-37)

[15] Article 22 of the Covenant

bodies but it never visited the Mandate Territories nor dispatched investigation commissions to them. It practically became an agent of the League Council.

1.1.5 The Atlantic Charter 1941

On August 14, 1941 the President of the United States and the Prime Minister of the United Kingdom adopted the Atlantic Charter. Articles II and III of the Charter dealt with the issue of self-determination in the following manner:

> "Second, they desire to see no territorial changes that do not accord with the freely expressed wishes of the people concerned. They respect the right of all peoples to choose the form of government under which they live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them."[16]

However, the UK government later tried to escape from the responsibility taken under this Charter. Thus, Churchill declared before the House of Commons that the concept had validity only with regard to European States and nations subject to the Nazi domination.[17]

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. No doubt, the United Nations did play a significant role in this regard as we shall see in the sections to follow.

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[16] L. Goodrich and E. Hambro, *Charter of the United Nations: Commentary and Documents* (Boston, 1949), p 305

[17] *Self-determination of Peoples*, p 132

1.2 RIGHT OF SELF-DETERMINATION AND THE UNO

1.2.1 The UN Charter

In 1945, when the United Nations was established, there were only 51 members. Today, it has 191 members, majority of them being former colonies or former parts of larger States. The UN Charter recognized the right of self-determination as one of the fundamental rights of all human beings. Although some of the colonial powers like Belgium tried to remove the provisions about self-determination from the Charter, they could not succeed in doing so because of the opposition of the developing countries.[18] The net result was, however, a compromise between the conflicting opinions of the developed and developing States.

The preamble of the Charter says:

> "We the people of the United Nations determined...to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."

The Charter explicitly lays down that 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 measures to strengthen universal peace."[19] Similarly, the Charter recognizes the principle of sovereign equality of all States.[20] On the other hand, the Charter also explicitly prohibits intervention in the 'internal affairs' of States.[21]

The Charter also emphasizes the role of the principle of self-determination in creating stability in the world.

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[18] *Kashmir Dispute: An International Law Perspective*, p 143

[19] Article 1(2) of the UN Charter

[20] "The Organization is based on the principle of sovereign equality of all its members." (Article 2 (1))

[21] "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))

"With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[22]

Member States are obliged to take separate and joint actions for achieving the objectives set out in the aforementioned Article.[23]

At the time of the formation of the United Nations, there were seventy-four 'non-self-governing territories' in the world. In Chapter XI, the UN Charter established the principles that continue to guide United Nations de-colonization efforts, including respect for self-determination of all peoples.

"Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle 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

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[22] Article 55

[23] "All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." (Article 56) Although some Western scholars, such as Hans Kelsen, believed that these provisions carried no significance because, according to them, it did not create a binding legal obligation, but the use of the word 'pledge' does signify that it was a legally binding obligation. (Hans Kelsen, *The Law of the United Nations* (New York, 1950), pp 51-53; Professor Quincy Wright, *Proceedings of the American Society of International Law*, p 30)

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] Those territories, each subject to separate agreements with administering States, 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. Eleven territories were placed under this system.

1.2.2 The UN Security Council

Security Council is neither a lawmaking nor a judicial body. The Charter explicitly says that legal disputes should generally be referred to the International Court of Justice.[28] The primary duty of the Council is to protect and restore international peace. 'Enforcement Action' (Chapter VII) provides the mechanism for achieving this purpose.[29] Resolutions of the Council under Chapter VII are binding upon all member States.[30]

Because of the power rivalry and the so-called Cold War between the super powers the UN Security Council could not play a prominent role in the plight of the oppressed people for the right of self-determination. However, in very rare cases when the five permanent members reached a consensus it did pass a few resolutions recognizing the right of self-determination for some groups of people.

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[24] Article 73
[25] Chapter XII (Articles 75-85)
[26] Chapter XIII (Articles 86-91)
[27] For details see *Cases and Materials*, pp 125-26.
[28] Article 36 (3) of the Charter says that the Council must bear in mind that "legal disputes should as a general rule be referred by the parties to the International Court of Justice".
[29] This mechanism will be analyzed in depth at some later stage in this thesis *in shā Allāh*. (See Section 2.1.4 of this dissertation.)
[30] Martin Dixon says: " 'Decisions' of the Security Council under Chapter VII of the Charter...are binding on the States, although rarely do they deal with abstract points of law. They are concerned more with mandatory enforcement action against delinquent States." (*International Law*, p 48)

Thus, it passed a resolution recognizing the right to self-determination for the people of Jammu and Kashmir.[31] It even formed a Plebiscite Commission for this purpose. But afterwards the Council could not do much in this regard, obviously because of the lack of interest and desire to settle the issue on the part of the permanent members as well as the parties to the dispute. The same is true of the Palestinian problem.

The case of East Timor[32], however, presents an excellent example of the good Security Council can deliver if the five permanent members are willing to fulfill their responsibilities. After a long series of discussions and negotiations between the Governments of Indonesia and Portugal on the one hand and between the United Nations and the Governments of Indonesia and Portugal on the other, and after considering the report of the Secretary General on the issue, finally the Security Council unanimously adopted a resolution deciding "to establish until 31 August 1999 the United Nations Mission in East Timor (UNAMET) to organize and conduct a popular consultation, scheduled for 8 August 1999, on the basis of a direct, secret and universal ballot, in order to ascertain whether the East Timorese people accept the proposed constitutional framework providing for a special autonomy for East Timor within the unitary Republic of Indonesia or reject the proposed special autonomy for East Timor, leading to East Timor's separation from Indonesia."[33]

One wonders why the same procedure could not be followed for settling the Kashmir and Palestinian disputes.

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[31] The Council declared in the Resolution: "India and Pakistan desire that the question of the accession of Jammu and Kashmir to India or Pakistan should be decided through the democratic method of a free and impartial plebiscite." SC/Res/47 (1948) It also admitted that: "The continuation of the dispute is likely to endanger international peace and security." (Ibid. See also UNCIP Resolution (S/1196, Para 51) January 5, 1949.) For a scholarly analysis of the Kashmir dispute in the light of international law, see Ijaz Hussain, *Kashmir Dispute: An International Law Perspective*, (Islamabad: Quaid-e-Azam Chair, 1998).

[32] See, for details, *Cases and Material*, pp 124-25, GA/Res/3485 (1975), SC/Res/384 (1975)

[33] SC/Res/1246 (1999)

1.2.3 The UN General Assembly

Although it is generally assumed that resolutions of the General Assembly are not binding upon member States, even upon those voting in favor, yet this over-simplistic view does not portray the real picture. Assembly resolutions, generally, act as evidence of Customary International Law, which is binding upon all States, even upon those who voted against this resolution. Similarly, some resolutions may contain new rules of conduct, which may convert into concrete rules of Customary International Law in due course. This is true particularly of the resolutions passed unanimously. Martin Dixon explains the importance of the Assembly resolutions as a source of International Law in the following way:

> "General Assembly resolution may be declaratory of existing customary law and, even though it is not the resolution itself that creates the binding obligation, this may be where the principles are found... Similarly, resolution may crystallize state practice so that a new rule of custom is created, although this may be more obvious where the resolution is adopted unanimously... Of course, that is not to prevent General Assembly resolution stipulating a voluntary course of conduct which is subsequently followed by States and becomes a rule of customary law... Importantly, a vote in favor of a resolution may be an indication of *opinio juris*... Obviously, the political expectations raised by a positive vote will have a considerable impact on the behavior of States and, therefore, on the development of customary laws."[34]

Now, we will discuss some of the landmark resolutions of the General Assembly.

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[34] *International Law*, p 46-47

1.2.3.1 Universal Declaration of Human Rights (1948)

In 1948, the General Assembly adopted the famous "Universal Declaration of Human Rights".[35] The declaration explicitly States that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family *is the foundation of freedom, justice and peace in the world*' and that '*disregard* and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind'. It also unequivocally lays down that:

> "It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."

1.2.3.2 Declaration on Granting Independence to Colonial Territories and Peoples (1960)

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.*[36] This is a landmark resolution that called for speedy end to the evils of colonialism. It emphasized 'the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples, and of universal respect for, and

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[35] GA/Res/217A III (1948)

[36] 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. All except the Dominican Republic were colonial empires! It will be discussed later that these States never acknowledged the legitimacy of liberation struggle. But they were not successful in getting a resolution of their choice passed from the General Assembly because of the presence of a great majority of developing States there. See Sections 1.5 and 3.2.4.3 of this dissertation.

observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'.

It clearly stated that denial of the right to self-determination results in 'increasing conflicts' which 'constitute a serious threat to world peace'. It not only welcomed 'the emergence... of a large number of dependent territories into freedom and independence', but also recognized 'the increasingly powerful trends towards freedom in such territories which have not yet attained independence'.

It unequivocally recognized the right to self-determination for 'all peoples'. The operative part of the resolution is reproduced here:

> "1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.
>
> 2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.
>
> 4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.
>
> 5. Immediate steps shall be taken, in Trust and Non-self-governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or color, in order to enable them to enjoy complete independence and freedom.

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity."

This declaration gave new strength to freedom struggles in different parts of the world. This is considered as one of the greatest achievements of the United Nations.[37] 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 1961, the UN General Assembly established a 17-member Special Committee, enlarged to 24 members in 1962, to examine the application of the Declaration, and to make recommendations on its implementation. The Committee is commonly known as the Special Committee of 24 on De-colonization. The Committee meets annually to discuss developments in Non-self-governing Territories, hears statements from appointed and elected representatives of the territories and petitioners, dispatches visiting missions to the territories, and organizes seminars on the political, social, economic and educational situations in the territories. The Committee also makes recommendations concerning the dissemination of information to mobilize public opinion in support of the de-colonization process and examines the assistance provided to the people of the territories by the specialized agencies and other organizations of the United Nations system.

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[37] 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.*)

In 1970, the General Assembly launched Program of Action for Full Implementation of the Declaration. In 1990, the General Assembly proclaimed 1990 – 2000 as the International Decade for the Eradication of Colonialism and adopted a Plan of Action. In 2001, The Second International Decade for the Eradication of Colonialism was proclaimed.

1.2.3.3 Declaration on Principles of International Law, Friendly Relations and Co-operation among States (1970)

This landmark resolution passed in 1970[38] put forward some basic principles of international law and is considered an important step in the codification of international law. The principles it mentions are:

a) The general prohibition on the threat or use of force;
b) Settlement of international disputes by peaceful means;
c) Non-intervention in matters within the domestic jurisdiction of any State;
d) The duty of States to co-operate with one another in accordance with the Charter;
e) The principle of equal rights and self-determination of peoples;
f) The principle of sovereign equality of States;
g) The principle that States shall fulfill in good faith the obligations they assumed in accordance with the Charter.[39]

It again declares that forcibly depriving people of their right to self-determination causes serious threats to international peace.[40] Regarding the right to self-determination the preamble of the declaration says:

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[38] GA/Res/2625 (XXV) (1970)
[39] Preamble of the Declaration
[40] "The subjection of peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security". (Ibid.)

> "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter."[41]

It also mentions the *duty* of States regarding the realization of the right of self-determination of peoples.

> "Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle"[42]

The resolution emphatically declares that States should refrain from the threat or use of force against the people striving for the right to self-determination.[43] It also declares explicitly that the people striving for the right to self-determination can get support from other States:

> "In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter."[44]

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[41] Section 1
[42] Ibid.
[43] "Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence." (Ibid.)
[44] Ibid.

1.2.3.4 Measures to *Prevent* International Terrorism (1972)

The General Assembly passed several resolutions condemning international terrorism and laying down measures for preventing it. In all those resolutions it was explicitly mentioned that all peoples have the right to self-determination, and that denying this right is one of the main reasons for individuals turning to terrorist activities. So, in order to eliminate terrorism the right of self-determination for all peoples must be accepted and respected. The long title of the 1972 resolution was indeed interesting and revealing:

> "Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedom, and study of underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which causes some people to sacrifice human lives, including their own, in an attempt to affect radical changes".[50]

This resolution, which was meant to put forward 'measures to prevent international terrorism', again reaffirms 'the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination', and upholds 'the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and principles of the Charter and the relevant resolutions of the organs of the United Nations'.[51]

It urged all States, unilaterally and in co-operation with other States, as well as relevant United Nations organs to contribute to the progressive elimination of the causes underlying international terrorism.

The resolutions passed by the General Assembly on this issue in 1979, 1983 1985 and even in 1989 continued to include clauses reaffirming the inalienable right of

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[50] GA/Res/ 3034 (XXVII) (1972)

[51] Section 3

self-determination and independence of the peoples, opposing all forms of domination by racist or colonial regimes and upholding the legitimacy of liberation struggles. The last resolution that retained the title of the 1972 resolution was passed in December 1989.[52]

1.2.3.5 Consensus Definition of Aggression (1974)

In 1974, the General Assembly passed yet another landmark resolution that defined "aggression".[53] Under Article 39 of the Charter, it is the responsibility of the Security Council to see whether an act of aggression has been committed by a state or not, and then to take appropriate measures. This resolution will be analyzed in detail later on, *in shā' Allāh*. It is, however, pertinent to note here that one of the reasons for the eagerness of the General Assembly to adopt a consensus definition of aggression was to prohibit States from the threat or use of force against those striving for their right to self-determination. That is why, the General Assembly reaffirmed 'the duty of States not to use armed force to deprive peoples of their right to self-determination, freedom and independence, or to disrupt territorial Integrity'.[54] Then, after giving a detailed definition of aggression it reiterated emphatically in the end:

> "Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law... particularly peoples under colonial and racist regimes or other forms of alien domination: nor the right of these peoples to struggle to that end and

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[52] GA/Res/44/29 dated December 4, 1989
[53] GA/Res/3314 (XXIX) (1974)
[54] Preamble of the Resolution

to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration."[55]

1.2.3.6 Resolution against State Terrorism (1984)

In 1984, the General Assembly reiterated its firm conviction that in order to achieve peace at global level the right of self-determination for all people must be accepted and respected. It is interesting to note that the term 'State Terrorism' was used in two quite different, rather contradictory, meanings. While peoples striving for their right to self-determination used this term to denounce the use of force against them by the State from which they sought independence, some States used it quite differently to condemn the support allegedly provided by some other States to such people. It was for this reason that the General Assembly passed the resolution on *Inadmissibility of the policy of State terrorism and any actions by States aimed at undermining the socio-political system in other sovereign States.*[56]

This resolution condemned the interference by some States in the affairs of other States encouraging civil war. At the same time, it categorically declared self-determination as 'inalienable right of all peoples' and that people should not be deprived of this right by coercive means.[57] It reaffirmed the obligation of all States 'to refrain in their international relations from the threat or use of force against the sovereignty, territorial integrity and political independence of any State, as well as the inalienable right of all peoples to determine their own form of government and to choose their own economic, political and social system free from outside intervention, subversion, coercion and constraint of any kind whatsoever'.[58] It urged all States 'to respect and strictly observe, in accordance with the Charter of the United Nations, the sovereignty and political independence of States and the

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[55] Ibid., Article 7

[56] GA/Res/39/159 (1984)

[57] The General Assembly expressed its profound concern that: "State terrorism has lately been practiced ever more frequently in relations between States and that military and other actions are being taken against the sovereignty and political independence of States and the self-determination of peoples." (Preamble)

[58] Ibid.

right of peoples to self-determination, as well as their right freely, without outside interference and intervention, to choose their socio-political system and to pursue their political, economic, social and cultural development'.[59]

Again, it reiterated that States should not, in the name of self-determination, try to encourage civil strife in other States. It, therefore, demanded:

> "All States take no actions aimed at military intervention and occupation, forcible change in or undermining of the socio-political system of States, destabilization and overthrow of their Governments and, in particular, initiate no military action to that end under any pretext whatsoever and cease forthwith any such action already in progress."[60]

It is quite obvious from the wording of the resolution that the General Assembly used the term 'State Terrorism' in such a way as to include both the meanings referred to above. In other words, State Terrorism has been assigned two meanings: forcefully depriving peoples of their right to self-determination, and encouraging seditionist movements in other States.

Conclusions

1) Right of self-determination is one of the most fundamental rights of all human beings recognized by international law and the UN Charter.[61] In the *Case Concerning East Timor (Portugal v Australia)*,[62] the ICJ was of the view that the principle of self-determination 'is one of the essential principles of contemporary international law'.
2) In establishing this right the UN General Assembly played a pivotal role. By adopting landmark resolutions on the issue it not only gave legal status to the

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[59] Section 3

[60] Section 2

[61] Martin Dixon says: "Today self-determination is a well-established principle of customary international law and may well be a rule of *jus cogens*." (*International Law*, p 154)

[62] *Case Concerning East Timor (Portugal v Australia)*, ICJ 1955 Rep 89

right of self-determination but also gave impetus to liberation movements and thus it helped eradicating the evils of colonialism. These resolutions are important from legal perspective because they embody rules of customary international law. They may also contain rules that became part of customary law after adopting these resolutions. The UN Security Council was relatively less active for the obvious reason of lack of consensus among the five permanent members. However, it did play its due role whenever there was a consensus.[63]

3) Right of self-determination is acknowledged not only for the people of the colonial or non-self-governing territories but also for all 'people'. This point will be analyzed in detail in the next section *in shā' Allāh*.
4) States are not allowed to forcibly deprive people of their right to self-determination.
5) Use of force or to seek support for the right of self-determination is not an act of aggression if it is in accordance with the principles of the UN Charter. What this actually means is the essence of this dissertation and will be discussed and analyzed in detail in the chapters to follow *in shā' Allāh*.

1.3 CLASSES OF 'PEOPLES' ENTITLED TO THE RIGHT OF SELF-DETERMINATION

Perhaps, the most important question here is which classes of 'people' are entitled to exercise the right to self-determination.

As the right of self-determination developed as direct response to the evils of colonialism so it is quite obvious that 'people' under foreign domination of another state enjoy this right. It means that the right is established for the people of colonial or the so-called Non-self-governing territories. But the right is not

[63] It is due to the well-concerted efforts of the UN that since its creation more than 80 former colonies have gained independence. Among them, all eleven Trust Territories have achieved self-determination through independence or free association with an independent state. There are 16 non-self-governing territories remaining today.

confined to them as, first of all, the *Resolution on Granting Independence to Colonial Territories and Peoples* mentions these people as just a class, and not the class, entitled to this right.[64] Then, it specifically mentioned the "important role of the United Nations in assisting the movement for independence in Trust and Non-self-governing Territories".[65] After this, it categorically declared:

> "All peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory."[66]

The operative part of the Declaration reaffirms this:

> "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".[67]

Similarly, the *Declaration on the Principles of International Law* also acknowledges this right for all people.[68]

Moreover, the right is acknowledged specifically for some groups of people by the UN Security Council. For instance, it recognized the right of self-determination

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[64] Thus, it explicitly emphasized in the preamble: "The need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples, and of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion".

[65] Ibid.

[66] Ibid.

[67] Section 2

[68] "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter." (Section 1)

for Kashmiris. Similarly, the creation of the Palestine Autonomous Area in Gaza/West Bank is but a step in the process of self-determination.[69]

Perhaps, the real question in this regard will be whether distinct ethnic or religious groups within an already sovereign and independent state can exercise self-determination. For instance, in 1971 the people of East Pakistan broke away from the Federation of Pakistan to form Bangladesh; in 1967 the Ibos Tribe unsuccessfully attempted to secede from Nigeria; and in 1993 Eritrea successfully seceded from Ethiopia. All these peoples claimed in some measures the right of self-determination. Moreover, in recent years the problem has been aggravated with the breakup of once stable federations like Yugoslavia and USSR, and the greater emphasis on human rights generally.

There are two approaches towards this problem. The narrower view restricts this right to the people of non-self-governing territories. But there are those who argue that any distinct ethnic group, whether part of a colonial, federal or unitary state, have the right to self-determination. Under this approach, the people of Gibraltar (colonial territory), of Alaska (federal state) and of Scotland (unitary state) all have the right and it could be exercised, protected and enforced by international law. Of course, the answer is not very easy.[70]

The EC Arbitration Commission on Yugoslavia[71] tried to go a middle way. It declared that the right of self-determination now certainly exists beyond the colonial situation. In their view, self-determination is available to the people of a territory that is part of an existing federal state, provided that they can achieve the factual prerequisites for statehood identified in the Montevideo Convention.[72]

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[69] See, for instance, the ICJ Advisory Opinion on the Construction of Wall in Occupied Palestinian Territory (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) 2004 ICJ Rep <*www.icj-cij.org*>).

[70] Martin Dixon rightly argues: "Overall, a balance needs to be struck between protecting the human rights of peoples and individuals and preserving the fabric of international society. Self-determination can foster the former, but might well be destructive of the latter." (*International Law*, p 156)

[71] Report of the EC Arbitration Commission on Yugoslavia, [1993] 92 ILR 162

[72] 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.

As Martin Dixon asserts, it encourages secessionist movements in federal States but by insisting on the prerequisites of statehood, the Commission has placed a practical limitation on self-determination. It also implies that the federal authorities can lawfully prevent secession. Whether they can use force for this purpose or not is to be discussed later on, *in shā' Allāh*.

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*[73] expressed the same view. 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, e.g., respect for language, culture etc.

Conclusions

1) International law recognizes the right of self-determination for all peoples. Modalities of implementing and enforcing this right, however, differ in different cases.
2) People living in colonial or non-self-governing territories have the right to self-determination and independence. They can choose other alternatives to complete independence as well.
3) People for whom this right is specifically acknowledged by the Security Council can exercise it in the same manner.
4) People living in federal States and striving for their right to self-determination can achieve total independence, provided they can fulfill the prerequisites of

[73] *Case of Concerning Questions Relating to Secession of Quebec from Canada*, 16IDLR (4th) 385

statehood. Their culture and identity must, however, be protected even if they could not get complete independence.

5) People living in unitary States cannot exercise the right to self-determination to achieve complete independence. They have, however, the right to some sort of *'second level' self-determination in so far as their culture and identity must be* protected and respected by the central authorities.

1.4 MODES OF IMPLEMENTING THE RIGHT OF SELF-DETERMINATION

An exercise of the right of self-determination may result in the territory becoming independent or the people may choose to affiliate themselves with another state, either in a federal system or simply as an addition to the existing territory. The crucial point is that self-determination 'requires a free and genuine expression of the will of the people concerned'. The Declaration on Principles of International Law, Friendly Relations and Co-operation among States thus mentioned 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."[74]

If the territory does become independent then its border may become permanently fixed under the doctrine of *uti possidetis juris*[75]. Simply it means that the frontiers of new independent States are to follow the frontiers of the old colonial territories from which they emerge. Moreover, they cannot be altered by unilateral action. The principle originated in South America as a consequence of the collapse of the

[74] Section 1

[75] See for details: *International Law*, pp 153-4

Spanish Empire when the former provinces agreed that the limits of their sovereignty should conform to the limits of the old colonial boundaries. In the *Frontier Dispute Case (Burkina Faso v Mali)*, the ICJ confirmed that *uti possidetis* was a principle of general application, not confined solely to South America.[76]

Indeed, the Organization of African Unity has adopted the principle in its Resolution on the Intangibility of Frontiers and it was applied in Africa in the *Frontier Dispute Case* itself. Likewise, in *El Salvador v Hounduras*, the ICJ chamber relied heavily on the *uti possidetis* in setting the boundary dispute between two parties, and there is no doubt that the chamber regarded the rule as of the utmost importance. In fact, the chamber made it clear that neither the effective display of state functions in disputed areas nor the inequality generated by old boundaries was sufficient to displace the *uti possidetis* principle.[77]

Again in 1992, the *EC Arbitration Commission on Yugoslavia* decided that the principle also applied to the newly independent States formerly part of a federation. Consequently, any action (by use of force or otherwise) designed to alter unilaterally the old federal boundaries will be unlawful. Of course, this application of the principle is necessary if stability among international community is to be preserved.

1.5 SELF-DETERMINATION AND TERRORISM

In 1945, when the United Nations Organization was established five States were given permanent seats in its Security Council. They were given the veto power, which meant that the UN could take no punitive action unless these five States reached some sort of understanding and agreement. It was thought that peace at global level could be achieved only if interests of these big powers were protected. They were given the 'primary' responsibility to maintain peace at international level. But soon after the establishment of the UN, there started the so-called 'Cold War' between the USA and the USSR. Other States willingly or unwillingly joined

[76] *The Frontier Dispute Case (Burkina Faso v Mali)* 1986 ICJ Rep 545

[77] *El Salvador v Honduras (Land, Island and Maritime Frontier Case), (Merits),* 1992 ICJ Rep 35

either the Capitalist or the Communist bloc. Then, the veto power became a tool in the hands of the big powers for blackmailing the whole world. Veto was frequently used to save the belligerent state. Thus USSR blocked the Security Council action against North Korea in 1950, as did USA for Israel time and again.

The Western developed nations were trying from the very beginning to secure a one-sided treaty on terrorism that would suit their point of view by including the liberation struggle within its scope.[78] This was, however, not possible in the UN General Assembly for the presence of a great majority of under developed non-Western States. Nor was it possible for them to get resolutions of their choice passed from the Security Council due the presence of the USSR. In 1971, Peoples Republic of China got permanent seat in the UN Security Council, which meant that the non-capitalist bloc got two vetoes. It became more difficult than ever for the USA and its allies to use the UN forum for their bloc interests.

It was at this juncture that the seven most powerful economies of the world started a new informal system of consultation, called the G-7. This organization was established in 1975 "to bypass the UN system"[79]. Soon they expanded the range of their co-operation from economic to political matters, including terrorism. In 1978 annual meeting at Bonn, the G-7 for the first time took up political issues and the question of terrorism. It laid increasing emphasis on terrorism in the subsequent meetings at Venice in 1980, at Tokyo in 1981 and thereafter. In the next decade the G-7 declared several communiqués on terrorism without a reference to the causes of terrorism or to the legitimate struggle for the right of self-determination.

In the United Nations, however, the approach was still balanced. Thus, in 1984 the General Assembly passed the *Resolution against State Terrorism* discussed above. Similarly up till 1989, the resolutions against terrorism passed by the Assembly had the title of the 1972 resolution:

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[78] See, for details, Alex Obot-Odora, *Defining International Terrorism*, E Law – Murdoch University Electronic Journal of Law, vol.6, no 1, March 1999. <http://pandora.nla.gov.au/parchive/2001/z2001-Feb-26/www.murdoch.edu.au/elaw/issues/v6n1/obote-odora61_notes.html>.

[79] Akram Zaki, *Terrorism: Myth and Reality* (Institute of Policy Studies, Islamabad, 2002), pp 30-31

"Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedom, and study of underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which causes some people to sacrifice human lives, including their own, in an attempt to affect radical changes".[80]

In December 1991, the USSR disintegrated and it is from there onwards that the wording of the resolutions at the General Assembly also changed. So, just before the disintegration of the USSR, the General Assembly passed a resolution having the title: "Measures to *eliminate* international terrorism". Although this resolution still contained the clauses on self-determination against colonial and racist regimes, yet it reflected "the new mood of the West".[81]

Would this mean that self-determination is no more considered a fundamental human right? Has there developed a new rule of customary international law superseding the older rules?

The answer to none of these questions can be in affirmative. While it is true that after the disintegration of the USSR, and particularly after 9/11, the international community has focused more on the issue of eliminating terrorism but it does not mean that the rules of international law regarding legitimacy of the struggle for the right of self-determination has in any way changed. The arguments for this view are:

1. New rules of customary international law do not come into being spontaneously. For a practice to convert into a custom it must fulfill certain conditions. First of all, this practice must be *general* and not confined to a

[80] GA/Res/3034 (XXVII) (1972)

[81] Mr. Akram Zaki, Pakistan's former Foreign Secretary-General, says regarding the change in the trends in the UN: "On December 31, 1991, the former Soviet Union finally collapsed and disappeared. All subsequent resolutions had different tone and a different text. The mention of self-determination, freedom struggle or underlying causes never appeared again." (*Terrorism: Myth and Reality*, p 36)

particular state or group of States. Then, it must be *uniformly* practiced. This uniform and general practice must be followed consistently for a *long period.* Last but not the least, there is the requirement of *opinio juris* i.e. States must follow this practice as a legally binding course of conduct and not merely out of goodwill or for the sake of expediency.[82]

2. Then, there is a particular class of the rules of customary international law, called the rules of *jus cogens,* which are deemed so fundamental that they cannot even be altered by treaty.[83] So, any subsequent practice contrary to the rules of *jus cogens* will be deemed a violation of international law and not a new custom. It also means that rules of *jus cogens* are self-perpetuating in nature. Hence, a custom cannot come into being if it is in violation of a rule of *jus cogens.* However, even if it were accepted as a theoretical possibility it would require a very long period of *universal violation* of the rule till it attains more sanctity and strength than the earlier rule.[84] Although there is no general agreement as to what are the rules, which can be said to have become rules of *jus cogens*, but self-determination has no doubt achieved that exalted status.[85]
3. Even if the status of *jus cogens* were denied for the right of self-determination there is no denying the fact that international law, both in customary and treaty form, has considered it a fundamental right for all human beings. Now,

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[82] See for detail: *International Law*, pp 28-38.

[83] Vienna Convention on the Law of Treaties States: "[A] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." (Article 53 of the Vienna Convention on the Law of Treaties 1969)

[84] Martin Dixon explains it in this way: "Although according to Art. 53 these fundamental or peremptory norms can be changed by new and convincing practice (leading to a new fundamental rule), in reality this is unlikely to happen. Quite simply, these rules are fundamental, any conduct contrary to the rule of *jus cogens* usually will be regarded as 'illegal' no matter how often it is repeated. In this sense, rules of *jus cogens* are self-perpetuating and it would take almost unanimous agreement and very weighty evidence of *opinio juris* before such a rule could be replaced, at least where it is claimed that the 'new' rule now allows that which was previously prohibited." (*International Law*, p 38)

[85] *Case Concerning East Timor (Portugal v Australia)* 1995 ICJ Rep 89 See also: *International Law*, p 38

let us see whether there is any evidence in recent state practice showing that a new custom superseding the older rules has evolved.

In 1997, several States in their presentation before the *General Assembly Ad Hoc Committee on Terrorism* stressed upon the need to differentiate between terrorism and legitimate struggle for self-determination.[86]

Pakistan, for instance, argued that a solution to the problem of defining international terrorism could be found in the root causes of terrorism and that, therefore, working on combating terrorism and suppressing terrorist bombings should take account of issues such as colonialism, fundamental human rights and alien occupation. Commenting on the *Draft Convention to Suppress Terrorist Bombings*, Pakistan regretted that the draft convention neither reflected the legitimate struggle for self-determination and the comprehensive view of the complexities inherent in terrorism, nor criminalized terrorist acts and other activities of military forces of a state.

Libya also argued that the Draft did not take into consideration the distinction between terrorism and struggles for independence.

Syria noted that there was a need to formulate a general definition of terrorism that must distinguish between acts of terror and the right of peoples to free their territory. She declared emphatically that the struggle for liberation was not terrorism.

After the 9/11 incidents, the Organization of Islamic Conference, having 57 member States, in its extraordinary session of foreign ministers held in April 2002, declared in unequivocal terms that struggle for self-determination is legitimate according to the rules of international law, and that it should not be confused with terrorism. Section 8 of the Kuala Lumpur Declaration says:

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[86] See, for details, Alex Obot-Odora, *Defining International Terrorism*, E Law – Murdoch University Electronic Journal of Law, vol.6, no 1, March 1999. <http://pandora.nla.gov.au/parchive/2001/z2001-Feb-26/www.murdoch.edu.au/elaw/issues/v6n1/obote-odora61_notes.html>.

"We reiterate the principled position under international law and the Charter of the United Nations of the legitimacy of resistance to foreign aggression and the struggle of peoples under colonial or alien domination and foreign occupation for national liberation and self-determination. In this context, we underline the urgency for an internationally agreed definition of terrorism, which differentiates such legitimate struggles from acts of terrorism."[87]

In September 2002, while addressing the 56th session of the UN General Assembly, General Pervez Musharraf of Pakistan regretted that UN resolutions on Kashmir remained unimplemented. He further said:

"The question is whether it is people asking for their rights in accordance with the UN resolutions are to be called terrorists or whether it is the countries refusing to implement UN resolutions who are perpetrating state terrorism."[88]

Musharraf said while terrorism is to be condemned, "the world must not trample on the rights of the people and their struggle for liberation."[89]
Simply, what all this means is that there is no evidence of a new customary rule that has changed the law relating to self-determination.

[87] OIC Declaration of Foreign Ministers on Terrorism, 1-3 April 2002 in Kuala Lumpur Malaysia
[88] See his full speech at: <http://www.rediff.com/index.html>
[89] Ibid.

CHAPTER II:

INTERNATIONAL LAW RELATING TO THE THREAT OR USE OF FORCE

International law relating to the threat and use of force 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 law of resort to war has two main branches: The law governing unilateral use of force, and the law governing collective use of force.

We will take the law of resort to war first.

2.1 THE LAW OF RESORT TO WAR

2.1.1 Historical Background

Before going into details of the law it is better to discuss briefly the different stages through which this law has passed. This historical background will help us understand the nature and extent of the ban on the use of force and exceptions thereto.[1]

2.1.1.1 The Law Before 1945

In medieval period, Just War theory was the governing doctrine in Europe. St. Augustine is considered to be the first scholar who presented this theory in a systematic way. Another great exponent of the theory was Hugo Grotius who is considered the "Father of international law" in West. According to this theory, war was allowed for a "Just Cause", which meant 'a wrong received or a right denied'. War without a just cause was deemed unlawful.

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[1] These stages are discussed in any good treatise on international law relating to the use of force. See, for instance, Martin Dixon, *International Law*, pp 294-96; D. J. Harris, *Cases and Materials*, pp 817-24. See also: Brierly, James, *The Law of Nations* (6th ed. 1963); Brownlie, Ian, *International Law and the Use of Force* (Oxford, 1983); Starke, J. G., *Public International Law* (9th Ed.); Bhalla, S. L., *Fundamentals of International Law* (Docta Shelf, Delhi, 1990).

In 17th Century, there emerged the Nation-State system in Europe and Charlemagne's "Holy Roman Empire" went into oblivion. The new nation-States had bitter fights and wars between them and it led to the emergence of the law of resort to, and conduct of, war. During this period, a refined version of the Just War theory governed the inter-States relationships. Now, the emphasis was more on state's authority than on a just cause. This refined version of the theory said that war was allowed 'if state believed it had a just cause'.

18th and 19th centuries saw the emergence of Legal Positivism in Europe. This theory considered state to be the source of law. In other words, law was deemed a creature of state. This in turn led to the conclusion that custom (state-practice) and treaty (inter-States agreements) were the sources of international law. So, for legality or otherwise of an act, reference was invariably given to the customary or treaty law. Now, the governing idea was not a just cause but the "sovereign right to resort to war". As there was no ban on the use of force, there was no need for the "right" of self-defense or of reprisals etc.

By the time the League of Nations was established in 1919 States resorting to the use of force were in a habit of claiming to act in self-defense, reprisal, rescue of nationals abroad etc, thus *justifying* the use of force although no justification was necessary, for there was no legal ban on the use of force at all. Moreover, reprisal, hot pursuit, rescue of nationals and property abroad etc were deemed kinds of *force short of war* – so as to avoid the obligations for the conduct of war.

The Covenant for the first time put certain conditions on the legality of war. Now, war was considered lawful if conditions mentioned in the Covenant were met.[2] Moreover, *force short of war* was deemed lawful. The net result was that self-defense as a justification for resort to war emerged more clearly.

In 1928 USA and France concluded the Pact of Paris, also known as the Kellogg-Brigand Pact. Later on, other States also entered into it. It for the first time in European history rejected war as an instrument of state policy.[3] There was,

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[2] Articles 10-16 of the Covenant

[3] Article 1 of the Pact

however, no reference in the Pact to self-defense and the *travaux preparotoires* show that this exception was taken for granted. The Pact also says nothing about *force short of war*. Some argue that the state-practice or custom gradually outlawed this. But majority of the scholars are of the view that it was still deemed lawful. The net result was that self-defense emerged as exception to the general prohibition on war.

2.1.1.2 The Post-Charter Period

The UN Charter for the first time declared a comprehensive ban not only on war but also on the *threat or use of force*. Article 2(4) of the Charter says:

> "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."

This, indeed, is a breakthrough and a significant achievement in itself. This general prohibition is reaffirmed in a number of General Assembly resolutions, e.g., *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States*[4], *Declaration of the Principles of International Law*[5], *Definition of Aggression*[6] and *Resolution on Enhancing the Effectiveness of the Prohibition of the Use of Force*[7]. We noted earlier that General Assembly resolutions may not be binding on the States but they do show a strong evidence of customary international law, which is binding even on those States that voted against the resolution. Thus, ICJ in *Nicaragua v USA* declared that this general prohibition on the use of force exists not only in the Charter but also in the customary international law.[8] Indeed,

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[4] GA/Res/2131 (XX) (1965)
[5] GA/Res/2625 (XXV) (1970)
[6] GA/Res/3314 (XXIX) (1974)
[7] GA/Res/42/22 (1987)
[8] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* 1984 ICJ Rep 392

several judges and international lawyers are of the opinion that the primary obligation not to use force has attained the status of *jus cogens*.

The Charter explicitly mentions just three exceptions to this general prohibition. First is the Collective Use of Force under Chapter VII of the Charter. Second is force used in individual or collective self-defense against an ongoing armed attack (Article 51). Third is action against ex-enemy state (Article 107), but this is now obsolete. So, now there are only two exceptions explicitly mentioned by the Charter.

There is another generally agreed upon exception to this ban, namely, the use of force *authorized* by the UN Security Council. This exception, though not mentioned in the Charter, has emerged due to state practice or custom. Some States have claimed a few other exceptions as well, but these are not universally accepted. The nature and extent of this general prohibition and of the exceptions thereto will be analyzed in a bit detail in the next sections.

2.1.2 The Prohibition on the Threat or Use of Force

2.1.2.1 Relationship of the Pre-Charter and Post-Charter Law

Regarding the relationship between the pre-Charter and post-Charter law Martin Dixon says:

> "Indeed, perhaps the most difficult question of all is the extent to which pre-1945 rules still affect the scope of a state's right and obligations under current international law."[9]

There have emerged two different schools on the issue, which led to interpreting the ban on the use of force and exceptions thereto in two different ways. One is the so-called "permissive" and the other "restrictive" school.[10] The permissive

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[9] *International Law*, p 294; See also: *Cases and Materials*, p 820

[10] See for details: *International Law*, pp 296-99. See also: Franck, T., *Who Killed Article 2(4)?*, (1970) 64 AJIL809; Henkin, L., "*The Reports of the Death of Article 2(4) Are Greatly Exaggerated*", (1971) 65

school contends that the Charter did not usher in a new era and that the pre-Charter customary law has not been abrogated altogether. Therefore, it says, the pre-Charter rights are still available to States. This school interprets Article 2 (4) of the Charter quite literally. Thus, it contends that Article 2 (4) puts two conditions on the threat or use of force namely, that it should not be against the territorial integrity or political independence of a state; and that it should not be in a manner inconsistent with the purposes of the UN. On the other hand, restrictive school believes that the Charter did usher in a new era and that for all practical purposes it is the Charter that now governs the conduct of States. This school takes Article 2 (4) to have put a comprehensive ban on the threat or use of force. It contends that only the exceptions that are explicitly mentioned in the Charter or exceptions that are universally accepted as 'new' customs are valid. We would discuss and analyze the views and arguments of both the schools in a bit detail.

2.1.2.2 Article2 (4)

According to permissive view, the threat or use of force is not unlawful if it does not result in the loss or permanent occupation of territory, or if it does not compromise the 'target' state's ability to take independent decisions, for it would not be 'against the territorial integrity or political independence of a state'. Similarly, this school contends that force used for enforcing and promoting the purposes of the UN is not unlawful because it is not 'in any other manner inconsistent with the Purposes of the United Nations'.

Examples of the former are rescue of nationals by means of swift surgical strike, as with Israel at Entebbe airport in 1976 and US' limited intervention in Panama in 1989 to kidnap the 'undemocratic' and 'criminal' General Noriega. Example of the later is NATO's action against Serbia for 'humanitarian purposes'. It is quite strange, however, that the permissive school does admit the fact that the

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AJIL 544; Hargrove, J., "*The Nicaragua Judgment and the Future of the Law of Force and Self-defense*", (1987) 81 AJIL 135; Ian Brownlie, *International Law and the Use of Force by States* (Oxford, 1983).

prohibition contained in Article 2(4) is something more than the mere prohibition of 'war' contained in the pre-Charter treaties.[11]

Restrictive school argues that the phrase "against the territorial integrity or political independence of a state" was meant to denote the totality of a state and that it does not provide a loophole for action against state. Similarly, according to this school, the phrase "in any other manner inconsistent with the Purposes of the United Nations" was not meant to allow force to achieve such purposes. Rather, it was meant to ensure that force could never be used against non-state entities such as colonies and protectorates. The net effect is that threat and use of force is prohibited in all forms except where explicitly allowed by the Charter. Martin Dixon says:

> "An analysis of the *travaux preparatoires* of the San Francisco Conference which gave birth to the Charter confirms that the disputed phrases in Art. 2(4) were inserted in preliminary drafts in order to strengthen the obligation not to use force rather than to weaken it. Furthermore, although there have been many examples of the use of force in the last 50 years, only Israel after the Entebbe raid has relied primarily on the permissive view of Art. 2(4). In all other cases...the States resorting to force have relied on alleged exception to the general principle prohibiting armed force rather than interpreting it narrowly. While these exceptions might be widely drawn, this is very different from claiming that the primary obligation is itself inherently flexible."[12]

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[11] As Martin Dixon puts it: "This in itself is enough to persuade proponents of the restrictive view that such an interpretation of Article 2(4) should not be adopted. Moreover, in so far as the permissive interpretation places the distinction between lawful and unlawful force on the subjective intention or aim of the acting state, it may go too far." (*International Law*, p 298)

[12] *International Law*, p 299

So, the drafting history of Article 2 (4), the general purposes of the Charter, and an analysis of the arguments presented by those States actually using force support the restrictive interpretation of the provision.[13]

2.1.3 Self-defense

Here again the controversy about the relationship of the pre-Charter and post-Charter law comes to fore.[14] Exponents of the permissive school argue that the Charter has preserved the pre-Charter customary right of self-defense. Restrictive school denies this claim. We will first discuss the scope of the customary right of self-defense.

2.1.3.1 Customary Self-defense

There was no general ban on the threat and use of force before the Pact of Paris. But gradually States started asserting the right of self-defense and by the 19th century, States were in a habit of giving "justification" to their use of force under the guise of self-defense, reprisal, rescue of nationals and property abroad etc, although still no such justification was legally required. Scholars generally admit that *The Caroline* incident clearly defined this right.

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 US Secretary of State Mr. 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."[15] Further, it had to be established that, after entering the United States, the armed

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[13] To quote again Martin Dixon: "It would be strange indeed if the Charter was to repeat the mistakes of the League Covenant and the Kellogg-Brigand Pact by providing a loophole based on an artificial and self-serving interpretation of Art. 2(4)." (Ibid.)

[14] See for details: *International Law*, pp 299-304; *Cases and Materials*, pp 848-68; Grieg, D., "*Self-defense and the Security Council: What Does Article 51 Require?*" (1991) 40 ICLQ 366; Hargrove, J., "*The Nicaragua Judgment and the Future of the Law of Force and Self-defense*", (1987) 81 AJIL 135.

[15] *Cases and Materials*, p 848

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."[16]

This statement defines the scope of customary right of self-defense and mentions the essential conditions for the exercise of this right. Thus, under customary international law the use of force in self-defense was justified if the following conditions were fulfilled:

1. Force was used against an immediate threat.
2. The threat was so overwhelming that it could not be avoided by other alternative means.
3. The force used was proportionate to the threat posed.

So, if these conditions were fulfilled the right of self-defense was available even before actual armed attack. In other words, preemptive strike was considered legal. Moreover, self-defense was not confined to situation of armed attack only. It was available even in response to economic aggression and propaganda that cause an instant and overwhelming necessity for forceful action. Finally, a state could claim self-defense if her interests abroad such as nationals, territory, property and rights guaranteed under international law faced actual or threatened attack.

Although none, except Israel after the Entebbe incident[17], debated the scope of the prohibition under Art 2(4), there are several examples when States resorting to the use of force claimed the existence of customary right of self-defense.[18] It is, therefore, necessary to ascertain that whether or not the customary right of self-defense survived the UN charter.

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[16] Ibid.

[17] *Cases and Materials*, pp 864-68; See for details: Stevenson, *90 Minutes at Entebbe* (1976)

[18] Thus, the destruction of Iraqi nuclear reactor by Israel in 1981 and the recent US invasion and occupation of Iraq in 2003 have been 'justified' under the guise of customary self-defense.

2.1.3.2 Article 51 of the UN Charter

Article 51 of the UN Charter 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 measures necessary to maintain international peace and security."

Permissive school claims that the usage of the word "inherent" in Article 51 means that the pre-Charter customary right has remained intact. It further says that Article 51 was never meant to be a comprehensive definition of the right of self-defense. It was rather a clarification regarding the relationship of regional organizations to the Security Council. So, for this school, the purpose of Article 51 was to declare that in case of self-defense, regional organizations may take armed action without Security Council authorization just as a state can take armed action in self-defense without such authorization. It is further argued that Article 51 did not say that right of self-defense is available *only* if an armed attack occurs.

Restrictive school, on the other hand, claims that the word "inherent" merely means that the right of self-defense is an *inalienable* right of statehood that can never be denied; it has nothing to do with the customary right of self-defense. They further say that Article 2(4) has put a comprehensive ban on the threat and use of force. Thus, reading it with Article 51 leads to the conclusion that the only right of self-defense available now is that found in Article 51, which in turn means self-defense against actual and ongoing armed attack. The restrictive school also contends the argument that Article 51 was never meant to define the scope of self-defense.

Next comes the issue of "armed attack". The words "armed attack" obviously exclude other forms of non-violent aggression such as economic aggression or destructive anti-government propaganda. It means that these words have qualified

the customary right of self-defense, which entitled a state to use force even in cases of non-violent attack on her interests.

Then, is it necessary that an armed attack must be from a state, or terrorist attacks, such as those on the WTC and Pentagon, can also be termed as armed attack?[19] There are scholars who argue that the words "armed attack" as used in the UN Charter and Washington Treaty imply that they denote an armed attack by a state on another state. Professor Giorgio Gaja says:

> "When stating the conditions for individual and collective self-defense, neither Article 51 of the UN Charter nor Article 5 of the NATO Treaty specifies that an 'armed attack' has to originate from a state. However, this condition may be taken as implicit. The two provisions deal with international relations and envisage an exception to the general prohibition of the use of force against States."[20]

Another argument is that armed attack is a sub-category of "aggression" and aggression necessarily emanates from a state.[21]

As far as the relationship between a terrorist group and government of a state and responsibility of the state for terrorist activities of that group is concerned it is a different question and is out of the scope of present study. It relates to the issues of "State Responsibility". A state may or may not be responsible for activities of a

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[19] The North Atlantic Council after the 9/11 attacks issued a Press Release stating: "If it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty, which States that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all." (Press Release (2001)(124) See also: Giorgio Gaja, The Attack on the World Trade Center: Legal Responses, *In What Sense Was There an "Armed Attack"?* (hereinafter referred to as *Armed Attack?*), <www.ejil.org/forum_WTC/index.html>)

[20] Ibid.; See also: Grieg, D., "*Self-defense and the Security Council: What Does Article 51 Require?*" (1991) 40 ICLQ 366.

[21] Thus, Article 1 of the "Consensus Definition of Aggression" GA/Res/3314 (XXIX) (1974) says: "Aggression is the use of armed force *by a State* against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations..."

terrorist group but such activities cannot be termed as "armed attack" in the sense it is used in Article 51 of the UN Charter.

Then, there is the issue of "occurrence" of attack. The *travaux preparatoires* at the San Francisco Conference do suggest that there was a hot debate on the wording of Article 51. It was USA, which insisted that the phrase *if an armed attack occurs against a member state* must be put in Article 51. Green Hackworth, the US State Department's legal adviser, warned that making self-defense conditional upon the occurrence of an armed attack 'greatly qualified the right of self-defense'.[22] But Deputy Head of the US delegation Governor Harold Stassen refused to yield. He argued that 'this was intentional and sound. We did not want to exercise the right of self-defense before an armed attack had occurred'.[23]

Another member of the US delegation Mr. Gates posed a question regarding the freedom of USA, under this provision, in case a fleet had started from abroad against an American republic but had not yet attacked. Stassen replied that 'we could not under this provision attack the fleet but we could send a fleet of our own and be ready in case an attack came'.[24]

Indeed, the stipulation of 'occurrence' has caused more concern in the contemporary world. Martin Dixon makes a valid point when he says "an attack may 'occur' before troops cross a frontier, as when missiles are launched or aircraft deployed."[25] Thomas M. Frank, Director Center for International Studies, New York City Law School, has the following to say:

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[22] Minutes of the Forty-eighth Meeting (Executive Session) of the United States Delegation, held at San Francisco, May 20, 1945, 1 *Foreign Relations of the United States*, 1945, 813 at 818

[23] Ibid.

[24] Minutes of the Thirty-eighth Meeting (Executive Session) of the United States Delegation, held at San Francisco, May 14, 1945, 1 *Foreign Relations of the United States*, 1945, 707 at 709; See also: Thomas M Frank, *When, if ever, May States Deploy Military Force Without Prior Security Council Authorisation?* (Hereinafter *Military Force Without Prior Security Council Authorisation?*), SJIL (2000) 4, p 368.

[25] *International Law*, p 301; See also: *Cases and Material*, pp 849-55

"It had been asserted that the emergence of 'new age' weaponry makes it illogical to require States to sit still until after an 'armed attack' against them has occurred. Where state is small and the potential attacker powerful or equipped with a 'first strike capability' there is vissimilitude to the claim that article 51 should be interpreted to allow anticipatory self-defense."[26]

This issue has got more importance after the declaration of the so-called "Bush Doctrine". In September 2002, the American president George W. Bush in his speech at the UN General Assembly made it quite clear that USA would use force in anticipation of any threat from any quarter, and asserted that it was her right to do so. We will discuss this issue in a little detail.

2.1.3.3 Pre-emptive Self-defense

Anticipatory self-defense was legal under the pre-Charter customary international law.[27] All those who still stress upon the legitimacy of this right base their argument on this customary notion of self-defense. Prof. Louis Rene Beres & Yoash Tsiddon-Chatto, for instance, say:

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[26] *Military Force Without Prior Security Council Authorisation?*, p 368 Similarly, Prof. Louis Rene Beres & Yoash Tsiddon-Chatto arguing for the right of pre-emptive self-defense say: "Indeed, this right is especially compelling today, when – in an age of mass destruction weaponry – failing to preempt may bring about annihilation or create a world of international political/criminal extortion by renegade States or terrorist groups." *In Support of Anticipatory Self-defense: Israel, Osiraq and International Law* (hereinafter referred to as *Anticipatory Self-defense*), http://www.freeman.org/m_online/jun97/beres1.htm

[27] Hugo Grotius, 'the Father of international law', said: "[I]t be lawful to kill him who is preparing to kill." (David M. Ackerman, *International Law and the Pre-emptive Use of Force against Iraq*, (hereinafter referred to as *Pre-emptive Use of Force*), Congressional Research Service Report for Congress, (September 23, 2002), http://www.hrcr.org/Text/HotTopics/Iraq.html) Emmerich de Vattel, another classical writer on international law, asserted: "The safest plan is to prevent evil, where that is possible. A Nation has the right to resist the injury another seeks to inflict upon it, and to use force ... against the aggressor. It may even anticipate the other's design, being careful, however, not to act upon vague and doubtful suspicions, lest it should run the risk of becoming itself the aggressor." Ibid.

"International law is not a suicide pact! Under the long-standing customary right known as anticipatory self-defense, every state is entitled to strike first when the danger posed is 'instant, overwhelming, leaving no choice of means and no moment for deliberation.' "[28]

But we have already concluded that for all practical purposes it is the Charter that now governs the law relating to the use of force. So, reference to the pre-Charter law can only be of little help.

Secondly, it is argued that because of several factors there has emerged new custom that now allows anticipatory self-defense even if it was not initially allowed under the Charter. The most important of these factors are the Cold War politics and emergence of sophisticated Weapons of Mass Destruction (WMD's).[29] It is said that because of Cold War the original scheme of Collective Security envisaged by the Charter could not be enforced and states had to rely on their own to cope with threats to their security. In other words, the Charter denied anticipatory self-defense because there was a system of Collective Security, which could help in case of any threat to the peace or international security. For that system has failed, states should be given the right of anticipatory self-defense.[30]

Indeed, the UN Charter also recognizes the fact that there may be circumstances in which preemptive use of force becomes necessary. Thus, Article 39 authorizes the Security Council 'to determine the existence of any threat to the peace, breach of the peace, or act of aggression.' As is obvious, in case of a 'threat to the peace' if the

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[28] *Anticipatory Self-defense*, supra note 26

[29] "It would be a travesty of the purposes of the Charter to compel a defending state to allow its assailant to deliver the first, and perhaps fatal, blow...." (Statement by Sir Humphrey Waldock, quoted in Roberts, Guy, *The Counter-proliferation Self-help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction*, 27 *Denver Journal of International Law and Policy* 483, 513 (1999))

[30] David M. Ackerman, Legislative Attorney American Law Division, says: "In further support of this view, it is argued that the literal construction of Article 51 simply ignores the reality that the Cold War and other political considerations have often paralyzed the Security Council and that, in practice, states have continued to use force preemptively at times in the UN era and the international community has continued to evaluate the legitimacy of those uses by the traditional constraints of necessity and proportionality." (ibid.)

Security Council authorizes the use of force it will be a perfect example of preemptive strike. In this case the authority to determine the necessity of preemptive strike lies with the Security Council.

But what about a state declaring to use force in self-defense because of an imminent threat? If the threat is imminent will it be wise to refer the matter to the Security Council and wait for its determination? On the other hand, if States were allowed to use force in case of an imminent threat would it not lead to abuse? Would it not nullify the comprehensive ban on the use of force?[31]

While it is true that the system of Collective Security as envisaged by the Charter did not work but it cannot be taken as a ground for allowing the States to use force when, in their subjective assessment, they feel that a threat to their security exists that can only be averted by pre-emptive strike. As is obvious, if States are given this license it will most probably be abused. Is it not an irony that the justification for pre-emptive strike is forwarded by those States who themselves have acquired WMD's and the weaker States have always preferred a restrictive interpretation of Art 51?[32]

As pre-emptive strikes are based on intelligence reports and assessments of the threats made by some state organs or policy makers there is every possibility that such reports and assessments may not be correct. There may be some sort of

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[31] The real dilemma in the words of Thomas M. Frank is: "On the one hand, it is evident that any adaptation of the Charter's absolute prohibitions on the unilateral or initiatory use of armed force would be nullified if each state were free to determine for itself whether a perceived danger of attack warrants anticipatory action. On the other hand, it is an irrational – and ineffectual – law that seeks to prohibit a state from protecting its very survival until the threat to it has eventuated." (*Military Force Without Prior Security Council Authorisation?*, p 369)

[32] As Martin Dixon says: "It is undeniable that the policy arguments which favour a wider right reflect powerful States' desire to preserve their freedom of action, especially as international law is such an imperfect system...Contrary to this is the interpretation of States who do not have the military capacity to use force to 'protect' their rights...They believe that self-defence should be an exceptional right, available in exceptional circumstances. Moreover, that exceptional situation should be the relatively objective and relatively easily established scenario of an armed attack against state territory." (*International Law*, p 302)

exaggeration and miscalculations. The result will be nothing short of a catastrophe.[33]

It is also important to note here that the term "pre-emptive self-defense" is used wrongfully by the Bush administration to justify its blatant and naked aggression against Iraq. There is a lot of difference between preemption and prevention.

> "*Preemption* is the use of force when an imminent threat exists... *Preventive attack*, on the other hand, is the use of force when no imminent threat exists. A number of legal experts and critics... have argued that Bush's policy is more accurately described as preventive, and is therefore in violation of international law."[34]

But the US State Department has been systematically trying to change the meaning of preemptive strike.[35]

Indeed, it is quite difficult to determine objectively when a threat is eminent as to require, and justify, a prompt reply in the form of use of force. To quote again Thomas M. Frank:

> "How to make – credibly and impartially – the key determination that, in a particular instance, extreme necessity does or does not exist, so as to justify, or not, a military action? Who shall decide and on what facts?"[36]

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[33] A perfect example of such exaggeration and miscalculation, rather distortion of facts, is the recent US – UK attack on Iraq. It is now well established that there was no real threat to UK or US from Iraq. UK's report on Iraq's weapons was found a worse example of plagiarism and distortion of facts. No Iraq-Qaeda nexus was proved. No WMD's were found. And now Mr. George Tenet, the CIA chief, admits that the reports given to Mr. George Bush by his intelligence agencies were wrong![33] What all this demonstrates is the unavoidable conclusion that the so-called pre-emptive self-defense is open to misuse, rather abuse.

[34] *Beyond Iraq: What kind of America?, More on What is Bush Doctrine, <www.futurenet.org/iraq/#top>*

[35] 'Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat — most often a visible mobilization of armies, navies, and air forces preparing to attack,' the strategy document States. It continues, 'We must adapt the concept of imminent threat,' and goes on to assert the right to strike first even if no imminent threat exists.' (Ibid.)

If the system of Collective Security envisaged by the Charter were to work smoothly the answer to this question would not have been so difficult. In the absence of a smoothly working system of Collective Security all the States can do is to assess the threat objectively and impartially. The responsibility for their action will be theirs. If the threat were imminent the use of force would not be widely condemned by the comity of nations. If the threat were remote that could be averted by means other than the use of force it will most probably be condemned by majority of the States. Thus, Israel's preemptive strike against the Arab States in 1967 was deemed necessary for her survival by most of the States. But her preemptive strike against Iraq's nuclear installations in 1981 was severely condemned by majority of the States. Thomas M. Frank observes:

> "The [UN] system has responded benevolently when anticipatory force has been used solely to prevent a demonstrably imminent and potentially overwhelming threat to state's security."[37]

Responding benevolently means "either specific consent or silent acquiescence."[38] But it must be emphasized here that this specific consent or silent acquiescence gives *post hoc* legitimacy to the use of force. In other words, the use of force in anticipatory self-defense was initially illegal but because of the gravity of the situation the comity of the nations considered it necessary, unavoidable and, hence, justified. All this means that the legitimacy of preemptive strike by a state depends upon its acknowledgement by the international community. What if the international community does not recognize it as necessary and legitimate? It would, then, be termed as an act of aggression and all the necessary implications will follow.

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[36] Ibid.
[37] Ibid. p 373
[38] Ibid.

It may, however, happen that even if the international community later condemns it, the attack may have brought changes that cannot be reversed. For instance, even if it is acknowledged that the recent US attack on Iraq was an act of aggression and not preemptive self-defense, the situation on the ground cannot change: the Saddam regime has been toppled and the US is now exercising authority over Iraq as occupying power.

Another point that needs consideration is that States are, more often than not, guided by interests and not by legal considerations. So, it is quite possible that the international community may not condemn a naked act of aggression. A perfect example is the recent US "preemptive" attack on Iraq. This is, however, an inherent defect in international system, which again calls for a restrictive approach towards the use of force.

To conclude, preemptive strike by the UN Security Council is perfectly legitimate. As for anticipatory attacks by States, they do use force in anticipation of an imminent and potential threat. The legitimacy of such attacks, however, depends upon the assessment of the international community. The guiding principle in this regard is that there is a difference between preemptive and preventive strike. The international community generally gives legitimacy to preemptive strike but not to preventive strike. The same strike may, however, seem preemptive to some States and preventive to others. In this regard, States are more often than not guided by their interests and not by legal considerations.

2.1.3.4 Protection of Nationals and Property Abroad

States also use to claim that they have the right to defend their nationals, and even property, abroad under the customary right of self-defense.[39] Customary

[39] For instance, in the Suez crises of 1956, the UK claimed that state property could be protected in this way. The United States invasion of Grenada in 1983, the bombing of Libya in 1986 and of Baghdad in 1993, all is 'justified' under this doctrine. The Entebbe incident 1976 is cited as a good example of a State using proportionate force to protect its nationals abroad without causing any damage to the territorial integrity or political independence of any other State. See for details: Akehurst, M., *The Use of Force to Protect Nationals Abroad*, (1976/77) 5 International Relations 3;

international law allowed the use of force for this purpose only if the following four conditions were fulfilled:

1. The 'host' state must be unable or unwilling to protect the nationals.
2. The nationals must be in serious and immediate danger of life-threatening harm.
3. Force must be the weapon of last resort.
4. The acting state may use only such force as is reasonably necessary and must vacate the territory of the 'host' state as soon as is practicable. [40]

These are essentially the same conditions, which are deemed necessary for the right of customary self-defense discussed above.

That the right to protect nationals and property abroad existed in the pre-Charter law is not disputed. What is not agreed upon, however, is that whether this 'right' still exists. We have already explained our opinion that for all practical purposes it is only the right mentioned in Art 51 that has legitimacy beyond ant doubt. Hence, pre-emptive strike or protection of nationals and property abroad can have justification only in cases of extreme necessity and then also within the limits of that necessity. Martin Dixon rightly points out that "it provides a tempting opportunity to interfere in the domestic affairs of 'target' States."[41]

The US invasion of Grenada in 1983, even if justified under this doctrine, lost all legitimacy when US tried to install a new regime there. Indeed, it is quite strange that the US bombing of Libya in 1986 and of Baghdad in 1993 because of the allegations of terrorist plans against US nationals are justified under this doctrine, although they were quite different from the Entebbe incident. The rescue operation at Entebbe, the so-called 'Swift Surgical Strike', took only 30 minutes and a very limited force was used. As Martin Dixon says:

Bowett, D., *Reprisals Involving Recourse to Armed Forces*, (1972) 66 AJIL 1; *Cases and Materials*, pp 861-68; *International Law*, pp 307-08.

[40] *International Law*, p 307

[41] Ibid., p 308

"It is difficult to see how this 'defence against terrorism' can be within the rubric of protection of nationals and self-defence, even if the more traditional rescue missions are. To most objective observers this new claim looks like punitive reprisals and illustrates why the existence of any right to protect nationals with force is so controversial."[42]

2.1.3.5 Self-defense against 'Indirect' Aggression

'Indirect Aggression' is an expression used to denote the help provided by a state to insurgents in another state. While legitimacy of such help may be debatable, but it is certain, as ICJ in *Nicaragua v USA Case* decided[43], that the 'target' state could not, under the guise of self-defense, use force against the state accused of indirect aggression.

2.1.3.6 Collective Self-defense

Is it necessary that all the States resorting to the use of force under this doctrine must have the right to use force in self-defense individually? Or is it that States, which have not been attacked, can come to the aid of a 'victim' state?

Majority of international lawyers, jurists and judges are of opinion that it is not necessary for the exercise of the right of collective self-defense that all States must be under attack. This view was expressed by majority of the judges in the *Nicaragua v USA Case*. They also mentioned the prerequisite for the exercise of this right: the 'victim' state must request the other state to help her. This may apparently seem unrealistic but as Martin Dixon says, "it does prevent a third party from taking military action merely because it thinks that collective self-defense is

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[42] Ibid.

[43] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* 1984 ICJ Rep 392; See also: Hargrove, J., "*The Nicaragua Judgment and the Future of the Law of Force and Self-defense*", (1987) 81 AJIL 135; *Cases and Materials*, pp 824-42.

justified."[44] This doctrine is the basis of different regional alliances, such as the NATO, the SEATO and the Warsaw Pact.[45]

2.1.4 The Collective Use of Force

2.1.4.1 The Original Scheme

The United Nations Charter envisaged for the first time a system of collective security.[46] Under Chapter VII (Articles 39-51) of the Charter, the Security Council is given the 'primary' responsibility of maintaining and protecting the international peace. Under Art 25 decisions of the Security Council under Chapter VII are binding on all members of the United Nation.

Under Article 39, the system of Collective Security comes into motion in three cases:

(i) When a state commits an act of aggression against;

(ii) When a state commits a breach of the peace; and

(iii) When there is a threat to the peace.

The authority to determine the existence of a situation where action under Chapter VII becomes necessary lies with the Council. As is obvious, the first two cases are a kind of punitive action while the third case is of preemptive nature.

Article 40 says that the Council may take any action it deems appropriate before the determination under Article 39. Normally, the first step after the determination is a resolution in which that particular act or threat is condemned and the relevant state is ordered to do some specific act showing her willingness to comply with the decision of the Council. However, if war has already broken out

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[44] *International Law*, p 303.

[45] Judge Jennings of UK said in his dissenting opinion in the *Nicaragua v USA Case* that it is necessary for the exercise of the right of collective self-defense that all the participating States must individually have the right to use force in self-defense. According to this view, the Gulf War 1991 was justified as there was 'attack' on the States dependent on Kuwait's oil. There is, however, little practical difference in these views. The reason is that the majority interprets the right of self-defense narrowly while Judge Jennings interprets it quite widely in the customary non-Article 51 sense.

[46] For details see: *International Law*, pp 313-24; *Cases and Materials*, pp 873-907; *Military Force without Prior Security Council Authorisation?*, pp 362-66; Gray C., *After the Cease-fire: Iraq, the Security Council and the Use of Force*, 65 BYIL 135 (1994); Warbrick C., *The Invasion of Kuwait by Iraq*, (1991) 40 ICLQ 482.

the Council tries to pass a cease-fire resolution and directs all the parties to stop hostilities.

Article 41 provides for the so-called 'soft sanctions', such as economic and arms embargo, cutting off of diplomatic ties etc. If these sanction do not work, or when the gravity of the situation demands a prompt action then Article 42 comes in to action. This article provides for 'Collective Use of Force' against the wrongdoer. Originally the scheme was that the UN would have its own forces for which purpose all the member States would provide some of their troops and they would work under the UN command. For this purpose, Article 43 provided for agreement between the UN and its members. This, however, could not materialize because of the so-called 'Cold War' between the super powers.[47] So, the system of Collective Security has been working without Article 43.

The Security Council has fifteen members, five of which (USA, Russia, UK, France and China) are permanent members. Decisions in the Council require majority of the members present and voting, provided that any of the five permanent members does not cast a negative vote called veto. The presumption behind giving the veto power to these five States is that maintenance of international security and peace is not possible if the interests of these States are not protected. This was a mechanism made for the purpose of avoiding a future conflict among the big powers that may result into catastrophes like the two World Wars.[48]

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[47] Thomas M. Frank 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 expected 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." (*Military Force without Prior Security Council Authorisation?*, p 362)

[48] While none can disagree with this there are some problems with this veto power. It has become a tool in the hands of these powers to claim impunity not only for themselves but also for their allies. The US veto, for instance, has time and again helped Israel to commit atrocities in the Middle East and go with impunity. This in turn has caused in the people of oppressed nations much dissatisfaction with the present world order. It has also caused disrespect for the UN and its peacekeeping activities. While it is true that the UN mechanism is made for peace, not for justice, it is equally true that without ensuring justice peace is never possible. The General Assembly has time and again recognized this fact. (See, for instance, GA/Res/3034 (XXVII) (1972)) Moreover, the structure and membership of the Council reflects the realities of the mid-20th century. These powers

2.1.4.2 Authorization – A New Adaptation of the Charter

2.1.4.1A Role of the Security Council in the Korean War

Soon after the adoption of the UN Charter there emerged serious differences among the Allies, the victors of World War II, on the question of control over Germany. Then, the ideological differences between the Western Capitalist States and the Socialist Soviet State, which were buried during the War because of the common threat from Germany and her Allies, came to surface. Thereafter, most of the Eastern European States came under the Soviet influence and USA announced to 'contain' communism and defend the Western Europe from the Soviet threat. This was the beginning of the Cold War, which soon reached the newly independent Afro-Asian States. In 1949, another factor further deteriorated the situation. This was the emergence of another Communist state in Asia – the Peoples Republic of China.

The Korean Peninsula was another bone of contention for the two super powers.[49] The result was inevitable. War broke out in Korea with Soviets supporting one side and Americans the other. The Secretary General in his report[50] to the Security Council observed that North Korea committed an act of aggression against South Korea and proposed that the Security Council should take action by demanding the parties to stop hostilities and imposing arms embargo on North Korea. He also proposed that the Council should call 'upon all Members to render any assistance' in this regard.

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were the victors at the end of World War II and they had some global influence. Lots of the things have changed since then. Indeed, there is the ever-emerging need of re-allocating the veto power among different States keeping in view the realities of the present day world. Professor Imran Ahsan Khan Nyazee, for instance, says: "To introduce true democracy, some new system will have to emerge in the future, a system that gives the membership of the Security Council to the various regions of the world rather than to individual nations, with the member nations of the regions representing their region on the basis of rotation." (Imran Ahsan Khan Nyazee, *Islamic Law and Human Rights*, Islamabad Law Review, Faculty of Sharī'ah and Law, International Islamic University Islamabad, Spring/Summer 2003, Vol. 1:1 & 2, p 16, at FN 9)

[49] See for details: *Cases and Materials*, pp 882-86

[50] UN SCOR, 5th Session, 473rd meeting at 3 UN Doc S/PV 473 (1950), 25 June 1950

As Soviet Union was absent from the Council meeting the proposal was swiftly adopted and invoked Art 39 determining breach of the peace.[51] 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.[52]

This was an adaptation of the Charter on the part of the Council, as the Charter only provided for Collective Use of Force under the command of the Security Council but the Council in this case *allowed* States to use force. Under the original scheme members were obliged to give military forces to at the Council's disposal, but in this case they were only *authorized* to give military forces. In other words, this was a 'Coalition of the Willing'. This resolution was passed by majority with only Yugoslavia voting against.

Again, with Soviet Union still absent and Egypt, India and Yugoslavia abstaining, the Council passed a resolution[53] asking Members to give forces to a unified command headed by the United States. This resolution also authorized the forces to use the UN flag and asked the United States to report 'as appropriate' to the Council. The Council could take no further action because of the Soviet veto.

2.1.4.2B The Uniting for Peace Resolution 1950

Then came the General Assembly to fulfill the task. It passed a hallmark resolution known as *The Uniting for Peace Resolution.*[54] By this resolution the General Assembly declared that it also had some responsibility, as well as authority, to protect and restore international peace. It declared that if veto of a permanent member becomes a hurdle in the performance of the Council then the General Assembly 'shall consider the matter immediately with a view to making appropriate recommendations to members for collective measures, including in the case of a breach of the peace or act of aggression, the use of armed force when necessary, to restore international peace'. This, however, could not lead to the use

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[51] SC/Res/82 (1950)
[52] SC/Res/83 (1950)
[53] SC/Res/84 (1950)
[54] GA/Res/377 (V) (1950). See for details: *Cases and Materials*, pp 891-94.

of force against aggressor, although it did succeed in bringing the matter to open debate in the Assembly and thus putting political pressure on the wrongdoers.

The same procedure was adopted in 1956 at the time of the Suez Canal Crisis, when due to the British and French veto the Council was unable to take any action.[55] The Assembly was successful enough to pass a resolution to the same effect and to persuade France and England as well as Israel to pull back from the Suez. The resolution was again used in 1980 when USSR invaded Afghanistan.[56]

Similarly, this resolution was the basis of the first Peacekeeping Mission (UNEF) in Egypt with her consent after the Suez Crisis. As is well known, there is no explicit mention in the Charter of the peacekeeping forces. The responsibility to maintain and restore international peace was interpreted widely by the Assembly to include within its scope forces for the purpose of peacekeeping with the consent of all the parties.

The ICJ in the *Certain Expenses Case*[57] confirmed that the Uniting for Peace Resolution and peacekeeping missions were valid and were in accordance with the UN Charter.

2.1.4.2C Authorization in the Post-Cold War Era

During the cold war era, the Council could impose non-military sanctions, although very sparingly.[58] 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.

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[55] *Cases and Materials*, pp 861-63

[56] Ibid., 844-46

[57] *Certain Expenses of the United Nations Case* 1962 ICJ Rep 151; See for details: *Cases and Materials*, pp 899-907

[58] For instance, it imposed comprehensive mandatory sanctions on Southern Rhodesia. (SC/Res/235 (1968) It also imposed arms embargo on South Africa (SC/Res/418 (1977), 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.

The very first, and perhaps the most successful, instance of authorization in this new era is the First Gulf War 1990-91. In August 1990, Iraq invaded Kuwait and occupied it. The Council passed a resolution with all the permanent members voting in favor and only Yemen from the non-permanent members abstaining.[59] It thereby determined that Iraq's action constituted a breach of the peace. Then in November, it invoked Chapter VII requesting member States to use 'all necessary means' to restore Kuwait's sovereignty.[60] This resolution was passed with China abstaining and Yemen and Cuba opposing. Some 29 States sent forces.[61]

In 1992, the Council authorized the *ad hoc* 'coalition of the willing', the United Nations Protection Force (UNPROFOR), in the former Yugoslavia.[62] 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'.[63] By the same resolution the so-called 'double key' approach was adopted, i.e., the UNPROFOR and the NATO air power were to work closely. The mandate was extended to Croatia in 1994.[64] By yet another resolution in 1995 the task was given solely to the NATO with the parties' nominal agreement.[65] In 1997, the Council authorized another protection force to restore order in Albania.[66] Only China abstained and the rest voted in favor.

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[59] SC/Res/660 (1990)

[60] SC/Res/678 (1990); See for details: Warbrick C., *The Invasion of Kuwait by Iraq*, (1991) 40 ICLQ 482; J. Quigley, *The United States and the United Nations in the Persian Gulf War: New Order or Disorder?*, (1992) 25 Cornell JIL 1; Gray C., *After the Cease-fire: Iraq, the Security Council and the Use of Force*, 65 BYIL 135 (1994);; J. Lobel and M. Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-fires and the Iraqi Inspection Regime*, (1993) 93 AJIL 124.

[61] As Martin Dixon says: "This action was collective security *par excellence* and, apart from acting under its implied powers instead of Art. 43, this was the Council doing exactly that which it had been designed to. Of course, there were cogent political reasons why this enforcement action was possible where so many others were not and it is the absence of a Russian or Chinese veto that is the most significant aspect of this episode. However, the ejection of Iraq from Kuwait, by a UN sponsored force, illustrated that collective security could work *if the members of the international community had the political will to make it work.*" (*International Law*, p 316 Emphasis added.)

[62] SC/Res/743 (1992)

[63] SC/Res/836 (1993)

[64] SC/Res/958 (1994)

[65] SC/Res/1031 (1995)

[66] SC/Res/1101 and 1114 (1997)

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.[67] Later, through another resolution[68] 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. By yet another resolution[69] it authorized the use of force against a Somali leader. This was in response to the killing of UN soldiers engaged in humanitarian relief in Somalia.

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.[70] This resolution was passed with only China and Brazil abstaining. The resolutions on Somalia and Haiti were passed unanimously. It thus confirms the conclusion that "creative adaptation of the Charter effectively had introduced a new form of collective security based on *ad hoc* 'coalitions of the willing' including the authorization by the Council of regional force".[71]

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.[72] It reflects the growing importance of human rights in international law and system.

In 1997, the Council authorized the use of force by the armed forces (ECOMOG) of the economic Community of West African States to end the argued of the Liberian civil war.[73] The Significance of this resolution is that it authorized the use

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[67] SC/Res/794 (1992)
[68] SC/Res/814 (1993)
[69] SC/Res/837 (1993)
[70] SC/Res/940 (1994)
[71] *Military Force without Prior Security Council Authorisation?*, p 366; Martin Dixon rightly says: "Undoubtedly, this is a reflection of the new understanding between the United States and Russia and the apparent unwillingness of Chine a wield its veto power" (*International Law*, p 315)
[72] SC/Res/1264 (1999)
[73] SC/Res/1116 (1997)

of force *retroactively*, i.e., the Council ratified the unauthorized use of force after it had already begun to operate. Thus, it was further adaptation of the Charter. So was the case, in the opinion of some scholars, with the NATO action in Kosovo. The NATO action in Kosovo was initially without Security Council authorization. It is argued that by subsequently authorizing (KFOR)[74] it gave legitimacy to the NATO's action from the beginning.[75] But there is little in support of this contention, especially when Russia and China specifically made it clear at the time of the adoption of the resolution that it should not be taken as retrospective endorsement of the NATO's action.[76]

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 'internal affairs' of States, which are beyond the scope of international law. Most of the time the use of military force was authorized in what were previously thought of as 'internal affairs' of States. This new practice also confirms the conclusion that the phrase 'threat to the peace' as used in Art 39 is not limited to military situations.[77]

2.1.4.3 Understanding the Law of Authorization

2.1.4.3A Interpretation of the Authorization Resolutions

In the post-cold war era there is much use of the authorization mechanism. But the attempt by the Western States to use this mechanism for their interests has unfortunately undermined not only this mechanism but also the whole UN system. While this is true that the authorization mechanism does not match the

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[74] SC/Res/1244 (1999)

[75] *Military Force without Prior Security Council Authorisation?*, p 366

[76] SC 4011th meeting, 10 June 1999. Professor N. D. White is worth quoting here: "What it does mean is that NATO stepped outside the parameters of the UN Charter when it suited the organization, and then it stepped back in again when it, or rather the G8, had produced a suitable formula for ending the bombing which satisfied Russia and was agreed to by the FRY." (White, N.D., *The Legality of Bombing in the Name of Humanity* (hereinafter referred to as *Bombing in the Name of Humanity*), JCSL (2000), vol. 5 no. 1, p 32)

[77] *International Law*, p 314

original scheme but is does not mean that there are no parameters for this system.[78] The very first condition for States to use force under the claim of authorization is that there must be an authorizing resolution. Then, this resolution must be construed narrowly. There are certain specific words used for authorizing military force. Professor White says:

> "In the United Nations there is consensus that the phrase 'all necessary measures' or 'all necessary means' in combination with an 'authorization' 'under Chapter VII' signifies that military enforcement action is being sanctioned. Other language will not do."[79]

Sometimes the Council determines the existence of a 'threat to the peace' or 'breach of the peace' or an act of 'aggression' but this determination in itself is not sufficient to authorize military enforcement action.[80]
Herein comes the issue of 'acting on behalf of the international community'

2.1.4.3B Acting on Behalf of the Intentional Community

Western States have time and again used this phrase to justify their unilateral use of force against state. The argument is made in this way:

> 'There is threat to the peace from a particular state, or it has committed a breach of the peace or an act of aggression; the Council has determined this;

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[78] Professor N. D. White has rightly pointed out: "*De minimums* there must be an authorizing resolution from the Security Council [], which, given its import and the fact that it is purporting to delegate devastating powers to States, must be construed narrowly." (*Bombing in the Name of Humanity*, p 31)

[79] Ibid. See also: T. D. Gill, *Legal and Some Political Limitations on the Powers of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter*, (1995) 26 NYIL 61; J. Lobel and M. Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-fires and the Iraqi Inspection Regime*, (1993) 93 AJIL 124.

[80] "[T]here is a huge leap from recognizing that there are laws prohibiting crimes against humanity, and recognizing that States have the right unilaterally or in combination with their allies to enforce those norms." (*Bombing in the Name of Humanity*, p 35)

now we are going to enforce the Council's resolutions, which embody the will of the international community; hence, we are right!"[81]

The claim of acting on behalf of the international community is often forwarded by the US and NATO States. This claim is based on the supposition that they represent the 'free world' and there is a system of checks and balances and accountability based on democratic principles. But decisions to go to war are taken by the executive branch of government, and the legislative generally approves these decisions retrospectively.[82] Moreover, even on democratic principles these States do not represent the international community. After all, how much of the world population, or States for that matter, they represent?

> "It is because the UN represents the vast majority of the world's States...that it has the only legitimate claim to be acting on behalf of the international community. Indeed, practically it is the only organization that can claim to be the international community."[83]

Again, it must be appreciated that it is the UN, and not the Security Council, which represents the international community. The Council is in need of reform if

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[81] The US took this line of argument and her 'Coalition against Terrorism' in their attaches against Afghanistan in 2001. The same is true of the UK/US intervention in Northern Iraq in 1991 and NATO's action in Kosovo in 1998/99.

[82] To quote again Professor white: "Parliament debates but decisions have already been taken, and it would cause a constitutional crisis if parliament were to vote against the actions already taken by the executive. The only real democratic control on such military actions is public opinion, which, to be honest, is often media led" (*Bombing in the Name of Humanity*, p 36)

[83] Ibid. p 37

it is going to represent the international community.[84] It the General Assembly that can really claim to represent great majority of world States.[85]

Hence, when the Council is blocked by the threat or use of veto by a permanent member then instead of States or groups of States *unilaterally enforcing the collective will* the Uniting Peace Resolution can be used to take the matter before the General Assembly.[86] The Assembly itself has asserted this right for itself by declaring that if the Council could not perform its task, then the General Assembly "shall consider the matter immediately with a view to making appropriate recommendations t members for collective measures, including in the case of a breach of the peace or act of aggression, the use of armed force when necessary, to restore international peace".[87]

To conclude, there is legally no room for some States, claiming to be acting on behalf of the international community, to use military force against another state. Authorization must come from the UN – either from the Security Council or from the General Assembly in cases where the Council is unable to take action. If Western States continue to bypass the Council and the Assembly and take unilateral enforcement action pretending to be acting on behalf of the international community, then there will be no agreement on the exact meaning of any Chapter

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[84] Professor White says: "Certainly, question mark my be raised against the composition of the UN Security Council and its and is ability to represent the international community, thereby calling into question whether a Council mandate, though having the necessary legal pedigree, gives sufficient legitimacy to the operation. Until there is a major reform of the Council the legitimacy of such military operation will be increased if they also have the support of the General Assembly." (Ibid., p 28)

[85] "The special value of the General Assembly is its universality, its capacity to be a forum in which the voice of every member state can be heard." (Report of the commission on Global Governance Our Global Neighborhood (1995) 242) While the use of force against Korea in 1950 and against Iraq in 1991 were legal in the sense that in both the instances the use of force was properly authorized but there was much less support in the General Assembly for the latter. (See GA/Res/376 (1950) and GA/Res/46/135 (1991).)

[86] See: N Krisch, *Unilateral Enforcement of the Collective Will: Kosovo, Iraq and the Security Council* (1999) 3 Max Plank Yearbook of UN Law 59. Professor White has also made a good case for the General Assembly authorizing the use of force in such cases. (*Bombing in the Name of Humanity*, p 38-41)

[87] GA Res. 377 (V) (1950) Although the resolution makes reference only to a breach of the peace or act of aggression there is no reason why the Assembly does not have this competence as regards threats to the peace. (*Bombing in the Name of Humanity*, p 42)

VII resolution. Resultantly, there will be disruption in the international system and disrespect for the UN in the less developed countries.[88]

2.1.5 Other Uses of Force

States, however, have been using force in a variety of situations under different 'Doctrines'. These doctrines are not universally accepted and there is a lot of debate on the legality or otherwise of the use of force under these doctrines. We will discuss some of these issues here.

2.1.5.1 Humanitarian Intervention

Intervention on 'humanitarian' grounds is the plea taken when a state uses force in the territory of another state in order to protect the human rights of individuals in that state.[89] Usually the individuals who are protected through such intervention are citizens of the 'target' state. Force is used in the territory of the 'target' state without the consent of its government. Thus, Indian intervention in the former East Pakistan in 1979, Tanzania's intervention in Uganda in 1979 and NATO's widespread bombing of Serbia in 1998/99 were 'justified' under this doctrine, although there are some other explanations as well. Similarly, the 'justification' for maintaining 'no-fly' zones in Iraq by UK and US is sought in this concept.

Those who interpret the ban on the threat and use of force (Art 2(4)) quite literally have still strong doubts on the legality of such interventions.[90] But it is equally true

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[88] It is indeed ironical that the Western States were striving hard for passing the Uniting for Peace Resolution in 1950 and now they simply ignore it and take upon themselves to enforce the will of the international community! It is perhaps the fear of the Assembly recommending military action against a permanent member of the Council or its interests that the Western States now do not want to give an active role to the Assembly. These are political considerations and, hence, beyond the scope of this dissertation.

[89] See for details: *International Law*, pp 308-10; *Cases and Materials*, pp 872-73; *Military Force without Prior Security Council Authorisation?*, pp 371-76; White, N. D., *Bombing in the Name of Humanity*, 27-43; Brownlie, I., *Humanitarian Intervention* in Moore, J., N., *Law and Civil War in the Modern World*, John Hopkins New York, 1974; Lillich, R., *Forcible Self-help by States to Protect Human Rights*, Schachter, O., (1984) 82 Michigan Law Review 1620.

[90] As Martin Dixon puts it: "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

that if no such intervention is allowed it may, in certain cases, result in a catastrophe. It may also constitute a 'threat to the peace', which is a valid ground for the Collective Use of Force. It may not be a defense that a government's atrocities against its citizens is its 'internal' affair because even the so-called 'internal' affairs of a state can constitute a threat to the peace in the meaning of Art 39. Now, if neither the system of Collective Security is working nor is the necessary authorization forthcoming should the catastrophe be allowed to happen? Conversely, if States were allowed to intervene on humanitarian grounds would it not nullify the ban on the use of force and lead to disruption in the international system?[91] So, has the system been 'remodeled' because of the emergence of some new customs?

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 ground in Cambodia in 1978 was specifically rejected by the overwhelming majority of States in the UN debates.[92] Thomas M Frank argues:

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last 50 years. This is especially true when we realise 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." (*International Law*, p 309)

[91] 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 defence of the Tutsi population, but did not receive prompt Council authorisation, 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, p 2)

[92] *Military Force without Prior Security Council Authorisation?*, p 373-74

> "Perhaps the system, unselfconsciously, has been *reworking* the Charter text to conform to a less rigid principle and is seeking to apply this adapted version of the applicable principle on a case-by-case basis, informed by the context and the facts as much as by an abstract normative concept."[93]

However, this argument does not carry much weight. At the most it can be said that to certain instances of humanitarian intervention the international community *retroactively* gives legitimacy and others remain illegal. What it means in simple words is that humanitarian intervention is still illegal but in certain cases the international community gives legitimacy to such intervention *after* the use of force. If international community is convinced that an otherwise inevitable humanitarian catastrophe was averted by the intervention it will probably gives legitimacy to it, otherwise not.[94]

Again, it must be borne in mind that States are not always guided by legal principles. More often they decide keeping in view their respective interests. So, less condemnation or silent acquiescence does not necessarily mean giving legitimacy. Thomas M. Frank himself admits that "[t]he UN organs have not always acted *wisely*".[95]

Even the argument of state practice is not very convincing as mere state practice cannot become a custom and, hence, a source of law. There are certain conditions which are necessary for a practice becoming a custom, the most important of which is *opinio juris*, which means that States follow a certain practice not because of expediency or any other consideration but because they consider it legally binding.

The conclusion is, then, that humanitarian intervention by a competent international organization, such as the UN, is perfectly legitimate. Similarly, a state

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[93] Ibid., p 372.

[94] Thomas M. Frank rightly observes that in the Security Council and General Assembly "decisions are affected profoundly, if not always decisively, by the quality of the information available to those bodies." (Ibid., p 375)

[95] Ibid., p 374

or group of States authorized by the UN Security Council can intervene on humanitarian grounds. 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 give legitimacy to it in some cases. So, the legitimacy of such intervention depends upon the assessment and judgment of the international community.

2.1.5.2 Invitation and Civil War

During the Cold War period, there were several instances when a state used force under the guise that the territorial sovereign invited her for help. This claim was endorsed by the international community in some cases and rejected in others. There are two general principles going parallel, which cause problem. The first is the principle of comprehensive ban on the use of force coupled with the obligation of non-interference in the internal affairs of other States. [96] The other is the principle of territorial sovereignty, which means that in situations of internal disorder the competent authorities of a state can take help from other state(s), which may be in the form of use of force. In some cases these principles do not clash, as when a state uses force with the permission or even invitation of the legitimate government of a state. In 1958, for instance, Jordan requested the UK to deploy her forces there, because of internal disorder encouraged by the UAR. In 1990, the US deployed her troops in Saudi Arabia to protect her from Iraq.

However, the problem arises when a civil war breaks out in a state and there appear several claimants of authority. Civil wars are not unlawful under international law, because States are bound not to intervene in the internal affairs of other States. Interference in a civil war is unlawful. The Soviet invasion of

[96] See Art 2(7) of the Charter and Declaration on the Inadmissibility of Intervention in the Domestic affairs of States (GA Res. 2131 (XX) (1965)). See also Section 2.1.2 above.

Afghanistan was considered unlawful by most of the members of the UN on this ground.[97]

Another important, and more dubious, question is, when a government ceases to have legitimate authority to invite foreign assistance? Thus, the Soviet Union contended that the Afghan government under Babrak Karmal was competent to invite foreign assistance against insurgents, while other States rejected this plea. "One state's civil war is another state's small rebellion, which friendly States can help suppress."[98] It, therefore, seems logical that, as a matter of principle, invitation should not be treated as a valid ground for intervention.[99]

2.1.5.3 Self-determination

This is the main topic of this dissertation and will be discussed in detail in the next chapter *in shā' Allāh*.

2.1.5.4 Regime Change

Regime change is a phrase used for 'justifying' the use of force to overthrow 'unwanted' government in a state.[100] This plea was taken when the US intervened in Grenada in 1983. Again, in 1989, the US intervened in Panama to oust the 'undemocratic' and 'criminal' regime of General Noriega. The attacks on Afghanistan in 2001 to overthrow the Taliban government and on Iraq in 2003 to overthrow the Saddam government were 'justified', *inter alia*, under this doctrine. Legally speaking, there is no room in international law for such unilateral use of force. This is purely an act of aggression, and it violates several rules of *jus cogens*,

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[97] As Martin Dixon points out: "Simply put, in a civil war there is no authority competent under international law to invite assistance from other States, although there is a possible exception in respect of assistance given to groups fighting for self-determination." (*International Law*, p 305) We will discuss the legitimacy of support to armed liberation struggle in the next Chapter, *in shā' Allāh*.

[98] *International Law*, p 305

[99] To quote again Martin Dixon: "[I]f we accept intervention by invitation is lawful as an aspect of sovereignty, we must accept that it is a loophole through which States can jump in order to perpetrate the most serious violations of international peace and security." (*International Law*, p 305)

[100] See for details: *Cases and Materials*, pp 824-47; *International Law*, pp 296-313.

such as the prohibition on the threat or use of force and the inadmissibility in the internal affairs of States as well as the principle of sovereignty and political independence. It cannot be justified under the customary right of self-defense either. The plea that a government poses a 'threat to the peace' cannot justify unilateral use of force. As noted above, it is only the Security Council that can take action in such a case.[101]

2.1.5.5 War on Terrorism

After the 9/11 incidents, the US started what it termed a relentless 'War on Terrorism'. An 'International Coalition against Terrorism' has also been formed which is determined to use force when and where it deems necessary to eliminate terrorism. Some States are being termed as forming an 'Axis of Evil' and are being threatened of dire consequences if they would not stop their alleged support to terrorism.

Apart from rhetoric and political slogans, following are the grounds for this War on Terrorism:

1. Self-defense;
2. Threat to the peace;
3. Regime change; and
4. Acting on behalf of the international community.

The very first justification forwarded for the US attack on Afghanistan was that of self-defense. But there is no room in international law for the US to claim a right of self-defense in this case because the necessary pre-requisites of this right are non-existent.[102] Afghanistan did not attack US. At the most, it can be argued that some 'terrorists' using their bases within Afghanistan planned the terrorist acts, although no proof of their involvement was given to the Taliban government. Then, it is also debatable whether the 9/11 incidents could be termed as 'attacks', especially in

[101] See Section 2.1.4.3 above.
[102] See Section 2.1.3.1 above.

the sense this term is used in Article 51 of the UN Charter.[103] Even if these acts were 'attacks' the US could use force in self-defense only during the attacks. Finally, US could unilaterally use force till the Security Council took cognizance of the matter. After that the sole authority was with the Council. The US attack could better be termed as reprisal, which is absolutely illegal.[104] These attacks violated even the essential conditions of the customary right of self-defense. For instance, the force used was in no way proportionate to threat posed.

Then, even if the right of self-defense is acknowledged for the US, what about the other States who joined the coalition and took part in the attack on Afghanistan? Even if the NATO States could claim a right of collective self-defense, the non-NATO States had no such justification, especially in the post-Charter international law. Could they justify their position on the basis that there was a threat to the peace from the Taliban government of Afghanistan? Even this justification does not hold water.

First of all, it is the authority of the UN Security Council to determine the existence of a threat to the peace. Secondly, mere determination is not sufficient. A specific resolution 'under Chapter VII of the Charter' authorizing the use of *all necessary measures* is necessary to allow the use of force.[105] Use of force in the absence of such a resolution is illegal even if the Council determined a threat to the peace and condemned the acts of a state. In the case of Afghanistan, no such resolution was passed.

It is true that the Council did not condemn the US attacks on Afghanistan, but it does not mean that the Council acknowledged the legality of the attacks because "lack of condemnation by the Security Council cannot be seen as an authorization

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[103] See Section 2.1.3.2 above.

[104] Is it a mere coincidence that the CNN broadcast the news of the US attack on Afghanistan with the heading: "America Strikes Back"? Reprisal is defined as an act of self-help by the injured state responding to an act contrary to international law by the offending state. (*Naulilaa Case* (1928) 2 RIAA 1012) See for details: *Cases and Materials*, pp 824-47; *International Law*, 306-07; Bowett, D., *Reprisals Involving Recourse to Armed*, (1972) 66 AJIL 1.

[105] See Section 2.1.4.3 above.

to use force"[106]. And we just noted that use of force in the name of regime change is absolutely illegal.

It is also contended that terrorism not only poses a threat to American interests but also to whole of the world, and that America and her coalition have been acting on the behalf of international community. This is also a baseless claim. As noted earlier, only the UN can legally claim to represent the will of international community. In the UN, it is the Security Council, which primarily has the authority to *allow* a state or group of States to use force on behalf of the international community, although in some cases the task is also done by the General Assembly. No other state or organization or group or alliance or coalition has this authority.

The case of attack on Iraq is even weaker. In this case, an additional 'justification' was forwarded - that of anticipatory or preemptive self-defense. But we noted earlier[107], that there is no room in the post-Charter international law for the unilateral use of force in the name of anticipatory self-defense. Moreover, the attack on Iraq does not even fulfill the conditions stipulated by the customary international law for the legality of preemptive strike. It was a 'preventive', and not preemptive, strike. While some may claim that preemptive strikes are legal, there is almost a consensus that preventive strikes are absolutely and definitely illegal.

To conclude, the US led war on terrorism violates some basic norms of international law and has no legal justification whatsoever.

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[106] *The Legality of Bombing in the Name of Humanity*, p 33

[107] See Section 2.1.3.3 above.

2.2 THE LAW OF CONDUCT OF WAR

The post-Charter law allows the threat or use of force in a few exceptional situations. However, States do use force to protect their interests even if such use of force is illegal. Moreover, the Charter has nothing to do with internal armed conflicts — Civil Wars. Even in cases of lawful wars such as those in self-defense and collective use of force there need to be some restrictions on the use of force. In fact, there is a bulk of rules that put some restrictions on the conduct of war when and if it occurs. These rules — the *jus in bello* — are meant to ensure the sanctity of some minimum standards of humanity. The International Court of justice has called them "elementary considerations of humanity"[108] and "fundamental general principles of humanitarian law".[109] The main object of these rules of International Humanitarian Law (IHL) — as they are called — is to minimize the destruction of war and to protect the "non-combatant population and property".

2.2.1 Historical Background

International Humanitarian Law in Europe does not have a very long history.[110] It was only in the second half of the 19th century that the need for the adoption of some rules of conduct of war was felt. Henry Dunant 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.[111] He proposed action on two levels.

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[108] *The Corfu Channel Case*, 1949 ICJ Rep 4

[109] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* 1984 ICJ Rep 392

[110] See for details: Dr. Hans-Peter Gasser, *International Humanitarian Law: An Introduction* (Henry Dunant Institute, Geneva/Paul Haupt Publishers, Bern, 1993); Drapper, G.I.A. "*The Development of International Humanitarian Law*", in *International Dimensions of Humanitarian Law* (Henry Durant Institute, Paris, 1988); Best, Geoffrey, *Humanity in Warfare* (Melthve & Co. Ltd. London, 1983); Muḥammad Munīr, *Non-Combatant Immunity in Islamic Law and Public International Law* (unpublished LL.M. Thesis, Faculty of Shariah and Law, International Islamic University, Islamabad, 1996).

[111] It is reported that within less than 15 hours time there were around 38,000 casualties — dead and wounded. Most of the wounded persons died because of the absence of medical treatment.

i. To establish an *organization* to assist wounded military personnel; and

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. It was adopted in a conference hosted by the Swiss government and attended by almost all States of that time.[112]

Other famous persons who worked hard for developing this branch of international law include Prof. Francis Leiber and Prof. Fredrick De Martins. Prof. Francis 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. Fredrick De Martins was professor on 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.

International humanitarian law is broadly categorized as the *Hague Law* and the *Geneva Law*. 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.[113] 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 *Convention on the Prohibition of the Crime of Genocide* was passed.

In 1949, four Geneva Conventions were adopted, each on a particular subject.

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[112] "With these two steps, Dunant hoped to ease the suffering caused by war. Only later in his life did he plead for a ban on war itself." (*International Humanitarian Law*, p)

[113] The full name of the convention was *Geneva Gas Protocol for the Prohibition of the Use in War Asphyxiating, Poisonous or other Gases and of Bacteriological Methods of Warfare.*

2.2.2 The Substance of Law

Dr. Hans-Peter says:

> "Humanitarian law has become a complex set of rules dealing with a great variety of issues. Indeed, six major treaties with more than 600 articles and a fine mesh of customary law rules place restrictions on the use of violence in wartime."[116]

However, there are some fundamental rules and principles that run through these treaties and customs. These can be summarized as follows:

- Inviolability of civilian and non-combatant population and property;
- The principle of proportionate use of force;
- Protection of the wounded, sick, ameliorated and captured combatants; and
- Restrictions on the means and methods of warfare.[117]

All the four Geneva Conventions and the Additional Protocol I deal with international armed conflicts, i.e., conflicts that occur between States. Under Protocol I, wars of national liberation are also included in international armed conflicts. Non-international or internal armed conflicts denote civil wars. Section 3, common to all the four Conventions, and Protocol II deal with these conflicts. It is to be noted here that Sec 3 is binding not only on governments but also on the

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[116] *International Humanitarian Law*, p

[117] See for details: Baxter, Richard, "*The Duties Of Combatants and the Conduct of Hostilities* (Law of Hague)" in *International Dimensions O Humanitarian Law* (Henry Dunant Institute, 1988); Best, Geoffrey, *Humanity in Warfare* (Melthve & Co. Ltd. London, 1983); Claude, R. and Weston, B., "*Human Rights in the World Community*" (University of Pennsylvania Press, 1992); Levid, H, "*Prisoners of War and the Protecting Powers* " AJIL 1961; Roberts, Q. & Gueff R., *Documents on the Laws of War* (Oxford, 1982); Manner, George, "*The Legal Nature and Punishments of Criminal Acts of Violence Contrary to the Laws of War*", 27 AJIL July 1943; Rrandelzopher, Albrecht, "*Civilian Objects*" in the *Encyclopedia of Public International Law*, vol.3, (1982); Zayas, Alfred, M, "*Civilian Population*" in the *Encyclopedia of Public International Law*, vol.3, (1982); Wells, Donald, *War Crimes and the Laws of War* (University Press of America, 1984); Hamilton, De Saussure, "*The Conduct of Armed Conflict and Air Operations*", 71 AJIL (1978) 176; Muḥammad Munīr, *Non-Combatant Immunity in Islamic Law and Public International Law* (Unpublished LL.M. Thesis, Faculty of Shariah and Law, International Islamic University, Islamabad, 1996).

insurgents. Protocol II applies to those insurgents who control part of the national territory.

2.2.2.1 Non-combatant Immunity

2.2.2.1A Protected Persons

International humanitarian law gives protection to several classes of persons who do not take, or are no longer taking, part in hostilities. Organized troops, militia forces, volunteers and nationals taking part in actual combat are the classes of combatants mentioned in Geneva Convention III.[118]

Armed forces are defined as follows:

> "The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict."[119]

All those who do not belong to any of these classes are "civilians" and are to be protected.[120] In case of doubt about a person, the presumption is that he is a civilian and, hence, immune.[121] Following classes of the protected persons are specifically mentioned:

> "Persons taking no active part in the hostilities, *including* members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all

[118] Article 4 A (1) (2) (3) and (6)
[119] Article 43 of the Protocol I
[120] Ibid., Article 50 (1)
[121] Ibid.

circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria."[122]

Regarding these persons following acts are declared prohibited:

a) "Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
b) Taking of hostages;
c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[123]

Person who help in giving medical treatment to the wounded and the sick are also among the protected persons.[124] Moreover, captured combatants (POWs) are also added to this list. Detail about them will be discussed a bit later.

2.2.2.1B Civilian Property

Civilian property, particularly places of worship, educational institutions, welfare organizations, historical places and hospitals must be protected.[125] Similarly, places

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[122] Article 3 (1) of the Geneva Convention IV

[123] Ibid. Article 4 of the Geneva Convention IV must also be read with the preceding Article: "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." It is to be noted here that the fourth convention does not give protection to the people who are protected under the other three Geneva Convention of 1949. Similarly, nationals of the States, which are not parties to the Fourth Convention, are not included in list of the protected persons under the fourth convention.

[124] Article 5 of the Geneva Convention 1864

[125] Article 27 of the Regulations Respecting the Laws and Customs of War on Land (Annexed to the Hague Convention IV of 1907). Article 52 (2) of the Additional Protocol I of 1977 says: "Attacks

indispensable for the survival of civilian – "such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installation and supplies and irrigation works" – must not be targeted.[126] It is also to be noted that retaliatory attacks against civilians are prohibited.[127]

2.2.2.1C Indiscriminate Attacks

In order to spare the civilian population, armed forces shall at all times distinguish between civilian population and civilian objects on the one hand, and military objectives on the other. Neither the civilian population as such nor individual civilians or civilian objects shall be targeted. That is the reason why the law specifically prohibits "indiscriminate attacks". These are defined as:

> "Indiscriminate attacks are:
> (a) Those which are not directed at a specific military objective;
> (b) Those which employ a method or means of combat which cannot be directed at a specific military objective; or
> (c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;
> and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction."[128]

Moreover, the following are also included in discriminate attacks:

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shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage." Similarly, Article 53 says: "Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited: (a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; (b) to use such objects in support of the military effort; (c) to make such objects the object of reprisals."

[126] Additional Protocol I of 1977, Art. 54

[127] Ibid., Article 51 (6)

[128] Ibid., Article 51 (4)

"(a) An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

(b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[129]

2.2.2.1D Collateral Damage

Civilians lose immunity only in two exceptional circumstances:

1. When they take part in war, i.e., they become combatants;[130] and
2. When they get targeted without intention or negligence on the part of the attacking state, as she must take every possible step to protect them. This may happen when they are mixed with the combatants or they reside in the vicinity of the military targets. This is based on the Doctrine of Necessity and this is what is termed as "Collateral Damage".

There are certain obligatory precautions in this regard.[131] These include:

- Doing "everything feasible" to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives;
- Taking all feasible precautions in the "choice of means and method" of attack;
- With a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects; and
- Not causing "incidental...damage to civilian objects... which would be excessive in relation to the concrete and direct military advantage anticipated".

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[129] Ibid., Article 51 (5)

[130] Article 51 (3) of the Protocol I says: "Civilian shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities."

[131] Article 57

It means that the law is based upon two basic principles: necessity and proportion. Of course, the law does not provide any hard and fast rules in this regard and this is a big loophole in the law.[132]

2.2.2.2 Captured Combatants

The Third Geneva Convention sets out specific rules for the treatment of prisoners of war (POWs). The Convention's 143 articles require that POWs be treated humanely, adequately housed, and must be given sufficient food, clothing, and medical care. Its provisions also established guidelines on labor, discipline, recreation, and criminal trial. POWs include:

- Members of the armed forces;
- Volunteer militia, including resistance movements; and
- Civilians accompanying the armed forces.[133]

They must at all times be protected against acts of "violence or intimidation and against insults and public curiosity" as well as "measure of reprisals".[134] Similarly, they must be kept away from the danger zones.[135]

A POW when questioned about his identity is "is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information."[136] Names of POWs must

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[132] See for details: Hamilton De Saussure, *The Conduct of Armed Conflict and Air Operations*, 71 AJIL (1978) 176. While there can be difference of opinion about the existence or otherwise of the state of necessity and also about the proportionate measures, bombing POWs with daisy cutters because of the alleged "revolt" of some them can never be justified. Prisoners in the Qala Jangi, Afghanistan, were directly bombed during the US attack in 2001. Similarly, bombing directly civilian installations – such as hospitals, offices of the ICRC, food go-downs – is also absolutely illegal. This also happened during the US attacks on Afghanistan.

[133] Geneva Convention III, Article 4

[134] Article 13

[135] "Prisoners of war shall have shelters against air bombardment and other hazards of war, to the same extent as the local civilian population. With the exception of those engaged in the protection of their quarters against the aforesaid hazards, they may enter such shelters as soon as possible after the giving of the alarm. Any other protective measure taken in favor of the population shall also apply to them." (Article 23)

[136] Article17

immediately be sent to the Central Tracing Agency of the ICRC.[137] POWs must be allowed correspondence with their families and to receive relief packages.[138]

POWs must not be used to "shield" areas from military operations.[139] They must not be subjected to torture or medical experimentation.[140] Female POWs must be treated with regard due their sex.[141]

All POWs must be housed in clean, adequate shelter, and receive the food, clothing, and medical care necessary to maintain good health.[142] They may be required to do non-military jobs under reasonable working conditions when paid at a fair rate.[143] Seriously ill POWs must be repatriated.[144] When the conflict ends, all POWs shall be released and, if they request, be sent home without delay.[145]

POWs are subjected to the laws of their captors and can be tried by their captors' courts.[146] The captor shall ensure fairness and impartiality. A competent advocate must be provided for the prisoner. Captors must not engage in any discrimination on the basis of race, nationality, religious beliefs, political opinions, or other criteria.[147]

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[137] Articles 122-23

[138] Article 48

[139] Article 12 says: "Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them." Article 19 says: "Prisoners of war shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger."

[140] "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind." (Article17) "In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest." (Article 13)

[141] Article 14

[142] Articles 29-30

[143] Articles 49-50 and 62

[144] Article 109

[145] Articles 118-19

[146] Articles 82-108

[147] Article 16 says: "Taking into consideration the provisions of the present Convention relating to rank and sex, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications, all prisoners of war shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria."

The ICRC or other impartial humanitarian relief organization authorized by parties to the conflict must be permitted to visit with prisoners privately, examine conditions of confinement to ensure the Convention's standards are being met, and distribute relief supplies.[148]

Keeping in view these provisions of laws, there seems no legal justification for the US sending captives from Afghanistan and other States to Guantanamo Bay and depriving them of all the rights given to them by the IHL and even the US national law. Is it not an irony that the US termed the attack on Afghanistan as a "War" on Terrorism and justified it on the basis of self-defense and even then it declines to give the status of POWs to the persons captured during that war? It must also be appreciated that US Supreme Court might not have jurisdiction over Guantanamo Bay but international law certainly has jurisdiction over it.[149] Legally speaking, the captives held at Guantanamo Bay are POWs and USA is blatantly violating international law. But who is going to enforce the law? This is where one finds international law to be an imperfect system of law.

2.2.2.3 Means and Methods of Warfare

The right of parties to an armed conflict to choose methods or means of warfare is not unlimited. The basic principle in this regard is that no superfluous injury or unnecessary suffering shall be inflicted.

The St. Petersburg Declaration 1868 prohibited a particular kind of cannons called "dumdum".[150] It also gave the principle of proportion, which means that the weapon used should not cause unnecessary destruction. The Hague Convention 1899 prohibited the use of asphyxiating gases. The Geneva Convention further

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[148] Articles 9-10

[149] The US Supreme Court has recently confirmed its jurisdiction and has declared that a state of war is not "blank check" for the president. (Linda Greenhouse, *Justices Affirm Rights of 'Enemy Combatants'*, New York Times, June 29, 2004)

[150] St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles, 1868 See also: J. G. Starke, *Public International Law*, p 522

strengthened and widened the scope of the prohibition on the use of chemical and bacteriological weapons.[151]

As far as explosive bombs are concerned there is one general restriction over their use, namely the principle of proportion. On the basis of this principle the use of nuclear weapons shall be prohibited, as there can be no proportion of the destruction caused by the use of nuclear weapons and danger averted by such use.[152] It also directly violates the prohibition on indiscriminate attacks.[153] Moreover, it violates the prohibition of widespread damage to environment.[154] It is also worth mentioning that the provisions of this Protocol are not confined to land and sea warfare. Rather, air attacks are included in its scope.[155]

Furthermore, nuclear weapons cause radiation and, hence, it comes directly under the prohibition on the use of radioactive weapons.[156] The destruction caused by radiation is far more excessive and, thus, the prohibition on the use of weapons causing excessive destruction also applies here.[157] It goes without saying the danger posed, and the destruction caused, by the use of nuclear weapons is far more greater than that of chemical and biological weapons or asphyxiating gases.

The ICJ in its advisory opinion on the legality of the use of nuclear weapons[158] based its decision on the above-mentioned principles.

> "The court applied treaty law and customary law to determine that the threat or use of nuclear weapons is generally illegal and that there is an obligation to conclude negotiations on complete nuclear disarmament. The conclusion on

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[151] Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and Bacteriological Methods of Warfare, 1925

[152] Protocol I to the Geneva Conventions, Article 35

[153] Ibid., Article 51 (4) and (5)

[154] "Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population." (Ibid., Article 55 (1))

[155] Ibid., Article 49 (3)

[156] Article 23 of the Additional Protocol to the Hague Convention IV, 1907

[157] *Public International Law*, p 524, n. 2

[158] *Advisory Opinion on the Legality of the Use of Nuclear Weapons (WHO Case)*, ICJ 1996 Rep 66

illegality of threat or use was based predominantly on the principles of humanitarian law under which it is prohibited to use weapons or methods of warfare which:

- are directed against civilians or
- cannot discriminate between military targets and civilians
- cause unnecessary suffering to combatants
- are disproportionate to the act to which is being responded
- violate the territory of neutral States
- cause long-term and widespread damage to the environment
- use poisonous substances."[159]

It is, however, strange that the court was not certain on the illegality of the threat or use of nuclear weapons in case of "an extreme circumstance of self-defense, in which the very survival of a state would be at stake".

Although the court rejected the argument presented by the Nuclear Weapons States (NWS) about the non-applicability of humanitarian law in such situation but the assertion of hypothetical situation of extreme necessary that would allow an otherwise absolutely illegal means of warfare is itself regrettable. The court also rejected the argument of the NWS about the legality of the use of "small, precisely targeted tactical nuclear weapons". The court, however, did not accept the argument that non-use of nuclear weapons is an evidence of *opinio juris*, an important requirement for customary rule. Majority was of the opinion that positive evidence was necessary.[160]

It is important to note that during the negotiations on the Statute for an International Criminal Court (ICC), several countries sought to include the threat or use of nuclear weapons as a crime, which would come under the jurisdiction of

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[159] *Legality of Nuclear Weapons, <www.nuclearfiles.org >*

[160] *International Law*, p 201

the court.[161] The NWS opposed this. However, New Zealand, on ratification, noted that the war crimes provision of the ICC statute would apply to the threat or use of nuclear weapons including in situations where such threat or use was by a state in self-defense.

It means that although threat or use of nuclear weapons is not declared as a separate crime but it will incur criminal liability because it would amount to genocide or aggression or other crimes.

2.3 CRIMES AND INTERNATIONAL TRIBUNALS

The nature of international humanitarian law is such that it must declare certain acts as offences. These offences must be prevented and the offenders must be punished. While there was no mechanism in earlier period for the enforcement of international law the situation changed after World War II. The calamities of WWII not only made people think about a new world order envisaging a workable system of collective security but also gave the victors an opportunity to try and convict the officers and army generals of the losing States. Before going into details of the provisions regarding these tribunals it seems better to define the important crimes for which they have jurisdiction.

2.3.1 Crimes

2.3.1.1 Aggression and Crimes against Peace

The Control Council Law for Germany gave the following list of the crimes against peace:

> "Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war in

[161] See ratification status of the Statute of the ICC at <*http//:www.icc.org*>. Visit also <*http//: www.nuclearfiles.org*>

violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing"[162]

The Nuremberg Charter did not give a definition of the crime of aggression, although it was mentioned in the crimes against peace. Art 39 of the UN Charter gives the Security Council the authority to determine whether or not an act of aggression has been committed by a state. But as a matter of fact, 'decisions' in the Security Council are generally based on political considerations and not on legal arguments. In the Nuremberg Tribunal, the US undertook the responsibility to prove the charges of committing aggression against the Nazi officials. But there was no general agreement over the definition of ingredients of aggression.

In 1974, the General Assembly passed a landmark resolution giving the 'Consensus Definition of Aggression'. This resolution excluded liberation struggle from the scope of the crime of aggression. This resolution, however, is of little help for international tribunals applying international humanitarian law on individuals. This is because it relates to the act of state and not of individual.[163]

In 1966, the International Law Commission prepared the Draft Code of Crimes against Peace and Security of Mankind (hereinafter the Draft Code), which gave the following definition of the Crime of Aggression from the perspective of individual responsibility:

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[162] Article 2 (a) of the Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20,1945, 3 Official Gazette Control Council for Germany 50-55 (1946)

[163] Sir Franklin Berman points out: "[A]ggression, within the meaning of the UN Charter and the General Assembly resolution, is the act of a State. And to turn a text describing the wrongful act of a state into a definition of individual criminal conduct is a very far from straightforward task." (Franklin, Berman, *The International Criminal Court and the Use of Force by States* (hereinafter referred to as *ICC and the Use of Force*), SJICL (2000) 4 p 485)

"An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression."[164]

This draft is yet get approval of the international community.

The Rome Statute of the ICC also did not give any definition of aggression and matter is still open to debate.

2.3.1.2 Crimes against Humanity

The Control Council Law for Germany included the following in the Crimes against Humanity:

"Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated..."[165]

Statutes of the International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) have retained the same list.[166] The Rome Statute of the ICC gives a long and comprehensive list of Crimes against Humanity.[167] It further gave definitions of each of these crimes as well.

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[164] Article 16

[165] Article 2 (c)

[166] Article 5 of the Statute of ICTY and Article 3 of the Statute of ICTR; Article 18 of the Draft Code also gave the same definition.

[167] Art 7 of the Rome Statute of ICC

2.3.1.3 War Crimes

The Control Council Law for Germany included the following in the War Crimes:

> "Atrocities or offences against persons or property, constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or for any other purpose of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity"[168]

The Draft Code gave quite wider definition of War Crimes.[169] Similarly, Rome Statute of the International Criminal Court (ICC) gives a much longer list of War Crimes.[170]

2.3.1.4 Genocide

The UN General Assembly in 1948 was able to give a convention against the crime of genocide. This Convention entered into force 1951. It gives the definition of the crime of genocide:

> "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> a) Killing members of the group;
> b) Causing serious bodily or mental harm to members of the group;
> c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

[168] Article 2 (b)
[169] Article 20
[170] Article 8

d) Imposing measures intended to prevent births within the group;

e) Forcibly transferring children of the group to another group."[171]

It makes punishable not only genocide but also the attempt or conspiracy to commit, or complicity in, genocide as well as incitement of public to commit it.[172] It also declares that every person, whether constitutional ruler, public official or private individual, who is guilty under the Convention will be punished.[173] Such person shall be "tried by a competent tribunal of the state in territory of which the act was committed, or by such international penal tribunal as may have jurisdiction."[174]

2.3.2 International Criminal Tribunals

2.3.2.1 International Tribunals at Nuremberg in Tokyo

The London Charter, the document that created the International Military Tribunals, set out the following four crimes that defendants would be charged with:

- *Conspiracy to commit aggressive war;*
- Crimes against peace;
- War crimes; and
- Crimes against humanity.

The most important question was whether people who could claim to simply have followed orders of their superiors and laws of their land could be prosecuted.[175] The defendants were punished with different sentences. Eleven defendants received

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[171] Article 2

[172] Article 3

[173] Article 4

[174] Article 6; Statutes of the ICTY (Article 4) and ICTR (Article) as well as the Rome Statute of the ICC (Article 6) define the crime of genocide in the same manner. The same definition is reproduced in Article 17 of the Draft code.

[175] The Issue caused a hot debate among the Naturalists and the Positivists. See for an interesting discussion: H. L. A. Hart, *The Concept of Law* (London, 1961), Chapter. See also Benjamin B. Ferencz, *A Nuremberg Prosecutor's Response to Henry Kissinger*, <*http://www.nuclearfiles.org/etinternationallaw/071701responsetokissinger.htm*>

death punishment, eight were sentenced to long terms of imprisonment, and three were acquitted of the charges.

The principles adopted and applied by the Nuremberg Tribunal are as under:

i. Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.

ii. The fact that internal law does not impose a penalty for an act, which constitutes a crime under international law, does not relieve the person who committed the act from responsibility under international law.

iii. The fact that a person who committed an act, which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

iv. The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law provided a moral choice was in fact possible to him.

v. Any person charged with a crime under international law has the right to a fair trial on the facts and law.

vi. The crimes hereinafter set out are punishable as crimes under international law: (a) crimes against peace... (b) war crimes... (c) crimes against humanity.

vii. Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principles VI is a crime under international law."[176]

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[176] <*http://www.deoxy.org/wc-nurem.htm*> It is really ironical that the Nuremberg Charter was signed on 8 August 1945 – two days after the first nuclear bomb was used in Hiroshima and one day before the other was used in Nagasaki! "The nuclear weapon used on Hiroshima, with an equivalent force of some 15 kilotons of TNT, killed some 70,000 to 90,000 people immediately and some 140,000 by the end of 1945. The bomb dropped on Nagasaki, with an equivalent force of

Whether or not the Nuremberg and Tokyo trials could become precedents in international law is debatable.[177] But for nearly half a century there was no further instance of a tribunal for trying individuals, although the last person sentenced by the Nuremberg Tribunal was in 1995.

2.3.2.2 International Criminal Tribunal for the Former Yugoslavia (ICTY)

In 1993, the conflict in the former Yugoslavia erupted, and war crimes, crimes against humanity and genocide once again attracted international attention. In an effort to bring an end to this widespread human suffering in the Former Yugoslavia, the UN Security Council established an *ad hoc* International Criminal Tribunal for the Former Yugoslavia (ICTY), to hold individuals accountable for those atrocities and, by so doing, deter similar crimes in the future. The Tribunal was established "for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia".[178] It was authorized to punish the perpetrators of the crime of genocide as well as those who committed crimes against humanity.[179] It could also

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some 20 kilotons of TNT, killed some 35,000 to 40,000 people immediately and some 70,000 by the end of 1945... It has been pointed out that the number of people who died immediately from the use of each of these nuclear weapons was less than the number of people who died in Tokyo on the night of March 9-10, 1945 as a result of U.S. bombing raids. This number is estimated at approximately 100,000." (David Krieger, *Nuremberg and Nuclear Weapons*, <*www.nuclearfiles.org/etinternationallaw/ nurembergandnuclearweapons.html*>) David Krieger, President of the Nuclear Age Peace Foundation, rightly argues: "I think it is reasonable to speculate that if the Germans had had two or three atomic bombs, as we did at that time, and had used them on European cities prior to being defeated in the Second World War, we would have attempted to hold accountable those who created, authorized, and carried out these bombings. We would likely have considered the use of these weapons on cities by the Nazi leaders as among the most serious of their crimes." (Ibid.)

[177] Scholars like Luterpacht and Akhurst believed that the Nuremberg Principles do present a precedent for other tribunals. (See for details: Muḥammad Munīr, *Non-Combatant Immunity in Islamic Law and Public International Law*, unpublished LL.M. Thesis, Faculty of Shariah and Law, International Islamic University, Islamabad, 1996. See also: Benjamin B. Ferencz, *A Nuremberg Prosecutor's Response to Henry Kissinger*, <*http://www.nuclearfiles.org/etinternationallaw/071701responsetokissinger.htm*>) It is also worth-mentioning that the ICTY, ICTR and ICC all accepted and applied the Nuremberg Principles. (See below.)

[178] SC/Res/827 (1993)

[179] Statute of the ICTY, Article 2

punish for the violation of the Geneva Conventions. Moreover, it could punish for other violations of "laws or customs" of war:[180]

2.3.2.3 International Criminal Tribunal for Rwanda (ICTR)

In November 1994, the Security Council, after considering the report of the Secretary General and the reports of the Special Rapporteur of the UN Commission on Human Rights for Rwanda, passed a resolution thereby establishing an *ad hoc* tribunal in Rwanda "for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States".[181] The Council also expressed its conviction that "the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace".

The Tribunal was further empowered to try the crime of genocide, crimes against humanity and violations of the Geneva Conventions as well as additional Protocols thereto.[182] The Tribunal gave primary importance to the principle of *individual criminal responsibility* as expounded in the Nuremberg Charter.[183]

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[180] Article 3

[181] SC/Res/955 (1994) It is also worth-mentioning that the Council also received a request for this purpose from the government of Rwanda.

[182] Statute of the ICTR, Article 4

[183] Article 6

2.3.2.4 International Criminal Court (ICC)

The ILC successfully completed its work on the draft statute for an International Criminal Court (ICC) and submitted its report to the General Assembly in 1994. The Assembly made an *ad hoc* and a preparatory committee for the establishment of an International Criminal Court. The latter held its final session in March-April 1998 and completed the draft. The Assembly in its fifty-second session decided to convene the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. The Conference was held in Rome, Italy, from 15 June to 17 July 1998. The task was to finalize and adopt a convention on the establishment of an International Criminal Court.

The Rome Statute is an important development in the enforcement of the IHL. It provides for an agreement between the state-parties to bring the Court into relationship with the UN.[184] The Court has international legal personality.[185] It has permanent seat at Hague, the Netherlands.[186] The Court has jurisdiction to try genocide, crimes against humanity, war crimes and aggression[187], although jurisdiction on the crime of aggression has been restricted by some conditions[188] and it seems as if there is no possibility in the near future for the Court to try an individual under this heading.[189]

The Court has no retrospective jurisdiction.[190] Unlike the Statute of the ICJ, state-parties are deemed to have accepted jurisdiction.[191] The Court may exercise jurisdiction even on non-parties if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court:

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[184] Rome Statute, Article 2
[185] Article 4
[186] Article 3
[187] Article 5 (2)
[188] Articles 121-23
[189] Sir Franklin Berman says: "[T]he subject-matter jurisdiction of the ICC covers three heads – or perhaps it is three-and-a-half, though some would certainly like to say four. The three heads are genocide, crimes against humanity and war crimes; the extra 'half' is aggression." (*ICC and the Use of Force*, p 483)
[190] Article 11
[191] Ibid.

i. The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

ii. The State of which the person accused of the crime is a national.[192]

The Statute declares the following cases as inadmissible:

> "a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>
> b) The case has been investigated by a State, which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
>
> c) The person concerned has already been tried for conduct, which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
>
> d) The case is not of sufficient gravity to justify further action by the Court."[193]

The Court shall primarily apply the rules of the Statute.[194] Then, treaties and principles and rules of international law, "where appropriate", shall be applied, including the "established principles of international law of armed conflict".[195] Finally, the "general principles of law derived by the Court from national laws of legal systems of the world" may also be applied[196]. The Court may also apply the rules as expounded in its previous decisions.[197]

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[192] Article 12 (2)
[193] Article 17
[194] Article 21 (1) (a)
[195] Article 21 (1) (b)
[196] Article 21 (1) (c)
[197] Article 21 (2)

CHAPTER III:

LEGITIMACY OF ARMED LIBERATION STRUGGLE

3.1 MEANING AND NATURE OF LIBERATION STRUGGLE

3.1.1 Defining Liberation Struggle

Opposition to government or state functionaries may be either through political means or through the use of violence. Then, the goal may be either complete independence from the state or it may be aimed at changing the governmental authorities or policies. Now, where should it be called a "liberation struggle"?

Dr. Muḥammad Ḥamīdullāh has given the following classification of the different stages of violent opposition to state or governmental authorities:

i. If it is directed against certain acts of government officials, and no revolution is intended, we call it as *insurrection*. The punishment belongs to the law of the land...

ii. If the insurrection is intended to overthrow the legally established government on unjustifiable grounds, we call it *mutiny*.

iii. On the other hand, if the insurrection is directed against a government established illegally, or which has become illegal for its tyranny, we may term the agitation a *war of deliverance*...

iv. If the insurgents grow more powerful to the extent of occupying some territory and controlling it in defiance of the home government, we have a case of *rebellion*...

v. If the rebellion grows to the proportion of a government equal to the mother government, and hostilities continue, we may term it a *civil war*."[1]

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[1] Dr. Muḥammad Ḥamīdullāh, *The Muslim Conduct of State* (Sh. Muḥammad Ashraf Publishers, Lahore, 1945), pp 167-68

It is obvious that the first, and some may suggest that the second as well, of these stages cannot be called "liberation struggle".

Bard E. O'Neill, Professor of International Affairs at the National War College, Washington, D.C., has given another classification, which seems more useful for our purpose here.[2] He 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"[3]

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. And by 'aspects of politics' he means "the political community, the political system, the authorities and policies."[4]

The political community "is, for the most part, equivalent to the state."[5] The 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."[6] Values are "general ideas of the desirable", such as equality, liberty and individualism, whereas rules encourage desired patter of behavior such as "prohibition of private property" which supports the value of equality.[7]

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[2] Bard E. O'Neill, *Insurgency and Terrorism – Inside Modern Revolutionary Warfare*, (Brassey's (US), Inc., New York, 1990); 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)

[3] *Insurgency and Terrorism*, p 13

[4] Ibid.

[5] Ibid.

[6] Ibid., p 14

[7] Ibid.

Some groups may consider specific individuals illegitimate because their behavior is inconsistent with existing values or because they are considered corrupt, ineffective, or oppressive. If this were the case the insurgents would try to seize the top decision-making offices without changing the system.[8] Finally, insurgents may resort to violence to change existing social, economic, or political policies that they believe discriminate against particular groups in the population.[9]

After defining insurgency and explaining its nature Professor Bard moves to classify insurgency into different types on the basis of the ultimate goal of the insurgents. He has classifies insurgency into seven kinds:

1) Anarchist: It is the one in which the insurgents "wish to eliminate all institutionalized political arrangements because they view the superordinate-subordinate authority relationships associated with them as unnecessary and illegitimate."
2) Egalitarian: Egalitarian insurgency seeks "to impose a new system based on the ultimate value of distributional equality and centrally controlled structures designed to mobilize the people and radically transform the social structure *within* an existing political community."
3) Traditionalist: "Traditionalist insurgents also seek to displace the political system, but the values they articulate are primordial and sacred ones, rooted in ancestral ties and religion... Within the category of traditionalist insurgents one also finds more zealous groups seeking to reestablish an ancient political system that they idealize as golden age. We refer to this subtype as *reactionary-traditionalists.*"
4) Pluralist: "The goal of pluralist insurgents is to establish a system in which the values of individual freedom, liberty, and compromise are emphasized and in which political structures are differentiated and autonomous."

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[8] Ibid., p 16
[9] Ibid., p 17

5) Secessionist: "Secessionists renounce the political community of which they are formally a part. They seek to withdraw from it and constitute a new and independent political community."
6) Reformist: "[R]eformists want more political, social, and economic benefits for their community, system, or authorities. They are primarily concerned with the existing allocation of political and material resources, which they consider discriminatory and illegitimate. [] Insurgents who demand autonomy, as opposed to separation, fall within this category."
7) Preservationist: "[T]hey are essentially oriented toward maintaining the status quo because of the relative political, economic, and social privileges they derive from it. Basically, preservationist insurgents seek to maintain the existing political system and policies by engaging in illegal acts of violence against non-ruling groups and the authorities who are trying to affect change."

While there may be the personal bias of the scholar in this classification, but it indeed is a useful classification, which helps understand the nature of insurgency. We may, however, express one observation here. These seven kinds of insurgency are not exclusive. They may cut across and there may be overlapping in some cases. For example, a secessionist insurgency may well be pluralist, or egalitarian for that matter. Professor Bard himself observes:

> "The type of political system that secessionists would establish varies between groups. The Sikhs in India and most of the Kurds in Iraq, for example would no doubt opt for a traditional system, while the Eritrean Popular Liberation Front favors a Marxist-egalitarian system."[10]

Hence, we deem it better to divide insurgents into two broad categories:

a) Those who want to secede from a political community, or in other words, who want the 'first level' of self-determination; and

[10] Ibid.

b) Those who want changes in the political system, authorities or policies without opting for separation from the political community. It means that these people want 'second level' of self-determination.

Hence, among the seven types described by Professor Bard it is only *secessionist* insurgency that can be equated with "liberation struggle".

3.1.2 Means of Violence in Liberation Struggle

Now, what are the means adopted by insurgents, particularly secessionists, for the achievement of their goal(s)? As indicated above, there are two broad categories of means, which insurgents use: political resources and violence. We will not go into the factual question as to which one of these means is better for the achievement of goals. Rather, we will confine our study to the legality of the use of these means.[11] For this purpose, however, we will give a brief description of the different 'modes' of violence used by insurgents.

Professor Bard identifies three forms of warfare about insurgents, namely, terrorism, guerrilla war and conventional war.[12] 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)."[13]

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[11] For details see: Ibid., pp 23-28

[12] Ibid., p 24

[13] Ibid. We will analyze different definitions of terrorism a bit later in this Chapter. (See Section 3.2.3.2 below.) Professor Bard 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.)

The most familiar kind of violence used by insurgents 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."[14]

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."[15]

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.

As Professor Bard 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

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[14] Ibid., p 25

[15] Mao Tse-tung, *On Guerrilla Warfare*, trans. Samuel B. Griffith, (Fredrick A. Praeger, New York, 1962), p 41. See on the attributes of guerrilla warfare: Julian Paget, *Counterinsurgency Campaigning*, (Walker and Co., New York, 1967), p 15.

combine guerrilla warfare with terrorism or to make a transition into the *conventional warfare*, i.e., the direct confrontation large units in field.[16]

3.1.3 Forms of External Support to Liberation Struggle

It would not be out of place to discuss briefly the different forms of external support that different states provide to liberation struggle.

There are four kinds of support that other states and organizations may provide to liberation struggle, namely, moral, diplomatic, material and sanctuary.[17]

Moral support denotes private and public statements that "indicate sympathy" for liberation struggle in general terms.[18] There may be emphasis on grievances, which justify recourse to violence. Moral support may be in the form of attacking the oppressors for denying political rights. It may take the form of praising the courage of the insurgents.

Diplomatic or political support goes a step further insofar as it is marked by "explicit and active backing for the ultimate goals of insurgents in diplomatic arena."[19] It is not necessary that moral and diplomatic support be given simultaneously, although it is often the case.

Material support consists of tangible resources that are either used on behalf of the insurgents or given to them directly. It is not confined to military-related resources. Non-military material support includes financing, providing basic necessities and supply or use of radio stations as well as political, ideological and administrative training.[20]

Sanctuary plays a very important role in insurgency. Bernard B. Fall observes:

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[16] *Insurgency and Terrorism*, p 26

[17] See for details: Ibid., pp 111-24; Edward E. Rice, *Wars of the Third Kind*, pp 79-80; Bernard B. Fall, *Street without Joy*, pp 294-95; Ted Robert Gurr, *Why Men Rebel?*, pp 269-70.

[18] *Insurgency and Terrorism*, p 114

[19] Ibid., p 115

[20] Ibid., p 116

"In brutal fact, the success or failure of all rebellions after World War II depended entirely in whether the active sanctuary was willing and able to perform its role."[21]

3.2 INTERNAL OR INTERNATIONAL ISSUE?

After understanding the meaning and nature of liberation struggle we will now turn to the legal questions that must be solved for having a clear idea about the legitimacy or otherwise of armed liberation struggle. The very first question is whether or not liberation struggle is an "internal" affair of a state?

It, indeed, is well established in international law that liberation struggle is not an "internal" issue. The argument for this is threefold.

Firstly, there are several resolutions of international organizations, especially the UN General Assembly, which make liberation struggle an international, rather than an internal, issue. So, for instance, the *Declaration on Granting of Independence to colonial Territories 1960* categorically condemns colonialism and all forms of alien domination.

"The subjection of people to alien subjugation domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Chapter of the United Nations and is an impediment to the promotion of world peace and co-operation."[22]

It also calls for an immediate end to colonialism.

"Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories, which have not yet attained independence, to transfer all powers to the people of those territories, without any condition or

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[21] *Street without Joy*, p 294

[22] Declaration on Granting Independence to Colonial Peoples and Territories (GA/Res/1514 (XV) (1960)), Section 1

reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or color, in order to enable them to enjoy complete independence and freedom."[23]

It also extends the scope of the self-determination beyond context to all people.

"All people have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[24]

The Resolution also condemns different 'excuses' for delay in the process of independence.

"Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence."[25]

So is the case with several other General Assembly regulations, as we noted in Chapter I. It means that self-determination is, now, an international, rather 'global', issue.

Secondly, there are some classes of people for whom this right is specifically recognized by the international community. These are, firstly, people living under colonial or alien domination. Secondly, those for whom Security Council has recognized this right, e.g., for the people of Kashmir, Palestine and East Timor. Self-determination at least for this class of people is not an internal affair of a state. Thirdly, it is also an accepted norm that liberation struggle is a conflict of international nature and not an internal dispute of the nature of civil war.[26]

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[23] Ibid., Section 5
[24] Ibid., Section 2
[25] Ibid., Section 3
[26] Article 1(4) of the Additional Protocol I to the Geneva Conventions

3.3 SELF-DETERMINATION AND THE USE OF FORCE

Use of force the right of self-determination can be seen from three different, though interrelated, perspectives. First, can a government of a state use force against people striving for self-determination? Second, if force is used against these people, legally or otherwise, do they have the right to take up arms and use force for vindication of their right to self-determination? Third, can other states provide military support to these people?

3.3.1 Use of Force to Deprive People of their Right to Self-determination

During their fight against colonial oppression several communities took up arms and liberation struggle took violent form in different territories. One reason for this phenomenon was that the colonial or occupying power was, in most of the cases, unwilling to acknowledge the right of Self-determination for them. As we noted in Chapter I, the international community recognized this fact and there was a flow of several resolutions in the UN General Assembly on this issue. These resolutions not only acknowledged the fundamental nature of the right of self-determination for all people, especially those under colonial or any form of alien domination, but also declared in unequivocal term that use of force against people striving for self-determination is absolutely illegal.

Hence, people having the first 'level' of the right of self-determination cannot be deprived forcefully form the exercise of their right to self-determination governments cannot take the plea that it is their 'internal affair'. This has been explicitly laid down in several General Assembly resolutions. For instance, the *Declaration on Granting Independence to Colonial People and Territories 1960* says that denial of the right to self-determination result in "increasing conflicts", which "constitute a serious threat to world peace." It categorically says:

"All armed action or repressive measures of all kind directed against dependent people shall cease in order to enable them to exercise peacefully and freely their right to complete independent, and the integrity of their national territory shall be respected."[27]

Similarly, the *Declaration of the Principles of International Law 1970* says:

"Every State has the duty to refrain form any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence."[28]

These resolutions are evidence of customary international law.[29] It means that this prohibition binds even those states, which voted against these resolutions because customary law binds all states.[30]

As for as people having a 'second level' of the right of self-determination are concerned it is true that states can, and do, take the plea that the matter comes within their internal affairs in which no state or organization should interfere. Some take this stance even when civil war breaks out in the state. But it is equally true that the growing concern in international community about fundamental human rights as well as increasing pressure over governments to take concrete steps for the protection of the rights of minorities are great impediments to the excessive use of force against these people.[31]

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[27] Section 4

[28] Section 1

[29] *International Law*, pp 46-47

[30] Ibid.

[31] See generally: Thio Li-ann, *Resurgent Nationalism and the Minorities Problem: The United Nations and the Post Cold War Developments*, (2000) 4 SJIL, pp 300-61. As discussed in the previous Chapter, some states even claim to have a 'right' of humanitarian intervention in cases of a government's excessive use of force against its own population. Others see a 'threat to the peace' in such situations and claim that enforcement action by the Security Council under Chapter VII becomes necessary. This is important because the UN General Assembly has several resolutions acknowledged the fact that denial of the right to self-determination results in "increasing conflicts", which "constitute a

After the breakup of the former Yugoslavia and the USSR several entities, which were previously federating units in large states, claimed statehood. The European Community (EC) issued its 'Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union' and also a 'Declaration on Yugoslavia'.[32] In these, the EC indicated its approach to the recognition of new states arising out of the turmoil in Eastern Europe. Interestingly enough, the EC put forward requirements for recognition that went far beyond the conditions of statehood found in the Montevideo Convention.[33] Thus, recognition was to be dependent on respect for established frontiers, respect for human rights, guarantees of minority rights, acceptance of nuclear no-proliferation and a commitment to settle disputes peacefully. This does not necessarily mean that the EC suggested additional conditions for statehood.[34] But it does show the growing concern in the international community about protection of minorities' rights. It proves the point that states are no more deemed free to use force against their own population. Hence, the conclusion is that states cannot use force even against people having second level right to self-determination. States are duty bound to ensure protection of rights of minorities.

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serious threat to world peace". We have already noted that a "threat to the peace" in the sense this phrase is used in Art 39 can be form internal affairs of a state, which in turn means that interference by international community becomes not only legitimate but also necessary. It thus becomes an exception from the prohibition of interference in the internal affairs of the states. Moreover, even if a government uses force against its own population it is bound to act within the parameters of the Geneva Conventions and Additional Protocols thereto.

[32] See for details (1991) 62 BYIL 559

[33] Article 1 of the Montevideo Convention on the Rights and Duties of States, 1933, put the following four conditions for statehood: permanent population, defined territory, government and capacity to enter into relations with other states.

[34] Martin Dixon says: "Possibly, the point was that the EC would not *treat* a territory as a state until such conditions and concerns were met." (*International Law*, p 123)

3.2.2 Supporting the people in Vindication of Their Right to Self-determination

3.2.2.1 The Legality of Support

The resolutions the General Assembly also acknowledge the legitimacy of support by other states to people striving for self-determination. Thus, the *Declaration of the Principles of International Law 1970* says:

> "In their action against, and resistance to, such forcible action pursuit of the exercise of their right to self-determination, such people are entitled to seek and to receive support in accordance with the purposes and principles of the Chapter."[35]

But it should not be taken as a free license to instigate seditionist tendencies in other states nor should it be used as tool for intervention in the internal affaires of other states.[36] What, then, is meant by the right of the people striving for self-determination" to seek and receive support"? *The Consensus Definition of Aggression 1974* puts two conditions for the legality of such support:

- That it should not violate the UN Charter; and
- That it should be in accordance with the *Declaration of the Principles of International law 1970.*

The UN Charter recognizes the right of self-determination, as do all the organs of the UN. But the Charter does not specifically mention any mode for vindicating this right nor does it mention any particular mode by which other states can help the people striving for this right. It does, however, mention the principle of non-interference in the internal affairs of other states.

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[35] Section 1

[36] Thus, Declaration goes on to say: "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 organization, 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." (Ibid.)

It means that according to the UN Charter support to liberation struggle will be legitimate if it does not amount to interference in the internal affairs of other states. This is a negative statement and, hence, remains quite obscure.

Similarly, the referred to Declaration acknowledges the legitimacy of liberation struggle and of support thereto, but simultaneously it mentions the principle of non-interference. And in the end it clearly states that all principles the mentioned in the Declaration are correlative and should be construed jointly.[37]

Thus, on the one hand is the legitimacy of liberation struggle and of support to it, and on the other is the principle of non-interference. The same is the case with the *Resolution against State Terrorism 1984* and *Resolution to Prevent International Terrorism 1989*.[38] What, then, is the way out of this dilemma?

We noted above that liberation struggle in case of people having right of 'first level' self-determination is not 'internal affair'. So, supporting these people would not amount to interference in the internal affairs of other states and, hence, it would neither violate the *Declaration of the principles of International Law* nor the UN Charter as such. It will, therefore, be in conformity with the *Consensus Definition of Aggression* as well.

Is it true of moral and diplomatic support only or of military support as well? What about the different kinds of support to people having right of 'second level' self-determination because supporting them apparently amounts to interference in the internal affairs of states?

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[37] "In their interpretation and application the above principles are interrelated and each principle should be construed in the context of the other principles. Nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter or the rights and duties of Member States under the Charter or the rights of peoples under the Charter, taking into account the elaboration of these rights in this Declaration... The principles of the Charter which are embodied in this Declaration constitute basic principles of international Law, and consequently appeals to all states to be guided by these principles in their international conduct and to develop their mutual by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles." (Sections 2 and 3 of the said Declaration)

[38] Alex Obote-Odora observes: "The main problem with the 1989 General Assembly Resolution is that it tried to accommodate the conflicting views of the developed and developing countries in a single document. The result is that neither terrorism was defined, nor adequate legal constrains were placed on actions of national liberation movements."

3.2.2.2 Military Support

As noted above, there is none denying the legitimacy as well as legality of moral and diplomatic support to the people having the 'first level' right of self-determination. But material and military support to these people is a contentious issue. While most of the developing countries have been persistently claiming legitimacy for military support to these people, it has been denied by the developed states. This is evident from the debates on the definition of terrorism.[39] However, there is almost a consensus that forcefully depriving these people from their right to self-determination amounts to a 'threat to the peace'. It, therefore, justifies, rather necessitates, action under Charter VII of the UN Charter. Enforcement action can be taken against the state using force against these people. This was the basis of the UN action in East Timor.

So, a safe conclusion would be that military support to these people could be provided by the international community through the expression of its will in a resolution of the UN Security Council or General Assembly authorizing the use of force. Unilateral use of force for their support is sill not allowed by international law. Such use of force may not amount to interference in the internal affairs of a state, as it is not an internal issue, but it would violate another basic principle of international law, namely, the general prohibition on the threat or use of force. If these people are deprived forcefully then military action under the authority of the UN can be taken against the state resorting to the use of force.[40]

Military support to people having 'second level' right of self-determination would amount to interference in the internal affairs of a state and would constitute the crime of 'indirect' aggression. Some states would deny the legality of diplomatic or even moral support to these people. However, the growing concern in international community about the protection of human rights, especially for

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[39] See Section 3.2.3.2 below.

[40] Some states clime the right of 'humanitarian intervention' in such a situation, which may, in their opinion, amount to humanitarian catastrophe. But we concluded in the previous Charter that international law in its present shape does not allow unilateral use of force in the name of humanity or on behalf of the international community.

minority groups, would make it legitimate to give them moral and diplomatic support.

3.2.3 Use of force to Vindicate the Right of Self-determination

3.2.3.1 The Question of Legitimacy

The developed countries were unwilling to acknowledge the legitimacy of such use of force. They took the plea that legitimizing such use of force would not only amount to disruption in the international system by instigating tendencies in different parts of the world but would also lead to interference in the internal affairs of other states.[41] That is the reason why we see strong emphasis on the principle of non-interference in the General Assembly regulations on the issue. They also took the plea that giving legitimacy to use of force for liberation would amount to legitimizing some kind of terrorism on subjective basis. Herein comes the issue of terrorism and liberation struggle and of distinction between them and the matter becomes more complicated.[42]

The developing states, on the other hand, were of the opinion that distinction must be made between terrorism and liberation struggle. Their emphasis was more on the freedom and liberty of people than on preservation of the system.

Resolutions in the General Assembly were a kind of compromise between these two different, rather conflicting, opinions. Thus, these resolutions emphasize the principle of non-interference. They also condemn instigating seditionist tendencies

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[41] Professor Bard analyzes the positions of the super powers with regard to liberation struggles in the third world in this way: "Although some of these countries achieved independence peacefully, others such as Vietnam and Algeria underwent a long period of violent conflict. In cases where the anti-colonial insurrections were led by Marxist parties (e.g., Vietnam and Malaya), the prevailing perception of the bipolar international structure of power led to fears that victories by the insurgents were tantamount to losses for the West, due in part to the fact that international struggle for power was considered a zero-sum game. Within this context, the policies of the West in general and the United States in particular were widely seen as oriented toward, or actively supporting, the status quo, while the Soviet Union and its allies were perceived to have the revolutionary mission of upsetting the existing order and structure of power." (*Insurgency and Terrorism*, pp 2-3)

[42] Israel, an ally of developed countries, and mindful of the activities of the PLO and Syria's support for it, argued before the UN Ad Hoc Committee on Terrorism that the proposed conference to differentiate terrorism from action taken by national liberation movement is an attempt "[t]o legitimize and justify terrorism by distinguishing between permitted and forbidden terrorism." ()

in other states. But simultaneously they give legitimacy to the peoples' struggle for vindication of their right to self-determination. They also explicitly legitimize support to such people. Perhaps, the key resolution for analysis is the *Consensus Definition of Aggression.*[43]

This Resolution defines 'aggression' and thereby facilitates the task of the Security Council in determining, under Article 39 of the Charter, whether or not an act of aggression has been committed by a state. It gives a long list of acts that constitute aggression. Again, like other resolutions, it also emphasizes "the duty of states not to use armed force to deprive people of their right of self-determination, freedom and independence", while at the same time prohibiting the use of force "to disrupt territorial integrity". It, however, gives exception to liberation struggle from the definition of aggression, which is very important.

> "Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, particularly peoples under colonial and racist regimes or other forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration."[44]

Hence, use of force for the right of self-determination will be legal if the following three conditions are fulfilled, namely:

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[43] GA/Res/3314 (XXIX) (1974)
[44] Article 7 of the Definition

1) That those who resort to the use of force for this purpose must be under colonial, racist, or any other form of alien domination. This simply means people having the first level of the right to self-determination.
2) That resort to the use of force can be made only when they are forcibly deprived of their right to self-determination. The same is true of the right to seek and receive external military support in this regard.
3) That the use of force must be within the constraints of international law, particularly the UN Charter and the *Declaration on Principles of International Law*.

In the previous Chapter, we discussed the details of the general constraints of international law – both the *jus ad bellum* and *jus in bello*. The UN Charter specifically contains some provisions about unilateral use of force and these have also been elaborated in detail in the previous Chapter. The most important of these constraints are:

- The initial general prohibition of the use of force;
- Pacific settlement of disputes;
- Non-interference in the internal affairs of states; and
- Unilateral force to be used only in exceptional circumstances of self-defense and that too within the constraints of necessity and proportion.

The same is true of the *Declaration on the Principles of International Law*.

It is obvious that the first three conditions are met with when some people who are forcibly deprived of their right to self-determination take up arms against their oppressors. It means that the law of resort to war is not violated in such cases. The liberation movements must, however, abide by the law of conduct of war. The most important constraints of international humanitarian law as discussed in the previous Chapter are:

- Inviolability of civilian and non-combatant population and property;
- The principle of proportionate use of force;
- Protection of the wounded, sick, ameliorated and captured combatants; and
- Restrictions on the means and methods of warfare.

It is the violation of any of these norms that turns liberation struggle into terrorism.

3.2.4 Liberation Struggle and Terrorism

3.2.4.1 Defining Terrorism

Terrorism has no consensus definition, which is why one man's terrorist is another's freedom fighter. It is ironical to see that there are several resolutions of the UN General Assembly and Security Council condemning "terrorism in all its forms and manifestations"[45] and recently an "International Coalition against Terrorism" has been formed, which is determined to fight a "relentless war against terrorism"[46], and yet there is no consensus definition of terrorism. Even the UNO, NATO, OIC, Arab League and other organizations, which condemned the 9/11 attacks as "terrorist attacks" and favored the US "war against terrorism" in Afghanistan, could not formulate a definition of "terrorism". Perhaps, the most important reason for the lack of consensus over definition of terrorism is the difference of approach in the views of the developed and developing states as pointed earlier. For the purpose of objective study, we will analyze some definitions of terrorism given by different scholars. After this the definitions of terrorism given by municipal laws of different states will be studied. Finally, we will have a look at the efforts to define terrorism at international level.

The Islamabad Policy Research Institute (IPRI)'s research paper on terrorism[47] defines terrorism in this manner:

> "Simply stated, terror is extreme or intense fear, a psychological state, which combines the physical and mental effects of dread and insecurity. Terrorism, thus, implies a system or concept, in which terror is applied to cause fear, panic, and/or coercive intimidation to exert direct or indirect

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[45] See, for instance, SC/Res/

[46] Speech of George W. Bush, the US President, *The News International*, Islamabad, September 18, 2001

[47] Rafiuudin Ahmed, Fasahat H. Syed et al, "*Terrorism*", (IPRI Islamabad, 2001) p 3

pressure to achieve political objectives. Invariably, the [common] people are the main target and the means employed are frequently violent, though not necessarily extreme or excessive."

Amongst the widely accepted definitions is the one offered by Yonah Alexander. He defines terrorism as:

"The use of violence against random civilian targets in order to intimidate or to create generalized pervasive fear for the purpose of achieving political goals."[48]

Professor Bard gave the following definition:

"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)... Their actions are familiar, consisting of such things as assassinations, bombings, tossing grenades, arson, torture, mutilation, hijacking, and kidnapping..."[49]

He describes different forms of terrorism in the following way:

"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

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[48] See, for details, Alex Obot-Odora, *Defining International Terrorism* (hereinafter referred to as *Defining International Terrorism*), E Law – Murdoch University Electronic Journal of Law, vol.6, no 1, March 1999. <http://pandora.nla.gov.au/parchive/2001/z2001-Feb-26/www.murdoch.edu.au/elaw/issues/v6n1/obote-odora61_notes.html>.

[49] *Insurgency and Terrorism*, p 24

> 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*)."[50]

It follows that terrorism has certain common features even if it is committed by state or sub-state groups. The act remains the same in essence even if the target is outside the state in which the terrorists had their cells. These definitions give the following ingredients of terrorism:

- Violence, or use of force;
- Generalization of the effects of violence[51];
- Civilian target; and
- Political objective(s).

Higgins highlights another important ingredient of terrorism, namely, the illegality of the use of force.

> "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."[52]

It means that the use of force is in such a manner that it either violates the *jus ad bellum* or the *jus in bello*. This definition also points out that the perpetrators of terrorism are not necessarily individuals or sub-state entities. Even states can, and do, indulge in activities that amount to terrorism. It is worth-mentioning here that

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[50] Ibid.

[51] Richard Clutterbuck has also emphasized the element of generalization of effects. He explains why most of the time civilians are target of terrorism. "An ancient Chinese proverb tells it all: Kill one to frighten ten thousand... Killing a soldier does not frighten his ten thousand comrades. On the contrary, their reaction is to urge their officers to lead them out with their guns to find the killer. But if a member of a family is killed by political terrorists on the street outside his home, everyone on that street is in terror lest it happens to them." Thus, according to this theory: "Terrorism is theatre; it is aimed at the audience rather than at the victim." (*Defining International Terrorism*, supra note 51)

[52] Ibid.

in the *Draft Code on Peace and Security of Mankind*, prepared by the ILC, "terrorist acts" formed part of the definition of "aggression". The definition of aggression included, *inter alia*, "the undertaking or encouragement *by the authorities of a state* of terrorist activities in another state".[53]

James M. Poland also points put almost the same ingredients of terrorism.

> "The premeditated, deliberate, systematic, murder, mayhem and threatening of the innocent, to create fear and intimidation in order to gain a political or tactical advantage, usually to influence an audience."[54]

Brian Jenkins, in his down to earth approach, explains the ingredients of terrorism in this way:

> "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. (This is a true hallmark of terrorism.)[55] And, finally, it is intrinsic to a terrorist act

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[53] Ibid.

[54] *<www.terrorism.com/terrorism/def.shtml>*

[55] While it was true until recent past that terrorist used to claim credit for the act, it does not happen often now. "Due to increasing hostility against terrorism, the concept itself has become more dangerous and lethal. Previously, most terrorist organizations operated within the framework of their political objectives and tried to calibrate their activities to cause just enough terror and violence to get the requisite attention and not so much as to alienate public support or to draw world's criticism. Now, such considerations seem outdated and the emphasis is on dramatic effects, irrespective of the horrifying extent of losses in material and human lives. The responsibility is invariably never claimed for fear of state reprisals and public alienation." (*Terrorism*, p 28) Another factor for not claiming responsibility is the terrorists' urge "to leave behind a mystifying terror through silence". (Bruce Hoffman, "*Terrorism – Trends and Prospects*" in *Countering the New Terrorism*, p 27) So, the hallmark of terrorism is "to terrorize", which sometimes is achieved by not claiming responsibility and at others by causing unexpected damage. This also explains the terrorists' urge to get access to WMDs.

that it is usually intended to produce psychological effects far beyond the immediate physical damage. One person's terrorist is everyone's terrorist."[56]

It is clear from the foregoing that even if there is a lack of consensus over the definition of terrorism, there still exists agreement to a larger extent over the ingredients of terrorism. The IPRI's research paper concludes:

> "In summary, therefore, terrorism may not be easily defined, but it can be qualified by its distinct features. It is political in aims and motives and concluded by an organization with an identifiable chain of command or secret cell structure, based in sub-national groups or non-state entities. It is violent and resorts to threat of violence to create far-reaching psychological repercussions beyond the immediate victim or target."[57]

While one agrees with the general observations of the authors, but there is no weight in their claim the terrorism is invariably to by "sub-national groups or non-state entities". It is worth-mentioning that the authors themselves criticized the League of Nations for giving a definition of terrorism that excluded from its scope the atrocities committed by the states against people living under their subjugation.[58]

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[56] *Defining International Terrorism*, supra note 51

[57] *Terrorism*, p 7

[58] Ibid., p 3. The developed states have been trying to get a one-sided convention passed on terrorism that would include in its scope the liberation struggle as well. This could not be done, however, because of the opposition of developing states, which are in majority in the General Assembly. This issue has been analyzed in a bit detail in the next Sections.

3.2.4.2 Terrorism in National Laws

Here, we will give the definitions provided by the municipal laws of different states. These definitions show the viewpoint of states regarding acts of terrorism committed within their territories by non-state entities. However, they are deemed helpful in understanding the nature of terrorism insofar as they indicate the ingredients of terrorism.

In the United Kingdom, the *Terrorist Act 2000* states that terrorism is:

> "The use or threat of action... designed to influence the government or to intimidate the public or a section of the public... for the purpose of advancing a political, religious or ideological cause."

The United States *Federal Statute* defines terrorism as:

> "Violent acts or acts dangerous to human life that... appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by assassination or kidnapping."[59]

Israeli law does not define terrorism. However, the *Prevention of Terrorism Ordinance No. 33* defines a terrorist organization as:

> "A body of persons resorting in its activities to acts of violence calculated to cause death or injury to a person or to threats of such acts of violence."

[59] See the United States Code, Title 18, Section 2331. After the 9/11 attacks, Congress passed a law, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USAPATRIOT) Act 2001, which expanded the federal government's power to investigate and prosecute suspected terrorists. The law allowed, *inter alia*, the government to detain non-citizens suspected of terrorism for months or longer without filing charges and to hold court hearings about them in secrecy. The law has been severely criticized by human rights group.

In India, the *Prevention of Terrorism Act* (POTA), 2002, defines a "terrorist act" in the following manner:

> "Whoever with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature or by any other means whatsoever, in such a manner as to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community or causes damage or destruction of any property or equipment used or intended to be used for the defense of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act... commits a terrorist act."[60]

It also includes in the scope of terrorist act membership of, or providing help to, some organizations declared unlawful under the *Unlawful Activities (Prevention) Act, 1967*.[61] The explanation to this Section also includes in its scope "the act of raising funds intended for the purpose of terrorism".

The Pakistani Anti-Terrorism Act, 1997 has reproduced almost the same definition.[62] The Act also names some offences, such as gang rape, child

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[60] Section 3 (a) of POTA, 2002

[61] Ibid., Section 3 (b)

[62] "A person is said to commit a terrorist act if he, in order to, or if the effect of his actions will be to, create a sense of fear and insecurity in the people, or in any section of the people, does any act or thing by using bombs, dynamite or other explosive or inflammable substances, or such firearms or

molestation, robbery coupled with rape[63], that are deemed included in the meaning of 'terrorist act'. Similarly, some ordinary offences may amount to terrorism if "the effect of which will be, or be likely to be, to strike terror, or create a sense of fear and insecurity in the people, or any section of the people, or to adversely affect harmony among different sections of the people".[64]

The characteristics of terrorism as are apparent from the definitions are as follows:

- The *intention* behind the act is to cause damage to the state or to strike terror in any section of the population;
- The *means* used for the act violent;
- The *likely effect* of the act is devastating; and
- The *purpose* of the act is to compel the government to yield to some political demands.

3.2.4.3 Efforts to Define Terrorism at International Level

3.2.4.3A The Draft Code on Peace and Security of Mankind

As noted earlier, in the *Draft Code on Peace and Security of Mankind*, prepared by the ILC in 1954, "terrorist acts" formed part of the definition of "aggression". The definition of aggression included, *inter alia*, "the undertaking or encouragement *by the authorities of a state* of terrorist activities in another state".[65]

Aggression, as ultimately defined by the General Assembly in 1974, does not contain any reference to terrorism as such. However, some of the component elements that were associated with state terrorism, including the sending of armed bands for violence against another state, are found in the definition.

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other lethal weapons as may be notified, or poisons or noxious gases or chemicals, in such a manner as to cause, or likely to cause, death of, or injury to any person or persons, or damage to, or destruction of, property on a large scale or a widespread disruption of any supplies or services essential to the life of the community, or threatens with the use of force public servants in order to prevent them from discharging their lawful duties." (Section 6 (a) of ATA, 1997)

[63] Ibid., Section 6 (c)

[64] Ibid., Section 6 (b)

[65] *Defining International Terrorism*, supra note 51

After a long period of inattention, the *Draft Code* came under renewed consideration from 1985-1991. The text was almost completed in 1990 by which stage terrorism was the subject of a separate article in the *Draft Code.*

3.2.4.3B Ad Hoc Committee to Define Terrorism

In 1972, the General Assembly established an Ad Hoc Committee with the mandate to provide a definition of the term "terrorism". When it reported to the General Assembly in 1979, the Committee avoided any attempt at definition.

The developed countries were nervous that a definition of terrorism could be used to include state terrorism. On the other hand, developing countries were nervous that any definition that emphasized non-state actors would fail to differentiate between terrorism and the struggle for national liberation.

The General Assembly requested the Secretary General to study and report to the Assembly on the possibility of convening an international conference 'to define terrorism and differentiate it from the struggle of peoples for national liberation'. The Secretary General submitted his report in 1989.

Developed countries regarded that the proposed conference would provide unacceptable opportunity for excluding national liberation movements from the scope of terrorism as an exception. Israel argued that the proposed conference is an attempt "to legitimize and justify terrorism by distinguishing between permitted and forbidden terrorism". The same was the position taken by Norway. Spain, speaking on behalf of the European Community, emphasized that it was the view of the European Community that however legitimate a cause may be, it can never justify resort to acts of terrorism. In its opinion the proposed conference would only contribute to the false idea that there is a link between terrorism and the exercise of the right of self-determination.

In the meanwhile the General Assembly passed several resolutions on the issue trying to accommodate the views of both the blocs. These resolutions have been analyzed in quite detail in Chapter I of this dissertation. Up till 1989, the General

Assembly resolutions contained the title of the 1972 Resolution on Measures to *Prevent* International Terrorism.[66]

> "Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedom, and study of underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which causes some people to sacrifice human lives, including their own, in an attempt to affect radical changes".

The last resolution containing this title was passed on December 4, 1989. Alex Obote-Odora observes:

> "The main problem with the 1989 General Assembly resolution is that it tried to accommodate the conflicting views of the developed and developing countries in a single document. The result is that neither terrorism was defined, nor adequate legal constrains were placed on actions of national liberation movements."[67]

3.2.4.3C Measures to *Eliminate* International Terrorism

In December 1991, the General Assembly revisited the problem[68] noting that a definition of "international terrorism which meets general approval would render the fight against terrorism more efficient."

This resolution reaffirms the ongoing contradictions within the United Nations, reflecting the division between developed and developing countries. While the resolution condemns all forms of terrorism, it also simultaneously affirms the legitimacy of liberation wars.

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[66] GA/Res/ 3034 (XXVII) (1972)
[67] *Defining International Terrorism*, supra note 51
[68] GA/Res/46/51 (1991)

In December 1995, the General Assembly passed another Resolution entitled "Measures to *eliminate* international terrorism"[69], in which the Assembly requested the Secretary General to follow up closely the implementation of the Declaration and to submit an annual report in this regard. In pursuance of the Declaration, the Secretary General, by a note dated 31 March 1997, drew the attention of all states to the Declaration and requested them to submit by 30 June 1997 information. Although very few states responded, a general debate was conducted in the Sixth Committee. But Alex Obote-Odora rightly observes:

> "What is striking is the fact that the debate moved away from any attempt to define terrorism, and instead, to the need for co-operation in combating, the so far, undefined 'terrorism'."[70]

3.2.4.3D Convention to Suppress Terrorist Bombings

In December 1996, the General Assembly decided[71] to establish an Ad Hoc Committee, open to all States members of the United Nations to elaborate, *inter alia*, an international convention for the suppression of terrorist bombings. The Assembly recommended that the work of the Ad Hoc Committee continue in the framework of a working group of the Sixth Committee. In accordance with that recommendation, the Sixth Committee, at its 2nd meeting on 22 September 1997, established such a working group.

The differences between developed and developing countries continued to exist.[72] At the end of the debate, the Sixth Committee recommended that the General

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[69] GA/Res/50/53 (1995)

[70] *Defining International Terrorism*, supra note 51

[71] GA/Res/51/210 (1996)

[72] Libya argued that the draft convention did not take into consideration the distinction between terrorism and struggles for independence. Pakistan emphasized to eliminate the root causes of terrorism. Thus, issues such as colonialism, fundamental human rights and alien occupation should be taken into account. Pakistan regretted that the draft convention neither reflected the legitimate struggle for self-determination and the comprehensive view of the complexities inherent in terrorism, nor criminalized terrorist acts and other activities of military forces of a state.

Assembly adopt the draft convention.[73] The Convention to Suppress Terrorist Bombings was adopted and opened for signature from 12 January 1998 to 31 December 1999.

While the convention defined a terrorist bomber, terrorism was not. The Convention defines a terrorist bomber as:

> "A person who unlawfully and intentionally delivers, places, discharges or detonates a bomb, explosive, lethal or incendiary device in, into or against a place of public use, a state or government facility, a public transportation system or an infrastructure facility with the intent to cause death or serious bodily injury or the destruction of such a place resulting in major economic loss."[74]

3.2.4.3E The Kuala Lumpur Declaration 2002

After the 9/11 incidents, the Organization of Islamic Conference (OIC), having 57 member states, held an extraordinary session of foreign ministers in April 2002 in Kuala Lumpur, Malaysia. The Declaration says in unequivocal terms that struggle for vindication of the right to self-determination is legitimate according to the norms of international law.

> "We reiterate the principled position under international law and the Charter of the United Nations of the legitimacy of resistance to foreign aggression and the struggle of peoples under colonial or alien domination and foreign occupation for national liberation and self-determination. In this context, we underline the urgency for an internationally agreed

[73] Sweden submitted that it was the best convention that could be achieved under the circumstances although the draft convention did not satisfy the interest of all parties.
[74] Article 2

definition of terrorism, which differentiates such legitimate struggles from acts of terrorism."[75]

In September 2002, while addressing the 56th session of the UN General Assembly, General Pervez Musharraf of Pakistan regretted that UN resolutions on Kashmir remained unimplemented. He further said:

> "The question is whether it is people asking for their rights in accordance with the UN resolutions are to be called terrorists or whether it is the countries refusing to implement UN resolutions who are perpetrating state terrorism."[76]

Musharraf said while terrorism is to be condemned, "the world must not trample on the rights of the people and their struggle for liberation."[77]

It means that although there is as yet no consensus definition of terrorism, but the efforts of the developed countries to bring to liberation struggle within the framework of terrorism have also failed. Majority of states still considers liberation struggle to be legitimate.

All members of the United Nations, including states that are suspected of sponsoring terrorism, condemn terrorism, and terrorist attacks in all their manifestations. However, they are divided on a definitive definition of terrorism. How to resolve this dilemma?

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[75] Section 8 of the Kuala Lumpur Declaration

[76] *<www.rediff.com/index.html>*

[77] Ibid.

3.2.4.4 The Way Out

We are of the considered opinion that there are two basic reasons for the lack of a consensus definition, namely, lack of objectivity and clash of vested interests. The problem of definition is not legal, but political.

In the international community there is almost a consensus on the essential ingredients of terrorism even if we lack a definition. These essentials are almost common in the national laws of different states. The debates in the international forums also indicate an implicit consensus over these ingredients. But because of the vested interests of the parties concerned and their lack of objectivity some declare an act as 'terrorism' and others consider it a justified act. We may reproduce these essentials here:

1) Threat or use of force;
2) Illegality of such threat or use of force;
3) Widespread or devastating effects of violence;
4) Civilian target; and
5) Political objective(s).

If these essentials are found in act it will amount to terrorism, be it committed by state or sub-state groups or individuals.

If a state forcibly deprives a group of people from the exercise of their right to self-determination it is actually indulging in terrorism – or more precisely 'state terrorism'. This is especially true if the people who are denied the right are those who have the 'first level' right of self-determination. On the other hand, if a state allows or instigates an act, which has all the essentials of 'terrorism', it will also be guilty of 'state instigated' or 'state sponsored' terrorism.

People having the first level right of self-determination may lawfully have recourse to the use of force if they are forcibly deprived from the exercise of their right. In this regard, if they confine their attacks to military targets they cannot be accused of terrorism. It means that there is no necessary link between liberation struggle and terrorism. Every liberation struggle cannot be termed as terrorism. However, it is equally true that liberation struggle and terrorism are not mutually exclusive.

If the insurgents target civilian population and/or property they will be guilty of terrorism. Professor Bard is right to comment that liberation is an end and terrorism is one of the means to achieve this end.

> "*[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 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."[78]

As far as attacks by insurgents on military targets are concerned they are called 'guerrilla attacks', which are not necessarily unlawful. As noted above, if people are forcibly deprived of their first level right to self-determination they are allowed to use force against combatants. Unlawful attack on the troops of a state conducted by the troops of another state it is called 'aggression'. Lawful armed attack by a state on the military targets of another state may be either in case of individual or collective self-defense or it may be in the form of collective use of force under the authority of the United Nations. This has been explained in quite detail in the previous Chapter.

[78] *Insurgency and Terrorism*, p 27

PART II

LIBERATION STRUGGLE IN SHARI'AH

"As time passes, it is becoming increasingly clear that Islamic law is no longer a municipal law: it is an international force with the power to shape world events. It is destined to play a positive role in shaping the norms of the future world order... In reality, Muslims need to wake up from their slumber and make the principles of their law compete with those of natural law and other systems so that these norms and values become part of international law. Mere complaining, without the necessary foundational work, about the domination of Western principles is not going to work for long... Non-Muslims, on the other hand, must ignore the propaganda launched against Islamic Law and be prepared to acknowledge and accommodate the values of systems other than Western... The United Nations must do so too if it is to remain a "United" Nations, as imposing value system of the Western world alone on the rest of humanity is not going to work for long."

Professor Imran Ahsan Khan Nyazee
(*Islamic Law and Human Rights*, pp 14-15)

CHAPTER IV:

RIGHT OF SELF-DETERMINATION FROM THE PERSPECTIVE OF THE SHARĪ'AH

4.1 The Sharī'ah Framework for Rights

Before discussing the nature and scope of the right of self-determination in the Sharī'ah it would be instructive to discuss the framework of the Sharī'ah regarding the protection and enforcement of human rights in general. Unless this framework is comprehended there will always exist misunderstandings and misconceptions as well as analytical inconsistencies regarding Islamic Law relating to human rights.[1]

4.1.1 Source of Rights

In Western Jurisprudence there are several theories regarding the origin and source of rights. We will briefly discuss two of these, Legal Positivism and Naturalism.

4.1.1.1 Naturalism

Naturalism believes that "there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid."[2] These superior principles of human conduct are known as principles of Natural Law. The presumption of Naturalists is that these rules can be discovered by human reason. They believe that this Natural Law has given man certain rights,

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[1] It is acknowledged that the "Sharī'ah Framework" for human rights as presented here is based primarily on the research of my learned teacher Professor Imran Ahsan Khan Nyazee. His original work on this issue can be studied in his monumental work on Islamic Jurisprudence entitled "*Theories of Islamic Law*" (Islamic Research Institute Islamabad, 1994). Further details are found in his "*Islamic Jurisprudence*" (IRI & IIIT, Islamabad, 2000). Some interesting insights are also found in his research papers "*Islamic Law and Human Rights*" and "*Islamic Law and the CRC*", (Islamabad Law Review, Faculty of Shariah and Law, International Islamic University Islamabad, Vol: 1, Nos. 1 & 2, Spring and Summer 2003). What I have done here is just to summarize his work with slight modifications here and there. Having said that, I do admit the possibility of misunderstanding or unintentional misinterpretation on my part. So, I am alone responsible for any mistake.

[2] H. L. A. Hart, *The Concept of Law*, p 182

which are "inalienable" in the sense that these cannot be taken back or suspended by State or any human institution. These are rights, which are available to man by virtue of his nature – by virtue of his being man. Indeed, Naturalists believe in a certain "State of Nature" when there was no State and government at all.[3]

The ideas of Naturalists, especially Locke and Rousseau, greatly influenced the later jurists and political thinkers, particularly the Americans. In fact, the American Revolution was based on these ideas.[4] That is why these ideas were embodied in the Declaration of Independence as well as the Constitution of the USA. Thomas Jefferson wrote in the Declaration of Independence:

> "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 effect their safety and happiness."[5]

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[3] There are differences among them as to the exact situation in such State of Nature. There were three important theorists, Thomas Hobbes, John Locke and Jean Jaqueous Rousseau. See for details: Thomas Hobbes, *Leviathan or Matter, Form and Power of a Commonwealth – Ecclesiastical and Civil*, in "The Great Books" (William Benton (Publisher), Encyclopedia Britannica Inc., 1952), Vol. 23, pp 39-283; John Locke, *Concerning Civil Government – Second Essay*, in "The Great Books", *op cit.*, vol. 35, pp 25-81; Jean Jacques Rousseau, *Discourse on the Origin of Inequality*, in "The Great Books", *op cit.*, vol. 38, pp 323-366. See also: Rousseau, *A Discourse on Political Economy*, *ibid.* pp 367-385; *A Discourse on Social Contract*, *ibid.*, pp 387-453.

[4] The slogan "No taxation without representation" was also a manifestation of the concept of Popular Sovereignty.

[5] 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...."

These ideas are also reflected in several documents and declarations regarding human rights adopted by international organizations. The Universal Declaration of Human Rights 1948 is primarily based on these ideas, although it seems "innovative" in certain aspects.[6] Similarly, the UN General Assembly has termed the right of self-determination as "inalienable" in several declarations.[7] Mary Robinson, the UN High Commissioner for Human Rights, representing this view has remarked:

> "Human Rights are inscribed in the hearts of people; they were there long before the lawmakers drafted their first proclamation."[8]

4.1.1.2 Legal Positivism

Legal Positivists believe that the source of rights is Positive Law i.e. the law made by State. To them, lawmaking is the prerogative of State and they do not believe in a superior law over positive law. For them, Natural Law is but a fiction.[9] Similarly, Positivists say that a positive law has to be obeyed and they criticize value judgments regarding the 'goodness' or 'badness' of law.[10] In fact, they believe in separation of law from morality because they consider morality to be relative, which changes from person to person, time to time and place to place. Positivists believe that rights are creature of State and, hence, it can suspend them in times of emergency.

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[6] Nyazee, *Islamic Law and Human Rights*, pp 32-33

[7] See Declaration on Granting Independence to Colonial Peoples and Territories (GA Resolution 1514 (XV) (1960)), preamble.

[8] Statement by Mary Robinson, the CRC Guide,

[9] Jeremy Bentham, *Theory of Legislation*, p 84

[10] The debate primarily revolves on the question whether or not there are some "fundamental" truths capable of being comprehended by human reason. For a scholarly discussion on the issue see *Islamic Law and Human Rights*, pp 19-30

Philosophers like Jeremy Bentham, John Austin and HLA Hart represent this school. Their ideas have influenced the legal system of UK and, in turn, the legal systems of British colonies such as India and Pakistan.[11] Legal positivism also has its bearing on International Law. Thus, for along period only treaty and custom were deemed the sources of International Law because treaty is the formal expression of the consent of State and custom is the name of state-practice. Article 38(1) (c) of the Statute of International Court of Justice says that among the sources of International Law are 'general principles of law recognized by civilized nations'. Some consider it as a reference to the principles of natural law. But Martin Dixon, a British jurist, severely criticizes this:

> "Almost certainly, this was not the original intention of para 1 (c) because states were (and are) reluctant to give up control over the creation of 'law', although in recent years it has been alleged that this provision is the 'source' of those legal rules dealing with moral issues, such as the protection of human rights and the prohibition of genocide. However, such principles as these may well have a universal appeal, in practice the source of a state's obligations in these fields is firmly based on treaty and custom."[12]

Even then he admits that "[w]ithout doubt, Art. 38 (1) (c) has eroded the strict positivist view of international law. It permits the Court to apply principles, which do not seem to have their origin in either custom or treaty, although they may later become embodied in such."[13]

Now, what does the Sharī'ah say about this issue?

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[11] But the difference lies in the fact that in UK democracy is deeply rooted due to which government cannot arbitrarily encroach upon rights of citizens. In Pakistan the rights of citizens are time and again suspended in the name of real or fictitious emergency.

[12] *International Law*, p 39

[13] Ibid. p 41

4.1.1.3 The Sharī'ah Perspective

There are several verses in the holy Qur'ān that categorically declare that lawmaking is a prerogative of God. None shares this power with Him.

> "The Command is for none but Allāh"[14]

> "You shall not falsely declare with your tongues: 'This is lawful, and that is forbidden', in order to ascribe false things to Allāh, for those who forge lies against Allāh will never prosper."[15]

But God does not communicate directly with each human being to inform him of His Will. He uses the medium of Prophet for this purpose. Thus, Prophet is the only source of law on earth. The Prophet (May Allāh's blessings be upon him) gave two fountains of law to his *Ummah*. These are Qur'ān and Sunnah. Thus, these are the two primary sources of law. The two cannot be separated from each other. They jointly form one whole.[16] Then, Qur'ān and Sunnah give delegated authority to humans for further legislation in conformity with the precepts of the two basic sources. So, the authority of humans to legislate is not original and absolute. Rather, it is delegated and limited. Every law made by humans, which is not in accordance with Qur'ān and Sunnah, is invalid. It is not a law. It does not bind a Muslim.[17] The Prophet (May Allāh's blessings be upon him) is reported to have said:

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[14] *Qur'ān* 12:40

[15] *Qur'ān* 16:116

[16] For a scholarly analysis of the relationship of *Qur'ān* and Sunnah see Abū Ishaq al-Shātibī, *al-Muwāfaqāt fi Uṣūl al-Sharī'ah*, vol. 3. See also Nyazee, *Islamic jurisprudence*, pp 176-82

[17] "O ye who believe! Obey Allāh, and obey the messenger and those of you who are in authority; and if ye have a dispute concerning any matter, refer it to Allāh and the messenger if ye are (in truth) believers in Allāh and the Last Day. That is better and more seemly in the end." (*Qur'ān* 4:59)

"It is obligatory for one to listen to and obey (the ruler's orders) unless these orders involve disobedience to Allāh. But if an act of disobedience to Allāh is imposed, he should not listen to or obey it."[18]

In this way, a hierarchy of norms and rules is formed, each validating the other. As Professor Nyazee remarked, "[t]he fact that ultimately Allāh alone is the source of all laws indicates to us the fundamental rule or norm of the Islamic legal system."[19] Every other norm or rule is to be validated by this *grundnorm*. Nyazee explains this in the following manner:

"Starting from the outer end, the Muslim may say:

I am ready to obey such and such law as it has been communicated to me by a qualified jurist.

I follow the opinion of the jurist as it is in conformity with the sources of Islamic law.

I obey a law based on the sources, as they are the sources revealed to Muḥammad.

I obey Muḥammad for he is the Messenger to of Allāh, and

I believe in Allāh.

In this way the validity of all laws is traced to Allāh."[20]

Hence, the rights acknowledged by the Sharī'ah cannot be suspended by State. This resembles the stand of Naturalists. But there is a fundamental difference. From the perspective of those Naturalists who believe in divine law as well, Natural Law is just a part of the divine law. Divine laws for them are of two kinds: revealed and others unrevealed. They contend that some divine laws cannot be

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[18] Bukhārī, *Kitāb al-Jihād wa al-Siyar*, Hadith no. 2735; *Kitāb al-Aḥkām*, Hadith no. 6611; Muslim, *Kitāb al-Imārah*, Hadith no. 3423; Tirmidhī, *Kitāb al-Jihād* Hadith no. 1629; Nasā'ī, *Kitāb al-Bay'ah*, Hadith no. 4135.

[19] *Islamic Jurisprudence*, p 80

[20] Ibid. p 81

discovered through human reason alone and that is why they were made known through Revelation. Natural Law, they believe, is that part of divine law that can be discovered through human reason. In their opinion, the Revealed Law 'supposes or assumes' the existence of these rules of Natural law. "It passes them over in silence, or with a brief and incidental notice."[21]

From the perspective of Islamic Jurisprudence, this contention in its absoluteness is unacceptable. Nyazee has rightly pointed out: that "once revelation has come, such laws may only be discovered in the light of revelation, because revelation does not pass them over in silence; it indicates them through general principles."[22] In other words, the Shari'ah never remains *silent* on an issue.

In the classical period of Islamic History there was a hot debate between the orthodox Muslims and the rationalists. Ash'arīs, who represented the orthodox Muslims, believed that human reason could not comprehend the goodness (*ḥusn*) or badness (*qubḥ*) of any act. Good *is* what the Sharī'ah *ordained* and bad *is* what the Sharī'ah prohibited from. Subject has to follow the precepts of the Sharī'ah without bothering about the goodness or badness of an act. This stand seems to be that of Positivists regarding Positive Law. Mu'tazilah, who represented the enlightened rationalists, were of the opinion that goodness and badness can be comprehended by human reason. Therefore, they maintained, Sharī'ah ordains good acts and prohibits bad acts. This stand resembles that of the Naturalists. There was a third group as well – the Māturīdīs – which represented a balanced approach.[23] Nyazee summarizes the debate in the following words:

> "The essential point in all this is whether reason can be used as a source of law for those things on which the Sharī'ah is silent? In other words, if something is not expressly prohibited or commanded by the Qur'ān and

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[21] John Austin, *Lectures on Jurisprudence*, vol. 1, p 104. Jāvēd Aḥmad Ghāmidī has expressed similar views regarding the Sharī'ah and Ijtihād. (See Jāvēd Aḥmad Ghāmidī, *Uṣūl-o-Mabadi*, in his *Mīzān*, pp)

[22] *Islamic Jurisprudence*, p 85

[23] *Al-Tawdih*, vol. 1, p 32

the Sunnah, can the law for such a thing be discovered through reason? The answer of the majority appears to be a clear "No!" This, however, does not mean that reason has no part to play in the discovery of laws in Islam. The requirement is that all reason and reasoning must proceed from the principles in the Qur'ān and the Sunnah. The process is the same in many other legal systems and judges are required to apply the general principles of law rather than those of natural law. The fundamental position of Muslim jurist is that there is no such thing as natural law outside the realm of the Sharī'ah on which we can rely as soon as we discover that a rule of law is not directly discoverable from the texts. Such a rule, they insist, needs to be discovered directly or indirectly from the principles of Islamic law, and not from some "ominous brooding in the sky."[24]

Conclusion

The conclusion is that the Sharī'ah considers revelation to be the source of all laws as well as rights. Human reason has a subordinate role to play in this regard. In matters, settled by the Sharī'ah reason has nothing to do. Subjects have to follow the precepts of the Sharī'ah whether or not they understand the *ḥikmah* (wisdom) behind each precept. As far as matters where the Sharī'ah is 'silent' reason can be used to discover rules in the light of general principles of the Sharī'ah. It means the Sharī'ah never remains silent on any issue. It either deals with every detail of an issue or gives general principles in the light of which details can be derived by human reason.[25]

It follows from the above discussion that State cannot take away or suspend the rights guaranteed by the Sharī'ah. State itself owes certain duties to God. Moreover, "natural" rights can have legal basis only if they are established either

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[24] *Islamic Jurisprudence*, pp 86-87

[25] Sometimes the Council of Islamic Ideology declares that a particular law is not repugnant to injunctions of the Sharī'ah just because it could not find violation of any text (*naṣṣ*) of *Qur'ān* or Sunnah. This is not the right way for Islamization of laws. (Nyazee, *Theories of Islamic Law*, pp 293-301)

directly by the texts of Qur'ān and Sunnah or through general principles of the Sharī'ah.

Some may say that there is virtually no difference between rights claimed as "natural" rights and those guaranteed by the Sharī'ah. But this, indeed, is oversimplification of issues. To quote again Professor Nyazee:

> "The differences are understood when we notice that individual rights mean very little in themselves, unless they are related to other competing rights and interests. The system of rights is an integrated whole. The rights support each other and clash with each other requiring delicate balancing by the lawmaker and preference and priorities that a legal system has determined for itself. The priorities within the two systems we are considering are quite different. This can be grasped by examining the jurisprudential interests or the value-system within the Western legal systems and the purposes of Islamic law called the *maqāṣid al-sharī'ah*."[26]

This leads us to the issue of "standards" for determination of priorities between competing rights. These standards are discussed under the title of the *Maqāṣid al-Sharī'ah* or Purposes of Islamic Law.

4.1.2 Purposes of the Sharī'ah

4.1.2.1 Five Definitive Purposes

According to Imām Abū Ḥāmid al-Ghazālī the purposes of the Sharī'ah are of two types, namely *dīnī* or the purposes of the Hereafter and *dunyawī* or the purposes pertaining to this world. Each of these has two aspects, namely *taḥṣīl* or securing of the interest and *ibqā'* or preservation of the interest. In other words, *taḥṣīl* is the securing of benefit (*manfa'ah*) and *ibqā'* is the repelling of harm (*maḍarrah*). The worldly purposes can be divided into four types: the preservation of *nafs* (life), the

[26] *Islamic Law and Human Rights*, pp 60-61

preservation of *nasl* (progeny), the preservation of *'aql* (intellect), and the preservation of *māl* (wealth).[27] When all types are taken together we have five basic purposes of law, which are also called *ḍarūrāt* (necessities):

- Dīn (Religion)
- Life
- Progeny
- Intellect
- Wealth

These primary purposes or *ḍarūrāt* are followed by *ḥājāt* (needs), which are additional purposes required by the primary purposes, although the primary purposes would not be lost without them. Then comes the third category called *tawassu'* (ease) and *taysīr* (facility) in the law. They are also called *taḥsīnāt* (complementary values). *Ḥājāt* and *taḥsīnāt* are meant to defend and protect *ḍarūrāt.*[28]

These purposes have been determined from the texts through induction (*istiqrā'*) and that is the reason why they are considered definitive (*qat'ī*).[29] Nyazee has rightly pointed out that moving beyond the *maqāṣid* leads to the area of weaker attributes, the *ashbāh.* They are probable (*ẓannī*) *maqāṣid.* Examples include the building of civilization, security, the maintenance of equality and freedom etc.[30] These values are preserved and protected in each society and are considered aims of justice in Western law.[31]

4.1.2.2 Understanding the Nature and Structure of the Maqāṣid

The first and foremost purpose of the Sharī'ah is to secure the interest of Man in the Hereafter. Ghazālī says that some would consider life, and also intellect, to

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[27] Abū Ḥāmid al-Ghazālī, *Shifā' al-Ghalīl fi Bayān al-Shabah wa al-Mukhīl wa Masālik al-Ta'līl,* (Baghdad: Dār al-Kutub al-'Ilmīyah, 1971) pp 186-87

[28] Ibid.

[29] Abū Isḥāq al-Shātibī, *al-Muwāfaqāt fi Uṣūl al-Sharī'ah,* (Cairo: al-Maktabah al-Tijārīyah, 1975), vol. 2, p 7

[30] *Islamic Jurisprudence,* pp 203-204

[31] Bodenheimer, *Jurisprudence,* p 196

have priority over the value of dīn because without life and intellect there would be no religion. But this argument takes into account collective life and intellect. He points out, however, that the provisions of law explicitly give priority to religion over life as well as other values. Thus, for instance, the subject is asked to give up his life in the way of Allāh, which shows that religion has priority over life. Al-Shātibī, the famous Andalusian jurist, draws a general principle from this: When the *maqāṣid* serve the interest of the Hereafter the determination of what is beneficial and what is harmful cannot be left to human reason. Human reason can play a role in this regard in the light of the general principles of the Sharī'ah.[32]

Each of the *maqāṣid*, as pointed above, has two aspects: *taḥṣīl* (achieving) or *ḥifẓ* (securing) and *ibqā'* (preservation). The positive aspect in the words of Shātibī is "what affirms its elements and establishes its foundations". The negative is "what expels actual or expected disharmony".[33] Thus, the interest of din is secured by the creation of conditions that facilitate worship and establish the other essential pillars of Islam.[34] From negative aspect, Jihād is prescribed for defending *dīn*, and prayer, *zakāh*, fasting and pilgrimage help establish it. Similarly, the interest of life is secured by creating conditions for the existence of life such as provision of sustenance and maintenance of good health, while it is protected through the provision of penalties for those who destroy life without legal justification. It is evident that the positive aspect of the *maqāṣid* imposes certain duties on government and ensures rights for subjects.[35] It is the positive aspect of the interest of *dīn* that forms the basis for the right of self-determination in the context of the Sharī'ah. We will come to this issue again a bit later, *in shā' Allāh*.

What happens when any of these interests clash with another? One has to be given priority over the other. This is where the Sharī'ah differs with the other legal systems. The rules prescribed for this purpose are:

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[32] *Al-Muwāfaqāt*, vol. 2, p 48

[33] Ibid., vol. 2, p 8. See also Ghazālī, *Jawāhir al-Qur'ān*, pp 32-35

[34] This is the basis for the right of self-determination in the Sharī'ah See Section 4.2.2 below.

[35] It is perhaps for this reason that in the process of Islamization in Islamic States governments ignore this aspect of the *maqāṣid* and concentrate on the negative aspect – punishments – only.

❖ The definitive interest prevails over the probable.

As noted above, the probable goals belong to the area beyond the *maqāṣid*. The jurists do not discuss these in detail. Consider the example given by Ghazālī while analyzing the *maṣlaḥah murṣalāh* (the interest that is neither acknowledged nor rejected by the Sharī'ah).[36] The enemy is attacking a fort in which Muslims are besieged. Muslim captives are used as shields in the hope that those in the fort will not fire at them. Should the Muslims in the forte fire at the enemy even if the Muslims being used as shield are killed? Ghazālī apparently does not allow it if the interest is not definitive.[37]

❖ The public interest is prior to the private.

On the basis of this rule, Ghazālī states that it is permitted for the ruler to impose taxes if money is needed for preserving the security of Muslim *Ummah*.

❖ The stronger interest shall prevail.

The five basic purposes are listed in their priority order on the basis of their inherent strength. Thus, the preservation and protection of din has priority over all other interests. Then comes the value of life after which are the values of progeny, intellect and wealth in the order they are stated.

Thus, Muslims are obliged to sacrifice their lives for defending their faith because din has priority over life. Similarly, a person facing death can drink wine if nothing permissible is available for the protection of his life even if badly affects his intellect for a while. In the same way, during famine a person may without the fear of punishment steal the property of another for saving his life. This is because life has priority over *māl*.

As stated above, it is this priority order that is different in the Sharī'ah from other legal systems. For instance, in the West religion is considered a private affair and

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[36] Ghazālī, *al-Mustasfā min 'Ilm al-Uṣūl*, vol. 1, p 290

[37] Ibid. See also *Islamic Jurisprudence*, pp 245-47

has been reduced to the lowest priority. Hence, right of freedom of expression as well as right of access to information, which fall under the value of intellect, are deemed prior to religion. In the perspective of the Sharī'ah, the values of *dīn*, life and family are prior to that of intellect. Hence, right of freedom of expression as well as right of access to information will be restrained if they demolish these superior values.[38]

In some cases there apparently is deviation from this priority order. For instance, theft is punished with the amputation of the hand even though theft is an attack on the value of wealth (the lowest in order) and amputation of the hand is connected to the value of life (the top second). Similarly the punishment for the offence of adultery is for the protection of the third value, namely progeny or family while the prescribed punishment attacks on the higher value of life. Is it that a public interest in a lower category has been preferred over a private interest in a high category? If it is so then, as Nyazee suggested, "it might be better to organize the structure of the *maqāṣid* into public and private interests and then divide each into the five categories of *dīn*, life, family and *māl*."[39] But this is not so simple because the Sharī'ah has given priority to what it calls as "rights of Allāh" over "rights of individual" and the former does not necessarily denote rights of collectivity. This leads us to the issue of different kinds of rights in the Sharī'ah.

4.1.3 Three Kinds of Rights

There are three kinds of basic rights in the Sharī'ah:

- Rights of Allāh (*ḥuqūq Allāh*);
- Rights of Individual (*ḥuqūq al-'Abd*);
- Rights of Individuals collectively or rights of community also known as rights of State (*ḥuqūq al-Sulṭān*).[40]

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[38] *Islamic Law and Human Rights*, p 61

[39] *Theories of Islamic Law*, p 249

[40] See, for instance, Sarakhsī, *Uṣūl*, pp . This was because these rights were in the jurisdiction of the ruler for which he was to formulate detailed rules in the light of the general principles of the Sharī'ah (See for details; Nyazee, *Theories of Islamic Law*, pp)

Sometimes the right of Allāh merges with that of individual, which gives rise to a mixed right. This again is of two kinds; the one in which the right of Allāh is predominant and the one in which the right of individual is predominant. Thus, we have four kinds of rights:

1) Pure rights of Allāh;
2) Pure rights of Individual;
3) Mixed rights of Allāh and individual. These are of two kinds:

a) Those in which the right of Allāh is predominant;
b) Those in which the right of individual is predominant; and

4) Rights of State or Community

Modern scholars of Islamic law generally consider the rights of Allāh to be the same as those of community. But this is a misunderstanding. The community itself owes duties to Allāh. So, how can the rights of Allāh and those of community be *synonyms?*[41]

Thus, the order of priority in case of clash between two different rights will be as follows:

- Pure rights of Allāh
- Mixed rights of Allāh and individual where the right of Allāh is predominant;
- Mixed rights of Allāh and individual where the right of individual is predominant;
- Rights of State or Community; and
- Pure rights of individual.[42]

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[41] Modern scholars generally presume that *ḥuqūq Allāh* and *ḥuqūq al-ṣulṭān* are the same. (See, for instance, 'Abd al-Qādir 'Awdah, *al-Tashrī' al-Jinā'ī al-Islāmī*, vol. 1, p) This, however, does not seem correct because it leads to analytical inconsistencies. Thus, for instance, if they were the same then why State does not have the authority to pardon the *ḥudūd* punishments, which *ḥuqūq Allāh?* From the other side, why the doctrine of *shubhah* (mistake of law or of fact) does not operate in *ta'zīr* or *siyāsah* punishments – *ḥuqūq al-'abd* and *ḥuqūq al-ṣulṭān*, respectively? (See for a scholarly analysis of the issue: Nyazee, *Islamic Jurisprudence*, pp ; *Theories of Islamic Law*, pp ; *General Principles of Criminal Law – Western and Islamic*, pp)

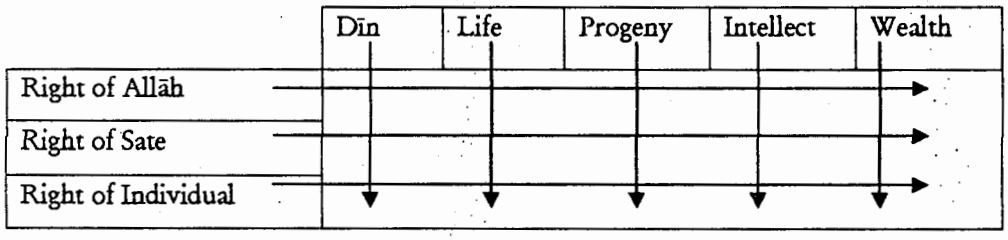
[42] There may be some debate on whether or not the rights of State have priority over the rights of individual. We presume that they do.

If this order is kept in mind the questions we put above regarding the priority order within the *maqāṣid* can be answered. Thus, in case of amputation of the hand for theft it is not the value of wealth that has been preferred over the value of life. Rather, it is the right of Allāh (the *ḥadd* punishment) in a lower category that has been preferred over the right of individual (relating to life) in an upper category. So is the case with the punishment for the offence of adultery because it is also a *ḥadd* penalty – a pure right of Allāh.

So, we would rephrase the above-quoted suggestion of Professor Nyazee in the following manner:

> "It might be better to organize the structure of the *maqāṣid* into different kinds of rights and then divide each into the five categories of *dīn*, life, family, and *māl*."

We have tried to do the same in the following diagram:



As is obvious, these rights cut across all categories. The right of Allāh has preference over all other competing rights, no matter to which category they belong. This has been indicated by the horizontal columns. Thus, a right of Allāh from the category of Wealth will have priority over a right of individual in the category of life. (This has been the case of the punishment of theft.) However, if two rights of the same kind compete with each other then priority is given on the basis of the five basic values. This has been indicated by the vertical columns. Thus, where a right of individual clashes with another right of individual priority will be

given according to order within the *maqāṣid*. Hence, for the purpose of settling a dispute the first thing is to determine the nature of rights involved. After that the values or *maqāṣid* will be considered.

Conclusion

The conclusion is that Islamic Law has its own set up and framework for the enforcement of human rights, which should be understood. Only then the difference between the perspective of the Sharī'ah and that of the western legal system can be grasped. Nyazee summarized the debate in the following words:

> "Islamic law provides one standard for judging and criticizing existing or proposed laws, while human rights as expressed by the United Nation provide another standard, especially where the nations have ratified the declarations and conventions of the United Nations. As far as the fundamental rules of Islamic law are concerned they have to be adopted by Muslims without investigating the goodness or badness of the rules on the basis of human reason. Such goodness or badness has already been determined by God Almighty. When there is a clash between these two standards, it is obvious that the standard imposed by Islamic law will be followed and the conflicting standard laid down by the United Nations will be rejected. This holds true whether or not a Muslim country has signed and ratified a convention of the United Nations and irrespective of what international law has to say regarding reservation to such instruments. Ratification cannot set side the fundamental rules of Islamic law. It may be argued that international relations are based on reciprocity and a Muslim nation can accept conditions when the same conditions are being imposed on the other signatory to a treaty. The argument against this is the same; although reciprocity is an acknowledged principle of Islamic law, no rule of

reciprocity can set aside, suspend, or permanently remove a fundamental rule of the Sharī'ah "[43]

Now, lets us see where does the right of self-determination lie in this set up?

4.2 Self-determination within the Sharī'ah Framework

4.2.1 The Islamic Concept of Freedom

To understand the concept of freedom within the framework of the Sharī'ah it is necessary first to understand the viewpoint of Islam regarding the position of Man in this universe and the purpose of his life.

Islam does not believe in the Chance Theory regarding the origin of life, particularly human life, on this planet. It says that it is all done through planning for a great cause. The cause is to show who among humans bow to the Will of God with his free choice and who rebels against Him.[44] This test necessitates free choice. Otherwise the test does not have any meaning. They are given free choice to accept or reject the message of God as conveyed by His Prophets and messengers (May Allāh's blessings be upon them all).

> "There is no compulsion in religion. The right direction is henceforth distinct from error. And he who rejecteth false deities and believeth in Allāh hath grasped a firm handhold, which will never break. Allāh is Hearer, Knower."[45]

This free choice inevitably leads to difference of opinions among humans on different issues. That is why Qur'ān also lays down explicitly that difference of

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[43] *Islamic Law and Human Rights*, p

[44] "Blessed is He in Whose hand is the Sovereignty, and He is Able to do all things. Who hath created life and death that He may try you, which of you is best in conduct; and He is the Mighty, Forgiving." (*Qur'ān* 67:1-2) See for details Mawdūdī, *Islamic Law and Constitution*, (Islamic Publications, Lahore, 1992) pp 45-49, 124-64.

[45] *Qur'ān* 2:256 See also 18:29

opinion should not be resolved by coercive means as it negates the very purpose of creation.

> "If it had been the Lord's Will they would all have believed all who are on earth! Wilt thou then compel mankind against their will to believe!"[46]

Hence, Islam bases its claims on arguments. If someone is convinced by these arguments and he wants to submit to the Will of God he may become a Muslim. If he is convinced but he does not want to accept the reality he is not forced to accept it.[47] If a person embraces Islam it means that he has unconditionally submitted to the Will of God. He should obey God in all respects. In this sense, Islam is but the negation of free will.[48] But this total and unconditional submission to the Will of God by the free choice of Man makes him free from all other chains. In this way, he becomes a "free man".[49] No human being has any superiority over others except through piety or *taqwā* i.e. keeping one's self within the limits prescribed by God and not transgressing them.[50]

Islam does not allow some human beings to impose their will on others. It condemns religious persecution in all its forms and manifestations.[51] It makes it

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[46] *Qur'ān* 10:99 See also 11:118-19

[47] "Call unto the way of thy Lord with wisdom and fair exhortation, and reason with them in the better way. Lo! thy Lord is best aware of him who strayeth from His way, and He is Best Aware of those who go aright." *Qur'ān* 16:125-128 See also 27:76-81

[48] "It is not fitting for a Believer man or woman when a matter has been decided by Allāh and His Apostle to have any option about their decision: if anyone disobeys Allāh and His Apostle he is indeed on a clearly wrong Path." (*Qur'ān* 33:36 See also 4:65 and 9:111)

[49] "Are many lords differing among themselves better or Allāh the One Supreme and Irresistible?" (*Qur'ān* 12:36 See also 39:29)

[50] *Qur'ān* 49:13 The holy Prophet (May Allāh's blessings be upon him) emphasized this principle in several traditions. (Tirmidhī, *Kitāb al-Tafsīr*, Hadith no. 3193; *Kitāb al-Manāqib*, Hadith no. 3890; Abū Dawūd, *Kitāb al-Manāsik*, Hadith no. 1628. It is also worth-noting here that *Qur'ān* declares its laws as "*Ḥudūd Allāh*" i.e. limits prescribed by Allāh. (*Qur'ān* 65:4-5) Furthermore, it declares that a community collectively keeps within these limits it flourishes both in this World and in the Hereafter. (*Qur'ān* 7:96)

[51] In *Qur'ān* 85:10 the word *fitnah* has been used, which is deemed equivalent to persecution, especially in matters of religion. Sayyid Mawdūdī says: "*Fitnah* is a wider term, which encompasses several moral crimes... Figuratively, it means anything that tests human being, and that is why property and offspring are called *ftinah*. Ups and downs in nations' life are also termed as *ftinah* because they test them. Putting on a person more burden than what he can bear is also called *fitnah*.

obligatory upon Muslims – those who submit to God's will – to fight against those who persecute and coerce people to accept a certain faith. It says that this fight should continue till persecution ends.

> "And fight them until persecution is no more, and religion is all for Allāh. But if they cease, then lo! Allāh is Seer of what they do."[52]

Those who submit to the Will of God – Muslims – are equal and there is a bond of brotherhood among them.[53] One of the necessary corollaries of this equality is that none is allowed to impose his will upon others. All their affairs should be carried on through mutual consultation.

> "(True believers are those) who conduct their affairs by mutual Consultation."[54]

Muslims may differ on some issues because of the freedom of thought, which necessarily leads to freedom of expression. But they should resolve all their differences by reference to what Allāh has revealed through His Prophet (May Allāh's blessings be upon him).[55] Even the leader cannot impose his will upon others. He is bound to accept the decision of the majority. Minority will be

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It means that *fitnah* actually means test, be it through things that a person likes or through fear of damage and troubles. If this test is from God, then it is perfectly right because He is Creator of human beings and He has the right to test His creatures. The purpose of this test is to spiritually develop human beings. However, if this test is by a human being it is absolute injustice because he does not have this right. The purpose of this test is to put restrictions on freedom of conscience. In this last sense of the word *fitnah* it is almost synonym of the English word "Persecution", although the former is much wider in its scope." (*al-Jihād fi al-Islām* pp 104-09; See also Dr. Wahbah al-Zuḥaylī, *Āthar al-Ḥarb fi al-Fiqh al-Islāmī*, pp 74 and 90-94)

[52] *Qur'ān* 8:39 See also 22:39-40

[53] *Qur'ān* 8:74 See also 49:10

[54] *Qur'ān* 42:38 See also Mawdūdī, *Islamic Law and Constitution*, pp 148-52.

[55] *Qur'ān* 4:59

allowed to express its opinion and to try to convince the majority but it is the decision of the majority that should be followed.[56]

It is on the basis of these teachings that the fuqahā' have declared unequivocally:

> "The original rule in human beings is freedom."[57]

It means that every human being is presumed to be free (*ḥurr*) unless he is proved to be a slave. It also means that freedom is the inherent characteristic of human beings and slavery is an unnatural situation that devolves upon a person – a *ḥālah ṭāri'ah*. Sarakhsī says:

> "Human being has been created as *mālik* (owner) and not as *mamlūk* (owned). So, the characteristic of being owned can be proved only if the characteristic of being owner is invalidated."[58]

Moreover, it indicates that the general rule is freedom for all human beings and that slavery is allowed only as an exception. We will come to this issue again at some later stage, *in shā' Allāh*.[59]

It follows from this explanation of the Islamic Concept of Freedom that Jihād is not meant for forceful conversion of non-Muslims to Islam. Rather, Muslims are obliged to fight against those who try to disturb this divine scheme by persecuting people to accept or reject a faith.[60] It is also clear that the right of self-determination

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[56] For a discussion on the relationship of *Shūrā* and *amīr* see Mawdūdī, *Islamic Law and Constitution*, pp 228-30; *Tafhīm al-Qur'ān*, vol. 4, pp 409-10. See also Mawlānā Amīn Aḥsan Iṣlāḥī, *Islāmī Riyāsat*, (Dār al-Tadhkīr, Lahore, 2002) pp 27-46. See for a different perspective Mawlānā 'Abd al-Raḥmān Kīlānī, *Khilāfat-o-Jumhurīyat*, (Lahore) pp .

[57] *Sharḥ al-Siyar al-Kabīr*, vol. 4, p 71

[58] *Al-Mabsūṭ*, vol. 10, p

[59] See Section 4.2.3 below. See also Section 5.2.2.2.1 of this dissertation.

[60] Here, some may question the position of Islam regarding the institution of slavery, particularly the enslavement of the war captives. Similarly, there are some doubts about the position of non-Muslims in Islamic State. In order to complete the discussion on freedom and self-determination within the Sharī'ah framework we will discuss these issues a bit later in this chapter, *in shā Allāh*. See Section 4.2.3 below. See also Section 6.5.

is ensured not only for 'peoples' but also for each and every individual. But, of course, practical implementation of this right has several modes, which will be discussed in detail in the next Chapters, *in shā' Allāh*.[61]

4.2.2 Self-determination and Religious Freedom

As we discussed in detail in the first Chapter, self-determination of 'peoples' is not confined only to their 'political independence'. More than that, it encompasses their "economic, social and cultural development" in accordance with their own wishes and aspirations without any external interference.[62] This wider right, therefore, relates to the very first of the five values that the Sharī'ah aims to protect and defend, i.e., *dīn*. So, each and every individual is free to choose the way of life – *dīn* – for him. He is not to be coerced to believe in a particular faith. Nor should he be forced to abandon a faith. But religious freedom is not confined only to embracing or rejecting a faith. Rather, as noted above, it requires ensuring an environment where at least that part of the religion can be practiced without any hindrance, which is covered by the doctrine of the rights of Allāh (*ḥuqūq Allāh*). Thus, for instance, there should be no hindrance in the performance of *ṣalāh*. Similarly, nobody should be forced to observe a particular dress code if that is prohibited by the Sharī'ah.[63] Moreover, this right of self-determination also encompasses freedom of expression as well as of access to information. It also necessitates participation of each individual, either directly or through his representative, in the decision-making process in the social set up. Then, from the negative aspect of the value, it becomes obligatory upon Islamic State to punish

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[61] See Section 6.4 of this dissertation. For a description of the modes for implementing the right of self-determination in international law see Section 1.4 above.

[62] For instance, the Declaration on Principles of International Law says: "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter." (GA/Res/2625 (XXV) (1970), Section 1)

[63] For instance, the Sharī'ah has prohibited Muslims from resembling non-Muslims in dress. (Abū Dawūd, *Kitāb al-Libās*, Hadith no. 3512) The recent ban in France on wearing scarves is, in fact, a violation of the right of self-determination.

those who violate this fundamental right of human beings. This punishment may even take the form of armed attack against the wrongdoers.

Now, as self-determination relates to the value of *dīn* – the highest of the values – it will have priority over all other rights that relate to values or rights of lower category insofar as it is linked to the foremost of rights – the right of Allāh. Resultantly, Islamic State is bound to ensure self-determination for its citizens. It cannot suspend it on any pretext.

Those Muslims who live outside Islamic State are also bound by the precepts of the Sharī'ah [64] insofar as they will be responsible for violation of any commandment of the Sharī'ah before Allāh on the Day of Judgment.[65] They should, however, observe the law of the land also. But this should not amount to violation of the basic norms of the Sharī'ah.[66] If in a certain territory they cannot live in accordance with their faith they should migrate from that territory to another suitable area.[67] If, however, they are not allowed to migrate, or when they are in considerable number and they strive for their right to self-determination, Islamic State will be bound to provide them moral, diplomatic as well as military and material support, if necessary.

As far as non-Muslims living in Islamic State are concerned, they are also given the right of self-determination. Details will be discussed in the next Chapters, *in shā' Allāh*.[68] But it may be noted at present that Sharī'ah does not consider them 'slaves'. They are 'free' citizens of Islamic State enjoying its protection.[69] Their religious freedom is guaranteed. Their places of worship are protected. In places other than *Amṣār al-Muslimīn* (Muslim Cities) they are given more freedom insofar as they are allowed to openly carry religious demonstrations and processions and

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[64] Imām Abū Yūsuf has given the following famous *dictum*: "A Muslim is to regulate his conduct according to laws of Islam wherever he may be." (*Al-Mabsūṭ*, vol. 10, p 95. For a discussion on the meaning and implications of this *dictum* see Section 6.1.1.3 of this dissertation.)

[65] See for details Section 5.1.1.2 of this dissertation.

[66] See for details Section 6.1.1.4 as well as Sections 6.2 and 6.3 of this dissertation.

[67] *Qur'ān* 4:97-100 (See for details Section 6.2 of this dissertation.)

[68] See Section of 6.5.4 this dissertation.

[69] See Section 6.5.3 of this dissertation.

to build new places of worship.[70] Even in *Amṣār al-Muslimīn* they are allowed to renovate their places of worship and celebrate religious festivals within their locality or places of worship.[71] These rights are ensured even for those non-Muslims who are inhabitants of lands conquered by Muslims.[72] As far as those non-Muslims are concerned who join Islamic State after concluding a treaty with it they may have additional rights by virtue of that treaty.[73]

4.2.3 Slavery and Islam

Here, it will not be out of place to discuss the position of slavery in Islam.[74] Slavery was not a part of the scheme of the Sharī'ah. The Sharī'ah did not envisage it. It was an institution that pre-existed the advent of the last Prophet (May Allāh's blessings be upon him).[75] We noted above that the fuqahā' have declared it unequivocally that 'original rule in human beings is freedom'.[76] It means that the Sharī'ah allowed slavery only as an exception. Sharī'ah did not at once abolish it altogether for several practical reasons. It, however, not only gave a detailed scheme for its gradual abolition but also ensured religious freedom for slaves during the transitional period before the complete abolition of this institution. We will give a brief description of the Sharī'ah rulings on this issue.

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[70] Abū Yūsuf, *Kitāb Al-Kharāj*, p 158 (quoting the authority of Ibn 'Abbās). For details see Section 6.5.4.1 of this dissertation.

[71] Ibid.

[72] See for details Section 6.5.4 of this dissertation.

[73] For the text of different treaties concluded with non-Muslims during the caliphate of Abū Bakr and 'Umar (May Allāh be pleaed with them) see *Kitāb al-Kharāj*, pp 148-62 (See for details Sections 6.4.5.1 and 6.5.4.3 of this dissertation.)

[74] For an analysis of the institution of slavery in Islam see: Dr. Wahbah al-Zuḥaylī, *Āthar al-Ḥarb*, pp 441-47, Mawdūdī, *Tafhīmāt*, Lahore, 1978, vol. 2, pp 348-84; Muḥammad Quṭub, *Shubuhāt Ḥawl al-Islām* (Jeddah, 1983), pp 54-106. See also: Aḥmad Amin, *Fajr al-Islām* (Cairo, n. d.), pp 87ff, Ṣubḥī al-Maḥmaṣānī, *Ḥikmat al-Tashrī' wa Falsafatuh* (Karachi, n. d., vol. 2), pp 380ff. See for further details: Aḥmad Shafīq Pāshā, *al-Riqq fi al-Islām* (Cairo, 1394 A. H.); 'Abdullāh al-Ḥamd al-Jalālī, *al-'Alāqat al-Ijtmā'iyah fi al-Qur'ān* (Dār al-Salām, al-Riyad, 1995), pp 93-125.

[75] In Jewish Law, for instance, there were two causes for enslavement; a crime or sin and war. (Deuteronomy, 20) St. Paul also defended the institution of slavery. (Epistle to Ephesus, 6). Aristotle's defense of slavery is also well known.

[76] *Sharḥ al-Siyar al-Kabīr*, vol. 4, p 71

4.2.3.1 Scheme for Abolition of the Institution of Slavery

1) Islam condemned enslavement of a free person.[77] It allowed enslavement in only one situation, namely, enslavement of the war captives, and that too as a last resort. We will discuss this issue in a bit detail in the next chapter, *in shā' Allāh*. At present it may be noted that it was based upon the principle of reciprocity (*al-mu'āmalah bi al-mithl*) and necessity (*al-ḍarūrah*).[78] When the other party was willing to exchange POWs or pay ransom for it Islamic State always welcomed it.[79] Similarly, there are numerous instances in the lifetime of the Prophet (May Allāh's blessings be upon him) when he released POWs gratuitously.[80]
2) It also laid great emphasis upon manumission of slaves. Even in the beginning of Islamic Da'wah in Makkah the act of manumission was described as a symbol of model Muslim character.[81] Muslims were always encouraged to spend their money on the wellbeing of the oppressed and needy, including slaves.[82]
3) When Islamic State was established in Madīnah, it was ordained that it should spend part of its revenue in freeing slaves.[83]
4) The Sharī'ah envisaged manumission as expiation (*kaffārah*) for several acts, such as breaking an oath[84], unintentional murder[85], *ẓihār*[86] etc.

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[77] Bukhārī, *Kitāb al-Buyū'*, Hadith no. 2075; Ibn Mājah, *Kitāb al-Aḥkām*, Hadith no. 2433
[78] See Section 5.2.2.3A of this dissertation.
[79] For instance, most of the POWs in the Battle of Badr were released after they paid some ransom. Some of them were freed on the condition that they should teach ten children of Anṣār writing and reading. (Ibn Sa'd, *al-Ṭabaqāt al-Kubrā*, vol. 2, p 22; Ibn Hishām, *al-Sīrah al-Nabawīyah*, vol. 2, p 221) Similarly, 'Amr the son of Abū Sufyān was released in exchange of the release of a Muslim captive Sa'd bin Nu'amān. (Ibid.)
[80] Among the POWs of Badr Abū al-'Āṣ, the infamous poet Abū 'Izzah and others were released gratuitously. (*Al-Sīrah al-Nabawīyah*, vol. 2, p 228) Eighty POWs were released gratuitously at the eve of the conquest of Makkah. (Muslim, *Kitāb al-Jihād* Hadith no. 3373; Tirmidhī, *Kitāb al-Tafsīr*, Hadith no. 3187; Abū Dawūd, *Kitāb al-Jihād* Hadith no. 2313)
[81] *Qur'ān* 90:11-13
[82] See, for instance, *Qur'ān* 4:36.
[83] *Qur'ān* 9:60
[84] *Qur'ān* 5:89
[85] *Qur'ān* 4:92

5) The institution of *mukātabah* was established to help those slaves who wanted emancipation. Muslims were ordered to help the *mukātab* slaves.[87]

6) Different rules were laid down for different classes of slaves. Thus, for instance, if a concubine were to give birth to a child for her master (*umm al-walad*) she would not be sold and would get freedom after the death of her master.[88] Similarly, a *mudabbar* slave was the one for whom the master made a will that he should be free after his death.[89]

7) The institution of *walā'* was also established. Under this system, if a person were to free his slave he would inherit that slave if he did not have any other relative at the time of his death.[90]

8) To change the psyche of the people regarding slaves and concubines the Prophet (May Allāh's blessings be upon him) ordered Muslims to call their slaves as *fatā* (boy) and concubines as *fatāh* (girl) instead of *'abd* (slave) and *'amah* (concubine), respectively.[91]

9) In *Jāhilīyah* some masters used to force their concubines to act as prostitutes. Islam not only prohibited it but also prescribed severe punishments for such masters.[92] It was quite natural that the moral character of slaves and concubines

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[86] *Qur'ān* 58:3

[87] *Qur'ān* 24:33 For detailed rules about the institution of *mukātabah* see:

[88] For detailed rules about *ummahāt al-walad* see:

[89] For detailed rules about *mudabbar* see:

[90] See for details: () It was a kind of incentive for people to free their slaves. Indeed, the right of *walā'* was very much attractive for people. So, for instance, it is reported that a concubine named Barīrah was manumitted by her master. She came to 'Ā'ishah (May Allāh be pleased with her), and asked her for financial help to set her free. She said that she would buy her and then set her free so that she gets the right of patronage (*walā'*). Her master agreed that she could buy her and set her free but he would retain the right of patronage. When the Prophet (May Allāh's blessings be upon him) was told about this irrational stipulation he was very angry and said: "How could some people attempt to impose stipulations that are not in the book of Allāh. Whosever stipulated conditions that are not in *Qur'ān* then these are not binding even if there were hundred stipulations". (Bukhārī, *Kitāb al-Buyū'*, vol. 1, p 269-70, *Kitāb al-Nikah*, vol. 3, p 79) In other reports it is said that the Prophet (May Allāh's blessings be upon him) told 'Ā'ishah to buy her and set her free and do accept the stipulation of her master because it does not matter as the right of patronage is the exclusive right of the person who would set her free. She did the same and then the Prophet (May Allāh's blessings be upon him) gave the sermon. (Ibid., *Kitāb al-'Itq*, vol. 1, p 1143-44, *Kitāb al-Shurūṭ*, vol. 1, p 1234 and 1238-39; Muslim, *Kitāb al-'Itq*, vol. 4, p 133-34)

[91] *Mushkil al-Āthar*, vol. 1, p 493

[92] *Qur'ān* 24:33

was not very good and that is why the Sharī'ah commuted the punishment for adultery in case of a slave or concubine. [93] Great reward was mentioned for a master who would help his concubine in building her moral character.[94]

10) Last but not the least, Muslims were ordered to care for their slaves and concubines. They were to wear them the same clothes that they themselves wore and were to give them the same food that they themselves ate.[95] They were prohibited from giving them excessive work and were ordered to help them in fulfilling a task.[96] The Prophet (May Allāh's blessings be upon him) led the Muslim community by example.[97] Like other walks of life he was the role model in this regard as well.

Apart from these rules, the Sharī'ah also guaranteed religious freedom for slaves and concubines. We will discuss this issue in a bit detail below.

4.2.3.2 Religious Freedom and Slaves

As discussed earlier, the *grundnorm* in Islamic legal system is that the all lawmaking authority vests in Allāh almighty. No one can change His law. He is the real master and all human beings are His servants. No one can take the rights given by Him. The right of Allāh has priority over the right of individual or that of state.

Thus, for instance, Allāh almighty granted every human being the right to choose a religion and a way of life for him. No one can take this right. Hence, nobody is allowed to impose a particular faith upon any person even if he is his slave.[98] Similarly, slave cannot legally become ruler of the state or judge in a court of law

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[93] *Qur'ān* 4:25

[94] Bukhārī, *Kitāb al-Nikah*, Hadith no.

[95] Bukhārī, *Kitāb al-Īmān*, Hadith no. 29; Muslim, *Kitāb al-Īmān*, Hadith no. 3140.

[96] Ibid.

[97] For instance, he not only freed his slave Zayd bin Ḥārithah but also arranged his marriage with his cousin Zaynab (May Allāh be pleased with them). Similarly, his attitude with his servant Anas and his concubine Māriah the Coptic (May Allāh be pleased with them) has always been seen by the Muslim community as the role model that should be followed.

[98] This is true not only of non-Muslims but also of Muslims. While Muslims should try to convince their slaves about the truth of Islam they are not allowed to coerce them. (*Al-Mabsūṭ*, vol. 10, p)

by virtue of his deficient legal capacity.[99] But if he has been appointed as a ruler or commander or he somehow captures power, then he must be obeyed like any ordinary Muslim ruler or commander. Thus, he will be obeyed until his obedience becomes equivalent to disobedience of Allāh and His messenger.[100]

There is another aspect of this issue as well. We earlier noted that the duties imposed by Allāh almighty have priority over all other duties. Obedience to creature should not result in disobedience to the Creator. So, when He imposed a personal duty upon a person no one is allowed to put hurdles in the performance of that duty. There are two kinds of obligations in the Sharī'ah, namely the *farḍ 'aynī* (universal obligation) and *farḍ kifā'ī* (communal obligation). For *farḍ 'aynī* each and every individual Muslim is personally liable before Allāh almighty. That is why, no permission of parents or master or ruler is required in fulfilling these duties.[101] Examples include *ṣalāh*, *zakāh*, *ṣawm*, *ḥajj*, acquiring minimum education and knowledge necessary to live as a Muslim etc. As far as *farḍ kifā'ī* is concerned it is a communal obligation for the fulfillment of which the whole Muslim community is responsible. Thus, when *sufficient* number of persons fulfils it the rest will not be held responsible for fulfilling it. Examples include *da'wah*, Jihād, *janāzah* prayers etc. In such cases individual Muslims are required to fulfill the duty after getting permission for it from the relevant person having authority. Thus, the permission of parents is necessary for a Muslim to go for Jihād. Similarly, a woman cannot go for Jihād without the permission of her husband. In the same manner a slave cannot go for Jihād without the permission of his master. But it must be noted here that *farḍ kifā'ī* sometimes becomes *farḍ 'aynī* in which case the requirement of getting permission is waved.

It means that slaves are free in fulfilling those duties, which are *furūḍ a'yān*. No one has the authority to stop them from fulfilling these duties. That is why, we earlier

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100 Bukhārī, *Kitāb al-Aḥkām*, Hadith no. 6609; Tirmidhī, *Kitāb al-Jihād* Hadith no 1628; Musnad Aḥmad, *Bāqī Musnad al-Anṣār, Hadith Yaḥyā bin al-Ḥusayn 'an Ummih*, Hadith no. 22150

101 *Al-Hidāyah, Kitāb al-Siyar*

commented that total and unconditional submission to the Will of God by the free choice of Man makes him free from all other chains.

CHAPTER V:

SHARĪ'AH AND THE USE OF FORCE

In the analysis of the Sharī'ah regulations regarding warfare the distinction between the *'Illat al-Qitāl* (the Cause of War) and the *Ādāb al-Qitāl* (the Conduct of War) must be kept in mind. Otherwise there will be several confusions and misunderstandings about the concept of Jihād.[1] That is why we will deal with these two issues of law separately so as to avoid misunderstanding and confusions.

5.1 JIHĀD – WHY?

5.1.1 Jihād from the Perspective of the Classical Jurists

Before going into details of Islamic *jus in bello* we will discuss the presumptions of the classical jurists regarding Jihād. We deem it necessary for better understanding of their concept of Jihād.

5.1.1.1 The Obligation of Jihād

The fuqahā' attached great importance to the obligation of Jihād because of the emphasis placed by the texts of the Qur'ān and Sunnah on this obligation. They would never allow Islamic State to leave this important obligation. Every act that was deemed equivalent to leaving of this obligation was declared prohibited. It is for this reason also that they do not allow permanent peace treaties with non-

[1] For instance, the Prophetic directive to give three options to non-Muslims (Muslim, *Kitāb al-Jihād*, Hadith no. 3261) is generally misunderstood because it is taken as a part of the *jus ad bellum* (See, for instance, 'Abd al-Raḥmān al-Raḥmāni, *al-Jihād al-Islāmī*, Dār al-Andalus, Lahore, 2004, pp 111-13). In fact, it is a part of the *jus in bello*. That is why the fuqahā' discuss the implications of this directive during their discourse on the *Ādāb al-Qitāl*. For instance, Shaybānī, the Father of Muslim International Law, begins his shorter treatise on *Siyar* with a discussion on the implications of this directive. (*Kitāb al-Siyar al-Saghir*, Islamic Research Institute, Islamabad, 1998, p 1.) It is interesting to note that Dr. Mahmood Ahmad Ghazi, in his translation gives the following title to this and other directives: "Instructions of the Holy Prophet about the Conduct of War and International Relations). Viewed from this perspective, this directive shows the eagerness on the part of Muslims to avoid war as a means of settlement of disputes. Thus, when war is imposed upon them they are obliged to give three options to those who waged war against them. To prove from it that Islam does not recognize the right of existence for non-Muslims in separate state(s) is going too far.

Muslim states.[2] It may be noted that some jurists, particularly the Ḥanafīs, saw a peace treaty as Jihād in spirit even if not in letter.[3] This is because the purpose of Jihād can be achieved by peace treaty as well.

5.1.1.2 Supremacy of Islam and Muslims

The fuqahā' wrote their manuals of fiqh in a period when Muslims were on a dominant position in World politics. This sense of dominance and superiority is reflected in their expositions. Thus, when they prescribe rules for validity or otherwise of peace treaties they have in mind the dominance of Muslims. They feel that it is a non-Muslim state, which is more in need of a period of truce. This is coupled by the presumption that non-Muslims were determined to fight against Muslims. The logical conclusion of these two presumptions was disapproval of treaties of permanent peace. They felt that peace treaties were used by non-Muslims as a means to get time for war preparations.[4]

Modern scholars are writing on Jihād in a period when Muslims have lost their power. They feel that today it is Muslims who are in need for a period of truce. That is why they are more inclined towards accepting the norms of peaceful coexistence and pacific settlement of disputes.

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[2] *Al-Mughnī*, vol. 8, p 461 Similarly, they declare that it is obligatory upon the Imām to send troops for Jihād at least once a year. (*Al-Mughnī*, vol. 8, p 348; *Mughnī al-Muḥtāj*, vol. 4, p 209) The reason they provide is that *jizyah* tax, which is levied on non-Muslims who opt for living within Islamic State and leave fighting against it, is taken once a year. Another reason they provide is that acts that are made obligatory by the Sharī'ah are required to be performed at least once a year like ḥajj and Fasting. (*Bidāyat al-Mjtahid*, vol. 1, p 304; *Mughnī al-Muḥtāj*, vol. 4, p 209; *Mawāhib al-Jalīl*, vol. 3, p 376) The Ḥanafīs oppose the other jurists on this issue. See *Fatḥ al-Qadīr*, vol. 4, p 283) Wahbah al-Zuḥaylī criticizing this ruling argues that analogy on the basis of *jizyah* is not correct because *jizyah* is an internal issue of Islamic State and Jihād pertains to relations with the outside world. Moreover, *jizyah* is a financial obligation of non-Muslim citizens in the same manner as *zakāh* is of Muslim citizens. It has nothing to do with the obligation of Jihād. Moreover, the directive of giving three alternative options to non-Muslims was meant to regulate the conduct of war and not to prescribe causes of war. Similarly, an act becomes obligatory only when the *sabab* (cause) of obligation is found. (*Āthar al-Ḥarb*, p 89)

[3] *Al-Mabsūṭ*, vol. 10, p .

[4] However, even in that period they did discuss a few cases where Muslims may not be in a dominant position. Thus, for instance, Sarakhsī allows a peace treaty on the condition that Muslims shall pay tribute or other tax to non-Muslims provided this set up is deemed necessary for the benefit of Muslims. (*Al-Mabsūṭ*, vol. 10, p)

5.1.1.3 *Dār al-Islām* and *Dār al-Ḥarb*

For comprehending the rules derived by the fuqaha' it is important to understand the meaning and implications of the division of the World into *dār al-Islām* and *dār al-ḥarb*. There are some scholars who argue that the division of the World into two hostile territories having perpetual war with each other is a permanent system envisaged by the Sharī'ah.[5] Others argue that the jurists made this division keeping in view the realities of their times and, hence, it has no permanence.[6] This difference of opinion has also had its bearing upon the nature of relationship between Islamic State and non-Muslim states on the one hand, and on the other, on the relationship of Islamic State with Muslims living temporarily or permanently in non-Muslim territories. It has also led to differences over the legitimacy of different transactions made in non-Muslim territories.[7]

Sharī'ah is divine law and, hence, the real sanction behind it is the fear of God and the real punishment for its violation is the one to be awarded in the Hereafter. This *theological perspective* knows no territorial limits. Hence, a Muslim is bound to follow the precepts of the Sharī'ah everywhere.[8] If he violates a rule of the Sharī'ah he will be responsible for it before God on the Day of Judgment. From this theological, humanity has been divided into two different categories; those who submit to God's will – Muslims – and those who do not – non-Muslims. From this perspective, a Muslim in any part of the World is part of the Muslim *ummah* and thus the bond of brotherhood binds a Muslim resident of non-Muslim state to his Muslim brethren in Islamic State. A Muslim by virtue of his being Muslim is *ma'ṣūm* i.e. 'protected' in the sense that God will punish, in the Hereafter, those who violated his rights. This is what is called as *'Iṣmah bi al-Islām* i.e. protection by virtue of Islam. This *'iṣmah* or protection does not necessarily

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[5] See, for instance, Majīd Khadūrī, *Kitāb al-Siyar wa al-Kharāj wa al-'Ushr min Kitāb al-Aṣl li al-Shaybānī*, Karachi, 1417 AH, pp 22-30.

[6] See, for instance, Wahbah al-Zuḥaylī, *Āthar al-Ḥarb fi al-Fiqh al-Islāmī*, pp 192-96

[7] It is acknowledged here that this analysis is based primarily on the ideas of the famous Ḥanafī jurist al-Sarakhsī as contained in his famous treatise "*al-Mabsūṭ*" vol. 10. It is also acknowledged that the present author got due help in understanding these issues from Sayyid Abū al-A'lā Mawdūdī's treatise on interest in Islam, namely, *Sūd*.

[8] See, *al-Mabsūṭ*, vol. 10, p 95, al-Mughnī, vol.13 p ,

mean that his rights will be enforced by courts in Islamic State. Moreover, *Islām* (submission to the will of God) and *Kufr* (Denial to submit to the will of God) are in perpetual conflict and there exists between these two systems a perpetual state of war. But this war is on theological and theoretical level only. It does not necessitate a perpetual state of war between Muslims and non-Muslims.

Then, there is the *municipal law perspective* of Islamic State. Muslim courts have no jurisdiction beyond the territorial limits of Islamic State. Thus, courts cannot enforce rights of a citizen beyond the territory of Islamic State. That is why, from this perspective the persons outside the jurisdiction of Islamic State as *ghayr ma'ṣūm* or unprotected. Islamic State has no authority, and no responsibility, to protect the rights of persons who are beyond its territorial limits. It can, and it should, protect the rights of those who are within its territorial jurisdiction, be they Muslims or non-Muslims. Every person, whether Muslim or non-Muslim, who is within the territorial limits of Islamic State is *ma'ṣūm*. This is called *'iṣmah bi al-dār* i.e. protection by virtue of territory or territorial jurisdiction. Hence, from this perspective also, the World is divided into two territories: *dār al-Islām* and *dār al-kufr*. This division is only on the basis of jurisdiction. From theological perspective, a Muslim in any part of the World is *ma'ṣūm*, while from the perspective of Municipal Law, *'iṣmah* is only for those persons who are within the territorial limits of Islamic State irrespective of their being Muslims or non-Muslims.

Then comes the *international law* of Islam. This law distinguishes between different types of *dār al-kufr* on the basis of their relationship with Islamic State. Thus, a non-Muslim state may be in a state of war with Islamic State, in which case it is called *dār al-ḥarb*. It may have a peace treaty with Islamic State in which case it is called *dār al-'ahd* or *dār al-muwāda'ah*. It may be a State, which is neither at war with Islamic State nor has it a peace treaty with it. In this case, it is either simply called as *dār al-kufr* or it may also be called as *dār al-ḥarb*. Now, from the perspective of Islamic State and courts, the first and the third kinds do not enjoy *'iṣmah*. In case of *dār al-'ahd*, of course, by virtue of treaty some jurisdiction may

be granted to Islamic State and courts due to which some kind of *'iṣmah* is established for those persons who are within the *dār al-'ahd.*[9]

Here, we will give some examples to explain the difference of opinion between the Ḥanafīs and other jurists. Sarakhsī, one of the greatest jurists of all times, has made some valuable points in the following passage:

> "If a Muslim enters the territory of non-Muslims by their permission, and lends or borrows from them money, or usurps their property or his property is usurped there, his case will not be heard [in the court of the Muslim territory], because they did that in a place outside Muslim jurisdiction. As for the Muslim who usurped their property after guaranteeing them not to do that, we hold this because he violated *his* pledge, not the pledge of the Muslim ruler. However, he will be advised by way of *fatwā* to return the property though he will not be compelled to do that by the court. And as for the foreigners in their home, who usurped the property of the Muslim, we hold this because they violated their pledge in a place where they were not under the Muslim jurisdiction... All this because the Muslim took the risk and exposed himself to that when he quitted the Muslim resisting power [i.e. jurisdiction]... Yet it is abominable for the Muslim *under his religion* to violate his pledge with them, for the violation of pledge is forbidden... It is on account of this that, when he violated with them his pledge and thus acquired some property and brought it over to

[9] *Dār al-kufr* and *dār al-ḥarb* are more often than not considered synonyms. This is true not only with modern scholars but also with classical jurists of schools other than the Ḥanafīs. It is submitted, with due regard to the scholarship and genius of all the jurists, that it is the Ḥanafī School, particularly Imām Abū Ḥanīfah, who always distinguished between the different kinds of *dār al-kufr* on the one hand, and between different perspectives of law from the other. One reason for the confusion of terms especially for the classical jurists, is the fact that in those days most of the non-Muslim states were in a continuous state of war due to which *dār al-kufr* and *dār al-ḥarb* were deemed synonyms.

Muslim territory, it would not be desirable for another Muslim to purchase it if he knew the fact."[10]

Marghīnānī has also laid down explicitly that if a Muslim trader goes to *dār al-ḥarb* and gets something by stealth he is deemed (by the law of the land) rightful owner of the property stolen, although he violated his pledge and is, thus, responsible *before God* for his act.[11] Other jurists hold that he should be held liable for his act *in the courts of Muslim State, and the property recovered from him would be* given back to the rightful owner, if possible.[12]

The following quotation is more explicit in this regard:

"According to Abū Ḥanīfah, the position of a person who embraces Islam in *dār al-ḥarb* and does not migrate [to *dār al-Islām*] is like that of *ḥarbī* [alien non-Muslim] because his property[13] is unprotected [by the law of the land in Islamic State]."[14]

Similarly, if a non-Muslim inhabitant of *dār al-ḥarb* embraces Islam and is killed by a Muslim, intentionally or otherwise, the Ḥanafīs hold that the murderer is neither liable to *qiṣāṣ* nor *diyah*.[15] Furthermore, even if two Muslims inhabitants of *dār al-Islām* are captured in *dār al-ḥarb*, or if they go there by *amān*, and one of them kills the other intentionally the murderer should be liable only to the punishment in the hereafter and no worldly punishment is to be awarded. If he killed him unintentionally he will not be liable to pay *diyah*, although he will be required to

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[10] *Al-Mabsūṭ*, vol. 10, p 95. Dr Ḥamīdullāh commenting on the above passage has the following to say: "[The Ḥanafīs] make a sharp distinction between jurisdiction of Muslim court and that of a foreign court over a Muslim, on the one hand, and moral obligations on the other; and they do not hold him responsible in a Muslim court for acts done in a foreign territory. And on the same basis, they acquit a foreign non-Muslim from all acts committed in foreign territory even against a Muslim subject, such as murder or theft." (*The Muslim Conduct of State*, p 104)

[11] *Al-Hidāyah*, Chapter on *Musta'min*

[12] *Al-Mughnī*, vol. 8, p

[13] And also his life, as is discussed below.

[14] *Al-Baḥr al-Rā'iq*, vol. 5, p 147

[15] *Al-Hidāyah, Kitāb al-Siyar*

offer *kaffārah* (expiation).[16] Ibn al-Humām, while commenting on the opinion of Abū Ḥanīfah, has made a fine distinction between the different perspectives of Islamic Law:

> "So, according to Abū Ḥanīfah, there is no *worldly* punishment for the murderer, except *kaffārah* in case of unintentional murder and punishment *in the Hereafter* in case of intentional murder... This is because due to imprisonment he [the victim] became like them [aliens]... and thus, he resembles a Muslim [inhabitant of *dār al-ḥarb*] who did not migrate [to *dār al-Islām*], as both lack *worldly* protection (*al-'iṣmah al-dunyawīyah*)."[17]

The precision and clarity of concepts in Ḥanafī jurists is at its best here.[18] Hence, we are of the considered opinion that the doctrine of *dār* as envisaged by the Ḥanafī jurists has nothing to do with the doctrine of perpetual war.[19] It was, in fact based on the concept of territorial jurisdiction.[20] There are several verses and traditions that clearly establish the concept of territorial jurisdiction.

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[16] *Fatḥ al-Qadīr*, vol. 5, P 451

[17] Ibid.

[18] Sayyid Mawdūdī opined that Imām Abū Ḥanīfah not only distinguished between different perspectives of Islamic Law but also distinguished between different kinds of *dār al-kufr*. He claimed that in all the above-cited examples, Abū Ḥanīfah must have used the term *dār al-kufr* and not *dār al-ḥarb*. However, if he used the term *dār al-ḥarb* it would be because of the fact that almost all of the adjacent territories of *dār al-kufr* at that time were in fact turned into *dār al-ḥarb*. According to Mawdūdī, Abū Ḥanīfah never used the word *ibāḥah* (permissibility) in these cases; rather, he used the phrase *ghayr ma'ṣūm* (unprotected by Municipal Law). The later jurists, even in the Ḥanafīs, unfortunately did not maintain this distinction, and that is why the opinions of Abū Ḥanīfah could not be well appreciated. (*Sūd*, p 367-68)

[19] As we shall see later, the opinion of the Ḥanafīs about perpetual war was based on some other foundations. It had no relation with the doctrine of *dār*. (See Section 5.1.1.4 below.)

[20] Here, it will not be out of place to mention the definitions of *dār al-Islām* and *dār al-ḥarb* as given by the fuqahā'. *Dār al-Islām* is the territory where Islamic Law is implemented (*Badā'i' al-Ṣanā'i'*, vol. 7, p 130) or where Muslims have the potential capability of implementing Islamic Law even if they do not actually implement it (*Asna al-Maṭālib*, vol. 4, p 204). *Dār al-Ḥarb* is the territory under the effective control of non-Muslims in which they implement their own laws. It will remain *dār al-ḥarb* even if Muslims inhabit it when they are not capable of implementing Islamic Law. Hence, the real distinguishing factor between *dār al-Islām* and *dār al-ḥarb* is whether or not Islamic Law is actually or potentially implemented there. As to when a *dār al-Islām* converts into *dār al-ḥarb* and vice versa there is a difference of opinion. Majority jurists including the *Ṣāḥibayn* of Abū Ḥanīfah – Abū Yūsuf and Muḥammad – believe that when laws other than Islamic Law is enforced and

Thus, for instance, when Muslims were persecuted in Makkah they were ordered to migrate to the Islamic State of Madīnah.[21] Those who did not migrate were deprived of the protection of Islamic State. It was explicitly mentioned that Islamic State does not have any responsibility regarding the protection of their rights. But, if they asked help of Islamic State "in matter of religion" Islamic State was duty-bound to support them militarily, if necessary. However, it was to act within the restrictions of treaties, if any.[22]

Similarly, different rules were given for unintentional murder of a Muslim depending on whether he was inhabitant of Islamic State, an enemy state or a state with which Muslims had a peace treaty.[23] This principle has been elaborated in several traditions as well.

> "When you meet enemies who are polytheists, invite them to three courses of action. If they respond to any one of these, you also accept it and restrain yourself from doing them any harm. Invite them to (accept) Islam; if they respond to you, accept it from them and desist from fighting against them. Then invite them to migrate from their lands to the land of Muhājirs and inform them that, if they do so, they shall have all the privileges and obligations of the Muhājirs. If they refuse to migrate, tell them that they will have the status of Bedouin Muslims and will be subjected to the

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Muslims lose the capability to implement Islamic Law in the territory it converts into *dār al-ḥarb*. On the other hand, Abū Ḥanīfah holds that *dār al-Islām* coverts into *dār al-ḥarb* when three conditions are fulfilled, namely, implementation of the laws of *kufr*; contiguity to *dār al-kufr*; and termination of the *amān* of Muslims. What it simply means is that non-Muslims enjoy effective control of the territory and Muslims become their subjects. (*Badāi'i al-Ṣanā'i'*, vol. 7, p 130) It must also be appreciated that the Ḥanafīs have different rulings for transactions in *dār al-ḥarb* as well as rights and duties of Muslims in *dār al-ḥarb*. That is why they have a stricter criterion for declaring a territory as *dār al-ḥarb*. In this regard the controversy over the status of India after the effective control of the British forces over large territories and the capital may also be recalled. It was the genius of Shāh 'Abd al-'Azīz which comprehended the necessity of declaring India as *dār al-ḥarb* after which all the rules of *dār al-ḥarb* were to apply. This *fatwā* paved the way for the Jihād Movement against non-Muslims and, then, for a full-fledged War of Independence against the British rulers. (See for details: Dr. Mahmood Ahmad Ghazi, *Muslim Renaissance in South Asia – The Role of Shāh Walīullah and His Successors*, (Islamic Research Institute, Islamabad, 2002) pp .

[21] *Qur'ān* 16:106-10, 4:97-99

[22] *Qur'ān* 8:72

[23] *Qur'ān* 4:92

Commands of Allāh like other Muslims, but they will not receive any share from the spoils of war or fay' except when they actually fight with the Muslims (against the nonbelievers)."[24]

Similarly, the famous event of Abū Buṣayr and his friends also establishes this principle beyond any doubt.[25]

5.1.1.4 The Doctrine of Perpetual War

Modern scholars have taken great pain in ascertaining whether from the perspective of the Sharī'ah war between Muslims and non-Muslims is a general rule or exception. Different scholars have presented conflicting opinions on this issue. There is almost a consensus that majority of the earlier jurists considered war as a general rule.[26] Hence, those among modern scholars who say that war is the general rule and peace is an exception base their arguments on their understanding of the work of the fuqahā'. On the other hand, those who say that peace is the general rule, more often than not, ignore the work of jurists and argue directly from the texts of the Qur'ān and Sunnah. Most of them consider the work of the fuqahā' as

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[24] Muslim, *Kitāb al-Jihād* Hadith no. 3261; Tirmidhī, *Kitāb al-Siyar*, Hadith no. 1532; Ibn Mājah, *Kitāb al-Jihād* Hadith no. 2849 See also Tirmidhī, *Kitāb al-Siyar*, Hadith no. 1530; Abū Dawūd, *Kitāb al-Jihād* Hadith no. 2273; Nasā'ī, *Kitāb al-Qasāmah*, Hadith no. 4698

[25] Ibn Qayyim al-Jawziyah, *Zād al-Ma'ād*, Abridged version, compiled by Shaykh Muḥammad bin 'Abd al-Wahhāb, (Lahore: Anṣār al-Sunnah al-Muḥammadīyah, n.d.) pp 215-16 There are scores of other verses and traditions from which the Ḥanafīs prove the concept of territorial jurisdiction. Thus, for instance, they say that those Muslims who migrated from Makkah to Madīnah are called by *Qur'ān* as *fuqarā'* (poor) although some of them had vast property in Makkah. The reason, according to the Ḥanafīs, is that they lost their ownership in that property by virtue of their migration to *dār al-Islām*. Another proof of their loss of ownership is that even after the conquest of Makkah the Prophet (May Allāh's blessings be upon him) never gave that property back to them. (See for details: *Badā'i' al-Ṣanā'i'*, vol. 7, pp 130-36; *al-Mabsūṭ*, vol. 10, pp . See for further details: *The Muslim Conduct of State*, pp 104-15; Sayyid Mawdūdī, *Sud*, pp 364-67; *Islamic Law and Constitution*, pp 185-89; Dr Ṭāhir Manṣūrī, "*The Role of Dr Ḥamīdullāh in the Development of Muslim International Law*", Quarterly *Fikr-o-Nazar*, IRI, Islamabad, 297-98)

[26] Majīd Khadūrī is among those who believe that war is the general rule. Wahbah al-Zuḥaylī says that peace is the general rule. It is interesting that both the scholars confess that the earlier jurists believed that war is the general rule. (See Majīd Khadūrī, *Kitāb al-Siyar wa al-Kharāj wa al-'Ushr min Kitāb al-Aṣl li al-Shaybānī*, Karachi, 1417 AH, pp 22-30; Wahbah al-Zuḥaylī, *Āthar al-Ḥarb fi al-Fiqh al-Islāmī*, pp 130-37)

a reflection of the realities of their time.[27] While this contention may carry some truth and arguing directly from the texts of the Qur'ān and Sunnah may have its own merits but to ignore the work of the fuqahā' in this process is not a better approach. The fuqahā' primarily derived rules from the Qur'ān and Sunnah. No doubt, realities on ground do affect minds. At that time, almost all of the adjacent territoties were in a state of war with Islamic State. So, the fuqaha' analyzed the world order and gave their rulings accordingly.[28] However, there were other more important legal foundations also.[29]

We earlier noted that jurists other that the Ḥanafīs do not differentiate between different perspectives of the Sharī'ah. Thus, they take the state of perpetual war that exists between Islam and *kufr* as a state of perpetual war between Islamic State and non-Muslim state(s). This is evident form their arguments. All the arguments that are forwarded to substantiate their claim basically prove that there can be no compromise or truce between Islam and *kufr*.[30]

Finally, several texts of the holy Qur'ān and Sunnah declare it unequivocally that the holy Prophet (May Allāh's blessings be upon him) should prevail over his opponents and that Islamic rule should establish over the whole of the Arabian

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[27] Zuḥaylī, *Āthar al-Ḥarb*, pp 194-96; Abū Zahrah, *Naẓariyat al-Salām fi al-Islām* p 33; Muḥammad Munīr, *The Protection of Women and Children in Islamic Law and International Humanitarian Law: A Critique of John Kelsay* (hereinafter referred to as *The Protection of Women and Children*), Hamdard Islamicus, vol. XXV, July-September 2002, pp 69-82.

[28] Thus, when al-Sarakhsī declares that weapons should not be sold to those non-Muslims with whom a peace treaty of temporary nature was concluded he gives the following argument: "Don't you see that after the period prescribed in treaty passes they will again become our enemies?" (*Al-Mabsūṭ*, vol. 10, p 88-89 and 97) Another possible translation of the sentence يصيرون حربا علينا can be: "They become our enemies." In either case the argument reflects the reality on ground. Non-Muslim states, more often than not, were considered as seeking opportunity to harm Muslims and Islamic State. This was not over-skepticism. Indeed, this was a diktat of the ground realities.

[29] Ignoring the work of the fuqahā' in very basic issues and then deriving detailed rules from the texts of fiqh manuals inevitably leads to analytical inconsistency. This becomes evident in several places such as when these scholars discuss the texts of the fuqahā' relating to the legitimacy of treaties of permanent peace with non-Muslims. (See, for instance, Zuḥaylī, *Āthar al-Ḥarb*, pp 675-80)

[30] For instance, one of the arguments provided for the state of perpetual war is the following verse of *Sūrat al-Mumtaḥinah*: "There is for you an excellent example (to follow) in Abraham and those with him when they said to their people: "We are clear of you and of whatever ye worship besides Allāh: we have rejected you and *there has arisen between us and you enmity and hatred forever unless ye believe in Allāh and Him alone.*"" (*Qur'ān*, 60:4)

Peninsula.[31] These texts are taken to mean that Jihād should continue till Islamic rule is established over the whole of the world.[32] As we shall see later, the wars fought by the holy Prophet (May Allāh's blessings be upon him) carried an element of punishment for his opponents among his immediate addressees. This was under a special divine law regarding his *rusul* (messengers) and, hence, Jihād after him has nothing to do with imposing Islamic rule over the opponents.[33]

Hence, in our opinion, the ruling of the fuqahā' about the existence of a state of perpetual war between Islamic State and non-Muslim states has three foundations (and not one):

- The existence of a state of perpetual war between Islam and *Kufr*;
- Special law for the holy Prophet (May Allāh's blessings be upon him) under which his opponents were to be either killed or subjugated; and
- Ground realities.

After analyzing the basic presumptions of the jurists we are, now, in a better position to understand their discussions on the *'Illat al-Qitāl* or the cause of war.

5.1.1.5 The Cause of Jihād

Some of the Shafi'īs and Ḥanbalīs considered that the cause of Jihād is *kufr* (disbelief).[34] Primarily, they base their opinion on the texts of the Qur'ān and Sunnah that prescribe *qitāl* (war) as a punishment for the opponents of the holy

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[31] See, for instance, *Qur'ān* 9:32-33; 48:27-28; 61:8-9

[32] See, for instance, Ibn Taymiyah, *Majmū' al-Fatāwā*, vol. 28, p 343

[33] See for details Sections 5.1.1.5 and 5.1.2.3 below. Professor Montgomery Watt is of the opinion that "the division of the world into the sphere of Islam and the sphere of war is by no means a thing of the past. In so far as traditional Islam grows in strength it could come into the forefront of world politics." (*Islamic Fundamentalism and Modernity*, (London, 1988), p 4) He further maintains that the expansion of the Prophet's city-state into an empire raised the expectation that the Islamic Empire would ultimately include the whole human race. But Professor Nyazee says: "The idea that Islam (not the Islamic empire) would ultimately include the whole human race is not based on early conquests alone, but is an acknowledged goal of the Muslim community, and it arises from the texts of the Qur'ān as well as the Sunnah..." (*Theories of Islamic Law*, p 253) However, we do find that most of the earlier jurists did expect Islamic State (not mere Islam as faith) to ultimately include the whole human race. As noted above, this is based on the texts of Qur'ān and Sunnah that declare the ultimate supremacy of the Prophet (May Allāh's blessings be upon him) over his immediate addressees. (See also: *The Muslim Conduct of State*, pp 156-59; *al-Jihād fi al-Islām* pp 85-149; *al-Jihād al-Islāmī*, pp 97-114.)

[34] *Mughnī al-Muḥtāj*, vol. 4, p 223; *Bidāyat al-Mujtahid*, vol. 1, p 371

Prophet (May Allāh's blessings be upon him).[35] On the other hand, majority of the jurists was of the opinion that the cause of Jihād is *muḥārabah* (aggression).[36] They also base their opinion on the texts of the holy Qur'ān and Sunnah.[37] They also say that if *kufr* were the cause of *qitāl* then non-Muslim women, children, aged people as well as priests and monks would not have been given immunity from attacks during war.

In fact, it is evident from the holy Qur'ān that the wars fought by the holy Prophet (May Allāh's blessings be upon him) did have characteristics of some sort of punishment for his opponents. Qur'ān considers messengers (*rusul*) of Allāh (May Allāh's blessings be upon them all) as the ultimate proof of the Truth. That is why it categorically declares that those among the immediate addressees of the messengers who reject their message were doomed to punishment both in this World as well as in the Hereafter.[38] It also explains various kinds of punishments awarded to the opponents of different messengers.[39] When Muslims were oppressed and persecuted in Makkah Qur'ān gave the opponents the warning of the dire consequences of their evil acts.[40] The opponents could not understand how they could be punished. So, they made a fun of these warnings.

In the very first revelation allowing Muslims to fight against their oppressors it was declared that this would be a punishment for them in the same manner as the earlier nations who rejected the message of God were punished with natural catastrophes and havoc.

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[35] These texts are analyzed below.

[36] *Fatḥ al-Qadīr*, vol. 4, p 291; *al-Mudawwanah*, vol. 3, p 6; *Bidāyat al-Mujtahid*, vol. 1, p 371; *Risālat al-Qitāl*, p 116

[37] These texts are also analyzed below.

[38] *Qur'ān* 58:5

[39] "So We took each one in his sin; of them was he on whom We sent a ḥhurricane, and of them was he who was overtaken by the (Awful) Cry, and of them was he whom We caused the earth to swallow, and of them was he whom We drowned. It was not for Allāh to wrong them, but they wronged themselves." (*Qur'ān* 29:40)

[40] *Qur'ān* 14: 47

> "Sanction is given unto those who fight because they have been wronged; and Allāh is indeed Able to give them victory... If they deny thee, even so the folk of Noah, and Aad and Thamud, before thee, denied; And the folk of Abraham and the folk of Lot and the dwellers in Midian. And Moses was denied; but I indulged the disbelievers a long while, then I seized them, and how (terrible) was My abhorrence!"[41]

When the opponents were defeated in the Battle of Badr they were told that this was the first installment of their punishment and were told to get lesson from this.[42] Similarly, the Battle of Hunayn was also called a punishment for the opponents.[43] After the conquest of Makkah when ultimatum was given to the infidels Muslims were instigated to fight against them in the following manner:

> "Fight them! *Allāh will punish them at your hands*, and He will lay them low."[44]

This clearly shows that there, indeed, was an element of punishment in the wars of the holy Prophet (May Allāh's blessings be upon him) for the non-Muslim opponents. But this punishment was confined to the wars of the holy Prophet (May Allāh's blessings be upon him) because only he could claim to have established the Ultimate Truth beyond any doubt.[45] Others cannot claim so. That is the reason why several verses of the holy Qur'ān and traditions of the holy Prophet (May Allāh's blessings be upon him) categorically declare that Muslims should fight only against those who persecute people.

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[41] *Qur'ān* 22:39 and 42-44
[42] *Qur'ān* 8:38-39
[43] *Qur'ān* 9:26
[44] *Qur'ān* 9:14
[45] "Messengers of good cheer and off warning, in order that mankind might have no excuse before Allāh after the (coming of these) messengers." *Qur'ān* 4: 165

"And fight them until persecution is no more, and religion is all for Allāh. But if they cease, then lo! Allāh is Seer of what they do."[46]

So, we see justification for both the opinions of Imām al-Shāfi'ī as well as of the majority jurists. *Kufr* was a cause of wavering the protection of life and property for the immediate addressees of the Prophet (May Allāh's blessings be upon him). As for the rest of non-Muslims till the Day of Judgment it is *muḥārabah*, and not mere *kufr*, that is the cause of war against them. God knows best.

There is another issue related to this. The fuqahā' also disagreed about the validity or otherwise of taking *jizyah* from Arab non-Muslims. The Ḥanafīs[47] were of the opinion that they could not be made citizens of Islamic State because Qur'ān ordered Muslims to fight against them till they embrace Islam.[48] Other jurists opposed them.[49]

In fact, there are verses and traditions that prescribe a different rule for Arab non-Muslims. The holy Prophet (May Allāh's blessings be upon him) is reported to have declared:

"I have been ordered to fight against the people until they testify that none has the right to be worshipped but Allāh and that Muḥammad is Allāh's Apostle, and establish *ṣalāh* and pay *zakāh*. So, if they perform that, then they save their lives and property from me except for Islamic laws and then their reckoning (accounts) will be done by Allāh."[50]

Here, although the word "people" is a general word but it is specified to mean Arabs.[51] One of the evidences that this relates to Arab polytheists is that in one of the versions of the tradition the word "polytheists" (*al-Mushrikīn*) has been used

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[46] *Qur'ān* 8:39

[47] *Sharḥ al-Siyar al-Kabīr*, vol. 1, p 102; *Fatḥ al-Qadīr*, vol. 4, p 370; *al-Muḥallā*, vol. 7, p 345

[48] *Qur'ān* 48:16

[49] *Ḥāshiyat al-Dasūqī*, vol. 2, p 201; *Nayl al-Awṭār*, vol. 7, p 232; *Ikhtilāf al-Fuqahā'*, p 201

[50] Bukhārī, *Kitāb al-Īmān*, Hadith no. 24; Muslim, *Kitāb al-Īmān*, Hadith no. 31

[51] Ibn Ḥajar al-'Asqalānī, *Fatḥ al-Bārī*, vol. 1, p 64.)

instead of the general word "people" (*al-Nās*).[52] This is also evident from the fact that Bukhārī brought this tradition in a chapter to which he gave the title of the following verse:

> "Then, when the sacred months have passed, slay the idolaters wherever ye find them, and take them [captive], and besiege them, and prepare for them each ambush. But if they repent and establish *ṣalāh* and pay *zakāh*, then leave their way free. Lo! Allāh is Forgiving, Merciful."[53]

These verses are part of a long discourse in which ultimatum was given to the opponents of the holy Prophet (May Allāh's blessings be upon him) from among Arabs. It is also to be noted that in the verse three conditions were put for them:

- Repentance;
- Establishing *ṣalāh*; and
- Paying *zakāh*.

In the tradition, there is in place of repentance testimony of the Oneness of God and Prophet-hood of Muḥammad (May Allāh's blessings be upon him). This explains the meaning of repentance as it is used in the above-quoted verse. In this verse, repentance means leaving their distorted religion and embracing Islam. So, they were to face death if they did not embrace Islam. This was no compulsion in religion. Rather, this was a divine punishment for the immediate addressees of the Prophet (May Allāh's blessings be upon him) because for them the Truth was crystal-clear. The verses say that when they fulfill these three conditions then "leave their way" because they are "your brethren in religion". The tradition explains this by declaring that after fulfilling these three conditions they will be considered Muslims by the law of the land, and the truth of their assertion will be left for God to decide.

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[52] See: Nasā'ī, *Kitāb Taḥrīm al-Dam*, Hadith no. 3903
[53] *Qur'ān* 9:5

Hence, our conclusion is that the opinion of the Ḥanafīs was correct about the immediate addressees of the holy Prophet (May Allāh's blessings be upon him). But as far as later non-Muslims from among the Arabs are concerned we prefer the opinion of the majority jurists that they can be made citizens of Islamic State.[54]

Another related issue is the dismantling of the symbols of *kufr* as well as places of worship of non-Muslims. The holy Prophet (May Allāh's blessings be upon him) dismantled all the idols found in the *Ka'bah* and other places within Arabia.[55] But this was also a part of the his mission because he established the Ultimate Truth beyond any doubt and that is why he was entitled to remove all the symbols of *kufr* from Arabian peninsula. This territory was also to be center of the religion of Islam and that is why it was categorically declared that no other religion was to remain there.

> "He it is who hath sent His messenger with the guidance and the Religion of Truth, that He may cause it to prevail over all religion, however much the idolaters may be averse."[56]

This was also a ruling peculiar to the Prophet (May Allāh's blessings be upon him). Jihād after him had nothing to do with this. That is why we see that the companions of the holy Prophet (May Allāh's blessings be upon him) did not destroy any place of worship in territories they conquered. Rather, they were ordered by the caliph to take care of these places. We have already analyzed some of the treaties, which Muslims concluded with the non-Muslim inhabitants of those territories. These treaties gave protection to all their places of worship and

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[54] It may also be mentioned here that according to Ibn Qayyim al-Jawziyah this disagreement among the earlier jurists did not have any practical implication because virtually all the Arabs either embraced Islam or were slain during wars. (*Zād al-Ma'ād*, vol. 1, p 914; *Aḥkām Ahl al-Dhimmah*, vol. 1, p 83)

[55] Bukhārī, *Kitāb al-Maẓālim wa al-Ghaṣab*, Hadith no. 2298; Muslim, *Kitāb al-Jihād wa al-Siyar*, Hadith no. 3333; Tirmidhī, *Kitāb al-Tafsīr*, Hadith no. 3063

[56] *Qur'ān* 9:33, 61:9, 48:28

religious symbols. Later, we will discuss some of the directives given to the commanders of Muslim armies relating this issue.

5.1.2 Jihād from the Perspective of Modern Scholars

5.1.2.1 "Defensive" or "Offensive"?

Among the modern scholars there are three major trends or schools of thought. Some scholars uphold the view that Jihād is a tool for the supremacy of Islam and Muslims over the whole of the World. They opine that non-Muslims cannot be forcefully converted to Islam, but they can live according to their faith only under the protection of Islamic State.[57] They generally base their opinion on the verses and traditions that prescribe a peculiar rule for the wars of the Prophet (May Allāh's blessings be upon him). There are other scholars who believe that Jihād is only for the purpose of defense. They see no room in the Sharī'ah for "offensive" Jihād[58] But there is disagreement over the scope of defense and it remains uncertain whether "defense" means defense of *dīn* or defense of State. There is yet another school of thought that believes that Jihād is for the purpose of combating tyranny and persecution.[59]

Those who say that Jihād is for the purpose of defense only put forward the following three-fold argument:

- Verses and traditions that restrict the obligation of Jihād to situations of persecution and transgression from the opponents;
- Interpretation of the wars fought by the holy Prophet (May Allāh's blessings be upon him) in a way that proves their defensive nature;
- Argument on the basis of the purposes of the Sharī'ah.

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[57] See, for instance, Majīd Khadūrī, *Kitāb al-Siyar wa al-Kharāj wa al-'Ushr min Kitāb al-Aṣl*, pp 22-30; Mawdūdī, *Al-Jihād fi al-Islām*, pp 117-21. See also: Dr. Muḥammad Ḥamīdullāh, *Muslim Conduct of State*, pp 156-59; *al-Jihād al-Islāmī*, pp 111-13; Mawlānā Faẓl Muḥammad, *Qānūn-e-Da'wat-o-Jihād* pp

[58] See, for instance, Mawlānā Abū al-Kalām Āzād, *Tarjumān al-Qur'ān*, vol. 2, pp ; Shiblī Nu'mānī, *Sīrat al-Nabī*, vol. 1, pp 328-53; Dr. Wahbah al-Zuḥaylī, *Āthar al-Ḥarb*, pp 128; Muḥammad Munīr, *Aḥkām al-Madaniyīn*, pp ; *The Protection of Women and Children*, pp 69 and 71-74.

[59] See, for instance, Dr. Wahbah al-Zuḥaylī, *Āthar al-Ḥarb*, pp 90-94; Jāvēd Aḥmad Ghāmidī, *Qānūn-e-Jihād* pp 260-70.

Following are among the verses that restrict the otherwise absolute obligation of Jihād:

> "Fight in the cause of Allāh those who fight you but do not transgress limits; for Allāh loveth not transgressors."[60]

> "If then anyone transgresses the prohibition against you transgress ye likewise against him. But fear Allāh and know that Allāh is with those who restrain themselves."[61]

The exponents of the theory of "offensive" Jihād consider these verses as being abrogated by the later verses, particularly those of *Sūrat al-Barā'ah*:

> "Then, when the sacred months have passed, slay the idolaters wherever ye find them, and take them (captive), and besiege them, and prepare for them each ambush. But if they repent and establish *ṣalāh* and pay *zakāh*, then leave their way free. Lo! Allāh is Forgiving, Merciful."[62]

> "Fight against such of those who have been given the Scripture as believe not in Allāh nor the Last Day, and forbid not that which Allāh hath forbidden by His messenger, and follow not the religion of truth, until they pay the tribute readily, being brought low."[63]

It is true that the rules about Jihād were revealed gradually, which is why the later revelations were more severe and strict in tone. But it in no way suggests that the later revelations abrogated the earlier ones. What it simply means is that initially Muslims were not allowed to take up arms against their oppressors. Later, they

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[60] *Qur'ān* 2:190
[61] *Qur'ān* 2:194
[62] *Qur'ān* 9:5
[63] *Qur'ān* 9:29

were allowed to fight against them. When as a result of several encounters Muslims were able to destroy the force of the enemies they got into a position where the initiative was in their hands. Now, they were allowed to give the final fatal blow to the enemies. But two pints must be kept in mind:

- That even when the Muslims were allowed to initiate a military campaign it was, in fact, a continuation of the previous hostilities.[64] Islamic State of Madīnah was in a state of perpetual war with its opponents from the very beginning. This war was imposed upon Muslims by their opponents. They had to resist the oppression and were forced to fight different wars. In the final stage, Muslims were able to be "offensive". Thus, after the conquest of Makkah the final verdict about the opponents was declared in *Sūrat al-Barā'ah*. This was "offensive" in the sense that non-Muslim opponents did not launch a fresh campaign. But it was "defensive" in the sense that it was a continuation of the earlier hostilities, which were initiated by the opponents.
- That there was an element of punishment for the opponents of the holy Prophet (May Allāh's blessings be upon him) from among his immediate addressees, as explained earlier. So, this final verdict was not only meant to destroy the war capability of the opponents. Rather, it was a declaration of the wrath of God for them. None of them was to be left alive. So, the wars fought by the holy Prophet (May Allāh's blessings be upon him) were not merely of the nature of self-defense.

It is argued that the *Maqāṣid al-Sharī'ah* (Purposes of the Sharī'ah) also indicate that *Jihād is* for the purpose of defense.[65] As noted earlier[66], the five basic purposes of the Sharī'ah are:

- The preservation and protection of *Dīn*;
- The preservation and protection of Life;
- The preservation and protection of Family;

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[64] *The Muslim Conduct of State*, p 153 and 182
[65] *The Protection of Women and Children*, p 69
[66] See Section 4.1.2 of this dissertation.

- The preservation and protection of Intellect; and
- The preservation and protection of Wealth.

These *Maqāṣid* have two aspects, positive and negative. Jihād is a tool for the protection or defense of the first of the purposes – *dīn*. In other words, the purpose of Jihād is defense of *dīn* from all external threats.

This seems logical. But there is a more complicated problem. "Defense" or "protection" of *dīn* is not equivalent to defense of state or of Islamic State for that matter. It is something more than that. Thus, most of the scholars are of the opinion that supporting Muslims who are target of persecution in a non-Muslim state is included in the "defense of *dīn*".[67] But it may not come within the scope of a "State's right to self-defense".[68] Similarly, if a state does not allow Muslims to peacefully propagate their religion and imposes different restrictions on them, then in the opinion of most of the scholars, the situation falls within the meaning of defense of *dīn* calling for military action in some severe cases.[69] But it seems almost certainly beyond the scope of a state's right to self-defense.

Hence, it is necessary to ascertain the scope of the right of self-defense of Islamic State.

5.1.2.2 Meaning and Scope of Defense

There are a variety of situations, which modern scholars include within the scope of the right of self-defense. These situations show that the scope of self-defense in the Sharī'ah is much wider than that in international law, particularly the Post-Charter Law.[70] We will analyze, here, the views of three eminent scholars in this regard.

Dr. Muḥammad Ḥamīdullāh, one of the pioneers in the field of Islamic International Law in modern times, considers the following as "Lawful Wars":

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[67] See, for instance, *al-Jihād fi al-Islām* pp 77-80; *Āthar al-Ḥarb*, pp 93-94.

[68] One may compare it with the concept of "protection of nationals abroad" included in the customary right of self-defense. (See Section 2.1.3.1of this dissertation.)

[69] See, for instance, *al-Jihād fi al-Islām* pp 63-66; *Āthar al-Ḥarb*, p 93

[70] We have discussed in detail the scope of the right of self-defense in Pre-Charter and Post-Charter International Law in Chapter II. See Section 2.1.3.1of this dissertation.

1) The continuation of an existing war;
2) Defensive wars;
3) Sympathetic wars;
4) Punitive wars; and
5) *Idealistic wars.*[71]

He is of the opinion that most of the wars of the holy Prophet (May Allāh's blessings be upon him) with the Makkans were included in the first category.[72] As far as "defensive" wars are concerned, Dr Ḥamīdullāh says that these are of two kinds: when either the enemy "(a) has invaded Muslim territory, or (b) has not actually invaded, but has behaved in an unbearable manner".[73] It means that he also believes in some sort of "preemptive self-defense". Thus, he considers the attack on Khaybar as "an instance of nipping war in the bud".[74] Similarly, he also explicitly mentions that declaration of war is not necessary in certain cases, one of which is "preventive war".[75] He quotes the examples of Banū al-Muṣṭaliq, Khaybar and Ḥunayn.[76]

By "Sympathetic Wars" he means support to Muslims who are target of tyranny and persecution in foreign lands[77], while "Punitive Wars" mean wars "against hypocrites, apostates, rebels and those who refuse to pay zakāh as well as those who committed a breach of the treaty of peace."[78] Finally, the phrase "Idealistic Wars" is used to denote wars fought for uprooting "godlessness and association with God in His Divinity".[79] Dr. Ḥamīdullāh is of the opinion that:

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[71] *The Muslim Conduct of State*, pp 153- 61
[72] Ibid., p 153 and 182
[73] Ibid., p 154
[74] Ibid.
[75] Ibid., p 182
[76] Ibid.
[77] Ibid., p 155
[78] Ibid., p 156
[79] Ibid.

"No one is to be forced to embrace Islamic faith...yet Islamic rule is to be established by all means."[80]

What Dr. Ḥamīdullāh calls as "continuation of an existing war" is also deemed by most of the Muslim scholars as being included in self-defense. That is why most of them consider expeditions of the holy Prophet (May Allāh's blessings be upon him) against Makkans as instances of self-defense.[81] Similarly, they consider "sympathetic wars" as part of defensive wars.[82] Thus, it is only "punitive wars" and "idealistic wars" that cannot be included in the scope of self-defense according to majority of modern Muslim scholars.

Dr. Wahbah al-Zuḥaylī, the famous Syrian jurist, is of the opinion that the division of "offensive" and "defensive" wars does not fit in the framework of the Sharī'ah for the following reasons:

- Islamic Jihād cannot be termed as "offensive" for this term carry the meaning of illegality, transgression and injustice, while Jihād is for ensuring justice and the rule of law.
- Islam does not believe in geographical and territorial limitations.[83] That is why Muslims are not only obliged to defend their territory and state but also Islamic Da'wah and preaching as well as fellow Muslims everywhere in the World.[84]
- The division of wars into "defensive" and "offensive" one is based on subjective standards. Sometimes it becomes necessary for protecting the interests of Muslims that Islamic State should initiate war before the threat from the

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[80] Ibid., p 157

[81] See, for instance, Mawlānā Abū al-Kalām Āzād, *Tarjumān al-Qur'ān*, vol. 2, pp ; Shiblī Nu'mānī, *Sīrat al-Nabī*, vol. 1, pp 328-53; Martin Lings, *Muḥammad – His Life Based on the Earliest Sources*, (Lahore: Suhail Academy, 1994), pp 135ff. See also Muḥammad Munīr, *The Protection of Women and Children*, pp 71-74

[82] See, for instance, *Āthar al-Ḥarb*, pp 93-94

[83] This statement in its generality does not seem correct because, as we earlier pointed, Islamic International Law as expounded by the Ḥanafī jurists does recognize the concept of territorial jurisdiction. (See Section 5.1.1.3 of this dissertation.)

[84] *Āthar al-Ḥarb*, pp 124-25

opponents eventuates. This situation may both be termed as "defense" as well as "offence".[85]

Dr. Zuḥaylī concluding his arguments says:

> "Some states in the contemporary World consider their unjust offensive attack on Egypt in 1956 as defense of their interests. Israel considers her attack on Arabs as defense of her interests. And U.S. considers her blockade of Cuba and intervention in the Dominican Republic as well as her illegal and brutal attack on Vietnam as defense of her interests. If this has been the case then it is proper for us to declare that war in Islamic Law is confined only to situations of self-defense."[86]

Dr. Zuḥaylī considers the following situations as being included within the scope of self-defense:

1) When non-Muslim state transgresses over preachers of Islam or puts hurdles in the way of preaching of Islam or persecutes those who embrace Islam;
2) Supporting Muslims who are target of tyranny and oppression on humanitarian grounds; and
3) Cases of actual attack on Islamic State.[87]

He also supports the right of self-defense in case of "indirect" aggression over Islamic State or Muslims.[88] Moreover, he admits that in certain cases "preemptive" strike becomes necessary.[89] So, from this perspective, the right of self-defense in the Sharī'ah resembles that found in customary international law, which some states still claim to exist.

Sayyid Mawdūdī, like Dr. Zuḥaylī, is of the opinion that the division of "defensive" and "offensive" wars cannot be accurately applied to Islamic concept of

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[85] Ibid., p 13
[86] Ibid., p 128
[87] Ibid., pp 90-94
[88] Ibid., p 91 and 13
[89] Ibid.

Jihād. So, he instead uses the terms "Defensive" Jihād and "Corrective" (*Muṣliḥāna*) Jihād. Similarly, he also includes "sympathetic wars" in self-defense.[90] Moreover, Sayyid Mawdūdī agrees with Dr. Zuḥaylī that defense includes removing hurdles put in the way of the propagation of Islam.[91] Dr. Ḥamīdullāh did not explicitly mention this, but it seems that he includes this in "idealistic wars". It is interesting to note that what Dr. Ḥamīdullāh considers as "punitive wars" are also considered by Sayyid Mawdūdī as part of "defensive wars".[92] Hence, according to Sayyid Mawdūdī, following are the instances of defensive wars:

1) Retaliation of tyranny and persecution;
2) Removing hurdles in the way of the propagation of Islam;
3) Punitive action against those who committed a breach of peace treaty;
4) Combating rebellion;
5) Ensuring internal security and peace by fighting against those who deteriorate the law and order situation; and
6) Supporting Muslims in foreign territories who are target of tyranny and persecution.

Furthermore, Sayyid Mawdūdī also believes in the legitimacy of preemptive self-defense.[93]

As far as "Corrective" Jihād is concerned, Sayyid Mawdūdī considers it a war for the purpose of combating *fitnah* (persecution) and *fasād* (corruption) in the World.[94] There are several situations that fall either under the heading of *fitnah* or *fasād*.[95] These cannot be called "defensive" wars even in the wider sense.

This description of the opinions of some of the modern Muslim scholars clearly establishes the point that self-defense in Islamic perspective has much wider scope than that found in international law. It seems even wider than the pre-Charter customary right of self-defense. Hence, even if one denies legitimacy of the

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[90] *Al-Jihād fi al-Islām* pp 77-80
[91] Ibid., pp 63-66
[92] Ibid., pp 62-63 and 66-77
[93] Ibid., pp 61ff
[94] Ibid., pp 104-05
[95] For details see ibid., pp 105-17

"Idealistic" or "Corrective" Jihād the concept of defense in itself is wider enough to cover several of the cases included by the Post-Charter International Law in "offensive wars".

Now, let us see the basis for this wider concept of defense in Qur'ān, Sunnah and expositions of the earlier jurists.

Before the establishment of Islamic State in Madīnah individual Muslims were allowed to use force in self-defense.[96] As we shall see later, some sort of collectivity was envisaged even for the enforcement of this right of self-defense of individuals.[97] Then, after *hijrah* they were allowed to fight in self-defense:[98] Muslims who were target of persecution were ordered to migrate to the Islamic State of Madīnah.[99] Those who did not migrate were deprived of the protection of Islamic State. It was explicitly mentioned that Islamic State does not have any responsibility regarding the protection of their rights. But, if they asked help of Islamic State "in matter of religion" Islamic State was duty-bound to support them militarily, if necessary. However, it was to act within the restrictions of treaties, if any.[100]

There are several traditions of the holy Prophet (May Allāh's blessings be upon him), which elaborate the importance of the obligation of defense.

> "Keeping watch for a day and a night is better than fasting for a whole month and standing in prayer every night. If a person dies [while performing this duty], his activity will continue and he will go on receiving his reward for it perpetually and will be saved from the torture of the grave."[101]

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[96] *Qur'ān* 16: 126, 42: 39-43

[97] See Section 6.3.3 of this dissertation.

[98] *Qur'ān* 22:39 and 2: 190

[99] *Qur'ān* 16:106-10, 4:97-99

[100] *Qur'ān* 4:75 and 8:72

[101] Muslim, *Kitāb al-Imārah*, Hadith no. 3537; Bukhārī, *Kitāb al-Jihād wa al-Siyar*, Hadith no. 2678; Ibn Mājah, *Kitāb al-Jihād* Hadith no. 2758

"Patrolling the frontier for a day in the cause of Allāh is better than a thousand days of other good works."[102]

On the basis of these explicit injunctions the fuqahā' have unanimously held that defense of Muslim territory and population anywhere in the World is a communal obligation (*farḍ kifāyah*), which sometimes converts into universal obligation (*farḍ 'aynī*).

"In times other than that of *nafir* [call by government to its citizen to go for Jihād] Jihād is *farḍ kifāyah*. But when there is open call to everyone (*nafir 'āmm*), as when the enemy attacks on a territory of Muslims, it becomes *farḍ 'aynī* and it does not matter whether the ruler who called for Jihād is a just ruler or a tyrant."[103]

"In such a case, a women should go for Jihād without the permission of her husband... because in universal obligations (*furūḍ a'yān*) the restriction of marriage contract does not operate."[104]

"Thus, it becomes obligatory on every Muslim of that territory [which is under attack]. So is the case with those who are nearer to them if those under direct attack cannot repel the attack. And if they are not powerful enough to repel the attack or they disobey God and show laziness, the obligation is upon those who come next to them, and so on... till it becomes obligatory upon each and every Muslim in the East and in the West."[105]

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[102] Tirmidhī, *Kitāb Fada'il al-Jihād* Hadith no. 1590; Nasā'ī, *Kitāb al-Jihād* Hadith no. 3118
[103] *Fatḥ al-Qadīr*, vol. 4, p 28
[104] *Al-Hidāyah*, *Kitāb al-Siyar*
[105] *Fatḥ al-Qadīr*, vol. 4, p 28

In Chapter II, we analyzed in detail the concept of self-defense found in pre-Charter and post-Charter international law.[106] We find that the concept of self-defense in Islamic Law includes these as well as some other concepts of international law, which are discussed below.

- First, there is the concept of Collective Self-defense of the whole *ummah*. This collective self-defense is based not on a treaty between different states of Muslims. Rather, it is based on the very concept of *ummah*. A Muslim anywhere in the World must be helped whenever he needs help. Thus, it is much wider than the right to protect 'nationals' abroad. Every Muslim, whether citizens of Islamic State or not, is to be defended.
- Second, there is also the concept of humanitarian intervention. We earlier noted that international law still does not allow unilateral use force on humanitarian grounds despite the fact that some states claim such a 'right'.[107] But in Islamic Law, humanitarian intervention is not only legitimate but also becomes obligatory in some cases. We quoted above verses of the holy Qur'ān that make it obligatory upon Muslims to give military support to their Muslim brethren who are target of persecution and tyranny. What is more interesting is that Islamic Law considers such a use of force on humanitarian grounds a part of the right of self-defense of *ummah*.

Hence, we conclude that the concept of self-defense as found in Islamic Law is much wider than that found even in customary international law.

Having said that, the following points must also be kept in mind while analyzing the Islamic Law relating to the use of force:

- Islam makes it obligatory upon Muslims to observe the norms of justice in every field of life. Muslims should try to establish justice irrespective of whether it is against the material interest of Muslims or not.[108]

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[106] For details, see Section 2.1.3.1 of this dissertation.
[107] For details, see Section 2.1.3.2 of this dissertation.
[108] *Qur'ān* 4: 135, 5:8 and 6: 152

- Moreover, Muslims should cooperate even with non-Muslims in establishing justice and the rule of law.

> "And let not your hatred of a folk who (once) stopped your going to the Inviolable Place of Worship seduce you to transgress; but help ye one another unto righteousness and pious duty. Help not one another unto sin and transgression, but keep your duty to Allāh. Lo! Allāh is severe in *punishment*."[109]

Can this doctrine form basis for a System of Collective Security as, for instance, envisaged by the UN Charter?

- Help and support to the oppressed people on humanitarian grounds is not confined only to Muslims. Rather, it is incumbent upon Muslims to help all the oppressed people irrespective of their faith. There are several verses and traditions that emphasize the support of the oppressed regardless of whether he is a Muslim or non-Muslim.

> "Beware, if anyone wrongs a *mu'āhid*, or diminishes his right, or forces him to work beyond his capacity, or takes from him anything without his consent, I shall plead for him on the Day of Judgment."[110]

> "A person should help his brother whether he is an oppressor or an oppressed. If he is the oppressor he should prevent him from doing it, for that is his help; and if he is the oppressed he should be helped [against oppression]."[111]

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[109] *Qur'ān* 5:2

[110] Abū Dawūd, *Kitāb al-Kharāj wa al-Imārah wa al-Fay'*, Hadith no. 2654

[111] Muslim, *Kitāb al-Birr wa al-Ṣilah wa al-Adab*, Hadith no. 4681; Bukhārī, *Kitāb al-Mazālim wa al-Ghaṣab*, Hadith no. 2264

Moreover, this is also in consonance with the Islamic Concept of freedom.[112] It is also worth-mentioning that the Holy Prophet (May Allāh's blessings be upon him) ratified the famous *Ḥilf al-Fuḍūl*, which was concluded for the help of the oppressed. He is reported to have said:

> "Observe fully the treaty made in *Jāhilīyah*, for it [Islam] will only make it stronger."[113]

For instance, the Prophet (May Allāh's blessings be upon him) helped the non-Muslims of Banū Khuzā'ah against the oppression on the Qurayshites and said:

> "May I not be helped if help not the sons of Ka'b!"[114]

5.2 JIHĀD – HOW?

5.2.1 Declaration of Jihād

5.2.1.1 The Authority of Declaration

The fuqahā' categorically declare that the matters of Jihād are primarily in the authority of the ruler. He has the authority to declare war. Others should obey his commands in this regard.[115] Ibn Qudāmah, the famous Ḥanbalī jurists, in the beginning of the Chapter on Jihād in his famous fiqh manual gave the following verdict:

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[112] See Section 4.2.1 of this dissertation.

[113] Tirmidhī, *Kitāb al-Siyar*, Hadith no. 1511

[114] *Al-Sīrah al-Nabawīyah*, pp ; *Sīrat al-Nabī*, pp 294ff; *Muḥammad* pp 291ff

[115] Dr. Ḥamīdullāh says regarding the role of government in Jihād: "No one [among the fuqahā'] mentions in the definition [of Jihād] who it is who will undertake as war: the public or the government? Incidentally, the question is answered in the course of other discussion." (*The Muslim Conduct of State*, p 150) While this seems true that the fuqahā' generally do not mention government in the *definition* of Jihād, it is equally true that they all agree that in ordinary circumstances Jihād is to be fought by, and under the command of, government. As we shall see in the next Chapter, they mention the role of government at each and every step of a Jihād campaign. Therefore, we think that it is not correct to say that they 'incidentally' mention who has the authority to declare war.

> "The issue of Jihād is referred to the Imām and his *ijtihād* and the subjects are bound to obey his commands in what he decides in this regard"[116]

He also says that when the Imām appoints a commander he should be obeyed in all respects. None is allowed even to "speak about any thing" without his permission.[117] Abū Yūsuf, the disciple of Abū Ḥanīfah, is even more explicit:

> "No troops should go for war except with the permission of the *Imām* or of the one whom he appointed as commander of troops. And none of the Muslim soldiers should attack on a non-Muslim soldier nor should he challenge him except with the permission of the commander of troops."[118]

Muḥammad bin al-Ḥasan al-Shaybānī, the Father of Islamic International Law, declared that this principle holds true even for non-Muslims insofar as if their troops attacked Islamic State without the permission of the legitimate authority it would be considered their personal act and, thus, it should not be taken as declaration of war from the non-Muslim state. He emphasized that while Islamic State would punish these perpetrators it should also get it confirmed from the government of the other state whether it had declared war or was it the act of some individuals.[119]

However, there are some exceptional situations in which the fuqahā' allow Jihād without explicit, and in some cases even implicit, permission of government. We will discuss this issue in a bit detail in the next Chapter, *in shā' Allāh*. But some remarks may be given here about the activities of different Jihādī Organizations.

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[116] *Al-Mughnī*, vol. 8, p 352
[117] Ibid., p 353
[118] *Kitāb al-Kharāj*, p 215
[119] *Badā'i' al-Ṣanā'i'*, vol. 7, pp 109-10

Some Remarks about Jihādī Organizations

Where the government of Islamic State has been toppled in war and the territory continues to be in a state of war Muslims are allowed to use force in self-defense, and for this purpose they should get united. This situation can be observed in Palestine. There is no government of Muslims in the territory that can declare war on the enemies. Indeed, there is no need for a formal declaration of war in such situations, as we shall see below, because of the fact that there is a perpetual state of war in that territory. Now, when the Israeli government has been persistently using brutal force against the Palestinian people they have the right to use force in self-defense, and what a Jihādī Organization does in this regard is to organize them for this purpose.[120] The same principle applies to the resistance movement against occupation forces in Iraq.

As far as states like Pakistan are concerned where government and state functionaries are exercising their authority, there is primarily no room in the concept of Jihād as envisaged by the fuqahā' for such "private ventures".[121] However, as earlier pointed out, there are some cases where such activities are not only allowed but also become obligatory.

For instance, Sarakhsī says that if some Muslim citizens of Islamic State go to war with the enemy by the permission of government it is obligatory upon the latter to help and support the former where necessary. He also says that if a group of Muslims having 'resistance power' (*mana'ah*) go to war they are deemed in the contemplation of law to have been permitted by the government even if it did not give any explicit permission. This is because such activities cannot take place without the knowledge of the government.[122]

It was only because of the changed circumstances in the post-9/11 World that Pakistani government felt compelled to dismantle such organizations and disown

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[120] It is really ironical to see the White House spokesman declaring after the assassination of Shaykh Aḥmad Yāsīn and Dr. 'Abdul 'Azīz Rantīsī by Israeli forces that Israel has the right to use force in self-defense!

[121] Jāvēd Aḥmad Ghāmidī calls the activities of such organizations as "Private Jihād ". (See his interview in Monthly "Ishrāq" Lahore, November 2001, p)

[122] *Al-Mabsūṭ*, vol. 10, pp

them. We are not going to discuss the political advantages and repercussions of having Jihādī Organizations as that is beyond the scope of this dissertation. Similarly, we are not concerned with the factual question that whether or not this strategy is successful in achieving the objectives.[123] But we should state it in a straightforward manner that form the perspective of Islamic Law, the activities and operations of these organizations in Indian Held Kashmir are deemed to have been with the permission of the government of Pakistan because of the fact that these organizations worked under the patronage of the government, which was well-aware of their activities and operations.

5.2.1.2 Declaration When Necessary?

Formal declaration is not necessary before each and every armed attack. Dr. Muḥammad Ḥamīdullāh opined that declaration is not necessary in case of "defensive" and "punitive" wars.[124] Similarly, he sees no need of formal declaration of war in case of a fresh encounter, which is in the nature of continuation of previous hostilities.[125] Similalrly, he is of the opinion that in case of violation of peace treaty by the other party there is no need of formal declaration of war.[126] Dr. Wahbah al-Zuḥaylī agrees with him in this regard with slight modification. He says:

> "If there exists a state of war with the enemy, or the enemy initiated war, or there was a treaty that the enemy violated, then it is permissible to start war against them and suddenly attack them *when they are in their own land* without warning or formal declaration, *because it is the enemy who caused the start of hostilities.*"[127]

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[123] For a discussion on the repercussions of Jihād i Organization on Pakistani Political system and society see Jessica Stern, Pakistan's Jihad Culture, Monthly "Foreign Affairs", November/December 2000.

[124] *The Muslim Conduct of State*, p 181

[125] Ibid., p 182

[126] Ibid.

[127] *Āthar al-Ḥarb*, p 149

He qualified this permissibility with the condition that the enemy should be in their own land. This is because he is of the opinion that if the enemy is in the territory of Muslims and he violates a treaty he should be warned and expelled from the Muslim territory before taking any action against him, except where the enemy committed espionage, murder or *fasād* (challenging the authority of the government).[128] Dr Zuḥaylī has also pointed to the reason of this ruling; when the enemy is the cause of beginning of hostilities there is no need of formal declaration of war against him. But this must be qualified with another condition. We earlier noted that Islamic State must distinguish between the act of some individuals and that of a state. So, if some individuals have in their individual capacity initiated hostilities against Islamic State it should not wage war against their state while punishing these individuals.[129]

Declaration in Case of Idealistic Wars

We earlier noted that there is no room for idealistic wars after the period of the holy Prophet (May Allāh's blessings be upon him) and of his companions (May Allāh be pleased with them). But the debate over the requirement of declaration before such an idealistic war gives some important principles, which can be of help for other instances of lawful wars.

The fuqahā' discuss in detail the issue of declaration of war against the people to whom the message of Islam has not been conveyed. There are three opinions on this issue. Some of the fuqahā' hold that the opponents must be invited to embrace Islam before war irrespective of the fact that whether or not the message of Islam has already been conveyed to them.[130] Others hold exactly the opposite view.[131] But majority of the jurists holds that it is compulsory only if the message of Islam has not already been conveyed to the opponents. If they already know about Islam it is

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[128] Ibid., pp 150-51 This is what is known these days as declaring a person as *persona non grata* (unwanted person).

[129] *Badā'i' al-Ṣanā'i'*, vol. 7, pp 109-10

[130] *Al-Mudawwanah*, vol. 3, pp 2-3; *al-Muḥallā*, vol. 7, p 297

[131] *Al-Rawḍah al-Naḍiyah*, vol. 2, p 338

still better, though not compulsory, to invite them to embrace Islam or to accept citizenship of Islamic State by paying *jizyah*.[132]

Declaration in Case of Defense

Both Dr. Ḥamīdullāh and Dr. Zuḥaylī hold that there is no need of formal declaration in case of defense.[133] Sayyid Mawdūdī also agrees with this.[134] But the problem is that these scholars do not agree over the meaning and scope of defense, as discussed earlier. Thus, for instance, what Dr. Ḥamīdullāh considers as "Sympathetic Wars" are included by Zuḥaylī and Mawdūdī in defensive wars. Similarly, they include within the scope of defense removing the hurdles from the way of propagation of Islam. As noted earlier, this concept is based on defense of *dīn* and, hence, it is much wider than the concept of defense of state. But it appears that in the issue of declaration of war these scholars have in mind the concept of defense of state. Thus, for instance, Dr. Zuḥaylī says:

> "If there exists a state of war with the enemy, or the enemy initiated war, or there was a treaty that the enemy violated, then it is permissible to start war against them and suddenly attack them *when they are in their own land* without warning or formal declaration, *because it is the enemy who caused the start of hostilities.*"[135]

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[132] *Sharḥ al-Siyar al-Kabīr*, vol. 1, pp 57-58; *al-Umm*, vol. 4, p 157; *al-Mughnī*, vol. 8, p 361; *Aḥkām Ahl al-Dhimmah*, p 5 Sarakhsī says: "Ibn 'Abbās (May Allāh be pleased with him) said: The Prophet (May Allāh's blessings be upon him) never fought against a people before inviting them to embrace Islam. This is because [if fight were not preceded by call to Islam] they would not know why is war waged against them and may think that they are robbers who want to take their property. And if they come to know that they are fought because of the call for the religion they may accept the call and may surrender to the truth. And if they are a people to whom the message of Islam has been conveyed it is still better to call them to embrace Islam before war because intensity and seriousness in warning sometimes prove fruitful." (*Al-Mabsūṭ*, vol. 10, p 90)

[133] *The Muslim Conduct of State*, pp 181-83; *Āthar al-Ḥarb*, pp 149-50

[134] *Al-Jihād fi al-Islām* pp 246-47

[135] *Āthar al-Ḥarb*, p 149

Hence, only those situations will be exempt from the requirement of formal declaration of war, which are included in "defense of state".

Declaration in Case of Sympathetic Wars

Dr. Ḥamīdullāh uses the phrase "Sympathetic Wars" to mean supporting Muslims in foreign territories who are target of tyranny and persecution. As he does not include these wars in Defensive Wars so it seems that he sees formal declaration necessary for these wars, although he does not expressly say so.[136] It seems surprising that Sayyid Mawdūdī considers such a war as part of Defensive Jihād and even then he considers declaration necessary for such a war, especially where the state that persecutes Muslims has a treaty of non-aggression with Islamic State.[137] Perhaps, here he is influenced more by the principle of territorial jurisdiction than by the concept of defense of *ummah*.[138]

The holy Qur'ān has given the following verdict about such a situation:

> "And those who believed but did not leave their homes, ye have no duty to protect them till they leave their homes; but if they seek help from you in the matter of religion then it is your duty to help (them) except against a folk between whom and you there is a treaty. Allāh is Seer of what ye do."[139]

On the basis of this verse Sayyid Mawdūdī holds that Islamic State should first repudiate the peace treaty formally, after which it will be legal for it to give military support to the persecuted Muslims.[140] But there are scholars who hold that the other state repudiated the peace treaty by persecuting Muslims and, hence,

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[136] After expressing his viewpoint that there is no need for a formal declaration of war in defensive, preventive as well as punitive wars he says, "In all other cases, previous declaration is necessary..." (*The Muslim Conduct of State*, pp 181-82)

[137] *Tarjumān al-Qur'ān*, June 1948, pp 65-67; *Tafhīm al-Qur'ān*, vol. 2, pp

[138] *Islamic Law and Constitution*, pp

[139] *Qur'ān* 8:72

[140] This is also the opinion of Jāvēd Aḥmad Ghāmidī. (*Qānūn-e-Jihād*, pp 256-58)

Islamic State need not repudiate it formally. In their opinion, Islamic State can proceed for giving military support to these Muslims without formal declaration of war.[141]

Indeed, the fuqahā' consider violation of certain conditions as equivalent to repudiation of the treaty. One of such violations was killing a Muslim.[142] Now, if killing a Muslim is considered equivalent to repudiation of the treaty then persecuting large section of Muslim population would be obviously deemed so. But the verses quoted above explicitly prohibit Islamic State from giving military support to Muslims who are target of persecution if they are within the territory of a state with which it has a peace treaty. It means that persecution is not equivalent to repudiation of the treaty. Then, what is the basis of the ruling of the fuqahā'?

There are two possibilities:

1) Killing a Muslim means a Muslim citizen of Islamic State. If this interpretation is correct, then such an act is deemed attack over Islamic State. This is true also if a non-Muslim citizen of Islamic State is killed because he is under its protection. This interpretation is supported by the different passages of the jurists on the issue. For instance, they give the evidence of the attack of the Prophet (May Allāh's blessings be upon him) on Makkans when they killed some of the allies of Muslims from the tribe of Banū Khuzā'ah.[143]
2) If 'Muslim' here means any Muslim, whether citizen of Islamic State or not, then the ruling is based upon the wider concept of defense of *ummah*. But this second interpretation ignores the concept of territorial jurisdiction of Islamic State.

Initially Islamic State has no responsibility regarding those Muslims who reside outside Islamic State. If they are persecuted Islamic State can, and should, help

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[141] *Qawl-e-Fayṣal*, pp 4-5

[142] *Al-Majmū'*, vol. 21, p 214

[143] See, for instance, *Fatḥ al-Qadīr*, vol. 4, p . We will quote Kāsānī below while discussing the issue of breach of a treaty. That passage also supports this interpretation. (See below "Material Conditions".)

them. But it must abide by the treaty obligations. The net result is that it can give military support to them only after it repudiates the peace treaty.

What if Muslim inhabitants of Islamic State face a threat to their life or property in a non-Muslim state where they have gone temporarily? Should it declare war before giving them military support? Here, one may recall the debate over the legitimacy in international law of the use of force to protect nationals and property abroad. While the legitimacy of such use of force may be doubtful in international law it is perfectly legal in Islamic Law, as noted earlier.[144] If the rescue operation resembles the "Swift Surgical Strike" (the *Entebbe incident* 1976), there seems no need of formal declaration of war. However, if it amounts to 'armed attack' and the threat to Muslim citizens is a remote one, then formal declaration seems necessary. This is because, as noted earlier, Islamic State should first try to settle the issue by pacific means.

Declaration in Case of Punitive Wars

By "punitive wars" Dr. Ḥamīdullāh means wars against hypocrites, apostates, rebels and those who refuse to pay *zakāh* as well as those who committed a breach of the treaty of peace.[145] He sees no need of formal declaration of war in these *situations.*[146] Dr. Zuḥaylī also agrees with him. Sayyid Mawdūdī has a slightly different opinion on the issue of declaration in case of breach of treaty. In the rest of cases he has the same opinion. As is obvious, these cases, other than breach of a treaty, involve defense of state from internal threats to its security and integrity, although a breach of the treaty of *dhimmah* may also pose a threat to the security and integrity of Islamic State.

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[144] See Section 5.1.2.2 above.

[145] Ibid., p 156 It may be recalled that these are also included by Sayyid Mawdūdī in defensive wars. (See *al-Jihād fi al-Islām* pp 62-62 and 66-77)

[146] *The Muslim Conduct of State*, p 181

Declaration in Case of *Actual* Breach of Treaty

In the opinion of Dr. Ḥamīdullāh and Dr. Zuḥaylī breach of treaty gives Islamic State the right to wage war without formal declaration. Sayyid Mawdūdī differs with it. He is of the opinion that in such a case Islamic State should give a formal warning to the other party before waging war. He says:

> "When a people violate the conditions of treaty and adopt hostile attitude against Islamic government then Islamic Law lays down that a formal ultimatum and a reasonable period for compliance with the treaty provisions must be given to them before waging war against them."[147]

In the footnote to this paragraph he says:

> "There is only one exception from this general principle; when the other party commits a violation of the treaty in clear terms or launches an armed attack, such as the one the non-Muslims of Makkah did [against the allies of Muslims in violation of the treaty of Ḥudaybīyah]. In such a situation the Islamic government has the right to wage war, if it wants, without a formal declaration in the same manner as the Prophet (May Allāh's blessings be upon him) did at the time of the conquest of Makkah."[148]

The basis of his opinion is the following verse:

> "If thou fearest treachery from any group throw back (their treaty) to them (so as to be) on equal terms: for Allāh loveth not the treacherous."[149]

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[147] *Al-Jihād fi al-Islām* pp 246-47
[148] Ibid., p 147 at FN 1
[149] *Qur'ān* 8: 58

But Mawlānā Midrārullāh Midrār has rightly pointed out that this verse does not deal with the issue of declaration in case of violation of a treaty; rather, it deals with a situation where Islamic State perceives that the other party is going to violate the treaty.[150] In other words, it makes declaration obligatory in case of *anticipated*, and not *actual*, breach of the treaty. Mawlānā Midrār, like Dr Ḥamīdullāh and Dr Zuḥaylī, is of the opinion that a breach of the treaty entitles Islamic State to wage war without formal declaration. In fact, this has been the opinion of majority of the fuqahā'. Imām al-Nawawī has made some valuable points in the following passage:

> "Peace treaty with *ahl al-ḥarb* is for the purpose of suspension of hostilities. Hence, both sides must abide by it... So, when non-Muslims violate the treaty by waging war, or supporting the enemy, or killing a Muslim, or taking the property [belonging to the inhabitants of Islamic State], the treaty *is deemed terminated and their amān* (protection) from Muslims vanishes."[151]

He categorically declares that in such a case of actual breach of treaty it is not necessary for Islamic State to formally declare war, or termination of treaty for that matter, "because declaration is necessary in case of ambiguity".[152] There are several important points in this passage. We will analyze this passage a bit later. At the moment it may be mentioned that the basic presumption behind this ruling is the existence of perpetual state of war between Muslims and non-Muslims.
Similarly, Ibn Qayyim al-Jawziyah says:

> "Some of the people say: 'Treaty must be declared void with those who violated it'. This is wrong for several reasons because the treaty does not

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[150] *Qawl-e-Fayṣal*, p 19
[151] *Al-Majmū'*, vol. 21, p 214
[152] Ibid.

remain enforceable for those who violated it and it does not require formal repudiation or declaration."[153]

In fact, the issue of declaration revolves around the following verses:

> "Those of them with whom thou madest a treaty, and, then at every opportunity they break their treaty, and they keep not duty (to Allāh). If thou comest on them in the war, deal with them so as to strike fear in those who are behind them, that haply they may remember. If thou fearest treachery from any group throw back (their treaty) to them (so as to be) on equal terms: for Allāh loveth not the treacherous."[154]

The first two verses deal with cases of actual breach of treaty, while the last one deals with anticipated breach. Thus, the first two verses lay down the rule that if a party actually violates a treaty and then Muslims confront them in war they should be punished in exemplary way.[155] What if they violated the treaty but did not wage war? Should Muslims wage war against them for violating the treaty? Or is it that the violation of the treaty is deemed equivalent to waging of war and therefore there is no need for a formal declaration of war by Islamic State? It appears that the fuqahā' consider violation of the treaty equivalent to waging of war and, therefore, they see no need of formal declaration. This is further strengthened by the fact that the Prophet (May Allāh's blessings be upon him) did not formally declare termination of the treaty with Banū Qurayẓah and attacked on their territory without previous notice. The same appears to have happened in case of the conquest of Makkah.

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[153] *Aḥkām Ahl al-Dhimmah*, vol. 2, p 843
[154] *Qur'ān*, 8:56-58
[155] This appears to be the basis of the punishment of the Jews of Banū Qurayẓah.

But there is a more complicated problem. There are several kinds of treaties, which Islamic State may conclude with non-Muslims.[156] Is every violation of every treaty equivalent to waging of war?

Peace Treaty (*Hudnah* or *Muwāda'ah*)

All the instances from the life of the Prophet (May Allāh's blessings be upon him), where a breach of the treaty was deemed equivalent to declaration of war, relate to *peace treaties* or pacts of non-aggression, such as the treaty of Ḥudaybīyah. There existed a state of war between the Islamic State of Madīnah and non-Muslims of Makkah. The treaty of Ḥudaybīyah suspended this state of war for ten years. When the Makkans violated a vital condition of this peace treaty the previous state of war was restored. Hence, Muslims were not obliged to formally declare war against Makkans. Similarly, the treaty with Banū Qurayẓah gave them protection from hostilities. When they violated it they themselves initiated hostilities and, therefore, there was no need of a formal declaration of war.

Again, every violation of the peace treaty is not deemed declaration of war. It is the violation of the *material* conditions that terminates the peace treaty. We may again quote Nawawī here:

> "Peace treaty (*al-Hudnah*) with *Ahl al-Ḥarb* is for the purpose of suspension of hostilities. Hence, both sides must abide by it... So, when non-Muslims violate the treaty *by waging war, or supporting the enemy, or killing a Muslim, or taking the property* [belonging to the inhabitants of Islamic State], the treaty is deemed terminated and their *amān* (protection) from Muslims vanishes."[157]

[156] See Section 6.1.1.3 below.

[157] *Al-Majmū'*, vol. 21, p 214

situations that establish the intent of repudiation, such as when some people of *Dār al-Muwāda'ah* with the permission of their government enter *Dār al-Islām* and commit robbery there. This is because the permission of the government implies repudiation of the [peace] treaty. And if they do so without the permission of their government and they lack resisting power (*mana'ah*) the treaty will not be repudiated because robbery without resisting power is not enough for repudiation of the treaty... And if they have resisting power and they come without the permission of their government and their people, then the treaty will remain in force for their government and people and not for them... And when the treaty is for a fixed period it terminates with the expiry of that period."[159]

The principle that emerges is: Any act that shows that the other party does not consider itself bound by the terms of the peace treaty is deemed equivalent to formal repudiation. So, when such an act is committed by, or with the permission of, the government the treaty stands terminated for the whole nation. But when a few persons commit the breach without the permission of their government the treaty will remain in force for people other than those who committed the breach. This leads us to the issue of involvement of government.

A few Qurayshites violated material conditions of the peace treaty of Ḥudaybīyah. But the Prophet (May Allāh's blessings be upon him) sent his envoys to the leaders of Qurayshites for confirming whether they supported the culprits or not. He put forward three alternatives: pay compensation for the murdered and injured; stop giving support and patronage to the culprits; or consider that the treaty of Ḥudaybīyah stands repudiated.[160] The Qurayshites accepted the last option. Hence, it was confirmed that the treaty stood terminated for all of them. Later, Abū Sufyan, the leader of the Qurayshites went to Madīnah to renew the treaty, but he

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[159] *Badā'i' al-Ṣanā'i'*, vol. 7, p 179

[160] *Al-Zarqānī*, vol. 2, p 336 (quoting the authority of *Maghāzī Ibn 'Āidh*). See also Shiblī Nu'mānī, *Sīrat al-Nabī*, vol. 1, pp 294-95. Shiblī expresses his surprise that despite the importance of this incident most of the biographers of the Prophet (May Allāh's blessings be upon him) ignore it.

was not heard by the Prophet (May Allāh's blessings be upon him). Similarly, when at the time of the Battle of Trench the Jews of Banū Qurayẓah gave support to the allied attacking forces, the Prophet (May Allāh's blessings be upon him) sent his envoys for confirmation. They openly repudiated the treaty.[161] Therefore, when the allied troops returned the Prophet (May Allāh's blessings be upon him) attacked the territory of Banū Qurayẓah without a formal declaration of war as there was no need of such declaration.

We earlier noted[162] the opinion of Shaybānī that if non-Muslim troops attacked Islamic State without the permission of the legitimate authority it would be considered their personal act and, thus, it should not be taken as declaration of war from the non-Muslim state. He emphasized that while Islamic State would punish these perpetrators it should also get it confirmed from the government of the other state whether it had declared war or was it the act of some individuals.[163]

But is it necessary that the government must give explicit permission? Kāsānī in the above-quoted passage deems it necessary. As we shall see in the next Chapter[164] that Sarakhsī has a different approach to such problems. He says that if some people having *mana'ah* go to another state they will be deemed, in the contemplation of law, to have the permission of their government because such activities cannot take place without the knowledge and complicity of the government.[165] We prefer the viewpoint of Sarakhsī because Kāsānī himself admits that repudiation may take place either by express statement (*naṣṣ*) or by implied behavior (*dalālah*). We hold that this situation comes within the meaning of repudiation by *dalālah*. Yes, when these people do not have resisting power then Islamic State must not presume that they have the permission of their government. It should get it confirmed before repudiating the treaty. God knows best.

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[161] Bukhārī, *Kitāb al-Maghāzī, Ghazwat al-Aḥzāb*, Hadith no. 3804; Shiblī, *Sīrat al-Nabī*, vol. 1, p 246

[162] See Section 5.2.1.1 of this dissertation.

[163] *Badā'i' al-Ṣanā'i'*, vol. 7, pp 109-10

[164] See Section 6.3.1.1 of this dissertation.

[165] *Al-Mabsūṭ*, vol. 10, pp 73-74

The fuqahā' also discuss cases where the treaty of *dhimmah* is deemed terminated as well as cases where a few of the *dhimmīs* repudiate the treaty and the rest do not. But we would not go into detail of these issues here.[166] Moreover, as Imām al-Shāfi'ī remarked, the verses under discussion relate to *hudnah* or *muwāda'ah* (peace treaty with alien non-Muslims) and not with *dhimmah* (peace treaty with non-Muslims who thereby become citizens of Islamic State).[167]

5.2.2 The Conduct of Jihād

5.2.2.1 General Principles

From the analysis of the norms of the Sharī'ah relating to the conduct of war and the practical examples of the holy Prophet (May Allāh's blessings be upon him) and the rightly guided caliphs it becomes apparent that there is interplay between three general principles. These are:

- Supremacy of the Sharī'ah;
- The Doctrine of Necessity (*al-ḍarūrah*); and
- The Principle of Reciprocity (*al-Mu'āmalah bi al-Mithl*).

Briefly it means that Muslims should abide by the laws of war as laid down by the Sharī'ah. They can deviate from these laws only in case of necessity, which should be kept within its limits. In case of a compelling necessity Muslims would primarily apply the rule of reciprocity.[168]

Thus, for instance, there is primarily no room in Islamic *jus in bello* for the use of weapons of mass destruction because it violates certain basic norms of the Sharī'ah. However, if the opponents use these weapons Islamic State can also use them within the restraints of necessity.

Sharī'ah acknowledges the principle of reciprocity. Thus, for instance, fighting in the *al-Masjid al-Ḥarām* is initially prohibited. But Qur'ān allows it in reciprocity

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[166] These issues will be discussed briefly in the next Chapter. (See Section 6.5.4.2 of this dissertation.)
[167] *Al-Umm*, vol. 4, p
[168] *Al-'Alāqat al-Dawlīyah*, pp

and within the limits of necessity.[169] So is the case with fighting in the Sacred Months (*al-Ashhur al-Ḥurum*).[170] The fuqaha' also applied the principle of reciprocity in settling some issues.[171]

Generally, there should not be any conflict between the principle of reciprocity and the norms of the Sharī'ah. However, if there does exist a conflict the norms of the Sharī'ah shall prevail. Professor Imran Nyazee is worth quoting here:

> "[A]lthough reciprocity is an acknowledged principle of Islamic law, no rule of reciprocity can set aside, suspend, or permanently remove a fundamental rule of the Sharī'ah "[172]

It is only under the doctrine of necessity that deviation from the norms of the Sharī'ah becomes permissible. Hence, the doctrine of necessity goes side by side with that of reciprocity.

Necessity is also an acknowledged principle of the Sharī'ah. For instance, eating carrion is generally prohibited. But it becomes permissible in necessity.[173] There are several sub-principles related to this general principle. For instance, "Necessity should be kept within its limits."[174] It means that what became permissible due to necessity remains so only up to the limit of necessity. Some other related principles are:

> "A wrong is not avoided by another of the same kind."[175]

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[169] *Qur'ān* 2:191

[170] *Qur'ān* 2:194 & 2:217 There are other verses as well that acknowledge this principle. (*Qur'ān* 2:190-91 & 16: 126)

[171] Sarakhsī while commenting on the rates of custom duties and tariffs on borders remarked: "*The matter between us and the non-Muslims is based upon reciprocity.* So much so that if they take from us 1/5th we will also take 1/5th, and if they take 1/10th we will take 1/10th." (*Sharḥ al-Siyar al-Kabīr*, vol. , p) . He made this comment at some other places as well. (See, for instance, Ibid., p)

[172] *Islamic Law and Human rights*, pp 30

[173] *Qur'ān* 2: 173

[174] Maxim no. 22

[175] Ibid., Maxim no. 25

"To avoid public harm (*al-ḍarar al-'āmm*) a private harm (*al-ḍarar al-khāṣṣ*) may be suffered."[176]

"What becomes lawful for a reason becomes unlawful when such reason disappears".[177]

"Repulsion of harm (*maḍarrah*) is preferable to acquisition of benefit (*maṣlaḥah*)."[178]

These along with the principle of necessity give rise to the principle of proportionality

These general principles run through out Islamic Law of Conduct of War, as we shall see below.

5.2.2.2 Non-Combatant Immunity

Islamic Law acknowledges the principle of inviolability of civilian population and property.[179] Sarakhsī defines combatants (*al-muqātilah*) as:

"Those who are physically capable of fighting are combatants."[180]

All others are non-combatants. Of course, if non-combatants take part in hostilities they lose their inviolability.[181] In the same manner those who are physically capable of fighting but do not take part in actual hostilities are also excluded from

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[176] Ibid., Maxim no. 26

[177] Ibid., Maxim no. 23

[178] Ibid., Maxim no. 30

[179] See, for details, Kelsay, John, "*Islam and the Distinction between Combatants and Non-Combatants*" in *Cross, Crescent and Sword: Laws of Armed Conflicts – A Collection of Conventions, Resolutions and other Documents*, ed. D. Schinder and J. Joman, Dordrechit, Henry Dunant Institute, 1987; Sultan Hamid, "*The Islamic Concept*" in The International Dimensions Of Humanitarian Law, 1988; Muḥammad Munīr, *Aḥkām al-Madaniyīn* (unpublished LLM Thesis), Faculty of Shariah and Law, International Islamic University Islamabad, 1996. See also his *The Protection of Women and Children*, Hamdard Islamicus, vol. XXV, July-September 2002, pp 69-82.

[180] *Sharḥ al-Siyar al-Kabīr*, vol. 4, p 78

[181] *Al-Mudawwanah*, vol. 3, pp 6-7; *al-Mughnī*, vol. 8, p 477; *al-Umm*, vol. 4, p 157

combatants.[182] So, the more important question is whether a person took part in actual hostilities or not.

The Prophet (May Allāh's blessings be upon him) and his successors (May Allāh be pleased with them) used to give instruction to military commanders for taking due care to protect those who are not capable of combat or who do not take part in hostilities.

> "When the Messenger of Allāh (May Allāh's blessings be upon him) appointed anyone as leader of an army or detachment he would especially exhort him to fear Allāh and to be good to the Muslims who were with him. He would say... 'Do not break your pledge, do not mutilate (the dead) bodies and do not kill the children...'"[183]

Similarly, when the Prophet (May Allāh's blessings be upon him) found dead body of a woman in an expedition he expressed his disapproval of the murder of women and children.[184] One version of the tradition says that he prohibited killing of women and children.[185] In another version, his words are quoted:

> "Why was she killed when she was not fighting?"[186]

Non-combatants include women, minors, servants and slaves who accompany their masters yet do not take part in actual fighting, the blind, monks, hermits, the very old, those physically incapable of fighting, the insane or delirious.[187]

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[182] For instance, monks and priests have the physical capability of combat, but if they do not take part in actual hostilities they remain inviolable.

[183] Muslim, *Kitāb al-Jihād* Hadith no. 3261; Tirmidhī, *Kitāb al-Siyar*, Hadith no. 1532; Ibn Mājah, *Kitāb al-Jihād* Hadith no. 2849 (See Appendix I for full text.)

[184] Bukhārī, *Kitāb al-Jihād wa al-Siyar*, Hadith no. 2791; Muslim, *Kitāb al-Jihād wa al-Siyar*, Hadith no. 3279

[185] Bukhārī, *Kitāb al-Jihād wa al-Siyar*, Hadith no. 2792; Muslim, *Kitāb al-Jihād wa al-Siyar*, Hadith no. 3280

[186] Musnad Aḥmad, *Bāqī Musnad al-Mukthirīn*, Hadith no. 5688; Abū Dawūd, *Kitāb al-Jihād* Hadith no. 2295

[187] *Sharḥ al-Siyar al-Kabīr*, vol. 4, pp 79-80; *al-Mabsūṭ*, vol. 10, p 69

Slaughtering animals is also prohibited, except where it is absolutely necessary for food.[193]

Another instance of the inviolability of civilian population is the prohibition of using them as shields (*tirs*). Dr Ḥamīdullāh says:

> "It appears that in classical times of Islam, it was a prevalent practice among non-Muslim to take shelter behind enemy prisoners.[] I have not found a single instance where Muslims were accused of this cowardly act when they forced their prisoners to fight against their own nation."[194]

Adultery and fornication even with captive women is prohibited.[195]

5.2.2.3 Weapons of Mass Destruction

From these different rulings of the Sharī'ah about the conduct of Jihād one can derive the rule for the use of weapons of mass destruction (WMD's). We noted in Chapter II that the use of nuclear weapons violates certain basic norms of international humanitarian law.[196] These norms are:

- Inviolability of civilians and other non-combatants;
- Prohibition of indiscriminate attacks;
- Prohibition of unnecessary injury to combatants;
- The principle of proportionality;
- Inviolability of the territory of neutral states;
- Prohibition of long term and widespread damage to environment; and last but not the least
- Prohibition of the use of poisonous substances.

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[193] *Sharḥ al-Siyar al-Kabīr*, vol. 1, p 27 and 34

[194] *The Muslim Conduct of State*, p 198

[195] As regards a free enemy woman, the violator is to be stoned to death or whipped according to whether he is married or unmarried. If, however, she is a captive, he is to receive discretionary punishment and to be fined as much as a *mahr mithl* i.e. what his nearest female relatives would have received as bride-money. (*Al-Aḥkām al-Sulṭāniyah*, p 88)

[196] See Section 2.2.2.3 of this dissertation.

One may add here that, from the perspective of the Sharī'ah, the same holds true of other WMD's, such as biological and chemical weapons as well as conventional weapons like missiles as and bombs. But, as noted above, the principles of reciprocity, necessity and proportionality may allow the *use* of these weapons. Whether or not there may a situation where the use of nuclear weapons becomes necessary is doubtful, as indicated by the controversial opinion of the ICJ on the issue.[197] One thing is certain though: Muslims must strive for having these weapons if their opponents have these. Defense of *dīn* and *ummah* is after all a communal obligation (*farḍ kifāyah*) of the *ummah*.

> "Make ready for them all thou canst of (armed) force and of horses tethered, that thereby ye may dismay the enemy of Allāh and your enemy, and others beside them whom ye know not. Allāh knoweth them. Whatsoever ye spend in the way of Allāh it will be repaid to you in full, and ye will not be wronged. And if they incline to peace, incline thou also to it, and trust in Allāh. Lo! He is the Hearer, the Knower."[198]

5.2.2.4 Treaty Obligations

Earlier we discussed in detail the rules about peace treaty between Islamic State and the other state. Here, we are concerned with another kind of treaties.

The parties to the conflict may forbid certain acts under treaties. The fuqahā' were aware of such treaties. Shaybānī mentions[199] many fictitious cases of this kind, which shows that it was a common practice in those days to agree what not to do in the conduct of war.[200] Acts prohibited under treaties are forbidden only so long as the treaties are in force, except where the Sharī'ah also prohibits them.

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[197] *Advisory Opinion on the Legality of the Use of Nuclear Weapons (WHO Case)*, ICJ 1996 Rep 66

[198] *Qur'ān* 8:60-61

[199] *Sharḥ al-Siyar al-Kabīr*, vol. 1, pp 200-05

[200] Geneva Conventions and Additional Protocols thereto are modern-day examples of such treaties.

5.2.2.5 Treatment of the Combatants

The rules about war captives will be discussed in detail later. Here, we will briefly discuss the rules about treatment of the combatants in the battlefield.

The Prophet (May Allāh's blessings be upon him) never allowed a massacre after destroying the capability of the enemy. The conquest of Makkah demonstrates the best example. He declared a general amnesty to all those who persecuted Muslims. Only about half a dozen persons were excluded who otherwise deserved death punishment having committed murder and apostasy or similar offences. Later, these also were pardoned, except three who were killed by Muslim soldiers without referring again to the Prophet (May Allāh's blessings be upon him).[201]

Muslim army was prohibited from unnecessarily cruel and tortuous ways of killing The Prophet (May Allāh's blessings be upon him) is reported to have said:

> "Fairness is prescribed by Allāh in every matter; so if you kill, kill in a fair way."[202]

Mutilation (*muthlah*) of men as well as beasts was also prohibited.[203]

Killing parents is not allowed even if they are non-Muslims and in the enemy ranks, except in absolute self-defense. At several occasions the Prophet (May Allāh's blessings be upon him) forbade persons who had asked for permission to kill their non-Muslim parents on ground of hostility to Islam.[204]

Burning a captured man or animal to death is also prohibited.[205] However, the companions (May Allāh be pleased with them) used 'fire-arrows' in wars.[206] This

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[201] *Al-Sīrah al-Nabawīyah*, pp 818-19

[202] Muslim, *Kitāb al-Ṣayd wa al-Dhabā'iḥ*, Hadith no. 3615; Tirmidhī, *Kitāb al-Diyāt*, Hadith no. 1329

[203] Bukhārī, *Kitāb al-Maẓālim wa al-Ghaṣab*, Hadith no. 2294; Muslim, *Kitāb al-Jihād* Hadith no. 3261; Tirmidhī, *Kitāb al-Siyar*, Hadith no. 1532; Ibn Mājah, *Kitāb al-Jihād* Hadith no. 2849

[204] *Sharḥ al-Siyar al-Kabīr*, vol. 1, pp 75-76

[205] Once the Prophet (May Allāh's blessings be upon him) dispatched a band with the instruction to the arrest a culprit and ordered them not burn the criminal, but simply to kill him; he said, only the Lord of fire can punish with fire. (Bukhārī, *Kitāb al-Jihād* Hadith no. 2793; Abū Dawūd, *Kitāb al-Jihād* Hadith no. 2299; Tirmidhī; *Kitāb al-Siyar*, Hadith no. 1496. See also: *Al-Sīrah al-Nabawīyah*, pp 468-69; *Sharḥ al-Siyar al-Kabīr*, vol. 3, p 214)

was either based on the doctrine of necessity or on the inherent difference in nature of the two acts. Perhaps, both grounds are valid.[207]

5.2.2.6 War Captives

Our jurists divide the people captured during hostilities into three kinds: *saby*, *'ajazah* and *asrā*.

Saby is the term used for women and children of the enemy territory, while *'ajazah* are older and disabled people. Priests and monks are also included in *'ajazah*.

Asrā is the technical term for POWs. They are people having capability of warfare and taking part in actual combat. In other words, they are enemy combatants.

5.2.2.6A: Treatment of the POWs (*Asrā*)

The fuqahā' in general allowed the enslavement of the people captured during hostilities. Similarly, some of them, particularly, the Ḥanafīs allow decapitation as well. Some modern scholars[208] see it as violation of the clear injunctions of Qur'ān regarding the treatment of the POWs. They say that the holy Qur'ān gave only two options about the POWs: repatriation or gratuitous release.

> "Now when ye meet in battle those who disbelieve, then it is smiting of the necks until, when ye have routed them, then making fast of bonds; and afterward *either grace or ransom* till the war lay down its burdens."[209]

Indeed, the fuqahā' do discuss the implications of the above-quoted verse. But they also look at the practical examples of the treatment of POWs and other enemy captives during the lifetime of the Prophet and his successors. Apparently, there

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[206] *Bidāyat al-Mujtahid*, vol. 1, p 373; *al-Mabsūṭ*, vol. 10, p 92

[207] It is also to be noted that the Mālikīte jurist, Khalīl, expressly prohibited the use of poisonous arrows. (*Mukhtaṣar al-Khalīl, Kitāb al-Jihād*; al-Dardīr, *al-Sharḥ al-Kabīr*, vol. 3, p 178)

[208] See, for instance, Parvēz, Ghulām Aḥmad, *Ghulām awr Londiyāṇ*, (Lahore: Idārah Ṭulū'-e-Islām, 1984), p 8. See also: Ghāmidī, *Qānūn-e-Jihad*, pp 272-76

[209] *Qur'ān*, 47:4

seems conflict in theory and practice, which led some of the classical jurists to prefer one of the evidences to the other.[210]

On the one hand are the traditions, which emphasize good treatment of the POWs.[211] These traditions are in consonance with the above-quoted verse as well as other Islamic injunctions.[212] Then, there are traditions that allow the enslavement of the POWs.[213] The Prophet accepted the decision of the arbitrator regarding the enslavement of the women and children of the Jewish tribe – Banū Qurayẓah.[214] He did not enslave the Jews of Khaybar. Rather, he imposed upon them a tax – *kharāj* – and thereby they became citizens of Islamic State.[215] He is also reported to have exchanged some of the prisoners with the opponents.[216] He also accepted ransom for some of them.[217] Lots of them were released gratuitously.[218] Finally, there are a few instances of the decapitation of a prisoner of war.[219] It means that the Sunnah of the Prophet gives the following options about these people:

- Gratuitous release (*al-mann*);
- Repatriation and exchange (*al-fidā'* or *al-mufādāh bi al-nafs*);
- Accepting ransom (*al-mufādāh bi al-māl*);
- Making them *dhimmī*;
- Decapitation (*al-qatl*); and
- Enslavement (*al-istirqāq*)

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[210] Abū 'Ubayd, al-Qāsim ibn Salām, *Kitāb al-Amwāl*, (Cairo: Dar al-Fikr, 1988) p 121; *Nayl al-Awṭār*, vol. 7, p 306; *Sharḥ al-Siyar al-Kabīr*, vol. 2, p 261

[211] Muslim, *Kitāb al-Nadhr*, Hadith no. 3099 See also: Ibn Hishām, 'Abd al-Mālik, *al-Sīrah al-Nabawīyah*, (Beirut: Dār al-Kutub al-Islāmīyah, 1994), vol. 2, p 215-17.

[212] See, for instance, Qur'ān 76:8-10

[213] *Al-Sīrah al-Nabawīyah*, vol. 3, p 231ff

[214] Qur'ān 33:26; Bukhārī, *Kitāb al-Maghāzī*, *Ghazwat al-Aḥzāb*, Hadith no. 3804. See also: *al-Sīrah al-Nabawīyah*, vol. 3, pp 187-88.

[215] *Al-Mabsūṭ*, vol. 10, p 29

[216] Tirmidhī, *Kitāb al-Siyar*, Hadith no. 1493

[217] Ibn Sa'd, Muḥammad ibn 'Īsā, *al-Ṭabaqāt al-Kubrā*, (Lahore: Maqbool Academy, 1978), vol. 2, p 22; *al-Sīrah al-Nabawīyah*, vol. 2, p 221

[218] Bukhārī, *Kitāb al-Salah*, Hadith no. 442; Muslim, *Kitāb al-Jihād wa al-Siyar*, Hadith no. 3373; *al-Sīrah al-Nabawīyah*, vol. 2, p 228 and vol. 3, p 190

[219] *Qur'ān*, 33:26; Bukhārī, *Kitāb al-Maghāzī*, *Ghazwat al-Aḥzāb*, Hadith no. 3804. See also: *al-Sīrah al-Nabawīyah*, vol. 3, pp 187-88.

Making some of the captured people *dhimmīs* is also included in *mann* because *dhimmī* is considered by the Sharī'ah a free (*ḥurr*) citizen of Islamic State enjoying its protection. Similarly, accepting ransom is included in *fidā'* or release for some consideration (*'iwaḍ*). Hence, these are in accordance with the Qur'ānic injunction quoted above. But the last two options – decapitation and enslavement – have been deemed by some of the modern scholars in conflict with that injunction.

In the opinion of the majority of the jurists including the Shāfi'īs, the Ḥanbalīs and the Ẓāhirīs the ruler has before him all the above-mentioned options, except making them *dhimmī*, and he will have to decide according to the dictates of *maṣlaḥah*.[220] These jurists allow the ruler to make the POWs *dhimmī* only when they themselves opt for it. However, they differ on whether it is compulsory upon the ruler to accept their offer or not.[221] This is because they differently interpret the Prophet's treatment of the Jews of Khaybar.[222]

The Mālikīs allow the ruler to make them *dhimmī*.[223] It means that these jurists have taken the way of reconciliation (*jam'*) instead of preference (*tarjīḥ*). It is also obvious that the majority jurists see no conflict (*ta'āruḍ*) between the verse of the Qur'ān and the practice of the Prophet. In their opinion the verse does not confine the treatment of the war captives to *only* two options.

The Hanafi jurists say that the ruler should initially choose one of the three options, namely, make the POWs *dhimmī*, kill them or enslave them. The options of gratuitous release as well as repatriation and accepting ransom should be used only when the ruler deems it absolutely necessary.[224] It means that they have given preference to the traditions, which report decapitation or enslavement of the war captives. They see those traditions to be in consonance with the general Qur'ānic

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[220] *Al-Umm*, vol. 4, p 68; *al-Muḥallā*, vol. 7, p 309

[221] Ibid.

[222] Similarly, they believe that what 'Umar did with the people of Iraq was based on his *ijtihād*, which they do not consider binding. (See, for instance, al-Juwaynī, *al-Burhān*, vol. 1, p 201.)

[223] Al-Dasūqī, Muḥammad ibn Aḥmad, *al-Ḥāshiyah 'alā al-Sharḥ al-Kabīr*, (Cairo: Dār al-Kutub al-'Arabīyah, 1984), vol. 2, p 169

[224] *Al-Mabsūṭ*, vol. 10, p 64; *Sharḥ al-Siyar al-Kabīr*, vol. 2, p 261; al-Kāsānī, 'Alā' al-Dīn, *Badā'i' al-Ṣanā'i' fi Tartīb al-Sharā'i'*, (Quetta: Dār al-'Ilm, 1999), vol. 7, p 119

injunction about the killing of the polytheists[225], which was later in revelation to the one quoted above. As far as those traditions are concerned, which report gratuitous release or repatriation they interpret those as being based on necessity.[226] The reason for preferring one set of traditions to the other is the fact that the preferred tradition is in consonance with the general principle, which the Ḥanafīs derived from the texts.[227] This principle prohibits anything that may increase the strength of the opponents. Thus, for instance, they do not allow the sale of weapons or even crude iron to the opponents. Similarly, they do not approve of accepting ransom for releasing a war captive (*al-mufādāh bi al-māl*). Instead they prefer exchange of prisoners (*al-mufādāh bi al-nafs*) and that too when it is absolutely necessary.[228]

But as we noted earlier, the *'illat al-qital* is not *kufr* but *muharabah* and the basis of relationship between Islamic State and non-Muslim state is not war but peace. So, the general principle derived by the Ḥanafīs has no solid foundation. Moreover, to say that 9: 5 has abrogated 47: 4 does not seem sound either. This is because abrogation (*naskh*) is sought for only when reconciliation between two texts is not possible.[229] Here, it is obvious that these verses relate to different stages of warfare. Thus, 9: 5 relates to those polytheists who are at war with Muslims and who have lost the protection of their lives and property while 47: 4 relates to treatment of the war captives after hostilities.[230]

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[225] *Qur'ān*, 9: 5

[226] Some of them say these events were prior to the last commandment about killing the polytheists. (*Badā'' al-Ṣanā'i'*, vol. 7, p 119) But the dominant view is that they were based on necessity. (Abū Yūsuf, Ya'qūb, *Kitāb al-Kharāj*, Karachi: Dār al-Ishā'at, 1987, p 196; *Sharḥ al-Siyar al-Kabīr*, vol. 2, p 264)

[227] For methodology of the jurists, particularly the Ḥanafīs, about using general principles in derivation and application of Islamic Law see: Nyazee, *Theories of Islamic Law*, pp 147-76.

[228] *Al-Mabsūt*, vol. 10, pp 138-40 Some of the modern scholars believe that the Ḥanafīs do not at all allow gratuitous release or release for some consideration. (See, for instance, al-Zuhayli, *Āthar al-Ḥarb*, p 430) But this does not seem to be the correct exposition of the view of the Ḥanafīs. What is obvious from their texts is that they do not prefer these options because these are not in consonance with the general principle, which, in their opinion, emerges from the texts.

[229] Al-Suyūṭī, Jalāl al-Dīn, *al-Itqān fi 'Ulūm al-Qur'ān*, (Karachi: Dār al-Ishā'at, 1986) vol. 2, pp 21-22

[230] Al-Ṭabarī, *Jāmi' al-Bayān*, vol. 26, p 24

Now, if 47: 4 has not been abrogated isn't there an apparent clash between this verse and the practice of the Prophet as reported in several traditions referred to above? To remove this apparent clash modern scholars have generally adopted two approaches towards this problem:

1) That 47: 4 is not exclusive. It mentions just two of the options that are available to the Muslim ruler. But this does not seem correct because the word *immā* (either... or) in the verse makes it exclusive.[231]
2) That 47: 4 is exclusive but what the Prophet did was not in any way repugnant to this injunction. They say that the instances of decapitation from his life are really very few, which shows that these were exceptions and that those who were decapitated deserved this punishment by virtue of their crime, which they committed before their captivity.[232] As far as enslavement is concerned some of them contend that it never happened in the lifetime of the Prophet. Rather, they contend, there are numerous instances in his life when he freed war captives.[233] But this seems to be over-simplification of the issues. There is no denying the fact that the Prophet accepted the decision of the arbitrator regarding the fate of the Jewish tribe Banū Qurayẓah by virtue of which combatants were killed and non-combatants were enslaved.[234] Now, even if it was a decision of the arbitrator who was appointed by the Jews themselves and who applied the Jewish law[235] on them, the Prophet would never have accepted it if it were in any way repugnant to the Sharī'ah. Similarly, when he married with one of the captives of Banū al-Muṣṭaliq the companions freed all of the slaves saying that they had become relatives of the Prophet.[236] No doubt he convinced the companions to free the captives of Hawāzin. But it is equally true that he had first distributed them among the companions who thereby

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[231] Ibid.
[232] *Āthar al-Ḥarb*, 436-41; See for a different perspective: Ghāmidī, *Qānūn-e-Jihad*, pp 273-74.
[233] Ghāmidī, *Qānūn-e-Jihad*, pp 274-76
[234] *Qur'ān*, 33:26; Bukhārī, *Kitāb al-Maghāzī*, Hadith no. 3804. See also: *al-Sīrah al-Nabawīyah*, vol. 3, pp 187-88.
[235] Deuteronomy 20:10-14 It is worth-noting that the Prophet called it the "law of Allah regarding them". (Tirmidhī, *Kitāb al-Siyar*, Hadith no. 1508.)
[236] *Al-Sīrah al-Nabawīyah*, vol. 3, p 231ff

became their owners.[237] One of the evidence of their ownership was that those among them who were not willing to free their captives gratuitously were paid their price.[238]

On the basis of these and other considerations some other scholars admit that there were few instances of enslavement of the war captives in the lifetime of the Prophet but they were based on the principle of reciprocity.[239] This seems correct but as Professor Nyazee remarked, "although reciprocity is an acknowledged principle of Islamic law, no rule of reciprocity can set aside, suspend, or permanently remove a fundamental rule of the Sharī'ah".[240] Hence, we should add here that there was, along side the principle of reciprocity, the doctrine of necessity as well. The permanent injunction of 47: 4 regarding the treatment of war captives invalidates enslavement. What if the other party is neither ready to exchange POWs nor pay ransom for them and Islamic State does not want to take risk of gratuitous release because it may strengthen the enemy? If the other party knows that Islamic State is bound to release POWs either gratuitously (*mannan*) or after accepting consideration (*fidā'an*), then why should it pay consideration? So, in all cases where acting upon the commandment of "either *mann* or *fidā'* " was not possible, instead of keeping them in jails or camps Islamic State distributed the war captives among its citizens so that they may take care of them and in response would get benefit from them. Islamic law, however, ensured certain rights for them in this transitional period, which we discussed in the previous chapter.

To conclude, there are only two options regarding war POWs: *mann* or *fidā'*.[241] A few captives POWs were decapitated in exceptional cases as a punishment for their crimes, which they committed before their captivity. Enslavement of POWs was based on the principles of necessity and reciprocity.

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[237] Ibid., p 453ff

[238] Ibid., vol. 4, pp 104-06

[239] *Āthar al-Ḥarb*, 441-47; *Aḥkām al-Madaniyīn*, pp 110-11

[240] *Islamic Law and Human Rights*, p 30

[241] This is also the opinion of al-Ḥasan al-Baṣrī, Ḥammād bin Salamah, Mujāhid and Muḥammad ibn Sīrīn. (*Kitāb al-Amwāl*, p 121)

5.2.2.6B: Enemy Children and Women (*Saby*)

The fuqahā' discuss four options about these different classes of people; decapitation, enslavement, repatriation (release with consideration) and gratuitous release (release without consideration).

The fuqahā' unanimously hold that *saby* cannot be killed once they are captured.[242] This is because the holy Prophet (May Allāh's blessings be upon him) prohibited the killing of women and children.[243] When these people do take part in combat either physically or through their advices and planning the Ḥanafīs declare that they can be killed during actual combat. But when they are captured they cannot be killed.[244] The majority jurists allow their decapitation during combat and after they are captured when they took part in actual combat.[245] In other words, they consider them like ordinary *asrā* in this situation.

The Mālikī jurists allow release of *saby* in repatriation of Muslims captured by the enemy (*al-fidā' bi al-nafs*), but do not allow release on ransom (*al-fidā' bi al-māl).*[246] The Shāfi'ī jurists allow ransom as well.[247] The Ḥanafī and Ḥanbalī jurists do not allow release of *saby* with or without ransom. However, they allow repatriation (*al-fidā' bi al-nafs*) in case of necessity.[248] Similarly, in case where a child is captured without their parents the Ḥanafī and the Shāfi'ī jurists do not allow ransom because in such a case they consider him a Muslim child.[249]

Mālikī jurists allow the ruler to release *saby* gratuitously without any consideration. The Shāfi'ī and the Ḥanbalī jurists also allow this but with the condition that the ruler should give due 'compensation' to the soldiers.[250] The Ḥanafī jurists do not allow this.[251]

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[242] *Sharḥ al-Siyar al-Kabīr*, vol. 3, p 196; *al-Mudawwanah*, vol.3, p 6; *al-Mughnī*, vol. 8, p 377

[243] Muslim, *Kitāb al-Jihād* Hadith no. 3261; Tirmidhī, *Kitāb al-Siyar*, Hadith no. 1532; Ibn Mājah, *Kitāb al-Jihād* Hadith no. 2849 (See Appendix I for full text.)

[244] *Al-Mabsūṭ*, vol. 10, p 64; *Badā'i' al-Ṣanā'i'*, vol. 7, p 101

[245] *Bidāyat al-Mujtahid*, vol. 1, p 371; *al-Umm*, vol. 4, p 157; *al-Muḥallā*, vol. 7, p 297

[246] *Al-Mudawwanah*, vol. 3, p 9

[247] *Al-Umm*, vol. 4, p 198

[248] *Sharḥ al-Siyar al-Kabīr*, vol. 3, p 285; *al-Mughnī*, vol. 8, p 376

[249] *Al-Aḥkām al-Sulṭāniyah*, p 129

[250] *Al- Aḥkām al-Sulṭāniyah*, p 129; *al-Qawānīn al-Fiqhīyah*, p 148

[251] *Fatḥ al-Qadīr*, vol. 4, p 309

To summarize the debate, the Mālikī jurists do not allow killing only and allow the rest of the three options. The Ḥanafī jurists say that the only option available to the ruler regarding *saby* is their enslavement. However, in case of necessity they allow repatriation as well. The Shāfi'ī and the Ḥanbalī jurists say that they become slaves by the fact of their being captured. If the ruler wants to release them he has to pay compensation to the soldiers, except where they willfully relinquish their right.

5.2.2.6C: Captives Who Are Old or Disabled (*'Ajazah*)

About *'ajazah* the jurists maintain that if their role in war planning was important they have the status of *asrā* or POWs. Otherwise, they should be dealt with separately. Now, when they are dealt with separately the majority jurists hold that they cannot be decapitated after the end of hostilities.[252] It is only the Shāfi'ī jurists that allow their decapitation after the end of hostilities provided the ruler considers that it is in the interest of Muslims.[253] The Ḥanbalī jurists do not allow even their enslavement,[254] while the Ḥanafī and Shāfi'ī jurists allow this.[255] The Mālikī jurists give exception from enslavement to priests and monks.[256]

We noted earlier[257] that enslavement was not originally part of the scheme of the Sharī'ah. Rather, it was based on the principles of reciprocity and necessity. Now, as the world has reached a consensus on outlawing this evil there is no room in the scheme of the Sharī'ah for enslavement of the war captives, be they *asrā*, *saby* or *'ajazah*. Similarly, we also concluded there that decapitation was not a general practice. Indeed, this option was used in very rare cases for those who otherwise deserved death punishment. Hence, the only option available is release with or without consideration. Again, the consideration may be either the captives of Islamic State with the enemy or it may be in monetary terms. Pending agreement

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[252] *Badā'i' al-Ṣanā'i'*, vol. 7, p 101; *Bidāyat al-Mujtahid*, vol. 1, p 371
[253] *Al-Muhadhdhab*, vol. 2, p 233
[254] *Al-Mughnī*, vol. 8, p 375
[255] *Al-Mabsūṭ*, vol. 10, p 64; *Mughnī al-Muḥtāj*, vol. 4, p 223
[256] *Ḥāshiyat al-Dasūqī*, vol. 2, p 163
[257] See Sections 4.2.3 and 5.2.2.3A above.

between the governments concerned about their release they may be kept in custody. Islamic Law has made it obligatory upon Muslims to take due care of their captives, as noted earlier.

5.2.3 The End of War

Dr. Muḥammad Ḥamīdullāh says that war ends with one of the following means:

1. Ending hostilities without formal agreement about peace and settlement of dispute;
2. Non-Muslim opponents embracing Islam;
3. Defeating the enemy and annexing their territory;
4. Acceptance by the enemy of the suzerainty of Islamic State; and
5. Settling dispute in a treaty of peace.[258]

There are detailed rules about each of these situations.[259] But we are concerned here only with the last one i.e. a treaty of peace.

5.3 JIHĀD AND PEACE TREATIES

5.3.1 Legitimacy of Peace Treaties

If the war ends with a peace treaty, it may be a treaty of either temporary or perpetual peace. There may be a treaty of peace in which the time period is not specified. Peace treaties may also be concluded with a nation with which no war has been fought. Are such treaties legitimate?

5.3.1.1 *Hudnah* and *Dhimmah*

The Prophet (May Allāh's blessings be upon him) on his arrival to Madīnah concluded a peace treaty with the Jews there. This treaty did not have a time limit.[260] Similarly, he concluded peace treaties for unspecified duration with pagans

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[258] *The Muslim Conduct of State*, pp 257-58 Dr. Zuḥaylī adds another to this list, namely, ending hostilities by arbitration. (*Āthar al-Ḥarb*, pp 636-37)

[259] See *The Muslim Conduct of State*, pp 87-90, 98-103, 227-43; *Āthar al-Ḥarb*, pp 638-769

[260] *Al-Sīrah al-Nabawīyah*, vol. 1, p 503; *al-Amwāl*, p 204

around Madīnah, especially with those on the route to Syria.[261] It was only in the treaty of Ḥudaybīyah that a time period of ten years was mentioned.[262] Later, the holy Qur'ān gave the following verdicts about peace treaties of specified or unspecified time period:

> "Freedom from obligation [is proclaimed] from Allāh and His messenger toward those of the idolaters with whom ye made a treaty: 'Travel freely in the land four months, and know that ye cannot escape Allāh and that Allāh will confound the disbelievers'. And a proclamation from Allāh and His messenger to all men on the day of the Greater Pilgrimage that Allāh is free from obligation to the idolaters, and [so is] His messenger. So, if ye repent, it will be better for you; but if ye are averse, then know that ye cannot escape Allāh. Give tidings [O Muḥammad] of a painful doom to those who disbelieve. Excepting those of the idolaters with whom ye [Muslims] have a treaty, and who have since abated nothing of your right nor have supported anyone against you. [As for these], fulfill their treaty to them till their term. Lo! Allāh loveth those who keep their duty. Then, when the sacred months have passed, slay the idolaters wherever ye find them, and take them [captive], and besiege them, and prepare for them each ambush. But if they repent and establish *ṣalāh* and pay *zakāh*, then leave their way free. Lo! Allāh is Forgiving, Merciful. And if anyone of the idolaters seeketh thy protection, then protect him so that he may hear the word of Allāh; and afterward convey him to his place of safety. That is because they are a folk who know not."[263]

We earlier noted that these verses relate to a peculiar characteristic of the Prophetic Mission. However, generalizing the rules mentioned in these verses the jurists held

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[261] Ibid., p 591; *Ṭabaqāt*, vol. 2, pp 26-27
[262] *Al-Sīrah al-Nabawīyah*,
[263] *Qur'ān* 9:1-6

that treaties of perpetual peace could not be concluded with alien non-Muslims. They approved of only one treaty of perpetual peace (*al-amān al-mu'abbad*) with non-Muslims – the treaty of *al-dhimmah* – by virtue of which they become citizens of Islamic State.[264] Peace treaty with alien non-Muslims is known as *al-hudnah* or *al-muhādanah*. The Ḥanafīs call it *al-muwāda'ah*. Can such a treaty be concluded for unspecified period of time? It is generally believed[265] that the jurists *unanimously* hold that a peace treaty for unspecified period is also invalid. But this, in our humble opinion, is not correct.

5.3.2 Peace Treaty for Unspecified Period of Time (*al-muwāda'ah al-muṭlaqah*)

The prevailing view in the Shāfi'ī and the Ḥanbalī schools is that a peace treaty should not be for an unspecified period. The Shāfi'ī School holds that if Muslims are stronger enough they should not conclude peace treaty for more than four months. If, however, they are in a weaker position they can have a peace treaty for a maximum period of ten years. They hold that this period can be further extended if at the end of ten years the government feels it necessary. In their opinion, the period should not exceed ten years at one time. [266] The prevailing opinion in the Ḥanbalī School is also that the maximum period for truce is ten years.[267] Nawawī says:

> "If the treaty of *hudnah* is concluded absolutely without a fixed period of time it is invalid because its absoluteness means that it is forever, which is not allowed. However, it will be valid if he [the ruler] concluded the peace treaty on the condition that he would have the option to repudiate it at his

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[264] *Al-Umm*, vol. 4, p 109; *Badā'i' al-Ṣanā'i'*, vol. 7, p 108; *Ḥāshiyat al-Dasūqī*, vol. 2, p 190; *al-Mughnī*, vol. 8, p 525

[265] Dr. Wahbah al-Zuḥaylī, for instance, says: "The fuqahā' unanimously hold that peace treaty with aliens must be for a specified period of time. So, it is not allowed in absolute terms without specifying the time period..." (*Āthar al-Ḥarb*, p 675)

[266] *Al-Umm*, vol. 4, p 110; *Al-Rawḍah al-Naḍiyah*, vol. 2, p 354; *Nayl al-Awṭār*, vol. 8, p 49

[267] *Al-Mughnī*, vol. 8, p 460; *Zād al-Ma'ād*, vol. 2, p 76

will[268]... But if a person other than the Prophet says 'I conclude peace treaty with you till the time Allāh wills' it is invalid because he has no means to know the will of Allāh... And if he says [to non-Muslims] 'I conclude the peace treaty with you till the time you want', it will be invalid because he thereby puts them in deciding position regarding Muslims [which is not allowed]."[269]

This reasoning proves that the Shafi'īs consider the treaty of *hudnah* as a binding bilateral agreement (*'aqd lāzim*), which one party cannot repudiate without the consent of the other party. Indeed, they have stated it expressly as well.[270] That is why they consider a treaty of perpetual peace or the one for unspecified period as equivalent to permanent suspension of the obligation of Jihād. The Ḥanbalī jurist Ibn Qudāmah says that the condition that the ruler may repudiate the treaty at his will is in itself invalid.

"This is not allowed because it [*hudnah*] is a binding contract (*'aqd lāzim*). Hence, it is not valid to put the condition of repudiation in it. "[271]

The Ḥanafīs and the Mālikīs, on the other hand, hold that there is no time limit for such a treaty. In their opinion it is the ruler who decides about the period of truce, keeping in view the interests of Muslims.[272] Moreover, the Ḥanafīs consider that *hudnah*, or *muwāda'ah* as they call it, is a non-binding bilateral contract (*'aqd ghayr lāzim*), which any party may repudiate at will without the consent of the other party after giving due notice to it.[273] That is why they have no objection to peace treaty for unspecified period of time.

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[268] The Ḥanbalīs say that even this is not allowed because this is against the nature of the treaty. (*Al-Mughnī*, vol. 8, p 460)
[269] *Al-Majmū'*, vol. , p
[270] Ibid., p
[271] *Al-Mughnī*, vol. 8, p 461
[272] *Fatḥ al-Qadīr*, vol. 4, p 293; *Ḥāshiyat al-Dasūqī*, vol. 2, p 190
[273] *Badā'i' al-Ṣanāi'*, vol. 7, p 179

Here, one has to recall the presumptions of the *fuqahā'* regarding Jihād, one of which was regarding the cause of war (*'illat al-qitāl*).[274] According to the Shafi'īs the cause of war is *kufr*, which is why they do not allow peace treaty with non-Muslims for a longer period. The Ḥanafīs hold that the cause of war is *muḥārabah*, and that is why they allow peace treaty with non-Muslims for a longer period.

Furthermore, the Shāfi'īs followed a more restricted interpretation of the texts of Qur'ān and Sunnah as compared to the Ḥanafīs. Some even argue that the only big difference between the literalist approach of *Ẓāhirīs* and that of the Shafi'īs is that the latter recognized the legitimacy of analogical reasoning and the former did not.[275] Hence, we see that the Shafi'īs look for express provisions of Qur'ān and Sunnah regarding the maximum period of truce, while the Ḥanafīs consider that the maximum period mentioned in the texts was based on the interest of Muslims and, therefore, this period can be extended on the same basis.

Dr. Wahbah al-Zuḥaylī is of the opinion that the Ḥanafīs do not allow this. He is perhaps misled by the order of presentation in the treatises of the Ḥanafīs. Thus, for instance, Kāsānī says that *amān* (giving quarter to non-Muslims) is of two kinds: perpetual *amān* and *amān* for some period-of time. By the first he means the contract of *dhimmah*. He, then, further divides the second one into two kinds: the ordinary *amān* (given to non-Muslims for temporary stay in Islamic State) and *Muwāda'ah*. Perhaps this has led Dr. Zuḥaylī to believe that according to the Ḥanafīs a peace treaty must be for a specified period of time. But Kāsānī himself states it explicitly that *muwāda'ah* may either be for a fixed period of time or it may absolute without prescribing a time period.

> "Peace treaty will be either absolute (*muṭlaq*) or for a limited period of time (*mu'aqqat*). So, when it is absolute it is terminated by either of the two things: express or implied repudiation. Express repudiation is explicit

[274] See, for details, Section 5.1.1.5 above.

[275] See, for details, Imran Ahsan Khan Nyazee, *Theories of Islamic Law*, pp 177-88. Professor Nyazee even argues that there is a lot of similarity in the earlier Shafi'īs and Ẓāhirīs about the legitimate form(s) of analogy.

declaration by the two parties. Implied repudiation occurs in some situations that establish the intent of repudiation, such as when some people of *dār al-muwāda'ah* with the permission of their government enter *dār al-Islām* and commit robbery there. This is because the permission of the government implies repudiation of the [peace] treaty..."[276]

The famous Ḥanbalī jurist Ibn Qayyim al-Jawziyah has explained the position of the Ḥanafīs in this way:

"And it is reported from Abū Ḥanīfah that it [peace treaty without specified period of time] is not binding (*lāzimah*); rather, it is non-binding (*jā'izah*). So, he gave the authority to the ruler to repudiate it at his will."[277]

Dr. Zuḥaylī stated that there is a consensus of the fuqahā' that peace treaty for unspecified period is not allowed.[278] It is strange indeed because, as we just saw, the Ḥanafīs explicitly allow this. Moreover, Ibn al-Qayyim from among the Ḥanbalīs made a strong case in favor of the legitimacy of such a treaty. He also says that there were two traditions reported from Imām Aḥmad bin Ḥanbal – the founder of the Ḥanbalī School – on this issue; one that allows such a treaty and the other that disallows it. Ibn al-Qayyim argues that the Prophet (May Allāh's blessings be upon him) concluded several treaties with non-Muslims for unspecified period. Even in the verses of *al-Barā'ah* he sees argument in favor of this contention. Thus, he says that these verses gave four months notice after which all the treaties for unspecified period would stand terminated. He derives from this that such treaties are not binding (*ghayr lāzim*). On the other hand, the verses declared that the treaties with specific time period would remain in force if the other party did no violate it. From this Ibn al-Qayyim derives that such treaties are binding (*lāzim*) in

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[276] Ibid.
[277] *Aḥkām Ahl al-Dhimmah*, vol. 1, p 337
[278] *Āthar al-Ḥarb*, p 675-76

nature. He also responded to the arguments of those who deny the legality of treaties of unspecified period.[279] For instance, he says that when the Prophet (May Allāh's blessings be upon him) said to the Jews of Khaybar 'I conclude peace treaty with you till the time Allāh wills' he thereby meant 'till the time we deem necessary'. Indeed, in another version of the same tradition he is reported to have said, 'till the time we want'. So, this is not peculiar to the Prophet only, as Nawawī believed. Rather, every Muslim ruler can say so to the other party.

To summarize the whole debate, there are three opinions on the legitimacy of peace treaty for unspecified period. Some of the Shafi'īs and Ḥanbalīs say that such a treaty is not allowed because they hold that it will be binding (*'aqd lāzim*) upon Islamic State, which in turn may amount to suspension of the obligation of Jihād The Ḥanafīs are of the opinion that every peace treaty is non-binding (*'aqd ghayr lāzim*) in nature. Hence, they hold that a peace treaty is always permissible, be it for a specified or unspecified period, provided that it is in the interest of Muslims. Ibn Qayyim al-Jawziyah also strongly favors legitimacy of peace treaty irrespective of its time period. But he holds that a peace treaty for a specified period is binding in nature, while the one for unspecified period is non-binding. When such a treaty is non-binding it means that any party may repudiate it at will without the consent of the other party. But it must give due notice of its intention to do so in order to avoid treachery. Thus, the polytheists were given four months notice before declaring the state of war. If, however, such a treaty is deemed binding, then Islamic State will have the authority to repudiate it only if it has strong evidence that the other party is going to commit treachery or other act, which is detrimental to the interests of Muslims. In this case, again, giving due notice is necessary before taking armed action. But as we noted earlier, there are certain acts, which if committed by the other party, are deemed equivalent to repudiation of the treaty from that party. In such a situation Islamic State need not formally repudiate the

[279] See Appendix II for some excerpts from his invaluable thesis.

treaty. It can presume that the treaty stands terminated and it may take any step, which it deems necessary for the protection of its interests.

We consider that the opinion of Ibn al-Qayyim is preferable because of the strength of his arguments. Moreover, his opinion seems more in consonance with the general principles as well as the purposes and spirit of the Sharī'ah. But even if a treaty for unspecified period of time is considered *'aqd lāzim* we find it perfectly legitimate. This point will be elaborated in a bit detail below.

5.3.3 Treaty of Perpetual Peace with Alien Non-Muslims

Those among the fuqahā' who do not allow a peace treaty without a specific time period (*al-hudnah al-muṭlaqah*) would obviously do not allow a treaty of perpetual peace. But even those fuqahā' who allow *al-hudnah al-muṭlaqah* expressly disallow such a treaty. Thus, for instance, Ibn al-Qayyim who made a strong case for the legality of *al-hudnah al-muṭlaqah* says about a treaty of perpetual peace:

> "The people who expressed the first opinion [saying that *al-hudnah al-muṭlaqah* is illegal] seem to have considered that even when it is absolute it is binding and perpetual *and, therefore, invalid by consensus.*"[280]

What he is saying here is that if *al-hudnah al-muṭlaqah* were binding and perpetual it would have been invalid by consensus. This despite the fact that Ibn al-Qayyim himself asserts that it is the *maṣlaḥah* of Muslims that determines the duration as well as nature of the treaty.

> "The general rule is that agreements are concluded in any manner in which there is a *maṣlaḥah*, which sometimes is found here and at others there. Similarly, the contracting party has the right to conclude it in a manner to bind both the parties and it can conclude it in a non-binding manner that

[280] *Aḥkām Ahl al-Dhimmah*, vol. 2, p

can be repudiated if there is no legal prohibition, which is not found here."[281]

What if *maṣlaḥah* of Muslims require a permanent peace treaty with non-Muslims? Ibn al-Qayyim does not find any legal prohibition on concluding *al-hudnah al-muṭlaqah* in a non-binding manner. But is there any legal prohibition on concluding a treaty for perpetual peace? The reason the fuqahā' give for prohibiting such a treaty is that it amounts to permanent suspension of the obligation of Jihād.[282] This opinion, in turn, is based on the presumption that there is a perpetual war between Muslims and non-Muslims and that period of truce is only an interval during the course of hostilities. We earlier concluded that this has not been the case.[283]

Perhaps, one of the reasons is that the fuqahā' were very conscious about fulfilling treaty obligations. They would never allow treachery or any other act that was deemed equivalent to treachery. They consider that if a peace treaty were concluded for perpetual peace Muslims would be bound by its terms forever and they would never take up arms against the other party. But even this argument cannot invalidate such treaties. This is particularly true for the Ḥanafīs and Ibn Qayyim al-Jawziyah for whom such treaties are *ghayr lāzim*. But even if such a treaty is considered *lāzim*, as some of the Shafi'īs and Ḥanbalīs believe, it is not a big problem. This is because they allow repudiation of peace treaty in case the other party commits a breach thereof. They are of the opinion that even before actual breach the ruler can denounce the treaty if he has reasonable evidence that the other party is going to commit a breach.[284] Moreover, as we noted earlier, Jihād becomes obligatory only when the cause of obligation is there.[285]

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[281] Ibid., p

[282] See Section 5.1.1.1 above.

[283] See Section 5.1.1.4 above.

[284] See Section 5.2.1.2 above.

[285] See Sections 5.1.1.3 and 5.1.1.5 above.

Hence, in our opinion, a treaty for perpetual peace is legitimate if it is concluded in the interests of Muslims. The arguments in favor of this opinion are:

1. The cause of war (*'illat al-qitāl*) is *muḥārabah* and not *kufr*. So, Muslims are not allowed to wage war against those non-Muslims who do not fight them.
2. According to Islamic injunctions, Muslims are obliged to accept the call for peace. War should be fought only as a last resort.
3. The division of the world into two territories – *dār al-Islām* and *dār al-ḥarb* – does not necessitate perpetual warfare. This division is only from the perspective of the municipal law of Islamic State.[286]
4. Even when peace treaty is concluded in a binding manner it does not mean suspension of the obligation of Jihād because the purpose of Jihād can be achieved by peaceful means. We earlier concluded that the purpose of Jihād is not supremacy of Islam or Muslims over the whole of the world. Rather, it is defense of *dīn*.[287] Several fuqahā' especially the Ḥanafīs consider a peace treaty as *qitāl* in spirit even if not in letter.[288] Even the Shafi'īs who hold that the cause of war is *kufr* expressly say that if the purpose can be achieved by peaceful means it is preferable not to wage war.

> "The purpose of war is [acceptance of the divine] guidance and testimony [of the truth of Islam]. It is not the killing of non-believers. Hence, if guidance is possible by arguments without Jihād it is better than Jihād."[289]

Moreover, as noted above, Islamic State has the right to denounce the treaty after giving due notice to the other party if at any time after the conclusion of the peace treaty it finds strong evidence that the other party is going to commit breach of the treaty. Similarly, if the other party actually commits breach of a

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[286] See Section 5.1.1.3 of this dissertation.
[287] See Section 5.1.1.6 above.
[288] *Al-Mabsūṭ*, vol. 10, p
[289] *Mughnī al-Muḥtāj*, vol. 4, p 210

material condition of the treaty Islamic State may consider that the treaty stands repudiated.

5.3.4 Denunciation of Treaties in Public International Law

Here, the rules for denunciation of treaties in contemporary public international law may be briefly discussed for the purpose of comparison.

International law that governs the making, interpretation, amendment as well as termination of treaties was for a long period based on state practice or custom. From 1969, the Vienna Convention on the Law of Treaties is the main instrument that governs this part of international law. Vienna Convention is also based primarily on the rules of customary international law, although like other law-making treaties it includes some 'new' rules as well. Some of these rules may well have become part of customary international law since then.

Vienna Convention considers peace treaty as a binding legal instrument (*'aqd lāzim*), irrespective of whether it is for a specified or unspecified period of time.[290] It means that such treaties cannot be unilaterally denounced. For the purpose of termination it divides treaties into two kinds:

a) Treaties, which are concluded for a specific purpose or period of time; and

b) Treaties, which are general in nature.

The rule about the first kind of treaties is that they are terminated after the achievement of the purpose or the completion of the specified duration.[291] What if a state wants to terminate such a treaty before the accomplishment of the object or the completion of the period? The primary rule in such cases as well as for the treaties of the second kind is that they can be terminated by mutual consent of the parties.[292] A corollary of this is that the treaty itself may provide the procedure for its termination.[293] If the treaty does not provide for termination or denunciation,

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[290] This resembles the viewpoint of the Shāfi'ī jurists.

[291] Article of the Vienna Convention on the Law of Treaties, 1969. One finds striking similarities between this article and the exposition of the Ḥanafī jurist Kāsānī quoted above.

[292] Art. 55 and 57

[293] Art. 57

the presumption will be that no right of denunciation has been given to the parties. Art. 56 of the Convention says:

> "1) A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:
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> a) It is established that the parties intended to admit the possibility of denunciation or withdrawal; or
>
> b) A right of denunciation or withdrawal may be implied by the nature of the treaty.
>
> 2) A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1."

This provision may be seen as in conflict with the rule of Islamic Law, which gives the right of denunciation to state-parties of *al-hudnah al-muṭlaqah*. Indeed, it has also caused hot debates among scholars of international law. The rule in the customary international law was ambiguous. Some states claimed such a right and others denied it.[294] Several states hold that such a right exists as a necessary corollary of state sovereignty.[295] We saw that even the fuqahā' were divided on the binding nature of such treaties. Some of the Shafi'īs and Ḥanbalīs considered them *lāzim*, which is the same position as adopted by the Vienna Convention. The Ḥanafīs and some of the Ḥanbalīs, like Ibn al-Qayyim, considered such treaties as *ghayr lāzim*, which has been the opinion of most of the developing states. But, as

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[294] Mostly developed states are of the opinion that if right of withdrawal cannot be deduced from the provisions of the treaty it is deemed as non-existent. In the Declaration of London 1871 it was mentioned: "It is an essential principle of the law of nations that no power can liberate itself from the engagements of a treaty, or modify the stipulations thereof, unless with the consent of the contracting powers by means of an amicable agreement."

[295] The Ottoman Declaration of 1914 pronounced that a treaty not containing any provision regarding its duration and without a denunciation clause could be denounced by any party at any time. Article 17 of the Havana Convention on Treaties 1920 also contained similar provision. In the San Francisco Conference 1945 both the delegates of USA and USSR expressed the view that any state could withdraw at its will from the Organization. They held that it was a necessary corollary of the states' sovereignty. (UNCIO, vol. 1, p 265 and vol. 2, p 619)

we noted above, this does not cause a serious problem because Islamic Law has laid down that even a *lāzim* treaty can be denounced in some cases. Vienna Convention also provides for this. Thus, it has given the following grounds for denunciation of the treaties:

a) Breach of a material provision by the other party;[296]

b) Supervening impossibility performance;[297] and

c) Fundamental change of circumstance – *rebus sic stantibus*.[298]

Indeed, there is a lot of controversy on the exact meaning and scope of each of these grounds of denunciation.[299] We are not going into details of those debates here. What we want to stress upon is that there may not be much conflict between the rules of Islamic Law and those of Public International Law on this point. But Muslim states must play active role in the debates on such issues in the international forums, such as the UN General Assembly, the ICJ and the International Law Commission.[300]

There is yet another problem. Vienna Convention makes formal denunciation of the treaty obligatory in case of *actual* breach of a material condition of the treaty.[301] Art. 65(2) says that, except in cases of special urgency, the other party shall be

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[296] Art. 60

[297] Art. 61

[298] Art. 62

[299] See, for details, D. J. Harris, *Cases and Material on International Law*, Sweet & Maxwell, London, 1991, pp 792-804. See also: Benedetto and Angelo Labella, *Invalidity and Termination of Treaties: The Role of National Courts*, European Journal of International Law (http://ejil.org/journal/Vol1/No1/art3.html).

[300] Professor Nyazee is worth quoting here: "When treaties are interpreted or courts are required to decide international disputes, reliance is usually placed on general principles of law that are "common to all legal systems of the world". In practice, "common to all legal systems" really means the Anglo-American common law system and Romano-Germanic civil system, which have much in common as they rely on "natural law". On occasions, lip service is paid to Islamic law and the "uncivilized world", and even in such cases the argument is expressed in legal constructs relevant to the two dominating systems... We totally disagree with the statement that equity is the same thing as *istihsan* in Islamic law... Our conclusion is that the substantive rules and principles of Islamic law must be identified, acknowledged and employed. The vague term "equity" that stands for unfettered discretion can never be a substitute for these principles. (*Islamic Law and Human Rights*, pp 15-16 at FN 8)

[301] Art 65(1). Oppenheim says: "Breach of a bilateral treaty by one of the parties does not *ipso facto* put an end to the treaty, but only entitles the other party to invoke the breach as a ground for terminating the treaty." (International Law, pp 1300-01)

given a period not less than three months. But it must be appreciated that this article relates to violation of ordinary treaties. What if a party violates a treaty of non-aggression by committing an act of aggression or an act that is equivalent to 'armed attack'? Would the other party still give it formal notification denouncing the treaty? Or should it proceed to repelling the attack and taking 'counter-measures', which may be of the kind of 'reprisals'? Indeed, there is a lot of controversy on this issue in the scholars of international law.[302] State-practice is also not uniform in this regard. One thing is certain though. States are always reluctant to accept any norm, which restricts their sovereignty especially in cases of self-defense.

As for Islamic Law, we already concluded that Islamic Law gives the affected party the right to consider the treaty as repudiated. It, thus, may consider itself released from the obligations under the treaty. If it launches an armed attack against the other party it will not be in violation of its treaty obligations. No formal repudiation of treaty or declaration of war is necessary in such a situation.

Islamic State must, however, confirm from authorities of the other state whether or not that state still considers the treaty in force. If that state considers it in force it will be asked to fulfill its obligations under the treaty. If that state does not consider itself bound by the treaty, then Islamic State need not formally denounce the treaty, as the treaty will be considered terminated in this case. Islamic State will have the right to take steps that it deems necessary for securing its interests, which may even amount to waging war without formal declaration. This was what the holy Prophet (May Allāh's blessings be upon him) did with the Makkans when they violated material conditions of the peace treaty of Ḥudaybīyah. The same procedure was adopted when the Jews of Banū Qurayẓah violated the peace treaty at the time of the Battle of Trench. Again, Islamic State need not formally denounce the peace treaty if the violation by the other party amounts to war or 'armed attack'. In such a case, Islamic State has the right to use force in self-defense.

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[302] For a good analysis of the issue and appraisal of different views see Linos Alexander Sicilianos, *The Relationship between Reprisals and Denunciation or Termination of a Treaty*, EJIL (1993) 341-359.

The rule appears to be that Islamic State may act in a manner that amounts to reprisals after it confirms that the other party is not interested in fulfilling its treaty obligations. However, there may be cases where the gravity of situation demands a prompt action. In such cases the formality of confirmation may be suspended.

So, there seems very little, if any, conflict between the provisions of Vienna Convention and those of Islamic Law. But, again, it must be stressed that Muslims will have to play an active role in international forums and agencies. The UN, the ILC, the ICJ and other forums must also give due respect to the norms of the Sharī'ah – the law followed by one-fourth of humanity. We will conclude this debate on the comments of Professor Imran Ahsan Khan Nyazee:

> "As time passes, it is becoming increasingly clear that Islamic law is no longer a municipal law: it is an international force with the power to shape world events. It is destined to play a positive role in shaping the norms of the future world order... In reality, Muslims need to wake up from their slumber and make the principles of their slumber and make the principles of their law compete with those of natural law and other systems so that norms and values become part of international law. Mere complaining, without the necessary foundational work, about the domination of Western principles is not going to work for long... Non-Muslims, on the other hand, must ignore the propaganda launched against Islamic Law and be prepared to acknowledge and accommodate the values of systems other than Western... The United Nations must do so too if it is to remain a "United" Nations, as imposing value system of the Western world alone on the rest of humanity is not going to work for long."[303]

[303] *Islamic Law and Human Rights*, pp 14-15

CHAPTER VI:

LIBERATION STRUGGLE FROM THE SHARĪ'AH PERSPECTIVE

Liberation Struggle can be seen from four different perspectives:

a) Muslims seeking liberation from non-Muslims. This may happen in case of Muslims living as minority in non-Muslim state or where non-Muslims occupied Muslim territory. This is the primary concern of Muslims and the main focus of this dissertation.

b) Non-Muslims seeking liberation from Muslims. This may be the case where *dhimmīs* want to terminate the contract of *dhimmah*.

c) Muslims seeking liberation from Muslims. This may be a case of *Khurūj* or revolt.

d) Non-Muslims seeking liberation from non-Muslims

While all these four situations can be more or less important from the Sharī'ah perspective, we will confine our study to the first two situations.

6.1 MUSLIMS SEEKING LIBERATION FROM NON-MUSLIMS

First of all, we will discuss whether, from the perspective of the Sharī'ah, Muslims are obliged to seek liberation from non-Muslim government and strive for an independent state of their own. Then, we will discuss the legitimacy of armed struggle for this purpose and of military support thereto.

There are several questions related to each other. First, whether or not Muslims are allowed to live permanently in a non-Muslim state? Second, if yes under what conditions? Third, in which cases are they allowed to strive for liberation? Fourth, whether the struggle for liberation ever becomes obligatory? Fifth, in cases where they are not allowed to live under non-Muslim domination whether they have the only option of liberation struggle or should they first try to migrate to an Islamic

State under the doctrine of *hijrah*? Sixth, whether or not the doctrine of *Jihad* covers armed liberation struggle?

6.1.1 Permanent Residence in a Non-Muslim State

We earlier noted[1] that the division of the World into *dār al-Islām* and *dār al-ḥarb* was based not only on the realities on ground but it also has its foundations in Qur'ān and Sunnah. We also analyzed in detail the practical implications of this division on issues such as jurisdiction of Islamic State, enforcement of Islamic law and protection of the rights of the citizens of Islamic State.

While there is no denying the fact that the Sharī'ah allows Muslims to go to non-Muslim state for a temporary period, such as for diplomacy, trade and other purposes, there is some controversy regarding permanent residence therein. Permanent residents of a non-Muslim state may either be born citizens of that state or they may have migrated from another Islamic or non-Muslim state and have become naturalized citizens.

6.1.1.1 Permanent Muslim Residence in *Dār al-kufr*

There are some texts of the holy Qur'ān and Sunnah that explicitly give legitimacy to permanent residence of Muslims in non-Muslim states while others strongly condemn those persons who claimed to be Muslims and still did not migrate to Islamic State of Madīnah. This led to difference of opinion on the issue. For instance, Dr. Muḥammad Ḥamīdullāh is one of those who say that permanent residence in a non-Muslim state is allowed for a Muslim[2], while Abū Zahrah is of the opinion that it is obligatory upon Muslim residents of a non-Muslim state to migrate to Islamic State.[3]

Dr. Ḥamīdullāh tried to prove the legitimacy of permanent residence from the following verse of the holy Qur'ān:

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[1] See Section 5.1.1.3 of this dissertation

[2] *The Muslim Conduct of State*, pp 75-76

[3] *Al-'Alāqat al-Dawlīyah*, pp 60-61

"It is not for a believer to kill a believer unless (it be) by mistake. He who hath killed a believer by mistake must set free a believing slave, and pay the blood money to the family of the slain, unless they remit it as a charity. If he (the victim) be of *a people hostile unto you*, and he is a believer, then (the penance is) to set free a believing slave. And if he cometh of *a folk between whom and you there is a covenant*, then the blood money must be paid unto his folk and (also) a believing slave must be set free. And whoso hath not the wherewithal must fast two consecutive months. A penance from Allāh. Allāh is Knower, Wise."[4]

It is submitted that although this verse does give legitimacy to Muslims' stay in a non-Muslim state, but they in no way indicate that they are allowed permanent stay there. As a matter of fact, Muslims were living in Makkah and other territories of non-Muslims' domination and as there was a perpetual state of war between the Islamic State of Madīnah and the non-Muslim state of Makkah, there was every possibility that a Muslim resident of Makkah may become victim of an attack. Thus, these verses gave ruling about such a situation. Establishing legitimacy for permanent residence in a non-Muslim State is going too far. It is also to be noted that these verses appear in the context of a long discourse over Jihād.[5]

Another argument in favor of this contention is the residence of Muslims in Abyssinia. They were not only allowed by the Prophet (May Allāh's blessings be upon him) to live there but were also encouraged for doing so.[6] Moreover, they lived there even after the establishment of Islamic State in Madīnah.[7] But this argument can legitimize residence in a non-belligerent state only.

The following verses of the holy Qur'ān not only explicitly give legitimacy to Muslims' living in a non-Muslim state but also give guidance about the

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[4] *Qur'ān* 4:92

[5] *Qur'ān* 4:43-126

[6] Aḥmad, *Musnad Ahl al-Bayt*, Hadith no. 1649; *Musnad 'Abdullāh bin Mas'ūd*, Hadith no. 4168; *Ṭabaqāt Ibn Sa'ad*, vol. p

[7] Ja'far al-Ṭayyār, the Prophet's cousin, came to Madīnah on the eve of the conquest of Khaybar in 6 AH. (Bukhārī, *Kitāb Farḍ al-Khumus*, Hadith no. 2903. See also *Zād al-Ma'ād*, vol. 1, p 1088)

responsibility of Islamic State regarding these people. It is also worth-noting that the reference, apparently, is to a belligerent state.

> "Lo! those who believed and left their homes and strove with their wealth and their lives for the cause of Allāh, and those who took them in and helped them; these are protecting friends one of another. And those who believed but did not leave their homes, ye have no duty to protect them till they leave their homes; but if they seek help from you in the matter of religion then it is your duty to help (them) except against a folk between whom and you there is a treaty. Allāh is Seer of what ye do."[8]

This is further clarified by the traditions of the holy Prophet (May Allāh's blessings be upon him). He is reported to have said to the commander of an expedition:

> "When you meet enemies who are polytheists, invite them to three courses of action. If they respond to any one of these, you also accept it and restrain yourself from doing them any harm. Invite them to (accept) Islam; if they respond to you, accept it from them and desist from fighting against them. Then invite them to migrate from their lands to the land of Muhājirs and inform them that, if they do so, they shall have all the privileges and obligations of the Muhājirs. If they refuse to migrate, tell them that they will have the status of Bedouin Muslims and will be subjected to the Commands of Allāh like other Muslims, but they will not receive any share from the spoils of war or Fay' except when they actually fight with the Muslims (against the nonbelievers)."[9]

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[8] *Qur'ān* 8:72

[9] Muslim, *Kitāb al-Jihād* Hadith no. 3261; Tirmidhī, *Kitāb al-Siyar*, Hadith no. 1532; Ibn Mājah, *Kitāb al-Jihād* Hadith no. 2849

This tradition explicitly lays down that Muslims may be allowed to live in a non-Muslim state where they can profess their faith and can live accordingly. As far as the responsibility of Islamic State regarding these Muslims is concerned the following tradition throws some light on it:

> "The Apostle of Allāh (May Allāh's blessings be upon him) sent an expedition to Khath'am. Some people sought protection by having recourse to prostration, and were hastily killed. When the Prophet (May Allāh's blessings be upon him) heard that, he ordered half *diyah* [blood-wit] to be paid for them, saying: I am not responsible for any Muslim who stays among polytheists. They asked: Why, Apostle of Allāh? He said: Their fires should not be visible to one another."[10]

What is important, here, is that some people who were Muslims became victim of the attack but the Prophet (May Allāh's blessings be upon him) categorically denied any responsibility regarding the protection of their lives. These traditions and the above-quoted verse clearly establish that the Sharī'ah does believe in the principle of territorial jurisdiction.[11]

At another place, the holy Qur'ān admits the presence of Muslims in Makkah and does not prescribe punishment for them. Rather, it says that non-Muslims were not punished because of the presence of these Muslims.[12]

On the other hand, it must also be noted that Qur'ān explicitly lays down that those who lived under Non-Muslim domination and thus were caused to do evil acts would be punished with hell-fire.

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[10] Tirmidhī, *Kitāb al-Siyar*, Hadith no. 1530; Abū Dawūd, *Kitāb al-Jihād* Hadith no. 2273; Nasā'ī, *Kitāb al-Qasāmah*, Hadith no. 4698

[11] See Section 5.1.1.3 of this dissertation.

[12] "Had there not been believing men and believing women whom ye did not know that ye were trampling down and on whose account a crime would have accrued to you without (your) knowledge. (Allāh would have allowed you to force your way but He held back your hands) that He may admit to His mercy whom He will. If they had been apart We should certainly have punished the Unbelievers among them with a grievous punishment." (*Qur'ān* 48:24-25)

> "When angels take the souls of those who die in sin against their souls they say: 'In what (plight) were ye?' They reply: 'Weak and oppressed were we in the earth.' They say: 'Was not the earth of Allāh spacious enough for you to move yourselves away (from evil)?' Such men will find their abode in Hell what an evil refuge!"[13]

However, it gives exception to those who have some reasonable excuse.

> "Except those who are (really) weak and oppressed men women and children who have no means in their power nor (a guide-post) to direct their way. For these there is hope that Allāh will forgive: for Allāh doth blot out (sins) and forgive again and again."[14]

Reading these verses with the above-quoted verses leads to the conclusion that those Muslims who were allowed to stay in Makkah had reasonable excuse for their stay there. Some of them did not need to migrate for they were stronger enough to resist religious persecution. Some were rendering valuable service for Islamic State there. Then, some of them could not yet express openly that they had embraced Islam. These are all different classes of people and each of these classes has a different rule.

These verses clearly establish the obligation of *hijrah* or migration to Islamic State from a territory where Muslims are not allowed to practice their religion. So, the real deciding factor will not be so much the state of belligerency as is the fact that Muslims are not given the religious freedom. We will come to this issue again a bit later, *in shā' Allāh.*[15]

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[13] *Qur'ān* 4:97 Abū Zahrah bases his opinion on this verse. (*Al-'Alāqat al-Dawlīyah*, p 60)
[14] *Qur'ān* 4:98-99
[15] See Section 6.1.1.2 below.

Conclusion

Reading all these verses and traditions collectively leads to the conclusion that if Muslims can practice their religion in a non-Muslim state they are allowed to stay there. It is less important for this purpose whether Islamic State has hostile or peaceful relations with that state. However, ordinarily, a state with which Islamic State has a peace treaty is expected to give religious freedom to Muslims. This must be mentioned in peace treaties in most of the cases. But there may be a situation where Islamic State may not be able to impose this condition in treaty or the other party may violate this condition. Similarly, a belligerent state is more likely to ignore, or encroach upon, the rights of Muslim citizens though it is not necessary. Hence, state of belligerency is less important in this regard. What is important is that they can live permanently there if they are free to practice their religion. If they stay there Islamic State would initially have no responsibility regarding the protection of their rights. But if and when they ask help from Islamic State "in matter of religion" she will be under an obligation to support them without violating the restrictions of treaty obligations, if any.[16]

Generally, Muslim citizens of a non-Muslim state who are not allowed to practice their religion and are persecuted have two options: either to migrate to, or to seek support of, an Islamic State. Whether the Sharī'ah has prescribed any priority order between these two options or whether there is a third option as well remain to be ascertained. One thing is certain though: that they are not allowed to leave their religion because of persecution.

Now, let us see what our *fuqahā'* say about this issue?

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[16] If the Sharī'ah were not to allow this, then any person embracing Islam from among the citizens of a non-Muslim state would have either to migrate to Islamic State or jurisdiction of Islamic State would have to be extended to his place of residence. In the first case, migration to Islamic State would have been obligatory upon each and every person embracing Islam in a non-Muslim state. In the second case, Islamic State would have been under an obligation to cover the whole world because of the possibility that at any given time any person in any part of the world would embrace Islam. It would have been a 'World State', which, of course, has not been the case. This World State vision would also impose a duty upon Muslims to wage a perpetual war against all the non-Muslim states, which would mean that war is the general rule and peace is an exception. This, of course, is not the case, as we discussed in detail in the previous Chapter.

6.1.1.2 Muslim Citizens of a Non-Muslim State

Our fuqahā' discuss the rules of Shari'ah regarding different categories of born Muslim citizens of a non-Muslim State under the title of *hijrah*. Ibn Qudāmah elaborated the rules about *hijrah* in the following way:

> "So, for the purpose of *hijrah*, people are of three kinds:
>
> Those on whom it is obligatory, and they are those who has the capacity to migrate [to Islamic State] and they are not allowed to practice their religion...while living there among non-Muslims...
>
> Those for whom *hijrah* is not prescribed, and they are those who do not have the capacity to migrate either because of illness or coercion to live there or due to weakness, such as women, children and the like...
>
> Those for whom it is not obligatory but still it is preferable for them [to migrate], and they are those who have the capacity to migrate, although they can profess their faith there. It is preferable for them because they would help them [Muslims of Islamic State] in their Jihād and would support and strengthen them numerically. Moreover, they would be relieved from the dominance of non-Muslims and the risk of mixing with them as well as from seeing sinful acts there."[17]

So, according to Ibn Qudāmah, there are two basic factors:

a) Whether or not Muslims are allowed to practice religion;
b) Whether or not they have the capacity to migrate to Islamic State.

It follows that there are four possible situations, although Ibn Qudāmah discussed only three of them:

1) When Muslims are not allowed to practice their religion and they have the capacity to migrate to Islamic State. In this case, migration is obligatory.

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[17] *Al-Mughnī*, vol. 13, p 151

2) When Muslims are not allowed to practice their religion and they do not have the capacity to migrate to Islamic State. In this case migration is neither obligatory nor recommended.
3) When Muslims are allowed to practice their religion and they have the capacity to migrate to Islamic State. In this case, migration is not obligatory, although it is deemed recommended.
4) When Muslims are allowed to practice their religion and they do not have the capacity to migrate to Islamic State. This may be the case where Muslims are allowed internal autonomy but are not given full independence. This is what we previously called 'second level' self-determination. Ibn Qudāmah did not discuss this situation but it appears that in this case, migration is neither obligatory nor recommended. This is important and we will come to this issue again at some later stage *in shā' Allāh*.

It appears from the analysis of Ibn Qudāmah that Islamic Law does not prefer Muslims' permanent residence in a non-Muslim state. So, even if Muslims are allowed to practice their religion it is deemed preferable for them to migrate to Islamic State, if possible. So, the fuqahā' would not allow, or at least would discourage, Muslims' migration from Islamic State to a non-Muslim state for the purpose of permanent settlement. Basing our argument on the reasoning of Ibn Qudāmah, we can derive the following rules:

i) If a non-Muslim state does not allow Muslims to practice their religion then Muslims' migration to that state for permanent residence would be absolutely prohibited. So, for instance, the fuqahā' prohibited, or at least disliked it for a Muslim who is temporarily in *dār al-kufr* to have sexual intercourse with his wife. Ibn Qudāmah says that it is preferable for a Muslim, if he ever wants to have sexual intercourse with his wife, to have *'azl* with her "so that she might not give birth to a child". The reason he provides is that non-Muslims might get influence or

domination over that child or he may become non-Muslim if he grows up there.[18] Imām Abū Ḥanīfah has given yet another reason, which is more important for our present discussion:

> "I dislike it if a person has sexual intercourse with his wife or concubine in the *dār al-ḥarb* as it is likely that she might bear child while *he is prohibited from getting settled [tawaṭṭun] in dār al-ḥarb*... And even if he gets out [of *dār al-ḥarb*] his children might stay there and might develop the character of non-Muslims."[19]

ii) If a non-Muslim state allows Muslims to practice their religion then permanent settlement there will not be prohibited, although it will be deemed abominable (*makrūh*). This is because the fuqahā' deemed it preferable for Muslims who are born citizens of a non-Muslim state and are allowed to practice their religion to migrate to Islamic State. So, a Muslim who leaves Islamic State to permanently settle in a non-Muslim state would commit a disapproved act even if he is allowed to practice his religion there. This may seem too rigid but this is what our fuqahā' say and this how they understood the Sharī'ah.

6.1.1.3 Sharī'ah Regulations for Muslims in a Non-Muslim State

The tradition of the holy Prophet (May Allāh's blessings be upon him) quoted above makes it obligatory upon Muslims to abide by the norms Sharī'ah even if they prefer not to migrate to *dār al-Islām*:

> "Then invite them to migrate from their lands to the land of *Muhājirs* and inform them that, if they do so, they shall have all the privileges and obligations of the *Muhājirs*. If they refuse to migrate, tell them that they will

[18] Ibid., pp 148-49
[19] *Al-Mabsūṭ*, vol. 10, 58

have the status of Bedouin Muslims and will be subjected to the Commands of Allāh like other Muslims, but they will not receive any share from the spoils of war or *fay'* except when they actually fight with the Muslims [against the nonbelievers]."[20]

Sharī'ah is a divine law and as such knows no territorial limits. Abū Yūsuf has given the following famous *dictum*:

"A Muslim is to regulate his conduct according to laws of Islam wherever he may be."[21]

But, as we noted earlier, this is true, according to Abū Ḥanīfah, from theological perspective only. As far as that portion of law is considered, which we termed as Municipal Law of Islamic State, he is not bound by it. It simply means that he is outside the jurisdiction of Islamic State and that is why he cannot be sued in the Municipal Courts of Islamic State for an act committed in the *dār al-kufr*. This is true for a Muslim who temporarily or permanently resides in *dār al-kufr*. From the aspect of International Law, a Muslim who is permanent resident of *dār al-kufr* has the same position as that of a non-Muslim. This is very important. The famous Ḥanafī jurist Abū Bakr al-Jaṣṣāṣ says:

"Al-Ḥasan ibn Ṣāliḥ said: When an alien [resident of *dār al-ḥarb*] embraces Islam and stays there [in the *dār al-ḥarb*], although he had the capacity to migrate to Islamic State, *he is not [to be treated as] a Muslim*. He is to be dealt with in matters of life and property in the same manner as alien non-Muslims are dealt with"[22]

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[20] Muslim, *Kitāb al-Jihād* Hadith no. 3261; Tirmidhī, *Kitāb al-Siyar*, Hadith no. 1532; Ibn Mājah, *Kitāb al-Jihād* Hadith no. 2849

[21] *Al-Mabsūṭ*, vol. 10, p 95

[22] *Aḥkām al-Qur'ān*, vol. 2, p 297

Although the apparent meaning of his words is that such a person is not a Muslim but we added some words to elaborate the real meaning intended. Such a person is a Muslim from theological perspective. He will be treated as a Muslim on the Day of Judgment. But as far as Islamic State is considered it has no obligation in respect of the protection of his life, property and honor. This is what is expressed in the following manner as well:

> "A person who is in the *dār al-ḥarb* is for those living in the *dār al-Islām* like a dead person."[23]

Al-Jaṣṣāṣ elaborating the Ḥanafī viewpoint has the following to say:

> "There is no value of the life of a person who settled in the *dār al-ḥarb* after embracing Islam, unless he migrates to Islamic State... Our people [the Ḥanafīs] dealt with him in the manner they deal with the alien [non-Muslim] *in regard of the wavering of compensation for damage to his property*[24]... His property is like the property of alien [non-Muslim] from this perspective. And that is why Abū Ḥanīfah validated those transactions with him, which are valid with the aliens [non-Muslim], like exchange of one *dirham* for two *dirhams* in the *dār al-ḥarb*."[25]

However, abiding by the laws of Islam, or Sharī'ah, is not the only restriction upon a Muslim. He must also abide by the law of the land.[26] This would, of course, imply that certain religious duties would not be imposed upon them. So, for instance, Jihād is one of the important religious duties and in case of an attack on Muslim lands it becomes the duty of every Muslim to do whatever he can for its

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[23] *Al-Mabsūṭ*, vol. 10, p 63
[24] As well as life, as noted above.
[25] *Aḥkām al-Qur'ān*, vol. 2, p 297
[26] *The Muslim Conduct of State*, p 114

defense.[27] But Sarakhsī explicitly states that this obligation is imposed only on those Muslims who are in *dār al-Islām*. So, Muslims present permanently or temporarily in *dār al-kufr* are not under an obligation to defend *dār al-Islām*.[28]

6.2 PEACEFUL STRUGGLE FOR RELIGIOUS FREEDOM

We concluded above that Muslim residents of a non-Muslim state, on the one hand, must abide by the law of the land and, on the other, they should not leave their religion under any circumstances whatsoever. No problem arises if both these obligations can be fulfilled. However, problem does arise when abiding by the law of the land means violating the norms of Sharī'ah. It is true that certain norms of the Sharī'ah do not apply to those Muslims who live in non-Muslim state, as noted above. But what if they are not allowed to fulfill those obligations, which are imposed upon all Muslims even if they live in a non-Muslim state?

The first thing they are required to do is to peacefully work for their right of religious freedom. This is evident from the models of all Prophets mentioned in the holy Qur'ān. Prophets Nūḥ, Hūd, Ṣāliḥ, Ibrāhīm, Lūṭ, Yūsuf, Shu'ayb, Mūsā, Hārūn, Zakarīya, Yaḥyā, and 'Īsā (May Allāh's blessings be upon them all) all followed the same way. They first tried to convince the local authorities of the truth of their preaching. When only a few of them accepted their message and the overwhelming majority rejected it they tried to convince the majority to allow them the right to practice their own faith. Thus, Prophet Shu'ayb (May Allāh's blessings be upon him) said to his opponents:

> "And if there is a party of you which believeth in that wherewith I have been sent, and there is a party which believeth not, then have patience until Allāh judge between us. He is the best of all who deal in judgment."[29]

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[27] See section 6.4.1.4 below.

[28] *Al-Mabsūṭ*, vol. 10, p 98 For further details see Section 6.3.1.1 below.

[29] *Qur'ān* 7:87

So was the case with Prophet Muḥammad (May Allāh's blessings be upon him) in Makkah. He never took the law into his hands.[30] He and his followers were always taught to be patient and were not allowed to retaliate even when they were bitterly persecuted.[31] In the last phase of their stay in Makkah individual Muslims were allowed to retaliate in equal measure, although it was stressed that to forgive is better.

> "And those who, when great wrong is done to them, defend themselves, the guerdon of an ill deed is an ill the like thereof. But whosoever pardoneth and amendeth, his wage is the affair of Allāh. Lo! He loveth not wrong doers. And whoso defendeth himself after he hath suffered wrong for such, there is no way [of blame] against them. The way [of blame] is only against those who oppress mankind, and wrongfully rebel in the earth. For such there is a painful doom. And verily whoso is patient and forgiveth, lo! that, verily, is [of] the steadfast heart of things.[32]

When Muslims were not allowed to practice their religion in Makkah the Prophet (May Allāh's blessings be upon him) tried to search for a place where Muslims could live in accordance with the norms of the Sharī'ah. Abyssinia was the choice.[33] Some Muslims migrated there and lived there under the protection of the Negus. They were allowed religious freedom there.[34] Then, the holy Prophet (May Allāh's blessings be upon him) searched for a place where Islamic State could be established. This was also through peaceful means of *da'wah* (preaching). He tried

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[30] This has been elaborated in the next paragraphs. See also Section 6.4.1.3 below. See for further details: Mawdūdī, Islamic Law and Constitution, pp 92-119; *Islāmī Riyāsat*, pp 693-720. See also: Jāvēd Aḥmad Ghāmidī, *Burhān*, (Lahore: Dānish Sarā, 2000), pp 184-96; Asif Iftikhar, *Murder, Manslaughter and Terrorism – All in the Name of Allāh*, (Lahore, 2000); Manẓūr al-Ḥasan, *Answer to a Critique on Jihād* Monthly "Ishrāq", Lahore, July 2000, pp 55-58.

[31] See, for instance, *Qur'ān*, 6:34, 11:112-23 and16:125-26.

[32] *Qur'ān* 42:39-43

[33] Aḥmad, *Musnad Ahl al-Bayt*, Hadith no. 1649; *Musnad 'Abdullāh bin Mas'ūd*, Hadith no. 4168; *Ṭabaqāt Ibn Sa'ad*, vol. p

[34] Ibid.

to convince the leaders of Ṭā'if – the second biggest city in Arabia after Makkah.[35] Their response was disappointing. He kept on trying. Finally, the inhabitants of Yathrib accepted his message and offered their city for this purpose.[36] Muslims in Makkah and other places were ordered to migrate to Yathrib. The migration to Abyssinia was from one non-Muslim state to another non-Muslim state for the purpose of religious freedom. Migration to Yathrib was for the purpose of establishing Islamic State. After the holy Prophet migrated to Yathrib he was received as the ruler of the city-state and the name Yathrib was changed to "*Madīnat al-Nabī*" or "The Prophet's City".[37]

After the establishment of Islamic State Muslims who were persecuted in Makkah and other places were ordered to migrate to Madīnah, if possible. Now, there was no need to migrate to Abyssinia for the purpose was achieved here in Arabia. Migration to Madīnah was not obligatory upon those Muslims who could practice their religion in their birthplace, although it was deemed preferable for them so as to strengthen Islamic State and to protect their faith and particularly their new generations from the effects of non-Muslim society. So was the case with those living in Abyssinia.

Those Muslims who were persecuted and were not allowed to migrate to Madīnah were in a miserable situation. The local authorities coerced them to leave Islamic faith. So, Qur'ān warned such people of the dire consequences that would follow in the Hereafter when one leaves faith after accepting it.

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[35] *Al-Sīrah al-Nabawīyah*, vol. 1, pp ; *Sīrat al-Nabī*, vol. 1, pp 151-52; Martin Lings, *Muḥammad*, pp 96-100

[36] Bukhārī, *Kitāb al-Manāqib*, Hadith no. 3603; Aḥmad, *Musnad Jābir bin 'Abdullāh*, Hadith no. 13934; *Al-Sīrah al-Nabawīyah*, vol. 1, pp ; *Sīrat al-Nabī*, vol. 1, pp 155-60; Martin Lings, *Muḥammad*, pp 108-12

[37] The *bay'ah 'Aqabah* was not merely declaration of the tenets of faith. More than that, it was oath of allegiance to the Prophet (May Allāh's blessings be upon him) whereby the *Anṣār* of Madīnah accepted him as their ruler. (Aḥmad, *Musnad Jābir bin 'Abdullāh*, Hadith no. 13934; Bukhārī, *Kitāb al-Fitan*, Hadith no. 6532; Muslim, *Kitāb al-Imārah*, Hadith no. 3427) Hence, he did not go there as a "refugee". Rather, he was welcomed as the Prophet-ruler of the Islamic State. (Mawdūdī, *Sīrat-e-Sarwar-'Ālam*, vol. 2, p 706; Ghāmidī, *Burhān*, pp 178-83)

"Whoso disbelieveth in Allāh after his belief save him who is forced thereto and whose heart is still content with Faith but whoso findeth ease in disbelief: On them is wrath from Allāh. Theirs will be an awful doom. That is because they have chosen the life of the world rather than the Hereafter, and because Allāh guideth not the disbelieving folk. Such are they whose hearts and ears and eyes Allāh hath sealed. And such are the heedless. Assuredly in the Hereafter they are the losers. Then lo! thy Lord–for those who become fugitives after they had been persecuted, and then fought and were steadfast–lo! thy Lord afterward is [for them] indeed Forgiving, Merciful."[38]

On the other hand, it made it obligatory upon Muslims living in the Islamic State of Madīnah to help such people out of persecution.

"How should ye not fight for the cause of Allāh and of the feeble among men and of the women and the children who are crying: Our Lord! Bring us forth from out this town of which the people are oppressors! Oh, give us from Thy presence some protecting friend! Oh, give us from Thy presence some defender!"[39]

From the foregoing it is evident that if Muslims are in microscopic minority then they should either migrate to, or seek support of, Islamic State.

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[38] *Qur'ān* 16:106-10 See also 2:217-18 ("They question thee [O Muḥammad] with regard to warfare in the sacred month. Say: Warfare therein is a great [transgression], but to turn [people] from the way of Allāh, and to disbelieve in Him and in the Inviolable Place of Worship, and to expel his people thence, is a greater with Allāh; for persecution is worse than killing. And they will not cease from fighting against you till they have made you renegades from your religion, if they can. And whoso becometh a renegade and dieth in his disbelief: such are they whose works have fallen both in the world and the Hereafter. Such are rightful owners of the Fire: they will abide therein. Lo! those who believe, and those who emigrate [to escape the persecution] and strive in the way of Allāh, these have hope of Allāh's mercy. Allāh is Forgiving, Merciful.")

[39] *Qur'ān* 4:75

What if they are in a considerable number and they can play some active role? Should they leave the land and migrate to Islamic State? Or should they strive for achieving some sort of self-determination and seek support of Islamic State in this regard, if necessary? Last but not the least, should this struggle for self-determination be for complete independence or the primary aim should be to achieve internal autonomy so that religious freedom is secured?

As discussed above, the examples from earlier Islamic history of *hijrah* to Islamic State of Madīnah suggest that the immigrants were a small group who were scattered and less organized having no political influence.[40] Indeed, if they are in a considerable number why should they leave their land to non-Muslim oppressors? Here we may discuss the example of Prophet Mūsā (May Allāh's blessings be upon him).

Israelites came to Egypt during the rule of Yūsuf (May Allāh's blessings be upon him). They lived and flourished there. Of course, they also propagated their religion and that is why lots of local inhabitants embraced their religion.[41] When nationalist revolution succeeded in overthrowing the Hyksos kings and establishing the rule of Egyptian Pharaohs the persecution of Israelites and their religious brothers from local population started. Their persecution was among the worst human history has ever witnessed. They were in considerable number[42] but were scattered throughout the country. Prophet Mūsā (May Allāh's blessings be upon him), on the one hand, tried to convince the Pharaoh of the truth of his message and on the other he tried hard to revive religious zeal in his followers.[43] So, he asked them to be patient in face of persecution and be sure that God would

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[40] Dr Ghāzī suggests that the total number of Muslims in Makkah before *hijrah* was less than 750. (*Khuṭbāt-e-Bahāwalpūr*, p)

[41] See, for instance, Exodus 12:38 "A *mixed multitude* also went up with them." (RSV)

[42] According to the Bible, there were about 600,000 male persons. Women and children were more than this. (Exodus 12:37)

[43] Those who portray Mūsā (May Allāh's blessings be upon him) as a nationalist leader are in fact influenced by Judeo-Christian traditions. The holy Qur'ān explicitly mentions him as the Prophet who along with his brother Hārūn (May Allāh's blessings be upon him) preached the religion of God to Pharaoh (see, for instance, *Qur'ān* 20:9-82, 79:15-26). For detail see Amīn Aḥsan Iṣlāḥī, *Was Mūsā (May Allāh's blessings be upon him) a Nationalist Leader or a Prophet and Messenger?* in "Tanqīdāt", (Lahore: Islamic Publications, 1978) pp 7-66.

help them.[44] He also tried to organize them. For this purpose, he was ordered to specify certain places in different cities where his followers would gather for congregational prayers.[45] This was the beginning of organization. Thus, he made them a power to the extent that the Pharaoh and his knights feared that they might establish their rule over Egypt and would overthrow Pharaoh.[46] He, then, asked Pharaoh to let his followers practice their religion. But the Pharaoh rejected this offer. Mūsā (May Allāh's blessings be upon him) asked the Pharaoh to let his followers gather at a place in the wilderness "at three days distance" to offer collective obedience to God.[47] The pharaoh not only rejected this but also bitterly persecuted them. As a consequence he saw different punishments from God after which he accepted this demand.[48] But when Mūsā (May Allāh's blessings be upon him) and his followers proceeded to their destination the Pharaoh followed them with his forces in order to collectively punish them and break their force.[49] That is why Qur'ān describes this act of Pharaoh as "*insolence*" and "*transgression*".[50] Then, God the Omnipotent drowned the Pharaoh and his forces and rescued Mūsā (May Allāh's blessings be upon him) and all of his followers.[51] After this they went forward to establish Islamic State.[52]

This brief description of the life history and mission of Prophet Mūsā (May Allāh's blessings be upon him) shows the guiding principles for Muslims living in a non-Muslim state as minority when such minority can exert some political influence. The foremost thing is that this movement was peaceful throughout. Resort to violence was never made even though they were bitterly persecuted. Secondly, Mūsā (May Allāh's blessings be upon him) tried to preach his message to the local authorities. This is the duty of Muslims wherever they live. If the non-Muslim

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[44] *Qur'ān* 7:127-28, 10:83-86
[45] *Qur'ān* 10:87
[46] *Qur'ān* 20:57, 7:109-10
[47] Exodus 3:18-20, 5:1-5, 10:8-18
[48] *Qur'ān* 7:130-36, 43:46-56
[49] *Qur'ān* 26:53-56
[50] *Qur'ān* 10:90
[51] *Qur'ān* 26:65-66
[52] *Qur'ān* 7:137, 44:28, 5:20-26

rulers or population accepts this message the state would automatically convert into Islamic State. If not, they should try to get the right to religious freedom secured. For this purpose, they have to organize under the leadership of one leader.[53] So, organization and discipline is the third lesson we get from his life. As there was no Islamic State present at that time that could support them this option was not available to them. So was the case with Muslims of Makkah before the establishment of Islamic State in Madīnah, as discussed above.

But there is one major difference between the struggle of the Muslims of Makkah and that of the Muslims of Egypt. Muslims in Makkah were in microscopic minority while those of Egypt were in a considerable number, though still in minority. That is the reason why Muslims of Makkah had no option but to search for a land where they could practice their religion while Muslims of Egypt tried to do so within Egypt till they were forced to migrate. It must be noted that Mūsā (May Allāh's blessings be upon him) and his followers did not initially intend to migrate from Egypt. They were driven by the force of events.[54] What follows is that migration is not the only option available to Muslims who are persecuted in non-Muslim states. They can, and they should, strive for some sort of self-determination if they are in considerable number and can exert some political pressure following the example of Prophet Mūsā (May Allāh's blessings be upon him). In this regard, they may get full independence (first level self-determination) or at least they can achieve some sort of internal autonomy and religious freedom (second level self-determination).

To conclude then, Muslims living in minority in non-Muslim states should strive to get the right of religious freedom secured through peaceful means. If they are persecuted and they are in a microscopic minority the Sharī'ah imposes upon them the duty to migrate to, or seek support of, Islamic State. If they are in a

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[53] The holy Prophet (May Allāh's blessings be upon him) greatly emphasized organization and discipline so much so that he ordered that when Muslims offer prayers they should appoint a leader among themselves even if they are only three persons. (Muslim, *Kitāb al-Masājid wa al-Imāmah*, Hadith no. 1077) See also Section 6.3.3 below.

[54] See *Mūsā (May Allāh's blessings be upon him) a Nationalist Leader?* pp 54-63.

considerable number they should strive for some sort of self-determination and seek support of Islamic State in this regard. Have they the right to take up arms for this purpose as a last resort?

6.3 ARMED LIBERATION STRUGGLE

There are some scholars who argue that taking up arms is allowed only under the command of government. There is no room in the Sharī'ah for "Private Jihād ", as they call it.[55] They argue that the Prophet (May Allāh's blessings be upon him) never took up arms in Makkah even when Muslims were bitterly persecuted. *Qitāl (war) was allowed only after Muslims migrated to Madīnah and established Islamic* State there. In their opinion, the options available to these persecuted Muslims are either to migrate to, or seek support of, Islamic State.[56] This seems too ridiculous to some. [57] Others would call it too idealistic approach.[58] We would analyze this viewpoint in a bit detail and for this purpose we will divide the argument into different parts.

6.3.1 Jihād and Imām (Government)

Some scholars do not see argue that any person or group of persons can wage Jihād against "the infidels".[59] For them, the texts of Qur'ān and Sunnah regarding Jihād are absolute and even if they were revealed at Madīnah they do not establish that the authority to wage Jihād lies with State. Generally, this group believes in the *state of perpetual war between Muslims and non-Muslims who live outside Islamic* State.[60] Moreover, they argue that governments in most of the Muslim Countries

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[55] Interview with Jāvēd Aḥmad Ghāmidī, Daily "Pakistan", Islamabad, Sunday Magazine, pp , November, 2001.
[56] Ghāmidī, *Qānūn-e-Jihād*, pp 243-45; *Burhān*, pp ;
[57] *Al-Jihād al-Islāmī*, pp 233-74; *Qānūn-e-Da'wat-o-Jihād* pp
[58] Mawlānā Zāhid al-Rāshidī,
[59] *Al-Jihād al-Islāmī*, pp 233-74 This is also the viewpoint of the Jihādī Organizations.
[60] Ibid., pp 97-114

do not wage Jihād against the wrongdoers even if it becomes obligatory and that is why individuals take it upon themselves to help their oppressed brethren.[61]

The example of Abū Buṣayr and his colleagues (May Allāh be pleased with them) is often quoted to prove the legitimacy of fighting with non-Muslims without governmental control.[62] Abū Buṣayr fled from Makkah due to persecution but was given back to the Makkans by the Prophet (May Allāh's blessings be upon him) under the treaty of Ḥudaybīyah. Then, he succeeded in fleeing to a place outside the jurisdiction of the Madinan State on the highway to Syria. Afterwards several other Muslims fled from Makkah and gathered there. They formed a group[63] and started attacking the caravans of the Makkans. Then, the Makkans themselves waived the condition of Hudabiyah treaty under which Muslims were bound to give them the persons who fled from Makkah.[64]

This, it seems, is a misinterpretation of the events. Firstly, these people were out of the jurisdiction of the Islamic State. Is there any example of the Muslims of Madīnah waging war without the approval of the Prophet (May Allāh's blessings be upon him)? Secondly, the holy Prophet (May Allāh's blessings be upon him) himself disliked this activity. Look at the wording of the tradition as reported by Bukhārī, the most authentic of the Hadith compilations:

> "Abū Buṣayr came and said, 'O Allāh's Apostle, by Allāh, Allāh has made you fulfill your obligations by your returning me to them, but Allāh has saved me from them.' The Prophet said, '*Woe to his mother! What excellent war kindler he would be, should he only have supporters.*' When Abū Buṣayr heard that *he understood that the Prophet would return him to them again*, so he set off till he reached the seashore."[65]

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[61] Ibid., 269

[62] Ibid., pp 261-69 See also: Zāhid al-Rāshidī,

[63] Bukhārī, *Kitāb al-Shurūṭ*, Hadith no. 2529

[64] Ibid.

[65] Ibid.

Some argue that even if they were outside the jurisdiction of Madīnah they were Muslims and the Prophet (May Allāh's blessings be upon him) could prohibit them. But this argument loses its ground if the fine difference between the theological and municipal perspectives of Islamic Law, as envisaged by the Ḥanafī jurists, is kept in mind. That difference is based on explicit texts of Qur'ān and Sunnah. Even a Ḥanbalī jurist Ibn Qayyim al-Jawzīyah says about this incident.

> "The Prophet (May Allāh's blessings be upon him) never did an act, which was in contravention of the treaty provisions. And when he concluded with them peace treaty on the condition that he would return the men [who fled from Makkah] he always facilitated for them to get back these men, although neither did he coerce nor order any of them to go back. When any of these men killed someone of them [the Makkans] or usurped their property he neither prohibited them nor gave compensation for that, *if the perpetrator was out of his hand* and did not reach them. This was because of the fact that neither he was under his jurisdiction (*taḥta qahrih*) nor did he order him and the peace treaty put on the Prophet (May Allāh's blessings be upon him) the responsibility regarding damage to life and property only by the acts of the persons who were under his jurisdiction. Thus, he compensated the damage Khālid [bin al-Walīd] caused to Banū Judhaymah and disliked this act."[66]

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[66] *Zād al-Ma'ād*, pp 215-16 Sayyid Mawdūdī also finds a ground in this incident for the doctrine of territorial jurisdiction: "The *Sharī'ah* dos not admit of a situation in which the Muslim people may be deemed to be absolved of the moral responsibility of the treaty entered into by their state. But the moral responsibility of the treaties of the Islamic State will devolve only on the Muslims who are citizens of the Islamic State. It will not extend or apply to those Muslims who are not citizens of the State binding itself by a treaty. That is why the Treaty of *Ḥudaybīyah* was not deemed to be binding on those Muslims of Mecca (*e.g., Abū Baṣīr and Abū Jandal*) who had not yet become the citizens of the Islamic State." (*Islamic Law and Constitution*, p 187)

There is yet another group of scholars who believe that to wage "offensive" Jihād is the authority of State. But they see no reason for State's permission in case of "defensive" Jihād.[67]

Those who claim that Jihād is to be fought under the command of the ruler primarily argue that the struggle of the Prophets (May Allāh's blessings be upon them all) as mentioned in Qur'ān clearly establish that none of them waged Jihād before establishing a government of their own.[68] Moreover, there are certain traditions of the holy Prophet (May Allāh's blessings be upon him), which establish clearly that this is a pre-requisite for the validity of Jihād:

> "Ruler is a shield for them [the Muslims] behind whom they fight, and they seek his protection. If the Imām orders people with righteousness and rules justly, then he will be rewarded for that, and if he does the opposite, he will be responsible for that."[69]

> "He who obeys me, obeys Allāh, and he who disobeys me, disobeys Allāh. He who obeys the chief, obeys me, and he who disobeys the chief, disobeys me. The Imām is a shield behind whom Muslims fight, and they seek his protection. If the Imām orders people with righteousness and rules justly, then he will be rewarded for that, and if he does the opposite, he will be responsible for that."[70]

It is also mentioned in certain traditions that even if the ruler is known for his bad character, Jihād is to be fought under his command.

> "Jihād in the path of Allāh is incumbent on you along with every ruler, whether he is pious or impious; the prayer is obligatory on you behind

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[67] Monthly "Ishrāq" Lahore, 2001
[68] Ibid.
[69] Bukhārī, *Kitāb al-Jihād wa al-Siyar*, Hadith no. 2737; Muslim, *Kitāb al-Imārah*, Hadith no. 3428
[70] Bukhārī, *Kitāb al-Aḥkām*, Hadith no. 6604; Muslim, *Kitāb al-Imārah*, Hadith no. 3418

every believer, pious or impious, even if he commits grave sins; the [funeral] prayer is incumbent upon every Muslim, pious and impious, even if he commits major sins."[71]

Imām Aḥmad bin Ḥanbal when asked about a ruler who is well known for drinking wine or misappropriation he replied that Jihād is to be fought under his command and the burden of his sins would be on him.[72] He based his opinion on the following tradition of the holy Prophet (May Allāh's blessings be upon him):

"None will enter Paradise but a Muslim, and Allāh may support this religion even with a disobedient man."[73]

6.3.1.1 The Role of Government in Jihād – The Views of Classical Jurists

Our fuqahā' did lay great emphasis on the role of *Imām* (ruler) in matters pertaining to Jihād. This is evident from the following few instances:

1) They categorically declare that the matters of Jihād are primarily in the authority of the ruler. He has the authority to declare war. Others should obey his commands n this regard. Ibn Qudāmah, the famous Ḥanbalī jurists, wrote:

"The issue of Jihād is referred to the *Imām* and his *ijtihād* and the subjects are bound to obey his commands in what he sees in this regard"[74]

When the Imām appoints the commander he should be obeyed in all respects. None is allowed even to "speak about any thing" without his

[71] Abū Dawūd, *Kitāb al-Jihād* Hadith no. 2171
[72] *Al-Mughnī*, vol. 13 p
[73] Bukhārī, *Kitāb al-Jihād wa al-Siyar*, Hadith no. 2834; Muslim, *Kitāb al-Īmān*, Hadith no. 162; Aḥmad, *Musnad Abi Hurayrah*, Hadith no. 7744
[74] *Al-Mughnī*, v 13, p 16

permission.[75] Abū Yūsuf, the disciple of Abū Ḥanīfah, categorically declared:

> "No troops should go for war except with the permission of the Imām or of the one whom he appointed as commander of troops. And none of the Muslim soldiers should attack on a non-Muslim soldier nor should he challenge him except with the permission of the commander of troops."[76]

Shaybānī declared that this principle holds true even for non-Muslims in so far as if their troops attacked Islamic State without the permission of the legitimate authority it would be considered their personal act and, thus, it should not be taken as declaration of war from the non-Muslim state. He emphasized that while Islamic State would punish these perpetrators it should also get it confirmed from the government of the other state whether it had declared war or was it the act of some individuals.[77] What else is required to prove the claim that our fuqahā' believed in Jihād under the command of state?

2) One of the corollaries of war is sending and receiving of messengers and ambassadors. The fuqahā' also unanimously consider it a prerogative of government. So, they discuss in detail the issue pertaining to the protection of the life and property of ambassadors and diplomats as well as the role of government in this regard.[78]
3) The fuqahā' discuss in detail the ruler's authority to decide about the children, women and older people of the enemy population captured in

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[75] Ibid., p 44
[76] *Kitāb al-Kharāj*, p 215
[77] *Badā'i' al-Ṣanā'i'*, vol. 7, pp 109-10
[78] See, for instance, *Al-Mabsūṭ*, vol. 10, p 92; *Sharḥ al-Siyar al-Kabīr*, vol.1, p 99; *al-Mudawwanah*, vol. 3, p 11. See also *Āthar al-Ḥarb*, pp 328-44

war.[79] So is the case with the prisoners of war.[80] There may be some dubious cases where decision about the fate of POWs becomes difficult, such as if any of them embraces Islam[81] or is made citizen of Islamic State by imposing *jizyah* on him.[82] Our fuqahā' have given detailed rules, in accordance with their understanding of the Sharī'ah, for guiding the ruler in this regard.

4) One of the important issues in this regard is the fate of the wounded and ameliorated persons as well as of the dead bodies of soldiers. The fuqahā' also gave guideline for the ruler to follow.[83]

5) When a Muslim soldier captures an enemy soldier he is not allowed to kill him before bringing him to the ruler or his appointed commander because he has the authority to deal with them.[84] If he kills him without his permission it is considered as encroachment (*iftiyāt*) upon the authority of the Imām.[85]

6) About the weapon and other items captured from enemy soldier (*salab*) the Ḥanafīs opine that the matter is within the discretion of *Imām* while the other jurists say that these things belong to whosoever got them basing their argument on a tradition of the Prophet (May Allāh's blessings be upon him)[86]. The Ḥanafīs argue that the Prophet (May Allāh's blessings be upon him) allowed this at a particular moment using his discretionary powers as the ruler and, hence, the ruler can issue such a command if he sees it

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[79] *Sharḥ al-Siyar al-Kabīr*, vol. 2, p 269; *al-Mudawwanah*, vol. 3, p 9; *al-Umm*, vol. 4, p 198; *Āthar al-Ḥarb*, pp 417-29

[80] *Al-Mabsūṭ*, vol.10, p 64; *al-Umm*, vol. 4, p 68; *Āthar al-Ḥarb*, pp 429-57

[81] *Al-Mabsūṭ*, vol. 10, p 64; *Sharḥ al-Siyar al-Kabīr*, vol.2, p 263; *al-Mughnī*, vol. 8, p 374; *al-Umm*, vol. 4, p 159; *Āthar al-Ḥarb*, pp 461-63

[82] *Al-Baḥr al-Rā'iq*, vol. 5, p 82; *al-Umm*, vol. 4, p 68; *al-Mughnī*, vol. 8, p 375; *Āthar al-Ḥarb*, pp 458-61

[83] *Al-Amwāl*, p 65; *Al-Mabsūṭ*, vol. 10, p 22; *Sharḥ al-Siyar al-Kabīr*, vol.1, p 78; *al-Umm*, vol. 4, p 157; *Āthar al-Ḥarb*, pp 475-92

[84] *Al-Mabsūṭ*, vol. 10, p 64; *Al-Mughnī*, vol. 13, p 51

[85] Ibid.

[86] The holy Prophet (May Allāh's blessings be upon him) is reported to have said: "Whosoever killed an enemy soldier his belongings are for the murderer." (Bukhārī, *Kitāb Farḍ al-Khumus*, Hadith no. 2909; Aḥmad, *Musnad Anas bin Mālik*, Hadith no. 11789)

better.[87] They base their opinion on the saying of the Prophet (May Allāh's blessings be upon him):

> "Nothing is permissible for a soldier except with the permission of his ruler."[88]

7) Another important issue is the effect of war on trade relations. The fuqahā' have given detailed rules, which the ruler should keep in mind while giving permission to foreigner traders for trade in Islamic State and for Muslims to go to non-Muslim state for this purpose.[89] Similarly, they have given the rules for imposing duties, taxes and other restrictions on them.[90]
8) The ruler has the authority to decide what has to be done with the property captured from enemy.[91] This property may either be moveable or immoveable. Similarly, it may have been captured by force (i.e. through conquer), or by a peace treaty. In each case, there are detailed rules about the distribution of the property and the taxes imposed on it. These rules are discussed under the titles of *ghanīmah* and *fay'*.[92] Similarly, the fuqahā' have also discussed in detail the issue of the time and place of the distribution by the ruler of the property captured.[93]
9) Sarakhsī also categorically declared that if the Sharī'ah did not fix the amount in some matters then the authority to determine its amount lies with the Imām.[94]

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[87] *Al-Mabsūṭ*, v 10 pp 47-49 See also: Bukhārī, *Kitāb al-Jihād wa al-Siyar*, Hadith no. 2823.
[88] Ibid., p 49
[89] *Kitāb al-Kharāj*, p 99; *al-Mudawwanah*, vol. 3, p 102; *al-Muḥallā*, vol. 7, p 349
[90] *Kitāb al-Kharāj*, p 135; *Al-Mabsūṭ*, vol. 10, p 92; *al-Umm*, vol. 4, p 198; *al-Mudawwanah*, vol. 3 p 102; *Āthar al-Ḥarb*, pp 512-48
[91] *Al-Mughnī*, vol. 8, p 422; *al-Umm*, vol. 4, p 103; *al-Muḥallā*, vol. 7, p 341; *al-Mabsūṭ*, vol. 10, p 15; *al-Mudawwanah*, vol. 3 p 26
[92] *Āthar al-Ḥarb*, pp 549-635
[93] *Al-Mughnī*, vol. 8, p 421; *al-Umm*, vol. 4, p 65; *al-Muḥallā*, vol. 7, p 341; *al-Mabsūṭ*, vol. 10, p 15; *al-Mudawwanah*, vol. 3 p 12; *al-Kharāj*, p 196; *al-Mabsūṭ*, vol. 10, p 19; *Āthar al-Ḥarb*, pp 627-635
[94] *Al-Mabsūṭ*, vol. 10, p 51

10) Some may claim that majority of Muslim jurists gave every Muslim the right of giving *amān*[95] (protection) to non-Muslims[96] and only a few Mālikī jurists, like Ibn Mājishūn and Ibn Ḥabīb, were of the opinion that even if an individual Muslim gave *amān* it would bind Islamic State only if it was approved and ratified by the *Imām* or his appointed commander.[97]

But the basis of the majority's opinion is the fact that in those days virtually every Muslim was either actually or potentially a soldier and, more often than not, was well equipped with war tactics.[98] Even then, these jurists put certain conditions on the right of individual soldiers to give *amān*, which narrowed down the scope of this right. Thus, for instance, most of them declared that the basis of *amān* is *maṣlaḥah* (a tactical benefit) of Muslims.[99] But, in fact, as Sarakhsī admitted, "*amān* vacillates between harm and benefit."[100] That is the reason why the Ḥanafīs gave the following verdict:

> "When Muslims besiege a castle none of them should give *amān* to the people besieged in castle or any of them except with the permission of *Imām*."[101]

Moreover, majority jurists made distinctions between the effect of *amān* given by *Imām* and of the one given by an ordinary person.[102] That is why a great majority of them opine that only the ruler or the one to whom he

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[95] Jurists say that *amān* is of two kinds: general, which is for all people; and particular, which is for one or a few persons. The first one is also called as *hudnah* (peace treaty). While the jurists generally agree that to give general *amān* is only the authority of Imām or his delegate they differed about particular *amān*. So, the majority validated it by almost any Muslim and a few jurists said that such an *amān* would be valid only if ratified by Imām or his delegate. (See, for details, *Mughnī al-Muḥtāj*, vol. 4, p 236; *Āthar al-Ḥarb*, p 225)

[96] *Sharḥ al-Siyar al-Kabīr*, vol. 1, p 168; *al-Mudawwanah*, vol. 3, p 41; *al-Mughnī*, vol. 8, p 396; *al-Umm*, vol. 4, p 196

[97] *Bidāyah al-Mujtahid*, vol. 1, p 270

[98] Sarakhsī says: "The benefit of *amān* is a concealed one and no one understands it except the soldier (*mujāhid*)." (*Al-Mabsūṭ*, vol. 10, p 71)

[99] *Sharḥ al-Siyar al-Kabīr*, vol. 1, p 169

[100] *Al-Mabsūṭ*, vol. 10, p 72

[101] *Sharḥ al-Siyar al-Kabīr*, vol. 1, p 356. See also, *Mughnī al-Muḥtāj*, vol. 4, p 238

[102] See, for instance, *Mughnī al-Muḥtāj*, vol. 4, p 236

delegated this authority can conclude treaties of temporary or permanent peace.[103]

As far as the rule about *amān* in contemporary world is concerned, warfare has become so complicated that an ordinary soldier, or even commander of a battalion, does not precisely know whether to give *amān* to a particular group would be beneficial or harmful. So, as Wahbah al-Zuḥaylī concluded,[104] the opinion of Ibn Mājishūn and Ibn Ḥabīb should be followed today. It will also be in consonance with the reasoning adopted by the majority jurists, especially the Ḥanafīs.

In fact, the rules of Jihād as derived and elaborated by the jurists are based primarily on the presumption that Jihād is to be fought under the authority and command of government. But it must be noted here that unlike the modern scholars who consider these as rights of government the fuqahā' them as duties of the government. Sarakhsī, for instance, opens the Chapter on Siyar (Islamic International Law) in his *al-Mabsut*, with a discussion on the role of *Imām* in Jihād:

"The Imām is always *under an obligation* to strive hard for going to Jihād himself or sending troops and battalions from among Muslims and rest assured about the good promise of Allāh regarding His help... So, when he sends troops he should appoint a commander (*amīr*) on them. This is what

[103] The jurists unanimously hold that only Imām or his delegate can conclude treaty of permanent peace (*dhimmah*). (*Fatḥ al-Qadīr*, vol. 4, p 368; *Mughnī al-Muḥtāj*, vol. 4, p 243) Overwhelming majority of the jurists is of the opinion that to conclude peace treaty for a temporary period (*hudnah*) is also the prerogative of the Imām or his delegate. (*Al-Mughnī*, vol. 13, p 157; *al-Umm*, vol. 4, p 110; *Āthar al-Ḥarb*, pp 665-68) Only the Ḥanafīs held that any individual Muslim could conclude it. (*Kitāb al-Kharāj*, p 207; *Sharḥ al-Siyar al-Kabīr*, vol. 4, p 4; *Badā'i' al-Ṣanā'i'*, vol. 7, p 108) The reason they provide is that peace treaty is based on *maṣlaḥah*, which can be grasped by any individual Muslim. While this might have been true in the ancient past and there might still be some situation where recourse to the central government becomes impossible and Muslims might conclude a treaty but it would bind the State only when the government ratifies it. Moreover, even the Ḥanafīs admit that *amān* vacillates between harm and benefit. So, we prefer the opinion of those jurists who hold that only Imām or his delegate can conclude *hudnah*. God knows best.

[104] *Āthar al-Ḥarb*, pp 279-82

the Prophet (May Allāh's blessings be upon him) used to do and because of this there will be unity among them."[105]

Similarly, they categorically say that the ruler must always act in such a manner that the interests of the *ummah* are secured. To quote again Sarakhsī:

"The ruler *is bound* to act in accordance with the interests of Muslims"[106]

"Our scholars (May Allāh have mercy on them) say that the validity of the acts of the ruler is based on whether he acted in the interests of Muslims *for this is the purpose of his appointment.*"[107]

Moreover, in the jurists' concept of Jihād there is primarily no distinction between the so-called "offensive" and "defensive" Jihād. Jihād is to be fought under the command of government, be it "offensive" or "defensive". Ibn Qudāmah explicitly laid down:

"When the enemy attacks [the Muslim territory] Jihād becomes obligatory upon every individual... So, it is not permissible [in such a situation] for any person to sit [in home] avoiding Jihād. If this is established, it must also be noted that they should not go [fighting] without the permission of the ruler because he is authorized to decide in matters of war and he better knows about the strength of the enemy as well as about their places and tactics. So, his opinion should be followed, as this is more secure way. This obligation is waved only when the enemies attack suddenly due to which it becomes impossible to take orders from him. So, in such a case taking permission from him is not obligatory because [in such a situation] the interest [of the

[105] *Al-Mabsūṭ*, vol. 10, pp 3-4
[106] Ibid., p 20
[107] Ibid., p 40

Muslims] is surely established in fighting and repelling them, for not fighting them would certainly lead to destruction."[108]

He, then, gives the example of Salamah ibn al-Akwa' (May Allāh be pleased with him), who fought in such a situation without the prior permission of the Prophet (May Allāh's blessings be upon him) who later approved his act.[109]

This is, in fact, a balanced approach and it takes into account the realities on ground. The idea that in all circumstances the explicit permission of the ruler is required is, indeed, not pragmatic. It is a too idealistic and theoretical approach.[110]

However, the fuqahā' have discussed some cases where they explicitly allow the use of force without the ruler's explicit, or even implied, permission. These are:

1) When some of the subjects of Islamic State go into the enemy territory and start fighting there;
2) When some of the subjects of Islamic State go temporarily to a non-Muslim state and that state declares war against another state.

As far as the first situation is considered, Sarakhsī in his down to earth approach says:

"Those who went out of a city of Muslims would either have *resisting power* (*mana'ah*) or not, and they would have gone either with the permission of the Imām or without it. So, whether they went with the permission of Imām or without it what they get is *ghanīmah*[111]... because they normally cannot go [for war] without the knowledge of Imām. Thus, it is obligatory upon Imām to support them and give them reinforcement [when so required]. This is because if they were defeated when they had resisting power it would be humiliation for Muslims and the polytheists would be

[108] Ibid., pp 33-34
[109] Ibid., See also Bukhārī, *Kitāb al-Jihād wa al-Siyar*, Hadith no. 2814. Muslim, *Kitāb al-Jihād wa al-Siyar*, Hadith no. 3371.
[110] Zāhid al-Rāshidī,
[111] It means that one-fifth of it would go to *bayt al-māl* to be distributed in the heads mentioned in the holy *Qur'ān* 8:41.

encouraged against them. So, when their support is obligatory upon Imām they have the same position as those who go with his [explicit] permission... Now, if they do not have resisting power, like one or two persons, and they go with the permission of Imām the answer is the same... And if these people who do not have resisting power enter the enemy territory without the permission of Imām by illegal means (*talaṣṣuṣ*), then, in our opinion, the property they capture would not be divided into five shares [as it would not be considered *ghanīmah*]. So, whosoever gets anything it would be for him specifically and what they got collectively would be distributed among them equally."[112]

Here, the first thing to be noted is that these rulings are about the "enemy territory" or *dār al-ḥarb*, the state with which Islamic State is at war. Of course, as mentioned earlier, to declare war is the authority of government. Now, when war has already begun and some Muslims go to *dār al-ḥarb* there are four possible situations, as discussed by Sarakhsī:

a) These Muslims have resisting power and they go there with the permission of government of Islamic State. In this case, they are like different battalions of troops. Their support is obligatory upon government and the property they capture would be dealt with in the same manner as that captured by regular troops.

b) These Muslims have resisting power and they go there without the explicit permission of government. In this case also, they are considered like different battalions of troops for "they normally cannot go for war without the knowledge of Imām". It means that they go there with the *implied* permission of the government. Hence, their support is obligatory upon government and the property they capture would be dealt with in the same manner as that captured by regular troops.

[112] *Al-Mabsūṭ*, vol. 10, pp 73-74

c) These Muslims do not have resisting power and they go there with the permission of the government. In this case, they are like the representatives or troops of Islamic State even if they are in a very small number. Their support and protection is obligatory upon government and if they capture some property it would be dealt with in the same manner as that captured by regular troops.

d) These Muslims do not have resisting power and they go there without the permission of government. In this case, they are not considered representatives or part of troops of Islamic State and, hence, Islamic State is under no obligation to support them. However, the property they capture would be considered theirs. This ruling is based on the principle that the property of a people who are at war with Islamic State is *mubāḥ* (permissible). Imām al-Shāfi'ī is of the opinion that even in this case, the property is considered *ghanīmah* and one-fifth of it should go to *bayt al-māl*.[113] Sarakhsī criticizes it and says that *ghanīmah* is "the name of the property capture through the best of means and that is *striving for making Allāh's word supreme* (*I'lā' kalimat Allāh*) and giving power and respect to religion (*I'zāz al-dīn*) and that is why one-fifth of it is specified for Allāh. And (obviously) this meaning is not found in what one person gets by illegal means."[114]

The second situation our jurists discuss is when some Muslims go temporarily to a non-Muslim state and that state declares war against another state. What these Muslims are required to do?

Sarakhsī has the following to say about it:

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[113] *Al-Umm*, vol. 4,

[114] *Al-Mabsūṭ*, vol. 10, p 74

> "When some of the Muslims are in the *dār al-ḥarb* by virtue of *amān* and another nation from among the *ahl al-ḥarb* attacks that territory these Muslims are not allowed to fight against them because in such a fighting there is the possibility of rendering one's self to death, which is not allowed except for the cause of making Allāh's word supreme and for giving power and respect to *dīn*, which purpose is not achieved here. This is because they do not have the power to enforce the laws of Islam there. So, they would apparently fight for making the word of polytheism supreme, which is not permissible, except when they fear that these people would kill them, in which case they are allowed to fight *not for the purpose of making the word of polytheism supreme but for defending themselves.*"[115]

He bases his argument on the model of Ja'far ibn Abī Ṭālib (May Allāh be pleased with him) who fought along with the forces of Negus of Abyssinia against his opponents.[116]

What if war breaks out between that territory and Islamic State? They are not under an obligation to fight because, as Sarakhsī says, "the obligation to help [Muslims of *dār al-ḥarb*] is primarily upon the citizens of *dār al-Islām*"[117]. However, they are under a duty to fight in case of severe emergency. To quote again Sarakhsī:

> "If these *ahl al-ḥarb* where *musta'min* Muslims are present attack on a territory of Muslims and capture their children they have to fight them, if they can. This is because they [non-Muslims] do not have authority over these children by virtue of occupation. So, they are transgressors in what they do and the *musta'min* Muslims did not promise them their

[115] Ibid., p 97-98
[116] Ibid., p 98
[117] Ibid., p 62

continuation of transgression... This is not the case when they capture some property because they own it by virtue of occupation."[118]

So, according to Sarakhsī, if they capture some property Muslims present in non-Muslim territory are not under religious obligation to release it from them. However, as non-Muslims cannot have legal authority over Muslim children and women so Muslims everywhere are bound to release these people from non-Muslims because "repelling *ahl al-ḥarb* from Muslims is obligatory on every Muslim who can do so."[119] In this case, these Muslims need not get permission from the ruler of Islamic State. The reason is obvious: they are not under his jurisdiction and this is a state of grave emergency. The same is the rule when these non-Muslims attack the territory of *Khawārij* and capture their children and women, as they are also considered Muslims.[120]

This is important for the purpose of our discussion because this refutes the claim of those who say that Muslims living under the domination of non-Muslims cannot take up arms against them, and if they want to do so they have to first establish a government in a free land.[121] We will come to this issue again later, *in shā' Allāh.*

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[118] Ibid., p 98
[119] Ibid.
[120] Ibid.
[121] Ghāmidī, *Qānūn-e-Jihād* pp 243-45; *Burhān*, pp

6.3.2 Between *Hijrah* and Seeking External Support

When Muslim residents of *dār al-kufr* fail to achieve religious freedom by peaceful means they have either to migrate to, or seek support of, Islamic State. This is the ordinary course of action, which is to be followed in most of the cases. What if migration is not possible or plausible? This may happen in four cases:

1) When they are in a considerable number. Migration is an option for those Muslims who are in a microscopic minority. What if they are in millions, like Muslims of Kashmir? Should they all migrate to Islamic State and leave their huge land for non-Muslims?
2) When the nearest Islamic State is far enough to migrate to it, especially for a large number of people.
3) When Islamic State is not able to accommodate such big number of immigrants.
4) When the non-Muslim state does not allow them to migrate.

In all these situations Muslims are target of persecution and migration is not an option for them. What they are required to do?

Of course, the foremost thing is organization. We discussed above how Prophet Mūsā (May Allāh's blessings be upon him) organized his followers in Egypt during the persecution of the Pharaoh and how he made them a force.

Secondly, they have to be patient and bear all the atrocities with courage and steadfastness. They should have strong faith in God's mercy and wisdom. In the meanwhile, they should carry on try to convince the government to accept their demand of religious freedom. In this regard, they should have a pragmatic approach and should not try to achieve the goal of religious freedom or independence in a fortnight. If they are given some internal autonomy by peaceful means they should accept this offer and after achieving this goal they may, if they wish, strive for more. This is what we described previously as peaceful method for achieving "some sort" of self-determination.

What if the government keeps on persecuting them and neither lets them migrate to Islamic State nor accepts their demand of second level self-determination? This

was the case with Muslims under the domination of non-Muslims in Makkah. They were bitterly persecuted and were not allowed to migrate to Madīnah. In this case, they have to seek support of the external world, especially Islamic State.[122] As is obvious, support here does not merely mean "diplomatic and political" support. Islamic State is duty bound to use military force to free these people of persecution, if diplomatic and political support does not yield results. The course of action for Islamic State in this regard has been discussed in the previous Chapter.[123] At present we are concerned with what the people who are target of persecution should do? Have they right to take up arms under the doctrine of self-defense?

6.3.3 Organized Use of Force in Self-defense

Self-defense is a universally recognized right. Use of force in self-defense has always been valid in all legal systems.[124] This is true not only of self-defense at individual level but also at collective level.[125] The holy Prophet (May Allāh's blessings be upon him) is reported to have said:

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[122] It is to be noted that it is the duty of Islamic State to support them whether or not they seek her support.

[123] See Sections 5.1.2 and 5.2.1.2 of this dissertation.

[124] Some may argue that the teachings of Jesus Christ as recorded in the Gospels do not allow the use of force even in self-defense. But this, in fact, is misinterpretation. These teachings when read in their true context simply mean that use of force is allowed but it is better to forgive and bear the atrocities. This was a particular ruling for a particular situation. See, for details, Muḥammad Mushtāq Aḥmad, *Principle for Interpreting the Teachings of Jesus Christ*, Monthly "Ishrāq", Lahore, September 2000. Moreover, even in the teachings of Jesus Christ in that particular period of time we find reference to the use of force, although he could not actually resort to it. "Do not think that I have come to bring peace on earth; I have not come to bring peace, but a sword. For I have come to set a man against his Father, and a daughter against her mother, and a daughter-in-law against her mother-in-law; and a man's foes will be those of his own household. He who loves Father or mother more than me is not worthy of me; and he who loves son or daughter more than me is not worthy of me; and he who does not take his cross and follow me is not worthy of me. He who finds his life will lose it, and he loses his life for my sake will find it. (Matthew, 10:34-39 RSV)

[125] In Part I, we discussed in detail the rules of international law regarding use of force in self-defense.

"If the property of anyone is designed to be taken away without any right and he fights and is killed, he is a martyr."[126]

A more detailed version of this tradition is:

"He who is killed while guarding his property is a martyr, he who is killed while defending himself is a martyr, and he who is killed defending his religion is a martyr, and he who dies protecting his family is a martyr.[127]

In yet another version the wording is more general:

"He who is killed defending his right is a martyr."[128]

We also noted above that the Muslims in Makkah were allowed to use force in individual self-defense at the later period before migration to Madīnah.

"If ye punish, then punish with the like of that wherewith ye were afflicted. But if ye endure patiently, verily it is better for the patient."[129]

This is important because, as we noted above, Muslims were a microscopic minority in Makkah and even then they were allowed the use of force in self-defense at a later stage. It means that the next stage would have been of collective use force, or in other words fighting against the persecutors. This was allowed in Madīnah in proper regular form when they got succeeded to migrate. But even when they were in microscopic minority in Makkah some sort of collectivity for

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[126] Tirmidhī, *Kitāb al-Diyāt*, Hadith no. 1340; Abū Dawūd, *Kitāb al-Sunnah*, Hadith no. 4141. See also: Nasā'ī, *Kitāb Taḥrīm al-Dam*, Hadith no. 4016; Bukhārī, *Kitāb al-Maẓālim wa al-Ghaṣab*, Hadith no. 2300; Muslim, *Kitāb al-Īmān*, Hadith no. 202; Tirmidhī, *Kitāb al-Diyāt*, Hadith no. 1338.
[127] Tirmidhī, *Kitāb al-Diyāt*, Hadith no. 1341. See also: Nasā'ī, *Kitāb Taḥrīm al-Dam*, Hadith no. 4026; Abū Dawūd, *Kitāb al-Sunnah*, 4142.
[128] Nasā'ī, *Kitāb Taḥrīm al-Dam*, Hadith no. 4025; Aḥmad, *Bidāyat Musnad 'Abdullāh bin 'Abbās*, Hadith no. 2643
[129] *Qur'ān*, 16:126

this purpose was envisaged. This, indeed, is evident by the wording of the following verses of *Sūrat al-Shūrā*:

> "Now whatever ye have been given is but a passing comfort for the life of the world, and that which Allāh hath is better and more lasting for those who believe and put their trust in their Lord. And those who shun the worst of sins and indecencies and, when they are wroth, forgive, And those who answer the call of their Lord and establish worship, and whose affairs are a matter of counsel, and who spend of what We have bestowed on them, And those who, when great wrong is done to them, defend themselves, The guerdon of an ill deed is an ill the like thereof. But whosoever pardoneth and amendeth, his wage is the affair of Allāh. Lo! He loveth not wrong doers. And whoso defendeth himself after he hath suffered wrong for such, there is no way (of blame) against them. The way (of blame) is only against those who oppress mankind, and wrongfully rebel in the earth. For such there is a painful doom. And verily whoso is patient and forgiveth, lo! that, verily, is (of) the steadfast heart of things."[130]

Here, the character of the true believers is described. One of their attributes is that they run all their affairs through their *shūrā* (mutual consultation). Then, after describing other characteristics it is mentioned that they support each other if they are wronged. What it simply means is that they were allowed to collectively fight the persecutors even though they had not yet established "government in a free land." Yes, the verses say that to forgive is better but it in no way invalidates fighting against the persecutors as a last resort. Imagine what would have been the case if Muslims were in a considerable number and were not allowed to migrate. As there was no Islamic State at that time, the only option for those who wanted to

[130] *Qur'ān*, 42:36-43

defend themselves against persecution would have been to fight against the persecutors.

It is also worth-mentioning that as sovereignty of state is but an extension of the concept of freedom and liberty of individual[131], the concept of self-defense of state is also but an extension of the right of self-defense of an individual. When individuals are given the right of self-defense they can, and they should, try to establish some sort of mechanism for collectively protecting their rights. This may in due time convert into what is called states' right of self-defense against external aggression.

Some may say that Prophet Mūsā (May Allāh's blessings be upon him) and his followers were not allowed fighting till the last moment even though they were in a considerable number. But it should be recalled that he initially did not plan to migrate from Egypt. He tried to organize his followers. The Pharaoh wanted to get rid of the united force of Israelites, once and for all. That is why he followed them with his military forces and God the Omnipotent drowned them all.[132]

It may also be mentioned that although his message was generally accepted by Israelites he was actually followed only by a small number of youth. This is testified both by the holy Qur'ān[133] and the Bible[134]. Though his followers were in considerable number, the stage where retaliation as well as use of force in self-defense is allowed did not yet reach. Most of them did not find any attraction in independent life where one can worship God without fearing anyone.[135]

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[131] *The Muslim Conduct of State*, p 71

[132] For details, see section 5.2, above.

[133] "But none trusted Moses, save some scions of his people, (and they were) in fear of Pharaoh and their chiefs, that they would persecute them. Lo! Pharaoh was verily a tyrant in the land, and Lo! he verily was of the wanton." (*Qur'ān*, 10:83)

[134] "They [the elders of Israelites] met with Moses and Aaron, who were waiting for them, as they came forth from Pharaoh; and they said to them, "The LORD look upon you and judge, because you have made us offensive in the sight of Pharaoh and his servants, and have put a sword in their hand to kill us." (Exodus 5:20-21)

[135] "And Moses said unto his people: Seek help in Allāh and endure. Lo! the earth is Allāh's. He giveth it for an inheritance to whom He will. And lo! the sequel is for those who keep their duty (unto Him). They said : We suffered hurt before thou camest unto us, and since thou hast come unto us." (*Qur'ān*, 7:128-29) When Pharaoh and his forces came near the Israelites, according to the testimony of the Bible, cried: "Is it because there are no graves for in Egypt that you have taken us

Moreover, they were not well organized and most of them were not ready to offer sacrifices for the great cause. Hence, most of them refused to fight even after they got independence from Pharaoh and were ruled by Mūsā (May Allāh's blessings be upon him).[136]

Hence, our conclusion is that if the prerequisite for the permissibility of the use of force were fulfilled, Israelites would have been allowed to fight in self-defense because they were in considerable number. These prerequisites are:

1) Force should be used as last resort when none of the peaceful options prove fruitful;
2) Majority of the people who are target of persecution should support armed struggle; and
3) Armed struggle must be in organized manner under the command of one leader.

We noted above that our fuqahā' not only allow use of force but make it obligatory upon Muslims present temporarily in non-Muslim state to release children and women of Muslims. Then, of course, it would be obligatory, or at least permissible, for the permanent resident of non-Muslim state, who are persecuted and who cannot avail the option of migration, particularly when they are in considerable number and are well organized.

Conclusion

Muslims present in non-Muslim states as minority and seeking independence or internal autonomy can resort to use of force under the doctrine of self-defense after they fulfill certain prerequisites. These are:

a) That they are persecuted and they use force as a last resort;
b) That migration is either impossible or implausible.

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away to die in the wilderness? What have you done to us, in bringing us out of Egypt? Is not this what we said to you in Egypt, 'Let us alone and let us serve the Egyptians? For it would have been better for us to serve the Egyptians than to die in wilderness." (Exodus 14: 11-12)

[136] *Qur'ān* 5:20-26

This use of force may amount to actual war, in which case they will have to fulfill the following preconditions as well:

1) That they are in considerable number, or, in the words of Sarakhsī, they have *mana'ah*;
2) That majority of the people who are target of persecution should support armed struggle; and
3) That they get organized under the leadership of one leader or commander.

6.4 MODES OF IMPLEMENTING SELF-DETERMINATION

As discussed in the first Chapter[137], liberation struggle may yield any of these three results:

1) The establishment of a sovereign and independent State;
2) The free association or integration with an independent State; or
3) The emergence into any other political status freely determined by a people.

This third option is the one we called 'second level' self-determination, which means internal autonomy and religious freedom. What if Muslims succeeded in achieving 'first level' self-determination? Should they form an independent state of their own or should they integrate with another Islamic State? What is the viewpoint of the Sharī'ah in this regard? Herein comes the issue of the legitimacy of more than one Islamic State.

6.4.1 Multiplicity of Islamic States

It is well known that in the beginning Muslims lived under the authority of one ruler. In the caliphate of 'Alī bin Abī Ṭālib (May Allāh be pleased with him) some of the provinces did not took the oath of allegiance to him but they never claimed complete independence, and Amīr Mu'āwiyah (May Allāh be pleased with him) never declared himself as Caliph before the death of 'Alī (May Allāh be pleased

[137] See Section 1.4 of this dissertation.

with him).[138] After his death his son Ḥasan (May Allāh be pleased with him) abandoned caliphate in favor of Mu'āwiyah (May Allāh be pleased with him) in 41 AH (661 ACE). That year is called *'Ām al-Jamā'ah* (the year of communion).

After the Umayyad dynasty was overthrown in year 132 AH (749 ACE) Abbasid dynasty ruled over the Muslim mainland. But in Spain and North Africa Prince 'Abd al-Raḥmān al-Dākhil of the Umayyad clan formed his independent rule. It was the first instance of the emergence of two independent Muslim states. This dynasty lasted for several centuries. In 640 AH (1243 ACE) the Abbasid caliphate was abolished in Baghdad but it was resurrected in Egypt in 656 AH (1258 ACE) where it survived till 912 AH (1506 ACE). Then, the mainland caliphate devolved to the Ottomans in 923 AH (1517 ACE). Another instance was the Fatmid caliphate of Egypt.

In the meanwhile, the Muslim World was divided into several independent states, each run by a king or Sulṭān. But till later times some sort of unity was there in the sense that these Sulṭāns used to get certificate from the caliph of Baghdad or later from the caliph of Istanbul.

During the 18th and 19th centuries and particularly after World War I almost all of the Muslim World came under the domination of Western Colonial Powers. It gradually succeeded in getting independence as a result of liberation struggle, especially after World War II. In some cases, liberation struggle in Muslim territories got virulent and people, in fact, fought for independence. Algiers is an example. Today, there are 60 independent Muslim states.[139] In some areas, still liberation struggles are carried on, which may result in increase in number of Muslim states in future.

Now, what is the status of these several independent Muslim states from the perspective of the Sharī'ah? Does the Sharī'ah believe in one Islamic State known

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139 As of 2001, the Organization of Islamic Conference had 57 states as members and 3 (Bosnia-Herzegovina, Central African Republic and Guyana) as observer. Two "communities" (of Cyprus and Moro) were given the status of "observer communities". See, Saad S Khan, *Reasserting International Islam*, (Karachi: Oxford University Press, 2001), Annexure I, p 315

as *dār al-Islām*? Or is there any room for several independent sovereign states within the *dār al-Islām*?

Abū Zahrah, the famous Egyptian scholar, is of the opinion that the Sharī'ah envisages that there should be only one caliph and Imām for all of the Muslim World.[140] Wahbah al-Zuḥaylī, his well-known disciple, believes that there is no violation of the Sharī'ah if there exist more than one Islamic State, provided that these states co-operate with each other and implement the Sharī'ah in their respective territories.[141] He also moves the doctrine of necessity to prove legitimacy of different restrictions imposed upon Muslims in different Muslim states.[142] Some argue that the lack of communication and effective control justified the existence of several Muslim states at one time.[143] Dr Ḥamīdullāh opines that in the beginning the jurists denied the legitimacy of more than one Islamic State but later on with the appearance of several states they acknowledged their legitimacy.[144]

After analyzing the arguments of these scholars we are of the considered opinion that Sharī'ah does not give legitimacy to more than one sovereign Islamic State. The arguments for this opinion are briefly discussed here.

Islam gave the concept of Universal Brotherhood of Muslims[145] and the existence of several sovereign nation states negates this very concept. There are traditions, which strictly prohibit Muslims from taking any action that divides the *ummah* and *jamā'ah*.[146] Then, there are several traditions that warn Muslims of the dire consequences of going out of the main body of the *ummah* and thereby dividing

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[140] *Al-'Alāqat al-Dawlīyah*, pp 57-61
[141] *Āthar al-Ḥarb*, pp 282-85
[142] Ibid., pp 283-84
[143] *Al-'Alāqat al-Dawlīyah*, p 59
[144] *The Muslim Conduct of State*, pp 75-77
[145] *Qur'ān*, 3:103
[146] "The Prophet said: There will be people standing and inviting at the gates of Hell. Whoever responds to their call will be thrown into the fire. I said: Messenger of Allāh, describe them to us. He said: All right. They will be a people having the same complexion as ours and speaking our language. I said: Messenger of Allāh, what do you suggest if I happen to live at that time? He said: You should stay with the main body (*al-jamā'ah*) of the Muslims and their leader. I said: If they have no (such thing as the) main body and have no leader? He said: Separate yourself from all these factions, though you may have to eat the roots of trees (in a jungle) until death comes to you when you are in this state." (Bukhārī, *Kitāb al-Fitan*, Hadith no. 6557; Muslim, *Kitāb al-Imārah*, Hadith no. 3434)

them.[147] Other traditions categorically declare that a Muslim should never take up arms against Muslims.[148]

Then, there are several traditions of the holy Prophet (May Allāh's blessings be upon him), which categorically prohibit allegiance to more than one caliph at a time. Some even order to kill the person who claimed to be caliph after Muslims promised allegiance to one caliph.[149]

Finally, there are traditions that strictly prohibit revolt against a ruler even if he becomes tyrant.[150] It dos not mean that they are to be followed in their wrongful acts as well. It has been laid down explicitly that wrongful orders should not be obeyed but even then revolt is not allowed. Rather, it is ordered that Muslims should criticize wrongful acts and orders of tyrants and should bear all difficulties with patience and courage.[151]

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[147] "One who defects from obedience [to the ruler] and separates from the main body of the Muslims–if he dies in that state–will die the death of *jāhilīyah*." (Bukhārī, *Kitāb al-Fitan*, Hadith no. 6531; Muslim, *Kitāb al-Imārah*, Hadith no. 3436)

[148] "Whoever carries arms against us, is not from us." (Bukhārī, *Kitāb al-Diyāt*, Hadith no. 6366; Muslim, *Kitāb al-Īmān*, Hadith no. 143)

[149] "When oath of allegiance has been taken for two caliphs, kill the one for whom the oath was taken later." (Muslim, *Kitāb al-Imārah*, Hadith no. 3444) "He who swears allegiance to a Caliph should give him the pledge of his hand and the sincerity of his heart. He should obey him to the best of his capacity. If another man comes forward (as a claimant to Caliphate), disputing his authority, they (the Muslims) should behead the latter." (Muslim, *Kitāb al-Imārah*, 3431; Nasā'ī, *Kitāb al-Bay'ah*, Hadith no. 4120; Abū Dawūd, *Kitāb al-Fitan wa al-mālahim*, Hadith no. 3707)

[150] "The best of your rulers are those whom you love and who love you, who invoke God's blessings upon you and you invoke His blessings upon them. And the worst of your rulers are those whom you hate and who hate you and whom you curse and who curse you. It was asked (by those present): Shouldn't we overthrow them with the help of the sword? He said: No, as long as they establish prayer among you. If you then find anything detestable in them, you should hate their administration, but do not withdraw yourselves from their obedience." (Muslim, *Kitāb al-Imārah*, Hadith no. 3437; Tirmidhī, *Kitāb al-Fitan*, Hadith no. 2190)

[151] "In the near future there will be rulers and you will like their good deeds and dislike their bad deeds. One who sees through their bad deeds (and tries to prevent their repetition by his hand or through his speech) is absolved from blame, but one who hates their bad deeds (in the heart of his heart, being unable to prevent their recurrence by his hand or his tongue), is (also) safe (so far as God's wrath is concerned). But one who approves of their bad deeds and imitates them is spiritually ruined. People asked (the Prophet): Shouldn't we fight against them? He replied: No, as long as they say their prayers." (Muslim, *Kitāb al-Imārah*, Hadith no. 3435; Abū Dawūd, *Kitāb al-Fitan*, Hadith no. 4133) "The best Jihād in the path of Allāh is (to speak) a word of justice to an oppressive ruler." (Tirmidhī, *Kitāb al-Fitan*, Hadith no. 2100; Nasā'ī, *Kitab al-Bay'ah*, Hadith no. 4138; Abū Dawūd, *Kitāb al-Malāḥim*, Hadith no. 3781)

It is pertinent to note that the Sharī'ah envisages the concept of *universal collective self-defense* of the whole *ummah*. Our fuqahā' are unanimous in this regard. Jihād is deemed a communal obligation (*farḍ kifāyah*), which means that if sufficient (*kāfī*) number fulfils it the rest are not required to do it. However, on the basis of explicit injunctions of Qur'ān and Sunnah the jurists have unanimously held that if a territory of Muslims is under attack it is the duty of the nearest Muslims to help their brethren and if they do not have sufficient power to repel the attack the next Muslims are bound to give support and so on till it becomes obligatory upon every Muslim (*farḍ 'aynī*) to do whatever he can do for the defense of the territory and rights of *ummah*. Thus, it becomes a universal obligation on each and every individual Muslim.

> "Jihād is *farḍ kifāyah* in times other than that of *nafir* (call by government to its citizen to go for Jihād). But when there is open call (*nafir 'āmm*) to everyone, as when the enemy attacked on a territory of Muslims, it becomes *farḍ 'aynī* and it does not matter whether the ruler who called for Jihād is a just ruler or a tyrant."[152]

> "In such a case, a women should go for Jihād without the permission of her husband... because in universal obligations (*furūḍ a'yān*) the restriction of marriage contract does not operate."[153]

> "Thus, it becomes obligatory on every Muslim of that territory [which is under attack]. So is the case with those who are nearer to them if those under direct attack cannot repel the attack, and even if they are not powerful enough to repel the attack or they disobey God and show laziness the obligation is upon those who come next who come next to them, and so

[152] *Fatḥ al-Qadīr*, vol. 4, p 28
[153] *Al-Hidāyah, Kitāb al-Siyar*

on... till it becomes obligatory upon each and every Muslim in the East and in the West."[154]

Last but not the least, the fuqahā' unanimously hold that every Muslim by virtue of his being a Muslim is citizen of Islamic State. If an alien non-Muslim, even a soldier, embraces Islam he automatically becomes citizen of Islamic State the moment he enters *dār al-Islām*.[155] Even in the days of rivalry between the Abbasid caliphate of Baghdad and the Umayyad caliphate of Spain Muslims could easily cross the borders without the restrictions, which were imposed upon non-Muslims.[156] They also hold that *dār al-Islām* is but one entity despite the fact that there exist different rulers in different territories.[157]

Hence, we see no room in the Sharī'ah for the validity of more than one Islamic State at a time. As far as the argument on the basis of the doctrine of necessity is concerned it must be noted that this doctrine is quite restricted in its application in Sharī'ah as compared to its scope in common law.[158] So, legitimacy to several Muslim states on the basis of this doctrine seems to be quite improper. Similarly, the justification of lack of communication and effective control does not hold ground in today's world.

In our opinion, the claim of Dr Ḥamīdullāh that later jurists gave legitimacy to the existence of more than one Islamic State is also not correct. In fact, the fuqahā' never legitimized it. What they did was just the acceptance of a reality on ground. In other words, they gave *de facto* recognition, and not *de jure* recognition.[159]

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[154] *Fatḥ al-Qadīr*, vol. 4, p 28

[155] *Sharḥ al-Siyar al-Kabīr*, vol. 4, p 319; *Bidāyah al-Mujtahid*, vol. 2, p 305; *al-Mughnī*, vol. 8, p 428; *al-Umm*, vol. 4, p 191; *al-Muḥallā*, vol. 7, p 309

[156] *The Muslim Conduct of State*, pp 115-17

[157] Ibid., p 76

[158] See, for a comparative study, Hashim Kamali, *The Law of Duress in Common Law and Sharī'ah*, Islamic Studies.

[159] Dr Ḥamīdullāh himself says: "There has been no difference of opinion among the Muslims as to the desirability of the institution of a central caliphate except for the insignificant and now almost extinct sect of Kharijites." (*The Muslim Conduct of State*, p 44)

Hence, it is obligatory upon Muslims to strive for the unity of Muslim World. To give detailed strategy for achieving this goal is beyond the scope of this dissertation. However, it may be mentioned here that as first step they have to minimize within Islamic World the tariff and non-tariff restrictions for Muslims. This may well be a collective response to the dangers of globalization. Moreover, they have to take concrete steps for sorting out a viable mechanism for collective self-defense.[160]

As far as Muslims struggling for vindication of their right to self-determination are concerned, the option of "free association or integration with an Islamic State" seems more in consonance with the spirit of the Sharī'ah than the option of "the establishment of a sovereign and independent state". However, if they do opt for complete independence they may do so and the Sharī'ah would give that entity a *de facto* recognition.

One of the effects of this *de facto* recognition will be that Muslims in that state would be prohibited from further dividing the territory into other independent states. This is what happened with Pakistan. She lost her Eastern Wing in 1971. This cessation was a violation of the norms of the Sharī'ah, as explained above. But once Bangladesh came into being it became obligatory upon Muslims of that state to protect it from further division. Another effect of this *de facto* recognition is that the governmental authorities in Muslim states have the same rights and duties as the Sharī'ah envisaged for a Muslim ruler.[161]

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[160] They may seek lessons from the integration of Europe. How are they going nearer to the ideal of a United Europe starting from Benelux and ECSC to EEC and now EU? NATO has been, indeed, a role model for materializing the ideal of collective self-defense.

[161] See, for further details, Section 6.5.7 below.

6.5 NON-MUSLIMS SEEKING LIBERATION FROM MUSLIMS

Now, we will briefly discuss the position of non-Muslims who seek liberation from Islamic State. Does the Sharī'ah recognize this right for them? Or once they became citizens of Islamic State they should always remain so and should never seek liberation from it? Can they unilaterally terminate the contract of *dhimmah* and thereby become independent? How if Islamic State wants to terminate this contract unilaterally? What are the rights recognized by the Shari'ah for non-Muslim citizens of Islamic State? Is there the concept of 'internal autonomy' or 'second level' self-determination for them? What are the rights recognized for belligerents if liberation struggle becomes virulent?

6.5.1 Non-Muslim Citizens of Islamic State

Non-Muslim citizens of Islamic State may be inhabitants of a land conquered by Muslims or they may have accepted sovereignty of Islamic State by concluding a treaty with her. Similarly, some of them may have become citizens by naturalization.

We will not go into details of the different modes by which Islamic State acquires territory.[162] What we are concerned with at the moment is the rights of non-Muslim population of the conquered land. They become citizens of Islamic State by virtue of this conquest once Islamic State announces its control over the land, a necessary consequence of which is the implementation of the Sharī'ah there. These people are called *ahl-dhimmah* or simply *dhimmīyīn*. By virtue of their status as non-Muslim citizens of Islamic State they are entrusted with some rights and obligations. These rights, which the Sharī'ah gave them, are minimum rights that Islamic State must ensure for them.[163] Other rights can also be given to them except those, which are barred by the Sharī'ah such as the right to be head of the state.

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[162] For details, see *The Muslim Conduct of State*, pp 80-96

[163] Amīn Aḥsan Iṣlāḥī, *Islāmī Riyāsat*, pp 175-220; Mawdūdī, *al-Jihād fi al-Islām* pp 275-287

If inhabitants of a territory conclude a treaty with Islamic State and thereby become its citizens they are called *mu'āhidin*. They may also be termed as *dhimmīyīn*, and thus, the term *dhimmī* became synonym of non-Muslim citizen of Islamic State. By virtue of treaty these people may get some additional rights, which are not normally available to those conquered with force.

When a non-Muslim woman marries with a Muslim or non-Muslim citizen of Islamic State she too gets citizenship.[164] Similarly, if a non-Muslim overstays in Islamic State he is given the option either to accept citizenship and bear the corresponding responsibilities or leave the State. If he accepts this offer or does not accept it but still remains in Islamic State he is deemed full-fledged citizen.[165]

6.5.2 Nature of the Contract of Dhimmah

Kāsānī says that the contract of *dhimmah* is *lāzim* (binding) for Muslims so that they cannot unilaterally denounce it under any circumstance. But he also says that it is *ghayr lāzim* (non-binding) for non-Muslims.[166] Does it mean that they can terminate it unilaterally at any time?[167] In other words, does the Sharī'ah acknowledge the first level right of self-determination for non-Muslims?

Moreover, the fuqahā' unanimously hold that it is contract of perpetual peace, meaning thereby that Islamic State is bound to protect the *dhimmīyīn* till the time they remain its citizens.

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[164] *Al-Mabsūṭ*, vol. 10, p 84

[165] Ibid.

[166] *Badā'i' al-Ṣanāi'i'*, vol. 7, p 112.

[167] It is pertinent to note here that in Islamic theory of contract, a contract may either be unilateral or bilateral. If it is bilateral it may either be *ṣaḥīḥ* (valid), *bāṭil* (invalid) or *fāsid* (vitiated). The *ṣaḥīḥ* contract may either be *nāfidh* (enforceable) or *ghayr nāfidh* (not enforceable at present). The *ṣaḥīḥ nāfidh* contract may either be *lāzim* (binding) or *ghayr lāzim* (non-binding). If it is *lāzim* one party cannot terminate it without the consent of the other party. Any party may terminate a ghayr lāzim contract any time it wishes without the consent of the other party. For details, see Dr Ḥusayn Ḥāmid Ḥassān, *al-Madkhal li al-fiqh al-Islāmī*, pp , Dr Muḥammad Ṭāhir Manṣūrī, *Islamic Law of Contact and Business Transactions*, pp

6.5.3 Rights of Non-Muslim Citizens of Islamic State

A brief description of the rights of non-Muslim citizens of Islamic State may also be given here.

First of all, they are free from any kind of religious persecution. They are free to practice their religion. That "there is no compulsion in religion" is the basic Qur'ānic dictum.[168] Their places of worship will not be destroyed. They are prohibited from making new places of worship in "Muslim Cities", as they call it, but in other cities they can do so. In the peace treaties concluded with non-Muslims in classical period the condition of religious freedom was explicitly mentioned. Thus, the very first pact concluded by the Prophet (May Allāh's blessings be upon him) with the inhabitants of Madīnah contained the following stipulations:

> "Those Jews who follow us will be helped and will be treated with equality. No Jews will be wronged. The enemies of the Jews will not be helped... The Jews have their religion and the Muslims have their religion... Those in alliance with the Jews will be given the same treatment as the Jews."[169]

In the treaty concluded by the Prophet (May Allāh's blessings be upon him) with the people of Najrān it was mentioned:

> "No church of theirs will be demolished and no clergyman of theirs will be turned out. There will be no interruption in their religion until they bring something new or take usury."[170]

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[168] *Qur'ān*, 2:256

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[170] Abū Dawūd, *Kitāb al-Kharāj wa al-Imārah wa al-Fay'*, Hadith no. 2644

In the treaty concluded with the people of *al-Ḥīrah* during the caliphate of Abū Bakr by Khālid bin al-Walīd (May Allāh be pleased with them) the following conditions were put:

> "Neither a church or monastery will be destroyed nor a fort where they used to take refuge in case of attack. They will neither be prohibited from ringing bells nor from displaying Crosses on Christmas day."[171]

The same conditions were put in different treaties concluded with non-Muslims during the caliphate of 'Umar (May Allāh be pleased with him).[172] In some treaties it was explicitly mentioned that non-Muslims "will not be coerced in matters of religion"[173] or that "they should not be forced to change their religion and they should not be prohibited from implementing their laws in their affairs"[174]. They were, however, required to take due care of the timings of prayers of Muslims and their religious sentiments.[175] It was also mentioned in treaties that their traders were allowed to travel freely within the territories with which Islamic State had peace treaties.[176]

They will pay a prescribed amount of tax, known as *jizyah*, to Islamic State in response of which the State will protect them from all internal and external threats. If they pay it they are not required to fight when Islamic State is under attack. When they do fight in such a situation the imposition of *jizyah* tax is waved from them.[177] They are not forced to pay more than what they can easily pay. Children, women, older people and others having reasonable excuse are exempt from this

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[171] *Kitāb al-Kharāj*, p 154
[172] Ibid., p 149
[173] See, for instance, the text of the treaty concluded with the Christians of Najrān. (*Zād al-Ma'ād*, vol. 3, p 53)
[174] Ibid.
[175] *Kitāb al-Kharāj*, p 158
[176] Ibid.
[177] *Al-Mabsūṭ*, vol. 10, p 78-79; *Ta'rīkh al-Ṭabarī*, vol. 5, p 250

tax.[178] Moreover, *jizyah* will not be paid out of the estate of a deceased if he dies before paying it.[179]

Islamic State is under obligation to protect their life, property and honor.[180] If a Muslim kills a non-Muslim he will be awarded with the same punishment as that for killing a Muslim.[181] Similarly, if a Muslim wasted wine of a non-Muslim he is to pay compensation for that, although if it were of a Muslim no compensation would be paid.[182]

In matters pertaining to marriage, divorce, maintenance and inheritance they are given the right to decide them in accordance with their own customs and laws.[183] However, in issues of public law they have to follow the precepts of the Sharī'ah as the law of the land. Thus, they cannot sell carrion or wine in public places.[184]

There is disagreement among modern scholars regarding the issue of appointment of non-Muslims on key posts. Wahbah al-Zuḥaylī is of the opinion that they can be appointed on any post once they are awarded citizenship.[185] On the other hand, Sayyid Mawdūdī opined that they cannot be appointed on key policy-making posts for Islamic State is an ideological state and only those persons can be given the task

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[178] Ibid., *Kitāb al-Kharāj*, p 72, 85; *Fatḥ al-Qadīr*, vol. 4, p 327

[179] *Al-Mabsūṭ*, vol. 10, p 81-82

[180] The Prophet (May Allāh's blessings be upon him) is reported to have said: "Beware, if anyone wrongs a *mu'āhid*, or diminishes his right, or forces him to work beyond his capacity, or takes from him anything without his consent, I shall plead for him on the Day of Judgment." (Abū Dawūd, *Kitāb al-Kharāj wa al-Imārah wa al-Fay'*, Hadith no. 2654) In other tradition he is reported to have said: "Allāh has not permitted you to enter the houses of the people of the Book without permission, or beat their women, or eat their fruits when they give you that which is imposed on them." (Ibid., Hadith no. 2652)

[181] Thus, when a Muslim killed a non-Muslim the Prophet (May Allāh's blessings be upon him) sentenced the murderer to death and said: "I am the best of those who fulfill their promise." (*Al-'Ināyah Sharḥ al-Hidāyah*, vol. 8, p 256) It is to be noted that this is the view of Ḥanafīs. Others say that Muslim is not liable to *qiṣāṣ* for killing a non-Muslim. He is to pay *diyah*. We see that the view of Ḥanafīs is more in consonance with the letter and spirit of the Sharī'ah For details, see *Al-Tashrī' al-Jinā'ī al-Islāmī*, vol. 2, pp ; *Aḥkām al-Dhimmīyīn*, pp 254-73

[182] *Al-Mabsūṭ*, vol. 13, p 37-38; *al-Durr al-Mukhtār*, vol. 3, p 273. Again, this is the viewpoint of the Ḥanafīs. See also *al-Mudawwanah*, vol. 4, p 418; *al-Muḥallā*, vol. 11, p 334

[183] See, for instance, *al-Mabsūṭ*, vol. 5, p 40; *al-Mughnī*, vol. 6, p 613

[184] They can do so in places other than "Muslim Cities" as is discussed below.

[185] *Āthar al-Ḥarb*, pp 725-27

of policy-making who believe in that ideology in the same way as a communist cannot be a policy-maker in a capitalistic economy.[186]

As noted above, those who attain citizenship by virtue of treaty can have additional rights as well.

6.5.4 Internal Autonomy

6.5.4.1 Places Other than "*Amṣār al-Muslimīn*"

Non-Muslims were not allowed to build new places of worship in public places in cities that were called "*Amṣār al-Muslimīn*" (the Cities of Muslims), although they could repair the older places of worship. Similarly, they could not openly carry religious demonstrations in these places. In places other than *Amṣār al-Muslimīn* they were allowed to build new places of worship and openly demonstrate religious zeal and carry on religious processions. Now, what is meant by *Amṣār al-Muslimīn*? Abū Yūsuf has reported the following verdict of 'Abdullāh bin 'Abbās (May Allāh be pleased with them):

> "As far as the cities, which were [newly] built by Muslims are concerned *dhimmīyīn* do not have the right to build new churches and monasteries, or ring bills, or drink wine, or maintain pegs therein. And those cities, which were built by non-Muslims and conquered by Muslims and their inhabitants wowed allegiance to Muslims they are to be dealt with in accordance with the treaty concluded with them, and Muslims shall fulfill their obligations."[187]

It means that *Amṣār al-Muslimīn* are cities, which are newly built by Muslims. Al-Kāsānī gave yet another of its features. He declared that *Amṣār al-Muslimīn* are places where prayers of *Jumu'ah* and *'Īdayn* are offered and *Ḥudūd* punishments are

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[186] *Rights of Non-Muslims in Islamic State*, pp 5-8, 34-35. See also, Dr 'Abd al-Karīm Zaydān, *Aḥkām al-Dhimmīyīn*, pp 77-83

[187] Ibid., p 161

awarded.[188] It means that these places are specified for Muslims' religious activities. That is why non-Muslims are not allowed to openly demonstrate their religious symbols and processions as well as build new churches and temples there. The purpose was to avoid any clash between them on religious grounds. This is important from the perspective of harmony in a pluralistic society. However, as noted above, even in Muslim Cities the already existing churches and temples were protected and non-Muslims were allowed to fulfill their religious obligations within their specified places.

6.5.4.2 Replacement and Rehabilitation

Another interesting instance in this regard is that of replacement of the Christians of Najrān from their original place in the Najrān of Yemen to the Najrān of Iraq by caliph 'Umar (May Allāh be pleased with him).[189] This act of 'Umar (May Allāh be pleased with him) apparently seems violation of the peace treaty with them. But after going through the earlier sources of Islamic Law as well as Islamic History we find in it yet another instance of 'second level' self-determination for non-Muslims within Islamic State without compromising the security and integrity of Islamic State. The facts as appear from original sources are briefly described here.

These people concluded a treaty with the Prophet (May Allāh's blessings be upon him) and one of the conditions of the treaty was that the protection of Allāh and His Messenger would be available to them forever, "provided they remain allegiant and fulfill their obligations faithfully"[190]. After the death of the Prophet (May Allāh's blessings be upon him) his caliph Abū Bakr (May Allāh be pleased with him) renewed this treaty and again categorically declared that they should remain allegiant and should fulfill their obligations faithfully.[191] Afterwards because of peace and tranquility under Islamic government they flourished both numerically

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[188] *Badā'i' al-Ṣanā'i'*, vol. 7 p 114
[189] *Al-Jihād fi al-Islām* pp 318-22
[190] *Kitāb al-Kharāj*, p 78
[191] Ibid., p 79

as well as materially.[192] Then, during the caliphate of 'Umar (May Allāh be pleased with him) they got divided in several factions and started fighting with each other. Moreover, each faction started giving such information to the central government against the other that would instigate it to take action against that faction.[193] 'Umar (May Allāh be pleased with him) initially did not take it seriously. But later on, he conceived a threat to the security and integrity of Islamic State. Abū Yūsuf gave the following reason for this:

> "He conceived from them a threat of rebellion against Muslims because they collected horses and weapons in their territory."[194]

It is pertinent to note here that Najrān was a very important city from strategic point of view. In the north of Najrān was the capital of Islamic State, Hijaz, and beyond it was the Red Sea on the other side of which was the Christian State of Abyssinia. There was every reason to believe that if not suppressed this rebellion would cause serious problems for Islamic State.[195] There was yet another proof of their undermining the authority of the government. They started interest-bearing transactions[196] from which they were prohibited in the treaty. This was not just a violation of the public law of the land and, thus, a denial of the writ of the government. More than that this was a declaration of war against Islamic State, as it is well-known that Islamic State had already declared war against those who indulge in interest-bearing transactions.[197] How did 'Umar (May Allāh be pleased with him) cope with this threat? He ordered that they should leave their places in the Najrān of Yemen and should be settled in the Najrān of Iraq. Abū Yūsuf has given details of the governmental ordinance in this regard:

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[192] According to Ibn Athir there were 40,000 combatants. (*Ta'rīkh Ibn Athīr*, vol. 2, p 112)
[193] *Futūḥ al-Buldān*, p 73
[194] *Kitāb al-Kharāj*, p 80
[195] *Al-Jihād fi al-Islām* pp 319-22
[196] Abū Dawūd, *Kitāb al-Kharāj wa al-Imārah wa al-Fay'*, Hadith no. 2644
[197] *Qur'ān*, 2:279

"The officers of Syria and Iraq to whom these people should go shall give them cultivable lands. This land should be given to them as charity and as a compensation for the land taken from them in Yemen. No one shall trespass over their rights in these lands nor shall any one intervene in their affairs... If someone commits injustice to them it is the duty of every Muslim present there to help and support them against the wrongdoer because they are a people who are under our protection. *Jizyah* is waved from them for two years."[198]

This is just incredible. They were people who were preparing for rebellion. The security and integrity of Islamic State was at stake. But it only took such steps as were necessary for coping with the threat. It took steps for their rehabilitation and gave them cultivable lands as a compensation for the land taken from them in Yemen. Moreover, it waved taxes from them for two years. In this way, non-Muslim citizens were given some sort of self-determination without compromising the integrity and security of Islamic State.

6.5.4.3 *Ahl al-Muwādaʿah*

There is another class of people, which has a bit different status, and that is why we will deal with them separately. These are people called *ahl al-muwādaʿah*.

In some cases, non-Muslims concluded peace treaty with Muslims without abiding by the public law of Islam like ordinary non-Muslim citizens of Islamic State (*ahl al-dhimmah*). They offered to pay some amount of tribute so as to secure for themselves internal autonomy. Now, what is the status of these people? Are they citizens of Islamic State and is their territory included in *dār al-Islām*? Or is their status like alien non-Muslims with the exception that Islamic State has certain obligations regarding them by virtue of the peace treaty?

[198] *Kitāb al-Kharāj*, p 79-80

Indeed, there were some of the fuqahā' who considered these people as citizens of Islamic State and their territory as part of the *dār al-Islām*.[199] Others believed that they were not citizens of Islamic State and their territory was not *dār al-Islām*. Rather, they gave it the name of *dār al-muwāda'ah* or *dār al-'ahd*.[200] Sarakhsī is worth quoting here:

> "If a nation from among the aliens (*ahl al-ḥarb*) offers to conclude peace treaty (*muwāda'ah*) with Muslims for a few determined years on the condition that they will pay some determined amount of *kharāj* every year but Islamic Law will not be enforced in their territory Muslims should not accept it, except when it is better for Muslims, because by this kind of treaty they are neither accepting the enforcement of Islamic Law nor are they leaving the status of being aliens."[201]

Sarakhsī has again pointed to the real problem. These people cannot become citizens of Islamic State when they do not accept the enforcement of the public law of Islam in their territory. But they are not like ordinary aliens because by virtue of peace treaty they do acquire some rights and privileges. This is the crux of the matter. Here, the difference between different spheres of the Sharī'ah explained earlier may be recalled.[202] Islamic State cannot enforce its writ in their territory. From the perspective of municipal law, these people are aliens and Islamic State has no authority to protect their rights in their territory, as it is beyond the territorial jurisdiction of Islamic State. Similarly, it cannot punish its citizens for crimes committed in *dār al-muwāda'ah*. This is why Sarakhsī says:

> "By virtue of this peace treaty their status as aliens is not changed as they did not accept the superiority of Islamic Law. Hence, it is not obligatory

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[199] *Al-Aḥkām al-Sulṭāniyah*, p 133
[200] *Al-Mabsūṭ*, vol. 10, p 88
[201] Ibid.
[202] For details see Section 5.1.1.3 of this dissertation.

upon Muslims to support them [when they are attacked by another state]. This is the main difference between their status and that of Muslims and *ahl al-dhimmah* [citizens of Islamic State]. Muslim traders are not prohibited from selling their business commodities to them except weapons... Don't you see that after the period prescribed in treaty passes they will again become enemies of Islamic State?"[203]

In its own territory Islamic State would protect their life and property.

"When such a peace treaty has been concluded and afterwards a Muslim steals something from them it is not valid to buy that thing from him because they attained protection of life and property [by virtue of this treaty]. And the property of *musta'min* is not owned by occupation. So, when the thief does not own it then it is invalid to buy it from him. And what he did [stealth] is treachery. Hence, the ruler should punish him for this act, when he knows of it. Moreover, there will be instigation on treachery in buying it from him."[204]

It may be recalled here that the Hanafīs have a different ruling if a Muslim steals property of an alien in *dār al-ḥarb*. They do call it treachery and holds the person liable in the Hereafter but do not prescribe any worldly punishment for him and say that if he sells it the courts of Islamic State will hold the sale valid.[205]

From the perspective of international law, *ahl al-muwāda'ah* are not like ordinary aliens. By virtue of peace treaty they attain certain rights. Thus, when some Muslims attack the territory of *ahl al-muwāda'ah* and capture their property it is not valid for Muslims of Islamic State to buy it from them, and if they do buy it Islamic State will invalidate the sale by using governmental authority. "This is

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[203] *Al-Mabsūṭ*, vol. 10, p 88-8 9 and 97

[204] Ibid., p 88

[205] For details see Section 5.1.1.3 of this dissertation.

because they were in the protection of Muslims and if some Muslims give protection it binds all Muslims."[206] But this protection is not like the one given to non-Muslim citizens of Islamic State. So, when some other non-Muslims state attacks on their territory and captures their property it is valid for Muslims of Islamic State to buy it from them as is the case with ordinary non-Muslims of *dār al-ḥarb*. "This is because by virtue of this peace treaty their status as aliens is not changed."[207]

Sarakhsī has given two important conditions of such a treaty between *dār al-Islām* and *dār al-muwāda'ah*:

a) Payment of some tribute by the *ahl al-muwāda'ah*; and
b) Temporary nature of this agreement, although Sarakhsī did not give a fixed period meaning thereby that it is left to the *ijtihād* of Imām.

He explicitly mentioned that the first of these conditions might be waved in some cases.

> "When an alien nation offers to conclude peace treaty with Islamic State for a few years without paying anything the Imām shall see the matter. If he finds some benefit in this set up for Muslims, either because of the strong resisting power of the aliens or for any other reason, he may accept this offer. The argument for this is the words of the Exalted: "" And the Prophet (May Allāh's blessings be upon him) concluded a non-aggression pact for ten years with the people of Makkah in the year of Ḥudaybīyah. This was keeping in view the interests of Muslims because there was the well-known military alliance between the people of Makkah and those of Khaybar [which was broken by this pact]. Moreover, Imām is appointed to secure the interests of Muslims, the foremost of which is protecting the power of Muslims."[208]

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[206] *Al-Mabsūṭ*, vol. 10, p 97
[207] Ibid.
[208] Ibid., p 86

If this condition can be waved in the interest of Muslims can the other condition – temporary nature of the peace – be also waved on the same basis? Sarakhsī did not discuss it perhaps because he did not approve of it. But keeping in view the line of his argument this condition can also be waved in the interest of Muslims.[209] We have discussed this issue in detail in the previous Chapter.[210]

Shaybānī has given yet another possibility, which really is interesting. He admits the possibility that *dār al-muwāda'ah* may be under the sovereignty of another state.

> "The real factor deciding the nature of a territory is the authority and resisting power behind the enforcement of laws. Thus, if the law is that of *muwādi'in* then with their superiority over others the territory will be *dār al-muwāda'ah*. And if the authority is of another ruler of another territory then none of the people of this territory will enjoy the benefits of *muwāda'ah*."[211]

It means that if this territory is under the authority of another state with which the peace treaty was not concluded then the people of that territory will not enjoy peace with Islamic State. This is because those who concluded the treaty did not really have the authority for that purpose.

6.5.5 Termination of the Contract of Dhimmah

6.5.5.1 By Islamic State

When Islamic State terminates the contract of *dhimmah* for a non-Muslim it means that it has cancelled his citizenship and now it has no obligation for the protection of his life and property. As noted earlier, the jurists consider that obligations created by the contract of *dhimmah* are of permanent nature. Moreover, this

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[209] Wahbah al-Zuḥaylī has, indeed, made a strong case for waving this condition in contemporary world. (*Āthar al-Ḥarb*, pp 675-80)

[210] See Section 5.3.1 of this dissertation.

[211] *Sharḥ al-Siyar al-Kabīr*, vol. 4, p 8

contract is *lāzim* for Islamic State, which means that she cannot unilaterally terminate it. Islamic State must always fulfill its duty to protect the life and property of *ahl al-dhimmah*. Similarly, *ahl al-dhimmah* must fulfill their obligations towards Islamic State by virtue of the contract of *dhimmah*. There, is, however, one instance in the classical period, which shows that in certain situations of grave emergency Islamic State can give independence to *ahl al-dhimmah*.

During the caliphate of 'Umar (May Allāh be pleased with him) at the time of the great war with the Romans – the War of Yarmūk – Muslims had to abandon lots of territories they had conquered and made their inhabitants *ahl al-dhimmah*. Abū Yūsuf has given details of this event:

> "When *ahl al-dhimmah* saw the good treatment of Muslims and their fulfillment of pledges their opposition to the enemies of Muslims became stronger and they willfully supported Muslims against their enemies. Thus, every city with which Muslims concluded peace treaty appointed some of its people on collecting information about the Romans and their preparation and future planning. Then, people of all the cities sent their messengers to the *amīrs* appointed by Abū 'Ubaydah bin al-Jarrāḥ on each city with the message that Romans had collected huge forces the like of which were never seen... These intelligence reports were overwhelming. Abū 'Ubaydah and Muslims were alarmed. Abū 'Ubaydah wrote to each of his *amīrs* in different cities with which he concluded peace treaties and ordered them to give the people back what had been collected from them as *jizyah* and *kharāj*. He wrote to them that they should say to the people: 'We are giving you back all this revenue because we have come to know that a huge force is going to attack us and we promised you that we should protect you. Now as we are not able to do so, we are giving you this revenue. But we will not break the promise we made with you, if Allāh gives us victory.' When they heard this, while the revenue was being given to them, they said: 'May Allāh bring you back for us and give you victory

over them because if they were there they would not have given us back this revenue.' "[212]

This not only shows the justice and fair-play on the part of Muslims but also gives the guidance about the manner of dealing with such extreme circumstances of emergency in which Islamic State cannot fulfill its obligation of protecting the life and property of non-Muslims. It also shows that the contract of *dhimmah* is based on mutual agreement and not on coercion from Islamic State.[213]

This was the case when Islamic State deemed it necessary to release itself of the burden of protecting non-Muslims. What if non-Muslims want to release Islamic State of the burden of protecting them? In other words, do they have the right to get independence of Islamic State after having become its citizens?

6.5.5.2 By Non-Muslims

If the contract of *dhimmah* is *ghayr lāzim* for non-Muslims, as noted above, it means that they can repudiate it any time they want to do so without the consent of Islamic State. Indeed, our fuqahā' have declared that the contract of *dhimmah* is terminated when a non-Muslim joins *ahl al-ḥarb*.[214] What if *ahl al-dhimmah* refuse to accept the authority of Islamic State over them in their territory? Would this act be considered as repudiation of the contract of *dhimmah* meaning thereby that they have lost the citizenship of Islamic State and all rights related therewith? Or is it a crime committed by the citizens of Islamic State whom it should with under the law of the land? The jurists differ as to whether or not the contract of *dhimmah*

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[212] *Kitāb al-Kharāj*, pp 149-50

[213] There are certain cases in which our jurists say for compulsorily making a person *dhimmī*, but these are exceptional situations. Moreover, even in these cases there is some element of consent from non-Muslim. For instance, if a non-Muslim overstays in Islamic State the jurists say that he should be given notice that after a fixed period if he does not go out of Islamic State he shall be made *dhimmī*. If he does not go after that period he is made *dhimmī* because by his overstay after due notice he gave consent to be citizen of Islamic State.

[214] See, for instance, *Badā'i' al-Ṣanāi'i'*, vol. 7, p 112. This, of course, means permanent settlement in the *dār al-ḥarb* because *ahl al-dhimmah* are allowed to go temporarily to *dār al-ḥarb* for the purpose of trade etc. (*Zād al-Ma'ād*, vol. 3, p 53)

is terminated by the crime of *baghy* (rebellion). The matter becomes more complicated when rebellion is made by non-Muslims along with Muslims.[215]

Majority jurists say that if *ahl al-dhimmah* alone rebel their contract of *dhimmah* is terminated and the Imām has the right to wage war against them.[216] Mālikī jurists are of the opinion that if they rebel because they are unjustly treated their contract of *dhimmah* is not terminated. However, when they rebel without any injustice being done to them they lose citizenship.[217] Similarly, majority jurists hold that when they rebel along with some Muslims they lose citizenship except when they claim coercion by Muslim rebels.[218] The Ḥanafīs opine that they do not lose citizenship in this situation and will be punished for the crime of rebellion under the criminal law of the land.[219] The reason they give for a different rule when some of the rebels are Muslims is that they are deemed subordinate to Muslim rebels and as Muslims remain Muslims after rebel *ahl al-dhimmah* remain *ahl al-dhimmah*. This is because the contract of *dhimmah* gives the same protection to them as Islam gives to Muslims.[220]

Similarly, when a *dhimmī* refuses to pay *jizyah*, or gives humiliating remarks against Islam or Qur'ān, or commits blasphemy against any of the Prophets (May Allāh be pleased with them), or persecutes a Muslim to leave his religion, or commits adultery with a Muslim woman, majority jurists consider that the contract of *dhimmah* is terminated, although some of them hold that the contract is terminated only when it was mentioned in the contract that should avoid such acts.[221] On the other hand, the Ḥanafīs see none of these crimes as repudiation of

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[215] Dr. 'Abd al-Karīm Zaydān, *Aḥkām al-Dhimmīyīn wa al-Musta'minin fi Dār al-Islām* (Baghdad: Maktabat al-Quds, 1976), pp 235-39

[216] *Badā'i' al-Ṣanā'i'*, vol. 7, p 113; *al-Mughnī*, vol. 8, p 121; *Mughnī al-Muḥtāj*, vol. 4, p 128

[217] *Al-Mudawwanah*, vol. 3, p 20-21

[218] *Al-Mughnī*, vol. 8, p 121; *Mughnī al-Muḥtāj*, vol. 4, p 128

[219] *Al-Mabsūṭ*, vol. 10, p 128

[220] Ibid.

[221] *Al-Mughnī*, vol. 8, p 525; *Kitāb al-Amwāl*, p 178; *Ḥāshiyat al-Dusuqi*, vol. 2, p 188; *al-Umm*, vol. 4, p 109; *Mughnī al-Muḥtāj*, vol. 4, p 258

the contract of *dhimmah*. They see them as crimes to be punished by the law of the land.[222]

It means that according to the Ḥanafīs there are only two factors that terminate the contract of *dhimmah*, namely, permanent settlement in *dār al-ḥarb* (citizenship of another state) and rebellion against Islamic State when rebels are all non-Muslims.[223] This view seems more in consonance with the spirit of the Sharī'ah. Moreover, it is based on the distinction between theological perspective of law and municipal and international law of Islam, as explained earlier.

6.5.6 Effects of Termination of the Contract of *Dhimmah*

What happens if these acts are considered causes of termination of the contract of *dhimmah* and not as mere crimes punishable by the law of the land? When a non-Muslim repudiates the contract of *dhimmah* he is deprived of the protection of Islamic State. In other words, Islamic State has no responsibility regarding protection of his life and property. A non-Muslim enjoys protection of Islamic State only by virtue of *amān* or the contract of *dhimmah*. If he neither has *amān* nor the contract of *dhimmah* he is an alien (*ḥarbī*) whose stay is illegal in Islamic State. On the other hand, if the contract of *dhimmah* remains intact he is liable only for the crime he committed. Thus, if he does not pay *jizyah* he will be liable only for the amount of *jizyah*, which will be paid out of his property.[224] The rest of his property will be protected by the State.

Should the person whose contract of *dhimmah* has been terminated be deported or expelled from Islamic State? Jurists of Shāfi'ī and Ḥanbalī schools believe that if the contract was terminated because of rebellion or other crime punishable with death

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[222] *Fatḥ al-Qadīr*, vol. 4, p 381; *al-Kharāj*, p 189-90

[223] A third factor is also mentioned, namely, embracing Islam. (*Badā'i' al-Ṣanā'i'*, vol. 7, p 112) But, of course, this is not a cause of loss of citizenship.

[224] It is worth-mentioning here that according to the Ḥanafīs if person does not pay *jizyah* for several years he will be liable to pay only for one year. Moreover, they hold that if he dies it will not be paid out of his property. (*Al-Mabsūṭ*, vol. 10, p 81) Other jurists hold that he will pay for all the years and if he dies it will be paid out of his estate because they treat *jizyah* as a debt. (*Al-Mughnī*, vol. 8, p 511; *al-Muhadhdhab*, vol. 2, p 267)

the offender should not be deported. As for other crimes they hold that the Imām has four options about him: death sentence, enslavement, repatriation (for Muslims in *dār al-ḥarb*) or deportation without any other punishment. Thus, they treat him like a person who comes to *dār al-Islām* without *amān*.[225] Imām al-Shāfi'ī says:

> "If a non-Muslim says that I will pay *jizyah* but will not abide by the law [of the land] he will be warned and will not be fought at that place. It will be said to him: 'Because you have paid *jizyah* you are given *amān* and we deport you from the territories of Islam.' After he is deported if he is again captured he will be killed."[226]

According to Imām Mālik, if the contract of *dhimmah* is terminated the person will be deported from Islamic State after which he will be given the same punishment as that of an apostate i.e. he will be killed if captured after deportation.[227]

The Ḥanafīs, as noted earlier, hold that the contract of *dhimmah* is terminated only by rebellion or acquiring citizenship of *dār al-ḥarb*. Thus, for all other acts they prescribe the same punishment as is there in the Law of the Land. For the one who settles in *dār al-ḥarb* they hold that he will be treated like an apostate. So, the Ḥanafīs and Mālikīs see repudiation of the contract of *dhimmah* by a non-Muslim as resembling apostasy of a Muslim after embracing Islam. However, if an apostate is captured he must be sentenced to death, while if a non-Muslim is captured after deportation he is considered *fay'* i.e. property of Muslims collectively meaning thereby that he is treated like an ordinary *ḥarbī*.[228] As for rebels the Ḥanafīs hold

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[225] *Al-Mughnī*, vol. 8, p 458; *Nihāyat al-Muḥtāj*, vol. 7, p 234

[226] *Al-Umm*, vol. 4, pp 198-99 Some of the Shafi'īs, like al-Muzanī, are of the opinion that if a *dhimmī* refuses to pay *jizyah* he shall be forced to pay it without being deported. (*Sharḥ al-Ḥāwī*, vol. 4, para 27)

[227] *Al-Mudawwanah*, vol. 3, p 21

[228] Ibid. When a *ḥarbī* enters Islamic State without *amān* Abū Ḥanīfah considers him as *fay'*, while Abū Yūsuf and Muḥammad say that he is owned by the one who gets him. The reason of the later opinion is that they consider him like a *mubāḥ* (permissible) property and, hence, the one who gets him becomes his lawful owner. Abū Ḥanīfah says the place where he has been found is under the jurisdiction of Imām and that is why none has authority over him except with his permission.

that they will be treated in the same manner as ordinary non-Muslim combatants of *dār al-ḥarb*.[229]

It may also be mentioned here that according to majority of jurists if some of non-Muslims repudiate the contract of *dhimmah* the rest will not be affected.[230]

6.5.7 Rights Acknowledged for Rebels

Some remarks may be given here regarding the rights the Sharī'ah acknowledges for rebels. But let us, first, discuss what does rebellion mean?

Dr Muḥammad Ḥamīdullāh says 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. If it is intended to overthrow then it is *mutiny*. When it grows 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.[231]

Now, if the rebels have established their rule over a territory it is called *dār al-baghy* (Rebel Territory) and the Ḥanafīs consider it outside the jurisdiction of Islamic State, which is called *dār al-'adl* an antonym of *dār al-baghy*.[232] Thus, culprits of a wrong committed in *dār al-baghy* cannot be tried in the courts of *dār al-'adl* even if that territory was later on conquered.[233]

Dār al-baghy may conclude treaties with other states as well.[234] Decisions of the courts of *dār al-baghy* are generally not reversed even after that territory is subdued.[235] Taxes are to be paid while crossing the borders of *dār al-'adl* to *dār al-*

Moreover, a Muslim was able to capture him because of the collective power of all Muslims. (See, for details, *al-Mabsūṭ*, vol. 10, pp 93-94)

[229] *Sharḥ al-Siyr al-Kabīr*, vol. 4, p 164; *Fatḥ al-Qadīr*, vol. 4, p 382. This is the rule when Muslim rebels do not accompany non-Muslim rebels. If they do the rule is different, as discussed below.

[230] *Fatḥ al-Qadīr*, vol. 4, p 253; *Mughnī al-Muḥtāj*, vol. 4, p 258; *al-Mughnī*, vol. 8, p 524

[231] *The Muslim Conduct of State*, pp 167-68

[232] *Al-Mabsūṭ*, vol. 10, p 130

[233] Ibid.

[234] Ibid.

[235] Ibid.

baghy and vice versa.[236] Thus, for all practical purposes *dār al-baghy* is considered another state. In other words, it is given a *de facto* recognition.[237] Sarakhsī was well aware of the difference between *de facto* and *de jure* recognition. So, about *de facto* recognition he says:

> "After they got resisting power the authority [of Imām] to impose [his] writ on them is terminated *physically*. So, their erroneous opinion will be considered sufficient to relinquish from them the liability for compensation [for the damage they caused], like the erroneous opinion of *ahl al-ḥarb* after they embrace Islam."[238]

But he negates *de jure* recognition for them:

> "The property captured from them [in war] will be returned to them, as it was not owned because of the fact that the *'iṣmah* [legal protection] and *iḥrāz* [separation in another state] of this property was intact. Moreover, ownership by forceful occupation does not establish until it is completed, which *is* done by *iḥrāz* in a state other than that of the person whose property is occupied. This [*iḥrāz*] is not found between *ahl al-'adl* and *ahl al-baghy* because [from the perspective of law] *dār* of both the groups is but one *dār*."[239]

Because of *de facto* recognition the mutual loss to life and property caused during a conflict between *dār al-'adl* and *dār al-baghy* is to be left without exacting punishment and no retaliation is to be made even if the culprits were identified.[240]

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[236] *Al-Aḥkām al-Sulṭāniyah*, p 101
[237] *The Muslim Conduct of State*, pp 168
[238] *Al-Mabsūṭ*, vol. 10, p 128
[239] Ibid. p 126
[240] Ibid. pp 127-28

This is a treatment quite different from that of ordinary robbers, highwaymen and pirates.[241]

All these rights are acknowledged for non-Muslim rebels as well, especially when they join hands with Muslim rebels.[242] It is to be noted here that fuqahā' treat non-Muslims as rebels only when their territory is surrounded by territories of Muslims. If they are adjacent to *dār al-ḥarb* they are given the same status as that of ordinary non-Muslim aliens.[243] It means that if they got enough resisting power their territory is to be treated as *dār al-ḥarb*. Here, it may be reminded that *dār al-ḥarb* as seen from the perspective of Municipal Law has a different connotation than that of International Law. From the aspect of Municipal Law, all of the territory beyond Islamic State is of one kind in the sense that all of it is outside her jurisdiction. From the aspect of International Law, Islamic State may be bound to a certain territory by treaty obligations and to other it may not be so. Thus, each will be treated differently from this perspective.[244]

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[241] Ibid. p 136

[242] Ibid. p 128, *The Muslim Conduct of State*, pp 175-76

[243] *Badā'i' al-Ṣanā'i'*, vol. 7, p 113; *Fatāwā Tātārkhānīyah*, Chapter on Rebels.

[244] For details, see section 5.1.1.1 above.

CONCLUSIONS

LEGITIMACY OF ARMED LIBERATION STRUGGLE IN INTERNATIONAL LAW

Right of Self-determination

Right of self-determination is one of the most fundamental rights of all human beings recognized by international law and the UN Charter. It is now a rule of *jus cogens*. In establishing this right the UN General Assembly played a pivotal role. By adopting landmark resolutions on the issue it not only gave legal status to the right of self-determination but also did a great deal in eradicating the evils of colonialism. The UN Security Council was relatively less active for the obvious reason of lack of consensus among the five permanent members. However, it did play its due role whenever there was a consensus.

Right of self-determination is recognized not only for the people of the colonial or non-self-governing territories but also for all 'people'. Modalities of implementing and enforcing this right, however, differ in different cases. People living in colonial or non-self-governing territories have the right to self-determination and independence. They can choose other alternatives to complete independence as well. People for whom this right is specifically acknowledged by the Security Council can exercise it in the same manner. People living in federal states and striving for their right to self-determination can achieve total independence, provided they can fulfill the prerequisites of statehood. Their culture and identity must, however, be protected even if they could not get complete independence. These are classes of people entitled to the 'first level' self-determination. People living in unitary states cannot opt for complete independence. They have, however, the right to some sort of 'second level' self-determination insofar as their culture and identity must be protected and respected by the governmental authorities.

Armed Liberation Struggle

Legitimacy of the use of force to vindicate the right of self-determination relates directly to the issues of 'threat to the peace', 'indirect aggression' and 'humanitarian intervention'.

A threat to the peace in the sense this term is used in Article 39 of the UN Charter can arise from the so-called 'internal' affairs of a state. A government cannot take the plea that its atrocities against its citizens are included in its 'internal' affair. And the struggle of those who have the right to first level of self-determination is certainly not an internal affair of state. Hence, use of force to deprive people of their right to self-determination is absolutely illegal.

Use of force to vindicate the right of self-determination is legal if the following three conditions are fulfilled, namely:

- ✓ That those who resort to the use of force for this purpose must be those who have the right to first level of self-determination.
- ✓ That resort to the use of force can be made only when they are forcibly deprived of their right to self-determination. The same is true of the right to seek and receive external military support in this regard.
- ✓ That the use of force must be within the constraints of international law, particularly the UN Charter and the Declaration on Principles of International Law.

The UN Charter the Declaration on the Principles of International Law has put some constraints in this regard the most important of which are:

- ➢ The initial general prohibition of the use of force;
- ➢ Pacific settlement of disputes;
- ➢ Non-interference in the internal affairs of states; and
- ➢ Unilateral force to be used only in exceptional circumstances of self-defense and that too within the constraints of necessity and proportion.

Moreover, there are the restraints of international humanitarian law as well. The most important of these are:

- Inviolability of civilian and non-combatant population and property;

- The principle of proportionate use of force;
- Protection of the wounded, sick, ameliorated and captured combatants; and
- Restrictions on the means and methods of warfare.

It is the violation of any of these norms that turns liberation struggle into terrorism.

The UN Charter has envisaged a detailed mechanism for the collective use of force. This system of collective security can be put into motion in case a state commits an act of aggression or a breach of the peace or when there is a threat to the peace from a state. Hence, where a state forcibly deprives some people from their right to self-determination it is the duty of the international community to use all necessary measures, including the use of force, to help the oppressed people in vindicating their right. If the Security Council is blocked by the veto of a permanent member, the mandate should be obtained from the General Assembly. Unilateral use of force on humanitarian grounds is still not legal, although international community may retroactively give legitimacy to it in some cases. So, the legitimacy of such intervention depends upon the assessment and judgment of the international community. If the international community does not recognize it as necessary and legitimate, it will be termed as an act of aggression. It may, however, happen that even if the international community later condemns it, the attack may have brought changes that cannot be reversed. Moreover, states are, more often than not, guided by interests and not by legal considerations. So, it is quite possible that the international community may not condemn a naked act of aggression.

Support to Armed Liberation Struggle

Moral and diplomatic support can be legally provided even to the people having the right to second level of self-determination. As far as material support is concerned, it can be provided by the international community through the expression of its will in a resolution of the UN Security Council or General Assembly authorizing the use of force. International law still does not allow unilateral use of force even for the support of the people having the right to first

level of self-determination. Such use of force may not amount to interference in the internal affairs of a state, as it is not an internal issue, but it would violate another basic principle of international law, namely, the general prohibition on the threat or use of force. As for the people having 'second level' right of self-determination, military support to them would amount to interference in the internal affairs of a state and would constitute the crime of 'indirect' aggression.

LEGITIMACY OF ARMED LIBERATION STRUGGLE IN THE SHARĪ'AH

The Sharī'ah Framework for Rights

Islamic Law has its own set up and framework for the enforcement of human rights, which should be understood. Only then the difference between the perspective of the Sharī'ah and that of the western legal system can be grasped.

From the perspective of Islamic Law, revelation is the source of all laws as well as rights. Human reason has a subordinate role to play in this regard. In matters settled by the Sharī'ah reason has nothing to do. Subjects have to follow the precepts of the Sharī'ah whether or not they understand the *hikmah* (wisdom) behind each precept. As far as those matters are concerned where the Sharī'ah is apparently 'silent', reason can be used to discover rules in the light of general principles of the Sharī'ah

Islamic framework for human rights is structured upon the interplay between the *maqāṣid al-Sharī'ah* and the different kinds of *ḥuqūq* envisaged by the Sharī'ah The five basic *maqāṣid* of the Sharī'ah, in the order of their priority, are:

- The preservation and protection of *Dīn*;
- The preservation and protection of Life;
- The preservation and protection of Family;
- The preservation and protection of Intellect; and
- The preservation and protection of Wealth.

These *maqāṣid* have two aspects, positive and negative. It is the positive aspect of these *maqāṣid*, which is the source of human rights in Islamic framework.

There are basically three kinds of rights in the Sharī'ah:

- ✓ Rights of Allāh (*ḥuqūq Allāh*);
- ✓ Rights of Individual (*ḥuqūq al-'Abd*);
- ✓ Rights of Individuals collectively or rights of community also known as rights of State (*ḥuqūq al-Sulṭān*).

Sometimes the right of Allāh merges with that of individual, which gives rise to a mixed right. This again is of two kinds; the one in which the right of Allāh is predominant and the one in which the right of individual is predominant. Thus, we have four kinds of rights. These are, in the order of priority in case of clash between two different rights, as follows:

- ➢ Pure rights of Allāh
- ➢ Mixed rights of Allāh and individual where the right of Allāh is predominant;
- ➢ Mixed rights of Allāh and individual where the right of individual is predominant;
- ➢ Rights of State or Community; and
- ➢ Pure rights of individual.

For the purpose of settling a dispute the first thing is to determine the nature of rights involved. After that the values or *maqāṣid* will be considered. The right of Allāh has preference over all other competing rights, no matter to which *maqṣad* they belong. Thus, a right of Allāh relating to the value of wealth will have priority over a right of individual in the category of life. However, if two rights of the same kind compete with each other then priority is given on the basis of the five basic values. Thus, where a right of individual clashes with another right of individual priority will be given according to order within the *maqāṣid*.

State cannot take away or suspend the rights guaranteed by the Sharī'ah Islamic State itself owes certain duties to God. Moreover, "natural" rights can have legal basis only if they are established either directly by the texts of Qur'ān and Sunnah or through general principles of the Sharī'ah

Self-determination within the Sharī'ah Framework

Self-determination relates to the value of *Din* – the highest of the values. Hence, insofar as it is linked to the foremost of rights – the right of Allāh – it has priority over all other rights that relate to values or rights of lower category. Resultantly, Islamic State is bound to ensure self-determination for its citizens. It cannot suspend it on any pretext. Islam bases its claims on arguments. If someone is convinced by these arguments and he wants to submit to the Will of God he may become a Muslim. If he does not want to accept the reality he is not forced to accept it. Allāh almighty granted every human being the right to choose a religion and a way of life for him. No one can take this right. Hence, nobody is allowed to impose a particular faith upon any person even if he is his slave.

Right to self-determination in the Sharī'ah framework is not confined only to embracing or rejecting a faith. Rather, it requires ensuring an environment where at least that part of the religion can be practiced without any hindrance, which is covered by the doctrine of the rights of Allāh (*ḥuqūq Allāh*). Moreover, this right of self-determination also encompasses freedom of expression as well as of access to information. It also necessitates participation of each individual, either directly or through his representative, in the decision-making process in the social set up. Similarly, it becomes obligatory upon Islamic State to punish those who violate this fundamental right of human beings. This punishment may even take the form of military attack against the wrongdoers.

The institution of slavery was not a part of the scheme of the Sharī'ah It was an institution that pre-existed the advent of the last Prophet (May Allāh's blessings be upon him). The Sharī'ah tolerated it on the basis of the principles of reciprocity and necessity. It, however, not only gave a detailed scheme for its gradual abolition but also ensured religious freedom for slaves during the transitional period before the complete abolition of this institution. The fuqahā' have declared it unequivocally that 'original rule in human beings is freedom'. Now, as the world has reached a consensus on outlawing this evil there is no room in the scheme of the Sharī'ah for this institution.

The Doctrine of Jihād

Jihād is a tool for the protection or defense of the first of the *maqāṣid* – *Dīn*. In other words, the purpose of Jihād is defense of *Dīn* from all external threats. Jihād becomes obligatory only when the cause of obligation is there. The cause of war (*'illat al-qitāl*) is *muḥārabah* and not mere *kufr*. So, Muslims are not allowed to wage war against those non-Muslims who do not fight them. Muslims are obliged to accept the call for peace. War should be fought only as a last resort.

The doctrine of *dār* as envisaged by the Ḥanafī jurists has nothing to do with the doctrine of perpetual war. It was based on the concept of territorial jurisdiction. All the territory outside Islamic State is one *dār*, meaning thereby that it is outside the jurisdiction of Islamic State. From the perspective of Islamic International Law, this *dār* is not of just one kind. There may be a state having hostile relations with Islamic State, while some states may have peace treaties with Islamic State. Then, some states may neither have a peace treaty with Islamic State nor have hostile relations with it. Each will be treated differently from the perspective of Islamic International Law and Municipal Law as well as Theological Law.

A treaty for perpetual peace with non-Muslims is legitimate if it is concluded in the interests of Muslims. The conclusion of such a peace treaty does not mean suspension of the obligation of Jihād because purpose of Jihād can be achieved by peaceful means as well. However, Islamic State has the right to denounce the treaty after giving due notice to the other party if at any time after the conclusion of the peace treaty it finds strong evidence that the other party is going to commit breach of the treaty. Similarly, if the other party actually commits breach of a material condition of the treaty Islamic State may consider that the treaty stands repudiated. There are certain acts, which if committed by the other party, are deemed equivalent to repudiation of the treaty from that party. In case of any ambiguity, however, Islamic State must confirm from authorities of the other state whether or not that state still considers the treaty in force. If that state considers it in force it will be asked to fulfill its obligations under the treaty. If that state does not consider itself bound by the treaty, then Islamic State need not formally denounce

the treaty, as the treaty will be considered terminated in this case. Islamic State will have the right to take steps that it deems necessary for securing its interests, which may even amount to waging war without formal declaration. However, there may be cases where the gravity of situation demands a prompt action. In such cases the formality of confirmation may be suspended.

The ruling of the fuqahā' about the existence of a state of perpetual war between Islamic State and non-Muslim states has three foundations:

- Ground realities;
- The existence of a state of perpetual war between Islam and *kufr*; and
- Special law for the holy Prophet (May Allāh's blessings be upon him) under which his opponents were to be either killed or subjugated. The wars fought by the holy Prophet (May Allāh's blessings be upon him) carried an element of punishment for his opponents among his immediate addressees. Jihād after him has nothing to do with imposing Islamic rule over the opponents.

For Muslims living in Islamic State it is obligatory that they should fight under the command and authority of the government. This is true even in case of attack on Islamic State, except where the gravity of situation demands a prompt action and delay till the orders of the government reach is deemed fatal. However, there are some exceptional situations in which they allow Jihād without explicit, and in some cases even implicit, permission of government.

Muslims Seeking Liberation from Non-Muslims

Those Muslims who live outside Islamic State are also bound by the precepts of the Sharī'ah insofar as they will be responsible for violation of any commandment of the Sharī'ah before Allāh on the Day of Judgment. They should, however, observe the law of the land also. But this should not amount to violation of the basic norms of the Sharī'ah.

If Muslims can practice their religion in a non-Muslim state they are legally allowed to stay there. Islamic State would initially have no responsibility regarding the protection of their rights. If in a certain territory they cannot live in accordance

with their faith they should migrate from that territory to another suitable area. If, however, they are not allowed to migrate, or when they are in considerable number and they strive for their right to self-determination, Islamic State will be bound to provide them moral, diplomatic and, if necessary, military and material support without violating the restrictions of any treaty obligations.

Muslims living in minority in non-Muslim states should strive to get the right of religious freedom secured through peaceful means. If they are persecuted and they are in a microscopic minority the Sharī'ah imposes upon them the duty to migrate to, or seek support of, Islamic State. If they are in a considerable number they should strive for some sort of self-determination and seek support of Islamic State in this regard. They can resort to the use of force under the doctrine of self-defense after they fulfill certain the following prerequisites:

- That they are persecuted and they use force as a last resort; and
- That migration to Islamic State is either impossible or implausible.

This use of force may amount to actual war, in which case they will have to fulfill the following preconditions as well:

- That they are in considerable number, or, in the words of Sarakhsī, they have *mana'ah*;
- That majority of the people who are target of persecution should support armed struggle; and
- That they get organized under the leadership of one leader or commander.

Ideally, there should not be more than one Islamic State at a time. The justification for multiplicity of Islamic States on the basis of the doctrine of necessity is not well founded, as this doctrine is quite restricted in its application in Sharī'ah as compared to its scope in common law. Similarly, the justification of lack of communication and effective control does not hold ground in today's world. Hence, for Muslims struggling for vindication of their right to self-determination, the option of "free association or integration with an Islamic State" seems more in consonance with the spirit of the Sharī'ah than the option of "the establishment of a sovereign and independent state". However, if they do opt for complete

independence they may do so and the Sharī'ah would give that entity a *de facto* recognition.

Non-Muslims Seeking Liberation from Muslims

Non-Muslims living in Islamic State are also given the right of self-determination. The Sharī'ah does not consider them 'slaves'. They are 'free' citizens of Islamic State enjoying its protection. Their religious freedom is guaranteed. Their places of worship are protected. In places other than *Amṣār al-Muslimīn* (Muslim Cities) they are given more freedom insofar as they are allowed to openly carry religious demonstrations and processions and to build new places of worship. Even in *Amṣār al-Muslimīn* they are allowed to renovate their places of worship and celebrate religious festivals within their locality or places of worship. These rights are ensured even for those non-Muslims who are inhabitants of lands conquered by Muslims. Non-Muslims joining Islamic State after concluding a treaty with it they may have additional rights by virtue of that treaty. There are several modalities of providing them internal autonomy or second level of self-determination.

The contract of *dhimmah* is terminated only by rebellion or acquiring citizenship of a non-Muslim state. For all other criminal acts there will be the same punishment as is there in the Law of the Land. Non-Muslims are considered rebels only when their territory is surrounded by territories of Muslims. If they are adjacent to a non-Muslim state, they are given the same status as that of ordinary non-Muslim aliens. Hence, if they got enough resisting power, their territory shall be treated as a non-Muslim state.

APPENDIX I:

ISLAMIC *JUS IN BELLO*

Instructions of the Prophet (May Allāh's blessings be upon him) to Commanders of Troops

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

"Fight in the name of Allāh and in the cause of Allāh. Fight against those who do not believe in Allāh. Fight but do not embezzle the spoils, do not break your pledge, do not mutilate [the dead bodies] and do not kill the children. When you meet enemies who are polytheists, invite them to three courses of action. If they respond to any one of these, you also accept it and restrain yourself from doing them any harm. Invite them to [embrace] Islam. If they respond to you, accept it from them and desist from fighting against them. Then, invite them to migrate from their lands to the land of the *muhājirs* (emigrants) and inform them that, if they do so, they shall have all the privileges and obligations of the *muhājirs*. If they refuse to migrate, tell them that they will have the status of Bedouin Muslims and will be subjected to the commands of Allāh like other Muslims, but they will not receive any share from the spoils of war or *fay'* except when they actually fight with the Muslims [against the opponents]. If they refuse to accept Islam, demand from them the *jizyah*. If they agree to pay, accept it from them and hold your hand. If they refuse to pay the *jizyah*, seek Allāh's help and fight them."[1]

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[1] Muslim, *Kitāb al-Jihād wa al-Siyar*, Hadith no. 3261; Tirmidhī, *Kitāb al-Siyar*, Hadith no. 1542; Abū Dawūd, *Kitāb al-Jihād* Hadith no. 2246; Ibn Mājah, *Kitāb al-Jihād* Hadith no. 2848; Aḥmad, *Kitāb Bāqī Musnad al-Anṣār*, Hadith no. 21900

Instructions of Abū Bakr (May Allāh be pleased with him) to Commanders of Troops

"I enjoin upon you ten commands. Remember them:
Do not embezzle. Do not cheat. Do not break trust. Do not mutilate. Do not kill a child or an old man or a woman. Do not hew down a date-palm nor burn it. Do not cut down a fruit tree. Do not slaughter a goat or cow or camel except for food... May be, you will pass near a people who have secluded themselves in convents; leave them and their seclusion."[2]

"I enjoin upon you the fear of Allāh. Do not disobey. Do not cheat. Do not show cowardice. Do not destroy churches. Do not inundate palm-trees. Do not burn cultivation. Do not bleed animals. Do not cut down fruit-trees. Do not kill old men or children or women..."[3]

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[2] *Ta'rīkh al-Umam wa al-Mulūk*, pp 1849-50
[3] *Kanz al-'Ummāl*, vol. 2, p 6261

APPENDIX II:

IBN QAYYIM AL-JAWZĪYAH ON THE LEGITIMACY OF PEACE TREATIES FOR UNSPECIFIED PERIOD

"Non-Muslims are either *ahl ḥarb* [not having any treaty of peace with Islamic State] or *ahl 'ahd* [having a peace treaty with Islamic State]. And *ahl al-'ahd* are of three kinds: *ahl al-dhimmah* [non-Muslim citizens of Islamic State], *ahl hudnah* [alien non-Muslims having peace treaty with Islamic State] and *ahl amān* [alien non-Muslims who come temporarily to Islamic State with its permission]...

Now, is it allowed for the ruler [of Islamic State] to conclude peace treaty with non-Muslims absolutely without a fixed time period? ... On this issue, there are two opinions of the scholars in the School of Aḥmad and others: one that it is not allowed. Al-Shāfi'ī opined this at one place and some of the followers of Aḥmad agreed with him, such as the Qāḍī in [his treatise] *al-Mujarrad* and the Shaykh in *al-Mughnī*, and they did not mention the other opinion. Second opinion is that it is allowed. Al-Shāfi'ī has explicitly stated this in *al-Mukhtaṣar* and some of the followers of Aḥmad, such as Ibn Hamadan, mentioned both these opinions. And it is reported from Abū Ḥanīfah that it [peace treaty without specified period of time] is not binding (*lāzimah*); rather, it is non-binding (*jā'izah*). So, he gave the authority to the Imām to repudiate it at his will...

The people who expressed the first opinion seem to have considered that even when it is absolute it is binding and perpetual and, therefore, invalid by consensus... And the second opinion – which is the right one – says that is permissible to conclude it absolutely as well as with specified time period. So, when it is concluded for a specified period it is permissible to make it binding, and if it is made non-binding... it is still permissible, provided that due notice of repudiation must be given so as to be on equal terms... And

when it is concluded absolutely, it is not binding forever. Rather, it may be repudiated at will.

This is because the general rule is that agreements are concluded in any manner in which there is a *maṣlaḥah*, which sometimes is found here and at others there. Similarly, the contracting party has the right to conclude it in a manner to bind both the parties and it can conclude it in a non-binding manner that can be repudiated if there is no legal prohibition, which is not found here. Rather, it is some times the dictate of *maṣlaḥah* [to conclude the treaty in a non-binding manner]... The treaties of the Prophet with non-Muslims were generally absolute having no specified period of time and were non-binding... Then, it is established from Qur'ān and *tawātur* (overwhelming and continuous chains of traditions) that the Prophet of Allāh denounced the treaties with the polytheists after the conquest of Makkah when Abū Bakr the Truthful led the *ḥajj* ritual in the year 9 [A.H.]. He accompanied 'Alī with him for this purpose because the tradition of the Arabs was that the leader or a person from his kin would repudiate treaties.

The verses of *al-Barā'ah* were revealed in this regard... In this *Sūrah* Allāh the Almighty divided the polytheists into three groups: those having a treaty for specified period and who did not violate the terms of the treaties... Muslims were ordered to abide by the treaty obligations till they remain so. Second were those who had absolute treaties for unspecified period. Muslims were ordered to denounce their treaties and give them a period of four months after which their lives and property would lose immunity. Third were those who did not have any treaty. If any of them wanted to listen to the Word of Allāh, he was to be given this opportunity after which he would be sent to the place where he considered himself safe. So, this last group of people was to be fought against without any delay...

Now, when it is proved that [in *Sūrah al-Barā'ah*] *mu'āhidin* (people having treaties) include both of the groups and that Allāh commanded to denounce the treaties that were not binding [those without time period] and commanded to abide by the treaties that were binding [those with specified time period], this is additional evidence of what Qur'ān contemplated. The Sunnah, the principles of the Sharī'ah and the interests of Islam further strengthen this opinion. May Allāh help us!"[4]

[4] *Aḥkām Ahl al-Dhimmah*, vol. 1, pp 336-344

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