Use of Force by Muslim State: A Comparative Study of Contemporary International Law

Dr. Hamidullah
Lecturer, Faculty of Shari'ah & Law, International Islamic University, Islamabad: hamidullha.rizwan@iiu.edu.pk

Abstract

Muslim International Law as well as Contemporary International Law allows the Use of Force If a justified cause of war is there. If there is no justified cause of war then the division of the world into different parts does not necessarily create hostile relations between Muslim and non-Muslim states, the notion that MIL does not recognize the co-existence of the non-Muslim state is not compatible with reality. All People are divided based on ideology into two kinds, namely, Muslims and non-Muslims which are two different nations. However, division based on ideology does not create hostility between Muslims and non-Muslims. Only aggression empowers the Muslim state to use power against the aggressor. The aggression against the Muslim state is either from Muslims or non-Muslims and it may be from the internal or external side. The properties, honor, and blood of the inhabitants of the Muslim state are protected irrespective of their faiths. Conversely, those humans who live beyond the territorial jurisdictions, their properties, honor, and blood are not protected by the Muslim state. Muslim state is bound to use Force for the protection of its inhabitant's rights and is not bound to use Force for the protection of those who live beyond the territorial jurisdiction of the Muslim state. On the other hand, Contemporary International law (CIL) also cognizes the use of Forces for the territorial integrity, and political independence of any nation-state, and the objectives of the United Nations Organization. In case of an armed attack, CIL gives the right of self-defense to the affected state. Similarly, CIL gives authority to the UN Security Council for "Collective Use of Force". The "Collective Use of Force" by the Security Council does not deprive the right of Self-defense of the affected state. This means that the affected state can be defended by using the right of self-defense as well as the right of Collective Use of Force. CIL also empowers the Security Council to use the right of a pre-emptive attack in dire need and if international peace is endangered.

Keywords: *Use of Force, Muslim, Contemporary International Law, self-defense.*

Introduction

Contemporary International Law (CIL) as well as Muslim International Law (MIL) allows the use of force for the protection of territorial integrity and rights of the people. When the use of Force by Nation State is discussed some important questions are raised to be addressed: What is the nature and extent of the use of Force by Nation State? Under what circumstances use of force is permitted? Does every Nation state have the authority to use Force? These kinds of questions are addressed in this article. Contemporary International Law (CIL) came into being after the Second World War in the specific historical background of the West. The majority of Western states are affiliated in one hand or in other to Christianity. It is known that Christianity does not believe in the physical use of Force irrespective of its legality and illegality. Christianity believes in love and observes surrender even against tyranny and injustice.[1] How Christianity led to war and the use of physical force although philosophically war and Force do not suit it. The other questions like when and how religiously and morally Christianity justifies the use of physical Force. The foremost doctrine in this connection is the legal philosophy of Just War Theory or philosophy. For understanding the history of Contemporary International Law it is necessary to study the history and development of European society in the context of law because it has grown in the specific historical events of the West.[2] In this context, the earlier Romans developed their theory of Just War.

The Just War Theory

For understanding the concept of the use of force by the United Nations, the religious background of the West regarding the notion of the use of force must be known at the earliest stage because the contemporary International Law regarding the legality and illegality of the use of Force grows in the specific historical background of the West.[3] It can be concluded from the Canonical Doctrines that Christianity does not believe in self-defense at individual and national levels. In the 4th century BC, the Roman emperor accepted Christianity and declared it the official religion of Rome. At that time, it was felt that the Roman Empire without using

[1] Sayed abū al-'Ālā al-Mawdūdī, *Al-Jīhād fī al-Islam,* (Lahore: Idārā Tarjuman al-Qurān,2011),411.
[2] Mlcolm N. Shaw, International Law (New York: Cambridge University Press, 2008),13.
[3] Mlcolm N. Shaw, International Law (New York: Cambridge University Press, 2008),13.

force would not be maintained and defended.[4] Saint Augustine, the religious scholar is considered the most important symbol of the preacher of Western rational and scientific practice. He contributed philosophically to every aspect of life. He is considered the father of the "Just War Theory". According to him, Using Force is the sole right of the state not of its citizens.[5] The theory of St. Augustine got famous as compared to another theory Plato's Athenian theory of War and Ethics in the West.[6] According to him war must be waged on just grounds and must not be waged on any unjust grounds. He redefined the issue of wagering war in Canonical terms which got acceptance throughout the West. He gave the theory of Just War based on Charity in Christianity.[7] He declared Rome as the "City of God" which was necessary to be defended by using physical force or any armed attack by the state only. The theory was refraining individuals from using physical force against individuals. According to this theory, two conditions were important to be fulfilled for the wagering of "Just War" by the Roman Empire**:** When the right of the state was negated and the second one was the illegal aggression against the Roman Empire. Only one exception was attached to this theory under which it was justified to use Force against polytheists or religious innovators on any ground. Later on in the Middle Centuries was called as Holy War. This "Just War Theory" was acceptable and recognized by the Western Jurists for many centuries till the abolishment of the City of God. After the abolishment of the City of God, different nation-states came into being. The Western jurists were confused in re-defining and handling the newly emerged nation-states juristically and philosophically. At that time, the top leading naturalist Dutchman Hugo Grotius (1583– 1645) had played a vital role in the amendments of the "Just War theory" According to the new amendment any nation-state can use Force if it considers fit and Just morally and legally.

In the eighteenth and nineteen centuries when the power of sovereignty was accepted by the state, it was already accepted impliedly for the state to have the authority of using Force. Now legally, the state is considered sovereign so it is the mandate of the state to use Force if thinks fits so.

---

[4]Muhammad Mushtaq Ahmad, *Jīhād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī,2012),180.

[5] Ibid.

[6] Ibid.

[7] James Turner Johnson, Just War Tradition and the Restraint of War: A Moral and Historical Inquiry (Princeton: Princeton University Press, 1981): xxiv, xxv.

Although theoretically, states have the authority to use Force practically they have to furnish sound justification for doing so. For instance, if the property or life of the citizens is endangered and the host state is unable or has no interest in securing it then the concerned state has the mandate to use Force against such danger to secure its citizen's interests. In self-defense, a state can use physical force in such self-defense. Similarly, a pre-emptive attack also became the mandate of every nation-state in the form of the modified Just War Theory of St. Augustine. The introduction of different legal amendments and international practices and justifications by the nation-states in the field of war have made the "Just War Theory" a neo-Just War Theory of the contemporary age for the use of physical force or armed attack by the nation-states.[8]

Pre-UN Charter Law

Historically, the state was used to have authority to use Force against any other state due to danger to its sovereignty with justified reason. There were no formal restrictions on the use of Force by the state. This situation remained till the First World War.[9] After the conclusion of the First World War in 1919 formal institution came into being with the name of the League of Nations. According to the Covenant of the League, the Use of Force was not declared illegal it considers the matter concerned with the League and imposes some restrictions on the member states for using Force. Article 11 of the covenant.[10]

However, it is proposed that all meaningful steps will be taken by the member states to maintain peace in the world. [11]

Article 10 of the covenant declared that all members of the League should respect and preserve the integrity and political independence of other member states. If there is any disputed issue among the members of the League the General Council of the League was considered a proper forum to resolve the issue.[12].

---

[8] Muhammad Mushtaq Ahmad, *Jīhād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī,2012),180.182.

[9] Muhammad Mushtaq Ahmad, *Jīhād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī,2012),180.182.

[10]Article 11 of the covenant of the League of Nations, Available on: http://www.unhcr.org/refworld/docid/3dd8b9854.html

[11]Article of the covenant of the League of Nations, Available on: http://www.unhcr.org/refworld/docid/3dd8b9854.html

[12] Ibid.

Article 15 of the Covenant League says, If the Council of the League failed to resolve the disputed issue peacefully the complainant state had the right to use Force for its rights.[13]

Article 16 says in this regard, the members of the League of Nations agreed that if any member of the league violated the agreed article of the covenant regarding the use of Force, such acts of the member state would be considered a war against all members of the league. As a consequence of such violations by the member state, all kinds of relations with the members of the League will be suspended. [14]

The covenant also states the council of the League its duty to constitute a military armed force to safeguard the covenant of the League.[15]

Any member of the League who violates the covenant will lose her membership in the League of Nations.[16] This is the position of International Law regarding the use of force by the Nation States till the Pact of Paris Covenant.

The Pact of Paris and Use of Force by States

In 1928, the Pact of Paris was signed by the United States of America and France, and later on other countries like Japan, Canada, and News Land also became part of the Pact.[17] According to the Pact, solutions to the disputed Issues through war became illegal.[18]

Through this Pact the war became illegal for the first time in the history of the Modern West. It was declared that the disputed issues would be solved through peaceful means.[19]

The Pact was silent about use of Force under the right of self-defense of the state due to it was considered the absolute right of the state.[20] Similarly, the Pact was also silent about the Use of Force lessor than war

---

[13]Article of the covenant of the League of Nations, Available on: http://www.unhcr.org/refworld/docid/3dd8b9854.html

[14]Article of the covenant of the League of Nations, Available on: http://www.unhcr.org/refworld/docid/3dd8b9854.html

[15] Ibid Article 16.

[16]Article 16 of the covenants of the League.

[17]Muhammad Mushtaq Ahmad, *Jīhād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī,2012),182.

[18] Article 1. The whole Pact is available on: https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0732

[19] The Pact of Paris

[20]Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī,2012),182.

for the state. From the thorough study of the Articles of the Pact and practices of the member state of the Pact, it is understood that the Use of Force was not declared illegal by the Pact.[21]

Post-UN Charter Law and the Use of Physical Force

The League of Nations imposed some restrictions on waging war for the Member States and later on the Pact of Paris declared waging war illegal. These stipulations were acted till the conclusion of the Second World War in 1944.[22] After the Second World War, the United Nations came into being which declared not only war but all the threats that were causing war illegal and unjust.[23]

All the nation-states have signed the Charter of the United Nations which they all are bound to follow it. Moreover, the International Court of Justice declared that refraining from the threat and not using of physical force by nation-states are now recognized as International customs and International moral values of the world. Due to this all states including non-signatory states are bound to follow this rule of customary International Law. So it can be said that the pre-UN Law regarding the use of Force is either changed or repelled by the current UN Charter.[24] Although some states and scholars of International law have the opinion that pre-UN Charter Law is still implemented. This juristic issue needs to be elaborated further on the topic of the Use of Force under the UN Charter Law.

Use of Force under the UN Charter

According to most international law experts, the UN Charter Law has changed the pre-UN Charter Law and that is known as "The Paris Pact" which considered the use of physical force by nation-states as legal while the war was declared illegal. The UN Charter not only declared the use of force illegal but all the threats that cause any war illegal. According to them, the UN Charter bans every kind of threat or use of force against the territorial integrity, and political independence of any state and in any other manner which is contradictory to the objectives of the UN Charter. International Law jurists are of the view that the use of force that does not

---

[21]Ibid,.

[22] Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī,2012),182.

[23] Charter of United nations, Article 2 subsection 4 of the UN Charter states;

[24]Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī,2012),183.

affect the objectives of the UN Charter will also be interpreted as unjust. It means that the use of force by nation-states against states is unjust and illegal in every situation. Moreover, in other words, the inverse implication may not be meant by Article 2 sub-article 4 of the UN Charter in the use of physical force by nation-states. This approach to the interpretation of International Law is known as a restrictive school of thought. According to this school of thought, every kind of threat or use of force is prohibited under the UN Charter law while there are exceptions from this law under which the Use of Force is allowed.[25]

Under the aforementioned UN Charter, all kinds of use of force by nation-states against another nation-state are declared illegal while there are two exceptions to this rule of law.

1. Collective use of force, against the aggressor state under the supervision of the General Council of the UN is to be considered just and moral.
2. The use of any physical force in self-defense by a nation-state against the oppressor is also to be considered just and moral.

On the other hand, other international law experts are of the view that the UN Charter does not expressly change or repel the pre-UN Charter Law under which the use of force was allowed, means which is still enacted by the present Charter.

According to this school of thought, the UN Charter Article 2 sub-article, 4 bans the use of force only allowed in the following situations:

1. Use of force against the territorial integrity of any state.
2. Use of force against the political independence of any state.
3. Use of force which is inconsistent with the purpose of the UN.

According to them if the use of force is for other than the aforementioned objectives of the UN Charter then the use of force may be considered permitted and this school of thought is known as the Permissive School of Thought. They are of the view that inverse implication will be applied and the use of force by the nation-states would be considered just and moral if it is not against the territorial integrity and not against the political independence of any state and consistent with the objectives of the UN Charter.

---

[25]Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī,2012),183.

Theoretically, the use of force according to the Permissive School of Thought is legal and just but practically it is illegal to use any kind of physical force by a nation station against another nation-state by Article 2 of the UN Charter of the last session at the San Francisco Conference.[26]

Collective Use of Force under the supervision of the UN Security Council

Collective use of force under the supervision of the UN Security Council is not a narrowed-down methodology but a war procedure that changes with space and time as well as the needs of the Member States. The methodology of collective use of physical force has been passed through different stages that can be divided into four categories:

The Hypothetical UN Charter System for the Collective Use of Force

It is declared in the UN Charter that all kinds of the use of force by any state is prohibited and the Security Council is made responsible for maintaining peace everywhere in the world. If peace is breached by any means the Council will restore it by using all means and measures. If any state violates this rule of law, all member states of the UN will use force collectively against such states. Under the UN Charter Articles, 39 to 51 make the Security Council a responsible organization for relinquishing any future threat and terror in the world and give the authority to use any physical measures against such state. Article 39 of the UN Charter gives the authority to the Council for using collective physical force or armed action against any nation-state in the following situations:

1. Any state does aggression against another nation-state
2. Any state breaches the peace of the world
3. Any state threatens the peace of the world.[27]

Any action taken by the Security Council in the first two cases is for the restoration of international peace and tranquility while in the last case, the action of the Council is done as a pre-emptive strike for maintaining international peace. The act of the Security Council will be determined by the resolution of the Members of the Council. Under Article 41 of the UN Charter, the action of the Security Council may be sometimes non-military sanctions like an economic embargo which is called swift punishment. Article 42 of the Charter further furnishes a way for military sanctions to

[26] Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī,2012),186.

[27] https://www.un.org/en/about-us/un-charter/full-text.

be authorized by the resolution of the Security Council against such a state. Under Article 43 of the Charter, it was determined to make a Combined Military Force under the Security Council but the Combined Military Force could not come into existence till this date. Article 40 of the Charter gives the power to use provisional measures under the supervision of the Security Council for the restoration of international peace and tranquility.[28]

The right to self-defense and self-deterrence

As earlier discussed the Charter of the United Nations Organization permits the Collective Use of Force against the nation-state that disturbs or threatens international peace and tranquility. In the continuation of the maintenance of international peace, the UN Charter also grants the right of Self-defense to every nation-state. The law regarding the right to Self-defense has gone through different stages of development.

The right of self-defense before the UN Charter

Gradually in the eighteenth and nineteenth centuries, nation-states got the status of sovereign states. After that, every nation-state got the power to wage war against any danger and threat. Although states were used to have some sort of justification for waging war. The right of Self-defense was also used to be considered justification for waging war. At that time waging war was not considered illegal but the right of Self-defense was always by some international customs and usages and there was not a uniform standard for measuring the validity of any international custom or usage but when the UN Charter was passed unanimously it provided understood ways and methods of using the right of self-defense by nation-states. Before the UN Charter, a war fought in the following situations was considered the right of Self-defense.

1. The war is waged against factual aggression that involves military action.
2. The pre-emptive attack against aggression or danger to international peace to stop the aggression or to minimize the expected loss.
3. The war is for the right and benefit of the state or the security of life or property of the citizens or threat to the life and property of citizens even beyond the state.
4. The war against economic embargos or severe propaganda in a situation where military action is necessary to be taken.[29]

[28] https://www.un.org/en/about-us/un-charter/full-text.
[29] https://legal.un.org/repertory/art51.shtml.

In the pact of Paris 1928, there were no restrictions laid down on the right of Self-defense.

The right of self-defense under the UN Charter

The "Collective Use of Force" by the Security Council does not deprive the right of Self-defense of the affected state. This means that the affected state can be defended by using the right of self-defense as well as the right of Collective Use of Force. The affected state can use force being informing the UN Security Council for further military assistance. The UN Charter states in this regard.[30] The article does not snatch the inherent right of self-defense of the state but it conditions the use of this right with the incidence of armed attack.

A pre-emptive strike by the State under the UN Charter

Article 51 of the UN Charter considers self-defense an inherent right of the state and the Collective Use of Force through the UN Security Council in a situation of armed attack. In inverse implication of the said article, in case of no armed attack, the affected state will have no right of self-defense. Similarly, the Security Council can also take no action to prevent any anticipatory strikes. However, the Security Council will still have a right to take any armed action as a precautionary to prevent any anticipatory attacks from the aggressor state. In other words, the inverse implication in the case of the Security Council may not be applied because Article 39 of the UN Charter gives the authority to the Security Council to act in three situations: first when aggression takes place, when international peace is abridged and the third one when there a threat to the international peace is sensed by the Council.[31] The last situation is known as a pre-emptive strike. Article 39 of the Charter gives a mandate of pre-emptive strikes to the Security Council. About the right of state for pre-emptive strikes nation states' have different stances, The United States of America and Israel are of the view that the state has the power of the pre-emptive strike. According to them, article 51 of the UN Charter considers self-defense the "inherent right" of the state. It means the pre-emptive right is given to the state in the pre-UN Charter Law while UN Charter Law in article 51 maintains this right as stated previously.[32] The interpretation of the said

[30] Article 51 of the UN Charter.
[31] Article 51 of the UN Charter.
[32]Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī, 2012), 194.

article by this means is not suitable because the word "inherent right" indicates that the right of self-defense is given to the state under its sovereignty.[33] On the other hand, the developing countries are of the view that the state has the right to self-defense when an attack occurs while the pre-emptive attack is the right of the Security Council only.[34] It was declared in the UN Charter that Combined Force will come into being under the UN Security Council but it could not come into practice by the Security Council. Due to the non-implementation of the UN Charter provisions, states use the pre-UN Law regarding the Pre-emptive Strike.

Conditions for the Pre-emptive Strike under pre-UN Law

1. A pre-emptive strike is unavoidable
2. A pre-emptive strike will only be just when the threat is obvious and dangerous in real
3. The threat can only be prevented by a Pre-emptive military attack
4. The physical force will be used to the extent of preventing the threat not more than that.[35]

Under the UN Charter, the pre-emptive strike is only the right of the Security Council. The state has the right of self-defense only in an armed attack.

Contemporary issues regarding self-defense and Pre-emptive strike

The Use of Force by the Security Council has caused multiple issues:

The right of self-defense and pre-emptive strike after 9/11.

After the incident of 9/11, the United States of America violated the rules of International Law and regulation in the name of 'The War on Terror. Similarly, it also misinterpreted the right of self-defense and pre-emptive strike which affected Global peace very badly.

Safeguarding of the citizens and their rights in other states.

As earlier discussed in pre-UN Charter Law, the notion of Self-defense of the state was extended to different interpretations. The state had the right to ensure the safeguarding of its citizens and their property beyond its territorial Jurisdiction. Such an act of the state for the safety of its citizens or their property was considered under the right of Self-defense by the

[33] Ibid.

[34] Ibid 196.

[35]Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī,2012),194.

state. Under the UN Charter Law Article 51, the issue of safeguarding citizens beyond the territorial jurisdiction of any state is debatable among the experts in International Law. Some of them are accepting this right for the state under the title of Self-defense. While most of them do not believe in any kind of use of force by the state. The state has only the right of self-defense under Article 51 of the UN Charter.[36]

State humanitarian intervention

The act of humanitarian intervention usually takes place when a foreign state intervenes in a state that targets its citizens or non-citizens in its territory to end the violation of Human Rights. This action is taken by the foreign state in the name of humanitarian integrity and solidarity. This issue is also debatable among the experts in International Law. Some of them are of the view that Humanitarian Intervention is legal under the UN Charter Law. Indian attack on East Pakistan in 1971 and the NATO attack on Serbia in 1998 were considered examples of Humanitarian Intervention. They argue that Article 39 of the UN Charter states the "Use of Force" which is to be considered valid if there is an obvious threat to International Peace. It means that every action taken for maintaining or restoring peace is legal under the UN Charter Law. This argumentation does not seem sound because the said article gives authority of action to the Security Council only not to a nation-state.

Use of Force under Muslim International Law

Muslim International Law (MIL) divides the world into Muslim state(*Dar al-Islam*) and non-Muslim states (*Dar al-Kūfr*). *Dar al-Kūfr* is further divided into *Dar al-Ḥarb* and *Dar al-'hd*. If the relationship between a Muslim and a non-Muslim state is hostile that state is called the Domain of war (*Dar al-Ḥarb)* and if the relationship between a Muslim and a non-Muslim state is peaceful that state is called the Domain of treaty (*Dar al-'hd)*. All the inhabitants of a Muslim state are protected without any discrimination. Similarly, all the inhabitants of the domain of the treaty are also protected as in the Muslim state.[37]

MIL protects the life of every human being irrespective of his or her religion and it considers the killing of a single human being as the killing

[36]Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī,2012),194.

[37] *Al-Qur'ān*:4,92.

of the whole humanity.[38] Similarly, MIL also ensures this right of all human beings at every cost which is why it gives the right of self-defense to everyone for making life protected.[39] Any disturbance which endangers peace within or outside the domain of the Muslim state may be suppressed at every cost. If the disturbance is within the domain of the Muslim state by its citizens like insurgency, then in such a situation Muslim state by its duty has to use physical force for its culmination. Similarly, every violence from outside of the domain of the Muslim state will also be extinguished by using physical force in the Muslim state. Non-Muslim citizens of a Muslim state enjoy all human rights in a Muslim state until they terminate it by starting hostility against the Muslim state.[40] When aggression is there use of force will be permitted and sometimes it will become obligatory to maintain or restore peace within the Domain or outside of the domain of the Muslim state by protecting Muslim citizens everywhere in the world. If there is a peace treaty between a Muslim state and a non-Muslim state in which Muslims are being tortured then the Muslim state cannot help the suppressed Muslims unless it terminates the peace treaty.[41] The relationship between a Muslim and a non-Muslim state is peaceful.[42]

Muslim state can use force in the following situations:

The relationship between a Muslim state and a non-Muslim state is peaceful.[43] Muslim International Law authorizes Muslim states to use force in the following situations:

1-Foreign Aggression

In case of aggression in the domain of the Muslim state by non-Muslims, the aggressors will be considered belligerents and the use of Force against belligerents becomes obligatory for Muslims. 44 Shaybānī considers

---

[38] *Al-Qur'ān*:5,32.

[39] "The recompense for an injury is an injury equal thereto [in degree]: but if a person forgives and makes reconciliation, his reward is due from Allah: for [Allah] loveth not those who do wrong. But indeed if any do help and defend themselves after a wrong [done] to them, against such there is no cause of blame" Al-Qur'ān: 42,40-41.

[40] 'Alā al-ddin,Abū bakar bin Māsūd bin Ahmad al-Kāsānī, Bādāi al-Sānāi vol.7 (Bairut: Dār-kutub al- 'lmiyyah, 1986),113

[41] Al-Qur'ān: 8,72.

[42] Al-Qur'ān:60,8.

[43] Ibid.

[44] "Fight in the cause of Allah those who fight you, but do not transgress limits; for Allah loveth not transgressor" Al-Qur'ān: 2,190.

aggression on Muslim states as the main cause of war. If aggression is done by a non-Muslim state on a Muslim state, war will be obligatory on Muslims against the aggressing state. He asserts that if non-Muslims are captured by Muslims causing no aggression they will not be killed even if they refuse to accept Islam. According to Shaybānī, if the non-Muslims are captured while causing aggression will be offered to accept Islam in case of their refusal, and force will be used against them. According to him, aggression makes the blood of non-Muslims permissible.[45] The Quran considers that drive Muslims out of their native land and help the enemy of Muslims in deriving them out of their native land as aggression.[46]

Ibn Qayyim al-Jawziyyah also endorses the viewpoint of Shaybānī and asserts that the cause of war against non-Muslims is aggression, not infidelity.[47] Further, he is of the view that war is obligatory for Muslims against non-Muslim belligerents only. He gives logic to this rule of law that the Prophet (peace be upon him) used to fight against those who did aggression toward Muslims.[48] To defend the domain of the Islamic state, the Prophet (peace be upon him) did pre-emptive aggressions like the battles of Khayber, Bano Mustāliq, and Tabūk.[49]

2-Apostasy and Paganism of Arab

Muslim International Law (MIL) differentiates non-Muslims from apostates and pagans of Arabs. Apostates and Pagans of Arab have only option to accept Islam. If they refuse to embrace Islam, the Muslim state will use Force against them.[50] Qur'ān orders the use of Force against the

---

[45] Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 2234.

[46] "Allah forbids you not, with regard to those who fight you not for (your) Faith nor drive you out of your homes, from dealing kindly and justly with them: for Allah loveth those who are just. " Al-Qur'ān:60.8.

" Allah only forbids you, with regard to those who fight you for (your) Faith, and drive you out of your homes, and support (others) in driving you out, from turning to them (for friendship and protection). It is such as turn to them (in these circumstances), that do wrong " . Al-Qūr'an: 60, 9.

[47] Ibn Qayyim al-Jawziyyah, *Aḥkām Ahl al-Dhimmah*, vol.1 (Dmmam: Rimadi linnashr,1997),110.

[48] Ibid,.

[49]Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī,2012),218.

[50] Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1(Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 76.

desert Arabs till they embrace Islam.[51] Based on these arguments, Shaybānī says a Muslim state cannot sign a peace treaty or an agreement with the pagans of Arabs. They will be invited to embrace Islam otherwise they will be killed, and their women and children will be made captives.[52] Shaybānī divides Pagans of Arab into two classes based on invitation (*Da'wāh)*. One who is formally offered Islam and the second one who is not invited to Islam. Those pagans of Arab who are not invited to Islam, if they are captured in war without any resistance will not be killed. In such a situation, Muslims should offer them to embrace Islam and if they refuse to accept Islam, they will be given imprisonment and will not be killed.[53] Sarakhsī furnishes a logic of not killing the Pagans of Arab in a situation because they are captured without war and aggression on their behalf. According to him, the poll tax will also not be offered to them because they are not holding books Book (*Ahle Kitāb*).[54] According to Shaybānī, if a Muslim leaves Islam, he will be allowed to re-accept Islam otherwise he will be executed.[55] Apostasy is worse than any disbelief. According to him, the immolation of the apostate is prohibited. He will be considered dead if he leaves the domain of Islam and his property will be distributed and all transactions made will be void once he enters the non-Muslim state (domain of war). He will not be given any guarantee to enter into the domain of Islam or to be a non-Muslim citizen of a Muslim state in lieu of giving the poll tax.[56] Shaybānī also differentiates apostasy based on gender, the male will be executed if he refuses to accept Islam while the female will be given imprisonment till to embrace Islam or die in jail.[57] According to Muhammad Hamidullah, apostates will be the subject of Muslim International Law if they have enough power to occupy a territory of a

---

[51] "Say to the desert Arabs who lagged behind: "Ye shall be summoned [to fight] against a people given to vehement war: then shall ye fight, or they shall submit. Then if ye show obedience, Allah will grant you a goodly reward, but if ye turn back as ye did before, He will punish you with a grievous Penalty" *Al-Qur'ān*:48,16.

[52] Mahmood Ahmad Ghazi, *The Shorter Book on Muslim International Law* (Islamabad: Islamic Research Institute, 1998),46.

[53] Muhammad bin Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1(Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 2234.

[54] Ibid.

[55] Mahmood Ahmad Ghazi, *The Shorter Book on Muslim International Law* (Islamabad: Islamic Research Institute, 1998),38.

[56] Mahmood Ahmad Ghazi, *The Shorter Book on Muslim International Law* (Islamabad: Islamic Research Institute, 1998),38.

[57] Ibid,41.

Muslim state otherwise they will be the subject of domestic law and they will not be dealt with under the Muslim International Law. He further says that apostasy is also disbelieving in any and every article of the Islamic faith.[58] He is of the view that the Muslim state can use Force against four kinds of people:

1- Apostates
2- Rebels
3- Highwaymen and pirates,
4- Non-Muslim combatants.[59]

From the above explanation of Shaybānī and Muhammad Hamidullah, it seems that according to Shaybānī apostates are the subjects of Muslim International Law whether they have power or occupy any territory of a Muslim state or not. He has mentioned some cases of individual apostates for instance if an apostate of has no power and has occupied no territory of a Muslim state leaves the domain of Islam and attaches to the domain of war he will be considered dead and his property will be distributed among his legal heirs. According to Muhammad Hamidullah, only those apostates are subject to Muslim International Law who have enough power to challenge the writ of the Muslim state and of having occupied any territory of the Muslim state. According to Shaybānī, non-Muslims other than pagans of Arabs and apostates are of two kinds: Enemy of Muslims and those who are not the enemy of Muslims.[60] According to him, Muslims should invite non-Muslims who are the enemy of Muslims in the battle of war either to accept Islam or surrender to the supremacy of the Muslim state and pay a poll tax. Shaybānī gives logic for the justification of the invitation of the non-Muslims to Islam during the war, saying they (non-Muslims) should not think about Muslims that they fight against non-Muslims to get their property and make their women and children captives.[61] If they reject these two options, then the Muslim state should

[58] Muhammad Hamidullah, *the Muslim Conduct of State* (Lahore: India Kashmiri Bazar, 1954), 160-161.
[59] Ibid, 160.
[60] According *Shāybani*, enemies of Muslims are those non-Muslims who belong to the domain of war (*Dār-ḥarb*) and non-enemy of Muslims either belongs to the domain of treaty or (*Dār-āhd*) domain of infidelity (*Dār-Kufr*)
[61]Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 76.

use Force against them till they surrender them to the Muslim state or accept Islam.[62]

3-Tyranny on Muslims beyond the territorial Jurisdiction of the Muslim State

According to MIL, a Muslim state is bound to defend the rights of its inhabitants living within its territorial jurisdiction. Muslims who are living beyond the territorial jurisdiction of the Muslim state seek logistic support from the Muslim state, Muslim states will support them because Muslims are one nation by their ideology.[63]

4-Persecution

Persecution means preventing people from accepting Islam, or compelling people to accept faith without their free consent.[64] Allah orders Muslims to use Force against those non-Muslims who oppress Muslims not to accept Islam. The fight against such non-Muslims will continue till the persecution comes to an end.[65]

The Muslim state cannot compel by using Force a non-Muslim to accept Islam it amounts to immorality and injustice.[66] Islam believes in freedom of thought and expression and gives a free choice for accepting Islam or disbelieving in it.[67] Conversely, Islam will not be degraded and disdained

---

[62] Ibid.76.

[63] "And why should ye not fight in the cause of Allah and of those who, being weak, are ill-treated [and oppressed]?- Men, women, and children, whose cry is: "Our Lord! Rescue us from this town, whose people are oppressors; and raise for us from thee one who will protect; and raise for us from thee one who will help" Al-Qur'ān: 4,75.

[64]Sayed abū ā'lā al-Mawdūdi, *AL-Jihad fil-Islam* (Lahore: Idara-e-Tarjuman Al-Qur'ān(ptv)Islamic publicaitons,2011),104.

[65]"And slay them wherever ye catch them, and turn them out from where they have Turned you out; for tumult and oppression are worse than slaughter; but fight them not at the Sacred Mosque, unless they [first] fight you there; but if they fight you, slay them. Such is the reward of those who suppress faith".Al-Qur'ān: 2,191.

"And fight them on until there is no more Tumult or oppression, and there prevail justice and faith in Allah; but if they cease, Let there be no hostility except to those who practise oppression" Al-Qur'ān: 2,193.

[66]" Let there be no compulsion in religion: Truth stands out clear from Error: whoever rejects evil and believes in Allah hath grasped the most trustworthy hand-hold, that never breaks. And Allah heareth and knoweth all things"Al-Qur'ān: 2,256.

[67]"Say, "The truth is from your Lord": Let him who will believe, and let him who will, reject [it]: for the wrong-doers We have prepared a Fire whose [smoke and flames], like the walls and roof of a tent, will hem them in: if they implore relief they will be granted

by anyone. It declares all kinds of contempt and disrespect of the symbols of Islam as a cause of war.[68] The Qur'ān urges fighting against those who contempt Islam and defame the Prophet (peace be upon him) and also considers it as *Jus ad Bellum*.[69] Any individual or individuals who commit to contempt Islamic Symbols even beyond the territorial jurisdiction of the domain of the Muslim state with the assistance of their mother state will be considered aggression of the individuals or the concerned state against Muslims and the Muslim state. Muslim state is bound to use Force against such individuals or states.

5-Harm within Muslim State

MIL considers that Muslim state can use force against those who create harm within Muslim state. there are two kinds of Preventive Laws for controlling any harm within the domain of the Muslim state:

1- Domestic Criminal Laws like *Ḥudūd,* Retaliation (*Qisās)* and *Ta'zīr*,
2- Muslim International Law.

Harm within the domain of the Muslim state is also considered a just cause to use force against the belligerents. The following situations amount to harm:

A. Degrading of the Symbols of Islam (*Sha'er-e-Islam*) or Defaming the Prophets of Islam.
B. Apostasy
C. Breach of *Dhimah* by guaranteed aliens.
D. Dacoity
E. Rebelling by Muslims.[70]

---

water like melted brass, that will scald their faces, how dreadful the drink! How uncomfortable a couch to recline on!" Al-Qur'ān: 18,29.

[68]Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shari'ah acadāmī,2012),222.

[69] "Hast thou not turned Thy vision to those who were given a portion of the Book? they traffic in error, and wish that ye should lose the right path. But Allah hath full knowledge of your enemies: Allah is enough for a protector, and Allah is enough for a Helper. Of the Jews there are those who displace words from their [right] places, and say: "We hear and we disobey"; and "Hear what is not Heard"; and "Ra'ina"; with a twist of their tongues and a slander to Faith. If only they had said: "What hear and we obey"; and "Do hear"; and "Do look at us"; it would have been better for them, and more proper; but Allah hath cursed them for their Unbelief; and but few of them will believe" Al-Qur'ān: 4,44,45,46.

[70] Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī,2012),224.

The harm committed by a group of non-Muslims having enough power within the domain of the Muslim state will be dealt with by the Muslim International Law and if the culprits have no power to challenge the writ of the Muslim state then will be dealt with by the domestic law of the Muslim state.[71]

6-Breach of Peace Treaty

Muslim International Law stresses the observance of peace treaties by Muslims in every situation. If non-Muslims breach the peace treaty with Muslims, their action will be also considered a cause of war.[72] MIL makes the use of Force compulsory for Muslim states against a non-Muslim state that breaches the peace treaty.[73]

In all the above-mentioned situations, the Muslim state can use force for the safety of the inhabitants of a Muslim state and for all those Muslims who are living beyond the territorial jurisdiction of a Muslim state but they are suppressed and seek help from a Muslim state. According to contemporary Muslim scholars, all Muslim states are considered part of *Dar al-Islam* and they are considered as rooms of a single house. If one part of *Dar al-Islam* is attacked by any non-Muslim state, the other parts of *Dar al-Islam* are bound to defend the attacked part. Contemporary international Law also recognizes this phenomenon of MIL, if there is reciprocal agreement among the existing Muslim states.

CONCLUSION

This article may conclude that MIL believes in the diversity of the world into different parts based on territorial jurisdiction. The domain of Islam, the Domain of war, and the Domain of peace. Theoretically, everyone who resides within the territorial jurisdiction of a Muslim state will be protected by the Muslim state. Conversely, all those who reside beyond the territorial jurisdiction of the Muslim state will not be protected. According to MIL, the diversity of the world changes the status of human beings concerning their rights and duties. The diversity does not create hostile relations

---

[71] Muhammad Hamidullah, *The Muslim Conduct of State* (Lahore: India Kashmiri Bazar,1954),160-161

[72] "Will ye not fight people who violated their oaths, plotted to expel the Messenger, and took the aggressive by being the first [to assault] you? Do ye fear them? Nay, it is Allah Whom ye should more justly fear, if ye believe"Al-Qur'ān: 9,13.

[73]Nature of Relations between Muslim and Non- Muslim States: Discourse of Muslim Classical and Contemporary Scholars by Dr.Hamidullah, Pakistan Journal of International Affairs. Vol 4, No 3 (2021) 545-564.

between Muslim states and other nation-states. Aggression against Muslims or Muslim states sets the parameters of relations between Muslim states and other nation-states. MIL considers that the use of force may be exercised by Muslim States when aggression there. Aggression may be by states or individuals and it also may be from the internal or external side of the Muslim State. On the other hand, Contemporary International law (CIL) also cognizes the use of Forces for the territorial integrity, and political independence of any Nation State, and the objectives of the United Nations Organization. In case of an armed attack, CIL gives the right of self-defense to the affected state. Similarly, CIL gives authority to the UN Security Council for "Collective Use of Force". The "Collective Use of Force" by the Security Council does not deprive the right of Self-defense of the affected state. This means that the affected state can be defended by using the right of self-defense as well as the right of Collective Use of Force. CIL also empowers the Security Council to use the right of pre-emptive attack in dire need to mention international peace.