"Do Not Transgress Limits": Parameters of Military Necessity in International Humanitarian Law and Islamic Law

A Dissertation Submitted to the Department of Law, International Islamic University Islamabad

in Partial Fulfillment of the Requirements of the Degree of Master of Laws (LL.M International Law)

By

Muhammad Aamir Aziz Ansari

Under the Supervision of

Dr. Muhammad Munir Esq.

At the

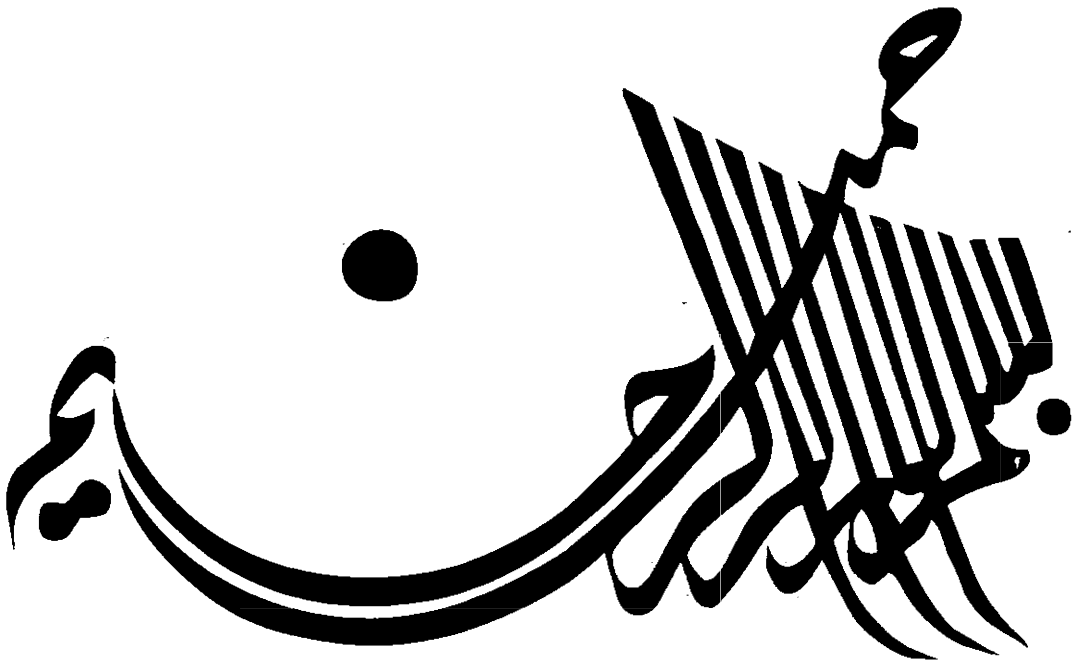
Faculty of Shari'ah and Law

International Islamic University Islamabad

May 2012

1 - Humanities ; Law

2 - Arts law



APPROVAL SHEET:

"DO NOT TRANSGRESS LIMITS": PARAMETERS OF MILITARY NECESSITY IN INTERNATIONAL HUMANITARIAN LAW AND ISLAMIC LAW

By

MUHAMMAD AAMIR AZIZ ANSARI

Accepted by the Faculty of Shariah and Law, International Islamic University Islamabad (I.I.U.I.) in partial fulfillment of the requirements for the award of the degree of LL.M (International Law)

Master's (LL.M) Committee:

Supervisor

Dr. Muhammad Munir

Associate Professor,

Chairman Department of Law,

Faculty of Shari'ah and Law, I.I.U.I

Internal Examiner

Ataullah Khan Mahmood

Assistant Professor of Law, IIUI

External Examiner

Osman Karim Khan

Advocate, Supreme Court of Pakistan

Dedication

To Jeena—My Sister—My Ideal.

DECLARATION

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

Student: **M. Aamir Aziz Ansari**

Signature: 

Date: 29-6-2012

Supervisor: **Dr. Muhammad Munir**

Signature: _____

Date: _____

ABSTRACT

Since its inception in the seventeenth century Europe, international law recognized the notion of state sovereignty and as a necessary corollary of that notion it deemed war a lawful instrument of state policy till the conclusion of the Pact of Paris in 1928. Similarly, the conduct of hostilities was governed by the notion of military necessity till the second half of the twentieth century. For the last one hundred and fifty years, however, international law has been persistently trying to restrict the notion of military necessity by expanding the scope of the principle of humanity. Even today, however, military necessity continues to be one of the general principles of the law of armed conflict along with the principles of humanity, distinction and proportionality. The interplay between these principles is much complex and, hence, the parameters of the principle of military necessity remain largely undefined.

Islamic law, on the other side, puts a general ban on the use of force and allows deviation from this general prohibition only as an exception for defending faith and community. It, therefore, upholds humanity as the governing general principle while deems military necessity as an exception. Even when it allows deviation from the general principles of humanity on the basis of military necessity, it restricts this deviation by the balancing principles of distinction and proportionality. In addition, Islamic law has prescribed well defined limitations on the utilization of the notion of military necessity and, thus, upholds that certain acts cannot be committed even under the guise of military necessity.

Hence, Islamic law's contribution to "humanizing the international humanitarian law" would be to recognize the principle of humanity as the cornerstone of international humanitarian law while the notion of military necessity should be recognized as an exception with defined parameters and limitations.

ACKNOWLEDGMENTS

Praise be to Allah, the Sustainer of the universe, the Exalted and the Overpowering, and His eternal and infinite blessings be upon Muhammad, the Seal of the Messengers, the bright and shining lamp.

I could not have accomplished the task of writing this dissertation without the support and help of my teachers, family members and friends.

Most of all, I am indebted to my supervisor, Dr. Muhammad Munir, who has always been very affectionate in guiding and supervising me in his characteristic way. His detailed comments at the end of every chapter are an invaluable asset to me. During the coursework of LLM, he taught us the course of Islamic international law and, thus, I got the opportunity of his discipleship and benefitting from his encyclopedic knowledge.

Special thanks go to my caring brother Muhammad Mushtaq Ahmad who has been mentoring my academic carrier. He helped me prepare the research proposal for this dissertation; he commented on each and every page of the synopsis. It is his accurate and interesting presentation of the Islamic law which attracted my interest. I am also indebted to my teacher-cum-friend Mr. Ahmad Khalid Hatam. He provided me the relevant material, and discussed various issues of my thesis with me. He has always been a confusion-killer in legal issues. I don't have words to thank him for his untiring efforts and generous support. A lot of thanks go to Dr. Akhtar Hussain for his encouragement and moral support.

My family members have been very supportive and encouraging. My father Prof. Abdul Mabood Ansari is my very first mentor in Islamic and Quranic sciences particularly. Since I opened my eyes, I always found him occupied by his best friends—the books. He inscribed the love for seeking knowledge in my heart. My

mother, after the completion of my LLB, strictly ordered me to do an LLM. It was one of the dreams she saw for me. It's coming true, Mummy! My sister Sadia Tabassum was very helpful. She provided me the relevant material and thoroughly studied and commented on the synopsis. My brother Tariq Aziz Ansari has been a source of inspiration for me. He has always been facilitating my academic activities.

Amongst friends, Sadaqat Ali deserves special thanks for facilitating my work in one way or the other. He was very supportive in many respects during my stay at IIUI. Bundle of thanks goes to Kamran Qureshi who has been scolding and reproving me for taking too much of time in writing *ten-page thesis*! Many thanks go to Muhammad Imran for giving me access to his very rich library. Aqeel Ahmad and Faisal Usman Khan deserve exceptional thanks for their assistance whenever I faced a problem in the hardware or software of my computer. The dissertation-writing has been an interesting exercise for me because of the joyful company of Muhammad Ahmad and Abbas Khan. Whenever I got bored, Abbas Khan has entertained and refreshed me by his innocent devilments and Muhammad Ahmad was very generous in cooking delicious foods for me. May Allah bless them all!

List of Acronyms

AP	Additional Protocol,
GC	Geneva Convention, 1949
IAC	International Armed Conflict
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
IHL	International Humanitarian Law
LOAC	Law of Armed Conflict
NIAC	Non-International Armed Conflict
POWs	Prisoners of War
WMDs	Weapons of Mass Destruction

TABLE OF CASES

Case **Page#**

United States v Altstoetter (The Justice Case);

United States v Von Leeb (The High Command Case). Available at: http://www.worldcourts.com/imt/eng/decisions/1948.10.28_United_States_v_Leeb.pdf (Last Accessed: 07-03-2012).

United States v. List (The Hostage Case), Case No. 7 (Feb. 19, 1948). Available at: http://werle.rewi.hu-berlin.de/Hostage%20Case090901mit%20deckblatt.pdf (Last Accessed: 07-03-2012).

TABLE OF CONTENTS

CHAPTER ONE

SPOTTING THE ISSUE

INTRODUCTION

War, no matter how terrorizing its name could be, is a reality. The recorded history is a witness that human beings have opted for wars in order to secure or defend their interests or punish those who pose a threat to their territorial integrity or expansion. Countless humans lost their lives in conflicts and efforts to secure maximum available resources. In an effort to ban use of force and wars or to, at least, minimize its effects, legal systems introduced frameworks with limitations on the use of force and conduct of hostilities.

Islamic Law prohibited the use of force in clear terms but permitted the resort to war in limited situations—where it remained inevitable. It could, therefore, be asserted that Islam considers peace as the general rule and war as an exception. Some situations, however, were recognized where strict allegiance to the law might lead to harm and injury; it hence awarded some relaxation to the person subject to unusual situations. This sort of situation would be dealt with by the doctrine of necessity in general, and the doctrine of military necessity in cases of armed conflict.

Modern international law had the same objective, i.e. limitations on the use of force, hence, international community had to come up with mechanism of minimizing the effects of war and regulating the conduct of warring parties during war. This mechanism is known as the international humanitarian law or the law of armed conflict.

The law of armed conflict, dealing with conduct of hostilities or regulating the means and methods of warfare, in its struggle for minimizing the destruction of war was based on certain principles which serve as the backbone of the entire regime. These principles are, *inter alia*, humanity, distinction, and proportionality.

Nevertheless, in recognition of the fact that deviation from these principles would, at times, attract significant military and strategic advantage, the law of armed conflict acknowledged the principle of military necessity. However, it seems that the principle, as is used in the legal sense, is unfortunately misunderstood. Commanders on the battlefield use it as a tool for violating the positive rules of international law that states have consciously agreed to and seconded their operative characteristic.

Looking at the conflicts of the modern times, it could be observed that military necessity and concepts such as collateral damage are widely used to provide justification for violations of the law of armed conflict which in reality undermines the basis, intent and objective of the law.

It, therefore, seems opportune to analyze the Islamic law of armed conflict and see what makes it distinct, and to asses if the Islamic concept of military necessity and the limitations prescribed in it, if any, can advance the purposes of the modern law of armed conflict and strengthen it in terms of application and providing a control on the claims of "justifications".

This work focuses, on one hand, on analysis of the Islamic law of necessity, and the status of military necessity in the framework, while on the other, it discusses the modern law of armed conflict and the place that military necessity occupies therein. Moreover, the major part of the work is devoted to finding the points where Islamic law could contribute to updating the law of armed conflict and its supervision of the conflict in the twenty first century.

1.1 LITERATURE REVIEW

Here, we will first review a few important articles and books written by scholars on the doctrine of necessity from the perspective of IHL and Islamic law. After this, we will see if the LLM Students in the Faculty of Shariah and Law, IIUI, have properly and sufficiently dealt with this doctrine in their respective theses.

1.1.1 Articles and Books

Peter A. Ragone in his article entitled "The Applicability of Military Necessity in the Nuclear Age"[1] shows that although states generally acknowledge the restrictions imposed by the laws of war, yet they legalize their own actions by arguing that these are exempt from the legal

[1] Peter A. Ragone, "The Applicability of Military Necessity in the Nuclear Age", *Journal of International Law and Politics*, 16 (1984), 701-713

sanctions on the basis of self-defense, reprisal and/or military necessity.[2] He also shows that the most abused justification for grave violations of the laws of war is that of military necessity.[3] Ragone, then, goes on to analyze the discourse on the doctrine of military necessity. He, thus, examines the "positivist interpretation" of the doctrine as presented by Francis Lieber: "Military necessity as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war." [4] This positivist interpretation does not look at the doctrine as a means for avoiding the laws of war. It, rather, limits the doctrine to those measures which do not violate international law.[5]

Ragone, then, turns to an absolutely opposed interpretation of the doctrine labeled *Kriegsraison*. According to this interpretation, military necessity is superior to the laws and customs of war; a belligerent state claiming military necessity could violate any law or custom of war with a view to avoiding defeat.[6] This interpretation, thus, allows terrorism and attacks against non-combatants if these are necessary to prevail in a conflict.[7]

After analyzing these two opposing interpretations of the doctrine, Ragone mentions the limitations imposed by IHL on the doctrine of military necessity. Foremost among these

---

[2] Ibid., 701.

[3] Ibid.

[4] U.S. Dept. of War, *General Order No 100, Instructions for the Government of Armies of the United States in the Field*, art. 14(1863).

[5] Ragone, "The Applicability of Military Necessity in the Nuclear Age", 702.

[6] Ibid., 704.

[7] Ibid.

limitations is that of proportionality.[8] This limitation allows such destruction, and only such destruction, as is necessary, relevant and proportionate to the prompt realization of legitimate belligerent objective.[9] The principle of distinction likewise restricts this doctrine as it confines the attacks to legitimate military targets.

While discussing the issue of nuclear weapons, relying upon research reports of various research committees and councils, Ragone asserts that nuclear explosion does not distinguish between combatants and non-combatants;[10] in the event of nuclear explosion, the injured combatants of the adversary and non-combatants will be in an area severely contaminated by radioactive fallout, and the presence of radioactive fallout makes it impossible to take care of these wounded and sick people;[11] it is impossible to explode a nuclear weapon and protect the civilians and combatants from the fallout;[12] the destruction caused by exploding nuclear weapon can in no way be proportionate to the military benefit which a state seeks;[13] exploding a nuclear weapon causes genetic damage which increases the gene mutation rate;[14] the genetic damage caused by radioactive fallout would be equivalent of genocide.[15] Ragone, therefore, concludes that the use of nuclear weaponry is violative of

---

[8] Ibid.

[9] Ibid., 705.

[10] Ibid., 712.

[11] Ibid., 710.

[12] Ibid., 711.

[13] Ibid., 712.

[14] Ibid., 708.

[15] Ibid., 712.

international law, customs of war and the UN Charter and that it is not allowed even under the principle of military necessity.[16]

Ragone's article contains some really useful material and his analysis is very helpful in understanding the true purport of the doctrine of necessity. Yet it remains to be elaborated as to why certain prohibited acts are allowed under the doctrine of military necessity, while others remain prohibited. In other words, the parameters of the doctrine of military necessity have to be clearly defined. This is the main objective of the present thesis.

Michael N. Schmitt in "Military Necessity and Humanity in IHL: Preserving the Delicate Balance"[17] asserts that the roots of principle of military necessity as a justification for deviation from IHL are found in the doctrine *Kriegsraison geht vor Kriegsmanier*, that is to say, "necessity in war overrules the manner of warfare". Schmitt says that this justification could only be reliable in two situations:

i) When the only way to avoid sever danger is to deviate from the legal norms; or

ii) When complying with the norms may endanger the ends of war[18].

However, this doctrine does not allow killing of civilians or destroying civilian objects. Since destruction as an objective of war is in itself a violation of IHL, thus, to justify this violation,

---

[16] Ibid., 713.

[17] Michael N. Schmitt, "Military Necessity and Humanity in International Law: Preserving the Delicate Balance", *Virginia journal of International Law*, 50 (2010).

[18] Schmitt, "Military Necessity and Humanity in International Law", 797.

a reasonable connection between destruction and complete surrender of the adversary must be shown.[19]

According to Schmitt, IHL represents a balance between the principles of military necessity and humanity in such a way that its rules provide a compromise between these two apparently opposing doctrines.[20] According to the preamble of the Hague Convention IV, 1907, the instrument was, "inspired by the desire to diminish the evils of war, as far as military requirements permit"[21]. Schmitt says that "Martens Clause" was included in the Convention with a view to balancing military aims by humanitarian considerations[22]. From this, he concludes that mere absence of an explicit rule on a particular issue does not justify an act on the argument of military necessity[23]. In other words, measures taken during war to secure the ends of war must reflect respect for humanity.

The fundamental thesis of Schmitt in this article is that every act of hostility is originally permitted, but the principle of humanity puts some restrictions excluding some of the acts from this general allowance.[24] Thus, military necessity is the norm and humanity is the exception. As opposed to this, in Islamic law, the principle of humanity is the norm while necessity is the exception. Thus, Islamic law generally prohibits all acts of hostilities under the

---

[19] Ibid., 798.

[20] Ibid.

[21] Preamble of the Hague Convention IV, 1907.

[22] Schmitt, "Military Necessity and humanity in International Law", 800.

[23] Ibid.

[24] Ibid.

principle of humanity, but allows some of these acts under the principle of necessity during war. This difference in approach has some important consequences, which will be explored in this thesis.

The principle of necessity in Islamic law has been elaborated in detail in the *Mawsu'ah Fiqhiyyah* in the article titled "*Darurah*". This article first gives the literal and technical definitions of the term necessity[25] after which it enumerates other relevant terms, such as *hajah* (need),[26] *haraj* (difficulty),[27] *'udhr* (legal excuse),[28] *ja'ihah* (material loss)[29] and *ikrah* (coercion).[30] The article mentions on the authority of the famous Andalusian jurist Abu Ishaq al-Shatibi that the legal rules (*ahakm*) are of two categories: some rules are applicable in ordinary situations to the subjects (*mukallafin*) in general, while some rules are applicable in extraordinary and exceptional situations.[31] The doctrine of necessity falls in this latter category. The article also mentions the texts of the Qur'an and the Sunnah which form the bases for the doctrine of necessity.[32] Importantly, the article lists the conditions for the application of the doctrine of necessity. It also mentions the situations where the Muslim jurists apply the doctrine of necessity. At the end, the article refers to some important general

---

[25] Ibid., 191.

[26] Ibid., 191-92.

[27] Ibid., 192.

[28] Ibid.

[29] Ibid., 192-93

[30] Ibid., 193.

[31] Ibid.

[32] Ibid., 193-94.

principles of Islamic law relevant to the doctrine of necessity.

The article contains some really useful and valuable material on the doctrine of necessity in Islamic law and references to the various schools of Islamic law. However, it talks of necessity in general terms and mentions military necessity very briefly and that too in passing only.

A recent scholarly work on the issues of necessity and coercion is done by Muhammad Mushatq Ahmad[33] in his book titled *Jihad, Muzahamat aur Bagahwat* (Jihad, Resistance and Rebellion). In this book, Ahmad devoted one chapter each to necessity and coercion wherein he analyzes these doctrines in quite detail.

The chapter on necessity starts with the identification of state of necessity and the general principles governing and limiting the scope thereof.[34] It describes that state of necessity is governed by two general principles of Islamic law, namely, necessity permits prohibited acts and necessity must be kept within its limits.[35]

It, however, remains to be ascertained that on what principle some acts are deemed permissible or obligatory in the state of necessity and others are deemed prohibited even in such state?

---

[33] Muhammad Mushtaq Ahmad is Assistant Professor of law in the Faculty of Shariah and Law, IIUI. In this book, he has virtually dealt with almost all important issues of the law of war from the perspective of the contemporary international law and *Siyar* (Islamic international law).

[34] Muhammad Mushtaq Ahmand, *Jihad, Muzahamat aor Baghawat* (Gujranwala: Al-Shari'ah Academy, 2008), 386.

[35] Ibid., 387.

In the second section of the same chapter, Ahmad analyses the issue of killing a protected person in the state of necessity.[36] He cites various passages of the earlier jurists (*fuqaha'*) in which they unequivocally declare that even when attacking the enemy fort becomes inevitable under the doctrine of necessity, they have to take all precautionary measures to avoid causing harm to any protected person[37] and where it is impossible to distinguish between the lawful and unlawful target, it is obligatory on them to intend killing only those whom it is allowed to kill.[38]

Moreover, the rule becomes stricter when it comes to willful killing an innocent Muslim. Ahmad cites the *fuqaha'* to substantiate that this act remains prohibited even in the state of necessity.[39] So much so that if Muslims are ordered by their commander to kill a group of people, but they come to know about the presence of an innocent Muslim in that group, they are not allowed to kill anyone of them till that particular person is singled out and spared.[40] Here, he also discusses the fictitious case created by the illustrious jurist-cum-philosopher Imam Abu Hamid Muhammad b. Muhammad al-Ghazali.[41] This is the case where the enemy while attacking the Muslim troops makes shields of some Muslim prisoners. Ghazali says that intentionally killing these Muslim prisoners is not allowed even in the state

---

[36] Ibid., 389.

[37] Ibid., 322-23.

[38] Ibid., 390.

[39] Ibid., 389-90.

[40] Ibid., 390.

[41] Ibid., 391-92.

of such dire necessity, unless it is definitively concluded that the enemy would kill *all* Muslims and it is not possible to repel the enemy unless these Muslims are killed.[42] This is a hypothetical case and it is practically almost impossible to have such situation in any war.

In Chapter 14 of the book, Ahmad elaborates the doctrine of coercion (*ikrah*) in Islamic law.[43] For this purpose, he begins with an analysis of the juristic discourse on the following verse of the Qur'an:

> The ones whose hearts willingly embraced disbelief after believing, except those whose hearts remained firmly convinced of their belief, shall incur Allah's wrath and a mighty chastisement lies store for them except for those who were forced to engage in infidelity to Allah after,.[44]

After this, he quotes the illustrious Hanafi jurist Abu Bkr Muhammad b. Ahmad b. Abi Sahl al-Sarakhsi (d. 490/ 1097) who says that in the state of coercion every act does not become permissible; rather, some of the acts become obligatory (*wajib*), others become permissible (*mubah*), while some acts remain prohibited.[45] Among these latter acts, an exemption

---

[42] Abu Hamid Muhammad b. Muhammad al-Ghazali, *al-Mustasfa min 'Ilm al-Usul* (Beirut: Dar Ihya' al-Turath al-'Arabi, n. d.), 1: 344.

[43] Ahmad, *Jihad, Muzahamat aor Baghawat*, 356.

[44] Qura'n 16: 106.

[45] *Jihad, Muzahamat aor Baghawat*, 358.

(*rukhsah*) is granted for the commission of some acts, while no exemption is granted for some of these acts.[46]

Ahmad, then, quotes various passages from the texts of the classical manuals, particularly Sarakhsi's *al-Mabsut* to elaborate the rules of Islamic law relevant to various acts and omissions under coercion. Thus, he concludes that oral transactions made under coercion are enforced, except from which the law allows retraction.[47] As for causing an injury to one's self under the threat of instant death, the act is allowed under the principle of committing a lesser evil for avoiding a greater evil.[48] However, where a person is threatened with death to kill another person, he is not allowed to do so for saving his life.[49] As for the punishment of *qisas* in this case if that third person is killed; the rule is that if this was a case of perfect coercion (*ikrah tam*), the one who coerced him (*mutasabbib/mukrih*) will be given *qisas* punishment as the person under coercion (*mubashir/mukrah*) is deemed a tool in hands of the *mukrih*.[50] On the other hand, in case of imperfect coercion (*ikrah naqis*), the *mubashir/mukrah* will be given *qisas* punishment.[51]

An important issue analyzed by Ahmad is that of coercion from state authorities on a person for committing an illegal act. He analyzes various texts of *fuqaha* and concludes that

---

[46] Ibid.

[47] Ibid., 360.

[48] Ibid.

[49] Ibid., 366.

[50] Ibid.

[51] Ibid

the liability for illegal act lies on state authorities.[52] Moreover, he argues that subordinates cannot take the plea that they were acting upon the commands of their superior because Islamic law does not allow obedience to any creature when it amounts to disobedience to the Creator.[53]

The issues raised by Ahmad are very important and are directly relevant to our thesis, but he has primarily concentrated on the rules and principles of Islamic law. There is a need to compare these with the rules and principles of the contemporary law of armed conflict and to improve the existing legal regime in the light of these rules and principles. This is the main purpose of our study.

1.1.2 Unpublished Theses in the Faculty of Shariah and Law

Although military necessity is a very important and sensitive issue, it has not been examined in depth in this faculty. Some good theses have been written on various aspects of international law and the use of force, but an in-depth analysis of the parameters of military necessity could not be undertaken. Muhammad Mushtaq Ahmad[54] in *Use of Force for the Right of Self-Determination in International Law and Shariah: A Comparative Study* briefly discusses the principle of military necessity but his primary focus was on the legality or illegality of

[52] Ibid., 369.

[53] Ibid.,598.

[54] Reg. No. 376-FSL/LLMIL/F04

armed liberation struggle. Rehmanullah[55] briefly touches the principle of necessity in *Parameters of Use of Force for self defense in International Law* but his focus was on *jus ad bellum* and he did not discuss the principle from the perspective of *jus in bello*. The same is true of Ch. Munir Sadiq[56] (*Terrorism and International Law*), Atif Abbas[57] (*Use of Force in Afghanistan and International Law Post 9/11 Scenario*) and Fayaz Khan[58] (*Protection of the Victims of War on Terrorism: Legal Perspective*), who gave only passing references to the principle of necessity and these too were mostly from the perspective of *jus ad bellum*, not *jus in bello*.

The only thesis that discusses the principle of necessity from the perspective of *jus in bello* is *Nuclear Weapons under International Law and Shariah* by Muhammad Jan.[59] However, his discussion is very brief and necessity is just one of the principles he analyzed in this thesis. He did not discuss the parameters and limits on the principle in this thesis.

Presently, some students are working on some important areas of *jus in bello*. These include Sardar Ali[60] (*International Regime of Civilian Protection in War on Terror*), Shahbaz Ali[61] (*U.S.A. Military Intervention in Weaker States*), Same-ur-Rahman[62] (*The Conduct of*

[55] Reg. No. 08-FSL/LLMIL/F04

[56] Reg. No. 11-FSL/LLMIL/F04

[57] Reg. No. 20-FSL/LLMIL/F04

[58] Reg. No. 48-SF/LLMIL/F05

[59] Reg. No. 1-FSL/LLMIL/F04

[60] Reg. No. 79-FSL/LLMIL/F06

[61] Reg. No. 99-FSL/LLMIL/S08

Hostilities in Non-international Armed Conflict: A Comparative Study of the Provisions of International Humanitarian Law and Islamic Law) and Sadia Tabassum[63] (*The Problem of Unlawful Combatants: A Hard Case for International Humanitarian Law*). However, none of these theses focuses on the parameters of military necessity.

Hence, there is a need to take an in-depth analysis of this very important legal issue relating to a very significant aspect of the contemporary law of armed conflict.

[62] Reg. No. 112-FSL/LLMIL/F08

[63] Reg. No. 118-FSL/LLMIL/F08

CHAPTER TWO

LIMITS OF THE DOCTRINE OF MILITARY NECESSITY: GAPS IN THE CONTEMPORARY INTERNATIONAL LEGAL REGIME

INTRODUCTION

The doctrine of military necessity has a principal place in international humanitarian law. It limits violence to only those measures which are necessary for achieving the strategic objectives of war and which are lawful according to the laws of war. Furthermore, the doctrine is subject to few other principles of the law of armed conflict including the principles of humanity, proportionality and distinction. Hence, it is safe to assert that a violent act would not be considered justified under the concept of military necessity if it violates all or any of these principles. Thus, those measures which are militarily unnecessary are prohibited.

However, the doctrine, as it is used in legal sense, is unfortunately misunderstood. The military commanders on the battlefield use it as a tool for violating the positive rules of international law that states have consciously agreed to and seconded their operative characteristic.

The problem of discrepancies between the theoretical position of the doctrine of military necessity and its practical application on the battlefield lies in its confusion for a different concept—necessity or extreme emergency where the very existence of a state is in peril. It is important to note that necessity or extreme emergency is an exception to the

general principles in any legal system. Nevertheless, military necessity is not an exception to the law; it is one of the fundamental principles of law of war that forms the foundation of IHL.

2.1 Defining and Determining the State of Military Necessity

International humanitarian law (IHL), also known as the law of armed conflict (LOAC), regulates the conduct of hostilities in armed conflict.[64] This law does not deal with the legality or illegality of war[65], it instead gives detailed rules for the conduct of hostilities. It embodies, on the one hand, principles for the conduct of hostilities in armed conflict with a view to ameliorating the condition of war victims,[66] and on the other, it puts constraints on the means

[64] IHL characterizes armed conflicts into two categories, namely, international armed conflict (IAC) and non-international armed conflict (NIAC). IAC is illustrative of a conflict which breaks out between two or more states or between state and a recognized liberation struggle. NIAC, on the other hand, involves hostilities between government armed forces and organized armed groups or between such groups within such state. See for details: Hans-Peter Gasser, *Introduction to International Humanitarian Law* (Haupt: Henry Dunant Institute, 1993) 21.

[65] International law relating to armed conflicts is divided into two main branches: *jus ad bellum* (the law of resort to war), and *jus in bello* (the law of conduct of war). The twin terms, though, elucidate the developments took place over centuries, yet they are of recent coinage. The former gives rules about the legality or illegality of wars, while the latter governs the conduct of hostilities. Jasmine Moussa, "Can *Jus ad Bellum* override *Jus in Bello*? Reaffirming the Separation of the Two Bodies of Law", *International Review of the Red Cross*, 90:872 (2008), 965.

[66] For example, the four Geneva conventions and the two protocols additional thereto. The first Geneva Convention seeks the amelioration of the condition of the wounded and sick in armed forces in the field; the second convention ameliorates the condition of wounded, sick and shipwrecked members of armed forces at sea; the third convention is relative to the treatment of prisoners of war; and the fourth convention is relative to the protection of civilian persons in time of war. See for details, Curtis F.J. Doebbler, *Introduction to International Humanitarian Law* (Washington: CD Publishing, 2005).

and methods of warfare.[67] Thus, IHL humanizes war; it aims at mitigating human sufferings arisen out of war. The gist of IHL can be summed up in the following principles.

One of the fundamental principles of IHL is 'Humanity'. It puts restrictions on the means and methods of warfare[68] and prohibits targeting civilian population and property.[69] Attacking and killing the enemy combatants is, however, not prohibited. Notwithstanding, the principle of humanity prohibits attacks on those combatants who lay down their weapons,[70] or become disabled of wounds or are *hors de combat*—no more taking part in the combat.[71]

---

[67] Doebbler, *Introduction to International Humanitarian Law*, 20.

[68] Under this principle, the use of various weapons is prohibited. These include, *inter alia*, weapons of mass destruction, such as chemical weapons, biological weapons and nuclear weapons. Similarly, employing those weapons which may indiscriminately harm the combatants and non-combatants is also prohibited. Article 51, Protocol I Additional to the Geneva Conventions of 1949 (AP I). The litmus test for identifying a lawful weapon is whether the damage resulting from its use can be limited to specific military objects. Article 22 of the Hague Regulations IV, 1907, states that "[t]he right of belligerents to adopt means of injuring the enemy are not unlimited", while Article 23 of the said Regulations prohibits the use of poisons or poisoned weapons, arms, projectiles or any other materials or techniques which cause superfluous injury. See for details, Peter A. Ragone, "The Applicability of Military Necessity in the Nuclear Age", *Journal of International Law and Politics*, 16:701 (1984), 704-708; also, Hamutal Esther Shamash, "How Much is Too Much? An Examination of the Principle of *Jus in Bello* Proportionality", *Israel Defence Forces Law Review*, 2 (2005), 110-113.

[69] See generally: Geneva Convention IV for the Protection of Civilian Persons in Time of War. The main object of this Convention is to confine military operations to military objects and to immune civilians during armed conflict. Articles 51 and 52, AP I.

[70] Article 8(b)vi of the Rome Statute, 1999.

[71] Article 41, AP I. A person is recognized as *hors de combat* who falls into the hands of adversary; indicates obviously his intention to surrender; or becomes unconscious or is otherwise incapable of defending himself. A soldier who is incapable of taking part in combat or wishes to surrender has to lay down his arms and raise his hands, or wave a white flag and come out of the shelter with hands raised. The surrender in these various ways, however, must be unconditional. The only right that the person who is surrendering can claim is that the status of POW is to be accorded to him. See for details, Commentary on Art. 41 of AP I (Geneva: International Committee of the Red Cross, 1987).

A necessary corollary of the principle of humanity is the principle of 'distinction' which has been inscribed in the Protocol I Additional to the Geneva Conventions of 1949.

The parties to the conflict must at all times distinguish between civilians and combatants;[72] attacking civilians intentionally is a war crime under the Rome Statute.[73] Thus, the principle of distinction prohibits attacking anything but the military objectives;[74] and obligates the parties to distinguish between lawful and unlawful objects for the purpose of conducting military operations.[75] The discrimination between combatants and non-combatants,[76] thus, paves the way for the prohibition of indiscriminate attacks.[77]

---

[72] Articles 48, 51(2) and 52 (2), AP I. The principle of 'distinction' as laid down in Article 48 of Additional Protocol I is recognized as a rule of customary international law. Moreover, there are examples of national legislation, for instance Italy, Azerbaijan and Indonesia, which make it an offence to attack civilians directly. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (New York: Cambridge University Press, 2009), 26.

[73] Article 8(b) (i), (ii) of the Rome Statute, 1999. Rome Statute or as sometimes referred to as the International Criminal Court (ICC) Statute is a treaty that was agreed upon for establishing the International Criminal Court—a court which would try serious crimes of concern to the international community. The treaty entered into force in 2002. As 1 February 2012, 120 states are parties to the treaty. For details visit: http://www.icc-cpi.int/Menus/ICC/About+the+Court/ (Last Accessed: 1-3-2012).

[74] Article 52 (2) of the AP I, defines military objects as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage". In addition, Articles 48 and 51 of the same Protocol provide for the general protection of civilians and their property.

[75] For instance, military camp is a lawful object while hospital, school and places of worship are unlawful objects for military operations.

[76] Article 1 of the Hague Regulations (IV) with Respect the Laws and Customs of War on Land, 1907 lays down four essentials for the status of combatant; namely, responsible command, distinctive emblem, carrying arms openly and obeying the laws and customs of war. This is for the purpose of determining the fate of a person who falls into the hands of the adversary during armed conflict; the status of prisoner of war is accorded to him if he fulfills these four conditions.

Nevertheless, if military operation is conducted against a lawful object, but consequently—not as a means or end but as a side effect—damage is caused to some civilian population or property, such damage is considered "collateral damage"[78] and is not considered a violation of IHL, provided all the necessary precautionary measures were taken.[79]

The principles of humanity and distinction collectively give rise to another important principle, namely, proportionality, which means that force should be used proportionate to the military objective. This principle has been embodied in AP I.[80]

---

[77] Art. 51, AP I. Indiscriminate Attacks are those which are not directed against a specific military object; or the use of such means and methods which could not be directed against a specific military object, that is, the harmful effect whereof may extend to civilians and their property; or the incidental loss to civilians, or civilian objects, or a combination thereof arising out of an attack would be excessive in relation to the military advantage expected to be introduced by that attack. See for details, Commentary on Art. 51 of AP I (Geneva: International Committee of the Red Cross, 1987).

[78] The phrase "collateral damage" has not been used in the Geneva Conventions and the Protocols Additional thereto. However, the concept is well found in IHL. See, for instance, especially in Article 51 and 57 of AP I. However, the phrase has been used in San Remo Manual. This Manual is not an international treaty, but a useful document prepared by experts of international humanitarian law to work as a guideline or draft proposal. Article 13(c) of San Remo Manual defines "collateral casualties or collateral damage" as "the loss of life of or injury to, civilians or other protected persons, and damage to or the destruction of the natural environment or objects that are not in themselves military objectives". For a detailed introduction of the manual, visit: http://www.icrc.org/eng/resources/documents/misc/57jmst.htm (Last Accessed: 04-05-2012).

[79] Article 57 and 58, AP I. During military operation, constant care should be taken to spare civilians and their properties. It should be clarified before attacking an object that is neither civilian object nor subject to any special protection, and all necessary precautions should be taken in choice of means and methods of operation to avoid incidental loss of civilians life, property or combination thereof, which would be in relation to the direct military advantage). See also: Article 46 of the San Remo Manual.

[80] Article 51(5)b and 57(2)(a)iii, b, AP I. The gist of these articles is that the parties shall refrain from launching any attack the objective whereof is not a military one, or is subject to special protection, or the expected incidental loss of civilian life, property or combination thereof is excessive in relation to the military advantage anticipated. Thus, concerning compliance with the requirements of AP I, a commander in the field have to ask himself whether the target is legitimate objective; whether the attack will cause damage indiscriminately; and whether the principle of proportionality will be violated. See

It prohibits disproportionate attacks, wherein the incidental loss—collateral damage—is excessive in relation to the military advantages anticipated,[81] and thus, balances the competing military and humanitarian advantages in an armed conflict. Similarly, causing superfluous injury to the enemy combatants is prohibited under this principle.[82]

It is customary rule of IHL that if the collateral damage introduced by an attack is excessive in relation to the military requirements, the principle of proportionality prohibits such attack,[83] even if the goal could not be achieved through any other way.[84] Hence, absolute extermination of the enemy should not be aimed at, instead such degree of harm may be inflicted as is necessary for winning the war.[85]

Belligerent states, while agreeing to the legitimacy of these *in bello* principles, usually argue that their course of action is exempt from legal sanctions. The justification presented for exemption is, *inter alia*, military necessity.[86] However, this doctrine is the most oft-

---

for details, Shamash, "How Much is Too Much? An Examination of the Principle of *Jus in Bello* Proportionality".

[81] Article 8(b)iv of the Rome Statute, 1999.

[82] Article 23 of the Convention II with Respect to the Laws and Customs of War on Land, 1899. See also Article 35(2), AP I.

[83] Article 51(5)b and 57(2)b of AP I.

[84] United States v. List (The Hostage Case), Case No. 7 (Feb. 19, 1948). See also, Shamash, "How Much is Too Much? An Examination of the Principle of *Jus in Bello* Proportionality", 108.

[85] Muhammad Mushtaq Ahmad, *Jihad Muzahamat aur Baghwat: Islami Shari'at aur Bayn al-Aqwami Qanun ki Roshni mayn* (Gujranwalah: Al-Shri'ah Academy, 2008), 302. Hence, use of weapons of mass destruction (WMDs), which unnecessarily and excessively cause damage to adversary, even to the combatants on the battlefield only, is prohibited. Similarly, article 35(2) and 51(5)b of AP I prohibit superfluous injury.

[86] Other justifications which states mostly rely upon are: self-defence; reprisals; and reciprocity. Ragone, "The Applicability of Military Necessity in the Nuclear Age", 701.

invoked and abused justification for otherwise unjustifiable military actions; flagrant violations of the laws and customs of war are committed in the name of military necessity.

In addition to the abovementioned principles, military necessity occupies an important stand in the IHL. This concept forms part of the legal concepts validating acts which are otherwise considered crimes in IHL. In other words, IHL recognizes the doctrine of military necessity whereby it allows targeting military objects,[87] even that the attack have adverse, and may sometimes have even horrible, consequences for civilians and civilian objects.[88]

The roots of doctrine of military necessity as a justification for deviation from IHL are found in the principle *Kriegsraison geht vor Kriegsmanier,*[89]that is to say, "necessity in war overrules the manner of warfare".

Nonetheless, this doctrine does not allow killing of civilians or destroying civilian objects.[90] Since destruction as an objective of war is in itself a violation of IHL, thus, to justify

---

[87] See generally, Convention IV with Respect to the Laws and Customs of War on Land, 1907. As war entails destruction and harm, therefore, what constitutes a military object may change during the course of combat; after the destruction of some military objects, the enemy will use some other installations, sometimes even civilian objects, for the same purpose. The use of new installations, even if they were used heretofore by civilians, renders them military objectives and a legitimate target for attack.

[88] Roy Gutman and David Rieff, *Crimes of War: What the Public Should Know* (Singapore: W.W. Norton and Company, 1999), 251.

[89] Michael N. Schmitt, "Military Necessity and Humanity in International Law: Preserving the Delicate Balance", *Virginia Journal of International Law*, 50:4 (2010), 796. This principle is equivalent of a principle of Islamic law which states that "necessity permits acts, which are prohibited in ordinary situations". However, in Islamic law too this general allowance is restricted by other principles, such as, "what became permissible due to an excuse becomes prohibited when the excuse is removed" and "necessity does not nullify the legal rights of others". See chapter 2 below.

this violation, a reasonable connection between destruction and complete surrender of the adversary must be shown.[91]

The doctrine has been approached in two diametrically opposite ways, namely, "*Kriegsraison*"[92] and "positivist approach".[93] The difference in approach to and interpretation of the doctrine results in difference in the conclusions and the corpus of the norms regulating conduct of hostilities in armed conflict.

As far as the *Kriegsraison* interpretation is concerned, it gives a superior status to military necessity; the laws of war can be overruled by the excuse of military necessity. This interpretation finds its roots in German doctrines *Kriegsraison geht vor kriegmanier*,[94] that is to say, "necessity in war overrules the manner of warfare" and *Not kennt kein Gebot*, that is, "necessity knows no law".[95] These doctrines allude to the idea that a commander on battlefield, while considering the demands of a military situation, can decide whatever in every case—whether the laws of war would be abided by or contravened.[96]

---

[90] Articles 51 and 52, AP I.

[91] United States v. List (The Hostage Case), Case No. 7 (Feb. 19, 1948). Available at: http://werle.rewi.hu-berlin.de/Hostage%20Case090901mit%20deckblatt.pdf (Last Accessed: 07-03-2012).

[92] This is sometimes referred to as "*Clausewitzian* approach". See for details, Scott Horton, "Kriegsraison or Military Necessity? The Bush Administration's Wilhelmine Attitude Towards the Conduct of War", *Fordham International Law Journal*, 30 (2006).

[93] Ragone, "The Applicability of Military Necessity in the Nuclear Age", 702-704.

[94] Schmitt, "Military Necessity and Humanity in International Law: Preserving the Delicate Balance", 796.

[95] Commentary on Art. 35, AP I (Geneva: International Committee of the Red Cross, 1987), 391.

[96] Ibid.

According to this approach, military necessity is superior to the laws and customs of war; a belligerent state claiming military necessity could deviate from any law or custom of war in order to avoid defeat.[97]

Carl Luder,[98] one of the stanch advocates of this unbridled interpretation, puts it in the following words that "any departure from the laws of war can be justified when circumstances arise which mean that the achievement of the war-aim, or escape from extreme danger, would be hindered by adhering to it."[99]

He tries to assert that the laws of war would not be relevant or should not complied with if they would hinder the achievement of military targets or they create problems in escaping from a situation of danger, provided that the measure should be taken for accomplishing a military objective.

In this situation, it seems that the belligerent on the battlefield is the sole judge of necessity; if he deems the deviation from a rule—or rules—of international law necessary for the success of his operation, the deviation is permissible.[100]

---

[97] Ragone, "The Applicability of Military Necessity in the Nuclear Age", 702. German authorities as General Julius von Hartmann instigated the acts of terrorism, cruelty and destruction against both combatant and non-combatants. It, in his view, was 'necessary' for prevailing in a conflict. Ragone, "The Applicability of Military Necessity in the Nuclear Age", 704.

[98] He is known to late nineteenth century jurists as "Lieber without limitations".

[99] Horton, "Kriegsraison or Military Necessity? The Bush Administration's Wilhelmine Attitude Towards the Conduct of War",585.

[100] William Gerald Downey, "The Law of War and Military Necessity", *The American Journal of International Law*, 47:2 (1953), 253.

It is this interpretation of the doctrine that the German leaders invoked as a legal justification for various doubtful practices, *inter alia*, attacking civilians, *hors de combat*, and unnecessary devastation.[101]

Likewise, in the recent history, George Walker Bush's administration constituted an attempt to resurrect the notion of *Kriegsraison* to justify the violation of laws of war committed during the US-lead global war on terror.[102] His administration continuously and obviously cited "military necessity" to justify various acts of cruelty, *inter alia*, torture to extract information,[103] cruel, inhuman and degrading treatment with the prisoners of war (POWs),[104] prolonged arbitrary detention, and disappearing. This interpretation, thus, allows terrorism and attacks against non-combatants if these are necessary to prevail in a conflict.[105]

This approach—or to be more specific, this abused interpretation—is, however, no more relevant in the contemporary legal regime.[106] The Tokyo and Nuremberg Tribunals

---

[101] See, for instance, United States v List et al (The Hostage Case); United States v Altstoetter (The Justice Case); and United States v Von Leeb (The High Command Case).

[102] See generally, Jennifer Van Bergen and Charles B. Gittings, "Bush War: Military Necessity or War Crimes?". Available at http://www.pegc.us/archive/letters/bush_war.pdf (Last Accessed: 22-1-2012); also Horton, "Kriegsraison or Military Necessity? The Bush Administration's Wilhelmine Attitude Towards the Conduct of War" 591.

[103] It includes various techniques, for example, sleep deprivation, stress positions—it results, over a period of hours or days, in painful failure of organ or dislocation of joints, and waterboarding—making a person through various means sense that he is drowning.

[104] For examples the detainees were subjected to forced nudity, lap dance and loud music for prolonged periods of time. Furthermore, the detainees were forced to wear women's underwear, a leash and behave like a dog.

[105] Ragone, "The Applicability of Military Necessity in the Nuclear Age", 704.

[106] See, for example, United States v List et al (The Hostage Case); United States v Altstoetter (The Justice Case); and United States v Von Leeb (The High Command Case). Also, ICRC Commentary on AP I,

were proved to be the death knell of this interpretation; what survived after the close of the Tribunals is the notion of military necessity which was embodied by Lieber, and is compatible with the Geneva Conventions, 1949 and the Protocols Additional thereto.[107] A Tribunal, during the Nuremberg trials, while rejecting the operative effect of this interpretation in a case, concluded that:

> It has been the view point of many German writers and to a certain extent has been contended in this case that military necessity includes the right to do anything that contributes to the winning of war. We content ourselves on this subject that with stating that such a view would eliminate all humanity and decency and all law from the conduct of a war and it is a contention which this tribunal repudiates as contrary to the accepted usages of civilized nations. [108]

Thus, this interpretation and sometimes the very existence of suspensory nature of the doctrine, has been generally rejected as a defense for acts which are forbidden by the customary and conventional laws of war "inasmuch as the latter have been evolved and

---

(Geneva: International Committee of the Red Cross, 1987), 391-396; Ragone, "The Applicability of Military Necessity in the Nuclear Age", 704; Schmitt, "Military Necessity and Humanity in International Law: Preserving the Delicate Balance", 798; also Nobuo Hayashi, "Requirements of Military Necessity in International Humanitarian Law and International Criminal Law", *Boston University International Law Journal*, 28:39 (2010), 52. Percy Bordwell, in early nineteenth century, noted that "given a liberal interpretation it would soon usurp the place of the laws altogether". Elihu Root, then president of the American Society of International Law, likewise remarked that "[e]ither the doctrine of *kriegsraison* must be abandoned definitely and finally, or there is an end of international law, and its place will be left a world without law".

[107] Commentary on AP I, 391.

[108] United States v Von Leeb (The High Command Case). Available at: http://www.worldcourts.com/imt/eng/decisions/1948.10.28_United_States_v_Leeb.pdf (Last Accessed: 07-03-2012).

crafted with consideration for the concept of military necessity".[109] The doctrine is restricted by various other doctrines, such as principles of humanity, distinction, and proportionality.

Francis Lieber[110] gives a "positivist interpretation" of the doctrine that "Military necessity as understood by modern civilized nations, consists in the necessity of those measures which are *indispensable* for securing the ends of war, and which are *lawful* according to the modern law and usages of war."[111] Yet another limitation on the doctrine of military necessity he imposes is that "Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, not of torture to extort confession."[112]

TH-1095

Lieber, thus, puts three limitations on the doctrine:

---

[109] Commentary on AP I, 391. Also, Article 3, U. S. Department of the Army, Field Manual No. 27-10, The Law of Land Warfare, 1956

[110] He is Francis Lieber, LL.D., a professor of law at Columbia University, was a German-American jurist and political philosopher. He was an advisor to Abraham Lincoln on matters of military law during civil war in the USA. He is the author of the Lieber Code, 1863, a military code that codifies the laws of war in 157 articles and instructs soldiers on their humanitarian obligations, and prohibited and permitted conduct during an armed conflict. This code represents the first attempt to gather the laws and customs of war into one document. Furthermore, it forms the basis for certain IHL treaties.

[111] U.S. Dept. of War, *General Order No 100, Instructions for the Government of Armies of the United States in the Field,* Art. 14 (1863). Emphasis added. Many other scholars advocate this positivist interpretation of the doctrine. Major William Gerald Downey, Jr. of the US army has stated that the doctrine allows only regulated violence not forbidden by laws and customs of war to force the complete submission of the enemy. Jordan J. Paust has given a similar view that only those measures are allowed in accordance with this doctrine which are not prohibited by international law and customs. Downey, "The Law of War and Military Necessity", 254.

[112] U.S. Dept. of War, *General Order No 100, Instructions for the Government of Armies of the United States in the Field,* Art. 16 (1863).

i. Military necessity does not allow all measures; only those measures can be embarked upon which are indispensible to arrive at a military end

ii. It admits of those measures only which are not prohibited by the laws of war; those measures which are explicitly banned by the laws of war could not be resorted to; and

iii. It does not allow cruelty—inflicting harm for the sake of harm.[113]

This positivist interpretation does not consider the doctrine a means for avoiding the laws of war, it, rather, restricts it to those measures which do not contravene international law.[114] Consequently, this approach to the laws of war obligates to construe the doctrine in a way that upholds the prohibitory effect of the laws of war, even in a state of necessity. Considering this approach, the U.S. military codes acknowledge the role of international law in limiting the doctrine of military necessity. It provides as to the binding effect of the laws of war:

> The prohibitory effect of the laws of war is not minimized by "military necessity" which has been defined as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible. Military necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war inasmuch as

[113] See also, Horton, "Kriegsraison or Military Necessity? The Bush Administration's Wilhelmine Attitude Towards the Conduct of War", 580-82.

[114] Ragone, "The Applicability of Military Necessity in the Nuclear Age", 702.

> the latter have been developed and framed with consideration for the concept of military necessity.[115]

Likewise, at the conclusion of World War II, German commanders tried to invoke *Kriegsraison* as a justification for a number of delinquencies of international law. The Nuremberg and Tokyo Tribunals rejected the justification in various cases. A Tribunal, for instance, concluded:

> It is apparent from the evidence of these defendants that they considered military necessity, a matter to be determined by them, a complete justification for their acts. We do not concur in the view that the rules of warfare are anything less than they purport to be. Military necessity or expediency does not justify a violation of the positive rules. International law is prohibitive law.[116]

The Tribunal further added: "[T]he rules of international law must be followed even if it results in the loss of a battle or even a war."[117]

Thus, 'necessary' and 'unnecessary' are euphemistic for 'permissible' and 'impermissible', respectively. It does not validate all actions that arguably help achieve military goals. In other words, military necessity justifies as a last resort those measures which are indispensable for

---

[115] Article 4, U. S. Department of the Army, Field Manual No. 27-10, The Law of Land Wafare, 1956.

[116] The Hostage Case. Available at: http://werle.rewi.huberlin.de/Hostage%20Case090901mit%20deckblatt.pdf . (Last Accessed: 07-03-2012)

[117] Ibid.

securing the complete submission of the adversary;[118] provided that they are not inconsistent with the law of armed conflict.[119]

2.2 Military Necessity: the Rule or Exception?

The fundamental question for this part of the discussion is to ascertain whether the doctrine of military necessity forms the basis and the principle of humanity puts restrictions on it or is it the other way round; that the principle of necessity forms the foundation of the law from which necessity allows deviation in some cases? In other words, is necessity the rule or the exception?

---

[118] Colonel J. G. Fleury, a student in Canadian Forces College, elaborates the distinction between two oft-confused situations, namely, necessity of success/military necessity and supreme emergency. He denies the mitigating character of military necessity in contemporary law of armed conflict. Military necessity in an armed conflict, he claims, would allow combatants at every level to set aside the laws of war altogether. Furthermore, if the mitigating role of necessity of success—that it justifies the prohibited acts and suspends the law—is accepted, then these laws will obligate only the winning side; the losing side will, thus, be justified to invoke military necessity to resort to cruelty and atrocities. Necessity to success is, hence, a political necessity and not a military necessity. At this level, the laws of war are operative in its entirety. Colonel J. G. Fleury, "Jus in Bello and Military Necessity". Available at: http://www.family-source.com/cache/90534/idx/0 (Last Accessed: 1-3-2012). The rules of international law must be abided by even if doing so would result in the loss of a battle or even a war. Expediency or necessity cannot warrant their violation. United States v. List (The Hostage Case), Case No. 7 (Feb. 19, 1948). Supreme emergency, a state where a nation faces potential and imminent defeat, which would likely result in enslavement or genocide, may suspend the laws of war. Furthermore, the tenet that "necessity knows no law" is applicable only when self-defence applies to the whole of society. Fleury, "Jus in Bello and Military Necessity". Available at: http://www.family-source.com/cache/90534/idx/0 (Last Accessed: 1-3-2012). See also: Article 54(5), AP I.

[119] Article 49, 53 of the GC IV; Article 35 of AP I.

It is the problem of distinction between the two apparently-similar concepts, namely, military necessity (*raison de guerre*) and state of necessity (*raison d'etat*)[120] that brings forth the difference of opinion as to the place of military necessity in international law. Although there can be no yardstick for differentiating between the two concepts, yet an allusion to the correct determination of a situation could be found by asking 'who is authorized to respond to the situation in question?' If it is something to be decided by a military commander on the battlefield, it is military necessity; and if is to be decided by a highest civilian authority, it is state of necessity. State of necessity is an exception to law allowing resort to the prohibited acts in extraordinary situations.[121]

Regarding the place of military necessity, scholars of international law have differed; though they recognize the role of legitimate use of force in international affairs. The basic

---

[120] Discussing state of necessity or *raison d'etat* is not the objective of this thesis. However, to elaborate military necessity and differentiate it from necessity, it is essential to discuss precisely the principal points thereof for تعرف الأشياء بأضدادها. Justificatory state of necessity is that a state is forced by circumstances to preserve its fundamental interest—the very existence—by defying international law and thereby infringing upon the lesser vital interest of others—either enemy or neutral. The assertion that the state of necessity could even be invoked against a neutral state—an innocent third party—distinguishes it from military necessity. Thus, where the very existence of a state is in peril, the state of necessity could be an excuse for the non-observance of the laws of war. William V. O'Brien, "The Meaning of Military Necessity in International Law", *World Polity*, 1 (1957), 114. It is this justificatory characteristic of the state of necessity that is usually confused for military necessity. Military necessity, as defined and elucidated by the forefathers of IHL, is a general rule restricting violence to those measures which are militarily necessary and which are lawful according to the law of warfare. This doctrine allows acts which are strategically and tactically necessary for prevailing in a war. Thus, killing a combatant will always be militarily necessary, while killing a civilian will always be militarily unnecessary, and thus, prohibited. Furthermore, in state of necessity, one is left with no choice; the only choice available to him is either to violate the law or surrender its very existence. In military necessity, however, there may be number of choices of which the least injurious and lawful should be opted for.

[121] O'Brien, "The Meaning of Military Necessity in International Law", 138.

principle of war, in view of those who consider military necessity as a general principle of international law, is that the means necessary to the attainment of the objective of war are, in general, permitted.[122] Thus, every act of hostility is permitted—militarily necessary—unless it is prohibited exceptionally by humanity, proportionality, and/or distinction. Hence, military necessity forms the foundation of the law while humanity, proportionality, and distinction are exceptions to the general principle of military necessity.

However, the Geneva Conventions, 1949 and the first two Protocols Additional thereto, 1977 have narrowed the role of the doctrine to an extent that could be *prima facie* accorded to an exception.

The rules of IHL have been drafted in a way that military necessity has already been taken into consideration; a saving clause—allowing deviation from the law—has been provided for in anticipation of a potential collision between the two apparently opposing principles of humanity and military necessity.[123]

The incorporation of these express saving clauses into the prohibitory provisions negates the existence of any implicit military necessity exception elsewhere.[124] Thus, IHL

---

[122] Ibid. Also see generally for the same view, Burrus M. Carnahan, "Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity", *The American Journal of International Law*, 92 (1998), 213-231; also, Downey, "The Law of War and Military Necessity", 251-262.

[123] See, for example, Article 23(g) Hague Regulation IV; Articles 8, 33, 34, 50 of GC I; Articles 8, 28, 51of GC II; Article 126 of GC III; Articles 49, 53, 143, 147 of GC IV; Articles 54(5), 62(1), 67(4), 71(3) of AP I; Article 17(1) of AP II; and Articles 8(2)(b)xiii, 8(2)(e)viii, 8(2)(e)xii of Rome Statute.

[124] Hayashi, "Requirements of Military Necessity in International Humanitarian Law and International Criminal Law", 56. When a state ratifies an international convention, it agrees that the rules codified in the convention are in consonance with the doctrine of military necessity and that no further appeal would be made to the military requirements.

represents a balance between the principles of military necessity and humanity in such a way that its rules provide a compromise between these two apparently opposing doctrines.[125]

However, difference of opinion has emerged as to the inovcability of the military necessity in respect of the violation of those provisions which do not contain an express saving clause. Though the framers of various conventions of laws of armed conflict anticipated any potential collision between the military and humanitarian considerations, yet what if a real and concrete collision occurs between these interests over those rules which are not accompanied by respective saving clauses?

The two diametrically opposite interpretations respond to the situation distinctively. *Kriegsraison* interpretation, for instance, holds that any measure which is militarily necessary for securing the ends of war renders those provisions of laws of war inoperative which obligate contrary action.[126] Although the laws of war do take military necessity into consideration, yet if a real collision occurs between military necessity and humanity the former could not be precluded from prevailing over the latter.[127] Nevertheless, this

---

[125] The Hostage Case. Available at: http://werle.rewi.huberlin.de/Hostage%20Case090901mit%20deckblatt.pdf. (Last Accessed: 07-03-2012)

[126] Hayashi, "Requirements of Military Necessity in International Humanitarian Law and International Criminal Law", 52.

[127] Ibid.

interpretation has generally been discredited, though it was influential until the end of World War II.[128]

Conversely, the positivist interpretation holds that military necessity has already been given due consideration while crafting the Law of Armed Conflict (LOAC); it holds no more place in LOAC beyond the premises of specific exceptional clauses.[129] Thus, the laws of war could not be departed from; any departure from the laws would be a violation, save as military necessity requires such a departure and which is expressly allowed by the laws.[130]

Moreover, according to the preamble of the Hague Convention IV,[131] 1907, the instrument was, "inspired by the desire to diminish the evils of war, as far as military requirements permit".[132] Furthermore, "Martens Clause"[133] was included in the Convention with a view of balancing military aims by humanitarian considerations.[134] It says to the effect

---

[128] See, for example, United States v List et al (The Hostage Case); United States v Altstoetter (The Justice Case); and United States v Von Leeb (The High Command Case). Also, ICRC Commentary on AP I, pages 391-396; Hayashi, "Requirements of Military Necessity in International Humanitarian Law and International Criminal Law", 52; Ragone, "The Applicability of Military Necessity in the Nuclear Age", 704; Schmitt, "Military Necessity and Humanity in International Law: Preserving the Delicate Balance", 798.

[129] See, for example, Hayashi, "Requirements of Military Necessity in International Humanitarian Law and International Criminal Law", 55-57.

[130] It is the outcome of the apprehension that justifying those acts which are otherwise unjustifiable would render the laws of war subservient to the necessities of war.

[131] In a recent case, the International Court of Justice found that this Convention acquired the status of customary international law. *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ 2004 Rep 136, 172.

[132] Preamble of the Hague Convention IV, 1907.

[133] Professor De Marten (Foyodor Foyodorvich Martens, 1845-1909) is considered among the pioneers of International Humanitarian Law in the modern era. He wrote the preambuler paragraph of the Hague Regulations. The "Marten's Clause", as it is called, is considered the precise summary and one of the

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and belligerents remain under the protection and the rule of the principles of law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.[135]

Hence, mere absence of an explicit rule on a particular issue does not justify an act on the pretext of military necessity;[136] forces on the battlefield are however bound by the laws of humanity. In other words, measures taken during war to secure the ends of war must reflect respect for humanity. Even when the doctrine of military necessity could be resorted to as a defense, it does not have a general characteristic of suspending the law of armed conflict; it is rather subject to some qualifications.[137]

2.3 Parameters of the Doctrine of Military Necessity?

Military necessity, from the legal point of view, does not contradict with the laws and customs of war, nor does it have overriding effect over those laws and customs. The measures

---

most fundamental principles of IHL. See for a brief introduction of De Martin's contribution to the development of IHL, Theodor Meron, "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience", *The American Journal of International Law*, 94:1 (2000), 79-80.

[134] Schmitt, "Military Necessity and Humanity in International Law", 800.

[135] Preamble to the Hague Regulations IV, 1907.

[136] Ibid.

[137] Fleury, "Jus in Bello and Military Necessity". Available at: http://www.family-source.com/cache/90534/idx/0 (Last Accessed: 1-3-2012).

and operations of commanding officer must be justified by the military requirement to undertake the desired course of action.

With reference to the *in bello* law, the general principle is that devastation of life and property is inherently bad, therefore, the forces should cause no more destruction than that strictly necessary to accomplish the military objectives.[138]

Although states generally acknowledge the restrictions imposed by the laws of war, yet they legalize their own actions by arguing that these are exempt from the legal sanctions on the basis of self-defense, reprisal and/or military necessity.[139] The most abused justification for grave violations of the laws of war is that of military necessity.[140]

IHL, however, imposes certain limitations on the doctrine of military necessity. Foremost among these limitations is that of proportionality.[141] This limitation allows such destruction, and only such destruction, as is necessary, required and proportionate to the prompt realization of military advantage anticipated.[142] Furthermore, a measure could not be considered as required for a military advantage unless it is satisfied that the measure is relevant to the accomplishment of military advantage; that among reasonably available measures for the realization of the military advantage, it is the least injurious to the persons and properties

---

[138] Ibid.

[139] Ragone, "The Applicability of Military Necessity in the Nuclear Age", 701.

[140] Ibid.

[141] Ragone, "The Applicability of Military Necessity in the Nuclear Age", 704.

[142] Article 57(2)b, AP I. See also, McDougal and Schlie, "The Hydrogen Bomb Test in Perspective: Lawful Measures for Security", *Yale Law Journal*. 64:648 (1955) 689.

otherwise protected by IHL;[143] and the injury that the measure introduced is not disproportionate to the advantage achieved.[144]

The principle of distinction likewise restricts this doctrine as it confines the attacks to legitimate military targets. It is a customary rule of IHL that the parties to the conflict must at all times distinguish between civilians and combatants; the attacks must not be launched against civilians and civilian objects.[145] Hence, any attack or the employment of any weapon which would cause indiscriminate harm to civilians and combatants[146] is prohibited by customary as well as codified laws of war.[147]

---

[143] Article 57(3), AP I. However, it is possible that the least injurious amongst the reasonably available measures causes disproportionate harm. Where this is the case the belligerent has to halt the achievement of the purpose altogether, or modify it. Hayashi, "Requirements of Military Necessity in International Humanitarian Law and International Criminal Law", 69.

[144] Article 51(5)b, AP I.

[145] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (New York: Cambridge University Press, 2009), 25.

[146] Nuclear weapons, for example, do not distinguish between combatants and non-combatants; in the event of nuclear explosion, the injured combatants of the adversary and non-combatants will be in an area severely contaminated by radioactive fallout, and the presence of radioactive fallout makes it impossible to take care of these wounded and sick people; it is impossible to explode a nuclear weapon and protect the civilians and combatants from the fallout; the destruction caused by exploding nuclear weapon can in no way be proportionate to the military benefit which a state seeks; exploding a nuclear weapon causes genetic damage which increases the gene mutation rate; the genetic damage caused by radioactive fallout would be equivalent of genocide. The International Court of Justice (ICJ), therefore, concluded in its advisory opinion in the Nuclear Weapons Case that the use of nuclear weaponry is violative of international law, customs of war and the UN Charter. ICJ Nuclear Weapons Case Section 243. It is, hence, obvious that employment of nuclear weapons is not allowed even under the principle of military necessity. Ragone, "The Applicability of Military Necessity in the Nuclear Age", 708-713.

[147] Article 51(4), AP I. Also, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (New York: Cambridge University Press, 2009), 37

2.3.1 Does Military Necessity Allow Every Prohibited Act?

IHL rebuts the assumption that whatever helps bring victory is permissible. It even refutes the notion that whatever is necessary for victory is permissible. It prohibits a number of acts utterly, for instance killing a POW.[148]

Yet, it recognizes military necessity as a defense; it can justify those measures only which does not violate the laws of war; and which the laws of war say it can justify,[149] and, as such, excessive use of force in violation of IHL is prohibited.[150] It, thus, rejects the negative implication of the doctrine, such as, cruelty and any other hostile act which renders the return to peace unnecessarily complex.[151]

Hence, it would be a distortion of IHL and over simplification if one argues that military necessity gives armed forces a free hand to take action even if that would otherwise be impermissible, for it is balanced against other humanitarian requirements of IHL. This defense is subject to constraints:

i. An urgent need which admits of no delay for taking the desired measures,[152] that is, the commander on the battlefield is urged by the circumstances to take instant action. The insufficiency of time or the severity of situation renders the

---

[148] Article 23(c), Hague Regulations IV; Article 130, GC III; and Article 8(2)(a)i, 8(2)(b)vi of the ICC Statute.

[149] Colonel J. G fleury, "Jus in Bello and Military Necessity" Page 10.

[150] See, for instance, Articles 35 (2), 51 (5) (b), 56, 57 (2) (a) (iii), 57 (2) (b), 85 (3) (b), AP I.

[151] Fleury, "Jus in Bello and Military Necessity". http://www.family-source.com/cache/90534/idx/0 (Last Accessed: 1-3-2012).

[152] Downey, "The Law of War and Military Necessity", 254.

recourse to other course of action impossible or dangerous. The military tribunals at Nuremberg, in case involving the execution of hostages and reprisals against the civilians, held that "unless the necessity for immediate action is affirmatively shown, the execution of hostages or reprisal [against the] prisoners without a judicial hearing is unlawful."[153] It is, thus, the urgent need that allows the resort to the desired course of action; therefore where no urgent need exists, the recourse would be illegal.[154]

ii. The attack must be intended and directed for the purpose of military defeat of the adversary,[155] that is, military necessity can justify those measures only which are instrumental in success of a military operation.[156] This, however, does not preclude military necessity exception for other purposes, such as, health initiatives concerning the occupying forces;[157] or measures taken which are merely of defensive nature.[158] Hence, military necessity could not be invoked for the justification of any purposeless devastation.

---

[153] The Hostage Case. Available at: http://werle.rewi.huberlin.de/Hostage%20Case090901mit%20deckblatt.pdf (Last Accessed: 07-03-2012)

[154] Downey, "The Law of War and Military Necessity", 255.

[155] Attacks not so intended cannot be justified by military necessity because they would have no military purpose. Roy Gutman and David Rieff, *Crimes of War: What the Public Should Know* (Singapore: W.W. Norton and Company, 1999), 251.

[156] Commentary on AP I, 399.

[157] Hayashi, "Requirements of Military Necessity in International Humanitarian Law and International Criminal Law", 58.

[158] The Hostage Case. Available at: http://werle.rewi.huberlin.de/Hostage%20Case090901mit%20deckblatt.pdf (Last Accessed: 07-

iii. Even the attack which is aimed at the military weakening of the enemy must not inflict harm to civilians and civilian objects that is disproportionate in relation to the concrete and direct military advantage anticipated.[159] Furthermore, if it is apparent that the attack would cause excessive devastation of life, or property, or a combination thereof, then the attack would be cancelled.[160]

iv. Military necessity does not justify violation of the other rules of IHL.[161] Military necessity plea is inadmissible where the rules of IHL are departed from. The laws of war, at times, explicitly allow deviation from the laws, for instance, the destruction or seizure of enemy property can sometimes be justified by the operation of the military necessity.[162] However, killing of POWs is absolutely prohibited.[163]

Thus, the action must not be prohibited by other rules of IHL, that is, the necessity and legality of the action must coincide; thus where the legality of

---

0302012); see also, Hayashi, "Requirements of Military Necessity in International Humanitarian Law and International Criminal Law", 60.

[159] Article 57(2)b of AP I. See also, Gutman and Rieff, *Crimes of War: What the Public Should Know*, 251.

[160] Article 57(2)b AP I.

[161] Gutman and Rieff, *Crimes of War: What the Public Should Know*, 251.

[162] Article 23(g) of the Hague Regulations IV, 1907

[163] Article 23(c), Hague Regulations IV; Article 130, GC III; and Article 8(2)(a)i, 8(2)(b)vi of the ICC Statute.

such a measure is absent, the measure would be criminal.[164] Furthermore, it is this requirement that makes military necessity an exception from the general rule.[165]

Furthermore, these limitations are cumulative; any measure failing to satisfy any one of these limitations would be considered militarily unnecessary and, thus, criminal.

CONCLUSION

The doctrine of military necessity has been viewed in two dissimilar ways, namely, *Kriegsraison* and positivist interpretation. The former considers the laws of war as mere customs or manner of war, and implies that military necessity prevails over the law of war if a conflict arises between the two. It, hence, allows every kind of violence if it is necessary for achieving the war-aim. This unbridled view is, however, condemned at Nuremberg trials.

The positivist interpretation, in contrast, permits only regulated violence. Military necessity consists in those measures only which are militarily, strategically and tactically necessary to achieve the war-aim and which are lawful according to the laws and customs of war; and it does not allow cruelty. It, in this way, renders the doctrine subject to certain restrictions.

---

[164] The Hostage Case. Available at: http://werle.rewi.huberlin.de/Hostage%20Case090901mit%20deckblatt.pdf (Last Accessed: 07-03-2012)

[165] Hayashi, "Requirements of Military Necessity in International Humanitarian Law and International Criminal Law", 87-91.

Furthermore, difference of opinion is observed amongst the scholars of international law as to the place of military necessity in the law of armed conflict. The classical writers have viewed it as a general principle of law of armed conflict which permits every act of violence, in general. It, thus, becomes unavoidable that every kind of violence is permitted unless prohibited by the law of war.

However, few of the modern scholars try to dub it as strictly an exception subject to certain restrictions. This is plausibly the outcome of the provisions codified in the Additional Protocols to the Geneva Conventions, especially. A saving clause has always been inserted in the prohibitory provisions where a threat of the potential collision between the principle of humanity and military necessity is apprehended. The insertion of provisos, thus, excludes the plea of military necessity elsewhere.

CHAPTER THREE

PARAMETERS OF THE DOCTRINE OF MILITARY NECESSITY IN ISLAMIC LAW

INTRODUCTION

Islamic law is adaptable enough; it conforms to the changing circumstances and the gravity thereof, and accordingly accommodates with ease and facility those who are subject to hardships. Since strict allegiance to the law, at times, leads to harm and injury, therefore, Islamic law awards some relaxation to the person subject to unusual situations. The defense that the subject was compelled by the severity of circumstances, however, could not be taken as an advantage *ad infinitum*; the relaxation is anyhow subject to some constraints, and some acts still remain prohibited even in state of necessity.

The *fuqaha'* classified the prohibited acts into three categories: those which become obligatory in state of necessity; those which remain prohibited, even in state of necessity; and those which although remain prohibited in necessity, yet an exemption (*rukhsah*) is granted by the lawgiver. *Rukhsah* allows deviation from the general rule; and is based on a legally justifiable excuse in commission or omission of the act. Although the original rule varies in *rukhsah*, yet evidence prohibiting the act (*al-dalil al-muharrim*) remains intact.

Being under the umbrella of the doctrine of necessity, military necessity is likewise subject to some constraints and confinements. It does not validate every act of hostility. The

analysis of various instances of invoking military necessity for deviation from the general rules of *jus in bello* substantiates that some acts remain prohibited even if militarily necessary for achieving the ends of war.

Furthermore, while invoking military necessity, the principles of humanity, distinction and proportionality will always be given consideration on preferential basis. Thus, it is not the military necessity which pinpoints the prohibition or permissibility of acts; rather it is the doctrines of humanity, proportionality and distinction which ascertain the permissibility or prohibition of acts. Hence, an act of hostility may militarily be necessary, the doctrines of humanity, or proportionality or distinction would still consider it prohibited.

3.1 The General Doctrine of Necessity

Necessity arises where an individual is forced by circumstances to have committed what he has committed. It works to suspend the law at the time of the alleged deviation from the law. 'Necessity knows no law' is one of the tenets governing the defence provided under the doctrine[166].

[166] Muhammad Muslehuddin, *Islam and its Political System* (Islamabad: Islamic Research Institute, 1988), 43.

iii. Those prohibited acts which remain prohibited even in the state of necessity, but *rukhsah* is given to commit such prohibited acts to avoid any harm. Thus, the preferred option (*'azimah*) is not to commit such a prohibited act, but it is allowed to commit such act in the state of necessity. Example includes uttering a statement that amounts to denial of faith (*al-nutq bi kalimat al-kufr*).[171]

This is a very useful classification for our purpose, but we have to be very clear about the basis for classifying various acts into these categories. In other words, on what principle some acts are deemed permissible or obligatory in the state of necessity and others are deemed prohibited even in that state?

An analysis of the issue of killing a protected person in the state of necessity might elaborate the above mentioned types for better understanding. The earlier jurists (*fuqaha'*) unequivocally declare that even if attacking the enemy fort becomes inevitable under the doctrine of necessity, Muslims have to take all precautionary measures to avoid causing harm to any protected person[172] and where it is impossible to distinguish between the lawful and

---

contemporary scholars. Considering a statement that amounts to denial of faith the most heinous crime without mentioning any ground therefor is over simplification, rather distortion of the law and its jurisprudence. For an opposing view on the issue virtually supported with sound legal arguments, see: Ahmad, *Jihad, Muzahamat aor Baghawat*, 371-76; Wahbah al-Zuhayli, *Nazariyyah al-Darurah al-Shar'iyyah Muqaranah ma'a al-Qanun al-Wad'i* (Beirut: Muassisah al-Risalah, 1985), 280-83.

[171] Ibid., 389. Zuhayli, *Nazariyyah al-Darurah al-Shar'iyyah Muqaranah ma'a al-Qanun al-Wad'i*, 288-83.

[172] Ibid., 322-23.

unlawful target, it is obligatory on them to intend killing only those whom it is allowed to kill.[173]

Moreover, the rule becomes stricter when it comes to willful killing of an innocent Muslim. If non-Muslims take shelter in a fort and detain Muslims there, it is allowed to attack that fort even if the Muslim detainee might be killed unintentionally[174], provided it is absolutely and definitively necessary[175] to attack the fort[176]. The reason for allowing such attack is that the prohibition of killing a Muslim detainee is similar in nature to the prohibition of killing the enemy women and children.[177] However, it is important to note that the intention should be to attack and kill the enemy, not the Muslim detainees for it is possible to at least distinguish intentionally between Muslims and infidels.[178]

The *fuqaha'* substantiate that this act remains prohibited even in the state of necessity.[179] So much so that if Muslims are ordered by their commander to kill a group of

---

[173] Burhan al-Din al-Marghinani, *al-Hidayah fi Sharh Bidayat al-Mubtadi* (Beirut: Dar Ihya' al-Turath al-'Arabi n.d.), 380:2.

[174] Abu Bakr Muhammad b. Ahmad b. Abi Sahl al-Sarakhsi, *al-Mabsut* (Beirut: Dar al-Kutub al-'Ilmiyyah, 1997), 10:32.

[175] Al-Ghazali, *al-Mustasfa min 'Ilm al-Usul*, 1:344.

[176] Al-Sarakhsi, *Al-Mabsut*, 10:38

[177] Abu Yousuf Ya'qub b. Ibrahim al-Ansari, *al-Rad 'ala Siyar al-Awza'i* (Karachi: Idarat al-Quran wa al-'Ulum al-Islamiyyah n.d.), 65-66.

[178] Al-Sarakhsi, *Al-Mabsut*, 10:32.

[179] Ahmad, *Jihad, Muzahamat aor Baghawat*, 389-90.

people, but they come to know about the presence of a Muslim in that group, they are not allowed to kill anyone of them till that particular person is singled out and spared.[180]

Imam Abu Hamid Muhammad b. Muhammad al-Ghazali, an illustrious jurist-cum-philosopher, creates a hypothetical case where the enemy, while attacking the Muslim troops, makes shields of some Muslim prisoners[181]. Ghazali says that killing these Muslim prisoners intentionally is not allowed even in the state of such dire necessity, unless it is concluded definitively that the enemy would kill *all* the Muslims; and the case lies under the purview of general (*kulli*)[182] and definitive (*qat'i*)[183] interest of Muslim *ummah*.[184] Moreover, it seems impossible to repel the enemy unless these Muslims are killed.[185]

Ghazali termed it as *maslahah gharibah*[186] which could only be relied upon when the above mentioned three conditions are found.[187] Thus, it is allowed to attack the enemy even if

---

[180] Muhammad Amin b. Ibn 'Abidin al-Shami, *Majmu't Rasai'l Ibn 'Abidin*, (Damascus: Al-Maktabah al-Hashimiyyah n.d.), 1:344.

[181] Al-Ghazali, *al-Mustasfa min 'Ilm al-Usul*, 1:344.

[182] That is, it should have a bearing on the entire Muslim *ummah* and be a communal interest.

[183] That is, the resulting consequences should be assured.

[184] Al-Ghazali, *al-Mustasfa min 'Ilm al-Usul*, 1:344.

[185] For a detailed analysis of the legal technicalities and elaboration thereof in this hypothetical case, see Imran Ahsan Khan Nyazee, *Islamic Jurisprudence* (Islamabad: Islamic Research institute, 2006), 240-248 and Ahmad, *Jihad, Muzahamat aor Baghawat*, 389-394.

[186] It is that kind of *maslahah* which the Shari'ah neither rejects nor acknowledges.

[187] Al-Ghazali, *al-Mustasfa min 'Ilm al-Usul*, 1:218.

a Muslim detainee happens to be killed provided the above mentioned three conditions are found.[188]

3.1.1 Necessity and Other Relevant Terms

The doctrine of necessity in Islamic law has been an extensive area of legal debates for the *fuqaha.* They differentiate among various circumstances appearing to be legal defence against committing an illegal act and, thus, suspending the law. These circumstances include, *inter alia*, *hajah* (need),[189] *haraj* (difficulty)[190] and *ikrah* (coercion).[191]

The famous Spanish jurist Abu Ishaq al-Shatibi[192] has divided the legal rules (*ahakm*) into two categories: the rules applicable in ordinary situations to the subjects (*mukallafin*), and the rules applicable in extraordinary or exceptional situations.[193] The doctrine of necessity

---

[188] It is, however, pertinent to note here that Ghazali explicitly mentions that killing a Muslim detainee is prohibited if any of the conditions is missing, particularly if the *maslahah* is not general—not affecting the *entire* Muslim *ummah.* See for details: Al-Ghazali, *al-Mustasfa min 'Ilm al-Usul*, 1:218; also: Ahmad, *Jihad, Muzahamat aor Baghawat*, 389-90.

[189] *Al-Mawsu'ah al-Fiqhiyyah* (Kuwait: Ministry of Endowments and Islamic Affairs, 1983), 8:191-92.

[190] Ibid., 192.

[191] Ibid., 193.

[192] Shatibi was a great Muslim jurist whose work on the philosophy and spirit of Islamic law titled *al-Muwafaqat fi Usul al-Shari'ah* is a classic. He developed the theory of the purposes of Islamic law (*maqasid al-shari'ah*) after Imam al-Haramayn al-Juwayni and Abu Hamid al-Ghazali. See for a detailed analysis of the views of Shatibi: Ahmad al-Raysuni, *Imam al-Shatibi's Theory of the Higher Objective Intents of Islamic Law*, trans. by Nancy Roberts (Herndon, Virginia: International Institute of Islamic Thought, 2005). See also: Khalid Masud, *Shatibi's Philosophy of Islamic Law* (Islamabad: Islamic Research Institute, 1995); Imran Ahsan Khan Nyazee, *Theories of Islamic Law* (Islamabad: Islamic Research Institute, 1994),189-267; *idem*, *Islamic Jurisprudence*, 202-212

[193] "*Daurah*", *al-Mawsu'ah al-Fiqhiyyah*, 28:193.

falls in the latter category. However, this doctrine could be considered only as a legal defense where the conditions derived by the *fuqaha'* from the Quran and the Sunnah are met.[194] Furthermore, the *fuqaha'* discuss unequivocally some situations where they apply the doctrine of necessity[195] subject to some important general principles of Islamic law relevant to the doctrine of necessity.

3.1.1.1 *Hajah* (Need):

Strict adherence to the law, at times, leads to harm and injury and is, therefore, followed by acute consequences. In view of this, it is permitted under Islamic law to follow the exceptional rules created by the legal apparatus.

Hajah pertains to a situation wherein an individual is in incommodiousness and hardship[196] though threat to life or limb does not exist, nonetheless, it is discomfort and miserable enough to tackle the situation.

It has, in dictating exceptions from the general rules, a lesser tendency than necessity;[197] however, it may attain that degree in case of the severity of the situations

---

[194] These conditions are: (a) that the state of necessity exists at the time of the application of this doctrine; (b) that the person cannot come out the state of necessity, except by violating a legal rule; (c) that the limits of necessity are not transgressed; (d) that a lesser evil is committed to avoid a greater evil; (e) that an act which remains prohibited in necessity is not committed. (Ibid., 194-5).

[195] The situations are: (a) necessity of consuming a prohibited food or drinking item; (b) necessity of looking at and touching the parts of the body of another person which is not allowed in ordinary situations; (c) necessity of causing harm to the life and limb of others or to commit an unlawful sexual act; (d) necessity of seizing the property of others without their legal permission; and (e) necessity of giving a false statement. (Ibid., 195-205) For the purpose of military necessity, the last three situations are of primary importance.

[196] *Al-Mawsu'ah al-Fiqhiyyah* (Kuwait: Ministry of Endowments and Islamic Affairs, 1983), 8:192.

whether it be a case of *hajah 'amah*[198] or *hajah khasah*.[199] The differences between *hajah* and necessity are that in state of necessity *haram bi'aynihi*[200] (prohibited for itself) becomes permissible (*mubah*)[201] while in state of *hajah*, it remains prohibited rather only *haram lighyrihi*[202] (prohibited for an external factor) becomes permissible.[203] *Hajah* occurs usually in

---

[197] 'Irfani, *Islami Nazriyah Darurat*, 67.

[198] *Hajah 'ammah* (public need) should not be confused with public interest. The later relates to benefits, luxuries of all sorts and other abuses of the modern world. It is not as pressing as *hajah 'ammah* is and is, therefore, not possible to be a source of law—the exceptional laws—for it will accommodate the things which could not be permitted under Islamic law. Muhammad Muslehuddin, *Islamic Jurisprudence and the Rule of Necessity and Need* (Islamabad: Islamic Research Institute, 1975), 58. *Hajah*, on the hand, occurs when the general public is collectively in need of something viz people—for ensuring their *masalih 'ammah*, which relate to trade, agriculture and the like—need to accomplish these *hajat*. 'Irfani, *Islami Nazriyah Darurat*, 67. Accordingly, necessity and need may be observed as a source of law i-e the exceptional rules. Muslehuddin, *Islamic Jurisprudence and the Rule of Necessity and Need*, 59. Contract of *Ijarah* (hire) is one the examples of *hajah 'ammah*. Islamic law annuls those contracts the *manafi'* whereof are non-existent at the time of concluding the contract. Thus, under the principles, the contract of *ijarah* is prohibited. It is permitted, contrary to analogy (*qiyas*), for people are in dire need to it. 'Irfani, *Islami Nazriyah Darurat*, 67.

[199] *Hajah khasah* is that kind of *hajah* where a particular group of people—not the general community at large—is in need of something. This particular group may be the inhabitants of a city or a group engaged in a particular trade. 'Irfani, *Islami Nazriyah Darurat*, 67-68. The most relevant and suitable example of *hajah khasah* is *bai' bi al-wafa'* or redeemable sale which was exceptionally and exclusively permitted for the people of Bukhara because of the heavy debts. Muslehuddin, *Islamic Jurisprudence and the Rule of Necessity and Need*, 61. Majallah al-Ahkam al-'Adliyyah refers to this rule: 'Need is considered as necessity whether it is of public or private nature. The validity of sale subject to the right of redemption is of this nature. The inhabitants of Bukhara, after having fallen heavily into debts, were allowed to enter into this contract in order to meet their need therefor. Section 32, *Majallah al-Ahkam al-'Adliyyah*.

[200] *Haram bi'aynihi* or *haram li-dhatihi* is the prohibition which is declared so for itself and right from the start—*ab initio*. It is not permissible *ab initio*. Examples include murder, theft and selling of carrion. The rule for this category is that on the commission of such an act, no advantageous legal effects or gains could be claimed. Thus, theft cannot be a reason of ownership. See for details, Hussain Hamid Hassan, *Usul al-Fiqh* (Peshawar: Maktabah Rashidiyyah, 2003), 50-54; also, Nyazee, *Islamic Jurisprudence*, 70.

[201] Mujahid al-Islam, *Darurat aor Hajat ka Ahkam Shari'yah mai Itibar* (Karachi: Idarah al-Quran wa al-'Ulum al-Islamiyyah, 2002), 396; Hassan, *Usul al-Fiqh*, 53.

[202] This is the prohibition which is not declared so from the start; the act was not permissible in itself but the intervention of an external factor led to its prohibition. Keeping fast, for instance, is allowed, but it becomes prohibited on the day of *'Id*. If, however, the intervening factor is removed, the act becomes permissible. See for details: Nyazee, *Islamic Jurisprudence*, 70; Hassan, *Usul al-Fiqh*, 50-54

cases wherein *haq al-'abd*[204] (right of individual) is involved whereas necessity occurs in cases wherein *haq Allah* (right of God) is involved.[205] The exceptional rule dictated by necessity is in contrary with the expressed *nusus* (texts) whereas *hajah* dictates the exception which is in contrary with *qiyas* (analogy).

Hence the exceptional rule created by the operation of necessity is exclusively for the particular person whereas the exception created by *hajah* could be benefited from generally.[206] Lastly, in case of necessity *haram qat'iyyah mansusah*[207] (definite textual prohibitions) become permissible while in case of *hajah* they do not become permissible[208] rather a relaxation (*takhfif*) is given in the *hukam*.[209]

---

[203] Muslehuddin, *Islamic Jurisprudence and the Rule of Necessity and Need*, 63; Nyazee, *Islamic Jurisprudence*, 71; Hassan, *Usul al-Fiqh*, 54.

[204] The *fuqaha'* devised the criminal legal system based on the rights involved. The kind of right violated determines the procedure to be followed in the courts. The understanding of the system of rights is instrumental in accurate comprehension of the criminal law of Islam. See for a useful discussion: Muhammad Mushtaq Ahmad, *Hudud Qawanin* (Mardan: Midrar al-'Ulum, 2006), 49-69; also Imran Ahsan Khan Nyazee, *General Principles of Criminal Law* (Islamabad: Shari'ah Academy, 2007), 63-70.

[205] Mujahid al-Islam, *Darurat aor Hajat ka Ahkam Shari'yah mai Itibar*, 396.

[206] Zuhayli, *Nazariyyah al-Darurah al-Shar'iyyah Muqaranah ma'a al-Qanun al-Wad'i*, 274-275.

[207] Unlike the majority of the *fuqaha'*, the Hanafites distinguish between the two modes and the respective corollaries of communication from Allah, the Exalted, which command the omission of an act. Thus, the prohibitions which are communicated through definite evidence—with respect to its transmission—are termed as *haram qat'iyyah mansusah*. On the other hand, the prohibition which is communicated through probable evidence is termed as *makruh tahrimi*—closer to prohibition. See for details: Nyazee, *Islamic Jurisprudence*, 68-69; also Hassan, *Usul al-Fiqh*, 50-52.

[208] Nyazee, *General Principles of Criminal Law*, 149.

[209] Mujahid al-Islam, *Darurat aor Hajat ka Ahkam Shari'yah mai Itibar*, 232.

3.1.1.2 *Haraj* (Difficulty):

Haraj or difficulty refers to trouble.[210] In Islamic law, *haraj*, which dictates exceptional rules, refers to an unusual trouble.[211] In order to impede the assimilation of any negative connotations of the term, Al-Shatibi explicitly asserts that *haraj* is not inclusive of the difficulties which an individual faces in routine life[212] and, therefore, the law does not take into account these usual difficulties.[213] It has lesser tendency in suspending the law or bringing about any *takhfif* (relaxation).[214]

In light of the above, it seems that the principle of "difficulty is repelled" is not a free licence and, hence, abandoning *ahkam* (legal rules) in usual situations on the pretext of *haraj* would amount to following the whims and wishes.[215]

---

[210] Shatibi, *al-Muwafaqat*, vol 2, page 159.

[211] Shatibi. An example of difficulty is journey. Journey is *haraj*—not a usual; rather unusual—that is why it calls for an exceptional treatment from the lawgiver. In accordance with the principle that difficulty is repelled, the passenger is not obliged to keep fast while in journey. It, likewise, holds in abeyance the obligation of ..... And thus the passenger is allowed to offer prayer individually. 'Irfani, *Islami Nazriyah Darurat*, 117.

[212] Shatibi. For instance, performing ablution with cold water in winter is not considered as *haraj*. Or the thirst for water in summer *Ramadan* is usual and demanded for, and therefore, does not call for any exceptional treatment. 'Irfani, *Islami Nazriyah Darurat*, 117.

[213] 'Irfani, *Islami Nazriyah Darurat*, 117.

[214] *Al-Mawsu'ah al-Fiqhiyyah*, 8:192.

[215] 'Irfani, *Islami Nazriyah Darurat*, 117.

3.1.1.3 *Ikrah* (Coercion):

Coercion is, generally, a wrongful pressure exerted upon a person to bring about certain result. It occurs in various forms.[216] The most straightforward of these forms is the immediate physical force against a person to commit or not to commit certain act.

It is a well-known fact that Islamic law acknowledges a sort of relaxation in strict allegiance to the general rules of law to the person who is coerced to commit an illegal act. The relaxation awarded as an exception from the general rule is, however, applicable only in particular situations to a certain extent,[217] exceeding which amounts to violation of the law.[218]

Majallah al-Ahkam al-'Adliyyah[219] defines coercion as it "is compelling a person without right to do anything by fear without his consent".[220] Thus, it is a situation in which a person is forced to commit an act without his willingness.[221]

---

[216] It could take the form of threat to life or limb if the dictates are not undertaken. Or, it may take the form of financial necessity, that is, a person may find himself in a dire necessity to finances. Such a person will be forced to comply with certain demands. Khaled Abou El-Fadl, *Law of Duress in Islamic Law and Common Law: A Comparative Study* (Islamabad: Islamic Research Institute, 1992), 8.

[217] 'Irfani, *Islami Nazriyah Darurat*, 38.

[218] See generally, Ahmad, *Jihad, Muzahamat aor Baghawat*, 339-401.

[219] *Majallah al-Ahkam al-'Adliyyah* is the codification of the preferred opinions (*Zahir al-madhhab*) of the Hanafi school of thought. It was in the reign of Ottoman Empire that a seven-member committee was constituted for the purpose of the compilation of the preferred opinions of the Hanafi school of thought in section-wise manner so that it could be promulgated in the state. Ibn Ibn 'Aabidin, son of Ibn 'Abidin al-Shami, was one of the members in the committee. It took some twenty years to codify the law, and it was the first codified civil law of the Ottoman Empire. See for details: Ghazi, *Muhadarat al-Fiqh*, 515-22.

[220] Section 948, *Majallah al-Ahkam al-'Adliyyah*. Some jurists may add to this definition that the threatened harm must be existent and imminent; it must paralyze and overcome the person's will and must deprive

Hence, it neither affects the capacity for acquisition (*ahliyyah al-wujub*)[222] nor the capacity for execution (*ahliyyah al-ada*)[223], instead, it negates the free consent;[224] and as a matter of fact, only a serious or compelling coercion can spoil the choice.[225]

The *fuqaha* divided coercion into two categories, namely, perfect coercion (*ikrah tamm*)[226] *and* imperfect coercion (*ikrah naqis*).[227] Perfect coercion annuls consent and spoils

---

him of his free choice; and it must produce a reasonable fear of harm, which could not be resisted to. Abou El-Fadl, *Law of Duress in Islamic Law and Common Law: A Comparative Study*, 9.

[221] Nyazee, *Theories of Islamic Law*, 100.

[222] The fitness or ability of human beings to acquire rights and obligations. The basis (*manat*) for the existence of this capacity is the attribute of being a human or natural person. The consensus opinion of *fuqaha* is that this form of capacity is possessed by each human being. Nyazee, *Islamic Jurisprudence*, 110.

[223] It is the capability of a human being to issue statements and perform acts to which the lawgiver has assigned certain legal effects. The basis (*manat*) for this capacity is intellect (*'aql*) and discretion (*rushd*). Nyazee, *Theories of Islamic Law*, 86-87.

[224] 'Irfani, *Islami Nazariyyah Darurat*, 38. It should, however, be noted here that even in the existence of coercion, a person's will, consent or the power of choice is not *really* paralyzed. He still has the ability to either opt for succumbing to the dictates or for denying the adherence, whatever the amount of physical or mental violence is. After all, a choice between two evils is still a choice. If, for instance, a person is threatened with death to sign a contract, he could make a rational decision of agreeing thereto rather than die. The person might not be pleased with the decision and the consequences arising therefrom; if the circumstances were different, he might have opted for a different course of action, which could be advantageous to him. However, it was a decision based on the choice of best possible scenario available to him at the time. It is for this reason that the Hanafites opine that choice is only corrupted (*fasid*) in coercion; it is never rendered non-existent. See for a useful discussion: Abou El-Fadl, *Law of Duress in Islamic Law and Common Law: A Comparative Study*, 15-16.

[225] Abou El-Fadl, *Law of Duress in Islamic Law and Common Law: A Comparative Study*, 12.

[226] *Ikrah Tamm* is concluded when certain conditions are found, namely, that the *Mukrih* has the potential to do the act with which he threatens the other; that the person threatened apprehends that the *Mukrih* is going to commit the threatened act immediately; that the act threatened with must be of the nature that it causes death or grievous hurt; and that the person coerced must be unwilling to do the act coerced for. When these conditions are fulfilled, *ikrah* is said to be *mulji'* (compelling). Unless the *ikrah* is *mulji'*, it will not allow deviation from the legal norms. See for details, Ahmad, *Jihad, Muzahamat aor Baghawat*, 356-385. It may not be out of place to mention the definition of *ikrah* as given in the Pakistani Penal Code. PPC defines *ikrah-i-tam* as putting any person his spouse or any of his blood relations within the prohibited degree of marriage in fear of instant death or instant permanent impairing of any organ of the body or instant fear of being subjected to sodomy or zina-bil-jabr. Section 299(g).

(*wajib*), others become permissible (*mubah*), while some acts still remain prohibited (*haram*).[232] In the latter category, an exemption (*rukhsah*) is granted for the commission of some acts, while other acts would still remain prohibited.[233] Thus, oral transactions made under coercion are enforced, except wherefrom the law allows retraction.[234] As for causing an injury to one's self under the threat of instant death, the act is allowed under the principle of committing a lesser evil for avoiding a greater evil.[235] However, where a person is threatened with death to kill another person, he is not allowed to do so for saving his life.[236]

However, if the *mukrah* would commit murder of a third person, the rule stands that if this was a case of perfect coercion (*ikrah tamm*), then the one who coerced him (*mutasabbib/mukrih*) will be awarded *qisas* punishment; for the person under coercion

---

the Hanafi jurisprudence *Usul al-Srakhsi*. See for details, Imam Abu al-Hasant Muhammad 'Abd al-Hayy al-Laknawi, *al-Fawa'id al-Bahiyyah* fi *Tarajim al-Hanafiyyah* (Karachi: Qadimi Kutub Khanah, n. d), 158.

[232] Al-Sarakhsi, *al-Mabsut*, 24:48.

[233] Ibid.

[234] Ahmad, *Jihad, Muzahamat aor Baghawat*, 360.

[235] Ibid.

[236] Ibid., 366. It is pertinent to note here that the *fuqaha'* do consider consensually a threat of harm to a third person as coercion. However, they differ over the person regarding whom a threat of harm would constitute a case of coercion. The Hanafites and Hanbalites opine that a threat of harm to a third person, whatever the type of threat may be, would constitute only a case of *ikrah naqis*. Other schools of thought recognize a threat directed against parents and offsprings only. Ibn Hazam, on the other hand, after quoting a *hadith* stating that Muslims are brothers, asserts that Muslims should protect one another. Since Muslims are joined by a universal empathetic brotherhood, thus harm to a third person, even a stranger Muslim, would constitute a case of coercion. Abou El-Fadl, *Law of Duress in Islamic Law and Common Law: A Comparative Study*, 13, 40.

(*mubashir/mukrah*) is merely a tool in hands of the *mukrih*.[237] In contrast, in case of imperfect coercion (*ikrah naqis*), the *mubashir/mukrah* will be given *qisas* punishment.[238]

Another important issue in this chapter is that of coercion by the state authorities on a person for committing an illegal act. After a perusal of the various texts of *fuqaha* it becomes clear that the liability for illegal act lies on state authorities.[239] The reason for the liability of the state authorities is that in case of *ikrah tamm*, the person coerced is considered a tool in the hands of the coercer.[240] However, the person coerced could not be released from the liability unless the coercer was standing over him at all times.[241] Thus, in case of physical absence of the state authorities, the subordinates cannot take the plea of acting upon the commands of their superior because Islamic law does not allow obedience to any creature when it amounts to disobedience to the Creator.[242]

3.2 EXEMPTION (*RUKHSAH*) FROM THE RULES AND ITS KINDS

It should however be kept in mind, and as elaborated above, that every ac t does not become permissible on the pretext of *darurah* (necessity), *hajah* (need), *haraj* (difficulty) or *ikrah*

---

[237] Ahmad, *Jihad, Muzahamat aor Baghawat*, 366-67.

[238] Ibid., 366.

[239] Ibid., 369.

[240] Ibid., 371.

[241] Abou El-Fadl, *Law of Duress in Islamic Law and Common Law: A Comparative Study*, 41.

[242] Ahmad, *Jihad, Resistance and Rebellion*.,598.

(coercion); instead, some of the acts become obligatory (*wajib*)[243], others become permissible (*mubah*)[244], while the rest remain prohibited.[245] An exemption (*rukhsah*) is granted for the commission of some of the acts in the last category, however, some remain prohibited and no such option is granted in their case.[246]

3.2.1 The Concept of *Rukhsah*

Rukhsah is an exemption from the general rule[247] ordained by the lawgiver[248] and is based on a legally justifiable excuse in commission or omission of the act.[249] Although the original rule varies in *rukhsah*, yet *al-dalil al-muharrim* (evidence prohibiting the act) remains intact.[250] For instance, one is allowed to utter a statement which amounts to denial of faith for saving his

---

[243] For instance, consuming carrion to save life in state of necessity or coercion.

[244] *Mubah* or the permissible is an act in the commission and omission whereof, the lawgiver has given a choice. The law does not ordain any legal consequences of opting for either of the choices. For example, eating and drinking is *mubah*. Individual has given a choice of eating or not eating, and neither of them is rewardable or punishable. See for details, Nyazee, *Islamic Jurisprudence*, 72-73 also Hassan, *Usul al-Fiqh*, 55-60.

[245] Al-Sarakhsi, *al-Mabsut*, 24:48. For instance, illicit sexual intercourse or murder in state of imperfect coercion.

[246] Ibid.

[247] Al-Sarakhsi, *Usul al-Sarakhsi* (Lahore: Dar al-Ma'arif al-No'maniyyah, 1981), 1:117. Some of the jurists classify the entire corpus of the law into general rules and the respective exemptions. This classification has important methodological consequences and helps the jurist achieve analytical consistency. Nyazee, *Theories of Islamic Law*, 69.

[248] Nyazee, *Islamic Jurisprudence*, 77.

[249] 'Irfani, *Islami Nazariyyah Darurat*, 131.

[250] Hassan, *Usul al-Fiqh*, 93. The legal consequences of asserting that the evidence still remains operative are, namely, that the punishment in the hereafter is suspended; acting in accordance with *'azimah* (the original rule initially imposed) is preferred over *rukhsah*; and *daman* (tortuous liability) does not cease to exist for the communication of the lawgiver *is* directed towards the individual. Al-Sarakhsi, *Usul al-Sarakhsi*, 1:119; also, Hassan, *Usul al-Fiqh*, 94.

life in case of coercion—provided his heart remain firmly convinced of his belief—although it is prohibited as a general rule. This relaxation in case of coercion is *rukhsah*. The evidence prohibiting the act remains intact; the act is still prohibited, however, the individual coerced will not be punished for the offense.[251]

Rukhsah, broadly, is of two kinds: *haqiqi* (.....) and *majaz* (....).[252] It is the first kind that the *fuqaha'* consider a *rukhsah* in real sense.[253] Here the evidence prohibiting the act remains operative, and thus, the legal effect of the evidence—the prohibition—remains intact.

As far as the second kind of *rukhsah* is concerned, here neither the evidence prohibiting the act remains operative,[254] nor the legal effect thereof,[255] it, hence, means that the communication (*khitab*) of the original rule is not directed to us at all.[256] These are the *ahkam* communicated to the nations preceding the last prophet Muhammad (upon him be peace). A relaxation has been given in these *ahkam*,[257] or *naskh*[258] (abrogation) of these *ahkam* has occurred.[259]

---

[251] Hassan, *Usul al-Fiqh*, 93.

[252] Al-Sarakhsi, *Usul al-Sarakhsi*, 1:118. This is the classification in view of the Hanafites. The Shafi'ites have a different classification. They classify it into *rukhsah al-fay'l* (exemption of doing a prohibited act) and *rukhsah al-tark* (exemption of refraining from an obligation). See for details: Hassan, *Usul al-Fiqh*, 92-93.

[253] Al-Sarakhsi, *Usul al-Sarakhsi*, 1:118-19.

[254] Ibid., 1:120

[255] Hassan, *Usul al-Fiqh*, 98.

[256] Ibid; also, Ahamd, *Jihad, Muzahamat aor Baghawat*, 399.

[257] For example, consuming wine or carrion. Although it is prohibited, yet the prohibition is suspended in state of necessity. *Wa qad fassala lakum ma harrama 'alaykum illa ma idturirtum ilayh.* Thus, the Quranic verse suspends the prohibition for those in necessity or under coercion. Hassan, *Usul al-Fiqh*, 98; also, Ahamd, *Jihad, Muzahamat aor Baghawat*, 400.

3.2.2 ACTS WHICH REMAIN PROHIBITED DURING NECESSITY

For the purpose of easy reference, we would recall the three kinds of *ahkam* explained in the first part this chapter that some prohibited acts become *wajib* (obligatory) in state of necessity; some prohibited acts still remain prohibited without providing any exemption (*rukhsah*); and some prohibited acts remain prohibited even in the state of necessity, but *rukhsah* is offered to avoid the harm by committing such prohibited acts. Thus, the preferred option (*'Azimah*) is not to commit such a prohibited act, but it is allowed to commit such act in the state of necessity.[260]

The details given above lead us to the principles underlying the *ahkam*. These principles can be summed up in the following way.

1. If the *hukam shara'i* demands the omission of an act the commission of which violates *haq Allah*[261] (right of God), the commission of the act becomes *wajib* in

---

[258] Technically, it is the lifting of a legal rule through a legal evidence of the later date. The evidence abrogating the existing rule is called *nasikh*, while the rule which has been abrogated is called *mansukh*. The doctrine is based on the interest (*maslahah*) of human being. As the interests may change with the circumstances, the law accordingly adjusts. See for details, Nyazee, *Islamic Jurisprudence*, 317-322.

[259] Hassan, *Usul al-Fiqh*, 98; also, Ahamd, *Jihad, Muzahamat aor Baghawat*, 399.

[260] Ahamd, *Jihad, Muzahamat aor Baghawat*, 397.

[261] The Islamic legal system and the consequential obligations and rights revolve around a set of rights. Each act affected by *hukam taklifi* obligation creating rule is based on a right. There are three kinds of rights in Islamic law: *haq Allah* (the right of Allah), *haq al-'abd* (the right of individual) and *haq al-saltanah* (the right of state). The third category of rights is collectively is enjoyed by the individuals. The modern writers confuse the right of Allah with the right of state though the right of Allah is distinct and independent of the right of the state. See for details, Nyazee, *Islamic Jurisprudence*, 92; also: Muhammad Mushtaq Ahamd, *Hudud Qawanin* (Mardan: Midrar al-'Ulum, 2006), 40-44.

state of necessity[262] and perfect coercion[263], even if it is from the category of *haram bi-'aynihi* (prohibited for itself).[264] In this case both the *hurmah* (prohibition) and *ithm* (punishment in the hereafter) are suspended.[265] Thus, the performance of the prohibited act becomes *'Azimah*.[266] For instance, *akl al-maytah* (consuming the carrion) and *shurb al-khamr* (drinking wine).

2. If the *hukam shara'i* demands the omission of an act that the commission of which not only violates *haq Allah* but *haq al-'abd* (right of individual) too, then we can classify it into two situations:

   i. The right of individual violated by the commission of the act that can be atoned for comes under the purview of *rukhas* in the state of necessity[267] and perfect coercion.[268] Although *'azimah* is to adhere to the initial rule,[269] that is, the *hurmah* still remains intact, and only the punishment in the hereafter is suspended.[270] For instance, it is allowed to consume the property of a Muslim without his prior permission in

---

[262] *Mawsu'ah al-Fiqhiyyah* (Kuwait: Ministry of Endowments and Islamic Affairs, 1983), 8:196.

[263] Al-Marghinani, *al-Hidayah fi Sharh Bidayat al-Mubtadi*, 3:274.

[264] Mujahid al-Islam, *Darurat aor Hajat ka Ahkam Shari'yah mai Itibar*, 36.

[265] Ibid.

[266] Ibid.

[267] Ibid., 35.

[268] Abou El-Fadl, *Law of Duress in Islamic Law and Common Law: A Comparative Study*, 26-27.

[269] Al-Sarakhsi, *Usul al-Sarakhsi*, 1:119.

[270] Hassan, *Usul al-Fiqh*, 93.

state of necessity. However, it must be followed by *daman* (compensation) of the property consumed or wasted;[271] and

ii. The right of individual violated by the commission of an act which cannot be atoned for still remains prohibited; hence, *hukam*—the prohibition and the *sabab—dalil muharrim* (evidence prohibiting the act) still remain operative. For instance, *qatl al-Muslim* (killing a Muslim)[272] does not become permissible[273] for it is impossible to compensate the right violated in this case.[274] Thus, it is not permitted for anyone to save his life at the cost of the life or chastity of others.[275]

3. If the *hukam shara'i* demands the commission of an act, or it relates to *'aqa'id* (beliefs) to be affirmed—for instance *'aqidah al-tawhid* (belief in the oneness of God) or *'aqidah al- risalah* (belief in the prophethood of Muhammad upon him be peace), and its omission or denial violates *haq Allah* only, the commission of the act or denial of the belief in the state of necessity comes under the purview of

---

[271] Abou El-Fadl, *Law of Duress in Islamic Law and Common Law: A Comparative Study*, 26-27.

[272] Al-Marghinani, *al-Hidayah fi Sharh Bidayat al-Mubtadi*, 3:274.

[273] For a different stance on the issues of *zina* and *qatal al-Muslim* and various other crimes, see: 'Irfani, *Islami Nazriyah Darurat*, 38-48.

[274] Mujahid al-Islam, *Darurat aor Hajat ka Ahkam Shari'yah mai Itibar*, 36.

[275] It is pertinent to note here that the preservation of the five *maqasid al-shari'ah* (objectives of Islamic law)—protection of religion, life, progeny, intellect and wealth—is important in this sequence. Individuals equally enjoy these rights; no one can save his life at the cost of the life of other. However, for an individual, there is a hierarchical importance; life could be saved at the cost of property. Yet this does not affect the rights of others. See generally, Yousuf Hamid al-'Alam, *al-Maqasid al-'Ammah li al-Shari'ah al-Islamiyyah*, trans. by Muhammad Tufail Hashimi, *Islami Shari'at: Maqasid oar Masalih* (Islamabad: Islamic Research Institute, 2011); also, Mujahid al-Islam, *Darurat aor Hajat ka Ahkam Shari'yah mai Itibar*, 36.

rukhas[276] though the *hurmah* of the act exists;[277] only the punishment in the hereafter is suspended.[278] However, *'azimah* is to adhere to the initial rule.

3.3 THE SPECIAL DOCTRINE OF MILITARY NECESSITY

In the process of deriving the *in bello* law of Islam, the *fuqaha'* weighed up the texts (*nusus*) and precedents in the Islamic military history against the sanctity of life and property of the enemy, on the one hand, and the military necessity of winning the war, on the other. Thus, Islamic law strikes an accurate balance between the two opposing interests in such a way that it gives a higher priority to saving the lives of non-combatants than the modern international law does.[279]

The classical *fuqaha'* discuss diverse situations where the doctrine of military necessity has been invoked during the lifetime of the Prophet (peace be on him) or his companions (may Allah be pleased with them). The doctrine has been invoked very rarely for calling the legal apparatus to provide the exceptional rules in the Islamic military history. Furthermore, the doctrine has always been remained an exception from the general rule; and strictly limited by other principles of law, for instance, humanity, distinction and proportionality. Being

---

[276] Hassan, *Usul al-Fiqh*, 93.

[277] Ahamd, *Jihad, Muzahamat aor Baghawat*, 356-57.

[278] Hassan, *Usul al-Fiqh*, 93.

[279] Ahmad Mohsen al-Dawody, "War in Islamic Law: Justification and Regulations" (Unpublished Thesis: University of Birmingham, 2009), 98-99. The classical jurist's discussions on them convey the position of Islamic law on the contemporary issues in which some Muslims are involved, such as targeting non-combatants, let alone kidnapping journalist and humanitarian aid workers in specific Muslim countries, beheading the acts of terrorism such as blowing up airplanes, trains and buses.

operative under the purview of the wider doctrine of necessity, it, likewise, does not have the overriding effect over all sorts of legal rules; still some measures remain prohibited even if militarily necessary for achieving the strategic objectives of war. For a positive comprehension of the doctrine and its application on the battlefield, it seems essential to understand the cause of war in Islamic law for this is the point whence the doctrine of necessity comes to suspend few principles of law.

3.3.1 The Legality of *Qital* (War)

The prophet of Islam, Muhammad (Peace be upon him) was sent as a divine blessing for the entire universe. He was tasked with eradicating the barbarity and savagery prevalent in the society, and preaching the dignity and sanctity of human life. The code of Islam outlaws the destruction of life and property. The protection of life and property is one of the most important objectives of Islamic law evident from the Quranic verses and prophetic traditions.[280] Thus, the protection of religion occupies the first priority followed by protection of life.

Since war is ruination *per se* and Islam considers it ill-favored, it is, therefore, allowed for the protection of *din* and repelling harm from the Muslims in certain acute situations only as a last resort.[281] Regarding war, a majority of the *fuqaha'* opines that the *'illah*[282] for this

---

[280] For example the Holy Quaran says: *Wa la taqtulu al-Nafs allti harrama Allah....*

[281] Al-Marghinani, *al-Hidayah fi Sharh Bidayat al-Mubtadi* 2:378.

[282] *'Illah* or the underlying cause is that apparent and constant attribute of *hukm shar'i* (legal rule) which indicates the existence and non-existence of the rule. See for details, Nyazee, *Jurisprudence*, 221.

hukm shar'i is the commission of aggression against Muslims or Islam by the adverse party, and not their infidelity (*kufr*).[283]

Similarly, Islamic law considers it obligatory to invite non-Muslims to embrace Islam prior to the waging of war against them. An affirmative reply to the invitation or consent to paying the *jizyah* (poll tax) obstructs legality of waging war against them.[284] It is, therefore, prohibited to wage war against non-Muslims unless they are invited to embracing Islam.[285] Hence, a prior notice of war is obligatory.[286]

Since necessities permit acts which are prohibited in ordinary situations, Islamic law, within war-context, therefore, allows to undertake the prohibited acts if they are militarily necessary for overpowering the enemy.

---

[283] Burhan al-Din al-Marghinani, *al-Hidayah fi Sharh Bidayat al-Mubtadi* (Beirut: Dar Ihya al-Turath al-'Arabi n. d) 380: 2. For a detailed analysis of the difference of opinions amongst the *fuqaha'* on the issue of cause of war in Islam, see generally, Muhammad Munir, "The Cause of War in Islam: Infidelity or the Defence of Faith". Available at: http://ssrn.com/abstract=1802003 (Last Accessed: 18-04-2012). It is for this reason that attacking civilians, against whom the '*illah*—aggression against Muslims—does not exist *ab initio*, or those who surrender, against whom the *illah* no more exists, is prohibited. Furthermore, non-Muslims may enter into a contract of *dhimmah* with the state authorities whereby they are given the citizenship of *dar al-Islam* (the domain of Islam). See for details: Muhammad Taj Shaikh 'Abd al-Rahman Ahmad al-'Urusi, *Fiqh al-Jihad wa al-'Alaqat al-Duwaliyyah fi al-Islam* (Islamabad: Instant Print System, 1999), 380.

[284] Consent to paying *jizyah* accords the status of *dhimi* to them. They, thenceforth, are given the citizenship of the domain of Islam.

[285] Al-Marghinani, *al-Hidayah fi Sharh Bidayat al-Mubtadi*, 2:379.

[286] Al-Sarakhsi, *Al-Mabsut*, 10:36.

3.3.2 The Protected Persons

Islamic law gives the most humane rules for regulating the conduct of hostilities. It rejects the notion of total war or scorched earth policy even if military necessity so demands. This is pursuant to the Quranic verses and prophetic traditions, and *casus belli* in Islamic law. The Holy Quran, for instance, obligates that war be waged only against those who fight against us. It says, "*And fight in God's cause against those who wage war against you, but do not commit aggression—for, verily, God does not love aggressor*".[287] Likewise, when the Prophet (peace be on him) saw a dead body of a woman, he condemned it saying that she could not fight, why then was she killed.[288] In another tradition, the Prophet (peace be on him) is reported to have said, "do not kill women and children".[289]

The *fuqaha'*, therefore, distinguish between two categories of enemy—*muqatil* (combatant) and *ghayr muqatil* (non-combatant).[290] Whereas combatant is a legitimate target in

---

[287] Al-Quran, 2:190. For a detailed analysis of various interpretations of the verse, see, Muhammad Munir, "The Protection of Civilians in War: Non-combatant Immunity in the Islamic Law", *Hamdard Islamicus*, XXXIV:4 (2011). He concludes, after analyzing the opinions of various classical and modern scholars, that the verse "and do not transgress" means that do not kill women and elderly. Furthermore, he asserts that this is the only verse which mentions the kind of *jihad* on which there is *ijma'* (consensus), that is, *jihad* in self-defence and the defence of faith. Munir, "The Protection of Civilians in War: Non-combatant Immunity in the Islamic Law", 10.

[288] Sarakhsi, *Al-Mabsut*, 36:10.

[289] Munir, "The Protection of Civilians in War: Non-combatant Immunity in the Islamic Law", 11.

[290] It is important to note here that the use of the term *muqatil* to differentiate between combatant and non-combatant dates back to the time of Prophet (Peace be upon him). When Sa'd b. Mua'dh was tasked with adjudicating on the case of Banu Qurayzah in the battle of Ditch, he pronounced that all *al-Muqatilah* (all able-bodied men) should be executed. Al-Dawody, "War in Islamic Law: Justification and Regulations" (Unpublished Thesis: University of Birmingham, 2009), 201.

war while non-combatant holds immunity against it; attacking non-combatants, such as children, women and disabled is prohibited.[291] Wanton destruction of civilian property is likewise prohibited.[292] Thus, the property upon which the civilians rely in ordinary life is equally immune from being the object of a direct and intentional attack.[293]

3.3.3 When Distinction is not Possible

As elaborated above that in ordinary situations, non-combatants enjoy protection against the horrendous effects of war. It is prohibited to launch attacks against non-combatants or the property which belongs to civilians or which is necessary for the life of the civilians. Thus, every effort be made to spare civilians and their property.

This immunity, however, ceases to exist for two reasons: when they physically take part in actual combat or through their intellect—advising about the war—[294]or when the

---

[291] Burhan al-Din al-Marghinani, *al-Hidayah*, 2:380.

[292] Qur'an 2: 205.

[293] This is based on various Quranic verses which prohibit *fasad*. Allah the Almighty, for instance, instructs, "so eat and drink of the sustenance provided by God, and do no evil nor mischief on the (face of the) earth", Quran, 2:60; and in the same *surah*, "when he turns his back, his aim everywhere is to spread mischief through the earth and destroy crops and cattle. But God loveth not mischief." Quran, 2:205. In another *surah*, likewise, states, "and God loveth not those who do miscief", Quran, 5:64. See also, Yousuf al-Qaradwi, *Fiqh al-Jiahd: Dirasah Muqaranah li Ahkamihi wa Falsafatihi fi Daw' al-Quran wa al-Sunnah* (Cairo: Maktabah Wahabah) 1:743-46.

[294] Since by taking part in the combat, the *'Illah* i-e *muharabah*, for attacking them is thus established against them. Hence, it is not treated as an exception from the general rules; they would be attacked, killed and maimed in the same manner as combatants are. Furthermore, planning the strategy of war is more—or at least equally—influential in winning the war than fighting physically. Al-Dawody, "War in Islamic Law: Justification and Regulations", 207-8.

distinction between combatants and non-combatants becomes impractical.[295] Although, in the later, it becomes militarily necessary to kill non-combatants of the adversary, the principle of proportionality, however, equally applies to the scenario.[296]

The *fuqaha* discuss three situations when the distinction between combatants and non-combatants becomes impractical. These situations are *igharah* (night raid), *al-tatarrus bi ghayr al-muqatilin* (turning non-combatants into human shields) and *al-hisn* (fort—where the possibility of presence of non-combatants exists).

3.3.3.1 *Igharah* (Night Raid)

The Arabs, in the pre-Islamic era, used to launch attacks against each other without a prior warning to the effect. The preferred time of attack was late night when everybody would be asleep.[297] Islamic law prohibits attacking enemy without prior notice.[298] Similarly night raids are prohibited in ordinary situations as they violate the principle of distinction.[299]

---

[295] Muhammad b. al-Hasan al-Shaybani, *Kitab al-Siyar al-Kabir*, commentary Muhammad b. Ahmad al-Sarakhsi (Quetta: al-Maktabah al-Subhaniyyah, 1992), 4:221.

[296] Munir, "The Protection of Civilians in War: Non-combatant Immunity in the Islamic Law", 16.

[297] Muhammad Munir, "The Prophet (Peace be on him)'s Merciful Reforms in the Conduct of War the Prohibited Acts", *Insights*, 2:2-3 (2009), 226.

[298] Al-Marghinani, *al-Hidayah fi Sharh Bidayat al-Mubtadi*, 2:379.

[299] Munir, "The Prophet (Peace be on him)'s Merciful Reforms in the Conduct of War the Prohibited Acts", 226.

However, within the restraints of certain strict conditions, surprise attacks and night raids, wherein the possibility of inflicting harm to the civilians also exists, are allowed[300] under the doctrine of military necessity subject to the principle of proportionality.[301] Hence, Islamic law recognizes military necessity along with the doctrines of collateral damage and proportionality. Thus, the collateral damage arising out of night raid or surprise attack should be proportionate to the military advantage anticipated.

However, in Islamic law, necessity remains exception to the general rule and, thus, every prohibited act is not allowed under this doctrine. Rather, many prohibited acts remain prohibited even in the state of necessity.[302]

3.3.3.2 Attacking Fort

Yet another situation wherein the discrimination between combatants and non-combatants becomes impractical is where non-Muslims—combatants and non-combatants—take shelter in a fort, or detain some Muslims there, it is allowed to besiege the fort and attack it with mangonels even if the non-combatants or Muslim detainee might be killed unintentionally,[303]

---

[300] Majid khadduri, *The Islamic Law of Nations, Shaybani's Siyar* (Baltimore: The John Hopkins Press, 1966), 95.

[301] Munir, "The Protection of Civilians in War: Non-combatant Immunity in the Islamic Law", 16. This is deduced from a saying of the Prophet (peace be on him). While replying to a companion's query regarding the collateral damage to children and women in a night raid, the Prophet stated, "they are from them". The saying, thus, recognizes the permissibility of collateral damage when militarily necessary along with the doctrine of proportionality. See for a useful discussion, Munir, "The Protection of Civilians in War: Non-combatant Immunity in the Islamic Law", 16-20.

[302] Ahmand, *Jihad, Muzahamat aor Baghawat*, 388.

[303] Abu Yousuf Ya'qub b. Ibrahim al-Ansari, *al-Rad 'ala Siyar al-Awza'i* (Karachi: Idarat al-Quran wa al-'Ulum al-Islamiyyah n.d.), 65-66.

provided it is the only way to force their surrender[304]—militarily necessary for achieving the ends of war.[305]

Similarly, it is allowed to cut off their food and water supply in order to make them surrender as soon as possible. Since we are obliged to overpower them, and there is no any alternate way except cutting off their supply to compelling them get out of the fort and surrender.[306]

The reason for allowing such an attack or cutting off their food and water supply—which may equally harm the non-combatants—is that the prohibition of killing a Muslim detainee is similar in nature to the prohibition of killing the enemy women and children.[307] However, it is important to note that the intention should be attacking and killing the

---

[304] Al-Shaybani, *Kitab al-Siyar al-Kabir*, commentary Muhammad b. Ahmad al-Sarakhsi, 4:261. This is inferred from the practical tradition of the Prophet when he employed mangonel against the fort of Ta'if. Similarly Abu Musa al-Ash'ari and 'Amr b. al-'As (may Allah be pleased with them) employed mangonel against Iskandariyyah. Mangonel is a kind of weapon—used in the bygone days—which may indiscriminately harm non-combatants. Its use was, however, allowed under the doctrine of military necessity. See also, Ahmad Mohsen al-Dawody, "War in Islamic Law: Justification and Regulations" (Unpublished PhD Thesis: University of Birmingham, 2009), 212-16. The tradition that the Prophet (peace be on him) used mangonels against Ta'if is not considered as authentic by some *Muhaddithin* (scholars of sciences of prophetic traditions). Contemporary jurists and jurisprudents, therefore, inclined to its prohibition. See, for example, Munir, "The Protection of Civilians in War: Non-combatant Immunity in the Islamic Law", 22; also, Al-Dawody, "War in Islamic Law: Justification and Regulations", 225-26.

[305] Al-Shaybani, *Kitab al-Siyar al-Kabir*, commentary Muhammad b. Ahmad al-Sarakhsi, 4:276.

[306] Ibid., 4:221; also, Munir, "The Protection of Civilians in War: Non-combatant Immunity in the Islamic Law", 19-20.

[307] Al-Ansari, *al-Rad 'ala Siyar al-Awza'i*, 65-68.

enemy, not the Muslim detainee for it is possible to at least distinguish intentionally between Muslims and infidels.[308]

3.3.3.3 Targeting Human Shields

While referring to the situations wherein the distinction is impossible, the *fuqaha'* discuss the issue of human shields. If the non-Muslim combatants make shields of non-combatant individuals—women, children, aged or a non-Muslim with whom we have a peace truce, or Muslim detainees, is permissible for the Muslim troops to attack them?

The Hanafites opine that there is no harm in attacking the enemy even if the non-combatant might be killed unintentionally,[309] provided the attack was the only solution to overpowering the enemy.[310] The intention should, however, be targeting and killing the non-Muslim combatants.[311] It is worth noting here that Hanafites do not distinguish between those who enjoy non-combatant immunity for the reason not taking part in combat, Muslims

---

[308] See for details, Al-Sarakhsi, *Al-Mabsut*, 10:32.

[309] Al-Marghinani, *al-Hidayah fi Sharh Bidayat al-Mubtadi*, 2:380.

[310] Munir, "The Protection of Civilians in War: Non-combatant Immunity in the Islamic Law", 20. Unlike the Hanafites, the other schools of thought differentiate between two situations, namely, when Muslims are turned into human shield and when non-combatant infidels or those with whom we have agreed on a peace treaty. Concerning the first case, the Malakites, Hanbalites and Imam Awza'i hold that it is prohibited to attack the enemy if Muslims are turned into human shields. They verify this ruling by referring to the Quranic verse that "*had they [believing Muslim men and women] been separated, we would have inflicted a sever chastisement on those who disbelieved from among them [the Makkans].*" Regarding second situation, however, the Malakites and Awza'i agree with the Hanafites that they may be killed unintentionally. Al-Dawody, "War in Islamic Law: Justification and Regulations", 213.

[311] Al-Hasan al-Shaybani, *Kitab al-Siyar al-Kabir*, commentary Muhammad b. Ahmad al-Sarakhsi, 4:226.

or any individual who belong to a country with which Muslims have a peace accord.[312] This is because the killing of a Muslim detainee in the hands of the adversary under the doctrine of military necessity is identical to the killing of women and children of the adversary.[313]

Furthermore, if Muslim troops refrain from attacking the enemy when they have human shields of immune people, the enemy would deliberately turn their women and children into human shield with a view to stopping Muslims from combat. Prevention from targeting the enemy during the course of combat would, therefore, bring them defeat, or at least damage on a massive scale.[314] Hence, attacking the human shields—whether of Muslims or non-Muslims holding immunity—is permissible if it is militarily necessary to avoid defeat or large-scale harm to the Muslims; apart from it, it is prohibited to target the enemy in such a situation.

3.3.4 Weapons

The classical *fuqaha'* dealt with the issue of three kinds of weapons, namely, employing mangonels, burning with fire and flooding the enemy fortification. Flooding the enemy forts or setting them on fire is disliked in ordinary situations.[315] Since the prohibition of killing women and children is evident by the texts, the indiscriminate nature of attack with these

---

[312] Al-Dawody, "War in Islamic Law: Justification and Regulations", 215.

[313] Al-Ansari, *al-Rad 'ala Siyar al-Awza'i*, 65-66.

[314] See also, Al-Dawody, "War in Islamic Law: Justification and Regulations", 213.

[315] Al-Shaybani, *Kitab al-Siyar al-Kabir*, commentary Muhammad b. Ahmad al-Sarakhsi, 4:276.

weapons halts Muslims from its use in ordinary situations.[316] Furthermore, the Prophet (peace be on him) has strictly refrained from punishing the creature of Allah with fire.[317]

If, however, the enemy has taken shelter in a fort and there is no any other way to make them surrender, then it is allowed to employ mangonels against them, flood it with water or set it on fire.[318] The Prophet (peace be on him) used mangonel against the fort of Ta'if.[319] The employment of these weapons was undertaken under the doctrine of military necessity—the prompt surrender of the enemy.[320]

Likewise, the cutting the water supply to the enemy fortification as a weapon, or putting blood or poison in their water in order to spoil it for them is allowed[321] under the doctrine of military necessity.[322] This, however, be noted here that these tactics are not allowed as weapons of mass destruction; the permission, instead, is for overcoming and

---

[316] Sohail H. Hashmi, *Islamic Ethics and Weapons of Mass Destruction: An Argument for Nonproliferation*, 328. Available at: http://site.ebrary.com/lib/mtholyke/Doc?id=10131745&ppg=346 (Last Accessed: 17-04-2012).

[317] Munir, "The Prophet (Peace by on Him)'s Merciful Reforms in the Conduct of War: The Prohibited Acts", 226; also, Hashmi, *Islamic Ethics and Weapons of Mass Destruction: An Argument for Nonproliferation*, 328. Available at: http://site.ebrary.com/lib/mtholyke/Doc?id=10131745&ppg=346 (Last Accessed: 17-04-2012).

[318] Al-Shaybani, *Kitab al-Siyar al-Kabir*, commentary Muhammad b. Ahmad al-Sarakhsi, 4:276.

[319] Ibid., 4:222.

[320] Al-Dawody, "War in Islamic Law: Justification and Regulations", 225; also, Al-Qaradawi, *Fiqh al-Jiahd: Dirasah Muqaranah li Ahkamihi wa Falsafatihi fi Daw' al-Quran wa al-Sunnah*, 1:745-46.

[321] Al-Shaybani, *Kitab al-Siyar al-Kabir*, commentary Muhammad b. Ahmad al-Sarakhsi, 4:221.

[322] Ibid., 4:276. Sarakhsi asserts that since we are obligated to overcome and destroy their power, therefore, what becomes unavoidable in pursuance thereof becomes pardoned. Al-Shaybani, *Kitab al-Siyar al-Kabir*, commentary Muhammad b. Ahmad al-Sarakhsi, 4:221.

destroying their power.[323] In other word, the objective of these weapons should be forcing the enemy in fortification to surrender, and not to kill them on large scale.

The resort to these tactics as weapons is, therefore, not a general rule; it, instead, is an exception created pursuant to the doctrine of military necessity.[324] Muhammad b. al-Hasan al-Shaybani explicitly states that these tactics are allowed as a last resort under the doctrine of military necessity only.[325] The commendable, however, is to overpower and make them surrender through other ways.[326]

3.3.5 Cutting Down Trees

Islamic law prohibits unnecessary destruction of enemy's property. This is referred to as corruption (*fasad fi al-Ard*) and is strictly prohibited.[327] The first rightly guided caliph, Abu

---

[323] Al-Dawody, "War in Islamic Law: Justification and Regulations", 228. Hence, the modern (weapons of mass destruction) WMD's could not be equated with these tactics for reasons that: the accuracy which the Islamic *jus in bello* necessitates in distinction between combatants and non-combatants could not be achieved while employing these modern WMD's; they kill or maim in such a cruel fashion which is violative of the provisions prohibiting mutilation; and they bring about long-term damage to the natural environment which is equivalent of *fasad fi al-Ard*. Hashmi, *Islamic Ethics and Weapons of Mass Destruction: An Argument for Nonproliferation*, 328. Available at: http://site.ebrary.com/lib/mtholyke/Doc?id=10131745&ppg=346 (Last Accessed: 17-04-2012).

[324] Munir, "The Prophet (Peace by on Him)'s Merciful Reforms in the Conduct of War: The Prohibited Acts", 234.

[325] Al-Shaybani, *Kitab al-Siyar al-Kabir*, commentary Muhammad b. Ahmad al-Sarakhsi, 4:276.

[326] Ibid.

[327] Quran, 2:205.

Bakr (may Allah be pleased with him) instructed the army, while leaving for Syria, to refrain from ruination of villages and towns, and crops should not be destroyed.[328]

On the contrary, the Quran approves the prophetic order of cutting down the trees of Banu Nadir.[329]The prophet (peace be on him), after besieging them, ordered the Muslim troops to cut down the trees of Banu Nadir in order to force their surrender. The siege lasted for six nights and ended without war.[330]

However, the *fuqahah'* view the incident of cutting down the trees of Banu Nadir as militarily necessary to arrive at the ends of war; this was the only option available to the Muslim troops for making them surrender.[331] As for the ten commands of Abu Bakr (may Allah be pleased with him), the Hanafites reconciled the contradiction by asserting that he gave these instructions because he knew that the Muslims would win the war.[332] As the tactics refrained from by Abu Bakr were not militarily necessary, it was, therefore, ordained to abide by the general rules, that is, refrain from unnecessary devastation.

---

[328] Munir, "The Prophet (Peace by on Him)'s Merciful Reforms in the Conduct of War: The Prohibited Acts", 229.

[329] Al-Quran, 59:5.

[330] Al-Dawody, "War in Islamic Law: Justification and Regulations", 232.

[331] Al-Qaradwi, *Fiqh al-Jiahd: Dirasah Muqaranah li Ahkamihi wa Falsafatihi fi Daw' al-Quran wa al-Sunnah*, 1:745. A group of some *fuqaha'*, however, has an opposing opinion on the issue of cutting down the trees. See for details of their arguments and legal analysis thereof, Munir, "The Prophet (Peace by on Him)'s Merciful Reforms in the Conduct of War: The Prohibited Acts", 229-36. Munir, after analyzing their arguments, concludes that though the practice is prohibited in ordinary situations, yet it is permissible if militarily required for destroying the stronghold of the adversary. Apart from military necessity, it is prohibited. Munir, "The Prophet (Peace by on Him)'s Merciful Reforms in the Conduct of War: The Prohibited Acts", 230.

[332] Al-Ansari, *al-Rad 'ala Siyar al-Awza'i*, 87.

CONCLUSIONS

The doctrine of necessity facilitates the individuals subject to unusual situations. Keeping in view the severity of the circumstances, it accordingly dictates the exceptional rules to adjust to the situations; the rules thus dictated may not be uniform, they get altered according to the circumstances. In other words, the doctrine sometimes obligates the performance of a prohibited act while sometimes gives option between the commission and omission of the prohibited act, though refraining from the prohibited act is preferred, and sometimes the prohibited remains prohibited.

The doctrine of military necessity is likewise subject to the constraints and conditions, and some prohibited acts still remain prohibited in state of military necessity. The classical *fuqaha'*, for a better elaboration of the doctrine of military necessity, analyze few instances found in the Islamic military history where the doctrine of military necessity was invoked for dictating the exceptional rules. They, sometimes, on the basis of already-known instances and the analysis thereof, frame hypothetical cases where the doctrine of military necessity could be invoked and thereafter ascertain the principles operating behind the specific rules and limitations thereof.

Thus, the doctrine of military necessity, as expounded by the *fuqaha'*, is not a general rule allowing atrocities and resort to inhumanity on the battlefield; it is, instead, an exception from the general rules which allows departure from the Islamic *jus in bello* provisions prohibiting various hostile acts. It is, hence, safe to assert that military necessity is subject to

few conditions and fundamental principles of Islamic law on conduct war, namely, humanity, distinction and proportionality. Islamic law of conduct of hostilities during an armed conflict strikes an accurate balance between the two apparently opposing interests, namely, military necessity and humanity in a fashion that it gives priority to respecting human life.

CHAPTER FOUR

IMPROVING THE CONTEMPORARY LEGAL REGIME ABOUT MILITARY NECESSITY

INTRODUCTION

The two distinct legal systems, namely, the contemporary international legal system and the Islamic legal system, deal with the doctrine of military necessity in two distinct ways peculiar to the their respective natures. Although they concur in allowing deviation from the law in case of military necessity, yet the difference lies in considering the nature of the doctrine. That is to say, the contemporary international legal regime views it as a general rule of the law of armed conflict and that it is contained by humanity, proportionality and distinction. It is, thus, the military considerations which determine the legality or illegality of hostile measures.

Furthermore, since military necessity is considered as a general rule of law of armed conflict, it allows every sort of violence unless prohibited by the dictates of humanity, proportionality and/or distinction. Thus, pursuant to the doctrine of military necessity, every act of violence is allowed generally, unless it is specifically prohibited. The prohibition must clearly state that the particular measures should not be undertaken in state of military necessity. This is the fashion adopted in the legally binding documents of contemporary international legal regime.

On the contrary, the Islamic law of armed conflict although allows deviation from the law in state of military necessity, yet the limits defined by the law therefor should not be transgressed. The exceptional rules laid down by the legal apparatus in state of military necessity are subject to the principles of humanity, proportionality and distinction. Furthermore, unlike the modern law of nations, Islamic law does not consider military necessity as a general rule of law of armed conflict which allows every sort of violence; it is, instead, an exception from the general rule of prohibition of every sort of violence unless militarily necessary. Importantly, even in an accurate situation of state of military necessity, few fundamental principles of Islamic *jus in bello* are operative in its full force. Violating any of these principles would render the recourse to military necessity as prohibited, and hence, punishable. Furthermore, it is these doctrines which decide the legality or illegality of hostilities; and not military necessity.

4.1 Identifying the Permissible and the Prohibited in State of Military Necessity

The rules of IHL are to be complied with in all circumstances whatsoever. They are posited in a way that military considerations have been given their adequate place. Military necessity though admits of departure from the norms of IHL, it is, however, subject to few restrictions and requirements. Since certain acts of hostilities are prohibited even in state of military necessity, the permissible and prohibited acts should be ascertained cautiously.

The legitimacy of the goal of military operation is to be affirmed in the first instance.[333] Where the goal is illegitimate, whatever is done in pursuit thereof will be illegitimate. Once it is affirmed that the goal is legitimate, what is deemed necessary for attainment of the goal becomes *prima facie* permissible and what is deemed *un*necessary becomes *im*permissible.[334] This, however, does not suffice for the present purpose.

As stated earlier that the permissible and the prohibited in state of military necessity be identified vigilantly for the IHL documents have not discussed the issue with due diligence. However, various tribunals, trying international crimes at the closure of various armed conflicts, have hinted at its requirements while determining the absence or existence of military necessity in particular contexts.[335] The protection accorded during an armed conflict under the regime of IHL is of two types:

---

[333] Here the 'legitimacy of goal of military operation' refers to the goal of that particular operation at minute level. It does not refer to the legitimacy of the cause of war. The legitimacy of the cause of war is pre-supposed. Since where the cause of war is not pursuant to *jus ad bellum*, the recourse to military necessity would be illegal even if the goal of particular operation is legitimate. See, for the legitimate and illegitimate use of force, Charter of the United Nations, 1945. For a good analysis of international law relating to use of force, see, Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Oxford University Press, 1983).

[334] Hayashi, "Requirements of Military Necessity in International Humanitarian Law and International Criminal Law", 44.

[335] See, for instance, cases tried by International Criminal Tribunal for Former Yugoslavia (ICTY): Prosecutor v. Kordic & Erkez, Case No IT-95-14/2-T. Available at: www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf *(Last Accessed: 17-03-2012)*; Prosecutor v. Broanin, Case No IT-99-36-T. Available at: http://www.icty.org/x/cases/brdanin/tjug/en/brd-tj040901e.pdf (Last Accessed: 17-3-2012); and Prosecutor v. Tuta & Stela, Case No IT-98-34-T. Available at: www.icty.org/x/cases/naletilic_martinovic/tdec/en/090319.pdf (Last Accessed: 02-05-2012). The ICTY was set up in 1993 by the United Nations Security Council under chapter VII of UN Charter in response to mass killing and maiming, expelling from their homes, torturing and sexually abusing civilians in Bosnia, Croatia and Herzegovina. The tribunal tries crimes committed from 1991 to 2001. It has convicted, up till now, more than 60 individuals. Those charged and indicted by the tribunal

i. General protection;[336] and

ii. Limited protection.[337]

The former indicates that the protection is not territorially conditional; property of this type is immune from attacks and appropriation irrespective of its location and military necessity. This type of protection is accorded to civilian hospitals,[338] medical air craft and ambulances, and hence, could not be made the objects of an attack regardless of whether or not it is in occupied territory.[339] Thus, property protected under the general protection scheme could not be made the object of attack even if military necessity so demands.

---

include, among others, prime ministers, army chiefs-of-staff and defence ministers. More than 40 are at different stages of their trial proceedings. For details, visit: http://www.icty.org/sections/AbouttheICTY. Also, Kriangsak Kittichaisaree, *International Criminal Law* (Oxford: Oxford University Press, 2001), 22-27.

[336] This is sometimes referred to as 'enhanced protection' or 'absolute prohibitions'. They are few in number, and can never be broken even in state of military necessity. O'Brien, "The Meaning of Military Necessity in International Law", 150.

[337] Prosecutor v. Kordic & Erkez. Available at: http://www.icty.org/x/cases/kordic_cerkez/acjug/en/cer-aj041217e.pdf (Last Accessed: 17-3-2012).

[338] Article 18 of GC IV. It provides that "a civilian hospital can in no circumstances be the object of an attack, but at all times be respected and protected by the parties to the conflict". The GC's characterize several kinds of property as generally protected. This characteristic could not be overturned even if military necessity so demands. See, for example, Articles 33-34 (protecting the buildings and materials of medical units or the aid societies) and 35-37 (protecting the medical transport) of GC I; Chapters III, V and VI of GC I; Articles 22-35 and 38-40 of GC II.

[339] Article 19 and 35 of GC I. See also, Prosecutor v. Brdanin. Available at: http://www.icty.org/x/cases/brdanin/tjug/en/brd-tj040901e.pdf (Last Accessed: 17-3-20120); also, Hayashi, "Requirements of Military Necessity in International Humanitarian Law and International Criminal Law", 103.

The limited protection accorded to property, however, is limited by its location being in occupied territory,[340] and military necessity.[341] Destruction of the property located in the occupied territory could be justified if such destruction is rendered absolutely necessary by military operations.[342]

Furthermore, military necessity has been given due consideration while crafting rules of IHL; a saving clause allowing deviation from the law has been provided for in anticipation of a potential collision between the two apparently opposing principles of humanity and military necessity.[343]

The insertion of these express saving clauses into the prohibitory provisions negates the existence of any implicit military necessity exception elsewhere.[344] Thus, a resort to the plea of military necessity would be illegal if the prohibitory clause does not provide therefor.[345]

---

[340] Article 53, GC IV. The ICRC's non-binding commentary on the provision asserts that "the prohibition of destruction of property situated in the occupied territory is subject to a reservation: it does not apply to the cases where such destruction is rendered absolutely necessary by military operations." Hence, the occupying forces may undertake the total or partial destruction of the property if it is militarily necessary. Commentary on Article 53 of GC IV (Geneva: International Committee of the Red Cross, 1958), 302.

[341] Article 3(b), ICTY Statute.

[342] Commentary on Article 53 of GC IV, 302.

[343] See, for example, Article 23(g) Hague Regulation IV; Articles 8, 33, 34, 50 of GC I; Articles 8, 28, 51of GC II; Article 126 of GC III; Articles 49, 53, 143, 147 of GC IV; Articles 54(5), 62(1), 67(4), 71(3) of AP I; Article 17(1) of AP II; and Articles 8(2)(b)xiii, 8(2)(e)viii, 8(2)(e)xii of Rome Statute.

[344] Hayashi, "Requirements of Military Necessity in International Humanitarian Law and International Criminal Law", 56.

[345] Ibid. See also generally, The Hostage Case. Available at: http://werle.rewi.huberlin.de/Hostage%20Case090901mit%20deckblatt.pdf. (Last Accessed: 07-03-2012)

This reasoning, however, poses confusion for the adherents to the LOAC that humanitarian considerations could not be invoked for condemning the inhumane conduct of the adversary unless the provisions contain it expressly. In other words, the insertion of humanitarian considerations in some provisions of IHL negates their existence elsewhere.[346]

The state of necessity, in Islamic law, is governed by two general principles, namely, necessity permits prohibited acts and necessity must be kept within its limits.[347] On the basis of these and other similar principles, various prohibited acts could be divided into three kinds, namely, some prohibited acts become *wajib* (obligatory) in the state of necessity; some prohibited acts remain prohibited even in the state of necessity and no exemption (*rukhsah*) is given for the commission of these acts; and some prohibited acts remain prohibited even in the state of necessity, but *rukhsah* (exemption) is given to avoid the harm by committing such prohibited acts.[348] Thus, the preferred option (*'azimah*) is not to commit such a prohibited act, but it is allowed to commit such act in the state of necessity.[349]

The earlier *fuqaha'* debated various instances in the Islamic military history and substantiated that although the doctrine allows deviation from the law, yet it is subject to some restrictions and conditions. The doctrine, for example, is subject to the principles of

---

[346] Hayashi, "Requirements of Military Necessity in International Humanitarian Law and International Criminal Law", 56.

[347] Mushtaq, *Jihad Muzahamat aur Baghawat*, 387

[348] Zuhayli, *Nazariyyah al-Darurah al-Shar'iyyah Muqaranah ma'a al-Qanun al-Wad'i*, 280-83.

[349] Mushtaq, *Jihad Muzahamat aur Baghawat*, 389.

humanity, proportionality and distinction.[350] Thus, an attack, even if militarily necessary, must not be launched against the adversary if it violates the principle of humanity or introduces disproportionate harm or is indiscriminate in nature. The instances of invoking military necessity analyzed by the *fuqaha'* clearly indicate that the said principles were kept in mind and respected. Hence, Islamic *jus in bello* balances the two apparently opposing interests of military necessity and humanity in a way that it accords priority to the protection and respect of human life.[351]

4.2 Legal Consequences of Committing the Prohibited Acts State of Military in Necessity

In Islamic military history, it is difficult to find any instance of committing the prohibited acts in ordinary situations in an armed conflict; and the limits have not been transgressed even in state of military necessity. The rules laid down by the divine authority were complied with in all circumstance.

Muhammad Munir asserts, "it is extremely difficult if not possible to find campaigns of the Prophet (peace be on him) or his successors in which, what is known as war crimes in

---

[350] 'Aamir al-Zamali, "Al-Islam wa al-Qanun al-Duwali al-Insani Hwl ba'd Mabadi' Siyar al-'Amaliyyat al-Harbiyyah" in *Maqalat fi al-Qanun al-Duwali al-Insani wa al-Islam, edited and compiled by 'Aamir al-Zamali* (Geneva: International Committee of the Red Cross, 2010), 61-64.

[351] It is pertinent to note here that the theory of *Maqasid al-Shari'ah* (purposes of Islamic law) as expounded by *Imam al-Haramayn al-Juwayni* and developed by *Imam Abu Hamid Muhammad al-Ghazali* accords priority to the protection of life over other *Maqasid* except religion. Thus, the protection of religion occupies the first priority followed by protection of life.

IHL parlance, are committed."[352] It is, however, very rarely found in the Islamic military history that the companions have made few mistakes, and that too because of misunderstanding or miscommunication or some mistaken interpretation of the texts.[353]

At the conquest of Makkah, one of the soldiers from the tribe of Banu Khuza'ah killed a person. It is reported that the Prophet (peace be on him) refrained them and said, "O the group of Khuza'ah! Stop the killing, you have killed a person and I will soon pay his blood money...".[354] Likewise, on another occasion, the Prophet (peace be on him) sent 'Ali b. Abi Talib to pay the blood money of the victims of Banu Jadhimah.[355] Thus, paying the blood money of the victims indicates that the Prophet did not condone it; rather condemned and regarded it as killing by mistake.[356] Thus, it is evident that Isamic *jus in bello* has always been enforced through an effective mechanism. It is, hence, concluded that instances of committing the war crimes are extremely unfamiliar to the Islamic military history. Furthermore, on few

---

[352] Munir, "The Prophet (Peace be on him)'s Merciful Reforms in the Conduct of War the Prohibited Acts", 258.

[353] Ibid.

[354] Ibid. Blood money (*diyah*) is the fine paid by the murderer or his family to the heirs of the victim. It is obligatory to pay it in cases of accidental murders, or may be paid in intentional murder if the heirs of the victim so demand. Furthermore, the heirs of the victims may waive the right to blood money if they pardon the murderer.

[355] The historical details of the incident are that after the conquest of Makkah, the Prophet (peace be on him) sent Khalid B. al-Walid to the tribe of Banu Jadhimah for inviting them Islam. They replied that they have converted to Islam. He asked them to hand over their weaponry. They refused to do so. He overpowered them and collected the weaponry from them. Since it was very cold, he instructed his soldiers in the morning to keep their captives warm (*idfa'u sahibakum*). The phrase, in the dialect of Quraysh, means "keep your captive warm", while in the dialect of Banu Slaim, it means to kill. Thus, some of them stared killing their captives. When the Prophet (peace be on him) came to know about this, he raised his hands in supplication and said, "O Allah, I register to you my displeasure at what Khalid has done". Munir, "The Prophet (Peace be on him)'s Merciful Reforms in the Conduct of War the Prohibited Acts", 258.

[356] Ibid., 259.

occasions, where they are committed, they are accordingly condemned and the victims are compensated therefor.

4.3 Principles Governing the State of Military Necessity

The plea of military necessity is not a free license to kill or destroy. Even in case of an accurate recourse to the doctrine, certain principles are to be adhered to. Although, when the doctrine is relevant, it holds some provisions of law in abeyance, yet the following general principles of IHL could not be influenced thereby; they remain operative and must be respected.

Foremost amongst them is the principles of Humanity. Constant care should be taken of civilian population.[357] Furthermore, the choice of adoption of means and methods of warfare should be given proper care.

The principle of distinction is yet another fundamental that governs the doctrine of military necessity. It obligates that the parties to the conflict must at all times distinguish between civilians and combatants;[358] it is considered a war crime under the Rome Statute if civilians are directly and intentionally targeted.[359] Thus, the parties to the conflict are obliged to refrain from attacking anything but military installations; they are required to discriminate

[357] See generally, GC IV; also, Articles 51 and 52, AP I.

[358] Articles 48, 51(2) and 52 (2), AP I.

[359] Article 8(b) (i), (ii) of the Rome Statute, 1999.

between lawful and unlawful objects while conducting military operations. It is a necessary corollary of this principle that indiscriminate attacks are uprooted.[360]

The principles of humanity and distinction collectively give rise to another important principle, namely, proportionality. It prohibits disproportionate use of force which causes excessive collateral damage in relation to the military advantage anticipated.[361] Similarly, causing superfluous injury to the enemy combatants is prohibited under this principle.[362]

Thus, the doctrine of military necessity allows divergence from law subject to the above-mentioned principles. In other words, where the destruction of objects or loss of lives was militarily unnecessary, it categorically signifies that the destruction of objects or loss of lives acquires the form of an unlawful attack.[363] The destruction of objects or loss of lives would be illegal if the attack was:

i. Directed intentionally against the civilians or civilian objects;[364]

ii. Indiscriminate;[365] or

---

[360] Art. 51, AP I.

[361] Article 51(5)b and 57(2)(a)iii, b, AP I. Also: Article 8(b)iv of the Rome Statute, 1999. See, for a useful discussion, Shamash, "How Much is Too Much? An Examination of the Principle of *Jus in Bello* Proportionality".

[362] Article 23 of the Convention II with Respect to the Laws and Customs of War on Land, 1899. See also, Article 35(2), AP I.

[363] Prosecutor v. Hadzihasanovic & Kubura, Case No. IT-01-47. Available at: http://icty.org/x/cases/hadzihasanovic_kubura/acjug/en/had-judg080422.pdf (Last Accessed: 17-3-2012).

[364] Article 48, AP I.

[365] Article 51, AP I.

iii. Though directed against a specific military object, yet resulted in disproportionate collateral damage.[366] It is customary rule of IHL that if the collateral damage caused by an attack is excessive in relation to the military requirements, the principle of proportionality prohibits such an attack,[367] even if the goal could not be achieved through any other way.[368]

These requirements are cumulative; failing to satisfy any of them would tantamount to absence of military necessity and, thus, unlawfulness of an attack.

The established norm, nevertheless, in international law is that every act of hostility is originally permitted, but the principles of humanity, distinction and proportionality put some restrictions excluding some of the acts from this general allowance.[369] Thus, military necessity is the norm and humanity, distinction, and proportionality are the exceptions.[370]

As opposed to this, in Islamic law, the principle of humanity is the norm while necessity is the exception. It means that the entire corpus of Islamic law of war is governed by the principle of humanity while the notion of military necessity serves an exception to it thereby permitting certain acts which in ordinary situations are prohibited. This however

---

[366] Article 8(b)iv of the Rome Statute, 1999. Also: Article 51, 57 and 58 AP I.

[367] Article 51(5)b and 57(2)b of AP I.

[368] United States v. List (The Hostage Case), Case No. 7 (Feb. 19, 1948), available at: http://werle.rewi.hu-berlin.de/Hostage%20Case090901mit%20deckblatt.pdf (Last Accessed: 05-12-2011); See also, Shamash, "How Much is Too Much? An Examination of the Principle of *Jus in Bello* Proportionality", 108.

[369] O'Brien, "The Meaning of Military Necessity in International Law", 138.

[370] For details, see, Chapter I.

would not mean that the instances of permission are left to the discretion of the decision makers; instead, Islamic law elaborates the parameters of such permission in detail. Since war is corruption in itself and Islamic law dislikes it; it is allowed for the protection of *din* (faith) and repelling harm from the Muslims in certain acute situations only as a last resort, Islamic law generally prohibits all acts of hostilities under the principle of humanity, but allows some of these acts under the principle of necessity during war. Thus, military necessity is an exception from the general rules of Islamic *jus in bello*; it could be invoked only as a last resort and subject to some strict conditions and limitations. The entire corpus of law of war in Islam is occupied by humanitarian considerations, however, very rarely military necessity could be given room therein.

4.4 Limits of Military Necessity

Civilians and civilian objects *per se* are immune from attacks; they should not be made the objects of direct and intentional attacks. Any attack launched against them is unlawful, whether it is intentional or indiscriminate.[371] An attack which is deliberately launched against them, and the attack causes some damage to property or life, or a combination thereof, then military necessity does not justify the damage for the damage in question does not satisfy the requirement of military necessity that the measure be in conformity with IHL.[372] Likewise,

[371] Article 8(b) (i), (ii) of the ICC Statute, 1999.

[372] Hayashi, "Requirements of Military Necessity in International Humanitarian Law and International Criminal Law", 115.

any attack which introduces disproportionate loss of lives of property is unlawful even if military considerations so require.

However, the doctrine that *Kriegsraison geht vor Kriegsmanier*, that is to say, "necessity in war overrules the manner of warfare", allows departure from the law in two situations:

i. When the only way to avoid sever danger is to deviate from the legal norms; or

ii. When complying with the norms may endanger the ends of war[373].

However, this doctrine does not allow the killing of civilians or destroying civilian objects. Since destruction as an objective of war is in itself a violation of IHL, thus, to justify this violation, a reasonable connection between destruction and complete surrender of the adversary must be shown.[374]

It is, however, worth noting here that in the contemporary law of armed conflict, it is the doctrine of military necessity which ascertains the legality or illegality of violence; the principles of humanity, proportionality, and distinction are exceptions from military necessity. Thus, if a measure is required by military considerations for securing the ends of war, it would be considered allowed unless specifically prohibited by the codified law of armed conflict.

---

[373] Schmitt, "Military Necessity and Humanity in International Law", 797.

[374] United States v. List (The Hostage Case), Case No. 7 (Feb. 19, 1948). Available at: http://werle.rewi.hu-berlin.de/Hostage%20Case090901mit%20deckblatt.pdf (Last Accessed: 05-12-2011); also, Schmitt, "Military Necessity and humanity in International Law", 797-98.

On the contrary, in Islamic law, it is the principles of humanity, proportionality and distinction which ascertain the legality or illegality of hostilities; and military necessity is an exception from the general rules strictly contained by these principles. Furthermore, the entire law of armed conflict in Islam is based on humanitarian considerations while military considerations are exceptionally given room to achieve the objectives of war.

CONCLUSION

Military necessity is one of the fundamental principles upon which the corpus of international humanitarian law is based. It justifies acts of hostilities which are militarily required for arriving at the ends of war and it constitutes a possible defense against violation of the positive rules of law of armed conflict. Furthermore, the notion has always been considered as a general rule of law of armed conflict which allows every sort of violence unless prohibited by the principles of humanity, proportionality, and/or distinction. Thus, it is the doctrine of military necessity which forms the foundation of the modern law of armed conflict and not the said principles of law. Moreover, the legality or illegality of violence is judged subject to the notion of military necessity.

The recourse to the doctrine, however, is subject to two conditions, namely, that the only way to avoid a severe danger is to deviate from the law and when complying with the law may endanger the ends of war. Furthermore, the military consideration anticipated by

the recourse to military necessity should not cause disproportionate loss to civilians or civilian objects, and, moreover, the doctrine does not allow indiscriminate attacks; distinction between lawful and unlawful objects should however be made.

The doctrine of military necessity has very rarely been invoked for undertaking the prohibited acts in war in Islamic military history. The instances of invoking military necessity for committing the prohibited acts during war are sufficiently analyzed by Muslim scholars. This is evident from their analysis and conclusion that the Islamic *jus in bello* does not deal with the notion of military necessity the way modern law of armed conflict does. The general principle of Islamic *jus in bello* is that all measures of hostility are prohibited unless required by military considerations. In other words, it is not the doctrine of military necessity which forms the foundation of the law; it is, instead, the dictates of humanity, proportionality, and distinction which form the basis of the law. Thus, an act of violence would always be considered prohibited unless permitted by military necessity. Moreover, military necessity is an exception from the general rules and is strictly limited by the said principles. Thus the Islamic notion of military necessity, with its parameters and details described by Islamic law itself, strikes an accurate balance between military and humanitarian consideration in a way that it gives priority to respecting human life.

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS

Military necessity is one of the fundamental principles upon which the corpus of International Humanitarian Law is based. It justifies acts of hostilities which are militarily required for achieving the objectives of war and constitutes a possible defense against violation of the positive rules of the law of armed conflict. Furthermore, the principle has always been considered as a general rule of the law of armed conflict which allows every sort of violence unless prohibited by the principles of humanity, proportionality, and/or distinction. Thus, it is the doctrine of military necessity which forms the foundation of the modern law of armed conflict and the legality or illegality of violence is ascertained by virtue of the principle of military necessity.

Military necessity has been viewed in two dissimilar ways, namely, *Kriegsraison* and positivist interpretation. The former considers the laws of war as mere customs or manner of war, and implies that military necessity prevails over the law of war if a conflict arises between the two. It, hence, allows every kind of violence if it is necessary for achieving the war-aim. This unbridled view was, however, condemned by the Nuremberg trials.

The positivist interpretation, in contrast, permits only regulated violence. Military necessity consists in only those measures which are militarily, strategically and tactically necessary to achieve the war-aim and which are lawful according to the laws and customs of war; and it does not allow cruelty. It, hence, renders the doctrine subject to certain

restrictions. Furthermore, scholars of international law differ as to the place of military necessity in the law of armed conflict. The classical writers have viewed it as a general principle of law of armed conflict which permits every act of violence, in general. It denotes that every kind of violence is permitted unless prohibited by the law of war.

Some modern writers, however, try to dub it as strictly an exception subject to certain restrictions. This is plausibly the outcome of the provisions of the Additional Protocols to the Geneva Conventions of 1949. A saving clause has always been inserted in the prohibitory provisions where a threat of the potential collision between the principle of humanity and military necessity is apprehended. The insertion of provisos, thus, excludes the plea of military necessity elsewhere.

The doctrine of necessity, in Islamic law, facilitates the individuals subject to unusual situations. Observing severity of the circumstances, it accordingly dictates exceptional rules to adjust to the situations; the rules thus dictated sometimes obligates the performance of a prohibited act while sometimes gives option between the commission and omission of the prohibited act, though refraining from the prohibited act is preferred, and sometimes the prohibited remains prohibited.

The narrower doctrine of military necessity is likewise subject to limitations, and some prohibited acts still remain prohibited in the state of military necessity. Thus, the doctrine of military necessity, as expounded by the Muslim jurists, is not a general rule so to allow atrocities and resort to inhumanity on the battlefield; it is, instead, an exception from

the general rules which allows departure from the Islamic *jus in bello* provisions prohibiting various hostile acts. Therefore, Islamic law of conduct of hostilities strikes an accurate balance between the two apparently opposing interests, namely, military necessity and humanity in a fashion that it gives priority to respecting human life.

In other words, the Islamic *jus in bello* does not deal with the notion of military necessity the way modern law of armed conflict does; for it is not the doctrine of military necessity which forms the foundation of the law; instead, it is the dictates of humanity, proportionality and distinction which form the said basis. Thus, an act of violence would always be considered prohibited unless permitted by military necessity which is in turn strictly limited by the abovementioned principles.

RECOMMENDATIONS

1. The notion of military necessity should be recognized as an exception to the rules of humanity, proportionality, and distinction, as is the case in Islamic law. That would mean that the entire framework of IHL should be covered by humanity whereas military necessity would serve as an exception at times of severe need.
2. Moreover, the parameters of necessity and the nature of "severe need" must also be defined in clear terms so that civilian causalities, in the name of collateral damage, are evaded, and destruction of civilian targets avoided.
3. It is claimed that the provisions of the Geneva Conventions of 1949 and the Protocols Additional thereto expressly mention military necessity wherever permissible, this, in

their opinion, denotes that it is permissible only in these situations while it would remain prohibited otherwise. Thus, any recourse to military necessity would be considered illegal unless the provision of the law explicitly allows. This, in our view, leads to ambiguity because military necessity is recognized as a governing principle by IHL as is humanity and distinction. Would this mean that if humanity is not mentioned in a provision, the principle of humanity would not be applicable in that specific situation? Would that case be governed by other principles? It is therefore, important and in consonance with the purposes of IHL that military necessity should, at times, remain unable to justify violating the rest of the principles.

BIBLIOGRAPHY

BOOKS

Al-Qur'an.

'Alam, Yousuf Hamid. *al-Maqasid al-'Ammah li al-Shari'ah al-Islamiyyah*, trans. by Muhammad Tufail Hashimi, *Islami Shari'at: Maqasid oar Masalih*. Islamabad: Islamic Research Institute, 2011.

'Irfani, 'Abd al-Malik, *Islami Nazriyah Darurat*. Islamabad: Shari'ah Academy, 2001.

'Urusi, Muhammad Taj Shaikh 'Abd al-Rahman Ahmad. *Fiqh al-Jihad wa al-'Alaqat al-Duwaliyyah fi al-Islam*. Islamabad: Instant Print System, 1999.

Ahmad, Muhammad Mushtaq. *Hudud Qawanin*. Mardan: Midrar al-'Ulum, 2006.

_____. *Jihad Muzahamat aur Baghwat: Islami Shari'at aur Bayn al-Aqwami Qanun ki Roshni mayn*. Gujranwalah: Al-Shri'ah Academy, 2008.

Al-Mawsu'ah al-Fiqhiyyah. Kuwait: Ministry of Endowments and Islamic Affairs, 1983.

Al-Ansari, Abu Yousuf Ya'qub b. Ibrahim *al-Rad 'ala Siyar al-Awza'i*. Karachi: Idarat al-Quran wa al-'Ulum al-Islamiyyah n.d.

Commentary on the Protocols Additional to the Geneva Conventions 1949. Geneva: International Committee of the Red Cross, 1987.

Doebbler, Curtis F.J. *Introduction to International Humanitarian Law*. Washington: CD Publishing, 2005.

El-Fadl, Khaled Abou. *Law of Duress in Islamic Law and Common Law: A Comparative Study*. Islamabad: Islamic Research Institute, 1992.

Al-Ghazali, Abu Hamid Muhammad b. Muhammad, *al-Mustasfa min 'Ilm al-Usul*. Beirut: Dar Ihya' al-Turath al-'Arabi, n.d.

Ghazi, Mahmood Ahmad. *Muhadarat al-Fiqh*. Lahore: al-Faisal Nashiran wa Tajiran I Kutub, 2005.

Gutman, Roy and David Rieff. *Crimes of War: What the Public Should Know*. Singapore: W.W. Norton and Company, 1999.

Hans-Peter Gasser. *Introduction to International Humanitarian Law*. Haupt: Henry Dunant Institute, 1993.

Hassan, Hussain Hamid. *Usul al-Fiqh* (Peshawar: Maktabah Rashidiyyah, 2003

Henckaerts, Jean-Marie and Louise Doswald-Beck. *Customary International Humanitarian Law*. New York: Cambridge University Press, 2009.

Ian Brownlie, *International Law and the Use of Force by States*. Oxford: Oxford University Press, 1983.

Al-Islam, Mujahid. *Darurat aor Hajat ka Ahkam Shari'yah mai Itibar*. Karachi: Idarah al-Quran wa al-'Ulum al-Islamiyyah, 2002.

Al-Kasani, Abu Bakr b. Mas'ud. *Badai' al-Sana' fi Tartib al-Sharai'*. Quetta: Maktabah Rashidiyyah, n.d.

Khadduri, Majid. *The Islamic Law of Nations: Shaybani's Siyar*. Baltimore: The John Hopkins Press, 1966.

Kittichaisaree, Kriangsak. *International Criminal Law*. Oxford: Oxford University Press, 2001.

Al-Laknawi, Imam Abu al-Hasant Muhammad 'Abd al-Hayy. *al-Fawa'id al-Bahiyyah* fi *Tarajim al-Hanafiyyah*. Karachi: Qadimi Kutub Khanah, n. d.

Majallah al-Ahkam al-'Adliyyah.

Al-Marghinani, Burhan al-Din, *al-Hidayah fi Sharh Bidayat al-Mubtadi*. Beirut: Dar Ihya' al-Turath al-'Arabi n.d.

Masud, Muhammad Khalid. *Shatibi's Philosophy of Islamic Law*. Islamabad: Islamic Research Institute, 1995.

Al-Mawsu'ah al-Fiqhiyyah. Kuwait: Ministry of Endowments and Islamic Affairs, 1983.

Muslehuddin, Muhammad. *Islam and its Political System*. Islamabad: Islamic Research Institute, 1988.

_____. *Islamic Jurisprudence and the Rule of Necessity and Need*. Islamabad: Islamic Research Institute, 1975.

Nyazee, Imran Ahsan Khan. *General Principles of Criminal Law*. Islamabad: Shari'ah Academy, 2007.

_____. *Islamic Jurisprudence*. Islamabad: Islamic Research institute, 2006.

_____. *Theories of Islamic Law*. Islamabad: Islamic Research Institute, 1994.

Al-Qaradwi, Yousuf. *Fiqh al-Jiahd: Dirasah Muqaranah li Ahkamihi wa Falsafatihi fi Daw' al-Quran wa al-Sunnah*. Cairo: Maktabah Wahabah, 2009.

Al-Raysuni, Ahmad. *Imam al-Shatibi's Theory of the Higher Objective Intents of Islamic Law*, trans. by Nancy Roberts. Herndon, Virginia: International Institute of Islamic Thought, 2005.

Al-Sarakhsi, Abu Bakr Muhammad b. Ahmad b. Abi Sahl, *al-Mabsut*. Beirut: Dar al-Kutub al-'Ilmiyyah, 1997.

Al-Sarakhsi, *Usul al-Sarakhsi*. Lahore: Dar al-Ma'arif al-No'maniyyah, 1981.

Al-Shami, Muhammad Amin b. Ibn 'Abidin. *Majmu't Rasai'l Ibn 'Abidin*. Damascus: Al-Maktabah al-Hashimiyyah n.d.

Al-Shari'ah, Sadr. *al-Tawdih fi Hall Jawamid al-Tanqih*. Karachi:np, 1979.

Al-Shaybani, Muahmmad b. al-Hassan. *Kitab al-Siyar al-Kabir*, commentary Muhammad b. Ahmad al-Sarakhsi. Quetta: al-Maktabah al-Subhaniyyah, 1992.

Al-Zamali, Aamir, "Al-Islam wa al-Qanun al-Duwali al-Insani Hwl ba'd Mabadi' Siyar al-'Amaliyyat al-Harbiyyah" in *Maqalat fi al-Qanun al-Duwali al-Insani wa al-Islam, edited and compiled by 'Aamir al-Zamali*. Geneva: International Committee of the Red Cross, 2010.

Al-Zuhayli, Wahbah. *Nazariyyah al-Darurah al-Shar'iyyah Muqaranah ma'a al-Qanun al-Wad'i*. Beirut: Muassisah al-Risalah, 1985.

ARTICLES

_____. The Protection of Civilians in War: Non-combatant Immunity in the Islamic Law. *Hamdard Islamicus*, XXXIV:4 (2011).

Bergen, Jennifer Van and Charles B. Gittings. Bush War: Military Necessity or War Crimes?. Available at http://www.pegc.us/archive/letters/bush_war.pdf (Last Accessed: 22-1-2012);

Carnahan, Burrus M. Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity. *The American Journal of International Law*, 92 (1998)

Downey, William Gerald. The Law of War and Military Necessity. *The American Journal of International Law*, 47:2 (1953).

Fleury, Colonel J. G. *Jus in Bello* and Military Necessity. Available at: http://www.family-source.com/cache/90534/idx/0 (Last Accessed: 1-3-2012).

Hashmi, Sohail H. *Islamic Ethics and Weapons of Mass Destruction: An Argument for Nonproliferation*, 328. Available at: http://site.ebrary.com/lib/mtholyke/Doc?id=10131745&ppg=346 (Last Accessed: 17-04-2012).

Hayashi, Nobuo. Requirements of Military Necessity in International Humanitarian Law and International Criminal Law. *Boston University International Law Journal*, 28:39 (2010).

Horton, Scott. Kriegsraison or Military Necessity? The Bush Administration's Wilhelmine Attitude Towards the Conduct of War. *Fordham International Law Journal*, 30 (2006).

McDougal and Schlie. The Hydrogen Bomb Test in Perspective: Lawful Measures for Security. *Yale Law Journal*. 64:648 (1955)

Meron, Theodor. The Martens Clause, Principles of Humanity, and Dictates of Public Conscience. *The American Journal of International Law*, 94:1 (2000).

Moussa, Jasmine. Can *Jus ad Bellum* override *Jus in Bello*? Reaffirming the Separation of the Two Bodies of Law. *International Review of the Red Cross*, 90:872 (2008).

Munir, Muhammad. "The Cause of War in Islam: Infidelity or the Defence of Faith". Available at: http://ssrn.com/abstract=1802003 (Last Accessed: 18-04-2012).

Munir, Muhammad. The Prophet (Peace be on him)'s Merciful Reforms in the Conduct of War the Prohibited Acts. *Insights*, 2:2-3 (2009).

O'Brien, William V. The Meaning of Military Necessity in International Law. *World Polity*, 1 (1957).

Ragone, Peter A. The Applicability of Military Necessity in the Nuclear Age. *Journal of International Law and Politics*, 16:701 (1984).

Schmitt, Michael N. Military Necessity and Humanity in International Law: Preserving the Delicate Balance. *Virginia Journal of International Law*, 50:4 (2010),

Shamash, Hamutal Esther. How Much is Too Much? An Examination of the Principle of *Jus in Bello* Proportionality. *Israel Defence Forces Law Review*, 2 (2005)

LEGAL INSTRUMENTS

INTERNATIONAL

First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1864

Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1906

Third Geneva Convention relative to the Treatment of Prisoners of War, 1929

Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949

Introduction of the San Remo manual, visit:

http://www.icrc.org/eng/resources/documents/misc/57jmst.htm (Last Accessed: 04-05-2012).

Protocol I Additional to the Geneva Conventions of 1949 (AP I).

The Hague Regulations IV, 1907

The Rome Statute of the international Criminal Court, 1999.

The San Remo Manual.

NATIONAL

U.S. Department of the Army, Field Manual No. 27-10, The Law of Land Wafare (1956).

U.S. Department of War, *General Order No 100, Instructions for the Government of Armies of the United States in the Field* (1863).

CASES

Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ 2004 Rep 136, 172.

Prosecutor v. Broanin, Case No IT-99-36-T. Available at: http://www.icty.org/x/cases/brdanin/tjug/en/brd-tj040901e.pdf (Last Accessed: 17-3-2012); and

Prosecutor v. Hadzihasanovic & Kubura, Case No. IT-01-47. Available at: http://icty.org/x/cases/hadzihasanovic_kubura/acjug/en/had-judg080422.pdf (Last Accessed: 17-3-2012).

Prosecutor v. Kordic & Erkez, Case No IT-95-14/2-T. Available at: www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf *(Last Accessed: 17-03-2012)*;

Prosecutor v. Kordic & Erkez. Available at: http://www.icty.org/x/cases/kordic_cerkez/acjug/en/cer-aj041217e.pdf (Last Accessed: 17-3-2012).

Prosecutor v. Tuta & Stela, Case No IT-98-34-T. Available at:

www.icty.org/x/cases/naletilic_martinovic/tdec/en/090319.pdf (Last Accessed: 02-05-2012).

United States v Altstoetter (The Justice Case);

United States v Von Leeb (The High Command Case). Available at:

http://www.worldcourts.com/imt/eng/decisions/1948.10.28_United_States_v_Leeb.pdf (Last Accessed: 07-03-2012).

United States v. List (The Hostage Case), Case No. 7 (Feb. 19, 1948). Available at:

http://werle.rewi.hu-berlin.de/Hostage%20Case090901mit%20deckblatt.pdf (Last Accessed: 07-03-2012).

WEBLIOGRAPHY

http://icty.org/x/cases/hadzihasanovic_kubura/acjug/en/had-judg080422.pdf (Last Accessed: 17-3-2012).

http://law.queensu.ca/events/lectureshipsVisitorships/ohlinNecessity.pdf (Last Accessed: 24-04-2012)

http://site.ebrary.com/lib/mtholyke/Doc?id=10131745&ppg=346 (Last Accessed: 17-04-2012).

http://ssrn.com/abstract=1802003 (Last Accessed: 18-04-2012)

http://werle.rewi.hu-berlin.de/Hostage%20Case090901mit%20deckblatt.pdf (Last Accessed: 05-12-2011)

http://www.asser.nl/wihl-webroot/documents/cms_ihl_id80_5_HILAC%20Lecture-%20Gill%20-PDF.pdf (Last Accessed: 7-3-2012)

http://www.elib.at/index.php/International_Humanitarian_Law_-_Introduction_-_ICRC_-_Frits_Kalshoven_-_Liesbeth_Zegveld#CHAPTER_I_-_INTRODUCTION (Last Accessed: 26-12-2011)

http://www.family-source.com/cache/90534/idx/0 (Last Accessed: 1-3-2012)

http://www.icc-cpi.int/Menus/ICC/About+the+Court/ (Last Accessed: 1-3-2012)

http://www.icrc.org/eng/resources/documents/misc/57jmst.htm (Last Accessed: 04-05-2012)

http://www.icty.org/sections/AbouttheICTY (Last Accessed: 17-3-2012).

http://www.icty.org/x/cases/brdanin/tjug/en/brd-tj040901e.pdf (Last Accessed: 17-3-2012)

http://www.icty.org/x/cases/kordic_cerkez/acjug/en/cer-aj041217e.pdf (Last Accessed: 17-3-2012)

http://www.idi-iil.org/idiE/resolutionsE/1999_ber_03_en.PDF (Last Accessed: 29-12-2011)

http://www.jstor.org/stable/pdfplus/2997993.pdf?acceptTC=true

http://www.pegc.us/archive/letters/bush_war.pdf (Last Accessed: 22-1-2012)

http://www.scottmanning.com/content/treaty-of-london-1839/ (Last Accessed 22-1-2012)