THE CONCEPT OF WAR AND PEACE IN ISLAMIC LAW

(MAFHUUM AL-HARB WAS-SALAAM FISH-SHARI'ATILISLAMIYYAH)

BY

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DECLARATION

It is hereby formally declared that this dissertation is my research work. Precisely it is a product of my relentless efforts over the years. The subject-matter of the thesis has never been a chosen topic of any known research work in the academia.

All published and unpublished works referred to in this dissertation are acknowledged by way of foot-notes and references at the end of each page.

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CERTIFICATION

This Dissertation entitled: ***'Concept of war and peace in Islamic Law*** **'**is hereby certified as a thesis that meets the requirements of the University for the award of doctorate degree in Islamic Law.

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DEDICATION

This work is dedicated to the service of Allah particularly to the good cause of enthroning peace and security in the international community.

Nuraen Taiwo Hassan DINDI

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ABSTRACT

This research work significantly examines a very interesting area of Islamic law. It is the portion of the Islamic law which relate to war and peace. The study focuses on the desire to make significant contribution to the modern law of Nations which features *inter-alia* classical Islamic jurisprudential works, and organizational layout of the work with justification of the study. As a matter of essence, the work emphasizes global peace and security as against the current international hostilities and intra-national conflicts. To achieve the said peace and security, Treaties with rules governing the conduct of hostilities and the restrictions placed on war by the Law are prescribed in this research work. In the final analysis, from the findings of this study, observations and recommendations are made as the author's contribution to knowledge of International Law and humanity in general.

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25. SocieteCommercialeD'orientVs Turkey (1929) 9 M>A.T. p. 612 at 613

26. Re-Armstrong Cork Company, 14 R. I. A. A. p. 613

LIST OF ABBREVIATIONS

1.	IHL	International Humanitarian Law
2.	U.N.O.	United Nation Organization
3.	S.A.W.	Salla-AllauAlaihiWasalam
4.	R. A.	Radiya – AllahuAnhu
5.	P. O. W.	Prisoner of War
6.	S.W.T.A.	SubhanauWa Ta Ala
7.	A.D	Anno – Domino
8.	PCIJ	Permanent Court of International Justice
9.	ICJ	International Court of Justice
10.	UNESCO	United Nations Educational, Scientific and CulturalOrganisation
11.	ECOWAS	Economic Community of West Africa
12.	AU	Africa Union
13.	UNSF	United Nations Observer and Security Force
14.	UNTEA	United Nations Temporary Executive Authority
15.	UNAVEM	UN Angola Verification Mission
16.	ICRC	International Committee of the Red Cross
17.	ECOMOG	ECOWAS Monitoring Group
18.	USSR	Union of Soviet Socialist Republics
19.	EEC	European Economic Community
20.	NATO	North Atlantic Treaty Organization

CHAPTER 1
GENERAL INTRODUCTION

1.0 INTRODUCTION

Although this work is not the first of its kind. There were various works on Islamic Law of War and peace dated back to over 700 years ago by reknown scholars such as Ibn Taymiyyah[1], Khadduri Majid,[2] and Abu Sulaiman Abdul Hamid[3] and a host of others. Perhaps the only mark of difference in the present work is its contemporary nature. Since arabic language is relevant to Islamic Law just as latin is to the English law,it is therefore pertinent to state the arabic version of the subject matter of the study as:***Mafhuum ul-Harb Was-Salaam Fish-shariy'atil Islamiyyah*** meaning **'Concept of war and peace under Islamic Law'**

As the global community is increasingly characterised by a "clash of civilizations" particularly between Western civilization and Islam[4].The universality of the application of Laws relating to war and peace becomes seriously threatened. With this threat on the increase, certain legal concepts particularly under Islamic Law became misunderstood.

The present work attempts to explore the principles of war and peace under the ambit of Islamic Law for further and better understanding of the contemporary laws of war and peace. Any study on Islamic International Law must essentially entail the two opposing concepts of war and peace, hence the legal principles of war and peace under Islamic law will attract prominent attention in this work.

The need for this study is further underscored by the varieties of the rules of warfare as prescribed by International Treaties and Conventions which have been discovered

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[1] Ibn Taymiyyah ,'Al-siyasa al shar'iyyah' ,Dar al katib al Arabi,.n.d

[2] Khadduri. M, War and Peace in the Law of Islam, 2nd Ed., ' New York press (1399) AH/(1979) AC.

[3] Abu Sulayman. A.H, The Islamic Theory of International Relations: Directions for Islamic Methodologyand Thought', Hemdon, V.A: The International Institute of Islamic Thought, (1408) AH (1987) AC.

[4] Huntington, S. P., The Clash of Civilizations, Foreign Affairs,Vol.72,No 3,Summer (1983), P.22

to be grossly inadequate and subject to manipulative skills of the big powers in favour of their interests inspite of the fact that the rule is placing emphasis on the material of the "highest persuasive character"[5]

The various arbitral tribunals or judicial bodies have had cause to make pronouncements on the diverse conflicts in various parts of the world. The question is how far have these decisions been? There is thus, the need to critically analyse some of these decisions in order to fully appreciate the position in the new world order. The available international judicial organs need be critically assessed so as to come to a relative yardstick of high objectivity and steer clear of the perceived greater subjectivity that we presently go through.

In the final analysis, the study of this area of Islamic law is informed by the limited knowledge as it presently exists and this has fundmentally put in place the difficulty to maintain the integrity of the doctrine of international law in this field of study,this need not be so. It is against this background that one deems it fit and most relevant to embark on a thorough research work on the concept of war and peace under Islamic law.

1.1 STATEMENT OF THE RESEARCH PROBLEM

The problem relating to the concept of war and peace under the Islamic law is the manner the non-Muslims want to solve the problem of war in Muslims states, according to their understanding of war. For example the united state of America's intervention in Afghanistan, Iraq and Iran. The difference between the Muslims' conception and non-Muslims' conception of war makes it difficult to profer solution to the problem of war in the Muslim nations. Precisely, the statement of the research problem of this thesis can be stated as follow:- 'The problems of war in the

[5] Schwarzenberger.G, International Law as Applied by International Courts and Tribunals,Vol.2, 1968, Sweet & Sons, London, P.6

International Community and Search for means of making peace among the conflicting Nations of the world is the statement of the research problems of the present dissertation.

The global community is experiencing wars among various nations in the world. There exists the problem of identifying the respective causes of these wars. The age-long armed conflict between Israel and Palestine needs to be probed into and it calls for an effective solution.There is need to consider the war between Iraq and Iran as well as the role played by the United States of America.Similarly,the statement of the research problem covers the different kinds of hostilities being witnessed in various African nations like Liberia, Sierraleone,Kosovo,e.t.c. Another significant problem that accounts for the present study is the fact that due to the absence of genuine motive in war,the International community is in total chaos, while imperialistic and bureaucratic tendencies are being introduced into it. The global armed conflicts have cropped up to an amazing extent.In this regard,the Afghanistan war is a relevant instance.Due to the imperialistic and bureaucratic intervention of the Soviet and the USA respectively,the Afghanistan war which commenced in 1978 is yet to end. Pakistan that supported Afghanistan against the Soviet in 1979 is today at war with Afghanistan. The aftermath of the Afghanistan war is full of severe political,economical and ecological problems.

Presidents or Heads of governments of various conflicting nations and war Lords are being brought for trial before the international war tribunals established by the United Nations. A question which agitates one's mind is: What has the United Nations Organisation done as a body established to serve as a temperate measure in an era of international crisis? There remains another problem of permanent settlement of international disputes. The research problem becomes more complicated as it seems to

be transparently clear that the Public International Law which is expected to serve as a moral suasion is rather helpless in matters of international conflicts.

All efforts in that regard has not succeeded in exterminating armed conflicts from the face of the world inspite of the fact that one of the cardinal principles of Public International Law is to ensure peaceful co-existence among the nations of the world.

The present work is expected to provide alternative and more possible solution to problem of global conflicts. The Islamic law principles in respect of international relations do not differentiate the maxim of ***lex lata***(The Law in force) from ***lex ferenda*** (The law as it ought to be).

As far as the law of Islam is concerned in affairs among nations of the world, law is law, there is no question of presumed law. The Islamic legal system is not the type to be subjected to changes and reforms because the system has sufficient room to accommodate any new developments in all generations. The Islamic legal system maintains consistency with modification in application of it's principles and procedure to meet the exigencies of international relationship. Such modifications are to be directed towards the general interest and peaceful co-existence among all nations of the world.

Finally, the last of the research problem is what options does the international community have in such critical circumstances.This study presents provissions of the Islamic law of war and peace as the available solution in such critical circumstances.

1.2 OBJECTIVES

The basic aim and objective of this study is to reasonably contribute to the development of knowledge. With better understanding of the concept of war and peace within the frame work of Islamic law, it is anticipated that the world will improve on its methods of conflict resolution. This will no doubt reduce the incidents

of war or armed conflict to the barest minimum. To a large extent, this work will be a contribution to the development of knowledge in the area of Islamic International Law.

The particular discernible research questions which provide the objective of this work are what are the principles of war and peace under the ambit of Islamic Law that can create a more peaceful international community with minimum cases of war or armed conflict? By this poser further and better understanding of Islamic law of war and peace will be achieved. Below are the objectives of the presnt research work.

(a) To identify the factors that promote war among the warring nations.

(b) To objectively juxtapose Islamic Law of war and peace with the current international regime of armed conflict.

(c) To expound on the concept of war and peace in accordance with Islamic Law.

(d) To make a good case for consideration of the rules of Islamic Law on war and peace as a panacea to the current dangerous trends in the contemporary policies of warfare.

(e) To analytically evaluate the impact of war on the peace and security of the international community.

(f) To explore the principle, nature and function of peace under the law of Islam.

(g) It is the objective of this research work to explain certain constraints imposed on nations engaged in war or armed-conflict.

1.3 SCOPE OF THE RESEARCH

Scope of any research work in modern terms implies geopgraphical or territorial coverage of the research. On the other hand, scope may imply the kind of law that is applicable. The scope of the present dissertation is not geopraphically limited because of the universality of the concept of war and peace which is the very

core of this work.It is for this singular reason, it is difficult to effectively discus*Islamic Law of War and Peace* without juxtaposing it with the current international regime which is globally in force.

The scope will accommodate a law of modern application which principles and procedure satisfythe exigencies of global life of the modern world at any given time. It is no other law than the Law of Islam. To be precise, the work will mainly concentrate on the Islamic Law of war and peace. Thus, since the core subject -matter of this research is 'concept of war and peace under the law of Islam', the applicable law is Islamic law.

1.4 METHODOLOGY

Doctrinal method was absolutely adopted in this dissertation. This is considered to be the best way to achieve the objective of this study. Doctrinal research approach otherwise known as library based research was adopted. This method involves reading relevant materials on the subject matter of the study, such as text books, journals, treatises, periodicals, case law and statutory provisions..

In addtion to the foregoing, authorities written in Arabic Language on the past research works similar to the present one were also consulted.Relevant materials were collected from war college in Abuja and from the office of the international committee of the Red Cross. For the purpose of this study,I went to the Institute of International Affairs in Victoria Island at Lagos as well as the Institute of advanced legal studies at the Univasity of Lagos,Akoka-Lagos to consult relevant materials on the subject matter of the research work.

Conclusively, the doctrinal research approach entails law as a normative science and humanity . This outlines norms with conventional standards for human

behaviour in certain conditions particularly in war situation. Thus, this method combined with the imperical method is found to be effective in the present work.

1.5 LITERATURE REVIEW

Prominent scholars of various generations have written several works similar to the present one. Notable among such early works include Khadduri Majeed`s work,[6] Abu-Sulayman Abdul Hamid`s work, and Louay M.Safi`s contribution to the American Journal of Islamic Social Science and a host of other classical works of some great scholars of note.

Khadduri Majeed, in his work upheld the view that " the classical law of Islam recognizes no other nation than it's own" According to him, the entry of Muslim nations into the United Nations is a significant phenomenon that constitutes a departure from the classical religious ideology of Islam.[7] There are also some Shariah advocates who hold a hard-line view that the institution of nation-state and modern internationalism are complete aberrations to Islamic world-order. Those who hold this view take a position that there should be perpetual hostility between the nations of Islam and the non-Muslim nations.

This position in my own view is not progressive. If Khadduri and other members of his school of thought are correct in their view, there can never be peace in the international community. Whereas, the cardinal symbol of Islam is peace. It is on this premise that there should not be a perpetual hostility between the nations of Islam and the non Muslim nations of the world. This is the only way; the conflicts of different kind all over the world can be brought under control.

Abu-Sulayman Abdul-Hamid takes side with the non-hostility school of thought. Relying on the opinions of other classical jurists. Many contemporary

[6]Khadduri, M. War and peace in the law of IslamBaltimore; John Hopkinspress,(1955) p.45

[7] See Khadduri. M. "The Islamic System: Its Competition and Co-existence with Western Systems" proceedings of the American society of International law. N.D

scholars like Abu sulayman disagree that Islamic law specifically prescribes a permanent state of animosity between the Islamic and non-Islamic realms.[8]

The view of a non-muslim scholar called Mayer[9] is that the contemporary nation states system is contrary to the Islamic legal theory whereby the only nation recognised in the world is the nation of the muslims. He further expressed the view that in spite of the fact that there is established nation-states system in the modern world, some Muslim nations which strictly adhere to the traditonal Islamic legal opinion by which any political sub-divisson of the muslim nations is inimical to Islam. This Mayer's view can not be taken as absolutely correct because there are some muslim states that embrace the nation-states systemand tolerate it on the assumption that the modern nation-states system is a temporary phenomenon.

According to Abu-Walid Muhammad bin Ahmad; in his work entitled "*Bidayat Al-Mujtahid*"[10]*Jihad* is a type of war which is a religious obligation on the generality of the muslims which if performed by a section of the Muslim *Ummah*,the rest of the muslims are absolved of the obligation. That is what is technically called *Fardu-al-kifayah*. Relying on the Quranic provision(Q.47 : 4) ,the muslim nations must always be at war with the non-muslim nations and thoroughly subdue them when and where ever they meet them. In other words, he is an advocate of perpeual hostility between *Daru al-harb* and *Daru al-Islam* He supported his position with the prophetic tradition where the Prophet (SAW) is reported to have said :

> *"I have been commanded to fight people untill they say:There is no diety but ALLAH……."*[11]

[8] Abu Salayman. A.A,''Op.cit. p.19

[9] Mayer, A, War and Peace in Islamic Tradition of International Law, Ends Johnson, cited in 'Just War and Jihad'

[10] Ahmad A.M., (Ibn Rushd) Bidayat al-Mujtahid wa Nihayat al-Muqtasid, Jadidat Munqahat wa Musohihat, 1990/1410 A.H, pp. 305-338.

[11] Ahmad A. M, Ibid

He has also attempted to explain the motive of war by making reference to Surat al-Anfal (8:67). He stated that the cause of revelation of the verse was the Prisoners of war in battle of Badar. The law in the verse is that; unlike ordinary war which may be fought for political or economic,and other military purposes. *Jihad* is fought under strict conditons stipulated by Islamic Law of war and peace. War is fought in Islam solely for the cause of Allah and not for any temporal worldly goods or any baser motives. Abu-Walid Muhammad bin Ahmad went further to consider prisoners of war as *Al-Amaana* (Trust) in the hand of the muslims.

Muhammad Subhi bin Hassan Hallaq, in his classical work on *fiqh*,[12] opined that *jihad* is not truly *jihad* if the *mujahid* does not seek thereby Allah's countenance and does not intend to glorify Allah's word, raise the banner of truth, repel falsehood and sacrifice himself in order to attain the pleasure of Allah. Therefore, anyone who fights only to obtain spoils or rank, or to display valour, to aquire prisoners of war for enslavement or to attain fame is definitely not fighting *jihad*.

Muhammad Subhi premised his opinion on the tradition of the holy Prophet (S.A.W) reported on the authority of Abu Mousa Al-Ashari (R.A) who said :

> *"A man came to the Prophet(S.A.W) and said: A man fights for war booty; another fights for fame and a third fights for showing off; who among them fights in the cause of Allah?The Prophet (S.A.W) said : "He who fights in order that Allah's Word (i.e.Islam) should be superior,for he fightsIn Allah's cause."*[13]

He further stated in the book that Jihad is Fard Kifaya[14] but if the Imam calls upon the Muslims to march forth in jihad, it becomes Fard Ayn (Global Obligation).

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[12] Muhammad Subhi bin Hassan H, Fiqh According to the Qur'an & Sunnah, Vol.2, Translated by Sameh Strauch, Maktaba Dar-us-Salam, 2008. pp.522-536

[13] Narrated by Al-Bukhari (no.2810) and Muslim (no.1904)

[14] Obligatory duty which if performed by a section of the community absolve the rest members of the community.

Imam Malik, in his classical work[15] extensively discussed *jihad* with a number of authentic *Ahaddith* (Prophetic traditions).He narrated that Umar bin Abdil-Azeez wrote to one of his administrators : We have learnt that whenever the Apostle of Allah(S.A.W) sent out a squad, he used to command them : *"Fight taking the name of the Lord with people who have disbelieved and rejected the Lord; do not commit theft, do not break vows; do not cut ears and noses, do not kill women and children. Communicate this to your armies. If Allah wills! Peace be on you"*. Most probably, What the great scholar wanted to transmit to readers with this prophetic tradition are the rules binding on the muslim soldiers when fighting *jihad*.

Imam Malik said : The unbelievers located near the port in Muslim territory, and they say that they are merchants and have been thrown out by the river,and the Muslims have no means to find the truth about them, but they guess that the unbelievers have been shipwrecked or have disembarked on account of thirst without permission, the leader of the Muslims has full authority over them.The Muslims who capture them are not entitled to the 5th share in the booty taken.

When the Imam was asked : If someone finds food in the territory of the non-believers, and eats out of it , is it right to take the remainder home or to sell it on his way? The response was that : If he sells it during *jihad* , he should deposit the proceeds with other articles of booty. However, if he returns to his home town, it is alright for him if he eats it or sells it with a proviso that the edible item is very insignificant such as bread, meat, and something similar; not if the article in question is valuable.

According to the universally renown Jurist, camel,oxen and goats are also articles of food that are right to be eaten before distribution in case of necessity.

[15]Muwata' Imam Malik,1st Ed.,Muasasat Al-tobaat wa Tasweer Al-katruniyat,(1406)A.H /(1980)

Hurewitz J.C, in his work entitled 'The Middle East and North Africa in World Politics : a Documentary Record[16]', commented that the long time relationship of the Muslim nations with the non-Muslim nations for over four hundred years strongly supports the preference for permanent peace between the nations of Islam and those of non-Muslims.

Along the same line of thought, he asserted that the practice of international relashionship is covered by the Islamic politico-legal principle of *As-Siyasa Ashari'iyyah* which confers on the government of the Muslim nationthe authority to exercise discretion in matters of Public International Law with respect to the welfare of the citizens. His position is that there should be perpetual, invaluable and constant peace between the muslim and non-muslim nations of the world.Hurewitz is of the view that all forms of hostility in the global community shall cease henceforth. Is it possible? We do not think this proposition is practicable. The reason being that as long as there is economic or political relationship among the nations of the world, there will always be war or armed conflict.

Louay M.Safi in his contribution to the American journal of Islamic social science, rebuts the positions of the classical doctrine of *Jihad* .He argued that these propositions were predicated on a set of Islamic legal rulings (*Ahkam al shar'iyy ah*) pertaining to specific questions which arose under particlar historical conditions, namely, the armed struggle between the Islamic state during the Abbasid era and various European dynasties.

The erudite scholar also attempted to defend the classical jurists who opined that there should be permanent hostility between Muslim nations and the non-Muslim nations. He demonstrated that classical Jurists did not have the mind of developing a holistic

[16] Hurewitz, J.C, The Middle East and North Africa in World Politics : A Documentary Record (New Haven : Yale University Press,1975) Vol.1 & 2.

theory with universal claims. Precisely, the position taken by Louay M.S is that the concept of "war and peace" is built on three essential Propositions[17] which are:

i) Division of the world into two territorial components *(i.e. Dar-al-Islam* and *Dar al Harb)*.

ii) That the Muslim nation is under permanent hostility until the non-Muslim nations are reduced to non-existence.

iii) Peaceful co-existence between the Daru-al Islam and *Dar-al Harb* is possible only when the latter renders an annual tribute of jizyah (tax) to the former.

The summary of the three above-stated propositions is that the tenents of the classical doctrine of war and peace provide for permanent war between the nations of Islam and the non-Islamic nations. Unlike other members of the hostility school of thought Louay M.S takes a middle course by holding that: "It is the normal state of things while peace between the Islamic and non-Islamic nations is contigent on acceptance of Islam by the non-Islamic states or their payment of annual tributes ***(Jizya)*** to the Islamic state.

According to Anwar Ahmad Qadri,[18] "In consonance with conventions and agreements on laws of war, the Islamic law provides proper safeguards against unnecessary damage to life and property". This opinion is correct as far as legal constraints on the conflicting parties are concerned,but the erudite author did not highlight what these conventions and agreements were and how effective they were. If Anwar Ahmad had addressed the issues raised, it would have been easy for one to determine the validity of his positon.It is difficult to accept a proposition that suggests

[17] Muhammed Talaat AL-Ghunaimi,`The Muslim Conception of International Law and the Western Approach (Netherlands: martinusNi; hoff/The Hague,1399/1978) p.156

[18] Qadri A.A, Islamic Jurisprudence in the modern world, SH. Muhammad Ashraf, Pakistan,2nd ed.1981, p. 278

that the Islamic law provisions are dependant on certain conventions or on any pacts whatsoever.Moreover,convention is foreign to the law of Islam.Convention, rather follows the Law and does not stand independent of it. The Islamic law takes its validity mainly from the Qur'an,the *Sunnah*, *Ijma'a* and *Qiyas*. Going by the law of Islam, the essence of*jihad* is to repel the unbearable aggression and persecution of the unbelievers. In Anwar Qadri's opinion,the Quranic injunction upon the Muslims to fight is Allah's directive to fight to end persecution and injustice as well as to establish justice, freedom of religion, and to protect the places of worship from being ruined. This noble object is better explained by the glorious Qur'an.[19]

Schwazenberger George, arenownedProfessor of International law, in his work,[20]presented war as a condition of those contending by force. His reason for taking this position is that any attempt to define the legal phenomenon of war in objective terms would amount to an effort in futility. He stated that, the primary position of the relativity of Peace and War is that of a negative state of affairs characterized by the predominance of political and economical power over military power and subsequent relegation of the military power to the background role of potential instead of an actual pressure. In his opinion, the effects of war is much more reflected in the state of war rather than in the war itself. The erudite Scholar sees the consequential impact of war on global peace as legal effects which are specially categorized into effects in reaction to the inter-states affairs relations between the Belligerent States and the enemy nationals and impact of war on private relations between individual members of the conflicting nations.

According to the seasoned Scholar, the 1864 diplomatic conference convened atGeneva was nothing but Humanitarian Law making. War or armed conflict may be

[19] See Q.22 : 40 & Q.9 : 29

[20] Schwazenberger. G,(nd.) International Law as applied by 'International Courts and Tribunals'

terminated under the International Customary Law by unilateral action on a consensual basis.He further opines that once a Peace treaty comes into force, the law of war becomes inapplicable in relations between the Belligerent states.

In the view of Abdul-Rahman Doi[21],non-Muslims living in predominantly Muslim states have been guaranteed adequate protection of their life and property together with equal honour and respect due to the Muslims in the nation of Islam.According to him, they are called *'Dhimmis'*under Islamic law.It is true that people living in Islamic state are classified into three classes viz-aviz-the Muslims, *Dhimmis* or *Must'amins*.What Abdul-Rahman Doi fails to explain is as to whether the classification was intended to be exhaustive for all time.For example, non-Muslims in a westphalian nation-state are not supposed to be *dhimmis* because the 1648 Peace of Westphalia Treaty enshrines territorial state as the primary sovereign unit for international relations and that happens to be the foundation of the structure and characteristics of the modern nation-state. In the interview granted the Press by the then Grand Khadi of Kwara state of Nigeria,Hon. Justice Ambali ,he agreed wlth the proposition that most Nigerian non-muslims are not *dhimmis*. The Honourable Grand Khadi said :

> *"Nigerian non-Muslims are not dhimmis; they are Christians. They do not pay jizya,there is no aman (trust or pact) between us.They betray us,maim us,and kill us.They are not dhimmis,they are of less status because. They do not have rights attributable to dhimmis*[22] *"*

Two reasons are further advanced by the erudite Grand Kadi for inapplicability of *fiqh*(Islamic jurisprudential) concept of *dhimma* (state of being a *dhimmi*) to non-muslims of the modern time.

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[21] Doi, A.R,(1980)Basis of Shariah, ABU Press, Zaria, p.594.

[22] The interview he granted to 'The Daily Trust' took place on the 14th May,2003.

Firstly, inasmuch as the jurisprudential rulings on dhimmis were then valid, non-muslims of today are not merely exempted but are excludable from the fiqh's analysis simply because they do not in any way share any of the characteristics of dhimmis within the purview of Islamic law.They were not defeated in any war nor were they placed under any obligation to pay *jizya*. Thus, if *fiqh* effectively addressed the issue of historical *dhimmis*, modern writers like A.Rahman Doi need to elaborate the Muslims' relationship with peoples who are not known to *fiqh,* unknown because in the new world order they are not in position to be, and can not be conquered or subjugated; do not pay *jizya* (tribute or poll tax); and they lead the armed forces which comprises of a Muslim majority.

Secondly, *fiqh* is inapplicable to the contemporary world because its classification of non-Muslims is not and cannot be exhaustive. Islamic jurisprudence cannot accommodate the modern religious groups that have become permanent component parts of muslim state territories.How then can one talk of making rules about relatioship with them. Present day experiences have shown that the two categories of non-Muslims are absolutely not covered by the *fiqh* concept of *dhimmah*.

(a) Christians and Jews in a Muslim nation-states or part thereof who have not been

subjugated or defeated in a war.

(b) Native Christians and Jews who precede the establishment of a political Islamic nation

state structure, and who cannot be subjected to war for any reason whatsoever.

What this aspires to add to the previous works reviewed above is to profer solution to the universal problem of war. It is a known fact that war or armed conflict is inevitable just like peace. In human behavior there is bound to be conflicts and peaceful co-existence. Thus, it is intended in this thesis to propose ways and means by which wars will be reduced drastically while peace will be effectively established among the Nations of the world.

1.6 ORGANIZATIONAL LAYOUT

This research work is covered by seven chapters all-together. The centre piece of the work is an attempt to examine one of the most interesting but inadequately explored areas of Islamic law. It is this aspect of the Islamic law that relates to war and peace. The study focuses on the desire to make significant contribution to knowledge and development of the international legal system. Thus, below is the organizational structure of the research work.

Chapter One: General Introduction

The opening chapter of the present work generally introduces the theme of the study. The chapter features inter-alia the statement of research problem, basic aims and objectives of the study, scope of the research, literature review with organizational structure as well as justification of the dissertation.

Chapter Two: The Concept of Islamic Law

The second chapter opens with the definition of Islamic Law. Nature, scope and Characteristicof Islamic Law are discussed in this chapter.

Historical background of the law of war under Islamic Legal system is elaborately analyzed. The core subject-matter of the chapter is the sources of Islamic law of war and peace.

The *Holy-Quran*, *Sunnah*, *Ijma'a*, *Qiyas* and other recognized subsidiary sources under the Islamic law are discussed.

Chapter Three: The Islamic Law concept of war

This chapter of this study is devoted to the concept of war. It comprehensively analyses the institution of war under the law of Islam. The intent here is to probe into the circumstances that justify hostilityin Islamic Law. Furthermore, what does the Islamic legal term *Daru-al-Harb* (Nation of hostility) imply. The chapter further distinguishes *Jihad* from war. *Jihad* is presented in a simple way that a novice will understand. War of extermination and war of reconciliation are treated as the two major types of armed conflict in Islamic law. As this very chapter and the succeeding one constitute the main body of the entire work, were tocover relevant parts ofthe history, nature and functions of war.

Chapter Four : The Islamic Law concept of peace

The fourth chapter treats*'Peace'* as conceived in Islamic law. It explains what *Daru- Salam* (Nation of Peace) stands for. Different modes of peace are discussed in this chapter. Other relevant issues given attention in this medieval chapter are the peculiar nature and scope of peace and the various ways of realizing peace as prescribed in Islamic law.

In this chapter, certain constraints in executing war under the law of Islam are discussed. The constraints imposed by the Islamic law on the conflicting parties are also discussed with solutions proffered from the Islamic Law perspective. A relevant fraction of origin and development of the Law of peace as well as some sources of peace are discussed.Also in this chapter principles of *Distinction, Precaution, Proportionality ,Prohibition* of indiscriminate attack and *Protection* of Prisoners of war were all addressed .

Chapter Five : Impact of war on global peace and security

Concerning the impact of war on the global peace and security, in the fifth chapter, war is portrayed as 'Cause' while its impact on the global peace and security is presented as *'Effect'*. Few cases of nations with serious effects of war are considered as case studies in this context. Extension of general hostility with other common consequences of war is attended to. Furthermore, restriction of commercial activities, disarmament as it was in the case of Iraq, socio-economic problems as it was in Iraq-Iran war, Israeli-Palestine armed conflict as well as the Kosovo genocide with the current intra-national armed-conflicts are all addressed in this chapter.

Chapter Six: International Treaties and Rules of Conduct of Hostilities

Under chapter six,*treaty* that gave birth to what is now recognized as '*modern diplomacy'*is discussed as another grave consequence of war. Effect of treaties is equally treated. Restrictions imposed on the conflicting parties are explained elaborately discussed under the following sub-headings :- Principles of distinction, Precaution, Proportionality, Prohibition of indiscriminate attacks and Protection of Prisoners of war.

Chapter Seven : Conclusion, Summary and Recommendations

As the conclusive chapter, each of the preceding chapters is briefly summarized. The chapter suggests recommendations for reforms with a view to restricting to the barest minimum the rate of armed-conflicts in the international community. It also suggests ways of promoting peace in the world; all within the purview of Islamic law.

1.7 JUSTIFICATION OF THE RESEARCH WORK.

The justification of this study is premised on the factors enumerated below:

i) The present thesis will be a great asset to students of international law, international law lawyers, Judges, and Islamic scholars. The reason being that the subject matter of this work is a branch of International law.

ii) It is no more ambiguous that the international community is bedeviled with war of various degrees. Every nation of the world have it's own dose of the hostile pills. To terminate the fast-spreading problem of armed conflict, it is necessary to embark on a research work of this nature. This will enable one to discover causes and effects of wars on the international community and profer solution to the problem.

iii) What is even more, when the only conventional option seems to be failing the international community, then the need to look elsewhere for solace and alternative solution to the problem of war.

All this put together serves as justification for this research work.

In conclusion, the dissertation is intended to consider ***The concept of war and peace*** from Islamic Law perspective. The study is informed by the negative effects of the diverse armed conflicts in almost every part of the world on the global peace and security. The dual benefit of the research work is that it will serve as the Author's contribution to knowledge of Law and it will profer solutions to the problem of war in the international community.

This work is justified by the fact that it is going to be of immense benefits to Judges, Students, legal practitioners, and generality of intellectuals of various disciplines.

CHAPTER 2

THE CONCEPT OF ISLAMIC LAW

2.0 INTRODUCTION

The General Concept ofIslamic law will be comprehensively discussed in this chapter for a clearer picture and better appreciation of the Islamic law of war and peace. Its definition, scope, sources,characteristics,nature with origin and historical development will serve as a relevant premise for the present work. As a matter of fact, this chapter is intended to correct the wrong conception of Islamic Law. The true position of the Shar'ah as the most effective legal system in the modern world will be exhibited here.

2.1 DEFINITION AND SCOPE

Shari'ah literelly means the path to be followed to a watering place. It is further interpreted in arabic language as a path path believed by all Muslims to have been divinely shown by *Allah,* the superme Law Giver, through His Prophet, Muhammad. It is asserted by Sayyid Qutb that in Islam, Allah alone is the Sovereign and it is only Him Who has the absolute right to ordain a path for the guidance of mankind[23]. Allah, the Most High states in the Glorious Qur'an thus:

> *"We made for you a law, so follow it, and not the fancies of those who have no knowledge[24]".*

This vividly explains why the Muslims all over the world are obliged to ensure total implementation of that divine path made for them by their Creator. No one created (individualy or collectively) posseses the absolute knowledge required to make a perfect law for human society. According to Sayyid Qutb, "They are equipped with nothing but fancies and ignorance when they undertake the task which is no concern

[23] . Qutb, S.Hadha al-Deen, U.S.A, I.I.F.S.O Publication, n.d, p.19
[24] . See Qur'an 45:18

of theirs and does not properly belong to them. Their claim to one of the properties of divinity is a great sin, and a great evil"[25]

Shar'ah, as a divine legal system covers all aspects of human life. The operational range of Islamic Law is universal. Its scope is so wide that it regulates both private and public life of its subject socially, economically and politically at national and international levels. Thus, Shar'ah is of universal application wiith the sole objective of maintaining justice, peace and love in human society. The scope of Shar'ah does not give room for injustice. Justice is done equally to all and sundry. Genuine due process of law is only found within the frame work of Shar'ah. It is stated in the Glorious Qur'an that :

> *"O ye who believe; stand out firmly for justice, as witnesses to Allah, even as against yourslves, or your parents or your kin, and whether it be against the rich or poor. For Allah can best protect both. Follow not the lusts of your hearts, lest you swerve,and if you distort justice, verily Allah is well-acquainted with all that you do"*[26]

2.3 SOURCES AND CHARACTERISTICS

Naturally there are sources for every institution in human endeavour. Law being the only effective mechanism to maintain peace and order in human society takes its sources from various events and conventions.Peculiarity of the Islamic legal system makes it highly distinctive from any other legal system in the contemporary world.

Thus, the sources of Islamic Law are so divinely universal that they are second to none in terms of suitability and applicability. The global legal history has exhibited

[25] . Qutb, S. op.cit. p.22
[26] . Qur'an 4:135

the existence of the Islamic rules of conduct and inter-state relationship long before the 16th century in Europe[27]. Prior to the advent of islam, the Arabs had some forms of international relationship. They used to exchange visits with rulers of neighbouring states and sent and received envoys.[28] The Yemenites would send envoys to Madyan seeking for Persian assistance against the Abbysinians, these Yemenites used to receive ambassadors of several rulers including the Byzantine empire.[29]

In spite of these informal rules of international relations, the Arabs proved to be very cruel in their treatment to other people of nations with whom they had no such relationship.[30] However, after the advent of Islam, the Muslim nations were the first to accord the most dignified position to international law.

Through the principal sources of international law under the law of Islam, the holy Prophet Muhammad (S.A.W)[31] injected into the world, a perfect legal system which encompasses principles governing human relations in a municipality and those governing inter-state relationship global-wise. He introduced into the international law positive reforms by a policy of peace, love, justice, fair play, and tolerance. His concept of international law did not only regulate the conduct of Muslim state with other non-Muslim individuals living in the Muslim state. The ultimate goal was to bring the global community into harmony with a progressive global village and to satisfy the needs of national and individual progress.

There are four principal or major sources of Islamic law. They are:-

a) *Al-Quran* (Divine Words of Allah)

b) *As-Sunnah* (Prophetic Traditions)

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[27] Qadri, A. A, Islamic Jurisprudence in the Modern World, SH. Muhammad Ashraf, Lahore, 2nd Ed., 1981, p.277.
[28] At-Tabari, Op.cit. Vol. 1, p.1537
[29] Madui S , Ard-al Quran, Vol. 1, p.319
[30] .Doi,A.R. Basis of Shariah, ABU, Zaria, 1980, p.586.
[31] Salla-Llau Alaihi Was-Salam (Peace, blessings and mercy of Allah be upon him)

c) *Ijma*' (Consensus of Opinion)

d) *Qiyas* (Analogical Deduction)

The first two above listed principal sources are regardedu as *Al-Addillat-Al-Qat'iyya* implying "*Absolutely Certain or Irrefutable Arguments*" while the latter two major sources as indicated above are called "*Al-Adillat-Al-Ijtihadiyya*" meaning "*Arguments obtained by Exertion*". The prominent schools[32] of Islamic jurisprudence differ with each other in some minor details in respect of the four principal sources. The Shafi'i school only accept *Ijma'a* and *Qiyas* with a qualified degree by use of different terms to expound inferential conclusion. The Maliki school takes a medium position. While the Hannafi school is a tale of speculative deductions. As for the Hambali school, there is no objection to Ijma a and *Qiyas* but the school places great emphasis on literal interpretation of the *Sunnah*.

All this notwithstanding, the four principal sources are comfortably accommodated within the framework of Islamic law. Thus, the Quran provides *interalia* as follows:

> *"O you who believe, obey Allah and obey the Apostle and those placed in authority over you…"*[33]

It is this provision in the Glorious Quran that is regarded by the Islamic law scholars as authority for the four principal sources about to be discussed in detail. When it is stipulated in the above cited verse from the holy Quran that the believers must "obey Allah", obeying Allah here represents obedience to the Quran which is the first primary and the most divine cornerstone of other primary and secondary sources of Islamic law. Perhaps this is why there is no argument on the *Qur'an*being among the four prominent schools of jurisprudence. The second directive in the verse under

[32] The Hannafi school, The Hambali school, The Shafi'i School and the Maliki school.
[33] Quran (An-Nisai) 4:59.

reference is "and obey the Apostle". This is self explicit. The Apostle here refers to the Holy Prophet Muhammad (S.A.W). Impliedly, it is a command to the believers to obey the practices and directives of the Holy Prophet for he said nothing nor did nothing except in compliance with the divine revelations from Allah the Lord of the world[34].

The verse goes further to state as part of the command thus: "and those who are charged with authority among you" it is this portion of the verse that stands for '*Ijmaa*' which is the third primary source of Islamic law. 'Those charged with authority' include persons with administrative, judicial or spiritual responsibilities.[35] Some Islamic Jurists limit the interpretation to those who are charged with spiritual responsibilities alone because their decisions or settlement of affairs will be based on the Quran and *Sunnah* alone. How be it, the fact remains that any consensu of opinion which is not premised on the Quran or *Sunnah* cannot be legally binding on the believers. Lastly, the verse (Q.4:59) goes a step further to say: "if you differ in anything among yourselves…"; going by this proviso, it is rightly conceived that this portion of the verse provides the legal backing for the fourth primary source of the Islamic law known as *Qiyas* (i.e. Analogical deduction).

Shar'ah like any other law in the world; orignates from a particular source. It is rooted directly in the divine commandment of *Allah* ,the Most High. However, man is given the power to interprete and expand the divine laws by ways of consensus of opinion, analogical deductions and through other processes which are not in contrary to the divine commandment.There are four major sources of Shar'ah namely:-*Qur'an, Sunnah, Ijma'a* and *Qiyas*. As orderly stated above, the Glorious *Qur'an* is the very

[34] See Qur'an (Al-Najm) 53:3-4.

[35] According to the footnote 580 of Yusuf Ali, 'Ulu Al-Amr', According to the footnote 580 of Yusuf Ali, it means "those charged with authority or responsibility or decision or settlement of affairs." He however acknowledge that "All ultimate authority rests in Allah."

first source of *Shari'ah*, followed by the *Sunnah* (Prophetic tradiition). The holy Prphet Muhammad did explain at the tail end of his life that: "I leave two things for you. You will never go astray while holding them firmly. The book of *Allah*and the *Sunnah* of His Prophet." The third and fourth major sources which are *Ijma'a* (Consensus of opinion of the Companions of the Prophet and that ot the 'Ulama') and *Qiyas* (Analogical deductions) make provission for detailed understanding derived from the Qur'an and Sunnah taking care of myriad of problems arising from man's life.[36] Besides these major sources, there are subsidiary soources of Shar'ah *Istihsan* (Juristic Preference), *Urf* (Custom) and*Al-masalih al-Mursalah* (Public interest)[37].

Shari'ah or Islamic Law is characterised by certain characteristics which distinguish it from other contemporary laws. It is yet to be established that there is a particular law which provides reward for obedience other than the law of Islam. In Shar'ah, while disobedience is punishable, obedience is rewardable. Other distinguishing features of the law are as follow :-

a)-*Allah* legislates as the Supereme Law Giver. Laws of Islam are not man-made in thesense that they are not passed in any assembly of elected Law Makers as it obtains inthe parliament of modern nations.This isone charcteristic which distinguishes Shar'ah from other legal systems in the world.

b)-Justice is another peculiar feature of Shar'ah. By Justice,each person is given his due regardless of his status in the society. No one is above the law.Whosoever violates itfaces grievous punishment. No special treatment for anybody. What a genuine concept of *'Equality'* before the Law.[38]

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[36] . Maodudi, Toward Understanding Islam, I.I.F.S.O Publication, 1970, p.143
[37] Muslehudddin, M, Philosophy of Islamic Law and the Orientalists, Taj Company, Delhi,1986, 146.
[38] Uwais M. L, Islamic Law and Jurisprudence, a contribution to 'AL-ADL' (The Just),NAMLAS, U.I Chapter, Ibadan – Nigeria, 2009. P.348.

c)-Due to the divine origin of Shar'ah, its degree of stability is greater than that of any man-made law in the world. the law of Islam is relevant to the past, present and future generations. Thus, it is characterised by universal application.

d)-Another prominent distinguishing feature of Shar'ah is the fact that it is free ofreview from time to time. For example, Nigerian Constitution has been several times. Question of constitutional review does not apply to Shar'ah.[39]

2.4 NATURE AND ORIGIN

The nature of Islamic Law is divine, because it takes its source from the only supereme Law Giver (i.e *Allah,the Lord of the world.)* The ultimate goal of Shar'ah is nothing but ***Justice*** in the true and natural sense of the word. Therefore, in Islamic Law there is a clear emphasis on the fact that sovereignty solely belongs to *Allah* by virtue of which He is the Law Giver while the entire *Ummah* (Nation of Islam) is merely His trustee. Based on this principle, the Nation of Islam and human race in general enjoy a derivative rule-making power and not an absolute law-creating prerogative. To be precise, man can not legislate but he can make rules that will not be inconsistent with the Allah-made Laws. Thus, any Muslim who is endowed with knowledge and wisdom is qualified to interprete the Laws of *Allah*,only when such interpretation becomes inevitable. This is the nature of *Shari'ah*.[40]

Discussing the origin and development of Islamic law of war and peace is as good as discussing the historical development of Islamic international law.[41] It is said in the Western circles that a professor of technology in University of Salamanca

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[39] Gide and Rest, A History of Islamic Economic Doctrines, p.29
[40] Muslehuddin M, Ibid, p.59
[41] Strike, J.E (1984) 'An Introduction to International Law' Butaterworth & Co. (publishers) ltd, London pp. 10-11..

Fracisco de Victoria (1480-1546) was the first authority on international law. On the other hand Hugo Grotius (1583-1645) is said to be the father of modern law of nations[42]. His work entitled *De Jure Belli Pacis* (the law of war and peace) was first published in 1625. However, it has been established that the very first and foremost work on intrnational law in the history of mankind was the book written by Imam Muhammed As-shaybani (740-805 AD). The treatise was entitled *"Al-Siyar Al kabir"* which was eventually translated into English language by a contemporary scholar[43] as the Islamic Law of Nations in 1896.

Without fear of contradiction, one may say that a profound study of the various texts of*Al-siyar* – Islamic International Law will disclose one undisputable fact that most of the contemporary international law principles are originally set out of Islamic Law.

After the advent of Islam, the Muslim nation introduced a dignified legal formula for the practice of international relations[44]. Hence it is under the Islamic law that the international law relating to war or armed confict in particular was first accorded a dignified place. By this position, the perfect international legal system coined out of Islamic law is known as *As-siyar* which encompasses not only relationship among Nations but relationship among nationals of different countries of the globe regardless of their religious inclinations. The Islamic international law therefore originated from the rules governing the conduct of war as well as behaviours of the warriors and how to treat captives in the custody of their captors.

[42] Shaw, M.N (1986), International Law, 2nd Ed. Grotius Publication Ltd. Cambridge, pp. 21-22
[43] Majeed, K, Ibid.
[44] Ibn Hisham, A. A, 'Sirah Sayyidina' Muhammed, Crottingen, 1858 pp. 217-221

In the pre-Islamic era, there was no just cause for waging war. In most cases the nature of wars or armed conflict prosecuted was aggressive and not defensive in nature. It is the law of Islam that disallowed the muslims to provoke war as agressors and yet permit them to take up arms for defence whenever war was forced on them. When conflict becomes inevitable, the muslims are mandated to engage in armed conflict for self defence and the defence of their faith. Mealy-mouthed compromises are not the right steps for soldiers of truth and righteousness. Rather they are often considered as a collection of cowardice, weariness, greed and corruptibility. Thus, Allah (S.W.T.A.) the supreme law Maker commands the muslim faithfuls as follows:

> *"O ye who believe! Fight the unbelievers who gird you about. And let them find firmness in you, and know that Allah is certainly with those who fear Him".* [45]

The first rule under the law of Islam before the above divine order to fight is rule of patience as indicated in the holy Quran thus:

> *"Now await in patience the command of your lord: for verily you are under our eyes".* [46]

While awaiting Allah's command (to fight) the persecution of the Muslims became intolerable that the Holy Prophet (S.A.W.) and the believers were forced to migrate. Some flew to Abysinia while the Prophet (S.A.W.) with some believers migrated to Madinah. It was in Madinah, the city of light that Allah's permission to fight was granted in the following words:

> *"To those against whom war is made, permission is given to fight, because they are wronged; and verily Allah is most powerful for their aid; they are those who have been expelled from their homes in defiance of right for no cause except that they say "Allah is our Lord"* [47]

That was how the law of war under the Islamic law started and eventually underwent developmental process through practices of the greatest and unprecedented war–commander in person of the noble Prophet Muhammad (S.A.W.). The developmental process can be divided into three periods. The first being the time of the holy prophet

[45]Quran, Suratu Tawbah (9): 123.
[46]Quran, Surat-ut-Tuur (52): 48
[47]Quran, Surat-ul-Hajj (22): 39-40

(S.A.W.). Next stage was the period of his noble and righteous '*Khulafai-Raashidin*' (The rightly guided caliphs) and finally is the present time.

In compliance with conventional rules of laws of war or armed conflict, the Islamic law provides adequate safeguards against unnecessary destruction of life and property.

This was effectively exhibited by the Holy Prophet (S.A.W.) as evident in his instructions to the troops he despatched against the Byzantine forces who threatened to invade the muslims when he (S.A.W.) directed thus:

> *"In avenging the injuries inflicted upon us, molest not the harmless inmates of domestic seclusion; spare the weakness of the female sex; injure not the infant and abstain from demolishing the dwellings of unresisting inhabitants; destroy not the means of subsistence nor their fruit trees and touch not the palm"*[48]

A good instance of the second stage of the development of Islamic law of war was clearly reflected in the charge with which the first rightly guided successor of the holy prophet (S.A.W.) in person of *Abu-bakr* sent forth to the muslim army for the conquest of Syria. By the said charge the enviable position of the muslims in the history of the law of nations was established once and for all. It runs as below:

> *"When you meet your enemies in the fight, behave yourselves as befits good Muslims,and remember to prove yourselves the true descendants of Isma'il.*
>
> *In the order and disposition of the host and in all battles and be ever obedient to your leaders. Never yield or turn your back on your enemies; it is for the cause of good that you fight – you are incited by no less noble a desire than His glory; nor let the numbers of your foes alarm you, even though excessive.*
>
> *If Allah should give you victory, do not abuse your advantages and beware*

[48] At-Tabari, Tarikh-Al-Rasul wal Muluk, vol. 12, Al-tibarah-almuhriyyah, Cairo. P.98

how you stain your swords with the blood of him who yields, neither touch ye the children, the women, nor the infirm old men when you may find among your enemies.

In your progress through the enemy land, cut down no palms or other fruit trees, destroy not the products of the earth, ravage no fields, turn no dwellings, from the stores of your enemies take only what you need for your wants. Let no destruction be made without necessity but occupy the city of the enemy, and if there be any that may serve as an asylum to your adversaries then do you destroy.

Treat the prisoners and him who renders himself to your mercy with pity as God shall do to you in your need, but trample down the proud and rebellious, nor fail to crush all who have broken the conditions solemnly entered into.

Let there be no perfidy in all things proving yourselves ever upright and noble and maintain your word and promise truly. Do not disturb the quiet of the monk or hermit, and destroy not their abodes; but inflict the rigour of death upon all who shall refuse the conditions you may impose upon them"[49]

The above quoted directives of the first Khalif in Islam takes care of the novelty of Islamic law in relation to the questions of how to conduct war, rules governing the warriors and treatment of prisoners of war including defenseless citizens of the oppossing nation such as children and women as well as infirm old people. This is exactly the path of honour trekked by the succeeding Caliphs. Their instructions to their respective war commanders tended towards treatment of hostile enemies with justice, mercy and chivalry.

[49] . At-Tabari, Tarikh-al-Rasul wa al-Muluk (History of the Prophets and the Kings),Vol.3, Al-tibarah Al-muniriyyah, 1388 AH. P.213

Sayyidina '*Alli ibn Abi Taalib* (R.A) who was the fourth caliph improved on the contributions of his noble predecessors in the development of the Islamic law of war.

The rightly guided caliph forbade the muslims to slay a fugitive after he has escaped from the battlefield or to pursue him beyond a single mile or to continue a siege beyond a set period. The compassionate elements in prosecuting war or armed conflict by the muslims marks a thick line of difference between the Muslim Heads of States and their contemporaries. If compared with all sense of purpose and intent, one will discover that the muslims were most merciful. For instance, the conquered monarchs such as Kahine of Barbary or Dastaro of Sind were indeed put to death, rebels were most cruelly handled, beheaded or impaled, but such harsh sentences were confined to important personages.[50]

In the present stage, the law of Islam relating to war or armed conflict has developed tremendously. Inspite the fast growing hostility of the non-muslim nations against Islam and the muslims, the muslim nations are not deterred from widening the scope of Islamic law of war with sincere objective of substituting hostility with peace and making the global village a better place to live for all.

The Islamic international law has further developed in the modern days to accommodate tolerance of religious opinion. It has been an essential feature of the Islamic law of war but it is more improved today that such feature becomes so prominent as an unambigious practical interpretation of the Quranic provision which reads as follows:

"*Let there be no compulsion in religion, truth stands out clear from error*" [51]

The christian inhabitants of a conquered town were invariably permitted the enjoyment of their lands as well as freedom of religion. Non-muslims living in

[50] . Al-Tabari, op.cit p. 250

[51] Qur'an, Suratul Baqarah (2): 256

predomnantly muslim states were guaranteed adequate protection of their life and property together with equal honour and respect due to the muslims of the country. They are called 'the *Dhimis*'[52]under Islamic law. This is one of the distinguishing features of the Islamic law of war from any other legal systems in the contemporary world. It is an open secret that Christians and Jews are living comfortably in muslim countries like Saudi-Arabia, Iran, Pakistan and Kuwait doing their lawful businesses and practising their respective religions undisturbed.

In the same vein of development of Islamic law of war in the contemporary world, the non-muslims under the protection of muslim state are classified into two categories as stated below :

The first consists of those who settle within the territorial jurisdiction of the muslim state. Their status is determined by a contract of socio-political nature which is technically reffered to as "*aqd al-dhimmah*"[53] under the law of Islam. As soon as the contract is concluded, the contractees become basically entitled to equal and reciprocal rights and duties. The other category of non-muslims are those who enter the Islamic state for a given period and whose status is subject to the regulations and conditions upon which the permission of transitory stay is granted. There are several instances in this regard when non-muslim foreigners visited Madina at the time of the Prophet (S.A.W). regarding the subjects of a belligerent state the law of Islam grants full protection as long as permission of sojourn has been granted with the proof of the visitors' *bonafides*. Such sojourners were regarded by the holy prophet (S.A.W.) as "holders of a covenant of protection" and they were granted the right to live according to their religious codes.

[52] Doi, A. R.,(1980),Basis of Shariah, ABU, Zaria, p.594.
[53] The phrase 'Aqd Al-Dhimmah" represents "contract of protection" in English language.

Going by the provisions of Islamic law, the concept of "majority" and "minority" is absolutely discarded.

Conclusively, one will be correct to hold that toleration of Enemies under the Islamic International law of war was a new thing in human history. It is a complete contrast to the brutalities of the crusaders and their likes to foreigners and non-members of their faith living within their territory. The muslims are well known for their tolerance of other religionists.

From the forgoing the islamic law of war and and peace takes its origin from the Quran and the prophetic tradition (*Sunnah*). It undergone three stages of development as already indicated above. As a religion of universal application embarked upon a universal wide spread in anticipation of winning the entire universe. Along the line a theory was expounded by the jurists whereby the nations of world are divided into territorial divisions. The first is known as *"Dar-Al-Harb*" meaning theNation of hostility, the normal relationship between the two divisions was hostility and eventually armed conflict. The second divide is called *"Dar-As-Salam"* meaning 'the Nation of peace.

Codial agreement of peace was allowed but could not last more than 10 years according to the unambiguous practice of the Holy Prophet Muhammed. The stage of developemnt according to Humidullah, was the expansion age which lasted a little over a century.

The second stage was known as 'age of interaction' whereby new juridical formulations were introduced. The question addressed by this developmental stage was 'what is the logic behind waging war against non-Muslim'.

Consequently, the Islamic legal thought re-interpreted the concept of *Jihad* thus: 'A defensive war against those unbelievers who threatened the territory of Islam, it was

at this stage that the dichotomy of divisional a tripartite world. Thus the third division is "Dar-Alsulh" meaning territory of peace making'. This is a division of nations that did not submit to the authority of the Islamic nation but were not hostile but gave way to friendly treaty relations with the Dar-al-Islam[54]

The general conception of Islamic Law is the central core of this chapter. It is discussed by analysis of definition of *Shar'ah* to the understanding of a person who has no idea of what is Islamic Law. The concept is further explained by the scope, sources and characteristics of the law of Islam as well as its nature.

The Islamic Law of war and peace undergone three stages of developemnt as already indicated above. Along the line, a theory was expounded by jurist whereby the nations of the world are divided into two territorial division. The first is knowN as *"Daru-al-harb"* meaning 'the Nations of hostility', the normal relationship between the two division was hostility which in most cases ransform into war or armed conflict. The second divide is called "*Daru-as-slaam"* meaning 'the nation of peace'.

[54] See Hamidullah, M (1977), The Muslim Conduct of War, Lahore, pp.68-70

CHAPTER 3

ISLAMIC LAW CONCEPT OF WAR

3.0 INTRODUCTION

Conflict in all its known forms is a necessary element in all-human contacts. It is an undisputable phenomenon in the global village as far back as when the class societies first emerged. No doubt quarrels occurred among the primitive peoples who made up the then international community and sometimes-armed clashes broke out among them.

Nevertheless such conflicts did not meet the two conditions required to classify them as war. In accordance with Marxism-Leninism definition of war as an instrument of political class struggle, the armed clashes or quarrels were not born out of intent to pursue class interest and secondly there was no separate organization distinct from the tribe as a whole charged with the job of fighting as we have armed forces in the modern world set-up. What this theory of Marxism-Leninism has proved in essence is that in the primitive international community though there were quarrels, armed clashes and social conflicts but there was no war simply because no states and classes existed.

To Grotius, a world acclaimed "father of international law", war *per-se* (by itself) is a "*status per vim certantium qua tales suit*", meaning "War is the condition of those contending by force, viewed simply as such". According to George Schwarzenberger, a Professor of International Law, "it became increasingly apparent that, in an overriding system of power politics it was futile to attempt to define the legal phenomenon of war in objective terms. What is obvious is that, it is frequently easier to establish the effect of a phenomenon rather than the phenomenon itself. In other words the legal effects of war much more easily attributed to state of war rather

than to the war itself.[55]This makes a wide gap of difference between the phenomenon of war and state of war.

Sociologists and legal Experts while seeking unambiguous concept of war have sought criteria sharply separating it from peace. They have adopted Hugo Grotius' definition, who when criticizing Cicero's definition of war as "a contending force" said that war is not a "contest but the condition of those contending by force",[56] a condition decorated with precise points in time separating a "State of war" from a "state of peace".

This implies clear criteria for determining the beginning and the end of war and for distinguishing belligerents and neutrals during that period. Wright, in his own contribution to the ambiguity which beclouds the concept of war has defined war or armed conflict as:

> "A *legal condition, which equally permits two or more hostile groups to carry on a conflict by armed force".*[57]

The varied positions on the concept of war propel the attempt to discuss in detail the Islamic Law concept of war or armed conflict.

3.1 'WAR' IN ISLAMIC LAW

The law of Islam realizes that war is the inevitable consequence of injustice be it social, economic, political or judicial injustice. Such injustice may either be on the part of one of the combating parties or on the part of both conflicting parties. It has never been and it will never be within the purview of Islamic Law that a war or armed conflict is occasioned between two totally "Just" opponents. This is so because the nature of justice only prompts men to resolve their differences in a spirit of brotherhood and love. War in most cases, is erroneously represented by *Jihad* which

[55] Schwarzenberger G., International law as Applied by International Courts and Tribunals, vol.II, Stevens & sons ltd., London, 1968, p.61.
[56] See, further the frontiers, p.234 ET. Seq
[57] Wright, (1942) P.8.

is often wrongly referred to as 'Holy War'. Bola Ajibola[58] asked, "how could a war be holy? And proceeded to conceive war as a brutal and ruthless exercise where lives and properties are destroyed.[59]

Whereas, the true concept of *Jihad* is absolutely in contrary to the very correct concept of war. *Jihad* is Striving or making efforts towards a particular goal while the true adjectival representation of war under the Law of Islam is '*Harb*' or *Qatlu*. Therefore, *Jihad* and Harb are two different concepts. However, they are commonly used ambiguously, while *Jihad* linguistically means. *To Struggle, To Strive*,[60] the word Harb or Qatlu simply means fighting or war, that is a process where weapons are employed in struggle against an opponent with the motive to overcome or overpower the opposing party through extermination. Thus, *harb* or *qatlu* can be said to be a component of*Jihad* while *Jihad* is not *harb* per-se.

In the opinion of a Kaduna based Legal Practitioner,[61]*Jihad* is a sacred duty of religion incumbent on the Muslim nation at large to launch defensive war against unbelievers to repel their persecution upon the believers or aggression upon the Muslim Country "Tohim, this is a divine duty and is called *Jihad* or religious defensive/offensive war depending on the prevailing circumstances. However the concept of *Jihad* under the law of Islam is in principle similar to that of war but completely different from one and other in applicability.

It is presented in the Holy Quran as a process of expending one's ability or power in terms of money and life in the cause of Allah.[62]

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[58] Bola Ajibola is an international Jurist, a diplomat and former Attorney-General of Nigeria and currently a Judge of International Court of Justice (ICJ).

[59] Bola Ajibola's paper presented at the 5th Annual public lecture of the Lagos chapter of Obafemi Awolowo University Muslim Graduates Association (UNIFEMGA) at Airport Hotel, Ikeja Lagos. p. 28

[60] Elias A. Elias, The Dictionary, Arabic/English, Taj Company, delhi-10006, 1985, p.73.

[61] Ajijola A.D, Introduction to Islamic Law, int'l Islamic publishers Karachi (Pakistan) July 1981, p.141.

[62] See Qur'an 61 (al-saff): 11

Precisely, *Jihad* could be conceived, as an effort in whatever form be it material, fiscal or otherwise directed towards achieving a particular goal materially, spiritually or politically. More so, where such efforts are intended to seek the pleasure of, Allah (S.W.T.A). For instance, one's efforts directed towards achieving academic goals with the intention of using such achievement to propagate Islam for Allah's pleasure only is a *Jihad*.

Similarly, a politician's efforts to win an election with the intent to enthrone peace and divine laws of Allah in his Country can be said to be a sort of *Jihad*. The word '*Jihad*' per-se implies in essence, the exertion of one's utmost power in repelling an enemy and using everything at one's disposal to enthrone peace for Allah and for the sake of humanity, it may be against a visible enemy, against the temptation of the devil and at times against one's own passions.[63] The word *Jihad* has been exclusively used by classical scholars to indicate the use of armed forces, for though the Quran often applies it in reference to act of war. By this application the Quran gives the concept a broader meaning. This position can be better understood with a brief perusal of the following Quranic verses:

> i)-"And those who make efforts (or strive) in our cause, we will certainly guide them to our path……[64]"
>
> ii)-"And whoever strive (makes efforts) he does so for his own soul……"[65]
>
> iii)-"Therefore listen not to the unbelievers, but strive against them with the utmoststrenuousness with the Quran."[66]

The three above-quoted Qur'anic verses directed the Muslims to fight in defence of their faith and their lives against the Qurayshi's persecution and oppression.[67]

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[63] See further Qur'an 2, (Al-Baqarah): 16 & 256
[64] Qur'an 29 (Al-Ankabut): 69
[65] Qur'an 29 (Al-Ankabut): 6
[66] Qur'an 25 (Al-Furqan): 52

It is further reflected in the verses of the Qur'an that *Jihad* can-not be truly *Jihad*if the Muslim involved does not intend by it to raise the banner of truth, to repel falsehood and sacrifice himself to attain Allah's pleasure.

However, the "hostility school" had interpreted *Jihad* as an offensive war portraying the perspective of a permanent hostile relationship between the Islamic realm (*Dar Al-Islam*) and non-Islamic realm (*Dar Al-Harb*) while on the other hand the "non-hostility school" had in its own conception defined '*Jihad*' as a defensive war. That is to say that the Muslims at that time were advised to bear the Quryshites' persecution, oppression and offensive armed conflict with patience and perseverance.

Impliedly, the view of the hostility school is more founded on the above–cited Quranic references than that of the non-hostility school. Though the view of the hostility school is dominant but it is not unanimous. Going by the interpretation of this school of thought which holds *inter–alia* that any period of peace between the two realms (i.e. Muslim nation and non-Muslim nation) must be seen as temporary, one will be correct to translate the participation of Muslim nations in the contemporary world order, their membership of United Nation and their covenant of peace with other non-Muslim Nations of the global village under the UN charter into a temporary relationship of peace. A good example at hand is the position of Khadduri relying strictly and absolutely on the opinion of Imam Shafii, when he observed that the law of Islam only allows for a peace treaty concluded between Muslims and non-Muslims for a period not exceeding ten (10) years duration.[68] It is pertinent to note here that the said opinion of the Shafi'i School is not unanimous among the Islamic jurists. There are so many other authoritative Islamic Legal

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[67] This includes anticipatory self-defense of which the Islamic state has the right to determine. See MOINUDDIN, B.A., the chapter of the Islamic Conference, (oxford: Clarendon Press, 1987) , p. 28.

[68] Khadduri, M.,The Islamic law of Nations: Shaytan:'s Siyar, Baltimore: the john Hopkins press, (1966) p.17.

opinions on the matter. Such other legal opinions conveniently accommodate permanent relationship of peace between the Islamic and non- Islamic realms. Ibn Qudamah and Ibn Rushd, Jurists of Hambali School and Maliki School respectively had explained in their respective works that there are other flexible opinions on this issue, to the effect that there can be peace treaties for unlimited periods between the Dar–al– Islam and Dar-al-Harb depending on the welfare (*Maslahah*) of the Muslim Nation.[69]

Ibn Qudamah further quotes Imam Abu Hanifah to have indicated the fact that the welfare of the Islamic State can be better served in peace than in war. This view is upheld by Al – Jazairi in his book published as *Minhaji Al – Muslim*.[70]

3.1.1*JIHAD*

The concept of *Jihad* positively inclines towards peace of permanent nature. The inclination to peace finds support in the injunction of the Quran, which states that:

> *"But if the enemy inclines towards peace, do also incline towards peace and trust in Allah: for He is the one that Hears and knows all things".*[71]

In line with this, evidence is in abundance from the practice of the Muslim Caliphs as far back as the 9th Century. Peace treaties between the Islamic realm and non-Islamic realm were signed. This falls within the scope of the Islamic politico–legal principle of *Al–Siyasah Al–Shar'iyyah* by which the ruling authority has the power under the Islamic Law to exercise discretion in matters of public law taking into consideration the welfare of the Ummah. It is on record that Al-Hakam, an Ummayyad Caliph

[69] Peter, R, and *jihad* in classical and modern Islam, Princeton: Markus wiener publishers, (1996) pp. 38-40.
[70] Al-Jazairi, A.J, 8th Ed. 1976, p.309.
[71] Qur'an (AL-ANFAL) 8: 61

concluded a peace treaty of unlimited period with Charlemagne in the year 812CE.[72] The consistence of this practice by the Muslim nations covering a span of more than four hundred years strongly supports the preference for eternal peace between the Muslim nations and the non-Muslim nations of the world.[73]

According to M.A Baderin,[74]"a significant instance was that of 1774 when the Islamic Ottoman Empire signed a treaty of peace with the "Tsarist Russian Empire to end the six years war between the Islamic Empire and the Russian Empire. The wordings of the treaty indicated an intention of seizing hostilities, not temporarily but on a permanent basis between the two realms".[75]

Article 1 of the above referred treaty stated *inter – alia* that:

> *"From the present time all the hostilities and enmities which have hitherto prevailed shall cease forever, and all hostile acts and enterprises committed on either side, whether by force or arms or in any other manner, shall be buried in an eternal oblivion without vengeance being taken for them in anyway whatever, but on the contrary there shall always be a perpetual, constant and inviolable peace as well by sea as by land".*[76]

Muhammad Abdul and Rashid Rida[77] were among the late 19th to 20th Century advocates of the doctrine of perpetual peaceful co-existence between the Muslim and non-Muslim nations who held that there should be no hostility or armed conflict of any form except strictly for defensive purposes.

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[72] El-Kosheri, A.S, History of the Law of Nations, Regional Developments: Islam in encyclopedia of Public International Law, Eds. Bernhardt, R: Amsterdam: Max Plank Institute, (1995) vol. II, p.812.

[73] Hurewitz, J.C, (ED.) The Middle East And North Africa In World Politics: A Documentary Record. (New Haven: Yale University press, 1975) vol 1 & 2

[74] A lecturer in law at the University of the West of England, Frenchay Campus, Coldharbour lane, Bristol, England.

[75] Baderin, M.A., The Evolution Of Islamic Law Of Nation And The Modern International Order: universal peace through mutuality and cooperation, published in the American journal of Islamic social sciences No 2, 2000, pp.57-80.

[76] See Hurewitz, J.C., Ibid, vol.1, pp. 93-101.

[77] Badawi, M.A.Z, The Reformers of Egypt, London: Croom Helm, 1978.

In the analysis of the Quranic verses on warfare Mahmud Shaltut concluded in his *Al Qur'an Wa al-Qital* as follows that:

"There are only three reasons for which the Islamic state may go to war, vis-à-vis.:

1.To repel aggression against it.

2.To protect the religion of Islam and

3.To defend religious freedom[78].

In his own opinion, Al–Umari, a contemporary Islamic historian, objected vehemently to the view that Jihad warfare is limited to self defence purposes. His contention is that the Advocates of such views are apologetic and "are affected by the emergence of international organizations which are concerned with reconciling the conflicting interests of nations, helping to establish international peace, and replacing wars with negotiation in order to solve international problems".[79]

The aim of Jihad according to Al-Umarri is not to force Islamic belief on anyone nor for the mere expansion of territory, but mainly to remove obstacles that prevent the spread of Islam and to establish universal truth and justice. It is properly established that whenever that objective can be achieved through peace rather than war, Islam always advocates the path of peace. This argument gains support from the provision in the glorious Quran, which reads thus:

> *"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 loves those who are just".*[80]

The Qur'an gives broader meaning to the concept of war by the usage of Jihad. For instance in the Makkan period the term Jihad was used in reference to the

[78] Shaltut,M., Al-Qur'an wa-al Qital, (1951). For an English translation; see Peters R, supra pp.60-101.

[79]

[80] Qur'an (AL-Mumtahinah) 60: 2

peaceful struggle in the cause of Allah, the most High. It follows that, contrary to the concept of war, the methodology of Jihad] includes inter–alia peaceful resistance and persevearance against oppression and tyranny, if the general conditions of the moment indicate that this approach is the most effective way to achieve the objectives of the Muslim community. It will be correct to conclude on the distinction between "Jihad" and 'War' as follows – perhaps the main distinction between the twain is that while "Harb" i.e. war may be defined as physical act of fighting or armed conflict per-se, Jihad represents the concept of "just war" which can be achieved through peaceful means or otherwise. The doctrine of "just war" has existed from time immemorial to justify different types of wars. In the contemporary world, the UN charter[81] prohibits aggressive wars except for self defence, enforcement actions and collective security authorized by the security council of the UN. It is only for those purposes that any war in the present time is considered "just" under the international law. Thus, basically the argument that the purpose of Jihad is mainly for liberating the oppressed and self–defence purposes or for protection of faith, differentiates the concept of Jihad from that of Harb (war) which could be embarked upon for any reason, ranging from conquest to occupy territory or to colonize, or to milk a rich but weak nation or for any other unjust purposes. One of the three essential propositions[82] upon which the classical doctrine of war is founded under the law of Islam is that: the Dar Al–Islam is under permanent obligation of Jihad until the Dar Al–Harb is reduced to non-existence. Jihad is thus, the instrument of the Islamic state to propagandize Islam and for purpose of territorial expansion so as to enforce Islamic Law.

Having appreciated the true and clear picture of Jihad as distinct from war, we will now proceed to examine the concept of war under the law of Islam. As a matter

[81] Article 2 (4) of the charter.
[82] Muhammad Talaat Al-Gunaimi, The Muslim Conception Of International Law And The Western Approach (Nether-lands) Marinus Nighoff/ the Hague, 1399/1978, p. 156.

of fact, war is presented under Islamic Law as a necessity of existence a fact of life so long as there exist in the global village oppression injustice, capricious ambitions and unfounded arbitrary claims. This position of Islamic Law on war should not be strange because it is a matter of historical record that human race has tremendously suffered communal, civil and international war up till now. It is equally a matter of fact that the victorious allies enthroned themselves as world powers and thereby settles their disputes over their gains and the status of their colonies and defeated enemies through wars and threats of war. Even in the contemporary world the entire members of the global community live under constant fear and buzzes of war over many resourceful and naturally blessed nations in the world.

Thus, the law of Islam being a practical system recognizes war or armed conflict as one of the natural phenomena, which is bound to occur like any other natural phenomenon from time to time in any given generation. As long as there remains in the world aggression whether provoked or unprovoked, armed conflict or war simplicity will continue to feature in the world till end of time. It is against this background, the law of Islam divided the global village into two realms as earlier on indicated in this work. These are Darul–Islam and Darul–Harb meaning Islamic realm and non-Islamic realm respectively[83].

According to Khadduri and Habachy[84], this Islamic Law division of world, order into two realms is "opposed to a world organization and to a cooperation of Muslim states in pursuit of peace and prosperity for all mankind within the frame work of the United Nations".[85]

It is however imperative to have comprehensive understanding of each of the two realms of the world order before advancing on the Islamic legal concept of war. In

[83] Doi, A. R, (1980), Ibid p.600

[84] They were two of the early post-UN commentators on Islamic law of nations.

[85] See "comments of Dr. Saba Habachy" proceedings of the American Society of International Law, (1959) p.59.

accordance with a section of the Hanafi School, the Islamic realm (Darul- Islam) means "a state where the affairs are run by the spiritual leader of the Muslims". A good example that readily comes to mind is the case of Islamic Republic of Iran particularly during the lifetime of Imam Ayatollah Khumaini[86].

Another section of same school of Hanafi portrays Darul – Islam as a "nation where the ruler and the ruled are not just Muslims but also in absolute peaceful co-existence among others".

That is a Nation or State of mixed religionists but all are in absolute peaceful condition.

Besides, another section of the Hanafi School holds the view that Darul-Islam is an "Islamic realm, which is absolutely under the governance of the Muslims".[87]

To the scholars of Shafii School, the Islamic realm of the world order is "a state where the non-Muslim residents are well protected".[88]

The Shafii School of thought goes a step further in its conception of Islamic realm by holding that if there are no Muslim subjects in a state as long as it is under the Dominion of Muslims, it should be considered as Darul-Islam. The basic understanding of the Islamic realm is a single nation of universal nature. That is global Muslim community under sole governance regardless of geographical or racial limitations.

The basis for this position, which is almost in line with the opinion of the Shafii School, is the assertion of the Almighty Allah in the glorious Quran, which goes thus:

> *"Verily, this nation of yours is a single nation and I am your Lord and cherisher, therefore serve me"*[89]

Perhaps this explains why the classical law of Islam gives no recognition to no other Nation than its own and consider the other half of the world as Dar Al-Harb, a non – Islamic realm or in other words an hostile realm. A large number of

[86] See Nathan J.B, Ibid, p. 2

[87] See Muhammad Ameer Al-Mansuri, Ikhtilafdaraini Wa Athrau Fili Ahkami Shariat, P.10.

[88] See Tuhfabu-li-muhutaji bisharihi al-minhaji of Ahmad Bin Hajar p.222.

[89] Suratul Anbiyai (21): 92.

Shari'ahadvocates hold a hard line view that the institution of the nation-state and contemporary internationalism in the light of the new world order is a complete aberration to the Islamic world-order and must therefore be dismantled to facilitate the creation of a unified Islamic realm (Darul Islam).

The non–Islamic realm (Darul–Harb) can be said to mean the direct opposite ofIslamicrealm. In accordance with the opinion of the Hanafi school, Darul-Harb is "a state or a nation under the leadership of unbeliever''.

It is equally conceived by another opinion as a state where the believers (i.e. Muslims) are living in fear of the unbelievers.[90]

Precisely, a non-Islamic realm is a nation ruled by non-Muslims who sometimes are hostile to the Muslim subjects.

Hence, it constitutes the second division of the world order. Going by the opinion of the classical Muslim Jurists, a permanent state of war exists between the two realms. Howbeit, there will always be struggle (*Jihad* **)** between the oppressors and the oppressed, the powerful and the weak but this struggle need not be violent. It mostly depends on the prevailing circumstances. However, the holy Prophet Muhammad (S.A.W) exhibited preference for peace at Hudaybia (Sulh-i-Hudaybia i.e. Treaty of Hudaybia) even at the cost of pride of the Muslims. With the treaty of Hudaybia, the argument of the advocates of perpetual peace between the two realms is more favored[91].

[90] Ikhtilaf Daraini Supra p.10.

[91] Anwar A.Q,(1981) Islamic Jurisprudence in the Modern World, SH. Muhammad Ashraf, Lahore,Pakistan,,p.278.

3.1.2 TYPOLOGY OF WAR

Wars are of different types; there are various kinds of warfare like the land warfare, the sea warfare and air warfare. Wars can also be categorised in another sense into chemical warfare, radiological warfare and nuclear warfare. Typology of war is in different dimensions. In the subsequent paragraphs, types of war will be examined from the Islamic law perspective.

War or armed conflict under the law of Islam is of two types. These are war of extermination and war of reconciliation. When discussing these two types of war in succession, it will be realized that war is not an objective of Islam nor is it the normal course of Muslims. It is in most cases the last resort as it is used under the most unavoidable circumstances when any other available measures fail.

The first type, which is war of extermination, is the kind of armed conflict against polytheists - Mushrikina who have two options. First, to opt for acceptance of Islam, and the second choice is for them to be eliminated. The second type of war is known as war of reconciliation against the people of the book who have three choices vis-à-vis to accept Islam and be left alone, to pay the Jizyah and enjoy Muslim protection. Under this option as long they pay Jizyah they can also retain their faith. Their third option is to engage the Muslim army in war or armed conflict. By this classification, it can be viewed that war or armed conflict under the law of Islam is conceived as the normal state of things and that peaceful co-existence between the Islamic realm and non-Islamic realm is contingent on the acceptance of Islam by the citizens of non-Islamic realm or their payment of yearly tributes (Jizyah) to the Islamic state.

For a clearer picture and more comprehensive analysis of the Islamic Law concept of war or armed conflict, each of these two types of war will be properly examined in the subsequent paragraphs.

a) War of Extermination

War of extermination in Islamic Law is an expedition embarked upon by an Islamic State to compel non – Muslim Nation to embrace Islam or get exterminated. The classical position of the Muslim Jurists or Islamic Law authorities regarding principles of War of Extermination has been primarily predicated on three Quranic Verses and on one prophetic tradition as cited below:

(i) "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 more hostility except to those who practice oppression".[92]

(ii) "But when the forbidden months are past, then fight and slay the polytheists wherever you find them and seize them, beleaguer them and be in wait for them in every stratagem of war, but if they repent, establish salat and pray their Zakat due, then open the way to them, for Allah is oft-forgiving most Merciful"[93]

(iii) "Fight those who believe not in Allah nor the last day nor forbid not what was forbidden by Allah and His messenger, nor acknowledge the religion of truth (even if they are) of the people of the Book (i.e. earlier revelations of the Jews and the Christians) until they pay the Jizyah with willing submission and feel subdued".[94]

[92] Qur'an (Al-Baqara) 2: 193
[93] Qur'an (At-Tawbah) 9: 5
[94] Qur'an (At-Tawbah) 9: 29

(iv) The holy Prophet said: "I have been commanded to fight the people until they say that: that is no god but Allah….[95]

The first verse in reference above which was revealed in Medina has been construed by some Muslim Jurists and Quranic Exegesis as compelling the Muslims to fight non-Muslims until they embrace Islam in the case of polytheists or pay Jizyah in the case of the people of the Book. That is to say that the verse has been regarded as a general rule which must have to be interpreted alongside with the particular rules contained in the other two verses under reference i.e. Q 9:5 and Q. 9:29 cited above.

In practical terms the verse (Q.2: 193) has been interpreted to mean that non-Muslims should be either forced to accept Islam or be dominated by the Islamic state, while the immediate and direct interpretation is that Muslims should fight non-Muslims until the non-Muslims cease attacking, persecuting or causing tumult (Fitnah) on earth. According to Muhammad Husayn At –Tabatabai the verse is a replica of another portion of the divine legislation (Holy Quran), which provides thus:

> *"And fight them on until there is no more tumult or oppression. And there prevails Justice and Faith in Allah altogether and Everywhere. But if they cease verily Allah does see all that they do".*[96]

In the opinion of the great Exegist of the Quran, this verse (Q. 8: 39) show that it is obligatory to call them (i.e. the Polytheists) to the right path (path of Islam) before embarking on war. If they accept the call, there will be no fighting but if they reject it then there is no master but Allah and He is the most Excellent Master and most Excellent Helper.[97]

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[95] Zakiyy Al Din Al Mundhiri. Ed., Mukhtasar Sahih Muslim, edited by Nasir al din Al-Albani; 2nd ed. (al-maktab al Islam wa dar – al arabiyya . 1392/1972) p.8.

[96] See Muhammad Ibn Jarir Al-Tabari, Tafiral Tabar Cairo; dar-alma'arif . vol. 3, pp. 572 – 74.

[97] Muhammad Husayin At-Tabatabai, An Exegesis Of The Quran, Beirut, 1391/1973, 3rd ed., vol. 3. p. 89.

The immediate and direct interpretation of the verse (Q. 2: 193) perfectly agrees with the view of At- Tabatabai which firmly posits it as the more plausible and more coherent and also the only possible interpretation of the verse if read in its context. Since this verse 193 of Chapter 2 of the glorious Quran cannot be read in isolation of the verses preceding it and verses succeeding it, one will be correct to hold that the five consecutive verses in the Suratul Baqarah (i.e. Q.2: 190 – 194) collectively promulgate a single law covering all its limits and details. The basic law is the statement under Verse 190 where Allah ordains as follows:

"And fight in the way of Allah",

While on the other hand a Disciplinary restriction is placed on the law by a clause under verse 190, which states that:

"...And do not exceed the limit verily, Allah loves not those who exceed limit".

The significance of this prohibitory order is that, it is general in terms of application and thus it covers all situations where one may be said to exceed the limit, for instance a nation of Islam commencing war against a non-Islamic nation without first calling the non-believer members of such nation to the path of truth, thereby killing and maiming women and children or on the other hand refusing to cease fire when ordered.

If one takes a cursory but careful look at the set of the said verses which establish the law of war in Islam, it willbe understood that the verses begin by commanding the Muslims or the Islamic realm to fight those who initiate war against them with emphasis that Muslims should never be the aggressive party. The word *'udwaan'* which is represented by "Aggression" is applied in the Qur'an to imply, the instigation of hostility.

This meaning is further exhibited in verse 194 of same Chapter two of the Qur'an where it is stated as follows:

"... Whoever then commits aggression against you?

Commit ye aggression against him accordingly..."

A practical example of the meaning of the 190th verse in conjunction with the above stated portion of verse 194 in the modern world is the war or armed conflict between America and two of her Allies[98] against Iraq in spite of the disapproval of the UN and majority of the member nations of the global village such as France, Germany, China, Russia and African continent as a whole.

The American government turned deaf ear to all known wise counseling and followed the path of self-aggrandizement. The U.S.A, Britain and Spain commenced the aggressive war and Iraq responded spontaneously. The world witnessed the beginning of the hostility against Iraq on Wednesday 18th March, 2003 and only God knows to what extent and when the war will end.

As a pragmatic legal system, the law of Islam always provides reasons as premise for any order or rule given to the Muslims or whoever is a subject of a particular law. Therefore, the verse 191 of the second Chapter of the glorious Quran posits the reason for which the Muslims had been instructed to declare war against the polytheists. According to the verse (Q.2: 191) the reason is to avenge the wrong inflicted by the latter that had fought the Muslims, drove them out of their homes and severely persecuted them for professing Islam. In the precinct words of the verse, Allah- the most High says:

"And kill them wherever you find them and drive them out
from whence they drove you out, for tumult and oppression

[98] Britain and Spain further discussion on the American led war may feature in the next segment of this chapter of the work.

is worst and more grievous than slaughter, and do not fight them at the sacred mosque until they fight with you then slay them, such is the recompense of the unbelievers''[99]

The above quoted verse is a cute presentation of the first type of war under the law of Islam. That is the war of extermination. It can be rightly observed that by the provisions of the verse (Q. 2: 191) the Muslims or Islamic realm are divinely ordered to eliminate the Polytheists wherever they find them similarly they were also instructed to drive the Polytheists out of their homes as they were driven out of theirs. This is extermination in both senses of partial and complete extermination.

However, the Muslims were cautioned not to fight or kill the polytheists in the sacred mosque except if only the polytheists launch an attack on them in the sacred mosque. All this notwithstanding, verse 192 provides for termination of war if the Polytheists surrender. The verse reads thus:

'' But if they cease, Allah is oft- forgiving most merciful''

This goes to show to a greater extent that that peace is the corner- stone of the Islamic law of war of Extermination. Coming back to verse 193 which is the core verse of the subject matter, it prescribes the objective of war under the law of Islam as the destruction or extermination of the oppressive forces which prevent people from freely choosing their belief and religion. The verse offers clarification for the category of people be it individuals or institutions against whom war should be executed with the sole objective of putting final end to practice of oppression and persecution of the faithful and on the same strength not to force and coerce people to Islam.

It is in same verse (Q.2.193) that the Muslims are instructed to terminate fighting immediately the objective has been achieved. It prescribes fighting only

[99] Quran (Al-Baqara) 2:191.

against oppressors and tyrants who use force to coercively prevent people from freely progressing and practicing their religion of Islam.

There are certain verses in the 9th chapter of the holy Qur'an, which some Muslim jurists consider to be the final words of the divine book in respect of the legal principles governing the initiation of war vis-a-vis non Muslims. There is difference in opinion of jurists as to whether these verses abrogate those contained in Surah Al-Baqara as discussed above. Those who claim that the verses abrogate other verses on the initiation of war premise their judgments on the grounds that these verses in chapter nine make up general rules, which cancel any other preceding rules.

The argument in favour of abrogation therefore is not predicated on textual evidence, but rather on rationality and speculation. Thus, it is correct to say that the issue of abrogation is a matter of opinion and as such is subject to refutation, on this conflict of opinion At-Tabari explains:

> *"If there exists a dispute among the Muslim scholars as to whether a specific rule is subject to abrogation, we cannot determine that the rule is abrogated unless evidence is presented"*[100]

What the great scholar of Quranic exegesis meant by 'Evidence' is a statement provided by the Qur'an or the Sunnah in support of the claim of abrogation .The verses of the 9th chapter of the Quran we are referring to which call for thorough examination are Q: 9:5 (already quoted and cited above as one of the verses upon which the Islamic law principles of war has been primarily predicated) and Q:9:1 which reads as follows:

> *"A declaration of immunity from Allah and His messengers, to the Polytheists with whom you have contracted mutual alliances".*

The next and the 3rd verse in the same chapter 9 to be examined for the war against the Polytheists, which according to the verse include continuous fight,

[100] Al-Tabari, Tafsir Al- Qur'an, vol.3, p.285

conspiracy against the Muslims to turn them out of Medina as they had been turned out of Makkah the birth place of the Holy prophet Muhammad (SAW) and the polytheists infidelity with high disregard for the covenant they had made with the Muslims. The verse reads thus:

> *"Will you not fight people who violated their oaths plotted to expel the messenger and took the aggressive by being the first (to assault) you? Do you fear them? Nay, it is Allah whom you should fear more justly if only you believe".*[101]

In examining this 13th verse of the 9th Chapter of the Quran in the light of war of extermination, one will be perfectly correct to consider the general implication of the text rather than the specific circumstances of the revelation as what matters in the understanding of the verse. Moreover such general implication is generally accepted in the principles of Islamic jurisprudence (Usul-Al-Fiqh) for the purpose of limiting the application of the text.

Abdul – Wahab Khallaf wrote:

> *"It should be noticed that the intent of the text is to be distinguished from the circumstances of its revelation, for Muslim jurisprudents are on consensus (Ijma'a) that the intent of the text may be used for limiting its application, with no dissention by any of them, while the circumstance of its revelation is what they refer to when they say" "what matters is the general implication of the text, not the circumstance of its revelation".*[102]

The general examination of all the verses concerning the war of extermination in Suratul Baqarah (i.e. Chapter 2) implies that they can only be applied to the pagan Arabs who lived at the time of the Prophet Muhammad (S. A. W) and not to the

[101] Quran (Al-Tawbah) 9:13.
[102] Abdl-Wahab Khallaf, Ilm Usulal Fiqh (AL-DAR al Kuwaytiyyah, 1388/1968) p.191.

Polytheists of the modern world. In those early days of Islam the pagan Arabs had to be coerced into Islam for the sole reason that they were extremely hostile to the Muslims and they in most uncultured manner disregarded their oaths and dangerously plotted against the Islamic state in Madinah. This conception is further strengthened by the Quranic provision, which exempted those who were faithful to their treaties with the Muslims in the following words:

> *"But the treaties are not dissolved with those pagans with whom you have entered into alliance and who have not subsequently failed you in ought, nor aided anyone against you. So fulfill your engagements with them to the end of their term for Allah loves the Righteous"*[46]

The same argument goes for the prophetic tradition where the Holy Prophet (S A W) says: *"I have been commanded to fight people…"*

The word "people" in the context of the Prophetic saying (*Hadeeth*) implies only the pagan Arabs and not the entire human race of that particular generation or of the generations thereafter. Were the word to be interpreted to be all-inclusive, the rule embodied in this *hadeeth* should also be applicable to the Byzantine Christians and Persian Zoroasstrians (Majus) of that generation. Since this is not the case, the word "people" has an exclusive meaning and implicates only the pagan Arabs. This explication, gains support in another authentic *hadeeth* reported by Abdullah Ibn Umar ibn Khattab (may Allah be pleased with both of them). He narrated that the Prophet (S. A. W) said:

> *"I have been commanded to fight people until they declare that There is no god but Allah and that Muhammad is the messenger of Allah, establish the Salah (prayers) and pay Zakah, if they did exactly that, their lives and property are inviolable to me, except (in case when) the law of Islam*

allows it (to take them). They will be answerable to Allah"[103]

Without mincing words, the word "the people" here clearly refers to the pagan Arabs of the early period of Islam who were recommended in the verses in Chapter 9 of the Quran to be forced by the Muslims to accept Islam or be exterminated.

It is obvious that when the Prophet (S.A.W) said 'people' he did not contemplate all people of all times but the Arabian polytheists of his time. In another consideration, if it were to include all people, there will be contradiction between the *hadeeth* and the directive in the Quran which permit the "people of the Book" to maintain their religion.

Even on the part of the Holy Prophet (S. A. W) it will be a case of self-contradiction as he implemented the Quranic directions.

The contention of Imam Abu Hanifa and his famous pupil Abu Yusuf is that it is only the Pagan Arabs that are to be coerced into Islam as far as the Quranic provision is concerned.

Abu–Yusuf consolidated this position in his book, Al – Kharaj where he relates that Al-Hassan Ibn Muhammad who said:

"The Prophet (S.A.W) consummated a peace treaty with the Zoroastrians of Al – Hajar on the terms that they pay Jizyah, but he did not permit (the Muslims) to take their women in marriage or to eat their slaughtered animals".[104]

He further stated that *Jizyah* may be collected from all polytheists such as Zoroastrians (Majus), Pagans, Fire and Stone worshipers, Sabians (*Sabidin*), but not from apostates or pagan Arabs, for the latter groups are to be coerced into Islam[105] (or

[103] Zakiyy al din al mundhiri, (ibid) p.139.

[104] Abu Yusuf, Kitab-Al-Khara; (Cairo : al Tibarah Almuniriyyah 1397AAH/1976AC) p.9

[105] Abu Yusuf, (ibid), p.139.

face death penalty). The opinion of Imam Shafihi and that of Maliki School is not different as each of them contends that *Jizyah* can be collected from polytheists.[106]

To draw the veil on the first type of war, one may rightly hold that within the frame work of Islamic international humanitarian law, war of extermination is the type of armed conflict exclusively directed against the Pagan Arabs of the early period of Islam in the Arabian peninsula to coerced them to accept Islam or face death. Thus they were left with no other option than that. All the Quranic provisions relating to this kind of war are exclusively applicable to the Pagan Arabs of the time of the Prophet. That is why today it appears that war of extermination is of little or no relevance.

b) War Of Reconciliation

From the foregoing, it has been discovered that the war of extermination in which a particular people has to be compelled to accept Islam has a particular ruling which application is limited to the Pagan Arabs only because of their hostility, infidelity and errant violation of peace treaties with the Muslim state. This is made of a ruling known under the Islamic Law as *Hukmul Khass.*

The war of extermination is not as popular as the law of reconciliation among the Muslim Jurists. Most leading Jurists including Imam Abu Hanifa and his two most famous students Abu Yusuf and Muhammad Ibn al Hassan, as well as Imam Shafii and Imam Maliki of the Shafii School and Maliki School respectively strongly advocate for war of reconciliation. It is the second type of war under the law of Islam. Unlike the former, it is in form of armed conflict directed against the people of the book and non-Arab polytheists with the objective of making them to enter into peace treaties with the Muslims provide they pay an annual tribute in form of *Jizyah* to the

[106] Ibn Rushd, chapter on *jihad*, in Bidaya Al-Mujjahid Wa Nihaya Al-Muqtasid, trans. Rudolph p. in *jihad* in medieval and modern islam (Belgium E.J. Brill. 1398/1977) pp. 23-24.

Islamic realm. The rule embedded in the war of reconciliation is considered by most of the Muslim jurists as a general rule commonly applicable to all non-Muslim of all generations. It is on this premise some Muslim jurists erroneously founded the division of the world into two realms. This class of jurists further declares that a permanent state of war exists between the two divisions until the non-Islamic realm is annexed to the Islamic realm. This declaration is also wrongly founded on verse 29 of Chapter 9 of the Holy Quran, which reads thus:

> *"Fight those who believe not in Allah nor the last day nor hold that forbidden by Allah and His Messenger, nor acknowledge the religion of truth from among the people of the book, until they pay the Jizyah[107] with willing submission and feel themselves subdued"*

The first thing to be noticed in the verse is that it is not all-inclusive so as to render it a general rule. The verse presents four criteria for those to be fought among the people of the book. These criteria include: Those who do not believe in Allah, do not believe in the last day, do not uphold what is forbidden by Allah and His Apostle and those who do not acknowledge the religion of truth. With this specification the Muslim jurists who hold that war of reconciliation has a rule of perpetual war between the two realms are obviously wrong in their opinion. If carefully observed, it will be seen that the verse at its tail end provides a condition, which compel the Muslims to terminate their offensive or even not to launch any attack against the people of the book. That is the portion, which says: 'Until they pay *Jizyah* with willing submission'

To expatiate on this condition, it must be understood that the imposition of *Jizyah* on the people of the book is never for the purpose of increasing the income of the Muslim state or for placing financial burden on non-Muslim, nor for promoting

[107] Jizyah literally means compensation. Its derivative meaning which because the technical meaning was a poll tax levied by the Islamic state on those who did not accept Islam, but were willing to live under the protection of Islam

the wealth of the Muslim community, more so that the amount of *Jizyah* is very minimal and levied only on financially capable males.

Rather, the purpose of *Jizyah* is merely to subdue hostile states or oppressive regimes in order to assure non-Muslims that they can profess Islam without being persecuted or harassed. According to Al-Sarkhasi :

> *"The purpose of Jizyah is not the money, but rather the invitation to Islam in the best manner. Because by establishing a peace treaty with (non-Muslims) war ceases and security is assured for the peaceful (non Muslim) who consequently has the opportunity to live among the Muslims, Experience first the beauty of Islam, or receives admonition, which could lead him to embrace Islam".*[108]

Jizyah is introduced by the law of Islam to assure freedom of expression for Muslims to spread Islam in non-Muslim territories and freedom of belief to those who may choose to embrace Islam. Thus, *Jizyah* was aimed at converting hostile territories into friendly ones. Once a non–Muslim really becomes friendly with a Muslim realm, *Jizyah* becomes less relevant because friendly non-Muslim state and those who are in alliance with Muslims do not pay *Jizyah*.[109] For instance, At–Tabari recorded in his treatise on history that a great ruler of an Islamic state in person of *Suayd Ibn Muqrin* wrote in an agreement with a non-Muslim community as follows:

> *"Whoever of you provides service to us will get his reward rather than paying Jizyah, and you are secured in your lives, property and religion and no one can change the provisions of this agreement".*[110]

Similarly, Siraqah Ibn Amr signed a treaty with the Armenians for giving military support to the Muslims. The said treaty exempted the Armenians from

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[108] Kamil S. A, Al Ilaq at –al Dawliyyah fi Al Islam, (Jeddah, Dar-al shuruq 1396 /1976), p.3002.
[109] Louay M. Safi, war and peace, a contribution to the American Journal of Islamic social science, Vol5, No1, 1988 p.39
[110] Kamil S.A,Op Cit, p..302

paying *Jizyah*.[111] It is also on record that the deputy of Abu Ubaydah in person of Habib Ibn Muslimah Al Fahri entered into a treaty with the Antakians in which they were granted exemption from *Jizyah* in return for services and assistance rendered to the Muslims.[112] Finally, it was also reported in *Futuhul-Buldani* that:

> *"Muawiyah ibn Sufyan signed a treaty with the Armenians in which the institution of religion, political order, and the judicial system of the latter were left intact, and the Armenians were further released from Jizyah duties for three years; after that they could either pay an amount of Jizyah as they may choose, or if they did not wish to pay Jizyah, prepare fifteen thousand warriors to help the Muslims and to protect the Armenian land. Muawiyah pledged to provide logistical support, should they be attacked by the Byzantines".*[113]

In the light of war of reconciliation the early Muslims state considered *Jizyah* as a measure for neutralizing hostile political communities and opening their territories to Muslims and not as a measure for oppressive domination and not for imposition of financial burdens on them.

A perfect, and what could be considered as *Locus –Classicu,* case to rebut the classical conception of the two realms of the world (i.e. Islamic realm and non-Islamic realm) being at war till end of time, is the friendly relationship and peaceful co-existence between Abyssinia, a non-Muslim realm, and the early Islamic State.

The highly respected Imam Malik ibn Anas, the founder of the Maliki School advised that the Muslim should not conquer Abyssinia. The great Jurist relied on a prophetic tradition in which the holy prophet Muhammad (SAW) was reported to have said: "Leave the Abyssinians in peace so long as they leave you in peace" Imam Malik however admitted that he was not certain about the authenticity of the *hadeeth*. For a very long time after the establishment of Islam in North Africa, Abyssinia had

[111] Al-Tabari, Tarikh al Tabari, Dar-alma'arif. Vol.3, p.236.
[112] Al-Daqs, (Ibid), p.303
[113] Supra, p.308

maintained its Christian identity. Arnold T.W. tackled up this historical fact when he wrote, "Few Muslim families could be found in the fourth century of *Hijri*[114] (i.e. Islamic calendar)"

In early days of Islam in Mecca when persecution of the Muslims was at its peak, Abyssinia served as a place of refuge for the Muslims. The Muslim emigrants were warmly received by the Abyssinians and were further protected from their persecutors. The good relationship between Abyssinia and the Islamic state continued. For Abyssinia was the only nation, which acknowledge Islam at that time.[115]

There is no way Abyssinia could be considered as part of *Dar-Al-Islam* (i.e. Islamic realm), yet it maintained excellent relationship and perfect peaceful co-existence with the Muslims of the Islamic realm. This peaceful relationship constitute a significant basis for rebutting the concept of permanent state of war which disallowed the recognition of any non-Muslim state as a sovereign entity and insists that such state should pay tribute to the Muslim state. Going by historical sources, the indication is that in-spite of the custom of wars and conquests of those times, the Prophet (SAW) developed a policy of peace alliance within-Muslim Arab tribes, with Christian and Jewish communities around Medina as well as with leaders of other foreign nations up to the time of his demise.[116] If this is the type of legacy in areas of global relation, that the holy Prophet (SAW) left, then it is obvious that the Islamic law relating to the war of reconciliation cannot accommodate a principle of permanent hostility between Islamic and non-Islamic realms.

From the understanding of war of reconciliation, the rule emanating there from is that which provides for reconciliation of the two realms through peace treaties and

[114] Arnold, T.W. The preaching of Islam, (London: constable & co. 1332AH /1913AC), p.113
[115] Muhammad, H The life of Muhammad, trans. Ismail Alfaruqi (North American Trust Publications 1397ah/1976AC0 pp. 97-101.
[116] See Moinuddin, H; The Charter Of The Islamic Conference, (Oxford: Clarendon Press, 1987) pp.36-37

willful submission to the Islamic realm by payment of annual tribute in form of *Jizyah*. This concept of war under the law of Islam was more feasible and the rule thereto was more effectively practicable in the early days of Islam up to the subsequent times when Muslim Ummah was under a unique centralized caliphate system. That is to say a period of a unified Islamic Ummah (nation) under a single political authority. Perhaps this accounts for the remark below calling for re-emergence of a unified *Dar-Al-Islam* in 1985 at the Muslim institute conference.

> *"The Major goal of the Muslim Ummah in the next phase of history is to abolish and dismantle the nation- states that now govern the Muslim areas of the world and to create a unified Dar-Al-Islam.*[117]

It is agitation of this nature that made Ann Mayer conclude thus:

> *"... the nation states has never been definitely reconciled with Islamic theory, which in its traditional formulation recognized only the umma or community of believers. There have been Muslims who despite the entrenched character of the system of nation –sate in the modern world, still adhered to the traditional opinion that any political subdivisions of the Islamic umma were inimical to Islam. Others have accepted these divisions or tolerated them on the assumption that they are temporary phenomenon"* [118]

With the political sub-division of the Islamic polity, it is not possible to maintain permanent state of war between the *Dar-al-Islam* and *Dar-al-Harb*. From all intent and purpose the rule in war of reconciliation does not call for a world of perpetual war or armed conflict. Rather it provides for ceasefire to be consolidated with peace treaty to enthrone permanent peaceful co-existence between the two realms. They have toed Hugo Grotius's line of thought who conceived war or armed

[117] See Inquiry, 2 No 9, Sept. 1985 p.63 cited in Sonn, T, "Irregular Warfare And Terrorism: Asking The Right Question'' in "Cross, Crescent and Sword'' Ends. Johnson, J.t., & kelsay, J. (New york: Greenwood press, 1990) 129 at 139.

[118] Mayer, A., "War And Peace In The Islamic Tradition Of International Law'' cited in "Just War And *Jihad*", Eds. Kelsey, J. & Turner J.T (N.Y: Green Wood Press, 1991) 195 at 212

conflict not as a contest but rather as "a condition of those contending by force"[119] a condition punctuated by precise points in time differentiating state of war from state of peace. By this concept a clear criteria for determination of the commencement of hostility and end of same is implied.

3.1.3 HISTORY OF WAR

By implication the notion that all forms of conflicts share certain common basic characteristics is the belief that they may have sprung from the same fundamental roots.

However, no consensus has yet been reached because each war has its own peculiar conditions. Perhaps history of war proffers solution to the problem of determining the origin or root of war. The history of war or armed conflict can be conveniently divided into five great periods which are: animal, primitive, civilized, modern and contemporarily ***recent*** war distinguished by the technological and lethal weapons employed in armed conflict.

a) Animal war

The lower animals like man generally engage themselves in conflict either for defence or consolidation of personal interest. In doing so, they mostly utilize only bodily equipment provided by heredity, although monkeys throw stones while higher apes sometimes use clubs. This age in history of war was an age Darwin wants us to believe that the highest animal (i.e. man) was in shape of "*Ape*"; a higher specie of monkey. The animals are not uniform in terms of equipment for aggression and defence.

Naturally, no animal can change its peculiar equipment for a more effective one; nevertheless there was room for development of the manner of usage by

[119] See Walras L, The Study Of War, p.453

experience. In other words, in this period of the history of armed conflict, the animals were found by natural law, which was one of the prominent sources of international humanitarian law. For instance, lethal hostility between animal of the same species are usually disadvantageous to the survival of the species and thus the rule of nature make such type of hostility uncommon so as to preserve a given species.

When non-lethal hostilities occur they are largely confined to hostilities between males for possession of females, hostilities to defending nestling site against invasion and hostilities to consolidate leadership of the group. Animals of various species attack themselves for food and the attacked put up a fight in defence instead of counter attack. This kind of conflict resembles the activities of man in the hunt rather than in war. A careful study of hostilities among animals can throw light on the drives leading to aggression in man, particularly on the influence of specialized techniques of aggression and defense, on the frequency and intensity of hostilities, and on the survival of the individual, the group or the species. This kind of specialization as we find in the lion's striking power, the antelope's fleetness, the buffaloed herd's mass charge, the elephant's size and relative invulnerability and the cooperative activity of social insects, all put together have analogues to human military instruments and tact.

The animal kingdom in the early period of living creatures is a replica of nation of human race. Therefore it is not out of place to gain insight into the behavioral attitude of human groups or society through the study of relationship of conflict, competition, cooperation, co-existence territorial control and even the hierarchical dominance to the nature of hostilities in animals of lower degree.

b) Primitive War

Prior to emergence of civilization man graduated to the stage of primitive age. An era in which man was only equipped with speech but not with writing. The world of the primitive age was properly and politically well organized into clans, villages and tribes on the principles of blood relationship in both times of peace and war. Then, his weapons of fighting were: stones, clubs, spears with bow and arrow, while animal skins and shield were used for defence.

The primitive peoples did not know the institution of war, as they were mostly peaceful. Inspite of this contention by some anthropologists, it has been observed that customs of war making existed among most primitive peoples exceeding the Greenland and Labrador Eskimos and peaceful Andamans. From the cave drawn by the ancient man of the stone age (i.e. the primitive era) there are indications that armed conflict or war occurred among the primitive people. The concept of primitive war was a picture of fighting which served to manifest the unity of the fighting group, its distinctiveness from its neighbours and the reliability of its customs. War was seen as a major contributing factor to social solidarity by distinguishing the cooperating "in-group" from all opposing "out groups"; they used to be the ultimate in-group, peaceful accord might however develop among neighbours thereby creating a tribe as a larger in-group. With the advancement of the primitive people through agricultural growth and herding, the in-group became even larger through the integration of tribes into kingdoms or federations; the warriors who were mostly men became specialized; while weapons and tactics became more efficient, casualties increased in magnitudes, and reasons for war on economic and political grounds developed. With the metamorphosis of clans into tribes, and tribes into kingdom or federation, the concept

of war equally transformed into a wider understanding. This leads us to what is known in the study of war as civilized war.

c) Civilized War:

With the introduction of art of writing to the primitive society, the primitive people achieved the distinction of civilization. Alongside this development were a systematic agriculture and/or herding and a hierarchic political organization controlling a defined territory. War or armed conflict ceased to be a general occupation of all and sundry. It became an institution conducted by specialized members of the society. Now that there were economic and political class, the concept of war now was portrayed as an act of physical conflict to plunder, or acquire territorial expansion, trade and to expand religious faith or ideological belief.

The characteristics of war differed among different stages in the same civilization. According to Quincy Wright, the ancient civilizations of Babylonia, Greece, Rome, and Japan appear to have been more warlike than those of ancient Egypt, China, and India.[120]

In each civilization, war or armed conflict increased in efficiency and destructiveness with the invention of new weapons and tactics.

Perhaps this is what explains the conception of war by Wright, when he wrote:

> *"war created and expanded states and then destroyed them. It unified civilizations and then disintegrated them".*[121]

In civilized war, alliances and power balancing were recognized within the purview of war or armed conflict. Thus, in the civilized period of war in history, armed conflict or war was perceived as a normal instrument of political behaviour. Most of the war

[120] Wright, Q., A Study Of War, 1942, 2nd Ed., University of Chicago press, p.572
[121] Ibid, p. 165

fought during the civilized period was justified on juridical grounds. The Charlemagne and the crusaders for instance acted under the legal as well as the spiritual authority of the Pope; England tried to make a legal case for its invasion of France under feudal law and hereditary claims. The Muslim nations operated under the legal and spiritual authority of the Qur'an. This spectacle of civilized war reflects the concept of war in the era of civilization. Next to this is another period known as modern war in the history of war.

d) Modern War

The concept of war or armed conflict wore another garment when the history of war entered its modern period. The modern war introduced the use of gunpowder in armed conflict for the first time. Likewise,the use of the printing press in nationalist propaganda. The new concept of territorial sovereign state as propounded by Machiavelli, Bodin and Hobbes with great emphasis on military power as the basis of political authority was generally accepted.[122]

This period commenced with the wars of Turkish expansion against the Byzantine empire which was brought to an end in 1453 with the Turkish conquest of Constantinople making the first use of gunpowder in siege artillery. The contentious claim for supremacy between the state and the church all over most of the western Europe inculcated a religious element into the concept of war, this war of religion which began in most of the western European countries after the reformation of 1520 culminated in the 30 years war which terminated in 1548 by the terms of the west phalia peace treaty under which the dominance of the secular state over the church gained legal recognition. It was in the modern period of the history of war that the original world war first occurred in Europe, North America, and India were on the

[122] Abon, Raymond, (1958) 1959 On War, Garden city, N.Y. Doubleday – first published as DE- la- guerre.

high seas. This war was fought for seven years and was ended by the peace of Huberrusbug in 1763.[123] The termination of the acknowledged first genuinely worldwide war augmented the power of Prussia under the great outside Europe.

The concept of war in the modern war period took a wider dimension due to rapid advancement of civilization and various revolutionary movements in the global village. Civil wars in various parts of the globe, like in Mexico, 1910 –1920. Russia, 1917 –1920, China, 1927–1936 and in Spain 1936 – 1939 arose from ideological differences and induced foreign interventions.[124]Resultantly, many casualties, reminiscent of ideological hostilities which are consequential to the 1520 reforms and the American coupled with the French revolutions of the late 18th century constituted a wider and more comprehensive concept of war under the law of nation if compared with the preceding periods of the history of war.

The total number of wars fought during modern war period is two hundred and seventy-eight (278)[125]out of which one hundred and eighty seven (187) were fought mainly in Europe and ninety one (91) were fought outside Europe while one hundred and thirty five (135) were fought to maintain balance-of-power and national sovereignty against imperial encroachments; seventy eight (78) were civil wars fought to ensure national unity, national self-determination and for revolutionary ideology and finally the remaining sixty-five (65) wars were fought between people of different civilization against the Turks or the Barbary states or for colonial expansion of European states in America, Asia and Africa. The balance-of-power principle was a major factor in the wars of the modern period particularly from the middle of seventeenth to twentieth century. In those wars, political imperialism and nationalism

[123] Oman, Charles W.C., 1937, A History Of The Art Of War In The Sixteenth Century, London, Methuen; N.Y. Dutton.

[124] Nef, John. V, 1950, War And Human Progress: An Essay on the Rise of Industrial civilization, Cambridge, mass: Harvard university press.

[125] Wright Quincy, (1961) The Role Of International Law In Law In The Elimination Of War, NY Oceana.

were more important than ideology; moreover, the idea of *'Just War'* became more prominent in the modern period than legal claims or justifications of the past periods. Conclusively, in the modern period by the concept of war, war was more regarded generally as a prerogative of sovereignty and reason of state was considered sufficient justification. However it is allowed in war propaganda to cite justification such as necessary defense, maintenance of the balance-of-power, correction of historic, strategic, national or economic foundries independence from colonial oppression. Nationality; a civilizing mission or the "white man's burden". This leads us to the final of all the periods of war history. That is current period of our contemporary world. How do we conceive war today?

e) Recent War

With the creation of a new world order, concepts of many institutions in human endeavors have either changed completely, partially or widened in scope. Thus, the institution of war or armed conflict, which has already undergone different changes in the various periods of history of war discussed above, is hereby to be further examined to determine its position in the contemporary era otherwise known as "recent war". This period was ushered in by the use of atomic weapons at the end of the Second World War in 1945. Not quite long, yet planes were developed with invention of intercontinental ballistic missiles and space satellites these modern invention have had an unprecedented influence on war to a greater extent that the old understanding of war is no more relevant in the present time as far as the concept of war is concerned. Between 1946 and 1965, thirty hostile incidents (wars) occurred resulting in more than five hundred deaths each, but none of the reported hostilities involved the use of atomic weapon. The most serious of them were the armed conflicts between India and Pakistan over partition, 1947–1948, the Korean hostilities

in which UN forces successfully suppressed North Korea between 1950 and 1953; similar incidents occurred in Indochina, 1947 – 1954; Colombia, 1948 – 1964; china in 1949, Algeria, 1954 – 1960[126]; and the Congo case of 1960 – 1962.

In order to prevent the hostilities from escalating to nuclear war, the nuclear powers of those days expressed and eventually implemented the desire of putting the fire of the hostilities off. The UN and other international bodies acting in concert caused a cease fire in those that were international hostilities as well as those threatening to be hostilities of international nature. The constant war activities global wise including the on-going war between Iraq and U.S.A with her allies account for the nation of both governments and people that war is an evil that is susceptible of effective control by human efforts and such efforts have been displayed with increasing vigor as the dangers of total war have increased. Accordingly, this is the contemporary concept of war in the recent war period of the history of war. It is an evil, which can be effectively put under human control.

3.1.4 FUNCTIONS AND NATURE OF WAR

The absence of unanimity among the scholars of international humanitarian law in respect of the functional nature of war is even more pronounced when the focus is narrowed down to the role of war. Some posited war as only functional pathological condition, others maintain that war or armed conflict has some definite beneficial social functions. Between these, a third school of thought opines that it is never necessary to offer human lives so as to resolve conflict. Generally, from the viewpoint of humanity, the over-all effect of war is always negative. To some scholars, in the primitive age, war or armed conflict had contributed immensely to the regulation of key variables: economic (possession of or access to goods and

[126]Montross L, (1944) 1960. War Through The Ages, 3rd ed; rev. & enl. NY: Harper

resources) demographic (population size, sex ratio, generational balance, land distribution) and psychological[127] (anxiety, tension, hostility) many scholars of note have directly or indirectly pointed out that warfare may have been the principal engine of human evolution through the mechanism of selection in favour of the victors (i.e. groups that better adapted themselves to the condition).

The differences of opinion about the functional role of war are perhaps more apparent than real since they stem to some extent from the different interpretation that can be given to the nation of armed conflict. Distinction have been made by scholars of study of war between conflict behaviour and the alternative (i.e. the use of violence and non-violent method). The scholars who in attempt to formulate general statements about all conflicts do not lay emphasis on the distinction between conflicts wherein violent means and non-violent means are employed.

The problem of functionality in principle does not exist; it has therefore been eliminated by the choice of concept. This in my own humble opinion constitutes one good instance of the difficulties, which block the path to a general theory of conflict.

Precisely, war or armed conflict function as a double edged sword in the sense that it is a course of destructive and devastating destination while at the same time it is an effective instrument for creative progress of the global village.

It serves as a catalyst for positive changes and rapid development. Talking about nature of war or armed conflict one may conclude that it is by nature an inevitable occurrence in the global community, which is a necessary element in all-human contacts. It features in every generation between individuals, groups or tribes within a society and between states of the world.

[127]Robert B, The Down Warriors Atlantic- Little Brown Boston, 1969 Tirney- High, 1971, p.148

Functions of war can be further analysed in the light of a principle whereby war is considered as a regulating variable and not as a regulated one. In that circumstance, one may examine a number of possible functions of war. That is its regulation of a number of various variables or kinds of variables.

i)*Regulation of Psychological Variables:* The role of armed conflict in keeping psychological variables such as anxiety, tension and aggressiveness under reasonable control has been emphasized by a good number of scholars. In relation to the emphasis on the regulation of psychological variables is the opinion of some anthropologists that game and other ritual and competitive or rivalries contests may be functional alternatives to war. This could be true because they provide release from emotions and tensions.[128] Those writers who relate primitive war to psychological variables usually premise their generalization on some reference to data on particular non-literate peoples and their conflict behaviour. For example Whiting[129] noted the case of a New Guinea tribesman who organized a raid because his wife had made his "belly hot with anger" by hunting him. This Whiting's presentation is an illustration of how aggression generated within the tribe may be displaced to an outstanding group. However one may be correct to hold that there has been no notable success so far in correlating any reliable measures or indexes of tensions and similar emotional states with the occurrence or non-occurrence of war at any given times among a particular non-literate people.

Thus, it may be concluded that the psychological functions of primitive war in terms of its regulation of psychological variables and for that matter, its functional equivalence to games have not been proved beyond reasonable doubt. Some experts of international humanitarian law have argued while not denying the fact that war has

[128] Berndt, C.H, Social And Cultural Change In New Guinea: Communication And View About Other People'' Sociologus New series 7, p.50

[129] Whiting J.W. M, The Frustration Complex In Kwoma Society Man, 1944, pp. 140-144.

psychological functions; have argued against the said functions as the only primary functions of primitive hostilities. Certain functions that may be more socio-political than psychological in character may be more important as primary functions of armed conflict.

ii) ***Regulation of Exercise of Power:*** In the research carried out on African kingdom by some British social anthropologists, the function of civil or intra societal war in checking abuses of political power have been emphasized, the researchers have viewed rebel inns. As "defenses of the kingship against the king".[130] It has been discovered that rebellion have similar function in non-literate societies in other parts of the world. In the societies of primitive age, which was devoid of literacy, the chiefs were charged with the responsibilities of allocation of goods, resources and labour. When the chiefs saddled with this responsibility made allocation unjustly according to their whims and caprices or for personal benefit, rebellion could apparently arise. Some examples of such rebellions are cited by Sahlins.[131]

iii) ***Regulation of Relations with other Group:*** The regulatory functions of the primitivewar are emboweled in what has been called *Fighting for Revenge*. This theory has been exhibitive in numerous primitive societies of various parts of the globe,[132]Even such was the practices among some simplest societies of hunters and gatherers[133] these primitive societies lack a central government with criminal jurisdiction over the separate local groups. In circumstance like these the punishment. For offences committed by members of another group and the presumption defector that the deterrence of more such offences may be effected by fighting and killing (armed

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[130] Beattie, J. H. M, Checks on the Abuse Of Political Power In Some African States: A preliminary frame-work for analysis sociologus, New series 9, pp. 97-115

74 See Sahlins, Marshall. D, Poor Man, Richman, Big man, Chief political Types in Melanesia and Polynesia, comparative studies in societies and History, pp. 285-303.

[132] Vayda, A. P, Maori Warfare, Major monograph No 2, 1960 p.2.

[133] Hobhouse, L.T, The Simplest Peoples 2 Parts British Journal of sociology 7 1956 pp. 77-119------ part 1: A comparative study, part2: peace and order among the simplest peoples

conflict conducted by the offended group) to avenge the assault, theft, nonpayment of bride price, rate, abduction, poaching trespass and any other resinous offences committed. No doubt such retaliatory war may satisfy the aggrieved groups need of the movement for revenge, however it can be considered as a great mistake to emphasize this function to exclusion of the role of war or armed conflict in the maintenance of collective possession and integrity of the groups.

iv) ***Regulation of Demographic Variables:*** The functions of war discussed so far are effectively reformed in some of the societies of the primitive age without much of bloodshed or loss of life. In those days a very terrifying war dance or chopping off one or two ears was capable of deciding a contest or drive away the aggressive energy or deter him at least.

This form of ritualism makes some of the primitive armed conflict a subject of comparison not only with the socialized aspect of threat behavior of the modern states as war games and but also comparative to the threat behavior of infrahuman animal of lower status; which occasionally perform similar function without necessarily sacrificing human life for conflict resolution[134]. To the contrary, it seems that the soldiers of the primitive societies focused their effort in their battles on killing the enemies as they ran. For instance, it has been reported from New Guinea that there used to be absolute extermination of a whole group in warfare. It is in the light of this, that a suggestion was made indicating increase in population as a principal factor responsible for the more sanguinary made of primitive war. Moreover, it has also been argued that the high rate of heavy battle mortality prevents population increase from proceeding dangerously so as to lead to an ever – exploitation and more or less

[134] Scuttles Wayne, 1961, Sub-Human And Human Fighting Anthropologice, New series 3, pp.146-163

permanent deterioration of resources.[135] Population pressure may be reduced as much as possible mortality in cases where a population whose own land is being filled to its carrying capacity, and has neighbors with unexploited or even under – exploited land. At times when increase in population is a long-term trend, warfare contributes not only to relieving local population pressure but also to maintaining an over all rate of increase by providing conquered territories into which the population can expand. Population expansion as it has been observed goes along with territorial expansion.[136]

v) ***Regulation of the Distribution of Goods and Resources:*** The consequential effects of warfare on the distribution of goods and resources are easily specified where territorial expansion, the subjugation and economic exploitation of the conquered people were the results of war waged by modern state – organized societies just like those of ancient Peru and Mexico[137.] Effects of this nature have been described by Steward and Shimkin as either uncharacteristic or of little importance in a war conducted by societies which lack state organization[138.] African and Asian pastoralists can be said to be exempted from these generalization because their warfare includes stock-raiding activities which apparently serve to keep within a viable range the number of animals held by each local group[139]. It is difficult to determine the significance of getting goods as tool and food distributed among groups in the absence of quantitative data on the war booty taken.[140]Regarding the regulation of territorial holdings by ways of armed conflict, it may be noted that there are some

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[135] Allan Williams, 1949, Studies In African Land Usage In Northern Rhodesia, Rhodes- Livingston papers, No15, oxford univ. Press pp. 25-26

[136] See Bohannan P, The Migration And Expansion Of The Tiv, African 24, 1954 P.2

[137] See Bram J, 1941, An Analysis of Inca Militarism monographs of the American Ethnological society No 4, New York. Augustin.

81 Steward, J.H AND Shimkin,D.B, (1961) Some Mechanism Of Socio-Cultural Evolution, pp. 67-87 cited in ''Evolution and Man's Progress. New York Columbia univ. press, Ed. HUDSON. H & RAPH. W

[139] See Leeds A. & Vayda, A.P (Editors) 1965, man, culture and Animals: The Role of Animals in American Association For the Advancement of sciences.

[140] Davie M. R., 1929, The Evolution Of War, A Study Of Its Role In Early Societies, Yale publications in Economics, social science and Government, No 1 New Haven, Yale univ. press.

regions of primitive culture devoid of state – organization where the displacement of defeated groups from their land and the occupation of their former territories by their enemies are naturally frequent aftermaths of fighting. The case of highland New Guinea is a relevant reference in this regard.[141] Nonetheless, it is true that the war expedition of many primitive people without state organization often end with no transfers of land. Perhaps it is this fact that led some scholars to ignore the role of primitive war in the regulation of territorial holdings. Never the less, it is however important to note that even in those places where fighting usually ends with territories and boundaries remaining intact, it does not at-times end that way.

3.1.5 REASONS FOR WAR

For every event recorded in history there are reasons. Occurrence of war or armed conflict is not an exception. The reasons for war under the International Humanitarian law are numerous but prominent among them include: to stabilize or effect a change in dynastic governance, to expand a nation's territory, to protect people and property against external aggression and war could be political, economical psychological, juridical, general defense or religious defense or in other words ideological reason. Of all the classes of reasons has been adjudged the most prominent ones[142.] In the expansion of the Islamic faith as well as the conquests of Charlemagne, and the crusades the ideological elements was highly pronounced. The same ideological reasons featured very well in the rising nationalistic ideologies of England and France during the centenary war.

[141] See Berndt, R.M, American Anthropologist New series 66 (special publication) No4; part 2, pp 183-203.

[142] Wright, Q., The Study of War (Ibid) p. 457.

The political reasons are made up by the urge to expend empire or national territory and to win glory, security and peace by protecting lives properties against external and internal aggressions.

These political reasons were certainly the motivations in the conquests by Alexander, Caesar, the Huns, the caliphs, Charlemagne, the Normans, the crusaders and the English Plantagenet and Lancastrians. As part of political reasons, wars are sometimes fought to unseat a dynastic ruler due to transparent and indefensible mal-administrations. The aim and objective in this circumstance is not national in orientation but were more or less a product of court politics. For example, the Roman war or wars in the Greek city-states of the 15th and 16th centuries. For this kind of motives, armed forces involved were mostly made up of mercenaries since such wars only satisfy personal and sectarian objective. Howbeit, there are some contemporary armed conflicts that are having the spectacle of wars and issues that are not national in orientation. Some observers with great anxiety point at the Iraqi first citizen, Saddam Hussein as a typical example of the above assertion. This is however a subject for debate. Probably, it is this position that encouraged the U.S.A and her Allies to launch an aggressive war against Iraqi president to comply with the provisions of the recent Resolution[143] of the U.N. in-spite of the U.N's disapproval of the America's decision to fight Iraq.

Concerning Juridical reasons for war or armed conflict, most of the wars fought in the history of war in the global Community are on the juridical grounds. For instance Alexander claimed to be acting on the authority of the Greek cities that had conferred a sort of juridical hegemony upon him to defend them against Persia. Another good example is the case of the Roman warlords who claimed to have acted

[143] Resolution 1441 of UN, 2002.

under the authority of the feudal college, an ancient Roman institution purporting to apply international law. Similarly, the Muslim soldiers operated under the legal as well as spiritual authority of the Qur'an, which is the unique and sole fundamental source of the Islamic law.

On another hand, the Charlemagne and the crusaders acted under the authority of the Pope and the medieval principle of a '*Just War'*. England attempted to make a legal case for its invasion of France under feudal law and hereditary claims, while the Huns and the Norsemen had little or no concerns for legal justifications.

For economical reasons, the powerful states commence aggressive war against the weaker nations with the singular motive of colonizing them for no reason other than to take full control of the economic powers of such weaker states. It is on record that at a time in point the European powerful nations such as France Britain, Germany, Austria did scramble for some African states which are blessed with enormous natural resources. According to Hargreaves, J.D., "Although some sort of scramble for political control of African territory was no doubt the logically inherent consequence of the rivalries among European traders on the coasts, this French initiative did much to determine the tempo and the climate of the European conquest"[144] Colonization of Nigerian and Ghana by the Great Britain as well as colonization of Dahomey (now Republic of Benin) and Ivory coast (now Cote-devoir) by France are good examples for the conflict among the European nations over the weaker nations of Africa.

When analyzing the causes of Hegemonic war, Thucydides wrote thus:

> *"---Athens began its imperial career from demographic pressure and economic necessity*[145]*."*

[144] Ade Ajayi, J.F & Crowther, Micheal (Editors), History of West Africa, Longman, London, 1974, vol. 2, p. 405.

[145] Robert Gilpin, Theory of Hegemonic war, Princeton univ. press, p. 21

In the modern world, justifications or legal claims were of little importance or very insignificant than in the medieval period, when the idea of 'just war' was prominent. In the medieval period, the global community generally considered war as a prerogative of sovereignty where by ''reason of state'' was regarded as sufficient justification. That notwithstanding, in the war of propaganda it was a common place notion that it was desirable to cite certain justifications such as necessary defence, maintenance of balance of power, correction of historic strategy, national or economic boundaries; independence from colonial oppression; nationality; a "civilizing mission'' or the "white man's burden'' as Genuine reasons or causes of war.

3.2 *ROLE OF IJMA'A*

For further and better appreciation of the Concept of Islamic Law, it is pertinent to examine the prominent role of Ijma'a, one of the major sources of Islamic Law; in the development of the unique Law of Islam. In the literal sense, *Ijma'a* means the unanimous consent of the learned Jurists of Islamic law otherwise known as *Mujtahiduna.* The unanimity of opinion on a given Islamic legal or non-legal matter represents what is called *Ijma'a*.

Technically, it could be defined as ''the consensus of the Muslim Jurists of any particular period concerning an Islamic value.[146]

As it obtains under the English Law that the two components of legislation are ''Matter" and "Form" so it is under the theory of striving (*Ijtihad*) in Islamic Law. Thus the Qur'an and *Sunnah* being the *Usul-Ul-Usul* meaning *Bases of the Bases* provide the matter of the law while the authoritative enunciation of the great Islamic legal experts supplies the form. The most perfect kind of this enunciation is *Ijma'a*;

[146] Qur'an (Ash-Shoura) 42:58-49

given fact, the possibility of positive changes to suit the needs of changing times and usages was influenced by the consensus of opinion of the jurists in all cases not directly provided by the two fundamental or principal sources of law. It is in this vein that consensus of opinion of the scholars as the third major source of the *Shari'ah* enjoys legal backing of the Quranic provision which reads as follows:.

> *"….and seek their opinion in the matters (of Law)*
> *whenever you decide upon something have relief in Allah,*
> *surely Allah loves those that rely on him"*[147]

The process of *Ijma'a* further gained the support of the Holy Prophet when he said:

> "*My People would never agree on whatever that will lead*
> *themastray*"[148]

Application of *Ijma'a* practically started in the days of the noble Companions of the Holy Prophet (SAW).

In the Qur'an, Allah (SWTA) does not prescribe a particular punishment for consumption of alcohol or any intoxicants whatsoever. Resultantly a consensus of opinion of the noble companion provided a prescribed punishment of eighty strokes of cane for drunkard.This consensus was reached when Sayyidina Ali said:

> *"He who drinks gets drunk he who gets drunk raves; he who raves accuses falsely and he who accuses falsely should be given eighty strokes of cane."*[149]

This consensus was derived from the Quranic injunction, which read thus:

> *''Those that accuse the innocent women falsely and they do not bring forth four witnesses, flog them eighty strokes of cane and do not accept their evidence, they are the wrong doers."*[150]

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147 Quran: Imran (3) : 159
148 Doi.A.R 'Basis of Shari'ah, p. 91
149 Doi A.R, ibid. p.487.
150 Quran (An – Nour) 24:4 see

The process of *Ijma'a* was usually informed by emergence of a novel issue. Normally, healthy consultation on such new development and the use of juristic reason (Ijtihad) were the preliminaries for arriving at a binding consensus (*Ijma'a*) The binding character of *Ijma'a* could be conceived as the binding effect of a given decision which is commonly accepted by all Muslim jurists of a particular age as long as such decision is not in contrary to the principal sources of law-the Qur'an and *Sunnah*.

According to Imam Bukhari, ''*Ijma'a* of the Companions cannot be broken unless it contradicts the *Hadeeth*[151].

In other words, the consensus of opinion of the Holy prophet (SAW) has a binding character on the latter Muslims in-as much as they are not inconsistent with the Qur'an and *Sunnah*.

In another notable authority on Islamic Jurisprudence, it is written as follows:

> *"If anything comes to you as decision, decide accordingly to the Book of Allah, if anything comes to you which is not in the Book of Allah then look to Sunnah of the (The Prophet) if anything comes to you which is not in Sunnah of the prophet then look to what people unanimously agreed upon''.*[152]

In formulating laws under the Islamic legal system, the noble companions stand foremost next to the holy prophet (SAW) and their consensus of opinion, which corresponds with the Qur'an and *Sunnah*, is definitely binding in respect of matters brought before them.

The Companions' consensus of opinions on various legal matters of their time are just like case laws or judicial precedents under the English legal system.

[151] See kashful Asrar; vol. III, p. 262
[152] Hujiatul-Balegah , p.154

Quoting copiously from Sayuti's 'History of the Caliph's', Mawlana Muhammad Ali wrote:

When a case came before Abu-Bakri (The immediate successor and first caliph of the Holy Prophet), he used to consult the Book of Allah. A company of the people gathered round him and every one of them stated what he knew from the Prophet and Abu Bakr would say: Praise be to Allah who has kept among us those who remember what the prophet has said. If he was unable to find anything in the *Sunnah* of the prophet, gathered together the heads of the people and consulted them. If they agreed upon an opinion, he decided accordingly.[86]

Thus the four rightly guided caliphs and the noble companions of the holy prophet, made enormous case Laws in the form of *Ijma'a*, which constitute the first among the secondary sources of Islamic law. Following the *Ijma'a* of the noble companions is the *Ijma'a* of *Tabi'un* that the immediate generation of Muslims after the prophets companions generation.

The *Tabi'un* and *Tabi-tabi'un* [i.e. - third generation to the generation of the Holy Prophet (SAW)] are better than the subsequent generations.

When *Ijma'a* of these two generations does not contradict the principal sources and *Ijma'a* of the Prophet's Companion it may be binding on the succeeding generations, if only circumstances remain relevant to the subsequent ages.

However where there is difference of opinion of Jurist consults, the *Ijma'a* of latter generations in conformity with the requirements and needs of society must prevail. This is a reflection of a fact that an *Ijma'a* can be abrogated. The only provision under this principle is that the *Ijma'a* to be abrogated can only be by another *Ijma'a* of similar class. Thus another *Ijma'a* of the companions can only repeal an *Ijma'a* while

the *Ijma'a* of the second generation (*At-Tabi'un*) may only be abrogated by another *Ijma'a* of the same generation or of succeeding generations.

The reason being that the *Ijma'a* of generations later than that of the Companions is considered of the same weight.[153]

For conformity of the prevalent law of Islam and its sacred principles with the requirement of changing nature of global society by conditions a methodological approach which is to be adopted to resolve this conflict can only be found in the concept of *Ijma'a* as a way of solution to legal problem by making laws in relation to international matters in accordance with the spirit of changing age the consensus of opinion (*Ijma'a*) provides a unique method to be adopted for practical enforcement of the international law based upon the sacred principles of *Shari'ah*. The second successor of the Holy prophet (SAW) as the Head and commander-in-Chief of the Muslim nation, *Umar Ibn Al Khatab* through his administration exhibited the binding effect and efficacy of *Ijma'a* as a source of Islamic law of war and peace.

According to Majid Ali Khan:

'He ('Umar Bin Al-Khatab) was the greatest democratic administrator whose example is unparalleled not only in the history of modern civilization. Throughout his Caliphacy, matters before him were decided by consultation.'

He once remarked: it is essential for a "khalifah'' to consult his "Shourah" (i.e. a consultative Council) Once a matter has been decided based on the opinion of the consultative forum, the Khalifah would not change it."[154]of all precedents of *Ijma'a*, the most easy and effective is the consultative administration and polity as introduced by Umar bin al-Khatab. The history of the life of the companions of the Prophets and

[153]Mulla J. J , Tafsirat, al-Ahmadiyya file Bayan-al-Ayat, Al-Shari'ah, Bombay, 1327AH p.320.
[154]Majid A. K,, The Pious Caliphs, Diwan press, India, p.99.

the methods adopted by their able leaders for *Ijma'a* are proofs of practical application of the doctrine.

The great ruler in Islamic history called Umar Bin Khatab was once reported to have said to his Judges (*Qudot*) the following words:

> *''Decide cases according to the Holy Quran. If you do not find any solution in it base your decision upon the Sunnah. In case you do not find an appropriate Hadeeth, search in the unanimity of the righteous predecessors (i.e Ijma'a)*[155]

At the conquest of Jerusalem, the people of the city voluntarily offered a peaceful truce on condition that the Muslims Head of State (i.e. the Khalifah) must had to come personally to sign the treaty in their presence. When the proposal was communicated to Umar bin-al Khatab (R.A.)[156] the instrument of *Ijma'a* was once again applied to decide on acceptance of the offer. By the process of *Ijma'a*, the said offer was accepted and Umar (R.A.) embarked on a journey to Jerusalem in company of a slave with only one camel which both of them rode by turn. The *Khalif* signed the treaty under which the inhabitants of Jerusalem were granted complete security of life and property. In spite of the fact that the entire people of Jerusalem were non-Muslims and the state religion was Christianity the peace truce conferred absolute freedom of religion on them and their places of worship were tightly secured[90.] Umar's dynamic foreign policy provided allowance for future happenings. When he visited Jerusalem, and it was time to observe one of the five compulsory *salawat* (Plural of *Salat*, an act of worship) he was allowed to perform the *salat* in the big church but Umar declined.

He offered the *salat* with his entourage on the steps of the church According to this great leader of the Muslim nation; he refused to perform the *salat* in the church so that

148 In an ordinance given in "Kanzul' (meaning Treasure of Deeds)
[156]See Majid A. K , Ibid. p. 86

it might not be an excuse for the future Muslim generation to take over the church from the Christian. This precept was consolidated by a written instruction to the Bishop of the church that the steps used for the *salat* would never be used for congregational *salawat* or for *Adhan* (call to prayer) in future.

In appreciation of Umar's unprecedented friendly and diplomatic gesture, the Bishop of Jerusalem proposed a place known as ''*Sakhra*'' as suitable for a mosque. The *Khalif* laid the foundation of the mosque at the suggested place. The mosque today is known as the Umar's Mosque.

Finally, for an *Ijma'a* to be valid, the under-listed conditions must be satisfied:

(a). The consensus must never be contrary to any of the two primary sources (The Qur'an and *Sunnah*)

(b). The *Ijma'a* of the Prophet's Companions should not be reopened.

(c). The Jurist of a particular age should be unanimous on the legal matter involved once an *Ijma'a* is made up, it gives material benefits for Islamic authority new laws and regulations can be framed in accordance with the requirements of the new world. By this suitable amendments in international and economic relation ,the policies can be beneficial for drawing human life or the entire global community nearer to newer eras.

Islamic Law concept of war has been examined with emphasis on the true concept of *Jihad.* Two major types of war were discussed with the five historical periods of war. Different functions and reasons of war were also given attention in the chapter. It is deemed necessary to consider the role of a principal source of Islamic Law in this portion of the research work. Thus, *Ijma'a*is discussed for its relevance to the Islamic Law Concept of War.

In the final analysis, the journey so far on concept of war within the framework of Islamic Law has revealed the peculiarity of the Law of Islam in the matter of war.

CHAPTER 4

THE ISLAMIC LAW CONCEPT OF PEACE

4.0 INTRODUCTION

In discussing the concept of peace under any form of law, it is highly imperative to understand the principle of '*Status Mixtus*[157] which emphasizes the relativity of peace and war in the international arena. The relativity of peace and war is primarily posited as a negative state of affairs characterized by the predominance of political and economic power over military power and the relegation of military power to the background role of potential, instead of an actual pressure.[158] This relativity of war and peace is as much legally relevant as the state of intermediacy between peace and war. It provides further and better interpretation to the different forms of non-hostile relations between belligerents. Such additional meanings of various non-hostile relations which are possible between the belligerents include military, passports, safeguards, *parliamentaires*, safe conduct, cartel, capitulations and armistices.

In a situation like this, contact between belligerent states and armies, may be made directly by radio, intermediary[159]or by conference.

Equally applicable to relations between belligerents as far as relativity of war and peace is concerned, are the rules governing fundamental principles of international law particularly those relating to consent and good faith.

The concept of peace is often confused with the concept of conflict resolution. Whereas, conflict resolution in accordance with the definition of Ladan, M.T., is "about activities that seek to discover, identify and resolve the underlying root causes

[157] Meaning: 'Intermediacy between peace and war.
[158] Schwarzenger, G. ibid. pp.13 & .140.
[159] Intermediaries here connotes protecting power or/and International committee of the Red Cross.

of conflict".[160] By this understanding, conflict resolution can be seen as a collection of peace building processes which include reconciliation, cooperation, dialogue, training and educational projects and conflict analysis. Peace on the other hand, can be said to be a definite end that can only be achieved by no means other than conflict resolution. This probably explains series of peace conferences which in the history of the world community have always been the natural result of major armed conflicts. For instance, the first officially recognized world war between 1914 and 1918 resulted to the 1919 peace conference which was opened in Paris in January. This conference was distinguished in many respects from any previous international conferences of its kind. For the purpose of enthroning peace, representatives of so many nationalities came together for the first time in the history of the global community. Above all, the conference of 1919 had to make not just one but several peace treaties; and of course it was not just a series of negotiations among the parties but a very useful discussion among the envoys of the victors about peace terms to be imposed on the vanquished. As far back as 1648, the global community had been searching for peace and security. In this year, almost a three and half centuries ago, by the peace of Westphalia, the thirty year armed conflict between the Catholic and Protestant states of Europe was laid to rest.[161]

The peace of Westphalia of 1648, also as an instrument of conflict resolution terminated the long time political domination of the Holy Roman Emperor which of course gave birth to political freedom of the protestant states of Europe.[162]

In-spite of these efforts to enthrone peace in place of war in the world, peace became elusive. By the end of Second World War, it became glaring that peace was the only

[160] Ladan, M.T.. 'Introduction to International Human Rights And Humanitarian Laws', ABU press, Zaria, 1999, p.454.

[161] For general overview, see Leo Goss, "The Peace Of Westphalia 1648 – 1948, The American Journal of International law, Vol. 42 (1948) pp.20 – 41.

[162] Leo Gross, (Supra) p. 23.

alternative to war. Thus, at the Dumbarton Oaks Conference held in October 1944, the general idea of the United Nations was formulated. This gave birth to a new international organization to replace the discredited League of Nations, which was originally the brainchild of American President Wilson in 1919. With this latest development, the first draft of the Charter of the United Nations was signed by fifty-one Nations on April 25, 1945 in San Francisco.

*Article 1*of the Charter stated the purpose of the organization as the maintenance of World Peace and security.[163] The 1st article also provided that all peoples of the international community should enjoy equal right to self determination (i.e. Sovereignty of a State) and it further widened the aim of the organization to cover not only political but also economic and cultural concord.

By the provisions of *Article 2*of the UN Charter, the organization covenanted non-interference in the internal affairs of member states except whenever it is inevitable like enforcement of measures already approved by the Security Council. All these efforts and similar ones were directed towards achieving global peace as the sole alternative to armed conflict in the world. The question is *were these purposes achieved? Or in other words to what extent has the united nations maintained peace and security in the international community?*

It is against this background that this segment of the fourth chapter is devoted to the concept of peace in Islamic Law .

4.1 PEACE IN ISLAMIC LAW

Peace is the corner-stone of Islamic Law. Essence of law in any given society is to maitain peace and orderliness. Whereas, peace is solidly founded on the Law of Islam.

[163] Peacock, H. L., "A History of moern Europe" 1789 – 1976, 5th Edn., Heinemann Educational Books, London, 1997, p. 441.

Therefore, attempts will be made to explore the Islamic Law concept of peace, the nation of peace (*Dar-Ul-Islam*) and more importantly the question as to the Islamic Law position in a situation of war or armed conflict where a party is vehemently opposed to peace move. Nature of peace, its peculiar concepton in Islamic Law, various means of achieving peace under the law of Islam will feature in this chapter. Qur'an, Sunnah, Qiyas and Fatwa will be discussed because of their relevant roles in the development of the Islamic Law concept of Peace.

The ultimate and principal source of Islamic Law, the Holy Qur'an prohibits Muslims from engaging in war or armed conflict unless when it is inevitable and at the same time enjoins them to patiently bear all forms of persecution in the way of Allah in order to establish regime of peace in the universe. Precisely Muslim nation ordinarily engages in armed conflict as last resort. Hence, peace is more closely related to Islam in many respects than war or armed conflict. As war is not an objective of Islam nor is it the normal course of Muslims, peace is the nature, the meaning, the emblem and basically the objective of the Law of Islam. The word '*Islam'* itself is derived from a root that primarily has dual meanings vis-à-vis "unqualified absolute submission to the will of Allah" and secondly "peace". It has been rightly argued by M. M. Ali[164] that the two interpretations of Islam are interconnected in the light of a verse of the Glorious Qur'an, which provides thus:

> *"Nay – whoever submits his whole self to Allah and is doer of good; he will get his reward with his Lord; on such shall be no fear nor shall they grieve."*[165]

The Quranic provision above portrays submission to the will of Allah, the supreme Law Maker as the only means by which peace can be achieved. The entire international community has been in search for peace from the birth of international

[164] M. M. Ali, The Religion of Islam, Lahore, 1973, p.2.
[165] Suratul Al-Baqarah (2):112

relations among the nations of the world. It is only logical to hold that one searches for only what one lacks. Thus the divine law of Islam via the above-referred verse proffers a panacea for the global problem of searching for peace. Therefore the lasting solution lies in absolute and undiluted willful submission to the master and divine law-maker of the world whose sovereignty over the entire universe is unequalled. Thus, the primary and first source of peace is the Almighty Allah the Creator of man and sole law Giver. The second means by which peace can be achieved is doing good to other people of the world as prescribed by the Quranic verse under reference.

Being at peace with man is a direct route to global peace. The natural result of this condition is one being filled with internal self-satisfaction or peace, which is depicted in the above quoted verse as freedom fromfear or grief.To further appreciate the position of Islamic Law on peace, it is pertinent to have a cursory look at the correlation of "peace" with Islam as a complete and perfect way of life. Allah, the Almighty God is presented by Islam to the entire mankind as the absolute source of peace. He Himself is "***PEACE"*** personified, hence one of His beautiful names is peace.[166]

4.1.1 *Nature of Peace in Islamic Law*

The Islamic faith that is governed by the Law of Islam imposes on a Muslim to greet others with an expression of peace by saying "*As-Salam Alaykum*"(السلام عليكم) meaning "Peace be unto you". The person to whom the greeting is said is also required to respond as thus: "*Wa-Alaykum Salam*" meaning "And unto you be peace also". The ultimate book of Islamic Law, the glorious Qur'an emphasizes that one of the beautiful features of paradise is this expression of peace when it provides as follows: 'No frivolity will they hear therein, nor any taint of ill except the saying

[166] See Suratul Al-Hashri (59):23

'Peace! Peace'.[167]This is further substantiated by the Prophetic tradition when he directed his noble companions and nation of the believers of all generations as follows:

> *"When you enter a house you should greet the inmates (say Assalamu Alaikum) and when you go out of the house you should bid farewell to the inmates of the house with the same greetings: "Assalamu Alaikum"*[168]

Another significant correlation of peace to Islam is the manner by which a Muslim terminates his ritual prayer with the expression of "*As –Salam Alaykum*". This also signifies the importance which the Law of Islam attaches to peace.

Above all, the adjective "*Muslim*" means "One who submits himself to Islam"; Paradise is also a "*Daru-Salam*" (house of peace). Every human being therefore is *bona-fide* entitled to enjoy the peace of Islam and the kindness of the peaceful Muslims, regardless of religious or geographical or racial considerations as long as there is no aggression against Islam and/or the Muslims.[169] The attachment of Islam to peace underlines its opposition to any threat to peace.

Under the law of Islam, peace is not an artificial or abstract phenomenon. It is rather a related "Law and order". Therefore the basis for the concept of peace is "Justice". Peace in the Islamic Law is a genuine peace which constitutes the rule within the purview of Islamic law while on the other hand, war is the exception.

The Islamic Law concept of peace has a wider and deeper significance than its concept under any other contemporary legal systems. By implication, within the Islamic legal framework, freedom, justice and security of all people symbolize peace. According to *Ishaq Oloyede* in his treatise, *'Sharia'* - Islamic Law is provided by

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[167] Surah Al-Waqiah (56):25 – 26.

[168] Adeshokan R, First 100 Hadith, published by "In the light the holy Qur'an and the Hadith", Ibadan, Nigeria, p.8

[169] Hammudah A, Islam in Focus, WAMY, p.143.

Allah to regulate the relationship between man and God; among men and between men and other creatures of God. The observance of such rules is *sine qua non* for absolute peace.[170]

Jackson in his own opinion wrote:

> *"In order to secure order in Society, Shari'a charges man with dual responsibility; one in relation to God and the other in relation to society, which results in a law of duties rather than of rights or moral obligations binding on the individual, from which no earthly authority can relieve him and which he disobeys at the peril of his future life."*[171]

Following the Islamic legal requirements for establishment of peace, mere abstinence from war does not guarantee peace as long as there is denial of God's supremacy, despotism and corruption with oppression.

Since Islam initially imbues peace in the individual's conscience, in his family, therein the community and finally in international relations. The law of Islam therefore requires that there should be peace in the relationship of an individual and Allah, his creator, between the individual and his inner conscience, as well as between him and his community members. Similarly it is part of the requirement of Islamic law that peace is firmly established in the inter-relationship of groups or segments of a given community or state, in the relationship between the government and individuals and between one nation or state and another in the larger global community. It is in the light of the foregoing that the concept of peace under the law of Islam will be discussed through the manner in which Islam set forth to achieve peace in the universal community. Therefore, peace will be further considered accordingly in the

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[170] Ishaq Oloyede, "In Search Of A Peaceful Society", Being a paper presented at Eko Hotels, Lagos on the 24th Rabiul awwal, 1421 A.H. (25/06/2000).

[171] Jackson, "Foreward to "Law in the Middle East".

succeeding paragraphs. The Islamic Law gradually introduces peace from tranquility of conscience to peace in the home, then to peace in the nation and finally ends in the world peace.

4.1.2*Peculiarity of the Islamic Law Concept of Peace*

The law of Islam inculcates in the individual's conscience what is said to be 'positive peace'. By the theory of positive peace, man's life is exalted and enriched. To the contrary, negative peace implies cowardly sacrifice of principles and ideals for the sake of safety and self-security. As peace does not emanate from ignorance and stagnation, positive peace which is harmonious and flows systematically acknowledges the individuality of each person's instinct, ambitions and desires as well as the interests and goals of the society at large. Relying on this factor, one may be correct to hold that positive peace is the base for peace of conscience because it frees constructive force, enhances potentials in man and subsequently acknowledges humanity with its needs at any given period, feelings, religion, morals and ideals; all acting in harmony.[172] Since in accordance with the tenets of Islam as the most practical way of life, there will be no peace in the world without the individual being at peace with himself. It is therefore important to establish a firm basis for international peace and the only means of doing that is to first effectively implant peace in man's innermost conscience.

Hence, to properly understand what peace of conscience is, one has to understand the procedure of implanting peace in man's innermost conscience.

For man to attain genuine peace in his innermost conscience, faith with sincerity is the only requisite.

[172] See Sayyid Qutb, "Islam and Universal Peace", American Trust Publications, 1993, p.16.

Husayn At–Tabatabai has stated "the Qur'an has explained that Islam is based on the judgment of true human nature, Humanity can only achieve its perfection if it accepts that judgment"[173]

This position suggests logical means by which peace of conscience can be achieved and be better appreciated. As an essentially simple and natural law, which is void of contradiction or confusion, the Islamic Law is in harmony with human logic. There are no riddles or illogical concepts in the law of Islam that bewilder man and agonize his conscience.

As a matter of fact, mysticism has no legal backing in Islam because if followed by the Muslim it will disorganize his inner conscience which may lead him to accepting illogical faith and this may ultimately drive him to atheism and compel him to sacrifice his sense of reasoning for improper belief which will consequently deprive him absolutely the peace of conscience. The simple and most unique creed of Islam which totally agrees with logic of man points to the fact and unqualified truth that Allah (God), is unique and there is nothing like Him. He is inimitable. He is the creator of the universe. He is the most supreme to whom sovereignty of the universe belongs and He is therefore the sole law maker for universal peace and order. Muhammad (S.A.W) was a human being whom God inspired to guide the entire mankind to His worship; for God is the absolute authority in mundane and spiritual matters. The Holy Prophet Muhammad (S.A.W) is not an anthropomorphic god nor was he a prophet on earth and a god in heaven. It is only within the purview of Islamic Law that the individual can communicate[174] with his Creator as this ability is engendered in the human soul. It follows that with the aid of logic and religious or spiritual activities, man can achieve peace of innermost conscience with himself. Thus

[173] Muha'd Husayn At-Tabatabai, 'Al-Mizan, An Exegesis of the Qur'an', Vol. 3 , Translated by Sayyid Saeed Akhtar Rizvi, Wofis Tehran – Iran 1402/1982, p.97.

[174] See Suratul Baqarah (2):186, Qur'an 58:7, Qur'an 2:60, Qur'an11:61 & Q 50:16.

the individual realizes his closeness to God and becomes aware of the divine mercy, concern and solicitude without necessarily resorting to mysticism and irrationality.

By the recognition of carnal and spiritual necessities of man under the law of Islam, man is at liberty to achieve peace in his innermost conscience. According to Sayyid Qutb, the desire for enjoyment goes together with the desire for elation which are both equally gratified instead of one being satisfied to the deprivation of the other.[175]

Allah the Most Supreme Law Giver has commanded the Muslims who are exclusively the subjects of Islamic Law as follows:

> *"O children of Adam, wear your beautiful apparel at every time and place of prayer, eat and drink but waste not by excess for Allah loves not the wasters? Say; who has forbidden the beautiful gifts of God. Which He has produced for His servants, and the things, clean and pure which He has provided for sustenance? Say: they are, in the life of this world, for those who believe and purely for them on the Day of Judgment. Thus do we explain the signs in detail for those who understand"*[176]

As a process of implanting peace into the innermost conscience of man, Allah has set limits of moderation to the satisfaction of the carnal and spiritual needs of man. Exceeding such limits to an extent, which leads to venality and atheism oppression, is as good as degrading human nature and ignoring laws of life which in the ultimate will result to lack of peace of conscience in man. Through the proper application of Islamic rules in relation to concept of peace, human energies are set free to develop and promote life for they guide men to the proper fulfillment of body and spirit.

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[175] Sayyid Qutb, ibid, p.19
[176] Surah Al-A'raf (7):31 – 32.

The bottom line of this analysis is that adequate coordination of religious and social codes regulates the individual's instinctive and social behavior. As long as the spiritual and social concord is achieved by way of effective application of Islamic legal principles, the individual members of the society live in perfect internal peace with his own conscience and undiluted external peace with his society. One will be correct to conclude that achieving an accurate balance between spiritual and physical cravings will result to enjoyment of tranquil conscience by all normal persons.

The law of Islam considers sin and atonement as path to peace of conscience. Practically, sinful acts create tumult and high sense of guilt in the innermost conscience of man. He becomes restless even if he is denying the act. Islam does not only recognize the individual's needs but also take to cognizance human fallibility and culpability. For man to achieve peace within him with self-guilt he must seek for atonement without delay.

Without any intermediary or human threats of exclusion from God's mercy, guilt and sin can be conveniently atoned for at any given time by anyone who wants to sincerely repent and purify himself. Such person will always find Allah ever willing to accept his repentance and to help him overcome his weakness. Hence it is stated in the Holy Qur'an thus:

> *"Say: O my servants who have transgressed against their souls! Despair not of the mercy of Allah; for Allah forgives all sins for He is oft – forgiving, Most Merciful"*[177]

Islam does not emphasize man's culpability but rather greater emphasis is placed on God's tolerance and mercy. Law of Islam is made to establish peace firmly within the individual and the society in general and not basically for punitive purpose.

[177] Surah Al-Zumar (39):53

Thus, commission of sin is inevitable for man but he is assured of atonement that will implant peace in his innermost conscience. The Law of Islam grants to the penitents, calm and confidence, vigilance and patience, keep the human personality sound and eliminate anxiety thereby enthroning peace in man's innermost conscience.

For attainment of peace in the individual conscience, the law of Islam even in its rituals do not burden the individual with more than he can tolerate. Where the individual is saddled with responsibilities beyond his endurance either socially or spiritually, the consequence is to be any or all of the following:

(i) Rigorous suppression of natural urges which may result in rejection and final inability to cooperate with any power.

(ii) High feelings of anxiety even when no crime has been committed.

(iii) Feeling of inability, deprivation, exhaustion and oppression under which the human personality could suffer psychological problem that is capable of stifling its natural development.

It is therefore in the light of nature of man that the Islamic Law imposes legal obligations in accordance with human endurance. Thus, enjoyment within tolerance is another means of achieving peace of conscience. It is stated in the Holy Qur'an thus:

"On no soul does Allah place a burden greater than it can bear".[178]

Similarly, the Apostle of Allah holy Prophet Muhammad (S.A.W) cautioned his followers against the complication of religious obligations and teachings of uninformed or exaggerated interpretations when he said:

"Do not be too strict with yourselves in practicing Islam,lest you would be strictly treated"[179]

[178] Surah Baqarah (2):286.

He (SAW) is also reported to have said;

"This religion is solid and you have to go through it gently"[180]

Furthermore, for man to have peace of conscience, he is required by the Law of Islam to be tolerant, kind and cheerful. Inspite of this, the same law takes into cognizance the fact of life that anger and bitterness are natural feelings in man that can deprive him of peace in his innermost conscience. Thus, it does not require man to exclude these feelings from his emotion nor does it consider such feelings criminal. However, it calls for self control to overcome the feelings of anger and bitterness. The divine Qur'an therefore provides that:

> *"And the servants of the most Gracious are those who walk on the earth in humility and when the ignorant address them, they say: "Peace"*[181]

From the above-quoted verse, it is clearly implied that the best of the Believers among human race will always return kindness, love and tolerance born out of peace for anger bitterness and belligerence.

Naturally, by adopting peace in form of pardon and forgiveness; anger, resentment and bitterness should subside. Going by the opinion of Sayyid Qutb, Islam does not accept the ecclesiastical saying "Whoever wrongly becomes angry with his brother ought to be condemned". Rather, Islam in its law calls for peace and conciliation while it grants the conflicting parties an ultimatum during which their anger cools down and normal sobriety may be regained. The greatest interpreter of the divine law, Holy Prophet Muhammad (SAW) has fixed the period of ultimatum;at three days when he said:

> *"It is not admissible for any Muslim to desert his brother for more than three nights. Then they should meet, each*

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[179] Quoted in Sayyid Qutb, ibid p.23
[180] Quoted in Sayyid utb, ibid, p.23.
[181] Surah Al-Furqan (25):63

other giving his point of view. The better of the two is he who first greets his brother."[182]

It is very difficult to find two Associates relating intimately without anger or/and bitterness which in most cases often lead to serious conflicts lf the situation is allowed to linger on for more than three days, non of the parties will have peace at heart. Since each of them belong to a common society, the condition of absence of peace of conscience will ultimately affect the society at large. This explains why the Prophet of Islam, Muhammad (SAW) disapproved of a Muslim being in a condition of anger and resentment against his fellow Muslim brother for more than three days.

Peace can also be conceived through genuine high confidence in Allah, which is another means by which man can achieve peace of his innermost conscience. For the fear of the unknown in respect of the future of man and particularly his ultimate abode after his present life, man's heart will be full of tumult, restlessness and greatly un-peaceful; Islam by its law and laid down principles; puts peace in men's hearts, making them trust Allah's merciful guidance and care.

The direct relationship between Allah, (the Creator) and man distinguishes Islam from any other system spiritual or mundane. It is a unique type of relation that is free from any interference. By the virtue of this kind of direct relation, the individual feels highly confident that he is protected by an All Powerful God with whom he may seek help and shelter as long as he proves beyond reasonable doubt to be absolutely loyal to Him exclusive of any other thing or anyone else.

Such undiluted confidence is further enhanced by the provisions in the divine law book for mankind where Allah Himself assures man in the following words:

"When my servants ask thee concerning me, I am indeed close (to them); I listen to the prayer of every suppliant

[182] See Islam and Universal peace, supra, p.24.

when he calls on me; let them also with a will listen to my call, and believe in me. That they may walk in the right way"[183]

Today, man knows no peace in his innermost conscience because of his non-compliance with the above stated Quranic provision. In the contemporary world, servants and sages are in search of peace for mankind, but peace has been eluding them. The remedy to this international modern problem is very simple. It does not require any capital outlay. Expensive infra-structure is uncalled for. All it takes is for individual to sincerely peep into his heart to first see ray of hope, call God as prescribed in the above quoted Quranic verse for peace at heart, he will definitely receive a signal response from Allah. Ultimately the individual will experience true peace of conscience by way of genuine confidence in Allah and sincere faith as pre-condition.

With this divine assurance from Allah, man will attain genuine peace in his innermost conscience if by his confidence; his safety, dignity and wealth are secured provided he cautiously maintain his direct relation with Allah who is the sole power that directs the universe. This is no doubt, a way by which the soul of man can become so calm, not-self revolting and highly confident that it cannot be disturbed by unpleasant events nor panicked in calamities.

The Qur'an, a divine universal constitution provides:

"Those who believe and whose hearts find satisfaction in Allah'sremembrance; for without doubt in the remembrance of Allah do hearts find satisfaction"[184]

Peace of innermost conscience in man can also be appreciated through the mirror of securities and guarantees. In the law of Islam, the subjects were not only

[183] Surah Al-Baqarah (2):186.
[184] Surah Ra'ad (13):28

subjected to various rules and regulations but were also assisted in the application of it. The Islamic Law is the divine law of only one God applicable to the entire international community.

In achieving this objective, the Law of Islam makes its subjects feel secure by assuring him that Allah the Supreme Law maker is indeed able to guarantee his safety. Thus, ultimately the individual may conveniently live in an atmosphere of justice, peace and prosperity.

To start with, man is securely protected by the law of Islam against all forms of injustice of both kings and common men. The motivating principle of Islamic Law ensure that the individual should have a feeling of honor and respect in his society which in turn guarantee the perfect security of his life and properties, which practically represent his peace of innermost conscience.

The Prophet of Islam is reported to have said:

> *"None of you is a true believer unless he likes for his brother what he likes for himself."*[185]

And he also said:

> *" A Muslim is He in whose tongue and hands the Muslims are safe and a true migrants is he who migrated (stay way) from what Allah has forbidden."*[186]

Similarly in his last or farewell pilgrimage sermon, he said, "All Muslims are sacrosanct to other Muslims; their lives, their wealth and their honor". What else can be more responsible for individual innermost peace of conscience than this kind of security and guarantee?

In another dimension, the validity of authority of a ruler largely depends on the ruler's application of the divine law of Allah. A law which governs the ruler and

[185] Imam Yahya An-Nawawi, 'Al-Ahadith N-Nabawiyah, Tunis, p.38
[186] Muhibudeen Al-Jurahi, Riyadh Solihin, Ar-Raji, Beirut, p.142.

the ruled world-wide. It is only under Islamic legal system one can find the most practicable true due process of law. Everyone is equal before the law. The ruler can be sued to the law court by any of his subjects and viz.-versa. It is on record that during the tenure of Sayidina Umar Ibn-Al-Khatab, the second rightly guided *Khalif* in Islam; a common citizen among his subjects instituted an action against him. When the *Khalif* entered the court, the presiding judge (*al-qadi*) rose up for him. The "Amir–al–Mumineen"[187] did not take it lightly and rebuked the honorable judge in the following words: "This is the first injustice you have done to the plaintiff in this case." According to Alhaji Shehu Shagari and Jean Boyd:[188]

> *"Under the laws of Allah and his messenger, all men are equal. Preferential treatment should not be given to anyone, neither scholars nor students nor sheriffai (i.e. of the prophet). We are told in Infak – Al – Maisur that the Shehu considered it a mark of ignorance to make distinctions between people on tribal or national lines".*

Obviously, the divine law has not been ordained to fulfill the desires or to serve the interest of a ruler or a particular class of people. Allah, the Lord of the universe promulgated His laws to safeguard the interest of all and grant securities and guarantees to individuals. It is pertinent to note that the complete security provided by these laws is to be enjoyed by all those who abide by the code in its entirety without discarding any part thereof.

` The sanctity of a person's home is guaranteed within the framework of Islamic Law. Under no circumstance is any one allowed to enter a house without seeking for the permission of its occupants. The Holy Qur'an provides thus :

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[187] "Commander of the Faithfuls"

[188] Shehu S and Jean B, "Uthman Dan Fodio , The Theory and Practice of his leadership", I.P.B. Lagos, 1978, p.29.

> *"O ye who believe! Enter not houses other than your own, until you have asked for permission and saluted those in them; that is best for you, in order that you may heed. If you find no one in the house, enter not until permission is given to you; if you are to go back, go back; that makes for greater purity for yourselves and Allah knows well all that you do."*[189]

A place of residence is considered in Islam as a source of tranquility and peace of innermost conscience. No person is at liberty to disturb the enjoyment of the peace for whatever reason. Even if criminal evidence is acquired by means of unauthorized entry into a residence, such evidence will be disqualified. It is related that the second and probably the most prominent *Khalif* and commander of the faithful Umar Ibn Al-Khattab while making a night round to find out the problems of the people overheard a suspicious conversation between a man and a woman. He climbed the fence of their house and jumped down on them suddenly. He saw the couple drinking alcoholic wine. He said to the man thus:

> *"You enemy of God! Do you think that God would keep your act a secret while you are disobeying Him? The man retorted: "O Umar, governor of the Believers! I disobeyed God in one way but you have violated three of His rules. God says, 'Do not spy', but you have spied on us. He says: 'Do not enter from the back door (unannounced)', but you climbed the fence and got down to where we sit. And He says, 'Enter not houses other than your own until you have asked permission and saluted', but you did not do so".*[190]

Umar could not penalize the man despite his crime because he sought evidence in an illegal manner. He simply asked the man to repent, which he did.

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[189] Suratul Nur, (24): 27 – 28.
[190] See Sayyid Qutb ibid., p.28.

It is by means of guarantees of such nature that Islam secures the freedom and tranquility of the individual. Whoever violates these rights will be punished accordingly even if he is a ruler. With the great emphasis the law of Islam laid on due process of law, one discovers that throughout the history of Islamic law, there has never been discrimination between the governor and the governed as both are equally subject to the same laws and penalties.

The practice of the holy Prophet (S.A.W.) in the administration of justice is the strict adherence to the principle of fair hearing by allowing an accused person to defend himself against the charge no matter how grave or how light the offence may be. Criminals of all categories were equal before the law of Islam. Regardless their respective stations in life. For instance, a Christian citizen during the era of the fourth prominent *Khalif* in Islam, *Sayyidina* Alli bn Abu Talib. The Christian citizen was accused by the *Khalif* of stealing his shield. The case was taken to court before *Shureh*, a famous Judge for adjudication. Having heard the case of the plaintiff (The *Khalif*), he granted the defendant adequate opportunity to defend himself. In his judgment, he could not find the accused person guilty for want of evidence. Therefore, he dismissed the case on grounds of insufficient evidence. The Governor, *Khalif* Alli bn Abu-talib then smiled in contentment at the just decision.

This is how Islamic law provides guarantee with security for the attainment of true peace of conscience in an individual. Islam places a high premium on peace of conscience of an individual because when an individual member of the society is at peace with himself, it will in turn transmits same to the larger society which will ultimately flow into the international community.

Another spectacle through which concept of peace in Islamic law can be viewed is the home or to be more precise, the family. The family system approved by

the law of Islam is intended to be a source of peace and an anchor of security. To achieve genuine peace at home, the Islamic law prohibits women from dressing alluringly in the public and caution against free interaction of males and females commanding them to be modest and be resistant to temptation. On this issue of chastity, the respected wives and daughters of the holy prophet Muhammad (S.A.W.) were not spared. Thus, they were admonished in the glorious Qu'ran as follows:

> *"O Prophet! Tell thy wives and daughters, and the believing women, that they should cast their outer garments over their person's (when abroad) that is most convenient, that they should be known as such and not molested and Allah is Oft– forgivining, Most Merciful"*[191]

In the opinion of Abdullah Yusuf Ali, the object of asking wives and daughters of the holy Prophet and all Muslims women to cover themselves with outer garments when walking around was not to restrict the liberty of women but to protect them from harm and molestation.[192] Doubtlessly, this will engender peace at home and in the society at large. Without these Islamic legal provisions, frustrated emotion will generate anxiety, adultery and an appalling prevalence of sexual dishonesty, which may ultimately displace peace in the home.

Consequent upon the lust anxiety incited by volatile emotions in a permissive society, many marriages have been broken and more will be broken. For instance, the number of pregnant girls accounted for as much as 48% of the girls attending a high school in Denver in the U.S.A.[193]The United States of America adequately represents a world of permissive society in our contemporary world. Therefore, the number of un-peaceful "happy homes" on premeditated relations and adultery can be best judged

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[191] Surah Al-Ahazab (33):59

[192] Abdullah Yusuf Ali, 'The Holy Qur'an, Text, Translation and Commentary, Amana Corportation, USA, Foot note 3766, at p.1077.

[193] Abdullah Yusuf Ali, 'The Holy Qur'an, Text, Translation and Commentary, Amana Corportation, USA, Foot note 3766, at p.1077

by the rate of divorce in the entire U.S.A. The rate of divorce increases in proportion to the amount of permissiveness in the society.

In a permissive society, wives and husbands that constitute the basic pillars of a home and sole source of peace in the home will be tempted by their opposite sexes to betray their marriage vows. In the process, the very root of peace in the home will be destroyed. Family life becomes less significant and more or less meaningful as one of or both spouses becomes involved in adulterous relationships. All this creates disharmony with gradual process of hatred and ill-feeling between the spouse. In the end, there will be no peace in the home.

Considering the position of family as the bedrock of a nation the law of Islam, having taken into consideration the serious negative implications of sexual arousal; commands that all (both male and female) should observe propriety and chastity by averting the eyes.[194] The law aims at finding unending tranquility in the innermost conscience of man as well as establishing genuine peace in the family at home. The peace at home is not only for the spouses but also for the children whose future must be effectively safeguarded by both parents as a joint venture. A split home as a result of marital failure in form of divorce cannot afford a conducive setting for this kind of joint venture. Once divorce occurs, domestic peace is extinguished. This is why one can be correct to hold that adultery has a great disastrous effect on domestic peace while the law of Islam is extremely particular about the domestic peace. Thus, it protects the home from adultery by encouraging propriety, modesty and chastity and simultaneously making unlawful lurid adornment and free interaction.

One of the prominent peculiarities of Islamic law is that it provides adequate facilities that will aid easy compliance with a given set of rules of law to justify

[194] Sayyid Qutb, ibid. p.33.

imposition of stipulated punishment on the subject. It is the basic function of the Islamic law to preserve the integrity of the home in order to guarantee the integrity of the society. This is in turn, in terms of universal application will solidly establish peace in the global community.

Thus, for the fact that fornication or adultery endangers the domestic peace with great enormity, the Islamic law prescribes the punishment as stated below:

> *"The woman and the man guilty of adultery or fornication, flog each of them with a hundred stripes; let not compassion move you in their case, in matter prescribed by Allah ifyou believe in Allah and the last day and let a party of the believers witness their punishment".*[195]

The punishment as indicated above was not prescribed as a curative measure but rather intended to be a preventive measure so as to ensure perfection of domestic peace. It is a trite law in Islam that no person accused of adultery or fornication should be penalised and punished accordingly, if the four witnesses required are not unanimous in their evidences, otherwise there is no penalty. It is equally well known law that invasions of privacy such as spying and forced entry are prohibited. Thus, proof of adultery as required by Islamic law is almost impossible unless the crime is flagrantly committed in public like animals of lower status. Where this happens, it can be interpreted further that the persons involved are carelessly and obviously spreading lewdness and bringing public morals to the lowest base. If both culprits are married, they will definitely destroy their respective marital domestic peace. In order to discourage irresponsible accusation which in the eyes of Islamic law is capable of causing family discord and to a large extent profound disaffection between the spouses, the law of Islam imposes a shameful penalty of flogging on anyone found

[195] Surah Al-Nur (24): 2 –3.

guilty of wrongful allegation of adultery and where such accusation is well founded but fail to produce four witnesses.[196] Even where it involves a spouse accusing his/her mate of adultery, the law require the plaintiff to in the absence of four witnesses, swear four times and on the fifth one to incur the wrath of Allah on himself if he is not telling the truth.[197]

In another dimension, when domestic peace is highly becoming elusive in a family, divorce can be resorted to in order to restore peace at home. However, it is the most detested permissible act in the sight of Allah.[198] Experience has shown that there are real life situations where continuation of matrimony will be very disastrous to the family and highly injurious to the society, if the spouses concerned are forced to maintain the matrimony, it will only destroy the domestic peace beyond repair.

It is true that Islam does not allow divorce in the first instance of conflict between the spouses, the law of Islam being a realistic one provides for dissolution of such unhealthy matrimony after all remedies to revive it fail. This is to prevent a home devoid of peace from contaminating the peace of the 'larger society. The Islamic law in respect of process of divorce still graciously provides ample opportunity for reconciliation. The law provides thus:

> *"A divorce is only permissible twice: after that, the parties should either hold together on equitable terms or separate with kindness…"*[199]

The divine law contained in the above-quoted verse requires that once there is mutual incompatibility among the parties the divorce can only be pronounced twice while the third one finalises the process. In other words, the monthly menstrual circle is a parameter to compute the two pronouncements. It should be noted that in

[196] See further Surah Al-Nur (24): 4 – 5 .
[197] See Surah Al-Nur (24): 6 – 9.
[198] See Usman Abi-Bakri, "The needs of a Muslim", Trans. Ishaq I. Guibi, 1997, p.31.
[199] Surah Al-Baqarah (2): 229.

accordance with the dictates of Islamic law, divorce cannot be pronounced during menstrual period of the wife if sexual intercourse has taken place during the previous month. The reason for this is to allow the couple to get divested of their anger or at least to cool off the anger. If this fortunately happens within the waiting period of three menstrual circles at the end of which the husband is required to repeat the pronouncement the divorce becomes revocable. Resultantly, the domestic peace will be resurrected. To enhance and consolidate peace at home and to discourage divorce as well as to prevent hasty decision or foolish mistakes on the part of the husband in pronouncing divorce irrevocably, the Qur'an stipulates that the husband cannot thereafter re-marry the wife until after she must have married another husband and get divorced without any influence or instigation from the former husband.[200]

For the high premium placed on domestic peace, in each of the afore-mentioned stages in the process of divorce, the law of Islam recommends kind treatment, good conduct and full payment of alimony. It has been rightly observed by Sayyid Qutb that such recommendations if complied with, will calm down any rancour which may remain during the period succeeding divorce and it may on the other hand revive their mutual love, heal their wounds and help re-instate their family life with a high degree of domestic peace.[201] Within the purview of Islamic law, divorce is a safety valve which tightly contains the family in domestic peaceful condition until it becomes untenable, a perfect means of maintaining peaceful matrimony through compromise and constant chances for the spouses to assess their feelings towards each other and examine their errors and shortcomings of the past.

[200] See Surah Al-Baqarah (2):230.
[201] Ibib. P.38; See further Q. 2:231 and also see Surah At-Talaq (65): 1- 3.

Under the law, divorce is the most detested permissible act which can only be exercisable strictly on the basis of justified need and no need can be more justifying than the need to create, sustain or consolidate a genuine domestic peace in the family.

Contrary to the general notion in some other legal systems of the world, the law of Islam does not anchor peace in the home to monogamous kind of matrimony. Within the frame work of Islamic law, polygamy is considered to be another safety valve which operates only as a panacea to social ills. In accordance with the rules of Islamic law, it is meant to be a precautionary measure against lust and insecurity in the home. In certain circumstances the institution of polygamy is highly instrumental to revival of domestic peace. It is very obvious that all aspects of social behavior calls for legislative intervention to prevent reckless abuse of rights but for polygamy, this is not true because, it is a unique social institution which automatically regulates itself. It is seen by objective minds as a valid and time honored social institution which constitutes one of the cornerstones of domestic peace in the family. There is definitely a lot of misinformation about polygamy. To many opinion leaders and some legal experts in particular, polygamy is synonymous to bigamy.[202] The position in Islamic law is different. The Qur'an which is the principal and foremost source of Islamic law strengthens the social roots of peace by emphasizing the role of need based economy which in a way represents polygamy and vehemently opposing to greed based economy which stands for monogamy as introduced by Western legal system. For the procurement of domestic peace in a polygamous matrimony, Allah (S.W.T.A.) requires the husband not to exhibit his preference and love to one before the other. Allah directs in this regards as below:

[202] A crime of contracting another marriage while the first marriage is still subsisting. This crime under the English law attracts a penalty of 7 (seven) years imprisonment if theoffender is found guilty.

> *"You are never able to be fair and just between women, even if it is your ardent desires. But turn not away (from a woman) altogether so as to leave her (as if it were) hanging (in the air) ..."*[203]

The divine legislation contained in the above-quoted verse acknowledges the fact that no man can maintain true justice and fairness among his wives. However, it imposes a duty of maintaining domestic peace by not abandoning a wife completely or partially in the home; thereby making life extremely difficult for her. Should the contrary happen in any family of a husband of two or more wives there can never be domestic peace.

Polygamy as a lawful institution in Islam is highly instrumental not only to domestic peace but also peace in the society for it allows for different circumstances arising from life. The intent is to provide a logical solution to domestic and societal problems emanating from various inevitable shortcomings and injustices. Whereas, any form of redress of injustice is a path to genuine peace particularly domestic peace which will normally reflect in the larger society.

In a treatise presented by Ishaq Oloyede, a Professor of Arabic and Islamic Studies, he explained the concept of peace in Islam with the following words:

> *"In Islam, peace is not an abstract or artificial phenomenon. It is a real and actual substance, it is related "law and order". The only peace to which Islam mobilizes man is genuine peace, which is based on justice. Justice itself presupposes the existence of law, whether divine or human".*[204]

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[203] Suratul Nisai (4):129

[204] Ishaq Oloyede, ibid. p.5.

The baneful effect of injustice in a society is total absence of peace and tranquility and prevalence of commotion and series of armed conflict within the society. Therefore, understanding peace in society is a means of further and better understanding of the concept of peace under the Islamic law. The assumption of law in some social doctrines is that the relationship between individual members of a given society is that of conflict and struggle as well as the rules governing relationship between individuals and their governments is one of suppression and coercion. On the other side of the coin, the Islamic doctrine founded an Islamic society (*Dar-al-salam)* on the legal principles of friendliness, compassion and mutual co-operation for security and peace. The law of Islam provides that individuals and states should exist in a balance between rights and duties, gains and losses, with efforts and rewards. To experience real or true peace in a society or state, there must be a wider scope for laws beyond provisions for labour and production which will resultantly make a state a complete society devoid of class struggle and unnecessary social conflicts. Inevitability of materialism and class struggle can never surface in a social life governed by the Islamic laws as ordained by Allah. The laws of Islam which ensure comprehensive peace in the society are enforced on behalf of the society and the individual while the authority of the Islamic law is solely dedicated to absolute justice. Without prevalence of rule of law whereby all and sundry are equal before the law there will never be peace in the society. The law of Islam does not prefer certain individuals or classes to the detriment of the members of the lower strata of the society. Thus, the Islamic legal system is free of any prejudice in respect of self-interest or collective interest. Unlike other contemporary legal systems global-wise, the Islamic legal system is motivated to protect its subjects from injustice and lack of tranquility.

For one to fully comprehend the true concept of peace in society as presented under the law of Islam, it is necessary to know the means by which the ultimate goal of peace in society solely premised on absolute justice can be achieved.

4.2 MEANS OF PEACE IN ISLAMIC LAW

4.2.1 Love and Clemency

This is one unique way by which peace in a society can be achieved. Islam being a practical way of life makes man submissive to its laws by first appealing to his conscience and humanitarian feelings. In this regard, it reminds individual members of the society of their creation from single soul and awakens in them the awareness of their Creator, Allah to whom all and sundry shall ultimately return.

The divine universal constitution (i.e. the Holy Qur'an) succinctly present this facts in the following words:

> *"O mankind! We created you from a single pair of a male and a female. And made you into nations and tribes, that you may know each other (not that you may despise each other). Verily the most honoured of you in the sight of Allah, is he who is the most righteous of you."*[205]

It this kind of knowledge that all men are created by Allah and the awareness that all shall return to same source of their existence makes individual members of the society to incline towards clemency and tranquility and further make them responsible to laws instituted for the establishment of peace. Such people or nation would doubtlessly guarantee social justice (without which there can never be legal justice) and smooth management of society.

True to the divine words of Allah that all men are descendants of a single soul or person originally created by Allah; it logically follows therefore that their differences and social disputes of various degrees should disappear in the presence of the bond

[205] Suratul Hujurat (49): 13; see also Suratul Nisai (4):1

which unites all human beings regardless of their race, language and nationality. Since there is no single society in the entire universe without having combination of nationals of other nations, it becomes essentially necessary to observe the above-stated rules of unity by relegating to the very background the issues of race, language and nationality otherwise there will be no peace in the society. However, the bond of human fraternity is more felt by true believers than other human beings simply because of their common faith which Islam considers stronger than any other tie. This single brotherhood which breeds peace in the society and societal unity is enshrined in the Holy Qur'an.[206]

In supplementing the Quranic provision, the holy Prophet (S.A.W) is reported to have said: "The believers, in their mutual friendship compassion and clemency are similar to the human body. If any of its organs is ailing, the whole body reflects the ailment causing sleeplessness and fever". The holy Prophet (S.A.W) further exhorts the believers "not to hate each other, not to envy each other and not to wrangle with each other and finally he (S.A.W) said, "Oh servants of God, be brethren".

To perfect peace in a society, adherence to the Islamic law prescription of love and clemency is a primary requisite. As a matter of fact, exhibition of love and clemency is not restricted to human beings alone, it is extended to every living being on earth. The holy Prophet (S.A.W) explains this in parable when he narrated the brief story below:

> *"While a man was walking along a road, he felt very thirsty, coming across a well, he climbed into it, drank and when he climbed up, he met with a panting dog licking sand out of thirst. The man said to himself; there is a dog who is suffering from thirst I was. He then climbed down the well, filled his shoe with water, held it*

[206] Suratul Al-Hujurat (49): 10; see further Suratul –al-Hashr (59): 10

in his mouth, came up and gave the dog a drink. God thanked him for it and pardoned his sins. A companion asked him: 'O Apostle, shall we be rewarded for the good we do to animals? He answered: Yes, there is a reward for (good done to) any living thing"[207]

Attaining this universal compassion with love is a unique goal that can only be achieved through unity of all living beings and profound belief in the oneness of the Creator of all beings.

4.2.2 Social Behavior

The law of Islam embodies certain rules to govern a Muslim's personal and social behavior. Its intent is to foster love in the heart of man. The said rules are the primary methods of attaining peace before laws and legislation were resorted to. Confidence, leniency as well as contentment in the society are the effective results of good behavior. Vanity, pomp and haughtiness are out-rightly condemned by the divine legislation where it is provided that:

"And swell not thy cheek (for pride) at men nor walk in insolence through the earth for Allah loves not any arrogant boaster. And be moderate in your pace and lower thy voice for the harshest of sounds without doubt is the braying of the ass"[208]

The above-legislation portrays pride, haughtiness and pomp as detrimental elements to peace and unity while on the other hand it implies that peace in Islam is fundamental and dominant.[209]

Peace under the law of Islam is conceived as a sure means of promoting human dignity, achieving equality and a way to enjoy universal brotherhood. This is what makes the law of Islam compatible with human nature. It denounces the

[207] Quoted in Sayyid Qutb's 'Islam and Universal peace', ibid p.47.
[208] Suratul Luqman (31): 18 – 19. See further Surah Al-Isra (17):37.
[209] Hammudah Abdulati, ibid. p.37.

insolent, repels the ostentatious and destroys the cornerstone of the pretentious and vain glorious; thus thereby lays the solid foundation for peace in the society.

The Islamic legal perspective of peace in the society opposes any form of threat to peace. In this respect, other aspects of individual's personal and social behaviour that is capable of displacing any kind of threat to societal peace include prohibition of anything that infringes upon human dignity, upholding and protecting human feelings and values, maintaining meaningful good relations among people through courteous greetings. Forgiving the wrongs of others and controlling one's anger and exhibition of high degree of kindness and leniency constitute principal components of individual's social behaviour to proffer peace in the society. This is one way by which the social atmosphere can be purified to foster peace and friendship in the society.

4.2.3 Solidarity

The link of individual to his society is solidified by the Islamic law through imposition of mutual obligations on both for the common welfare, individual's freedom and societal stability. The Islamic system requires the cooperation and genuine solidarity for attainment of peace in the society. The holy Prophet of Islam is reported to have said:

> *Everyone of you is a steward and is accountable for that which is committed to his charge. The ruler is a steward and is accountable for his charge, a man is a steward in respect of his household, a woman is a steward in respect of her husband's house and his children. Thus, each of you has a responsibility and must account for it".*[210]

[210] Imam Nawawi, "Riyadh as-Salihin, Trans. By Muhammad Zafrulla Khan, 1406 A.H. (1980), Beirut, p.180.

In essence, the above-quoted prophetic tradition depicts the legal obligations of responsibility imposed on every member of the society in order to achieve non-hostile but peaceful co-existence and genuine peace in the society. It reveals an existing fact that a peaceful society must have in place an effective mechanism of "check and balances". Such mechanism becomes necessary so as to protect a united and peaceful society from coming to an abrupt end. The greatest Interpreter of the divine universal constitution in person of Prophet Muhammad (S.A.W) distinguishes those who obediently observe Allah's orders and those who violate them with impunity in the following parable:

> *"The case of those who observe the limits set by Allah and those who do not care about them is like passengers on a ship who cast lots to determine who should occupy the upper deck and who should be on the lower deck and disposed of themselves accordingly. Those who were on the lower deck passed through those of the upper deck whenever they had to fetch water. So they said to the occupants of the upper deck: if we were to bore a hole through our part we would not have to trouble you. Now, if the occupants of the upper deck were to leave the others to carry out their design they would all perish together; but if 'they were to stop them from carrying if out they would all be saved"*[211]

Without concerted efforts of all in a society, peace in the society which envelopes safety, unity and stability will for ever remain a dream. Those that are placed in a vantage position by virtue of knowledge, wealth and even of spiritualfacilities are required under the law of Islam to employ the vantage position to protect, guide and properly maintain the weak and less-privileged members of the society.

[211] Imam Nawawi, ibid. pp. 128 – 129.

For the society to experience genuine peace, usury and monopoly which constitute the basis for hatred, hostility and disunity in the society are forbidden under the Islamic law. It makes it a duty for the Muslim society to sustain and protect the weak. The orphans must not be treated with harshness nor the petitioner be repulsed.[212] The indigents must be fed and possibly be provided with means of marriage.[213] It is in the light of this *de-facto* that Allah (S.W.T.A) the supreme law Maker commands in the Qur'an as follows:

> *"And hold fast all together by the rope which Allah stretches out for you and be not divided among yourselves and ..."*[214]

Absolute submission to Allah which is considered vital to the Islamic Lawl concept of peace is the common desire in a Muslim society. The obedience to Allah (S.W.T.A) is a magnetic force which attracts the individuals in a society to hold themselves in unity and thereby create a peaceful society. Cooperation and solidarity are therefore a major way of conceiving true peace in the society.

4.2.4 *Achieving Life Ambition*

The conventional concept of goals of life is the respective dreams of individuals in life. It is the over-zealous and reckless pursuant of life ambition that often lead to restlessness which in most cases is the consequence of suppressed energy that cannot find an outlet within a narrow range of activity. Nevertheless, Islam through its unique legal system fosters peace in society by compelling the individual and his society to move out of their shell of self-interest and widen their areas of involvement. There is bound to be hostility, unrest and conflicts of different form in the society as long as hopes thin out, goals in life dwindle and when self

[212] Surah Al-Duha (93): 9 – 10.
[213] Surah Al-Maun (107): 1 – 5.
[214] Surah Al-Imran (3):103.

interests, national interests or collective interest become the sole aim of all and sundry in the society.

The individual is allowed under the law to involve himself in communal or public life and to eschew class or/and national prejudices for the unity and peace of the universe.

Therefore the society and individual do not exist for themselves but for humanity and its future. Humanity and its future as indicated above depict peace in the society which provide assurances of achieving life ambition for the individuals at the lower ebb of the social strata. The society is ordered under the Islamic law to rescue the weak. It is thus stipulated that:

> *"And why should ye not fight in the cause of Allah and those who, being weak are ill-treated and oppressed? Men, women and children whose cry is: ..."*[215]

In the light of the above-stated Quranic provision, the weak and ill-treated individuals are to be assisted to achieve their Islamic goals and life ambitions. Unlike any other systems, the law of Islam does not only entrust the individual and his society with these responsibilities, it also provides a constructive outlet for their energies and promotes good judgment by facilitating the execution of the responsibilities. Ultimate goals of life if genuinely pursued and achieved by individuals and the society at large, then there will be a perfect reflection of the Islamic law concept of peace.

4.2.5 *Act of Governance*

Having discussed the human values upon which the Islamic law founded social peace, another one value of undeniable significance in relation to the Islamic legal concept of peace in the society is the political system under the said law. The

[215] Surah Al-Imran (3):103.

Islamic socio-political principles integrates obligatory and voluntary acts in such a way that every individual in the society is commanded by law and urged to contribute more than what the society lawfully requires of them to establish social peace. The Muslim nation of Islamic society is governed by means of a legislative-cum-judicial system which produce peace through guarantees of security, social equilibrium and livelihood. Peace in the society is enhanced by the relationship between the ruler and the ruled. This type of relationship is clearly defined under the law of Islam as that of justice and contentment. Where this type of relationship exists between the Government and the governed, the style of governance would be based on popular consensus, free choice and proper application of the divine laws as prescribed by the Most Supreme law Maker – Allah (S.W.T.A.). In this system of governance, it is definite that high confidence will be promoted in the citizens and peace will be created in the society. There will be no room for unnecessary and excessive complaints. Similarly there will be no grounds for revolt, simply because the society is being governed with divine legislations of Allah (S.W.T.A).

The rule of Islamic political system is that of consultation which allows for collective participation in governance which in turn leads to creation of peace in the society. The Quran describes Muslims as those "who conducts their affairs by mutual consultation".[216] In the Islamic political system, the divine laws of Islam are to be applied equally to all categories of people in the society. This is the true "due process of law" whereby law is no respecter of anyone. A society wherein all are equal before the law is bound to have genuine social peace. The Muslims are commanded to strive against whosoever fails to apply the law revealed by Allah and not to accept any rulers who betray their pledge to obey Allah and His Apostle.

[216] See Q. 42:38 & Q. 3: 159.

As a matter of fact, allegiance to the ruler in Islamic society largely depends on his fidelity in adhering to the Islamic laws. The holy Prophet Muhammad (S.A.W) instructed the Muslims in a nation of Islam in the following words:

> *"Obey the ruler even if he is a black slave as long as he applies the book of Allah".*[217]

In the same strength, Abu-Bakr (R.A) the first Caliph who succeeded the Apostle of Allah (S.A.W) as leader of the Muslim nation or commander of the faithfuls (*Amirul Muminina*) on his appointment after taken oath of allegiance from his people said:

> *"I have been made a ruler over you though I am not the best of you all. If I do the right support me if I do wrong, then put me right. Truth is a trust and falsehood is a breach of that trust. ... obey me as long as I obey Allah and His Apostle; but if I disobey them, then I shall have no right to claim your obedience''.*[218]

With these words coupled with the prophetic tradition quoted above it is clearly established that both the ruler and the ruled are equal before the law as far as the Islamic system is concerned. Within the purview of Islamic law, the system governs both the society and individual, making peace between them, providing allowance for freedom of choice within the limits set by the law. Furthermore, the Islamic system promotes conscientious participation, and sincere loyalty. It is a unique system in which genuine peace in the society can be perfectly realized.

4.2.6 Legal Justice Assurance

Guaranty of legal justice is another spectacle by which concept of peace under the Islamic law can be viewed. In the government of Muslim society, justice is derived from law itself. Therefore, there cannot be social justice without legal justice. When these two forms of justice are not found in any given society, social peace can

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[217] See Sahih Al-Bukhari, summarized and trans. By Muhammad Muhsin Khan, Maktaba Daru-salam, Riyadh, 1418 A.H. p.1024.

[218] Mohyidin, B. A., Islamic Religious Studies (History), Continental Book Centre, India, 1981, p.69.

never be achieved in such society. However, the law of Islam which is free of all bias because it is ordained by Allah the supreme Law Giver; is the only method by which absolute justice (both social and legal) can be realized. As a pre-requisite for peace in the society, justice be it social or legal must be properly and sincerely administered by those assigned with the responsibility. Absolute justice in accordance with Islamic legal system implies integrity and good conscience.

Every individual in the Muslim society is duty-bound to prevent injustice, to admonish the ruler when necessary and to counsel the judge whenever he errs. According to Ishaq Oloyede,[219] Allah (S.W.T.A) emphasizes in various verses of the Glorious Qur'an that He is a just God who will neither do injustice nor condone it. Thus, He the Most High provides *Sharia* – Islamic Law for man to regulate the relationshipbetween man and his God, the sole Creator of the universe as well as the relationship between man and other creatures of God. It is pertinent to note here that the observance of such rules is *sine-quanon* for absolute peace not only in the society but in the entire global community. Hence, God has delegated to man the right to make regulations among themselves for social peace to prevail in human society. Thus, it is categorically stated in the Qur'an that:

> *"To each among you (Jews, Christians and Muslims)*
> *have We prescribed a law and open ways".*[220]

With this Quranic provision, man is given a leeway to make laws or rules in anticipation of regulating his relationship with fellow members of the society which will eventually lead to lasting peace in the society. Such delegated authority must be exercised within the purview of the divine law. That is to say that validity of any law made by man as bylaws to the divine legislation largely depends on its consistency

[219] Ishaq Oloyede, ibid, p.5.
[220] Surah Al-Maidah (5): 48.

with the divine law (Islamic law). The verses of the Quran in relation to justice are quite explicit. In the 4th chapter for instance the Muslims are commanded as below:

> *"O ye who believe! Stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether .... Follow not the lusts of your hearts, lest you swerve, and if you distort justice, Verily Allah is well-acquainted with all that you do".*[221]

The Muslims are directed in the above-quoted verse to ensure that social justice is maintained as well as legal justice. Social justice in the sense that "standing out firmly as witness for Allah" regardless of whosoever is the defendant even against oneself. The history of Islam has recorded remarkable and innumerable examples of absolute justice of Islamic rule which were responsible for true absolute peace in the Muslim society of the past.

The case of theft of war shield belonging to the then Commander of the Faithful in person of *Sayyidina* Ali (R.A) is one of such historic instances in relation to absolute justice. Ali (R.A) the fourth caliph in Islam found his missing shield with a Christian and immediately took him to Shureih (R.A), the judge. Ali who was the plaintiff claimed: "This is my shield which I never sold or gave to anybody". The presiding Judge asked the non-Muslim defendant: "What do you say about the caliph's claim?" The defendant responded: "This is my shield and the caliph is lying". The Judge addressed Ali thus: "O Caliph, have you proof of ownership?" The *Amiril Muminina* smiled and said: "I have no proof. The Judge then gave his verdict in favour of the Christian who walked away with the shield. He had only taken a few steps when he turned back to Ali and said: "I declare that such are the rulings of Prophets. The caliph sues me in the court of his judge who gives his verdict against him! I hereby

[221] Surah Al-Nisai (4): 135; See further Surah Al-Maida (5): 9 &45.

declare that there is no God but Allah, and that Muhammad is His servant and Apostle. The shield is yours Caliph. I followed the army after the battle of Siffin and the shield dropped from your camel. The caliph Ali (R.A) answered: "Now that you have embraced Islam, the shield is yours".[222]

Another instance in the same vein is the decision of Abu Yusuf (R.A) during the Abbasid Caliphate when a man sued the Abbasid king in person of El-Hadi in his court. The ordinary citizen who was the plaintiff in that case claimed that the king was exploiting his orchard. The Presiding Judge heard the king's testimony. Abu Yusuf, the Judge was convinced by the evidence before him that the plaintiff's claim was right and gave his verdict in favour of the poor man and thus returned the orchard to him.[223]

This is the way social peace can be felt by individuals in the society. When the citizens' confidence in the government is high; being conscious of the fact that their law is divine, unbiased with social justice exhibited as they and their rulers have equal legal rights being subjects to the same laws and above all that those charged with administration of justice are God-fearing, then the individuals are definitely at peace in a secured and just society.

There can be no peace in the absence of security. Society itself cannot function effectively when its individual members feel unsafe and insecure. Thus, guaranty of security whereby social peace is insured through proper application of divine laws are also condition- precedent to peace in the society. The topmost of these guarantees is the preservation of life. The Quran prohibits unjust killing as it states unequivocally that:

[222] Majid Ali Khan, The Pious Caliphs, Ed. syed A. Husainm Diwan Press. P.231.
[223] See Sayyid Qutb's Islam and Universal Peace at p.56.

"And do not take the life which Allah has made sacred except for just causes ..."[224]

This guaranty covers every human being regardless of faith, race or colour. Under the law of Islam life is sacred and it can only be taken for three reasons in accordance with the sayings of the Apostle of Allah. These genuine reasons which can be regarded as 'just cause' mentioned in the above-quoted Quranic verse are: Murder, Adultery, and Apostasy.

This guaranty is inevitable for peace in the society to become a reality as every sound individual has an interest in establishing social security. Perhaps this is why such guarantee is left to human discretion or to threats of damnation. Allah (S.W.T.A) left no stone unturned in this respect as He, the Most High has unambiguously specified these guarantees when He allowed retaliation for intentional killing. In the Islamic legal system, for murder case justice calls for the life of the murderer, and in case of wounds, the infliction of like wounds. It is on the basis of this rule that the principle of reciprocity or retaliation was introduced in the law of Islam in the following divine words of Allah:

> *"O ye who believe, the law of equality is prescribed to you in case of murder; the free for the free, the slave for the slave, the woman for the woman ...."*[225]

In giving credibility to divine legislation above, the Apostle of Allah says:

> *"He who kills his slave, we shall kill him and he who cuts the nose of his slave we shall cut his nose".*[226]

Furthermore, under guarantees of security is the guaranty of privacy. Therefore, spying, back-biting and speaking ill of each other are all prohibited under Islamic law.[75] Though there is no specific penalties in the Quran for such crimes but through other principal sources of Sharia the Islamic jurisprudence prescribes punishment and

[224] Surah Al-Isra' (17):33 & See further Surah Al-Maidah (5): 35.
[225] Surah Al-Baqarah (2):178 & See also Q.4:92.
[226] Sahih Bukhari Collection.

permits the judge to decide according to circumstances of the matter before him. The glorious Quran stipulates that:

> *"The punishment of those who wage war against Allah and His, and with might and main for mischief through the land is: execution, or messenger crucifixion, or the cutting off of hands and feet from opposite sides or exile from the land: that is their disgrace in this world and a heavy punishment is theirs in the hereafter".*

Mischief on land is another description of non-peaceful atmosphere or hostility in a society. It is a great crime against humanity as it is capable of destroying social peace and high tendency of leading to armed conflict that may also probably bring a society to an end. To prevent this capital offence as implied in the prescribed punishment above, the Islamic legal system offers guarantees of security by which spying on others, backbiting, speaking ill, slandering and perjury as well as suspicion are forbidden; thereby bringing absolute peace to the society.

To maintain perfect social justice so as to achieve absolute social peace in the society, the law of Islam calls for reasonable extra-ordinary caution in inflicting punishment on accused person. For instance, in a case of adultery, four stable, sincere and fair witnesses are required to secure conviction. Moreover, a penalty of eighty stripes is the punishment for false witnesses who wrongly accuse chaste women and fail to produce four witnesses required in adultery case.

Even, a self-confessed culprit in a criminal case of that magnitude cannot be punished if the accused made the confession under any constraint. That is to say, such confession must be made freely without any compelling influence.

It is related that one Malik ibn Ma'iz came before the Apostle of Allah one day and requested him to punish him for committing adultery. The Apostle refused his confession, therefore dismissing his request three consecutive times. Despite of the

man's voluntary confession, the messenger of Allah exercised great caution by rejecting and dismissing the confession-cum-request three consecutive times and on the fourth one, the Messenger still asked if the man was insane or drunk and he responded that he was sound and sober. The Apostle of Allah had to ask him for the sake of confirmation – "Have you truly committed adultery? The man answered in affirmative and thus the verdict was pronounced as there was no doubt about his confession.

A legal system like that of Islam which discourages hasty infliction of punishment on self-confessed culprit will no doubt produce a peaceful society completely devoid of hardened criminals, hostile individuals and possibly armed conflict. To put away these unsocial features and establish a regime of peace in the society, those charged with the responsibility of administration of justice must always [227]avoid rushing into verdicts and quick execution of the court's decisions must be avoided. As a point of law, the Islamic system in order to sustain a peaceful society, nullifies an established guilt of an accused person who is compelled to commit the crime. It is in conformity with the Quranic texts that 'compulsion voids guilt'. It provides thus:

> *"But if one is forced by necessity without willful disobedience, nor transgressing due limits, then he is guiltless for Allah is oft-forgiving, Most Merciful"*[286]

In a case of theft brought before the second Caliph of Islamic nation, Umar Ibn Al-Kattab, penalty for the crime was not applied. The facts of the case are that some servants of a well-known merchant called Hateb Ibn Balta'a stole one of their master's camels. Umar (R.A) the commander of the faithfuls discovered that the master who was the complainant in the case was not providing his servants with food.

[227] Surah Al-Baqarah (2) : 73

The caliph did not only refuse to punish the offenders but also imposed on the master double the price of the stolen camel. The considered opinion of

Umar in this matter is that the servants were compelled to steal and so they were pardoned and set free.

From the foregoing, it is now better understood that it is only through sincere application of the divine law that peace in the society can be promoted.

All personal and social guarantees of human rights to life, property, honor and justice are secured for the individuals by the society. With these, social peace is made easy to achieve.

4.2.7 Social *E*quilibrium

This is a process of comprehensive social justice which guarantees every individual adequate standards of living; whereby peace is established in the society.

As it is generally known that imbalance of wealth leads to a number of social ills not the least of which is discontent in the poor segment of the society, it is therefore inevitable for government to properly apply the principles of social equilibrium. The application of the said principles in non-Islamic societies has been proved to be unsuccessful due to improper and partial application. Consequent upon this was a partial and incomplete remedy for economic imbalance. This in turn leads to elimination of absolute peace in the society. In the Islamic system, social equilibrium is simply discerned in its legislation, in its judicial structure as well as its social security sector. It is in the light of this background that the Islamic legal concept of peace can be illuminated.

The first principle of Islamic social equilibrium is that the poor individual members of the society should not be exempted from circulation of wealth scheme. It is one principle that is explicitly mentioned in the Quran when Allah (S.W.T.A) says:

"... in order that it (wealth) may not merely make a circuit between the wealthy among you".[228]

The principle was applied by the Apostle of Allah (S.A.W) when distributing all the spoils collected from Bani El-Madhir; and since then, it became an established rule in Islamic law. It is related that the Messenger distributed all the spoils among the needy Meccan emigrants (*Muhajirun)* and only two Medinites (*Ansar)* who were as poor as the Muhajirun. The idea of the Prophet (S.A.W) was to balance the two Muslim groups; the Muhajirun and the Ansar.

Prior to the assassination of Umar Ibn Khattab, the second caliph of Islam, the principle as implied in a plan he intended to implement. He had declared before his demise that he would take the excess wealth of the rich and re-distribute same among the poor. He even stated further that such a similar policy which he had not implemented before would be followed in the future. No one raised any objection against Umar's declaration because he was well-intended to ensure equal distribution of public wealth. However, he did not live to execute this impressive plan.

Along the same line, another principle of social equilibrium in Islamic law is the prohibition of usury. The law of Islam recognizes the fact that profit fluctuates depending on socio-economic circumstances. However, usury is not subject to the fluctuations which regulate profit as usury is unrelated to labour. The philosophy behind this principle of usury is to bring under control the rate of inflation in the society which is the consequence of increase of money in a ratio that is neither connected to labour nor profits as it is the case of a capitalistic system.

Legal prohibition of usury prevents the rich class of the society from multiplying their fortunes by taking advantage of the needy through exertion of interest on loans. It is

[228] Surah Al-Hashri (95): 7

obvious that the wealthy members of the society want to get richer and the surest way to gain more legally is either to invest with high risk or engage in partnership with a poor person who is ready to work for a share of the profits. As for usury, it has no place in this kind of transaction so as to pave way for absolute social peace in the society.

With this principle of prohibition of usury, in an Islamic realm (*Darul-Salam)* there is no benefit in depositing money in the bank because it would not yield any interest and perhaps it may even decrease because the banking institution in such Muslim society are allowed to deduct cost of services rendered otherwise known in modern terms as C.O.T.

Anyone in this kind of system would be compelled to invest and re-circulate the capital thus promoting general welfare and socio-economic equilibrium which will ultimately bring about the much needed peace in the society.

Monopoly and avaricious concessions are also prohibited under the law of Islam. This is another principle of social equilibrium under the divine law of Islam. Monopoly induces unregulated power in the hands of the monopolists either *De-Jure* or *De-Facto.* Such power is used by the monopolists against the interest of the society in general and the interest of the consumer in particular because it exploit the people's needs for certain commodities that are not available elsewhere except from the monopoly whose policy is to make enormous profits to the detriment of the society. The monopolist in most cases is in a vantage position to control the government through corrupt practices which ought not to be because it is the government that is supposed to control him. A good case in mind is the monopoly of the petroleum industry in Nigeria, where the independent marketers and government agencies enjoy absolute monopoly with unrestricted avaricious concessions. According to "The

Guardian"[229], the Federal Government (of Nigeria) had on June 20 announced new prices for petroleum products raising the cost of petroleum from ₦ 26 to ₦ 40 per litre and those of diesel and kerosene from ₦ 26 and ₦ 24 respectively to ₦ 38". The excuse of the government is that the increase in price was premised on Government policy of liberalization and deregulation of the oil industry. This ungenerous and socially detrimental policy only resulted to nationwide strike action embarked upon by the Nigeria Labour Congress under the leadership of Adams Oshiomhole. The strike action which lasted for over one week caused the Nigerian populace a great deal of hardship, loss of lives, discomfort and series of conflicts. The losses of the petroleum industry as a result of the strike action was estimated to about ₦150 million. The crux of the matter is that the monopolists of the Nigerian oil industry control the monopoly or avaricious concession *defacto* or *dejure* to a greater extent that they have greaterinfluence on the government of the day when it comes to matters of petroleum products. The monopolist's political expenses are passed on to the individual members of the society through price increase as it was in the above-cited Nigerian case. Similarly, when artificial scarcity of fuel or any of the petroleum products is created deliberately by the monopolists, the individuals would be willing to pay high prices for necessary but very scarce items. For example, a five litre gallon of petroleum which ordinary goes for ₦ 200.00 at ₦ 40.00 per litre in the filling station was being sold for ₦ 1,500.00 and even more than that in some places during the crisis. In a society where principles of social equilibrium are not applicable, there can be no regime of absolute social peace. In that circumstance, the monopolist has the power to upset the economic and social equilibrium through control of supply and

[229] July 8, 2003 Edition, p.1

demand. Perhaps to discourage monopoly and avaricious concession, the holy prophet (S.A.W) is reported to have said:

> *"The truthful and honest merchant shall be with the prophets, with the standard bearers of truth and with the martyrs".*[230]

Other principles of social equilibrium in Islam include public control of public utilities which in modern terminology referred to as public resources. These are the resources or utilities that are commonly owned by the entire individuals of the society. These resources are considered to be essential to life and are equally regarded as joint property of the society. Examples of such resources include water, pastures, mineral resources, ores and petroleum. Any of these resources according to Maliki School of jurisprudence, if privately owned still remains the government's property. That is, they are the common property of all and sundry in the society.

With the common ownership of certain public utilities, the government is made responsible for the control of such joint property. Howbeit, the government therefore should set up price control machinery to ensure that these public resources are made available to the common man in the society. With such price control machinery in place, monopolist power would be broken, civil unrest and anarchy in the society would be banished while the unity, love and peace will be enthroned. Hence, correct conception of absolute social peace will be better understood.

It is pertinent to note that the Islamic idea of common ownership of public utilities should not be mistaken for socialism. Reason being that socialism is an ideology which violates the human right of private ownership. Whereas private proprietorship is essential to the Islamic socio-economic order. A situation where everything belongs to government, the few privileged individuals whose lifestyle would by virtue of their being government officials be more comfortable and enviable if compared with that of

[230] Abdul-Rahim A. F, 'The 200 Hadith' 4th Edn; 1990, pp.162-163

the less privileged individuals. It is very obvious that class distinction will be created and the unpleasant results will be unhealthy rivalry, discontent and unrest which in most cases lead to armed conflict within the society.

The law of Islam guarantees the individual the right to own property if he is capable. Private ownership insures the individual of his rights over the society because of the reality of life which is the fact that man will ever remain in bondage as long as his sustenance is determined by the society/state. The legal system of Islam takes cognizance of this position and it therefore puts in place a unique system of taxation whereby Islam taxes the wealth of the rich and distributes it equitably among the poor. Private ownership as practiced in Islam guarantees the poor their freedom. The tax on the members of the society as imposed by Islam emphasizes the common ownership of the society's wealth without inflicting injury on the right of individuals to privately own property or otherwise. It is the duty of the government to guarantee this right of private ownership for the rich and poor alike.

Without social equilibrium, the society will know no peace particularly if it is society where extravagance with luxury prevail. Hence, prohibition of extravagance and luxury is a principle of social equilibrium by which concept of peace under the law of Islam can be understood. In an Islamic society a life of privation is not allowed. On the contrary, Muslims who have the financial capability to enjoy all the permissible pleasures of life and the system condemns those who prohibit or dissuade others from such enjoyment. Despite this, the same system disapproves of extravagance. It is in relation to this disapproval that Allah (S.W.T.A) directs the sons of Adam to *"wear your beautiful apparel at every time and place of prayer. Eat and drink but do not waste by excess, for Allah loves not those who waste resources"*[231]

[231] See Surah Al-Araf (7): 31-32

Extravagant behavior of individual is a catalyst for emergence of discovery, which is also condemned in Islam. It corrupts an individual's physical and moral constitution as well as their social structure. Luxury and extravagancy have been responsible for the decadence of nations of the past. Prior to the divine decision of Allah to destroy a socially decayed nation, definite order would be rolled out to the people therein. The Qu'ran states:

> *"When we decide to destroy a population, we first send a definite order to those among them who are given the good things of this life and yet transgress; so that the word is proved true against them; then we destroy them utterly"*[232]

Going by the provision of the holy Quran stated above, one may be correct to hold that the rich in the society derive their excess wealth from other remunerated labour and unwarranted profiteering from the consumer.

This resultantly explains the fact that extravagant wealth causes resentment, which dissipates the social peace; causing social discard among the underprivileged and deprived individual members of the society their fundamental rights. Certainly, such extravagant wealth encourages the rich to indulge in licentious behaviour. It is in this regard couple with the fact that excessive wealth promotes dissension and decadence that the Muslim society applies the principles of precautionary measure by which means of acquiring extravagant wealth are prohibited in order to perfectly maintain social equilibrium which is an essential factor to social place.

Other principles of social equilibrium under the law of Islam include precautionary measure to check hoarding which is a contributory factor to the destruction of the society. Hoarding therefore is a public affair matter that could not be confined to Allah's penalty in the hereafter. Several portions of the Glorious

[232] Surah Al-Isra (17): 16.

Qu'ran 82 prohibit hoarding just as the holy Prophet Muhammad has prohibits it in the following words:

> *"He who collects a dinar or dirham, gold or silver without setting it aside to be spent in the cause of Allah, he is a miser and shall be punished in the hereafter."*[233]

A prophet of Islam (SAW), by his above stated tradition has taught the world that unutilized wealth is highly detrimental to peace in the society.

In order words hoarding of valuable like money, gold, silver, articles of merchandise and the like is a contributory factor to the destruction of a society that belongs to all. Therefore, it is prohibited in the society.

Similarly, legitimate ownership and *Zakat*, which coincidentally is the fourth pillar of Islam, are principles of social equilibrium theory in Islamic law. As much as the law of Islam recognises the right of individual to lawfully owns property which precisely implies private ownership, it equally impose payment of poor due which is *Zakat* on the individual.

As a matter of fact, the Islamic legal principles in relation to private ownership of property are moderate and are all in conformity with human nature, protecting the individual and society at large against class friction. One of the principal ways by which individual's right to private ownership of property and wealth is regulated by the institution of *Zakat*.

The essence of this is to bring about an effective balance in the social equilibrium, which in turn will guarantee peace in the society. According to Sayid Qutb, *Zakat* is an annual levy of 2.5% on total assets or actual capital[234].

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[233] See Muhammad M.Khan's 'Summarized Sahih Al-Bukhari (Arabic English), Maktaba Dar-US-Salam, Riyadh, 1417AH (1996), p. 984.

[234] Sayyid Qutb, Ibid, p.66

Collection of this *Zakat* is considered as state's responsibility. Therefore, it is the states that impose it, collect it and decides its distribution among the poor and needy or decides its public expenditure, which will greatly relief the poor individual. For instance, such public expenditures, which must be within the purview of Islamic law, include educational purposes like schools, students' books and of course Teachers salaries and students food etc. Through *Zakat* there will be social peace.

The poor will sincerely be at peace with the wealthy class. The rich will be secured in the hand of the underprivileged and the poor. *Zakat* should not be seen as charity rather it is an institution within the Islamic legal framework or in other words it is a universal due which depicts a global legal instrument of social peace.

To effectively institute social peace, every society must have a set of laws for regulations of its relationship and affairs as well as to enhance its unity. However, such law cannot perform these functions without people's readiness to obey the law with high confidence in government. It is also required that the people must have to respond to its authority with strong conviction that the law will defend their interests. Law is the sole instrument of peace and order in the society. However, people disobey law for three factors, which are discontent, possible conflicts and civil unrest in the society.

Unjust law is the first factor that is responsible for people's disobedience to enacted law. When a law is enacted to uphold or protect the interest of a particular individual, or group or class of people at the expense of the general and common interests of majority members of the society. In such circumstances those that suffer deprivation and exploitation are naturally bound to disobey the unjust law; more so when their exploiters live luxuriously in affluence. Since they are in majority, their reaction is capable of depriving the society of absolute social peace.

The second factor is the incompatibility of the law with the society's conditions and expectations. In a situation like this, people do not feel that the law is pertinent to either individual or social circumstances. Hence, the law will be recklessly violated with high grade of impunity.

Once there is a feeling of estrangement between the spirit of the law and that of the society to which it applies, it naturally follows that such law will be rendered impotent. Where law and order is of no effect, anarchy, conflict of various kind and un-peaceful atmosphere will prevail.

The third and the last factor is the arrant violation of the law informed by the desire of some individuals to bolster their egos by showing off. Their desire for recognition are achieved only through violation of laws enacted by an unsympathetic individual, institution or class of people who tend to enforce their authority by subordinating social institutions to their interests.

It has been established convincingly that no man-made law is free of these afore-mentioned flaws, especially the first and the third, both of which are transparently reflected in almost all the secular laws known to mankind. The only law that has successfully divested itself of these flaws is the divine law of the Muslim society. This explains why social peace in its true sense is properly instituted by the Islamic laws which greatly influence the realization of absolute peace in the society. The facts as indicated in legal history of the world is that all codes of law, ancient or modern, are deficient in one way or other while the Islamic divine legislation is the only complete and unadulterated law. In the Islamic system, Allah is the Supreme legislator whose divine law survive all times or generations.

Thus, the Supreme Law Maker has no reason for favoring an individual or class because all belongs to Him on equal basis. Moreover, in the contemplation of Islamic legislation, every living human being is regarded as subject to the law.

Resultantly, class consciousness simply does not exist within the purview of Islamic law in the Muslim society. Every individual have equal rights and obligations with others under the law. No preferential treatment nor is there any class conflicts. When the Islamic laws are fully implemented in a society, there will be no class discontent and no rebellion to assert either individual or class identity or supremacy.

The only positive consequence will be absolute social peace that will make the society a better place of abode for all. Social balance and justice will be achieved.

All the above-discussed theories and principles are the means of understanding as well as assessing peace in Islamic Law.

The questions to be treated in winding up the discussion on this first segment of chapter five of the present work are what does *Darul-Salam* (i.e. Nation of Islam) stand for? And if going by the Islamic law concept of peace what precisely is the position of Islamic law in an armed conflict or war where a conflicting party is vehemently opposed to peace movement?

The Islamic state or Muslim society is a nation of peace whose obligations include first and foremost instituting peace and unity in the society. The general Islamic perception of life indicates that it considers life as an integrated unity.[235] This general Islamic view confirms the unity of the entire humanity, unity of religion and of believers. It is in the same strength that Islam is confirmed as final and complete religion, it further confirms the preceding revelations or scriptures. Thus, in accordance with this general Islamic outlook, the Muslim society or *Darul-Salam* has

[235] See Surah Al-Baqarah (2): 28

the sole responsibility towards humanity by achieving peace on earth within the Muslims themselves and at their respective homes and the society in general. Peace is the type based on recognizing God's oneness and omnipotence, on instituting justice, equality and liberty as well as on achieving social equilibrium and unity. All that the Islamic society stands for is peace.

It is important to note that there is no relationship between peace and violence. While violence is empirical as a social and political phenomenon; peace is ideological. The holy Quran, while permitting violence in some inevitable circumstances ordain peace as a norm.

That is the prophet (S.A.W) himself a state man of note who will forever remain the best model for statesmen as far as the ideological institution of peace to humanity is concerned.

The Islamic state or nation of Islam stands for peace and peaceful society at all periods of time. Whenever any struggles involve Islam as a religion, Muslims or the Muslim society shall always be considered as "upholders" of peace and justice.

To millions of Muslims, Islam is a great source of inner peace. There is no difference between non-Muslim society like American society bombing countries of weaker military forces in the name of democracy and human rights and a Muslim society like Iraq committing acts of violence and terror in the name of Islam. How does it matter if the people are killed in the name of Islam or in the name of democracy and fundamental human rights? What the Islamic nation offers is pure and absolute peace. *Daru-as-salam* stands for peace.

One must therefore learn the difference between ideals and their use and misuse by some vested interests or frustrated people in order to have better understanding of what *Daru-as-salam* or nation of peace stands for.

As for the question relating to position of Islam in a situation where one of the conflicting parties declines peace moves; the law of Islam has already taken care of that. The Quran providesthat:

> *"If two parties among the believers fall into a quarrel, make ye peace between them; but if one of them transgresses beyond bounds against the other then fight ye all against the one that transgresses until it complies with command of Allah ..."*[236]

Abdullah Yusuf Ali in his opinion as indicated in the footnote[237] to the above-stated Quranic verse, holds that individual quarrels are easier to compose than group quarrels or in the contemporary world national quarrels. What he is saying precisely is that it is less difficult to bring about peace among individuals than among groups or nations. He however stated that collective community of Islam (Muslim society) should be supreme over groups or nations. According to him such nation of Islam or Muslim society would be expected to act justly and try to compose quarrel for peace is better than fighting. If one party is determined to be the aggressor, the whole force of the community is brought to bear on it. The essential condition of course is that there should be perfect fairness, justice and respect for the highest principles; for Islam takes cognizance of every just and legitimate interest without separating spiritual from temporal matters. The great Quranic Interpreter concluded his view with reasons why the defunct league of Nations and the existing United Nations failed in their efforts to compose national quarrels. According to Yusuf Ali, they failed and the United Nation has not succeeded hitherto simply because the required essentials[238] were absent. Today, under the auspices of United Nations 'peace keeping forces' were

[236] Surah Al-Hujurat (49): 9

[237] Abbdullah Yusuf Ali, The Holy Quran, Text, Translation and Commentary, Amana Corporation, U.S.A, FT.note 4927, p.1341

[238] That is taking into accounts of every just and legitimate interest without separating spiritual from temporal while implementing the essentials which are perfect fairness and justice as well as respect for the highest principles.

put in place in certain countries where there are conflicts but the goals were not achieved for the simple reason that the moves to enthrone peace in the affected nations lack the above stated essentials.

A Muslim society only fights when compelled to and after it must have exhausted all peaceful avenues for reconciliation. Nonetheless, should any opportunity of peace arises, then it is made compulsory for the Muslim nation to take it. The Muslim individual and society are also required to extinguish the flame of war whenever and wherever they can; even if it warrants taking up arms to suppress the aggressive party who is not ready to toe the path of peace and order.

The preference of peace is encouraged by the law of Islam wherever possible. During the time of the holy prophet (S.A.W), Abu Dawud, a prominent collector of *hadeeth* narrates that Haarith Ibn Muslim said that his father said:

> *"The prophet sent us on an expedition and we reached the grotto, I prompted my horse thus beating my companions and leaving them behind. I reached the village first and the occupant welcomed me with reverberation and I said to them: 'Say that there is no God but Allah and that Muhammad is His Messenger, so they accepted the call of Islam. My friends reproached me for denying them the opportunity of spoils which they would have had, had these people remained disbelievers. When we went back, they related to the prophet what I had done. Subsequently, he called me to him and praised my actions and said to me" Allah has given you such and such reward for every soul amongst them".*[239]

On the authority of Safwan Ibn Saleem, the Messenger of Allah (S.A.W) is reported to have said: "… I will advocate against the transgressor on the day of judgment".[240]

[239] Cited and quoted in a paper entitled 'peace in Islam presented by Hassan-Al-Banna, a great Muslim Activist in Egypt, the paper was presented in 1938.p.20

[240] Ibid, Hassan-Al-Banna, p.22

The position of Islamic law on any individual or society that is antagonistic to peace movement is unambiguous. The peace making forces are authorised by the law of Islam as already indicated in the 9th verse of chapter 49 of the Glorious Quran to collectively fight such unrepentant aggressor, subdue him and compel him to accept terms of peace. This is one of many circumstances where Muslim society is lawfully permitted to resort to war or armed conflict as a means of safeguarding the truth. As a matter of historical fact, all past and contemporary laws came with a similar principle. A good instance is what were found in the books of the old testament which are often referred to by the Jews today. The said books are filled with statements on war, struggle, fighting, destruction, devastation, ruin and hostage taking. Thus thereby affirming the legality of war or armed conflict but in its most reckless and ruthless form. In the book of Deuteronomy for example, it is stated as below:

> *"When you come near to a city to fight, call for peace; if it responds to your call for peace and opens its doors in front of you then all its people will be under your command and all will be your slaves. If it does not heed to your demands for peace then besiege it, and if your Lord God pushed it to you then strike all its males with the edge of your sword. As for the women, children and beast and all that is in the city, they are all a booty for you. And eat the booty of your enemy, which your Lord has given you. Such should you do to all those cities that are very far from you and those cities that are not the cities of those nations. As for the cities of those peoples which your Lord God gives unto you do not leave a soul in it – the Hannites, the Amorites, the Fayarazites, Yousites, like your Lord as ordered you".*[241]

Likewise, in the same vein one of the books of the new Testament also states as follows attributing the statement to Jesus Christ:

> *"Think not that I have come to spread peace in the land but the sword. For I have come to separate a man from his son, and the son from his*

[241] Deuteronomy 20:10 and above.

> *father and the daughter-in-law from her mother-in-law ... and the animosity of the person with his household, whoever loves a son or a daughter more than I; will not deserve me and whosoever does not take his cross and follow me also does not deserve me. Whoever finds his life will lose it and whoever loses his life for my sake will find me".*[242]

The provisions of modern International law also admit to certain circumstances under which war can be adopted to attain peace as long as the laid down rules and regulations are observed. However, the rules under the Islamic laws in relation to this issue are finer, more comprehensive, more compassionate and more just than any of the above-referred legal system. Under the Islamic system, whenever the Muslim society is compelled to adopt armed conflict, the definite end result is absolute peace and pure justice. The Quran says:

> *"Wherewith Allah guides all who seek His good pleasure to ways of peace and safety and leads them out of darkness, by His Will, unto the light – guides them to a path that is straight".*[243]

Anything contrary to what the law of Islam offers in a situation of a conflicting party to a quarrel being opposing to peace movement, will always be efforts in vain. The position of Islam in such circumstance remains and will ever remain the best and most effectively result-yielding approach.

With the foregoing analysis, coupled with one's understanding of the concept of peace under the law of Islam, it is now very easy or more convenient to say without any fear of contradiction that the system of Islam is the most comprehensive legislative system which has taken bold steps in the path of establishing peace in the entire universe.

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[242] Mathew 10:25 and above.
[243] Surah Al-Maidah (5): 16

The Islamic law provides for stability, justice, peace and unity the most genuine guarantees, if adopted by the various societies in the global community and diligently followed by the different rulers of the world, then the world will truly be transmitted to a global village which would be in perfect tranquility and save its inhabitants the agonies of war or armed conflict.

These regulations and guarantees drawn by the Islamic legal system to achieve the lofty goal of a peaceful global community include *inter-alia* the prominent ones stated below:

i . Spiritual training of the souls with greater emphasis on spirit of forgiveness.

ii. The sanctity of what brotherhood means or what it practically stands for and the overcoming of the spirit of racism and rigidity.

iii. The restriction of the idea of armed conflict to the smallest possible boundaries.

iv. Declaring unlawful transgression in all its manifestations.

v. The enthronement of dominance of principles of justice, fairness, compassion,

and respect of law and order even during war period.[244]

vi.Disarmament or arms control. The law of Islam has circumvented all contemporary legal measures in this regards.[245]

Above are the positive steps proffered by the law of Islam with its laid down terms of guarantee for the establishment of peace in the universe. If the United Nations, the ECOWAS, the AU and similar international bodies with common objective of establishing peace in the world adopts the Islamic legal prescriptions

[244] Surah Al-Maidah (5): 8
[245] Surah Al-Hujurat (49): 9

above, the world would be a better place for all and records of crisis and armed conflicts will be reduced drastically to the barest minimum.

The League of Nations that was established immediately after the First World War with the sole motive to install peace died unnatural death before it was born due to its inability to solve just only one case of disagreement between the nations that signed its treaties. It was not long thereafter that these same member-nations started the Second World War yet again to fulfill their political and imperialistic desires. The reason for the failure of the League of Nations was said to be lack of a military sanction for the culprit-nation. Subsequently the United Nations was founded with Security Council as one of its principal organs to avoid the past experience in relation to the erstwhile League of Nations. This notwithstanding, the disagreements, differences and crisis of various magnitude are still intensifying and gaining momentum. Neither the UN nor the Security Council till now have succeeded in resolving one dispute or have been able to untangle a disagreement between two conflicting nations. In the recent time the USA has proved to be out of control of the UN. A good case in mind is the recent case of American military attack on the people of Iraq which the UN loudly opposed to.

4.3. LEGAL CONSTRAINTS

Varieties of events of hostility within and outside a nation state such as intra-national and international armed conflicts in different parts of the world confront the international community day after day with the cruelty of war alongside the suffering, death and destruction emanating from it. By virtue of these ugly events taunting the world, an obvious question is raised in the following words:"*Is the behaviuor of*

belligerent parties subject to any limitations?"[246] *or Are there any constraints imposed on the warring parties by the law of Islam?* Answer to questions of this nature is not far fetched, since such limits or constraints exist to the extent that they incline towards the realm of law rather than to that of morality alone. As a matter of fact, they constitute rules of a body of international Law under all known legal systems that is applicable exclusively to armed conflict.

It would be so difficult to study the holy Quran, the New Testament, or the Old Testament without encountering the questions of legitimacy and limits of force. There is none of these sacred books that does not contain divine directives which are extensively associated with efforts to restrict and regulate the use of force.

David Little in his contribution to a book[247], he wrote- "Yahweh, God and Allah are all predominantly characterized as exercising political and legal functions. They all perform these functions in such a way as to control certain illicit kinds of force".[248]

Going by the regulations[249] in respect of laws and customs of war on land, the laws, rights and duties of war are not only applicable to the soldiers but also to the militia and volunteer corps who must have to fulfill the following conditions:-

i) To be commanded by a person responsible for his subordinates.

ii) To have a fixed distinctive emblem recognizable at a distance.

iii) To carry arms openly; and

iv) To conduct their operations in accordance with the laws and customs of war.

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[246] Frits Kalshoven, 'Constraints on the Waging War', International Committee of the Red cross, Geneva, 1987, 2nd Edition, p.1.

[247] Just War and Jihad Historical and Theoretical Perspectives on War and peace in Western and Islamic Traditions' Ed. By John K and James T. N.

[248] David Little's "Holy War" Appeals and Western Christianity: A Reconsideration of Bainton's Approach,', in Op. cit. p. 121

[249] Art. 1, Section 1 of CAP. 1, The Hague, 18 October, 1907 reproduced in the 'International law concerning the conduct of Hostilities, ICRC, Geneva, 1989.

It should however be noted that in countries where militia or volunteer corps constitute the army, or form part of it they are included under the denomination *"army"*. On legal constraints in waging wars, Ladan M. T. stated:

> *"International Humanitarian Law (IHL) means international rules, established by treaties and customs, which limit the rights of parties to a conflict to use the methods or means of war fare of their choice, or which protect states not party to the conflict or persons and objects that are or may be affected by the conflict*[250]*"*.

This portion of the fourth chapter of the present work sets out to examine from the Islamic Law perspective, the legal constraints imposed on warring parties with regards to the following:

i) Source of Problems/Challenges in war.

ii) The Constraints.

iii) The conquered territory.

iv) Relation between belligerent states and neutral states.

4.3.1 Source of Problems/Challenges in War

The Source of Problems/Challenges of war is usually economic factor; other factors are made Complementary or a make believe Justification for war or armed Conflict. It is rather unfortunate that such economic factors are not put forward by the offensive as a reason for engaging in war but other reasons or factors such as social reasons, Political reasons and humanitarian reasons. For academic works if Studied carefully, it is beyond these afore mentioned factors (Social, Political, humanitarian).The all-embracing source of problems of war is the economic factor. Taking a case study of the middle-east crises on our hand and the middle-east and the outside world on the other hand. The iraq-kuwait crises starting from August 1990.

[250] Ladan M. T., 'Introduction to International Human Rights and Humanitarian Laws, ABU, Zaria, Kaduna state Nigerian, 1999, p. 132

The Problem that resulted to the war were the claims of the head of Iraqi's Government of Sadam Hassain among which are:

- The border dispute between the two Countries. Which Sadam claimed that the region had always been a part of the ottoman empire from 18th century head, Kuwait is a part of Iraq and governed as part of an ottoman province in Southern Iraq and as result it belongs to Iraq.
- kuwait that was a sovereign state haven gotten British protection in 1899 in return for local autonomy in local affairs, consequently its independence as a sovereign state in 1961. Iraq claimed that Kuwait was extracting oil from a field along the border of Iraq-kuwait and that Kuwait was not sharing the revenue coming from such oil field.
- Iraq also claimed that Kuwait was undermining her oil export because Kuwait was producing more than the OPEC quota as hence, affecting the economy of Iraq.

  Another was the fact that after the Iraqi- Iranian war of 1980-1988 kuwait assisted Iraq with loan and by 1990, Iraq had been indebted to the turn of $80 billion and demanded that Kuwait should forgive her of the part of the debt and field in the payment of the rest.

If one takes a critical look at the factors that led to the Iraqi-Kuwaiti war as well as the condition of intentional forces in Kuwait, one will not be wrong to conclude that it was economic gains that is attached to the disputed border land between Kuwait and Iraq.

It is also true that economic reason was the major sources of the USA – Iraqi war of 2003 popularly known as USA incursion of Iraq. The USA government led by president George Bush claimed that Iraq had renewed it's chemical and biological

program after accepting to disarm as required by the diplomatic agreement that ended the Persian gulf war.

The George Bush administration also claimed that Sadam Hussain failed to completely comply with UN security council resolutions since 1991. Consequently, the USA with the assistance of Britain and Kuwait invaded Iraq in march 2003.

It will also not be wrong to conclude that the source or reason for the invasion of Iraq by USA in 2003 was primarily for economic reasons and not the ones claimed by president George Bush if one consider the following facts :

1. That Iraq accepted a UN resolution for the immediate return of weapons inspectors in Iraq in 2003. The weapon inspectors come up with the report that No proscribed activities, or the result of such activities from the year of 1998 – 2002 have, so far, been detected through inspections.
2. The International Atomic Energy Agency (IAEA) also reports in early march that there was no sign of renewed nuclear weapon program in Iraq which was a clear compliance with the UN Resolution 1441 of 2002.
3. When Hans Blixn requested that more time should be given, America refused and went ahead to invade Iraq.
4. When USA could not win majority Votes in UN general Assembly in favour of considering armed-conflict because other countries such as such as France, Germany and Russia opposed military action and they are of the opinion that diplomacy and inspection should be given more time.

5. That since the ousting of Sadam Hussain government by USA in 2003, almost a decade after, the USA forces are yet to leave Iraq they kept on transferring Iraqi oil through what they called transitional regime.

6. That at the end of the day the Bush administration could not account for any Chemical or biological weapon or nuclear weapon in Iraq. From the aforementioned factors it will not be wrong to conclude that the source of this war was the oil gains USA foresaw in Iraq which was their major and only achievements. And up to date the USA government is still benefiting from it.

The claim that economic factors constitute the major source of problems/challenges of war is especially true when one considers the USA foreign policy because it is a common saying that a country's foreign policy is its mirror considering words like the "business of America is business".

Besides economy as a source of war problem we have ideology and security, some countries engage in war not because of economic gains or political interest but to ensure security for the country, a very good example here is the Arab–Israel war of 1964 where Isreal attacked Egypt, Jordan, Syria and the subsequent seizure of west bank, Gaza strip, Sinai peninsula and Golan height by Israel. Israel got possession of these places not because she wanted it for economic purposes but to negotiate for peace and security with her neighbors, this is true especially if we consider the outcome of Camp David accord and the Oslo accords.

One can rightly say the source of war problem is Ideology, such ideology is mostly religious while others may be economic or socio-political ideology. In the case of religious ideology in the far middle east we have two major Islamic religious sects , the Sunni and the shiite. The Iranian revolution that swept across Iran in the 3rdquarter

of 1970s saw the emergence of the Shiite Islamic sect in Iran and the Ideology was fast spreading across middle east, Sadam Hussain who is a major sunist and at that time the Shiites have had a Successful revolution in Iran and this political-cum-religious influence was fast spreading among her neighbours, this the government of Iraq which is a sunni fealt seriously threaten and pick up conflict with Iran using the existing dispute over Irani-Iraqi border of shatt Arab as an excuse for war. This was to check the spread of Shiite ideology into Iraq.

The Cold war which is another ideological war was the after-math of world war ll whereby USA was spreading capitalism and democracy while Russia was spreading socialism and Communism.

4.3.2 The Constraints

Constraints on war will first be generally considered from the Islamic Law perspective. In terms of the bases of Islamic Law concept of peace, it is wider in scope than that of any other Law. The fundamental bases of the Law of Islam are the Quran; the Sunnah, Ijma'a and Qiyas. A combination of all these provides genuine reasons for validity of the constraints imposed by Islamic law on waging war in order to establish a regime of peace. In consonance with the modern conventions and international agreements on laws of war, the law of Islam offers proper safeguards against unnecessary damage to life and property.[251] From the inception of the Muslim Nation, treatment of the hostile enemies with justice, mercy and chivalry has been the practice of the Holy prophet Muhammad (SAW) and his succeeding commanders of the faithful. In the prophet's advice to his successors (i.e the Khulafai Ar-rashideen) about non-Muslims he instructed them that the non-Muslims must be treated with leniency and must not be oppressed by any ruler nor must they be taxed beyond their

[251] See further, Anwar A. Q., 'Islamic Jurisprudence in the Modern World', Lahore 2nd Ed., 1981, p. 278.

capacity and nothing should be taken from them except for a duty encumbering them.[252]

The prophet is reported to have emphasized this advice when he said:

> *"Whoever oppresses a non-Muslim subject or taxes him beyond his capacity, then I shall be his opponent in litigation"*[253]

In the tail-end of *Sayyidina* Umar bin Khattab's administration, [the 2nd *Khalif*ah in the history of Muslim nation], he is reported to have said thus:

> *"I exhort my successor regarding the treatment to be meted out to the covenanted people by the messenger of Allah. They should receive the fullest execution of their covenant, and their life and property should be defended even if it requires to go to war with oppressors, and they should not be taxed beyond their capacity"*[254]

This great leader of Islam, called Umar bin Khattab used to enquire from delegates from neighbouring provinces about the condition of non-Muslims in their provinces. There was a time he asked some delegates to tell him about the treatment of non-Muslims at the hand of Muslims in their home towns. In response, they said:

> *"We do not know except fair treatment by fulfilling their pledge"*[255]

Here is a hint on the behavior of Muslim states towards victims of war and non-Muslims under their jurisdiction.

Ever before the Western world endeavor to establish rules and regulations prohibiting recourse to war and aggression for disputes emanating from political-cum-economic rivalry, the divine law of Islam had legally restrained the Muslim state from engaging in aggressive conflicts. The Quran ordered the Muslims to desist from

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[252] Cf. Abu Yusuf bin Ibrahim, Kitab-al-Kharaji, pp. 69-72.
[253] Ibid.
[254] Ibid.
[255] Al-Tabari, 'Tarikh al-Tabari', vol.4 p. 218

fighting and to patiently bear all persecutions in the way of Allah[256]. Talking about hostility generally, the term 'aggression' underscore the truism of hostility in general. Apart from its daily usage, aggression has a special Concept in law and particularly in public international law. In that wise, the term is used to signify a special situation in international relations in which peace and global security are threatened under the canopy of general hostility, war of aggression is a case of armed attack whereby norms, rules and common international traditions of war are violated. The divine law of Islam as contained in the glorious Quran had already and unambiguously forbidden the act of aggression. However, there are numerous provisions in the Quran which make lawful a religiously inspired war that is often described as "*Jihad*" which explicitly define the objectives, the limits and the relevant laws governing the conduct of war.[257] The parameter for legitimacy of a war in the law of Islam is its objectives, and the manner by which such war is executed. Muslims are warned against causing hostilities or conducting war not even in the name of winning converts into Islam, unless when it is extremely unavoidable. That is to say it is imposed upon them by the enemy such imposition or aggression may be in various forms and different acts. For examples, usury portion of fundamental rights, constant denial of territorial jurisdiction, deprivation of freedom, wealth and imposition of foreign ideology. Regardless of the fact that war is conducted legitimately in defense, the law of Islam still requires that divine and humanitarian principles should be taken into consideration theoretically and practically. Constraint on waging war was so imposed by the law of Islam that no war was conducted by the Muslims without the express

[256] See Surah al-Kafirun (109) and Surah al-muzamil (73): 10.
[257] See Surah-al-Barqara (2): 190

permission of Allah and in all the cases it was conducted for defense of themselves and of the faith.[258]

In agreement with international conventions and agreements on laws of war, the Islamic law allows head of the Muslim state to enter into treaties with other countries and also to abide by his commitments and promises; he can only withdraw from the treaty only after he must have given due notice of his intention to the other party; unless the said other party starts hostility in violation of the treaty.[259]

The law of Islam provides for dialogue, treaty, and any other form of non-hostile manner of reconciliation without necessarily resorting to hostilities. Through the application of non-hostile manners to settle disputes, the states operating Islamic legal system, would be under legal constraints to execute war.

The imposition of legal constraints by Islamic Law also cover the attitude of the combatants at the battle field as well as that of the civilian authorities and non-militant persons in armed conflict. The Muslim soldiers are constrained by the law of Islam in respect of their behavior when in action. A Muslim soldier is forbidden to attack certain categories of people like the non-combatant, old infirmed person, women and children. They are not allowed to provoke war nor are they allowed to be aggressors. Inspite of all the aforementioned, the Islamic law commands the Muslim army to put its entire force into the combat when war is forced on them. As combatants, the holy Quran warns the Muslim army not to let the hatred of a people incite them not to act equitably. They are enjoined to be equitable in action because such behavior is nearer to piety[260], where the enemy seeks for peace after the armed conflict has commenced, the Muslim combatants should not refuse; even if there is doubt about the enemy's

[258] See Surah-al-hajj (22): 39-40 and Surah at-Tauba (9) :123
[259] Cf. Surah-An-nahli (16): 91, Surah-Tauba (9):4

[260] See further Surah-Almaidah (5) : 3.

sincerity of purpose. The prophet is reported to have said to the Muslim combatants that:

> *"Fight and do not exceed the limits and be not unfaithful and do not mutilate bodies and do not kill children"*[261]

4.3.3 The Conquered Territory

Constraints on waging of war under the Law of Islam are also found in the application of law of occupation in conquered territory.

Occupied territory is required by the Islamic law to be administered with specific and clear order. In line with the conventional practices of the past, tributes and taxes were levied on the conquered state and yet such levies have nothing to do with religion of the affected people. The Islamic state was as much in need of finances to run its government as well as to maintain its people like any other states of the world.

Thus, the Muslim states resorted to the same method of imposition of tributes and taxes on the states under her jurisdiction that were not necessarily Muslims. During the days of the holy prophet (SAW), all that happened was that certain small non-Muslim states were when subjugated given the right to administer their own affairs, but they only paid a small sum of money by way of tribute as contribution towards the maintenance of the central government at Madina[262]. Absolute autonomy was conferred on a people who rose in war against the Muslims and ultimately conquered by them, and as captives; were only allowed to pay a paltry sum of tribute (*Jizyah*) in such less strict condition; that was a great act of magnanimity on the part of holy-prophet of Islam. As far as the law of occupation is concern, there was no interference at all in their religion. While the tribute paid to the ruling Muslim state

[261] Muslim, Sahih, 11,32.
[262] Anwar Ahmad Qadri, ibid, p. 284.

served as cost of protecting these small states against all enemies. Same practice was followed in all the subsequent history of Islam.

4.3.4 The Belligerent and Neutral States.

Under the umbrella of Islamic law, constraints on the waging of war are also reflected in the relationship between belligerent states and neutral states. With the series of conquest made by Muslim states, Muslim toleration and compassionate treatment of war captives became a novelty in human history. The Muslims always tolerate other religionists. Precisely, the various 'Fiqh'[263] literature provide ample illustrations of equality granted to non-Muslims in the Muslim state on the basis of legal principles of territoriality and neutrality in application of the Islamic law. The general understanding in the legal system of a Muslim state is that the law does not punish the innocent, regardless of the religious background of such person. The Quran says:

> *"Whoever works righteousness benefits his own soul, whoever works evil, it is against his own soul nor is thy Lord ever unjust in the least to His servants"*[264]

This is to establish the non-hostile relation between a belligerent Muslim state and a neutral state. It is such a relation based on equality just like that granted to the non-Muslims in a Muslim state. The simple divine directive of Allah as contained in the second chapter of the glorious Quran is that Muslims should fight only those who fight with them and that they should not exceed the limit.[265]

There are abundant evidence to prove that the Muslims always respected their obligations and consequently abstained from so many practices which today are condemned as crimes against peace and neutrality. The fact that the Muslim states of

[263] Islamic Jurisprudence, that is the rules of law governing the practice of Islam.
[264] Surah-al Fusilat (41) :46.
[265] See Surah Al-Baqara (2) : 190.

the contemporary world show respect to ambassadors of non-friendly countries does not in any way suggest that the Muslims just realized the Concept of neutrality by being neither a friend nor enemy. According to Abdul Majid, 'the law of neutrality after-all was the application of the law of transference to the idea of sanctity from the person or ambassador[266], to the hosts of the belligerent state. When Khalid, a great warrior in Islam, put to death captives of the tribe of *Jadhimah,* the prophet could not help expressing extreme displeasure at this. He is reported to have said when he heard of it:

"Oh Lord I tell you my displeasure at what Khalid has done".[267]

The prophetic confirmation of the protection given by Ummu Hanifah, daughter of Abu-Talib to two relatives of her non-Muslim husband is also characteristic of the prophet and breathes a spirit of humanity only known to the present advanced stage of international practices. In the language of Sobhi Mahmassani, "Islamic Law is essentially a law of peace, built on human equality, religious tolerance and universal brotherhood…."[268]. Based on the universality of brotherhood, no belligerent Muslim state would be hostile to neutral state. Application of law of neutrality as indicated above is within the purview of Islamic law. If one agrees with Mahmasssani in his theory of war, where he presents war, in theory as "just and permissible only as a defensive measure, on grounds of extreme necessity namely to protect the freedom of religion, to repel aggression, to prevents injustice and to protect social order…."[269]

Then, it will not be difficult to appreciate the peaceful relation between the belligerent Muslim states and neutral states in accordance with law of neutrality.

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[266] For detailed rules see Abdul Majid, 'The Moslem International Law', 28 L. Q. R. p89

[267] cf. B.A. Mohyidin, ''Islamic Religious Studies (History), Continental Book Centre, India, 1st Edn. 1981, p.50

[268] S.Mahmassani, "International Law", p.320

[269] Ibid, p. 321

It is understood from the foregoing that Muslim states are legally constrained in waging war to avoid being hostile to hostile enemies, rather the practice should be treatment with justice compassion and chivalry as example by the holy-prophet Muhammad (SAW) and his successors. A Muslim soldier is forbidden during the course of his combat totransgress, corrupt, destroy or steal nor kill women, children or elderly person nor does he mistreat a prisoner of war or a man of religion. He is also forbidden to strike anyone in the face. Slow killing of the enemies is also forbidden by the law of Islam as the holy prophet is reported to have said:

> *"By He in whose hands is my soul, if it be a chicken I would not subject it to slow death"*[270]

On hostilities in general Muslim army commanders are profoundly cautioned. Bura'dah (RA) reported thus:

> *"whenever the prophet of Allah briefed one of his army commanders, he reminded him to fear Allah in his actions and to treat well those believers who are with him. Then the prophet would tell him to fight in the name of Allah those who turn away from him fight and do not exceed your limits, do not transgress and do not kill a child."*[271]

Subsequent*Khulafahi* and*Umarah* inherited this commitment by always entrusting the leaders of their armies with it on their conquests. After the demise of the holy prophet the first expedition to be executed by Abu-Bakr (RA) the first *Khalif*ah of Islam, was the one led by a young man called Usama (RA). As war commander, Abu-Bakri said to him thus:

> *"Do not deceive, do not dishonour a treaty, do not mutilate the dead; nor should you kill a child an old man or a woman. Do not destroy palm trees nor burn them,*

[270] This hadith is narrated in An-Nisai of Abu Dawood on the authority of Abu Ya'laa
[271] Sahih Muslim, An-Nisai of Abu Dawood and At-Tirmidhi.

> *neither are you to cut a fruitful tree, do not kill a lamb, a cow or a camel except for purposes of food. You will come across a people who have devoted themselves to the monitories; leave them and what they do".*[272]

The rhetoric here is: Have you seen anywhere, hearts more tender than these?

It is also clear that treaty or covenant must not be disrespected. The law of Islam is strict in command that any treaty or covenant should be honoured, kept and conformed to in the strictest sense and warns those who disrespect such treaties in the strictest possible terms.[273] This is another constraint. On the authority of Abu-Dawood, it is narrated that Safwan Ibn Saleem (RA) said that many of the sons of the companions of the messenger of Allah said that their respective fathers told them that the messenger of Allah (SAW) said:

> *"Whoever oversteps or does injustice to whom he has a covenant with, or asked him for what which is beyond his powers, unless the latter does it out of generosity and good will, then I will advocate against the transgressor on the day of judgment."*

The people of Samarqand during the era of Umar Ibn Abdul Azeez (RA) as *Khalif*ah and commander of the faithful, said to their governor:

> *"Qutaiba has dishonoured his oath with us, betrayed and wronged us and taken away our country; but Allah has now spread justice and equity, so give us permission to send a convoy from among ourselves to the Khalifah to complain to him about the tyranny that has besieged us and to take back our dues".*[274]

The governor, Sulaiman (RA) granted them permission, and so they went to Umar. When Umar heard their complaints, he wrote to Sulaiman saying:

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[272] Hassan Al-Banna, 'Peace in Islam,' sourced through internet on website: http;//www. Young muslims.ca/online library/book/peace in Islam, p.22.

[273] Surah-An-Nahl (16) : 91-92; see further Surah Al-Israa (17) : 34

[274] Lovay M. S. 'War and Peace', The American journal of Islamic social sciences, vol. 5, No 1, 1988, p. 39

The people of Samarqand have complained to me about their unfortunate treatment, and the campaign of Qutaibah against them. If you receive this letter of mine call a judge to look into their case; if he shall rule in their favour then give them back their country, just as they were before.Sulaiman in compliance with the directive appointed Jamee' Ibn Headr (RA) as the judge who would consider their case. The judge ruled that the people of Samarqand return to their land to either reach a peaceful conclusion with him (Qutaibah), or if he refuses this solution to resort to the use of violence to drive him out after warning him in advance. The people of Samarqand said: 'we will agree to our previous pacts and we do not want to enter into war.' They said that they have mixed and lived with the Muslims who gave them security. Moreover, if we resort to war we know not for whom will be victory, for if victory does not side with us, we would have created more hostility following the conflict. So they left things as they were and were contented with a peaceful solution and did not fight. This is the highest limit of justice and the honoring of covenants. This narration is to further reveal the Islamic legal constraint in waging war with regards to honoring treaties and covenants.

As for the administration of a conquered territory with specific and clear order reflecting Islamic legal constraints in waging war, the prominent practice of the Muslim state is the imposition of tribute (*Jizyah*) on the non-Muslims of the conquered land. Lovay M. S. asserts that the intent of '*Jizyah*' is to assure freedom of expression for the Muslims to propagate Islam in non-Muslims territories and freedom of belief to those who may choose to come into the fold of Islam e.g. moreover, the motive behind imposition of tribute; (i.e. *Jizyah*) was to turn hostile territories into friendly ones. This explains why *Jizyah* was not imposed on friendly nations. The tribute has been a sort of tax only on the non-Muslims of the conquered

lands or/and the Muslims under the Muslim state. It is, as matter of facts a reimbursement for the protection of the non-Muslims and their lands. By the tribute they were exempted from serving in the army. Tribute serves as a monetary exchanged for their blood-tax and it is a means by which the Islamic system alleviate some of the burdens from those who pay it given the religions nature of military actions and the definition of what is considered as 'national interest' in Islam. Should inhabitants of a country that is within the rule of a Muslim state join the Muslim army or undertake the burden of defense by themselves, the *Jizyah* or tax would drop for this kind of reason, many of the regions conquered by the Muslim commanders of the faithful were exempted from paying the Jizya. It is on historical records that letters written and treaties signed by the commanders of Islamic armies reflected the rules on tribute or *Jizyah*. A good instance is the letter written by a famous war commander of the Muslims called Khalid Ibn Al-Waleed; addressed to Salouba Ibn Nastouna and his people when he entered Euphrates. The actual text of the said letter goes thus:

> *"This is a letter from Khalid the son of Waleed to Salouba the son of Nastuona, and his people . I have promised you my protection in return of your payment of Jizyah. It is upon you to pay tribute and upon me to protect you. If you do not pay tribute, I will not protect you"*[275]

Another relevant example is the regime of Abu Obaida (RA) when he discovered that his covenant to protect the people of Homs was about to be frustrated, he, the *Khalif*ah directed the governors to return the tribute back to the people of Homs. When carrying out the *Khalif*a's instruction they said to the people of Homs as follows:

[275] Written in the 12th year after Hijra in the month of safar, Quoted from Hassan Al-Banna's 'Peace in Islam,' op. cit. p.23

> *"We are returning back your dues because news has reached us that a huge army is preparing to fight us. You made it a condition that we protect you in return for your payment of tribute and since we are not able to meet this condition we forfeit the Jizyah. But if Allah grants us victory, then we will fulfill the covenants between you and us."*[276]

In response, the people of Homs replied:

> *"May Allah return you to us, and give you victory over them, for if it was them they would have returned nothing that they may have returned nothing that they may have taken and kept everything to themselves, your loyalty and justice is by far the more beloved to us than the tyranny and transgression that we were in"*[277]

Application of law of occupation is reflected in the foregoing wherein the imposition of tribute or *Jizyah* on the non-Muslim individuals of states under Islamic state is portrayed as one of the legal constraints in waging war. Once a Muslim state goes to war and conquered, it must have to be constrained by the above-discussed factors in waging war. Basically, the Muslim states are prohibited to invade or launch an aggressive war. Even when they were compelled to engage in armed conflict, yet the law of Islam places certain legal constraints as seen above; on them.

4.4 CONTRIBUTIONS OF QUR'AN,SUNNAH ,QIYAS AND FATWA

Definitely, it is not out of place to aid the understanding of Islamic Law concept of Peace through the lenses of the glorious Qur'an, Sunnah, Qiyas and Fatwa. The Qur'an is the direct source of Islamic Law, while the Sunnah which is the Prophetic

[276] Ibid Peace in Islam op. cit p. 24
[277] Ibid Peace in Islam op. cit p. 24

traditions suplement it. Analogical deduction (Qiyas) and Islamic Legal rulings (Fat'wa)provide wider scope for better understanding and easy application of the law.

4.4.1 The Holy Quran

I consider it very pertinent to open this segment of this work with the observation of a non-Muslim legal luminary called 'J*ackson*' when he said:

> *"Islamic law finds its chief source in the will of Allah as revealed to the Prophet Muhammad. It contemplates one community of the faithful, though they may be of various tribes and in widely separated locations. Religion, not nationalismor geography, is the proper cohesive force. The state itself is subordinate to the Quran, which leaves little room for additional legislating, none for criticism or dissent. This world is viewed as but the vestibule to another and a better one for the faithful, and the Quran lays down rules of behaviour toward others and toward society to assure a safe transition. It is not possible to separate political or juristic theories from the teachings of the Prophet, which establish rules of conduct concerning religious, domestic, social and political life. This results in a law of duties rather than of rights, of moral obligations, binding on the individual, from which no earthly authority can relieve him, and which he disobeys at peril of his future life."*[278]

The operative words which are most relevant for the purpose of this work are contained in the very first sentence of above referred quotations. That is "*Islamic law finds its chief source in the will of Allah…*" The Quran as the "will of Allah" is considered to be the "Chief Source" of the Islamic law simply because; most scholars of Islamic international law regard every word in the Quran as *Divine Legislation* of the Supreme Law Maker, (i.e Allah, S.W.T.A)[279]. It is a universal legislation, a law book without blemish and ambiguity[280]. The uniqueness of the holy – Quran as a

[278] Jackson, forward to 'Law in the Middle East' pp. vi – vii.
[279] See Quran (AL-KAHFI) 18:1
[280] Quran, Al-Sajidah (32):2

divine constitution[281] of universal application for the global community lies in its inimitability which is due to the fact that it was revealed directly to the Holy Prophet Muhammad (S.A.W) in the precinct words and phrases in which it appeared.

It provides code of conduct for not only every individual but also for the states and nations of the world. One outstanding fact about the Quran being the word of Allah, the most high is that Holy Prophet Muhammad (S.A.W) through whom it was revealed was an illiterate raised from among stark illiterate people to teach the whole human race literate and illiterate alike, the true message of Allah (S.W.T.A).

Another distinguishing fact about the uniqueness of the Quran is the unquestionable authenticity of its contents and order. This is a quality which no other book of whatever kind has ever enjoyed or likely to enjoy. The Quran has laid down the general and basic principles of Law.

According to one opinion,"*The Quran is the very word of Allah revealed to the Holy Prophet (S.A.W.) it is for the Muslims of every school, the main soource and final authority of all laws."*[282]. The Quran as a final authority of all types of law, is hereby presented as a foremost principal source of Islamic international law.

A cursory but very objective look at its contents will form a good basis for the asserted position of the Quran as a foremost principal source of law of Islam. The contents of the Quran are of thirty divisions or parts; each of which is known as '*Juz*'. The entire thirty parts are made of one hundred and fourteen (114) chapters comprising of six thousand, six hundred and sixty-six (6,666) verses. While the total sum of words is eight million, six hundred thousand, four hundred and thirty (8,600,430). The numbers of letters of alphabets contained in the Quran is three million, twenty three thousand seven hundred and sixty (3,023,760). The significant

[281] Quran, v (Al-Sajidah) 32:2

[282] Ajijola A.D., Introduction to Islamic Law, International Islamic Publishers Karachi (Pakistan) July, 1981, 1st Ed., p.55.

feature of the contents of the Holy Quran which makes it a complete and most competent legislation of universal application is the fact that it contains not only 'Dos' and 'Donts' but equally provides for corresponding rewards and punishments respectively. On the contrary man made law only award punishment for violation and no reward for obedience. The process of law making in form of revelation spread over a period of twenty two (22) years, two (02) months and twenty two (22) days starting from the 15th night of the month of Ramadan in the 40th year of the Holy Prophet Muhammad's life.[283] Its present contents are the same as originally revealed in its precinct form and the Quran remains relevant to all matters in all circumstances till the end of time[284].

The Holy Quran contains the truth about every thing in human endeavour, allegories, perfect and unambiguous descriptions, blessings and flawless examples. It shows light as to where rights, duties and justice lie. The global constitution is an embodiment of rules of law capable of settling interstates conflict as well as to settle practical questions ranging from infanticide, usury, oappression of the weaker sex, commercial and political matters. Perfect and complete legal principles relating to governmental and state administration are also contained in the Quran. The contents of the Quran are divided into *Zahir* meaning '*Obvious*' and *Khafiyyi* meaning '*Hidden*'. Thus Allah, the most High says:

> "*He it is who has sent down to thee the Book. In it are verses Basic or (of established meaning). They are the foundation of the book. Others are not well established meaning…*"[285]

In other words, it may be correct to say the division of the whole book is into *Literal* and *Allegorial* which gives rise to few questions when interpreting the legal

[283] Doi, A.R Ibid, p.31
[284] Quran, Al-Anam (6):38
[285] See Quran, Ali Imran (3):7

principles involved in a particular verse. For an Islamic Jurist to properly interprete and apply the laws in the Quran, he must know: (1) the reason why, (2) the place where (3) the time when the particular portion involved was revealed.

This is not all, he needs to know all the prophetic traditions which bear upon it and he has to determine whether the verse in question is abrogated or it abrogates itself. The Holy Prophet Muhammad (S.A.W.) in his own way has summarized the contents of the Quran as follows:

> *"The Book of Allah, in it are: history of those before you, information about thosecoming after you, rules of law by which to judge among yourselves, it is toilluminate and not to create joke. And whoever seek guidance in other thing besides it, such person has strayed. For it is a strong rope of Allah. It is a Reminder and it is a straight path ... and the learned will never be thirsty of knowledge by it"*[286]

From the above quoted Prophetic tradition, it will be correct to hold that the contents of the Quran cover advice, directives, guidance in form of laws, stories, parables and arguments for the entire human race. The verses contained therein were revealed intermittently to meet the requirements of events in the global community and such events are regarded as '*Asbaab An-Nuzool*'[287]. The medium of revelation of the contents of the Quran is Arabic language, which apart from being the mother tongue of the Holy Prophet Muhammad (S.A.W), a more cogent reason is founded in various factors of choice for perfect expressions, explanations and forms. According to *Ibn Khaldun*, as a living language, Arabic was eminently fitted by its wealth of root idea, of which each is susceptible.[288]

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[286] Ahmad, Al-Gayatili Maqsudat, Daruli Kitab, Lagos, 2nd Ed. 1989, p.81.
[287] "Causes or Reasons for revelation"
[288] Ibn Khaldun, Muqaddimah; Zahrah, Imam Malik, Cairo, 2nd Edn. P.338 trans. By *Ubaidullah Qudsi,* Lahore, 1960.

It is not out of place in discussing contents of the Quran and in connection with the study of the Quran as a principal source of international law to explain what is abrogation of the Divine Laws. Abrogation is in other words 'Repeal' and 'Replacement' of divine laws. This may seem strange but it should not be.

The divine legislations contained in the Quran were intended to correct man's beliefs about Allah the Most Supreme Law Maker (*Aqeedah*), man's methods of worshipping Allah (*Ibaadah*) and his social life or conduct (*Mu'aamalat*). Since the belief about God is constant and remain the same from the very first generation up to the present one till the end of time the question of abrogation does not affect "*Tawheed*" which is the only correct belief about Allah, (The most exalted).

However, it is not true in respect of man's methods of worshipping and social conduct particularly in matters of conduct among nations as the needs of each nation or people were different. The needs may even vary from one generation to another of same nation. Invariably, what may suit a people in one age may not suit them in another. Therefore it should not in anyway seem strange that Allah may repeal an existing divine law and replace it with another based on His knowledge of all things, past, present and future.

This process of abrogation is referred to in Islamic legal terminology as "*Naskh*". This process is evident in the divine universal constitution (i.e. the Quran)[289] where Allah (S.W.T.A.) says:

> *"And if we place a verse in place of another verse and Allah knows best what He bestows from high, step by step – they say, 'You (i.e. the prophet are just inventing it'*[290]

In another portion of the glorious Quran Allah (The most Exalted) says:

[289] See Qur'an (An-nisai) 4:105.
[290] Qur'an (An-Nahl) 16:101

"Whatever verse we have abrogated or caused to be forgotten,I will bring another better than it or equal to it"[291]

By abrogation of divine laws, there is no room for amendment by any human race with regards the existing divine laws of Almighty Allah. Comparatively all man-made laws suffered depreciation through various repeals, amendment and at times suspension as experienced in the military regime. It should be noted that divine abrogation applied only to divine commands and prohibitions. It does not apply to statements of fact, because such statements are either true or false. For instance if one says that a previous report has been abrogated he means that it was either a delibrate lie or an error both of which can never be attributed to Allah. It should be noted that occasionally orders in Quran are in form of statements[292]. Essentially, contents of the Quran relating to descriptions of Allah's attributes, the stories of the previous prophets and their respective peoples, parables and descriptions of the hereafter are all excluded from the category of *Naskh*. Similarly, the divine promises and warnings are excluded because Allah does not break His promises.

Likewise, Allah's promise of gardens in paradise in an early verse and in a later verse promises them the pleasure of seeing Him physically cannot be considered as abrogation as the two promises will definitely happen[293]. The underlying principles of worship and moral behaviours of fundamental values are equally excluded. Therefore, the area in which abrogation operates is in details of the format of a religious practice[294] or public law as affecting international relations and definitely not in the core principle of Islamic jurisprudence.

[291] Qur'an (Al-Baqarah) 2:106.
[292] cf. Q.2:125, Q.2:228, Q.2:233 & Q.3:97
[293] See Sharh al-kawkab al-Muneer (vol.3,) pp.543.
[294] Bilal P (Abu Ameenah), Usool at Tafseer, Sharjah, U.A.E 1997, pp.222- 223.

The circumstances responsible for the revelahtions of the contents of the Quran form one of the cornerstones on which the elaboration of Islamic jurisprudence has been gradually erected. The entire Quranic contents are fundamentally concerned with the reform of humanity, for human welfare and man's betterment in the universe. Thus, as there are well defined rights and duties between individuals and individuals, so is the case between nations and nations. A nation must have to respect the rights and obligations of another nation. Therefore, the rights of nations and their corresponding duties to each other are as good as those of individuals. It is only through the observance of such rights and obligations by nations and states that permanent peace and increase in the ever-growing prosperity of the global community can be sustained[295]. The Quran as a principal source of Islamic law of war and peace provides legal instruments to facilitate effective observance of rights and obligations among nations.

Such instruments which eventually formed the grand super-structures on which Islamic international law is chiefly based include rules as:

i)-No ambassador shall be killed.

ii)-No treaty shall be unjustly violated.

iii)-No unjustifiable aggression shall be made on weaker nations.

iv)-A nation has got as much right for worldly business as another nation has got.

v)-Humanitarian laws in warfare must have to be properly observed.

In order to consolidate the above stated established structures and also to prevent dishamony and hostility in the global community, the Quran forbids the Muslim nation to disallow non-Muslims of other nations living in the Muslim state to hold

[295] Fazlul K, Al–Hadis The Book House, Lahore, 1939 vol.11, p.394.

unto their ways of worship. It is a rule of each National keeping to his faith[296]. In the same vein, the Quran as a primary source of Islamic international law takes a just and balance position between peace and war; between justice and injustice as well as between good and evil.

In international relations, under the provisions of Islamic law it is unlawful for a nation or any of her citizens to engage in war or any form of armed conflict for the sole purpose of Imposing her religion or any form of ideological beliefs on another sovereign nation or individual. The most supreme law Maker says in the Quran as follows:

> *"There is no compulsion in religion Truth stands out clear from error: whoever rejects evil and believes in Allah has grasped the most trust worthy handhold, that never breaks. And Allah hears and knows all things."*[297]

Contrary to this provisions of the grand source of islamic law of war and peace (i.e. the Quran), Nations of Europe and America imposed their respective religion and ideology on the weaker nations of the global community through imperialism, colonialism and slave trade. For instance, when the American President[298] who succeeded President kenedy after his assassination was commenting on the intervention of his country in foreign lands, he remarked:

> "I have seen the glory of art in Architecture, I have seen the sun rising over mount Blanc … but the most beautiful vision that the eyes ever beheld was the flag of my country in foreign land"[299]

Without any ambiguity, this statement clearly reflects what the foreign policy of the United States of America represents. Furthermore, hiding under the banner of

[296] See Qur'an (Al-kafirun) 109:1-6.
[297] Qur'an (AL-BAQARAH) 2,:256.
[298] President Lyndon Johnson.
[299] Harrison S. M., Word's Conflict in The 20th Century, p.335.

Christianity, the modern European nations of 1400 and 1500's embarked on process of colonisation. While claiming to spread the gospel of Christ, they simultaneously searched for crude materials such as coal, oil and minerals in their pure natural state. Hence, by 1700's the British, French and Dutch had colonized much of Eastern North America. The Dutch gained control of the Indies (now Indonesia) while the British commenced the governance of India[300] The Bristish possession of India was portrayed in an English news magazine as a crime where it was stated as below :

> *"We went into India to exploit her wealth. We succeeded to the extent of impoverishing her, making her starved, unhappy, uneducated. We have sucked the blood from her veins and scored the flesh from her bones. The state of India is a crime…"*[301]

By late 1800's, a period regarded as the age imperialism, Belgium, France, Germany, Italy, Portugal, Spain and the British have divided up nearly all of African continent. This they executedby coarsely subjecting the people of this part of the globe to all kinds of torture, deprivation and largely slavery and total dehumanisation with the sole aim of asserting their dominance without the thought of the consequences of their actions on the inhabitants of this region. This is a case of one party been unjust and highly aggressive to the other.

On the other hand, a case where both parties were unjust is the war or armed conflict between France and Prussia where France consequently suffered an unprecedented defeat in the hand of Prussia in 1870[302]. The two conflicting parties were fighting unjustifiable war over the scramble for West African colonies as at then.

[300] Abdul-Hakeem H, September 11 Before and Beyond, Newith, 2002, Lagos, p.20.
[301] The New statesman,, November, 1919.
[302] Ajayi J.F.A and Michael. C, Co-editors, History of west Africa, Vol.2, Longman Group ltd., London, 1974, p.406

It has never been within the purview of Islamic international law that two nations would engage in war wherein both of them would be totally just opponents. The Quran as a principal source of international law therefore make provision for law of war by which aggressive and unjust wars are unequivocally condemned. It *afortiori* approves of war or armed conflict initiated by justice, defence of faith, life, properties and fundamental human rights of individuals and nations[303]

The Muslim nations are not allowed to engage in war or armed conflict against another nation until when they must have exercised restraints in the face of serious persecution, oppression and threats of the highest order. It was a tale of most bitter experience for the very first generation of the Muslim nations; permission was not granted to them to fight until after unprecedented severe persecution, oppression unknown to previous human generation and economic sanctions. The Muslims were socially humiliated and driven out of their homes for no just cause.

Most of them were forced into exile. Consequently, legal authority to fight was granted to those upon whom war is made.

Thus, the Quran directs as follows:

> *"And fight in the cause of Allah those who fight you, but not transgress limits for Allah loves not Transgressors."*[304]

From the Quranic quote above, it can be deduced that when a nation embarks on a defensive war it must strictly be with the sole motive to restore peace and absolute freedom to serve Allah alone. As a principal source of International law, the glorious Quran makes it clear that war becomes extremely inevitable when peaceful co-

[303] Morteza M., *Jihad*, the Holy War of Islam and its Legitimacy in the Quran, 1st edn. 1981, Iran, p. 7.
[304] Qur'an (Al-Baqarah) 2: 190.

existence among nations and people of the universe is seriously threatened and about to give way to hostility and destruction of lives and properties.

In the light of the fact that injustice, oppression, capricious ambitions with arbitrary and false claims are naturally bound to exist among nations, the divine law of Islam therefore recognises war or armed conflict as a lawful and justifiable course for self-defence as well as for restoration of justice, freedom and peace to the global community[305].

The Quran being a divine source to Islamic law of war and peace states "Maxims, principles, indications, general or fundamental methods of approach"[306] towards international relations and human conduct in general. The Quran guides for a sort of polity or states to be established as a universal nation. Consultative principles are contained therein but the fomulae or modus operandi of applying these principles are not provided in details. Such required details are comprehensively embodies in the '*Sunnah*' of the holy Prophet Muhammad (S.A.W) otherwise known as the Prophetic traditions which constitute the second principal source of the Islamic international law.

This position is authenticated by Allah (S.W.T.A) when He says in the Quran thus:

> "*And what the Apostle assigns to you, take and what he forbids you,*
>
> *desist from. andfear Allah; for Allah is strict in punishment"*[307]

Hence the points of law contained in the holy-Quran had to be comprehensively explained in the light of the prophetic traditions. With this background, the *Sunnah* of the prophet takes a place next to the Quran as an independent source of law under the Quranic principles[308].

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[305] Hammudah A, Islam In Focus, Islamic Teaching center, U. S. A., p.142.
[306] See Khudri, 'Al-fight fil Quran' Islamic literature, Xiv no. 1, pp. 27-39
[307] Qur'an (Al-Hashr) 59:7.
[308] Al-Ahmed Nadri', Jami'al-ulum

4.4.2 *Sunnah*

The embodiment of comprehensive interpretation of the divine laws (i.e. the Holy Quran) is the Holy prophet Muhammad (S.A.W). Thus he was not only the Transmitter of the divine laws but also the most authentic interpreter of the Holy Quran. It is this interpretation inform of his conducts or practices that is regarded as *Sunnah*. While his interpretation inform of speeches or utterances are known as *Hadeeth*. It is noteworthy to mention here that technically *Sunnah* includes the conducts or practices of others particularly of the Holy Prophet's companion approved by the Prophet (S.A.W) tacitly or overtly. Similarly *Hadeeth* covers speeches or utterances of others tacitly or overtly approved by the Holy Prophet (S.A.W.). The only known mark of difference between the ordinary expressions of the Prophet (S.A.W) and his revelations is the fact that the former are divine in content alone and the latter are divine in form. The authority in support of this opinion is embeded in Allah's words which read thus:

> "*... and we have revealed to you the exhortation (i.e. the Quran) in order that you may explain to men what has been revealed to them."*[309]

In this wise, the prophetic tradition is as important a source of Islamic international law as the Quran. Literally speaking, the word '*Sunnah*' (سنّة) is a derivative of '*Sanna*' (سنّ) which possess the basic sense of clarity, straight forwardness and continuity .

According to Yusuf, S.M. of Department of Religious Studies, University of Jos, Nigeria "Most helpful in this, connotation is the co-derivative '*Sanan*' meaning the clear pathway unfolding itself in a line in front of the traveler."[310] By way of illustration a purposeful traveler may stand at any point on the pathway, but he will

[309]Cf. 'Abdal-Nabiy-Al-AhmadNadri, Jami' al-ulum:
[310]Yusuf S.M., An Essay on the Sunnah institute of Islamic culture, Lahore 3rd edition, 1980, p. 22.

always carry the extension of it backwards in his wakeful mind while the extension forward is set clear before his eyes.[311] Linguistically, *Sunnah* can be said to be of the same meaning and usage with *Tariqah* (طريقة),[312]*Shir'ah* (شرعة)[51] and *Minhaj* (منهاج)[313] hafiz Ibn Rajab Hamtali, submits thus:

> *"The Sunnah is the path which has to be followed. It means to hold on firmly to the beliefs, practices and statements of the Nabi (i.e. the Holy Prophet, S.A.W) and his righteous khulafaa. This is the perfect Sunnah."*[314]

In the words of Abdul-Qadir Jilani, *Sunnah* has been defined as:

> *"... that which was enacted by Rasulullah (S.A.W)..."*[315]

The definition of *Sunnah* in an Arabic/English Dictionary[316] agrees with the above-cited definition of the great saint. However, in the English/Arabic dictionary of current usage[317]*Sunnah* is defined as custom, habit or/and usage, ranking as a synonym to *Taqlid*, *Aadat* and *Urfu* all representing custom or tradition in English language.

The antithesis of *Sunnah* is *Bid'ah* which is characterised by lack of previous model and discontinuity with the past.[318] The concept of *Bid'ah* as opposed to *Sunnah* is a complete departure from the established *Sunnah* which in essence is an innovation. The evil of *Bid'ah* and it's characteristics are reflected in the verses of poem of Hassan Ibn Thabit below:

> *"Certainly the destructive clothes and their brethren.*
> *After the path to be followed has been made clear to people.*

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[311] Al-Ahmad N, Ibid.
[312] Elias A. E, The Dictionary, Arabic/English, Taj company, New Delhi, 1985, p.193.
[313] See Qur'an (Al-Maidah) 5:48.
[314] See 'Awake To The Call Of Islam' published by the young Men's Muslim association, Ramadan 1394 (Sept.-Oct, 1974) p. 22.
[315] Al-Shatib, Al-I'tisam, vol.1,18-19.
[316] Elias A. E , Ibid.
[317] Doniach N.S (Editor), The Oxford English/Arabic Dictionary of Current Usage 1972, Oxford university press, London, p.298.
[318] Hassan B.T, Diwan, GMS, 1910, xx111, 1&4.

Imagination and undisclosed dream differ from speech.
Definitely the truth of the Evil creature is Innovations"[319]

Just as conformity to *Sunnah* is rewardable and commendable, so innovation is to be condemned and punishable.[320]*Bid'ah* is deviation from the direction of the future advance asset down and indicatedin the past. It is like an artificial canal diverting water of a stream from the natural course followed by it up to the point of diversion. Perhaps it is because of the enomous danger of the consequence of *Bid'ah* that the Holy-Prophet (S.A.W) himself warned thus:

> *"Beware of innovation. Every new thing (i.e. new practice introduced into Islam) is an innovation and every innovation is error manifest"*[321]

The focus of attention here is actual practice of the divine laws and not just the provisions of the law. Since the very embodiment of the law is the practice in forms of application and interpretation by the chief law officer in person of the Holy Prophet himself and his righteous successors; one will go many steps further to discuss in details the prophetic tradition (*Sunnah*) as the second principal source of Islamic law.

Importance of the *Sunnah* as a principal source of Islamic law in general and as practical interpretation of the entire divine law (Al-Quran) is evident in the divine words of Allah (SWTA) as follows:

> *"Nor does he (Muhammad) talk out of his own desire. It is no less than inspiration sent down to him"*[322]

[319]Cf sadr-ush-Shari'ah, Taudih, 359,.J. Robson.
[320]Collections of Tirmizi, Ibn Majah, Abu-Dawood.
[321]Collection of Al-Bukhari..

[322]Qur'an (An-Najm) 53:3-4.

The whole study of Islamic international law is in the context of *Sunnah* and its principles. The Holy prophet (SAW) confirmed that '*Sunnah*' comes next to the Holy Quran as principal and primary legal authorities when he (SAW) said:

"*Undoubtedly, I am given the Quran and the like of it (i.e Sunnah) with it*"[323]

From the foregoing, the *Sunnah* has come to supplement the Quran as a primary source of Islamic law. The Muslim nations and individuals rely heavily on these primary sources for answers to all problems, be they legal or religious. This of course is due to the fact that the *Sunnah* is not only explanatory of the Quranic text but also complementary to it.

The peaceful conditions which succeeded series of wars mostly led and commanded by the Holy Prophet (S.A.W) created conducive atmosphere for the growing Muslim nation to establish relationship with other nations of the world.

The Holy Prophet (SAW) as the Head of state and commander-in chief of the Muslim nation demonstrated statesmanship of the highest order by sending several letters to the sovereigns outside his territorial jurisdiction and to the tribal chiefs within Arabia peninsula.

According to Waqidi,[324]their letters were sent in the month of *Dhul-Hijjah,* 6 A. H. which coincides with 627 A. D. one of these letters was sent to Chosroes Pervez, the Iranian Emperor who was killed in March 628 A. D. Similar letter would have been sent to Heraclius, the Emperor of Rome in the same year 627 A. D. But he was on a tour to Armenia. Heraclius should have thus, received the letter on his return from Armenia in 628 A. D. but heproceeded on pilgrimage to Palestine.[325]

However, he eventually received the said letter from the Apostle of Allah. On the advice of the companions of the Holy Prophet (SAW), all letters sent to the kings and

[323] One of the leading Biographers of the Holy Prophet. (S.A.W)
[324] See Alfred J. B, The Arab conquest of Egypt, p.140
[325] Ali-Nadwi S.A, Muhammad Rasulallah, Islamic Research and publications, India, 1979, p. 274

local chiefs of the Arabs were sealed with a silver seal each on which was engraved: '*Muhammad The Messenger of Allah*.[326] Similar letters were sent to Negus, the great king of Abyssinia (the present day Ethiopia) to Muqauqis, the chief of the Copts of Egypt. No one can appreciate the gravity and significance of the memorable and dynamic step taken by the Holy prophet Muhammad (SAW) towards international relations unless one knows who were these great kings to whom the letters were addressed.

In the world of the seventh century, Heraclius of Rome, Chosroes of Iran, Negus of Abyssinia and the Muqauqis of the Copts of Egypt were the powers that be with wide territorial jurisdiction, prestige, might and splendor. Anyone who is well acquainted with the political map of the world in the seventh century as well as with the power and splendour of the ambitious monarchs who had divided the world among themselves would come to a conclusion that only a man (of Muhammad's calibre) sent by Allah on a divine mission could dare to summon the world imperious Autocrats to come to terms with a growing nation of his. In response to the Apostle's letters, Herachlius, Negus and Muqauqis received the letter with all due respect and each gave a courteous reply. Both Negus and Muqauqis exhibited the highest regards to the envoys and the latter sent some gifts to the Holy Prophet. The said gifts included two slave-girls, one of whom was Maria-*Kibitiyyah*.[327] As for the great king of Iran, Chosroes II, he was indignant and arrogantly tore the letter into pieces saying, "My slave dare write me thus."[328] Consequent upon this unguarded pronouncement, within few years, the whole of Iran lay at the feet of the Muslims.

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[326] Ali-Nadwi S.A, Ibid.p.285

[327] The Egyptian Copt wife of the Holy-Prophet (S.A.W) who eventually gave birth to the Apostle's son called Ibrahim.

[328] Ibn Kathir, VOL.III, P. 513 and Muslims

By the various contents of the letters from the Holy-Prophets (SAW) to the great kings of the world, the Holy-Prophet (SAW) introduced international law in the shade of divine peace to the world. The core of the letters was nothing but invitation to peace and peaceful co-existence. The main object was to put in place a unitary global community devoid of hostility, war or armed conflict. This confirms the fact that the rules and principles pertaining to relations between Islamic state and non-Islamic states emanated from the *Sunnah*, which is the practical interpretation of the holy Qur'an. Good manners, good character and good conduct which are the basic components of the Holy-Prophet's person are reflected in his foreign policies in the Muslim nation's relationship with other nations of the world. For instance, *Sa'ad Ibn Waqas*[329] reported:

> *"Once I went to Aisha (R. A.) and her father and asked them about the character and conduct of the prophet to which Aisha replied – Don't you read the Qur'an? I said: Yes. She said: The character of the messenger of God is the Qur'an"*[330]

The three 'Dos' and three 'Don'ts' as contained in the Glorious Qur'an[331] which are often referred to by some Muslim Jurists as the Muslims' code of conduct are exceptionally put to practice by the Holy Prophet (SAW) as Head of the Muslim nation in his international relations. For sake of clarification, it is pertinent to highlight the 'Dos' and 'Don'ts' in the verse under reference. The 'Dos' are: Justice, Kindness and maintaining family tie by giving dues to the relatives. On the other hand, the 'Don'ts' are prohibitions of indecencies, evils and rebellion. By this provision in the Qur'an, the Holy prophet (SAW) introduced universal system of justice. This was exhibited in his precepts about war, which *interalia* were that

[329] A prominent companion of the Holy prophet Muhammad (S.A.W)
[330] Fazlul K, Ihy a ulumiddin (احيا العلوم الدين) vol. 2, Taj company, Delhi- 110006, 1986, p.235
[331] Quran (An-Nahl) 16 : 90

emissaries and delegates from other countries should be held in great respect. Any mistakes or discourtesies committed by them should not be counted against them. Moreover, where a Muslim commits the sin of ill-treating the prisoner of war, atonement is to be made by releasing the captive concerned without ransom. The uniqueness of the Holy prophet (SAW) in enforcing uniform standards of justice and fair dealing cannot be over emphasized. This was not only applicable to individuals within the territory of the Muslim nation but also to the nations dealing with the Muslim nation. According to Hazrat Mirza Bashir-Ud-Din[332] "Even during the exigencies of war he (the holy prophet) was most particular in observing all accepted rules and conventions" In another instance, there was an argument between Abu-Bakri, a blossom friend of the Holy prophet and a Jew. In the process an utterance of Abu-Bakri hurt the feelings of the Jew who complained bitterly to the Holy Prophet (SAW). The prophet reprimanded his bosom friend and said:

"You should not have said this as the feelings of other people should be respected"[333]

Concerning kindness, the Holy prophet (S.A.W), who in most cases is described as 'The possessor of compassionate heart', taught the entire mankind the spirit of forgiveness and mercy. The conquest of Mecca, which was foretold in form of prayer, taught to the Holy prophet in the Qur'an[334]marked the end of wars or armed conflicts fought by the Muslims in defense of their faith against the *Kufar* of Mecca. On his return to Mecca, the first declaration of the holy Prophet was: "By Allah, you will have no punishment today and no reproof"

[332]Bashiru- Din M. A, The life of Muhammad, published by the Ahmadiyya Muslim foreign missions office, Pakistan, 1949, p.194
[333] Bukhari, collection, kitab-al-Taohid
[334]Quran (Israi) 17: 81-82.

The merciful Apostle of Allah forgave the enormous fault of all. It was certainly the widest amnesty ever granted by any conqueror in the world. As part of his declaration of amnesty, he said: "He who enters Abu-Sufyan's house would be safe, he who shuts his door upon himself would be safe and he who enters the sacred mosque would be safe"[335] Out of compassion, before ordering the Muslim army to enter Mecca the holy prophet instructed his men to lift their hands only against those who obstructed their advance or drew swords against them. He further directed that the troops should not lay their hands on any moveable or immoveable property of the Meccans nor destroy anything. This combined trait of forgiveness and mercy made the holy prophet (SAW) the best head of nation who was and remains the best statesman in the contemporary world.

The third of the three 'Dos' under the Quranic provisions that represent the holy prophet's good conduct and character is 'keeping family tie intact'. The Apostle of Allah infected the spirit of universal brotherhood into the world polity. To him the entire inhabitants of the globe are one and inseparable family. Perhaps this is what prompted him to have said:

"You are' all from Adam and Adam was from the earth"[336]

If the above-quoted prophetic tradition has been adhered to, there would have been smooth relationship among the nations of the world. It is now left for the global community with a view to building a united, friendly and loving world community.

As for the 'Don'ts, the Apostle of Allah transparently applied the prohibition of indecency evils of all kind and rebellion components of his person. In relating with other leaders of the universe, he never used foul languages neither in speech nor letter. He carefully applied the rules of decency. When sending emissaries either to deliver

[335] Ibn Hisam, Ibid, Vol. II, p. 409
[336] Bukhari, Collection, kitab-al-Taohid

a letter or to negotiate with other nations, he picked finest envoys of the highest intellectual quality. Contents of his letters that were similar in substance reveal decency of highest order and any rebellious suggestion. Each of the letters was devoid of hostility and threat. They were persuasive and convincingly inviting to both physical and spiritual peace with the practical interpretation of the divine law (Al-Qur'an) as enumerated above, a sworn enemy of the holy prophet and his new nation of the Muslims becomes a devoted follower. Such was the case of one *Shaiba* (R. A.), a Meccan resident who determined to kill the holy prophet (SAW) at the battle of *Hunain*.

When fighting became brisk, *Shaiba* drew his sword and started advancing towards the prophet. By the time he came closer to the prophet he became unnerved. His determination became unstable. In his own words he said, confessing:' When I got very near the prophet I seemed to see a flame threatening to consume me. I then heard the voice of the prophet saying ''*Shaiba*, come the prophet moved his hand over my chest in great affection as he did , he said, God, relieve *Shaiba* of all Satanic thought' Just with this little touch of affection *Shaiba* changed. His determination hostility and enmity against the prophet diffused and eventually evaporated. That was how *Shaiba* converted to Islam and held the prophet dearer than anything else in the world.

The truth of the matter in respect of *Sunnah* or prophetic tradition is that, just as the sources of Qur'an was Allah, (for without His revelation) there can be no Qur'an) so the source of all sermons, prohibitions, permissibility, and regulations as practiced and propagated by the holy prophet (SAW) was also Allah in the conduct of state affairs respecting the Muslim nations the Holy Prophet laid down a precept that

state affairs on any matter whatsoever should be conducted by consultation,.[337] This precept can be said to be the practical interpretation of a Quranic provision which reads thus:

> *"Those who harken to their Lord and establish regular prayer; who conduct their affairs by mutual consultation…"*[338]

In testimony to the position of the Holy Prophet (SAW) with respect to conduct of state affairs by consultation, his noble companions (God be pleased with them) were reported to have said:

> *''Never did we see a person who was engaged in counsel more often than the Holy prophet (SAW)''*[339]

Conclusively, the *Sunnah* of the Holy Prophet (SAW), which by extension include the practices of his rightly guided successors and his leading illustrious companions is a vast ocean of wisdom and unbeatable precepts as far as matters of international relation are concerned. It is therefore an established second principal source of the Islamic Law of war and peace. No work however elaborate can encompass it.

4.4.3 *Qiyas*(Analogy)

The root meaning of the word *Qiyas* is measuring or comparing.

In its literal sense, it means measuring,[340] which by the way of better understanding the word *Qiyas* can be said to mean to estimate or to guess.

According to a Kaduna based Legal Practitioner, it signifies "a process of deduction by which the law of a text is applied to cases, which though not covered with the

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[337] Sayyid Abul-Ala M, The Message of the Prophet's Seerah, 1403 A.H (1983) Published by the Holy Koran Publishing House, Beirut- Lebanon, p. 28

[338] Qura'n (Ash Shoura) 42: 58

[339] See. Sadr-ush-Shari'ah, p.425

[340] Ajijola A.D, Introduction to Islamic Law, opicit. 76

language, but governed by the reason of the text."[341] Another legal mind precisely defines *Qiyas* in Islamic theological parlance as analogy or analogical deduction *simplicita*.[342]

However a more comprehensive and analytical definition of the concept of *Qiyas* is the one given by Anwar A. Q as follows:

> "To extend (*Ta'diyah*) the *Shari'ah* value from the original case or ask over to the subsidiary by reason of an effective cause or (*Illah*) which is common to both cases and can not be understood from the expression concerning the original case alone."[343]

For instance any acts common or similar to a given act prohibited in the Qur'an or *Sunnah* or even prohibited under the consensus of opinion *(Ijma'a)* in regard to the effective cause for which the prohibition has been decreed are likewise prohibited.

The function of *Qiyas* is to discover the effective cause or *illah* of the revealed law or of a decided matter under the *Sunnah* so as to extend same to similar cases. Wine drinking for example is prohibited by explicit text.[344] The cause for the prohibition is the intoxicating effect, thus in whatever this cause is found probation will be applicable. Snuffing cocaine heroine or smoking Indian hemp are *inter-alia* cases of such nature. Each of these instances has intoxicating effect and none of the items are specifically prohibited by the Qur'an or *Sunnah* like wine. Hence, by way of analogical deduction (*Qiyas*), they are all prohibited under *Shariah*.

[341] See introduction to Islamic law, op. cit. p.77.
[342] Doi A.D, ibid. p.99
[343] Anwar A. Q, 'Islamic Jurisprudence in the Modern World, op. cit. p. 211
[344] Quran (Al-Maida) 5 : 90

Thus the law is extended to other cases of similar nature. The Holy Prophet (SAW) whose sayings and traditions constitute the second primary source of *Shari'ah* is reported to have said:*"Every wine is prohibited."*[345]

The significance of the concept analysis in its necessity and use as of *Ijma'a*. It is a mechanism in the shape of a source of legal development to bring law in relation to its application to the changing need of the human society.

The bases of *Qiyas* are firmly established in the fundamental *Shari'ah* evidences themselves under which principles the sacred *Shari'ah* is a perennial system for all time.

There is a conflict of opinion among the jurist as to the validity of *Qiyas* as a source of law.

The opponents of *Qiyas* base their argument on the assertion of Almighty Allah in the glorious Qur'an that: ''we do not admit anything in the book (i.e. Holy Quran) surely to your lord shall you return.''[346] This argument is also buttressed with another provision of the Qur'an, which reads as follows:

> *"We have sent down to thee a Book explaining everything a guide, a mercy and glad tiding to Muslims."*[347]

This position is also back up with the prophetic tradition on Israelites violation of the directions outside the basis by making legitimate what was prohibited and what was legitimate as prohibited.

The fear of the opponents of *Qiyas* was heightened by the belief that *Qiyas* would lead to conflict and dissentions in the various schools of jurisprudence and more particularly in the field of legal interpretation. No doubt, the rightly guided caliphs and the companions were unanimously in agreement with the validity of

[345] Sahih Muslim Collection, Cairo, 1334 A.H, vol.v1, p. 101
[346] See Qur'an (Al-Anam) 6:38
[347] Qur'an (An-Nahl) 16: 89

*Qiyas*but the jurists among the successors differed as to what extent could analogical deduction could be relied upon.

The *Imamiyah Shia* rejected it outrightly. Likewise *Daud Al-Zahiri* with the majority of jurists and *zaydiyah shiah* accepted and uphold the validity of *Qiyas*. The foremost contention of these proponents of *Qiyas* is that all the companions of the Holy Prophets and all the followers as well as the righteous people and theologians have unanimously agreed that *Qiyas* through the use of personal opinion on the basis of the *Shari'ah* principles in order to decide undermined cases is a valid and lawful source of Islamic law.

To concretize this position, the pro-*Qiyas* jurist rely heavily on a number of Quranic verses prominent among which are the following

> "*And such are the parables We set forth for mankind, but only those who understand them are those who have knowledge*''[348]

Other verses of the Qur'an include Q.59:2 where Allah says "… consider o ye possessors of eyes" and Q 8:22 which reads thus:

> *"For the worst of beasts in the sight of Allah are the deaf and dumb, those who understand not."*

Apart from the above cited Quranic references. The Advocates of *Qiyas* equally rely on the tradition of the holy prophet. One of such tradition is the Holy prophets application of *Qiyas* by likening the fulfillment of an ordinary debt to deduce a rule of law.[349]

It is reported that a woman from Juhaynah tribe approached the Holy Prophet and enquired that her mother had vowed she would perform pilgrimage but died before realizing her dream, that is before fulfilling her vow, "should I perform the pilgrimage on her behalf'' she asked and the Prophet's accurate response was:

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[348] Suratul (Al-Ankabut) 29:43

[349] Al-Majtahid (The Jurist), MSSN, Nigerian law school, 2000, Abuja, p. 66.

"Yes, do perform the pilgrimage on her behalf. If your mother died with outstanding debt, would you not offset the debt, repay God's debt for God is more entitled to redemption.''[350]

Another strong ground for validity of *Qiyas* is the *Sunnah* of the prophet when he was sending Mu'adh ibn Jabal to Yemen as Governor. He asked him how he would judge when an occasion arose and he replied that he would Judge in accordance with God's Book. The Prophet probed further in case he could not find solution in God's book, Mu'adh answered that he would act according to the *Sunnah* of God's messenger, the prophet asked what he would do if he could not find guidance in the *Sunnah* of God's Messenger and he replied that He would do his best to form an opinion and spare no pains. On hearing this the holy Prophet then patted him on the breast and said:

"Praise be to Allah who has disposed His Messenger's Envoy to something with which God's messenger is pleased.[351]

On another occasion, the Prophet sent Abu Musa Al Ashari to Yemen as a Judge and He instructed him in the following words:

"Judge upon the Book of Allah and if you do not find in it what you need, upon the Sunnah of the prophet, and if you do not find guidance in that then, use your own opinion''

To the same noble companion that is Abu Musa Al-Ashari (May Allah be pleased with him) Umar, the second Khalif in Islam wrote:

"... use your brain about matters that perplex you and to which neither the Qur'an nor the Sunnah seems to apply. Study similar cases and evaluate[352]

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350 Mishkat, Ibid, vol.2 p.794

351 Karkahi, K , Justice in Historical Islam'

352 Al-Mujtahid, op. cit. P. 58

The relevance of *Qiyas* as a major source of Islamic law to the study of law of war and peace cannot be over-emphasized.

With introduction of highly sophisticated weapons and more particularly scientific weapons such as nuclear or/and Chemical weapons which were not used in war fares throughout the life time of the Holy Prophets (SAW) and the first, second and third succeeding generations to the prophetic era, one can not but acknowledge the need for application of *Qiyas* strictly based on the Qur'an, *Sunnah* and the *Ijma'a*,therefore for *Qiyas* to be accepted particularly as a source of Islamic law of war and peace, the laid down conditions listed below must have to be satisfied.

i). The *Qiyas* can only be applied only when solution to the matter on ground is not found in the Qur'an and *Sunnah*.

ii). The new problem at hand must not have been treated or decided in any manner whatsoever by a *Sunnah* or *Ijma'a*.

iii). There must be similarity in both the original case and the new one. That is they must be identical.

iv). The *Qiyas* must not be in conflict with fundamental principles of Islam.

v). The effective cause in both cases must be compelling factor in other words it should be clear and not ambiguous. It must be specific and not general.

vi). No *Qiyas* should be founded on exception of the general rules.

vii). The application of *Qiyas* must not lead to alteration of a prescription of the Qur'an and *Sunnah*.

In line with the thoughts of honourable Justice Uthman Muhammad OFR, in his contribution to the Al-Mujtahid, a law journal,one may safely rest his case on *Qiyas* by concluding thus:

By the application of *Qiyas* the law of Islam has not been stagnated with the demise of the Holy Prophet and his Companions. Rather, Muslim Jurists have been developing the Islamic law in all its ramifications strictly based on the holy Qur'an and the *Sunnah* for their guidance using the instrument of consensus (*Ijma'a*); through this process, the universal law of Islam has develop to a very high degree of technical perfection with treatises compiled in remarkable style of profound reasoning and orderly presentation making it acceptable to the new world order.

Finally, the law of Islam in the contemporary world, accommodates Fat'wa and Treaty as subsidiary sources of Islamic Law. For their relevance to the practice and interpretation of Islamic Law in modern days, the succeeding paragraphs will be devoted to Formal Islamic Legal rulings.

4.4.4 Fat'wa

Fat'wa is a formal Islamic legal opinion or ruling on contemporary matters. It is therefore not out of place to consider Fat'wa as a foremost minor source of Islamic Law. In this segment, various lslamic Legal rulings by different Muslim Scholars of note on the subject matter of war are to be addressed.

On suicide bombing in *Jihad*, Dr Yusuf Qardawi, a renowned Islamic Scholar and Leader of the Muslim Brotherhood of Egypt; issued a Fat'wa on the 22/03/2004.[353] He held as follow:

[353] http://www.Islamonline.net/Fat'wa/english/68511

- Distinction has to be made between martyrdom and suicide as the martyr operation is the greatest of all sorts of *Jihad*; while suicide is a crime in Islamic Law.
- When *Jihad* becomes an individual duty, as when the enemy seizes the Muslims territory , a woman becomes entitled to take part in it alongside with men.
- Regarding the use of *Hijab*, a woman can put on a hat or anything else to cover her hair. Even when necessary, she may take off her *hijab* in order to carry out the martyr operation, for she is going to die in the cause of *Allah* (SWT) and not to show off her beauty or uncover her hair. The Sheikh said : "I don't see any problem in her taking off *hijab* in this case".
- In the *Fat'wa*, the great Scholar adopted the general opinion of the Jurists where it is maintained that : when the enemy assaults a given Muslim territory, it becomes incumbent upon all its Residents to fight against them to the extent that a woman should go out without the consent of her husband, a son without the permission of his parent, a slave without the approval of his Master and the employee without the leave of his employer. He explained further that, this is a case where obedience should not be given to anyone in something that involves disobedience to *Allah*(SWT).
- The legal opinion is sealed with a ruling that, the committed Muslim women in Palestine have the right to participate and have their own role in *jihad* and to attain martyrdom.

  Another Prominent Jurist, Sheikh Salman Al-Qadah issued Fat'wa in respect of jihad, terrorism and killing of harmless civilians. The Sheikh premised his legal opinion on the Islamic Law principle which prohibits the targeting of

innocent people like women, children, aged people and citizens who are not carrying arms.

This principle applies even when there is actual armed conflict between the Muslim State and the non-Muslim states. His *Fat'wa* contains the following rulings :

- Disbelief (*Kufru)* in and of itself is not in anyway a justification to kill.
- In compliance with the tradition of the holy Prophet Muhammad (SAW) and the rightly guided Caliphs who succeeded him, it is necessary to protect and give consideration to the Weak and the Non-combatants.

To support this Fat'wa, the erudite Scholar stated that, the Prophet of Islam (SAW) as Commander-in-Chief of armed forces of the Muslim Nation was reported to had once sent a directive to Khalid bn Walid in the following words : *'Tell him not to kill children or laborers.'*

- Public places like Aircrafts, Markets and Work places are open territory where adults and children, men and women are to be found. These places are not and must not turned into targets, even during the times of war.
- In the Fat'wa, the Sheikh declared thus :

  "*Those people and these today are to be called to Islam. They are the ones to bring the message (of Islam) to. Failure to fulfill this vital duty* properly at one time or another does not mean that it always has to be *this way, because there is an Islamic injunction that requires invitation of the non-muslims to Islam"*[354].

As to whether *Jihad*is defensive or offensive, Sheikh Abd-ar-Rahman bn Nasir Al-Barrak issued Fat'wa in reaction to Dr Salman Al-Awda's comments on Al-

[354] Htt://www.Islamtoday-English-htm

Jazeera (A satellite Televission) by which Salman.A accepted that jihad is defensive and there is no offensive jihad. He based his argument on the claim that Prophet Muhammad's offensive wars were permitted because there were no International agreements as at then. Below are legal opinions of Sheikh Abd-ar-Rahman of the Kingdom of Saudi Arabia[355].

- There is offensive jihad against the Infidels. He founded this legal opinion basically on the provisions in the verses 5 & 29 of chapter 9 (Surah At-Tawbah). The distinguished Scholar also heavily relied on the tradition of the holy Prophet which read thus "*I have been commanded to fight against the people until they testify that there is no god but Allah"*
- Jihad could be defensive or offensive. Both defensive and offensive Jihad have their respective positions in Islamic Law depending on the cause or circumstance of the war.
- Islam makes jihad (Offensive and Defensive alike) a requirement for the Muslims, while on the other hand the International agreements prohibit jihad for the Muslims.

Sheikh Abdullah Azam, in his own Fat'wa, he introduced the concepts of *Fard Ayn and Fard Kifaya* into the discuss of jihad being offensive or defensive. He gave ruling as follows :

- Jihad becomes Fard Ayn (Global Obligation) on every Muslim male and female whenever a piece of Muslim land is infringed upon.

[355] See 29,March,2003, Fatwaonline.com

- When jihad is fard ayn, permission from any lawful Authority stands nullified because Jihad that is of universal obligation takes precedence over obedience to any other lawful authority like that of Parent over a child.
- Jihad is of two types which are Offensive and Defensive. Sheikh Azam declared Offensive Jihad to be Fard Kifaya (An obligation, which if fulfilled by a section of the people, the rest of the community is deemed to have performed it),and Defensive Jihad as Fard Ayn(A compulsory duty upon all)

With regard to when exactly does Jihad becomes Fard Ayn, the four major schools of thought in Islamic jurisprudence have different opinions. To the Maliki School, Jihad can only becomes Fard Ayn upon surprise attack by the enemy. Where ever there is a sudden aggressive attack on the Muslim nation, jihad immediately becomes Fard Ayn upon every body, even women, slaves and children and they march out, even if their guardians, husbands and creditors forbid them to.

The Hannafi School is of the view that Jihad becomes compulsory for all and sundry only when the enemy attacks one of the boarders of the Muslims and it becomes so upon those to assist. However, the school believes that, in a circumstance where those far away are needed, perhaps because those nearby the attack can not resist the enemy or are indolent and can not fight, then it becomes Fard Ayn upon them. Just like the obligation attached to the five daily compulsory prayers (Salat) and the compulsory fasting in the month of Ramadan (Sawm), there is no room for the Muslims to leave fighting in the cause of Allah (Jihad). If they are unable, then it becomes Fard Ayn upon those behind them, and so on in the same manner until the jihad becomes Fard Ayn upon the entire Muslim Nation (*Ummah)* from East to West and from South to the Northern part of the world.

In the opinion of Shafihi School of thought , if the enemy approach one of the Muslims' lands and the distance between them and the Muslims is less than the distance permitting the shortening of prayers, then the people of that territory must defend it and it becomes Fard Ayn even upon those for whom there is usually no jihad like women, children, slaves and the debtors.

Ibn Qadamah of the Hambali School agrees that Jihad is Fard Ayn but it becomes so only under three circumstances. These are :

a) If the two sides meet in battle and they approach each other.

b) If the Kufar enter a land, jihad becomes Fard Ayn upon its people.

c) If the Imam calls a people to march forward, it becomes Fard Ayn upon them to march forward.

It is pertinent to include the Fat'wa of Ibn Taymia, a great Scholar of his time. On *Jihad,* Ibn Taymia issued the following legal opinions :

i)-The first obligation after Iman is the repulsion of the enemy's aggression by which the enemy assaults the religion and worldly affairs.

ii)-When pious people from the best of mankind are in the enemy's land of the un-believers(*Kufar)* and it is not possible to fight these Kufar except by killing them, then they are to be killed as well. The modern Scholars are in accord with this ruling. Their position is that if the Kufar use Muslim captives as human shields, and there is fear for the rest of the Muslims if they are not fought, then it is permitted to shoot them aiming at the enemy.

iii)-Ibn Taymia issued the opinion that if the enemy enters a Muslim land, there is no doubt that it becomes obligatory upon the closest and then the next closest to repel him, because the Muslim lands are like one land. It is obligatory to mach to the territory even without the permission of parents or creditors.

To conclude this portion of the third chapter of this work, it is important to mention the Fat'wa on the current fighting in Palestine and Afghanistan. In the present condition in both Palestine and Afghanistan *Jihad* has transformed from being *Fard Kifaya* to *Fard Ayn* whereby no permission whatsoever is required from anyone whosoever. The legal opinions therefore are as follow:

- Participation in the fighting in Palestine and Afghanistan is a defensive jihad, therefore a *Fard Ayn* (Global Obligation) upon the Muslims world-wide.
- The sin of not fighting is suspended on the necks of all the Muslims as long as any hand span of land of a Muslim nation is in the possession of the infidels (*Kufar).*
- The sin is measured according to individual's authority or capability. For instance, the sin of the *Ulama (* Learned Scholars), the *Umara* (Government/ Ruler or King) and the *Daahi* (Preacher) who are well known in their communities; is greater than the sin of ordinary citizen in the Muslim territory.
- The sin upon the present generation for not advancing towards Afghanistan, Palestine, Kashmir, Lebanon, Eritria etc, is greater than the sin inherited from the loss of lands which have previously fallen into the possession of the kufar.
- Defensive Jihad which is Fard Ayn does require a Commander-in-Chief (*Ameer).* That is to say, Jihad could be fought without an Ameer.
- It is obligatory on the Muslims to fight in Afghanistan, even with disunited leaders because fighting is for the defense of the Muslims against the aggression of Atheists.

- Seeking assistance of any kind from the Infidels (*kufar or Mushrikun)* is prohibited.

In the final analysis, the journey so far on concept of peace within the framework of Islamic Law has revealed the peculiarity of the Law of Islam in the matter of war and peace.

The word 'peace' was conceptually introduced from various dimensions. It is distinguished from other concepts in the light of historical sequence and different beliefs in the contemporary world. The fourth chapter is sealed up with brief discussion on the legal constraints imposed by the Islamic Law on the conflicting parties when at war. Three major and one subsidiary sources of Islamic Law were employed to mirror the Islamic Law concept of 'Peace'.

CHAPTER 5
IMPACT OF WAR ON GLOBAL PEACE AND SECURITY

5.0 INTRODUCTION

For every event in human endeavor, there is always definite cause and effect. War is one of the conventional causes which effects represent greater impact in various forms on the world peace and security. War or armed conflicts in one way or the other always have memorable consequential impact on the peace and security of the world. Such effects that have been rightly qualified by G. Schwarzenberger as "*Legal Effects*"[356] are specifically classified into effects in reaction to the interstates affairs relations between belligerent states and enemy nationals, the impact of war on private relations as well as in the light illegal war.

When interpreting the Peace Treaty of Nevilly (1924), the World Court i.e. the ICJ contrasted the relations between belligerent states which are "governed by the laws of war" with those affairs between belligerent and non-belligerent states which are governed by the "law of peace and neutrality"[357]. In essence, the laws of war and neutrality considerably widened the discretionary powers of belligerent states towards one another and towards non-belligerent states. Thus, the varied relations in time of peace is naturally distinguished from the relations between the warring parties known as the belligerents as well as between any of them and the neutral states and ultimately between private individuals or nationals of the belligerent or neutral states in times of war.

[356] Schwerzenberger. G, 'International Law as Applied by International Courts and Tribunals'', Vol.2, Stevens & Son Ltd; London, 1968, p. 75.

[357] See Re: Armstrong Cork Company (1953 – Italo-United States Conciliatory Commission) 14 R.I.A.A.P. 159 at 163.

Hostility or armed conflict symbolizes cause while the consequential impact on the peace and security of the international community sufficiently represent the effect.

The focus in this chapter is the effect of war on the global peace and security. It is thus on this premise that the said effect of war on global peace and security will be objectively examined in the light of the horrific genocide in Rwanda, and the intra-state conflict in sierra Leone reflecting their impact on regional peace and security. The Iraqi-Iranian war will be discussed with special reference to the role of U.S.A. which seriously affected the peace and security of the international community as at then. Following this will be the non-international conflict in Kosovo with its profound impact on the peace and security of the world. In the same strength, the effect of the long time armed conflict between the nation of Israel and Palestine as it affected the peace and security of the middle East and by extension global peace and security.The chapter will be closed with effect of natural aftermath of war (i.e. treaties) which are formal agreement to maintain peace among the belligerent states and their respective nationals.

5.1 CONFLICTS IN AFRICA

In recent time Africa has become a war theatre[358]. Conflicts in Africa have been the common features in various states within the continent[359]. Due to the consequential impact of these dastardly-armed conflicts all over Africa, politico – military organizations emerged at international, regional and sub-regional levels.[360]An operational concept called "Peace keeping" resulted from the Canadian sponsored General Assembly resolution. The peace keeping concept has been understood in

[358] The Rwanda Genocide Started April 7, 1974, The 2nd Phase of Eritrea – Ethiopia War Occurred in 1999 and the intra-State Conflict in Sierra Leone erupted as Civil War in 1991.

[359] See B.B.C Focus on Africa, Edition of April – June, 1999, p.20

[360] See Ishola W., His Contribution to Nigeria in International Peace-keeping 1960 - 1992, Ed. By M.A. Vogit & E.E. Ekoko; Malthouse Press Ltd, Lagos – Nigeria, 1993, pp. 247 – 252.

several ways but it has been generally defined as a mechanism for the containment and management of conflicts[361]".

The A.U as regional organization have not recorded much success in the region. For example, an unsuccessful attempt was made in Rwanda with an A.U observer mission led by Brigadier Hashim Mbita of Tanziania apart from sub-regional effort led by Zaire[362]. In the same strength Liberia could have ended up like Somalia[363]if not Nigeria – led ECOWAS initiative, ECOMOG which since then has remained the sub-regional politico – military organization. With these examples, the impact of war or armed conflicts in Africa on the regional peace and stability is reflected. As case studies, the genocide in Rwanda and conflict in Sierra-Leone be examined in the light of their impacts on peace and stability in Africa and by extension on the global peace and security.

5.1.1 Rwanda

The Rwanda crisis in 1994 cannot be regarded as conflict but as a pure Case of genocide which by definition, is any acts committed with the mind to destroy either wholly or partially, a national, ethnical racial or religious group[364]. According to Ladan M.T when breaking down the definition of genocide he listed three essentials vis-avis: (i) an identifiable national, ethnical, racial or religious group; (ii) the intent to destroy such a group in whole or in part (mensrea) and lastly the actual commission of any acts founded on such intent (Actus reus)". All these essentials of genocide were featured in the Rwanda conflicts. It was an ancient tribal hatreds that degenerated into series of inter tribal conflict between the Tutsi and Hutus which

[361] See Ishola.w, 'Strategic Planning of Peace-keeping operations' in op.cit. P. 245.
[362] See Ishola W, Ibid. p. 248
[363] See B.B.C Focus on Africa, Ibid. p. 25
[364] See Article 2, The 1948 Convention on the prevention and punishment of the Crime of genocide

climax was the 1994 genocide[365]. It has be reported that "At least half a million of people perished in the Rwanda genocide; perhaps as many as three quarters of the Tutsi population with thousands of Hutus were slain[366]". The few Hutus killed in the genocide were those who opposed to the killing campaign and the force behind it. According to the Human Rights watch, it is not correct to believe that the genocide was an inevitable outburst of rage by a people consumed by 'ancient tribal hatreds.'

The genocide resulted from the deliberate choice of a modern elite to foster hatred and fear to keep itself in power. This small, privileged group first set the majority against the minority to counter a growing political opposition within Rwanda. Then, faced with RPF (Rwanda Patriotic Front) success on the battlefield and at the negotiating table, these few power holders transformed the strategy of ethnic division into genocide [367] In agreeing with the above-stated report of the Human Rights Watch, Richard Robbins[368] wrote: "if we examine cases of purported Ethnic conflict we will generally find that it involves more than ancient hatred, even the 'hatreds' we find are relatively recent and constructed by those ethnic entrepreneurs taking advantage of situations rooted deep in colonial domination and fed by neocolonial exploitation[369]"

The intra–state conflicts emanating from ethnic cleansing and unhealthy tribal rivalry in Rwanda was having greater impact on the peace and stability of the Africa region more so with the involvement of France. According to Richard Robbing:-

> The French, anxious to maintain their influence in Africa, began providing weapons and support to the Rwandan government, and the army grew from 5,000 to 40,000 from October 1990 to mid – 1992. A French military officer took command of a counter-insurgency operation. Habyarimana used the actions by the RPF to arrest

[365] Ahtt p: // www. Global issues. Org/Geopolities/Africa/Rwanda. Asp. 2003, p.1
[366] Shah, Ibid, P.1
[367] Human Rights Watch, March 1999 Report Entitled, Leave None to Tell the Story, Genocide in Rwanda
[368] A professor of anthropology at the New York State University, N.Y, U.S.A.
[369] Richard H. R, Global problems and the Culture of Capitalism, Allyn and Bacon, 1999, 2000, p. 269.

10,000 political opponents and permitted the massacre of some 350 Tutsi in the countryside.

In spite of increased state oppression and French-supported buildup of the armed forces, in January, 50,000 Rwandans marched in a prodemocracy demonstration[370] in Kigali, the country's capital. To worsen the situation, the Habyarimana's administration authorized the establishment of death squads which members were trained armed and indoctrinated in racial hatred toward Tutsi. The massacre of the Tutsi in Rwanda began in 1990. These were crimes that were effectively documented by local and international Human Rights groups as well as by rapporteur for the UN Commission on Human Rights. In fact the Belgian Government in protest. No one openly challenged Rwandan explanations that the killings were spontaneous and uncontrollable and none of the powerful nations used its influence to ensure that the guilty were brought to book. Moreover, the inaction of the international community or to say the least, the lack of international response to the 1993 massacres in Burundi encouraged the Rwandan Extremists to be confident that they could slaughter fellow Rwandans massively without any consequence."[371]

The fact that the Rwanda genocide was unprecedented in Africa is sufficient to make it threat to peace and stability in the region peace and stability in the region of Africa. It remains a model for ruthlessness and indiscriminate killings in Africa. This is nothing but a grave crime against humanity. The unprecedented Rwanda genocide flung opened the door of conflicts of the same magnitude which cannot be considered as genocide because they lack the essentials of the definition of genocide. Such armed conflicts were those of Sierra Leone Ethiopia – Eritrea and the crises in kosovo.

[370] Richard H. R, Ibid. pp. 271-2
[371] Human Rights watch Report, 1999.

This is how the Rwanda genocide affected the peace and stability in Africa and, by extension, the global peace and stability.

5.1.2 Sierra Leone

Serious and grotesque human rights violation has been experienced by sierra Leone as far back as 1991 when the civil war erupted. By the year 2001, more than 50,000 people have been killed while over one million people have been displaced[372].

The conflict in Sierra Leone was premised on the corruption and mismanagement of diamond and mineral resources by various governments in Freetown. The rebel force, the 'Revolutionary United Front (RUF) and the R.U.S have committed horrendous abuses. People have been raped, limbs have been amputated and houses have been burnt down with catalogue of arsons committed by revolutionary group[373]. According to Lansana Fofana, a B.B.C Reporter in Freetown, "sometimes the rebels would set fire to houses after locking the residents inside.[374]" People were powerless to stop the arson. The RUF rebels renewed their attacks as the UN peacekeeping forces tried to disarm them near various diamond – rich areas that they controlled. At times for a long time, a number of UN Peace-keepers were also held by rebels but subsequently released.[375] The peace and stability of the region was so greatly disturbed that the A.U's efforts had to be supplemented by ECOWAS with its West African peace keeping force, ECOMOG in place to resolve the conflict and restore peace back to the government and people of Sierra Leone.

Like the armed conflicts in Liberia and Rwanda, the conflict in Sierra Leone had its root in regional political and economic in stability. The effects of the conflict

[372] Anupshah, 'Conflicts in Africa, htt p:11 www.Globalissiues org/Geopolitics/Africa/Sierra Leone, asp., 2001, p.1
[373] B.BC. Focus on Africa, Ibid, p. 28
[374] B.BC. Focus on Africa, Ibid, p. 28
[375] Anupshah, Ibid, Sierra Leone, p.2

have spilled over the Sierraleonian borders to regional neighbor as her citizens have to seek refuge in the neighboring states.

Thus,it is in effect a great impact on the regional peace and stability. It therefore logically follows that the cessation of armed conflict and reconstruction of the affected nations must have to be dependent upon the country – specific remedies, but equally dependent on the regional factors which eventually affect long – term stability in West Africa.

It has been rightly observed that the fate of each of the countries within the African region linked to one and other in the sense that their respective conflicts are the result of regional tensions and factors.[376] Their porous borders have allowed wars to spill over into neighboring countries for more than a decade, as Liberian fighters, for instance, entered sierra Leone to support the RUF rebel forces there. Those same borders given way to arms smuggling and theft of resources to support regional conflict.

Consequent upon the armed conflict in Sierra Leone, Sierra Leonian refugees are spread all over the West African sub-region thereby impacting economic burden on these neighbouring states as they provide for needs of refugees and armed soldiers crossing the borders.[377] Such refugees are found in Liberia, Nigeria Cote d'Ivoire and Guinea. There by, having impact on the regional peace and stability.

5.2 IRAN – IRAQWAR

Invasion of Iran in September 1980 marked the beginning of a armed conflict between Iraq and Iran. The said armed conflict was vigorously conducted for a period of eight years. The war came to an end in August 1988 when the UN initiated a ceasefire with certain directives such as withdrawal to the pre-war border and

[376] Bernath and Sarah Martin, 'Peace-keeping in West Africa: A regional report, Relief Web, 2004, p.2
[377] See further www. reliefweb.int comments.

submission to an international body to determine responsibility for the war.[378] By the global history, the war was considered to be one of the longest and destructive of the 20th century claiming over one million causalities. In spite of the length and cost of the war, none of the parties made any significant gains; be it territorial or political. Moreover, the fundamental issues responsible for the armed conflict remained unresolved at end of the war.[379]This international conflict between Iraq and Iran was the first Gulf war conducted for almost one decade – 1980 –1988 as indicated above.

5.2.1. Background:

The primary factor responsible for the hostility between Iran and Iraq was the borderlands between the two nations which had been profoundly contested diplomatically and sometimes militarily for several centuries.

The borderlands had never made any sense. Rather than defining any real ethnic homeland, the border merely marks a point where two prominent expanding dynasties of the Ottomans and Persians respectively ran into each other in the 16th century. From diplomatic view-point, the final treaty signed about two centuries thereafter separated Kurds, Shiites and Arabs between the two overlords along a vague line drawn somewhere in the wild mountains.[380]

The breaking-up of the Ottoman Empire after the World War I whereby the non-Turkish provinces were ceded to the British and French as mandated under the League of Nations did not improve matters. These provinces would have been better off if they were merged together to form logical nation-states. After the conquest of the modern Iraq in 1534 by the then Ottoman Empire making it the Eastern most part of its empire, Iran, its eastern neighbour, became a frequent rival. This fact became

[378] UN Resolution 598 passed in July, 1980
[379] See Nathan J.B, Contribution on "Iran –Iraq war" to 1993-2001 Microsoft Corporation p.i
[380] Mathew W, "Iran vs Iraq :1980-1988, http :II users. erols .com/ mashite 28/Iranraq htm P. I.

more evident in the aftermath of World War I (1914 – 1918) when Iraq was made a separate state as an autonomous entity. There arose sharp disagreement between Iran and Iraq over the precise border between them, particularly in the area of the Shatt – al – Arat[381].

By the year 1937, the two nations through the instrument of diplomacy came to an agreement by which a boundary that gave Iraq full control of the Shatt al Arat was established.

Despite the 1937 agreement the diplomatic relations between Iran and Iraq continued to suffer occasional crises. Perhaps two factors were responsible for these periodic crises. First, irrespective of the well known fact that Iraq is predominantly Arab and Iran is predominantly Persian, the borderlands yet cut across some political loyalties. Towards the northern axis, a considerably large population of Kurds (who are neither Arabs nor Persian) were straddled on both sides of the border. Along the southern part of the border, a minority of the Arab inhabited the Iranian province of Khuzestan in the midst of Persian majority. Moreover, the largest portion of the Iraqi populace is Shiite Muslims; while similarly, the majority of the Iranian populace are Shiite. In the customary practices, the Shiite leaders at odds with the secular government of their respective homes countries; always sought refuge in the other. This Shiite tradition further strained Iranian-Iraqi relationship. The best example in this regard is the case Ayyatullah Ruhollah Khomeini, a leading Shiite religious scholar who took refuge in Iraq after been exiled from Iran by the then President of Iran –Muhammed Reza Shah Pahlavi in 1964.

[381] A river channel providing Iraq's only outlet to the sea, via the Persian a. Gulf.

The second factor that was responsible for the continuous conflict between Iran and Iraq was the political instability. The two nation-states were politically unstable.

Whenever either of them experienced a revolution or coup, the peaceful one would take advantage to exploit the troubled country's political flaws to gain diplomatic advantage.

Wide difference between the foreign policies of the conflicting nations further created a bitter rivalry between the two countries. Both Iran and Iraq became more independent to pursue more ambiguous foreign policies, undisturbed (and sometimes also supported) by external powers as a result of gradual loss of influence in the gulf area by the western Nations especially the Great Britain.

Iran under Reza shah Pahlavi, felt she could assert its authority in the gulf with the partial support of the U.S.A. On the either hand Iraq, under the military administration of Major General Ahmed Hassan Al-Bakr, sought to bring the Arab world under one umbrella with the intent to strengthen the Arab nations and reject western influence. Thus, the foreign policies of the two neighbouring countries were in opposite directions.

In the early 1970s, there was internal conflict in Iraq when the Kurds rebelled against the Iraqi government. Prominent among other nations that supported the insurgency was the next-door neigbhour of Iraq, that is Iran. At a peace talk in Algiers in 1975, an agreement was reached between Iran and Iraq to the effect that Iran would abandon its support for the Kurdish rebels in Iraq and in return the Iraqi Government agreed to cede 518 km^2 of oil-rich border lands along the Shatt-al Arab to Iran.

This Algiers agreement of 1975 nullified the 1937 agreement and the border between the two nations was drawn down the middle of the shatt al-Arab and no more along the eastern bank of Iran as it was under the former agreement.

In January, 1979, Ayatollah Ruhullah khomeini led a revolution which eventually toppled the government of Muhammed Reza Shah Pahlavi. All this while Khomeini was on exile but commenced the revolution while in exile and in a month later that was February, 1979. Immediately on arrival, Khomeini began to take control of the newly formed government. Consequent upon a popular referendum, an Islamic Republic of Iran was established in April, 1979.

Success of the revolution in Iran posed an enormous opportunity and simultaneously a dire threat to the Iraqi government, now led by Saddam Hussein.

Naturally, the revolutionary process threw Iran into serious disarray and complex confusion. The various elements in the coalition that removed Shah Pahlavi from power were dangerously divided and the Iranian army was being sanitized by purge, re-deployment and fresh orientation. In addition, the taking of American hostages in November, 1979 coupled with the desire of the new Islamic government in Iran to rescue the people of Iran from all forms of foreign influence left Iran isolated in the global community. It was this chaotic condition of Iran that that Saddam Hussein took advantage of to shift the disputed border back in favour of Iraq with the untenable excuse that the predominantly Arab population of this region would prefer to be part of the Arab state of Iraq. In pursuance of this ambition the Iraqi army crossed into Iran in September, 1980. After some initial success the Iraqis stalled in the outskirts of Abadan in Iran.

The crisis between Iran and Iraq escalated in 1980 due to series of factors including external factor. For instance in Iraq the domestic opposition to Saddam Hussein's

strong handled government became emboldened. A famous religious leader in particular, Mohammed Baqir-al-Sadr who shared and champion common ideas of revolution with Ayatollah Khomeini was arrested and executed. This governmental act led to violent protests from the Iraqi Shiites and widened the scope of Iranian-Iraqi crisis.

The crisis became more escalated in 1980 as the two nations accused each other of border violations and undue interference in each other's internal affairs. The first reaction of Iraq in this circumstance was the formal repudiation of the 1975 pact which gave Iran access to the Shatt al-Arat. The Iraqi government further escalated the conflict by launching full-scale invasion of Iran that initiated the eight years of warfare.

In the opinion of Mathew White, when two of the world's leading suppliers of crude oil go to war, definitely the consumers' world has to take sides, but it becomes difficult to decide which side to take when such war pits a corrupt dictatorship against a fanatic theocracy.[382] Majority of the nations of the world supported Iraq and particularly the two superpowers[383] openly assisted Iraq as did most centrist Moslem states such as Egypt, Pakistan and Saudi-Arabia. On the other hand most of the diplomatically isolated nations of the world like Israel, South-Africa, Taiwan, Libya and Argentina supported their fellow outcast, Iran. The solid backing of America for Iraq is better understood when one remembers the Carter doctrine which read thus:

> *"An attempt by any outside force to gain control of the Persian Gulf region will be regarded as an assault on the vital interests of the U.S of A, and such an assault*

[382] Mathew whiteibid.
[383] United States of America and USSR.

will be repelled by any means necessary including military force"[384].

5.2.2 Diplomacy and International Involvement

Battle-field in any armed conflict is mirrored by the diplomatic situation. In the circumstance of Iraq-Iran war, the war had been initiated by Iraq with the optimism that a weak and isolated Iran would surrender and accept border modifications.

The Iraqi leadership was certainly hopeful to bring down the Iranian revolutionary leadership by diplomatic instruments. Ironically, as the war progressed, Iraq scaled down its aims drastically, though it continued its harsh criticism of the Iranian leadership and gave helping hand to Iranian dissident groups. To top it all, Iraq accepted the idea of a cease-fire and negotiations in relation to the border dispute. That was the peak of Iraqi diplomatic retreat.

The Iranian revolutionary leadership however considered the Iraqi diplomatic retreat as a sign of further weakness. Having evicted Iraq from most Iranian territory in 1982 exactly two years after the commencement of hostility, Iran was not ready to end the war unless Iraq was prepared to admit that it was the instigator of the war and accept to bear full responsibility for the disastrous consequences of the war. Hence, Iran persistently refused to accept cease-fire as long as Iraq could not agree on terms such as payment of huge reparation and removal of Saddam Hussein's leadership of Iraq. No doubt, these conditions effectively destroyed any hope of a peaceful resolution.

With diplomacy at its peak in the conflict, what was the reaction of the international community and specifically what steps did the UN take in finding lasting solution to the conflict between Iran and Iraq.

[384] Thomas P, Ed, Major Problems in America Foreign Policy (Lexington: d c Health & co, 1989) 681-682.

In the words of Nathan, J. B., "International reaction to the Iran-Iraq war was remarkably muted; at least at the outset".[385] Although, the relevant organ of the UN[386] did not fold arms and sat on the fence. It called for a cease-fire at the inception of the armed conflict when it was a week old and renewed the call on subsequent occasions. It can however be rightly observed that the refusal of UN to come to the aid of Iran to repel the Iraqi invasion was not good enough for the peace and security of the world.

To the Iranians, the UN's refusal to repel the Iraqi invasion was construed to be its subtle bias in favor of Iraq. Besides the UN, other nations of the universe took few constructive steps to end the fighting. This inadequate concern and insufficient efforts to end the war was unusual for a war of such magnitude. The Iran's international isolation and mutual hostility between Iran and the Western world in the wake of Iran's Islamic revolution were partly responsible for the silence and lackadaisical attitude of the international community. More so, the Islamic republic of Iran did not effectively seek for international support, willing to remain free of relationship neither with the West nor with the East as such relationship might make it beholden to other benefactor-Nations. Iraq on the other side of the coin, expected an easy victory against a supposedly weak and vulnerable opponent, thus it did not also seek for international backing at the initial stages of the war.

Within the Middle East, either party to the war enjoyed diplomatic support. Initially, most of the Arab states regarded Iraq warily but were more terrified by the prospect of victory by the revolutionary regime of Iran. Thus they were aiding Iraq gradually and tactfully until 1982 when Iran recorded tremendous victory over Iraq. Then they, particularly Egypt, Jordan, Saudi Arabia and a host of other Arabian

[385] Nathan J. Brown ibid. P. 3.
[386] The Security Council

Penisula assisted Iraq not only diplomatically but also militarily. For Iran, it had very few friends within the region.

It was only Syria, an aged-long rival of Iraq that stood out of the Arab world to support Iran and on few occasions Libya did offer its support. The two leading powers – USSR (The Soviets) and USA (America) respectively played double game because of their interest in the Gulf region.

The USSR openly supported her traditional client state, Iraq while she covertly assisted Iran as compensation for not meddling in Afghanistan.

The USA provided the Iraqis with intelligence and committed the US Navy to safeguarding the flow of oil out of (and the flow of money and arms into) Iraq but secretly engaged in sale of arms to Iran in order to fund anti-Communist rebels in Nicaragua, and gain influence with hostage-holding Muslim militias in Lebanon.

It is the effect of the America's role in the Iran-Iraq war on the global peace and security that is about to be examined in the subsequent paragraphs.

5.2.3. America's Role in the Iran – Iraq War

The involvement of USA in the armed conflict between the two countries in the Gulf region was an effect of the war itself. As the Iraqi government failed to persuade Iran to accept a ceasefire free of her stringent conditions, the war progressed in a highly unpleasant manner; the Iraqi naval force attacked the Iranian ships which led to counter-attack by the Iran which was not limited to Iraqi ships alone but dangerously extended to the ships of Iraqi's supporters within the Gulf or Middle East region. In order to protect the valuable shipments of oil from the Middle East, America and some Western world powers were drawn into the Gulf war. What distinguished the role of America in the war from the other nations' roles was the fact that a good number of events in relation to the war seriously affected American interest and the

freedom of her citizens. To mention but a few instances, on the eve of the war some American citizens were held hostages by the Iranian government in 1979 November, the rapid pace by which the Iranian Islamic revolution was succeeding constituted a great threat to the Americans and America herself. The fear of America was heightened by Sandanistas' overthrow of Anastasio Somoza in Nicaragua. (The Sandanistas were a broad group of revolutionaries and reformers who source their names from Augusto Cesar Sandino, who led the opposition to the American forces in Nicaragua from 1927-32. This group enjoyed the maximum support of USSR and Cuba. Jimmy Carter, the then American President in an attempt to implement his doctrine repelling any outside force to gain control of the Persian gulf region which he considered as " vital interests of the US of A", he dispatched fourteen (14) war planes to Iran in defiance of the congress position on the rescue mission of the hostages. Perhaps, it was this incident which led Reagan to criticize Carter in the following statement as those planes with their respective crew got missing hitherto.

America's defence strength is at its lowest ebb in a generation, while the Soviet Union is vastly outspending us in both strategic and conventional arms……..IsAmerica stronger and more respected now than it was three-and-a-half years ago? It is the responsibility of the President of US in working for peace, to ensure that the safety of our people cannot successfully be threatened by a hostile foreign power…We always seek to live in peace….But neither can we be naïve or foolish …. Can we doubt that only a divine providence placed this land as refuge for all those in the world who yearn to breath free?[387]

No one needs any explanation for the exceptional role of the USA in the Iran-Iraqi war. She virtually made herself a party in the war. Apart from the fact that the Iranian Revolution was expected, its success was a big shock to both US public and US policy makers, the holding of the American hostages and horrific reminder of

[387] Thomas P, ibid pp. 681-682

unsuccessful US policy in the past and a terrible threat of unknown future. Carter's botched rescue efforts in April, 1980 signified continually destabilizing diplomatic and military relations between the growing Islamic government in Iran and the US. However, in spite of this situation when the Iranian officials approached the Reagan-Bush team for possibility of obtaining arms, American did not hesitate to supply arms secretly to Iran; More-so when the release of the hostages coincided with the swearing-in of Reagan into office. This perhaps explains the Reagan doctrine of 1985 as depicted in his words below:

> *"We must stand by all our democratic allies. And we must not break faith with those who are risking their lives – on every continent, from Afghanistan to Nicaragua to defy Soviet- supported aggression and secure rights which have been ours from birth. The Sandinista dictatorship of Nicaragua, with full Cuban-Soviet bloc support, not only persecutes its people, the Church, and denies a free press but arms and provides bases for communist terrorists attacking neighbouring states. Support from freedom fighters is self-defence and totally consistent with OAS and UN charters. It is essential that the congress continue all facets of our assistance to Central America. I want to work with you to support the democratic forces whose struggle is tied to our own society".*[388]

Arms continued to flow to Iran from the US covertly while her support for Iraq was globally acknowledged. This is a pure case of diplomatic hypocrisy. Publicly in the international community, the US champion an arms embargo to Iran and privately the US funneled million of dollars worth of arms to Iran.

Between 1985 and 1989, BNL – Atlanta relying on government-backed loans provided monetary assistance of 5 billion dollars to Iraq for the purchase of

[388] Ibid, pp. 682-683.

agricultural materials and supplies including machinery and prominently for dual-use technology.

With the support of Schultz[389] and Weinger[390], Bush[391] pressurized the CCC and the Ex-IM bank to extend credit and materials to Iraq. Thus, Iraq and Iran relied heavily on both USSR and USA respectively.

When Iran responded to the Iraqi violation of the 1984 UN-sponsored moratorium on the shelling of civilian targets by stepping up its air raids on tankers serving Iraq and her oil-exporting facilities in 1986 and 1987, Kuwait was the chief victim as the Kuwaiti vessels constituted the large portion of the targets in the Persian Gulf region. The Kuwaiti government therefore sought protection from the international community by the tail-end of 1986. In early 1987, the Soviet Union (USSR) was the first member of the global community to respond by agreeing to charter a considerable number of her tankers to Kuwait. Eventually, the U.S.A. which has been approached even before USSR but had postponed its decision now consented. The USA involvement was sealed by May, 1987 when the Iraqi missile attack on the USA Stark whereby thirty seven crew members were killed. Iraq apologized with an explanation that the attack was a mistake. The United States ironically used the Stark incident to blame Iran for escalating the war and dispatched American ships to the Gulf region to escort eleven Kuwaiti tankers that were 'reflagged' with USA flag and had American crews.

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[389] Prior to serving Nixon and Reagan, George Schultz had worked for Bechtel. He is currently on the board of Bechtel as well as a number of other companies and financial conglomerates.

[390] Cap weinberger was a senior official at bechlet before serving under Nixon and Reagan. Currently he is a news Analyst for Fox news.

[391] Prior to serving as VP for Reagan bush (snr) held positions in the during Interdiction Task force and the counter terrorismTask force in addition to serving as C.I. A director (1976-77) After his unsuccessful contest for a second term in 1992, he became a senior Advisor to the charley Group, a major defiance contractor.

Iran thus refrained from attacking the USA Naval force directly, but adopted various forms of harassment including mines, hit-and-run attacks by small patrol brats as well as occasional stop-and-search operations. Whenever, Iranian force hit the re-flagged Kuwaiti tankers especially the tankers Sea Isle city in October 1987 to which the USA retaliated by total destruction of an Iranian oil platform in Rostam field and in similar manner, the USA employed the United States Navy's sea, air and land (SEAL) commandos to blow up the second oil platform nearby.[392]

For the first time America openly and directly attacked Iran in such a ruthless manner which had a long time effect on the economy of Iran which in turn by implication affected the peace and security of the world.

Another effect (but this time a positive effect) of the role of the USA in the Iran-Iraqi war on the global peace and security was discovered when Iraqi moved its attack on the tankers farther south near the strait of Hormuz. America played a key-role in framing UN Security Council Resolution[393]on the Gulf war which was passed unanimously. Through this resolution, Western attempts to isolate Iran were frustrated. Though, the Islamic Republic of Iran rejected the resolution on the ground that it did not satisfy its requirement that Iraq should be punished for initiating the conflict. It was because of this rejection that the West made moves to isolate Iran for Iran failed to realize that she was more favoured by the resolution. Most importantly, the resolution highly tended towards enhancement of global peace and security.

The resolution 598 called for both sides to end the war, withdraw to pre-war border, and submit to an international body so as to determine responsibility for the war. While Iraq seized on the resolution, Iran continued its attack but failed to achieve the victory it hoped for.

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[392] Federation of American Scientists Publication, *military Analysis network g h.t.t.p ;//w.w.w. fas. Org/man/dod- 101/ops/war/iran-iraq. Htm, p.13, Visited on the 21st,October,2011.*

[393] Resolution 598, July 20, 1987.

In 1988, Iraq which had won the sympathy of the international community, sufficiently rearmed and regrouped. She drove the Iranians out of Al-faw and several other border areas. Iran was in no position to launch a counter-attack as the international situation seemed increasingly favorable to Iraq. Moreover, by early 1988, the Gulf region was "a crowded theatre of operations"[394]. Nothing less than ten Western navies and eight regional navies were patrolling the area, the site of weekly incidents in which merchant vessels were crippled. Between April and August, 1988, four major battles were fought, in which the Iraqis routed the Iranians. In "operation Blessed Ramadan" which was the first offensive, the Iraqi republican Guard and regular Army units recaptured the Al-fawpenisular. It was a 36-hour battle conducted in a militarily sophisticated manner with two main thrusts backed-up by heliborne and amphibious landing with low-level fixed wing attack sorties. In this battle, the Iraqis effectively used chemical weapons (CW) employing nerve and blister agents against Iranian command and control facilities, artillery positions and logistics points. Three subsequent operations followed much the same pattern, although they were somehow less complex. In the last major engagement farther to the north and prior to the August 1988 cease-fire, Iraq armored and mechanized forces had penetrated profoundly into Iran, defeating Iranian forces and capturing huge amount of armor and artillery. In the fall of 1988, the Iraqis exhibited in Baghdad captured Iranian weapons almost three-quarters ($^3/_4$) of the Iranian armor inventory and almost half ($^1/_2$) of its artillery pieces and armored personnel carriers. On August 20, 1988, both sides ceased fighting in compliance with the provisions under Resolution 598 of July, 20 1987.

[394] Lessons learned; Iran-Iraq War, Marine Corps Historical Publication, FMFRP3-203-203-10 Decemter1990

5.2.4. Consequences

The Iran-Iraq war which lasted eight years resulted in catastrophic massive destruction of lives and properties in both belligerent nations.

According to the 'military Analysis Network', casualty figures are highly ambiguous, though estimates on the ground suggest more than one and half million war and war-related casualties.

Perhaps in the Iran-Iraq war, as many as a million people died, many more were wounded and many in millions were made refugees. However, what is certain is that Iraq's victory was not without cost. It suffered an estimated 375,000 casualties, the equivalent of 5.6 million for a population size of the USA.

A total number taken as prisoners of war (POW) by the Iranians was estimated to be 60,000. on the part of Iran, its losses might have included more than a million people either killed or maimed. A minimum of 300,000 Iranian lives must have been claimed by the war while about 500,000 were injured out of a total population which was nearly 60 million by the end of the war.

From economic viewpoint, the war was extremely destructive to each of the belligerent state's economy. In-spite of the fact that estimates vary, the total cost of the war including military supplies and civilian damages, the conflict would have cost each of the parties a whooping sum of over $ 500 billion.

Both countries sacrificed their considerable oil wealth to the war for nearly a decade, and Iraq was compelled to borrow heavily particularly from its allies on the Arab – penisula.

It is highly remarkable to note here that at the end of the war, virtually none of the issues upon which the war was premised had been resolved. The conditions that existed at the beginning of the war remained unchanged. It is true that Iraq emerged

victorious militarily and achieved a significant military advantage over Iran in 1989, the 1991 Gulf War reduced Iraq's capabilities to a point where a rough parity existed between Iran and Iraq conditions similar to those found in 1980. In fact the border demarcation remained incomplete. Ten years after the 1988 cease-fire, Iran and Iraq are yet to settle these differences that caused the war.

It is worth mentioning here as part of the consequences of the war that a variety of unresolved humanitarian issues from the Iran-Iraq war include deliberate refusal on the part of the parties involved to identify the combatants killed in action. Similarly, there was no attempt to exchange information on those killed or missing. Iran accepted the term to release 5,584 Iraqi POWs in April, 1998, and news organizations world wide reported intermittent meetings between the governments of both countries throughout the rest of 1998 in relation to final agreement on the remaining POWs held by each side. On the part of Iran, its government pledged to settle the outstanding issues on prisoners of war with Iraq in 1999. This effort was supplemented by a joint Iran-Iraq search operations initiated to identify remains of those missing in action.

The USA under Carter and Reagan administrations played a vital role in the Iran-Iraq war of 1980 – 1988 and it took a dangerous dimension which threatened the peace and security of the international community.

According to Saddam Hussein in his defense, "it was primarily Reagan who encouraged Iraq's merciless war against Iran"[395].The deadly weapons of mass destruction employed by Saddam during the Iran-Iraq war were supplied by the USA.[396] From another report, it has been observed that in the 1980s, the Regan administration secretly provided "critical battle planning assistance at a time when

[395] See the Dissident Voice, United States, January 7, 2004 edition.
[396] Louisiana weekly L A, Dec. 22, 2003

America knew that Iraqi commanders would employ chemical weapons (CW) in waging the decisive battles of the Iran-Iraq[397]. Consequent upon the America's role in the almost a decade war, the world population was drastically reduced by more than one million people while 300,000 were either seriously injured or maimed.

To a greater extent, such huge loss negatively affect the global peace and security. The military gains of Iran after 1984 were a major reason for the increased American involvement in the war. For instance, in 1986 the Iranian forces captured the Port of Al-faaw, one of the Iraqi major oil-exporting ports before the war. Richard Murphy, the United States Assistant Secretary of State toured the Gulf region in 1987 emphasizing to friendly Arab states the US commitment, a commitment that became suspicious because of the transfer of arms to Iranians by US officially as an incentive for the Iranian government to assist in freeing American hostages held in Lebanon. Thus, the multiple interests of America all over the places calling for protection simultaneously made the effect of America's role on the global peace and security more pronounced.

At the end of the day, same USA played a prominent role in the UN Security Council resolutions seeking an en to the war. Finally, the war ended when Iran accepted the UN Resolutions 598 which led to the August 20, 1988 cease-fire.

5.3 KOSOVO GENOCIDE

By April, 1999 it was five years that the worst and clearest case of genocide occurred in Rwanda. It was an historic activity of massive butchery of 800,000 unarmed Rwandan men, women and children. In spite of the gravity of this anti-humanitarian activity, the USA and the rest of the world stood by like helpless

[397] See The New York Times, Aug. 18, 2002.

spectators without lifting a finger to stop it[398]. There was sufficient evidence to establish that a similar genocide of same magnitude was unfolding but this time in Kosovo. Like in the Rwanda case, President Clinton was determined and made it absolutely clear that no American soldier will be deployed to stop the killing and mass expulsion of Kosovar Albanians. Ironically, America is the chief among the champions of human rights in the world.

The crime of genocide is a class by itself compared to classes of horrible abuses of human rights in the world. As a unique crime against humanity, genocide has been defined as "… acts committed with intent to destroy in whole or in part, a national, ethnic, racial or religious group … by killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its destruction, in whole or in part"[399]. The convention was adopted by the UN General Assembly on December12, 1948 but came into force after ratification on January 12, 1951.

What occurred in Kosovo can be rightly considered as the practical interpretation of genocide. Slobodan Milosevic[400] and his forces were definitely wiping out a fraction of an ethnic group[401] by forcibly banishing almost half its population out of Kosovo, through targeted killings of community leaders by the execution of Kosovo men and boys, and the wholesome demolition of homes, villages, cultural and religious sites. The man called Milosevic acquired the identity of a young Communist in a Yugoslav regime at odds with Stalin but nevertheless profoundly influenced by the USSR sense of virtue.

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[398] Holly Burkhalter, 'Statement on Kosovo Genocide, // Editorial on Kosovo Genocide. htm.

[399] Article II, Convention on the Prevention and Punishment of the crime of Gerocide, 1951.currently on trial for war crime.

[400] Milosevic was the Yugoslav President

[401] Reference to ethnic Albanians who were forcibly displaced from pristine numbering 25,000 on 1st April, 199.

Milosevic was one of the most willing, toughest, most treacherous canny, tricky, ruthless and resourceful human being[402]the world has ever produced. In an accelerated manner, the killings, expulsion and destruction of the Kosovo men and boys were on the increase within a span of three weeks. This ruthless treatment was the fulfillment of the dream of Milosevic before he became the President of Yugoslavia when he declared, "No one has the right to beat you. No one will ever beat you again"[403].

The statement became a battle cry for Serbians, the largest nationality among Yugoslavia's two republics. Eventually not up to five months to the date of his declaration, Slobodan Milosevic deposed his friend and mentor Ivan Stambolic in 1989 and took over as President. As soon as he became the Yugoslave President, he revoked Kosovo's autonomous status. In his inaugural address he said:

"If we Serbs cannot work, we can surely fight".

His inauguration as President coincided with the booth anniversary of the Battle of Kosovo Polje, in which the Turks overran the Serbs. Apparently, his goal was to a Serb-dominated Yugoslavia without any opposition to his leadership. As communism declined in the entire Eastern Europe, Yugoslavia's republics started to form independent nations which was not pleasant to Milosevic. He was uncomfortable with the development. Having taken from control of the news media and bluntly refused to tolerate criticism, he made brutal efforts to rein the growing independent countries out of Yugoslav republics in ignited bloody conflicts in Bosnia and Croatia and this earned him the nickname – "Butcher of the Balkans". However, his dream in that regard was dashed when international pressure was mounted on him through sanctions and NATO war planes. He was eventually forced to accept the republics and even took part in the peace talk that ended the conflict.

[402] See Norman Mailer, "Milosevic and Clinton", Washington Post, May 24, 1999 p. A 25.
[403] See Norman Mailer, "The Time of our Time" The Washington Post Company, 1999. p. 27

By February, 1998, the Kosovarians struggled for the restoration of their autonomy and other reforms. This effort resulted in another ethnic war at the instance of Milosevic and his Serbian brethren. The war claimed at least 2,000 lives and more than 400,000 were driven from their homes. The demands from U.S. and N.A.T.O.[404] for settlement with Kosovo were refused by the Yugoslav President. Consequent upon his refusal, both forces launched air-strikes against Yugoslavia in March, 1999. Despite the anti-US and NATO sentiment which enhanced Milosevic's support among Serbs, Yugoslavia could not hold out against the bombing campaign and was therefore compelled to accept a NATO-led peace keeping force in Kosovo. With the presence of the peacekeeping force in Kosovo, jubilant ethnic Albanians who had fled Kosovo returned en-mass to Kosovo while those Serbs frightened of revenge left quietly unannounced.

By September 24, 2000, Slobodan Milosevic was defeated overwhelmingly at the polls by opposing candidate – Vojislav Kostunica. The reign of Milosevic came to an end after 13 years.

It was a 13 years of terror, brutality and medieval barbarism in the hands of the Serbs led by Slobodan Milosevic. This accounts for his current controversial trial before the war crime tribunal. The gory features of his regime as Yugoslav President constituted what is globally acknowledged as genocide in Kosovo.

In a press conference at the White House, Bill Clinton, the American President told the journalists that on Slobodan Milosevic's orders "tens of thousands of people" had been killed in Kosovo. The truism of this statement is found in the series of Humanitarian law violations in Kosovo. A good instance was the massacre of thirteen men at Golubovac, a village in Kosovo province on Saturday September 26, 1998. On

[404] In full, it is "North Atlantic Treaty Organization".

the same date, was the forest massacre in another village called Gornje Obrinje wherein fifteen (15) able-bodied men were killed in the forest leaving only one sole survivor – Selman Morina to tell the gory story of extra-judicial execution[405].

The forces of Milosevic went beyond brutal and ruthless dealing with the Kosovar men, they also adopted a method of systematic destruction of civilian property.

The village of Polica was entirely destroyed. A food storage facility holding melons and pumpkins and many other buildings were still smoldering as at the time Human Rights Watch, an International non-Governmental organization visited the village.

Everything at the scene was a symbol of systematic premeditated destruction of valuable properties of the helpless local ethnic Albanians.

Most of the homes, some of them century-old stone structures were destroyed to foundation level. Valuable possessions like electrical appliance, satellite dishes, vehicles and household equipments were either carted away by the Yugoslav forces or severely vandalized[406].

This is a clear case of violation of Humanitarian law. Objects that are essential to the survival of the civilian population were destroyed indiscriminately. An indisputable and substantiated evidence exists that the vast majority of the destroyed properties were systematically set ablaze by the Serb police after the towns were abandoned by the villagers. The Human Rights Watch directly witnessed two policemen in Mlecane conveying boxes of goods out of a private home.

The United Nations Human Rights Commission (UNHCR) in its own findings disclosed that water-wells in Dobrosevac had been deliberately polluted with dead animals and garbage[407]. Same practice has been confirmed by Humanitarian organizations in other areas. R. Jeffrey Smith in his own contribution to the

[405] file: // A:/ Massacre of Thirteen Men at Golubovac. htm
[406] http:/www.hard/reports /1 999/kosovo obrinje 6-03. htm # p.675 1024.54
[407] UNITICE Briefing notes, ect. 23,1998

Washington Post wrote about the widespread poisoning of civilian wells in Kosovo that:

> *"Most of the poisonings appear to have occurred shortly before Yugoslavia withdrew many of its forces under the threat of NATO air strikes in October, allowing thousands of refugees to return home. Since then, refugees in at least 58 villages throughout Kosovo have informed foreign aid organizations that their wells contain dead dogs, chickens, horses, fuel oil, detergents, garbage, paint, flour and other contaminants"*[408].

Having seen the remains of a dog in a well in a village he visited, Jeffrey Smith concluded that the poisonings could not have been accidental.

According to Paddy Ashdown,[409] in his personal observation when he visited Drenica Region of Kosovo on September 26, 1998, the procedure of destruction is through the systematic methods as he wrote:

"First comes the ultimatum, delivered by the Serb police
Give up your weapons or we will destroy your village"

After the dead-line comes the shelling. Heavy artillery and 120- millimeter mortars and heavy caliber machine guns and T55 tanks. The weaponsof total war, against defenseless civilians. One after the other, I watched them.

Next comes the soldier looters with heavy articulated lorries, into which are loaded the meager valuables of a peasant population. And finally the soldiers who systematically burn the houses one after the other up the valley. I watched them; three days after the Security Council had passed a resolution saying this must stop and at the same time as the Yugoslav government has assured the world that it had stopped. I counted 17 villages in flames and countless individual farmhouses[410].

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[408] Jeffrey S. R, "Poisoned wells plagued Towns All over kosovo", Washington post, December 9, 1998.
[409] Paddy Ashdown is the leader of the liberal party in the United Kingdom.
[410] Guardian (London), September 30, 1998

The preliminary results of a joint survey carried out by the different humanitarian aid organizations to assess the damage caused during the conflict in Kosovo; provide compelling testimony to the widespread nature of destruction. The said survey assessed 285 villages altogether. 210 out of these villages were found to have been affected by the fighting. The estimated pre-conflict population of these villages was 350,000 persons and total number of homes was 35,185 homes out of which 9,809 were completely destroyed. 5,112 of the affected homes has severe damage, while an additional 6,017 homes sustained moderate to minor damage leaving forty percent of the homes in the affected regions undamaged[411]. Going by the scale of the destruction of civilian property and of objects essential to the survival of the non-combatant or civilian population, it can be established that the destruction was executed as a matter of state policy contrary to the view that it was actions of rogue soldiers or policemen.

As such, responsibility for these systematic violations of the laws of war and crimes against humanity lies with the top of the command structure of the Yugoslav military and security forces. In fact, the legislation that established the International Criminal Tribunal for the former Yugoslavia (ICTY) defines wanton destruction of civilian property as a violation of the law of war.[412]

However, the critiques of the role of U.S. and NATO in the Kosovan conflict consider the ICTY and its indictment of Milosevic as illegal based on the incompetence of Security Council to set up a war crimes tribunal. One of such critiques is Ms. Carla Berg[413] who argued that the Security Council is not empowered to establish war crimes Tribunal nor to play any judicial role in any International conflicts. According

[411] IDP/Shelter Survey kosovo: Joint Assessment in 20 Municipalities as released by UNHCR Pristine, dated November 12, 1998.
[412] See Article 3, ICTY Statue.
[413] Carla Berg is a Graduate of political science and International Law from Austria.

to her, the UN Charter under ART.41 only provides the Security Council with authority to negotiate, use arbitration, diplomatic methods and similar such measures to address the aforementioned acts.

From the provision under Article 41 of the UN Charter, the Security Council has no legal basis to establish judicial bodies as it did in the case of ICTY. The practical method of establishing any judicial body according to International law is to start with a treaty. Once the treaty is ratified, the judicial body can be established by the General Assembly of the UN and not by the Security Council.

The position of C. Berg in respect of the ICTY was concretized by a contributor From Germany whose contribution was published by "International Progress organization"[414]. From the contributions the author made excellent points in his observations particularly on the sheer illegality of the war crimes Tribunal prominent among his observations are:

1. The indictment (of Slobodan Milosevic and other Serbian government leaders in 1999) issued by the Chief Prosecutor of the ICTY is legally invalid simply because the tribunal lacks jurisdiction in the present and other case of international status.
2. The Tribunal derives its *raison d'etre* exclusively from Security Council 827 which was adopted at the Council's 3217th meeting of 25 May, 1993. In this resolution, the Council sought legal coverage under CAP. VII of the UN Charter.
3. When adopting the above-referred resolution, the Security Council acted *ultra vires*. The provisions under chapter VII of the UN Charter only confers competence on the Council in matters of global security but not in respect of

[414] An NGO (non-governmental organization) which has worked in associations with the United Nations for almost 30 years.

judicial matters or criminal justice. The sole authority in international judicial matters is conferred on the International Court of Justice (ICJ).

Besides the foregoing, some opinions hold that the conflict in Kosovo was not genocide. Moreso, the former Yugoslav President – Slobodan Milosevic should not be a culprit in a case of genocide or any war crimes for that matter. Though, it is admitted that "he may be an ineffective Nationalist but his ascent to and hold on power has always been based on Nationalism"[415] How does one reconcile an opinion that approbate and reprobate just like this contribution to the U.S. House International Relations Committee hearing on "The U.S. role in Kosovo which runs thus:

> *"The resulting suffering of Kosovars is obvious. Yet the fighting in Kosovo barely rises to the status of atrocity in today's world. It certainly does not constitute genocide, ..."*

It has also been argued that there is particularly in the humanitarian assistance to the Kosovan s if viewed from comparative perspective. This argument is based on the fact that less than a year since the signing of Peace Agreement between NATO and Serbia under Slobodan Milosevic administration, the Kosovo crisis continue to pose important and sometimes difficult questions about humanitarian assistance.[416] To further dissuade the Clinton administration from the Kosovo conflict, it is further opined that: "Intervention in Kosovo, would be even more pervasive compared to the US experience in Bosnia's case. Not only does the West have no answer. Its autonomy proposal satisfies no one and could be enforced only through yet another inevitable interminable occupation; but the conflicting parties were not ready to quit fighting then.

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[415] Proceedings of the American Congress House International Relations Committee Hearing on "The U.S, Role in Kosovo", March 10,1999.

[416] Borton, J (1999)," The state of International Humanitarian System," London, ODI Briefing paper.

Intervention in a conflict of this nature would involve the US in an undeclared war against a nation which has not threatened the U.S. or any of her ally. It was also observed that in the last two decades the U.S. administration has implemented the most militaristic programme without achieving its objectives. It is stated that within the last two decades, the President used U.S. troops to attempt rebuilding Somalian society, bombed Serbian insurgent in Bosnia, warned of possible military action against North Korea, occupied Haiti, sent troops to Macedonia and Bosnia; has undertaken military exercises around the world, is launching regular attacks on Iraq and now threatens war against Yugoslavia over Kosovo.

According to U.S. President, the role being played by America in International conflicts is premised on the belief that Washington must not allow small conflicts to "fester and spread". But ironically this U.S. policy has consistently failed. Somalia was a disaster, in Bosnia: reconciliation remains a fantasy, Haiti now enjoys a Presidential administration instead of military dictatorship, only diplomacy kept the peace in Korea, Iraq remains recalcitrant while U.S. threat have changed nothing in Kosovo province of Yugoslavia.

The above-stated position of anti-Kosovans' struggle for autonomy who do not see the massacre in Kosovo as genocide is not correct and lacks substance. What occurred in Kosovo meets the test of the definition of what is conventionally considered as genocide. The former Yugoslav President, Milosevic was determined to wipe out a whole ethnic group in order to avoid granting Kosovo province autonomy. The fact that he has already lost the Serbs in Bosnia and Croatia, he apparently prefer NATO attacks to losing Kosovo. The loss of Kosovo would be far more threatening to his political future than NATO attacks as that would afford him the liberty to pose as Yugoslavia's Protector against the aggressive West. He was convinced that even if

eventually NATO action depose him, his successors who share the same doctrine with him are likely to be maintaining Yugoslav sovereignty over Kosovo. Milosevic was more comfortable even with his Western oriented opponents such as Vesna Pesic and Zoran Djindjic for their strong belief that Kosovo will perpetually be part of Serbia coupled with the fact that most Albanians appeared to have grown beyond the point of accepting Serbian sovereignty in any form under anyone whosoever. It was this inordinate ambition that prompted Milosevic to embark on a systematic campaign of murder, burnings, shelling, arrest, torture and targeted execution of important personalities like medical doctors, political leaders, journalists and intellectuals from the Albanian community. Words of caution on the position of the U.S. were addressed to the American President by the Advocacy Director[417] of the Physicians for Human rights when he wrote:

> *"If President Clinton avoids taking the painful action necessary to expel Serb forces from Kosovo, he will be remembered as the President on who watch as three genocides unfolded. There is still time for him to claim a different legacy: that of a leader who has learned from the past and vowed to stop the crime of genocide and punish its perpetrators".*[418]

With the catalogue of massacres perpetrated in Kosovo with forcible displacement of ethnic Albanians civilians[419], looting of homes and shops throughout the province[420], systematic destruction of properties through widespread of burning of homes and storage facilities as well as unlawful detention and at times wholesome kidnapping of

[417] Holly Burkhalter
[418] file: //A; / Editorial on Kosovo Genocide Htm.
[419] On Aril 15 in Sllovi Village of Lipjani, Serbian terrorist forces committed another fresh massacre wherein 31 persons were killed and 11 others seriously injured.
[420] See Drenica Region – Kosovo Crisis Centre (February – March, 1998)

ethnic Albanian men and young boys[421]; how else can one describe these chains of crimes against humanity? It is nothing but pure genocide and errant violation of humanitarian law with impunity.

As a result of this degree of ruthlessness and brutality from the Serbs under Milosevic, the U.S. and NATO had to intervene to prevent the crisis from spreading and offer humanitarian assistance in conjunction with other humanitarian organizations to the victims of the genocide. The ground for those who have sympathy for Milosevic and condemn the intervention of U.S. and NATO was the strategy adopted by Milosevic. He set up a trap. Despite the warning and threat from U.S. and NATO on the Kosovo conflict, Milosevic was not in a hurry to execute his plan on the Kosovars.

If before, the bombings by NATO and U.S. began, he had already committed all the heinous acts he has since perpetrated, why he would probably have been doomed. The outrage of the international community would have been immense.

His strategy: he waited, set up a trap; when threatened by NATO with air strikes, he made promises with regard to his future conduct in Kosovo which he deliberately failed to keep over a number of months thereafter. Therefore, a fresh round of negotiations commenced.

They came to a climax at Rambouillet where he refused to appear. Madeline Albright, U.S. Secretary of state got enraged and declared:

"If we not only threaten him again but, indeed, carried it out, he would give in quickly"[422].

Thus, they began the bombing in cooperation with NATO. The aerial bombing of Serbia and ground occupation of Kosovo which coincided with the 50th anniversary of NATO were considered necessary to save NATO.

[421] Http:/www. Usia. Gov/regional/eur/balans/kosovo/rack. Htm.
[422] Norman M, Ibid, p. 10

According to Robert Hunter of the Rand Corporation, "if fighting in Kosovo goes on unabated at the time of NATO's 50th anniversary this April, the focus will not be on its new strategic concept or grand visions. Kosovo will overshadow both celebrations of the past and plans for the future"[423]. Those whose views are not different from that of Robert Anchor would definitely favour America going to war in order to preserve the European alliance. As for NATO, it was clearly in NATO's interests to be seen to be alleviating the problems of Kosovo Albanian population or risk creating a huge contradiction in the public mind. Concerning its overall humanitarian purpose, both the U.S. and NATO had genuine causes to intervene the way they did.

Prior to the bombing of the Yugoslavia, peace talks at different places at the instance ofU.S. and NATO were abortive because of the non-cooperative of the Milosevic's representatives. Instead, they went ahead to launch more brutal and heinous acts of terror against the Kosovar Albanians. NATO was only performing its traditional function as constant mediator in efforts to rebuild the Balkan region. The North Atlantic Treaty Organization (NATO) was formed in 1949 after the North Atlantic Treaty was signed.

It became involved in the Balkan conflict when Slobodan Milosevic embarked on an offensive attack against the ethnic Albanian in Kosovo.

On March 23, 1999, the North Atlantic Council ordered operation Allied force against Milosevic's army. So soon as bombing commenced, Milosevic's atrocities increased probably by 50 or 100 times over what he had perpetrated before it began. Houses, towns and cities in Kosovo were ablaze. "Genocide" had begun. Chaos and horror was further magnified in the spectacle of what NATO was doing to the Serbs and

[423] See San Francisco Chronicle, 19 April 1999

there was no military plan to conclude the war. By June10, 1999, the air campaign was suspended in the region after Milosevic's forces moved away from Kosovo. At the end of the day, the Serbs left Kosovo with almost 3,000 people killed and more than 1.5 million people displaced in Kosovo.

A professor of history from De Paul University, Thomas Mockaitis adjudged the role NATO played in Bosnia and Kosovo as been very problematic. Moreover, he said: "NATO acted without U.N. approval to stop a genocide in Kosovo, but at least the majority of international opinion favored the operations". The roles played by NATO forces in response to the refugees' crisis was the most enduring image of the blurring of political and humanitarian considerations. Perhaps that was why NATO still maintained a peace-keeping force of 50,000 troops strong in the Balkans. Their main objective was to deliver humanitarian aid to the victims of the ravaged areas. For whatever the negative side of NATO's role in the Kosovo crisis or conflict, it should be understood that NATO's global mission is to defend its members and other nations, ensuring that propaganda fueled by hatred or ignorance does not lead to genocide or terrorism. Thus the U.S. and NATO roles in Kosovo conflict should rather be commended than condemned.

The Kosovo case was the third serious case of genocide that threatened the peace and security of the world. If the Security Council, NATO and U.S. did not intervene, the consequence could have been more fatal than those of Bosnia and Rwanda.

5.4. THE ISRAELI-PALESTINIAN ARMED CONFLICT

The root cause of the Palestine – Israel conflict was the refusal of the state of Israel to allow the almost 759,000 Palestinians who as a result of the 1948 war were either actively expelled from their ancestral home land and turned into refugees or fled in

terror. The new-born state of Israel did not only refuse to allow them to return but also ensured that even if they return there would be no room for rehabilitation, by destroying their villages entirely, expropriation of their land, orchards, houses, personal possessions and businesses for the benefit of the Jewish population[424].

According to mahatma Gandhi, "Palestine belongs to the Arabs in the same sense that England belongs to the English or France to the French…. What is going on in Palestine today cannot be justified by any moral code of conduct"… If they (the Jews) must look to the Palestine of geography as their national home, it is wrong to enter it under the shadow of the British gun. A religious act cannot be performed with the aid of the bayonet or the bomb. They can settle in Palestine only by the goodwill of the Arab's …. As it is, they are co-sharers with the British in despoiling a people who have done no wrong to them…" [425].

From the thinking of Mahatma Ghandi above, the Palestinians are the original landlords whose country was encroached by the Israelis. It was the Israelis occupation of the Palestines land's that was responsible for the age-long conflict between the Palestine and Israel.

Discussing the British mandate on Palestine, Ismail Raji al-Faruqi described the people of Palestine in the following words when the wrote:

> *"Most of the Palestinians were Muslims. A few, about a fifth, were Jews. All spoke Arabic and belonged to Arab culture and Civilization. Ethnically speaking they were a mixed lot. For they descended from the original Canaanites and Philistines with a mixture of HebrewRoman, Arab European-Crusader, Egyptian and Turkish blood[426]".*

[424] See "The origin of the Palestine – Israel Conflict', published by Jews for Justice in the Middle – East.
[425] See "A land of Two people" Ed. Mendes – Flohr.
[426] Al-faruqi, I.R "Islam and the Problem of Israel", al-fathi Islamic publication, Lagos, P. 56-57.

This people of Palestine remained persisted through all various types of regimes known to Palestine and different kinds of invasions experience by the state of Palestine. The persistence of the Palestinians also survived and sustained numerous languages and cultures superseding one another throughout the history of Palestine. repulsed or received and absorbed, enriched and fertilized, acculturated and converted the invaders, that gave Palestine its continuity in history"[427]. Through the 30 years British colonial administration, the entity known as Palestine was transformed by the British Government into a nation divided against itself with the strong backing of the colonial administration in Palestine, about 600,000 Jews were permitted to settle in Palestine from Europe between 1918 and 1948. They plunged the Palestinians into constant rebellion with large explosions punctuating history at the intervals of every two or three years. For no crime other than courageous rejection of the unregulated influx of Jews and colonialist polices of the British government, Palestinians were incarcerated into the prisons and concentration camps. For a long time, Britain had been waiting for an opportunity to colonise Palestine and indeed the long-expected opportunity came through the World War I when Palestine was made a free region under international supervision. However, in 1917, Britain made Palestine as a whole to be placed under her protection by amending the sykes-pico agreement of 1916 which had first made Palestine a Freeland under international supervision[428]. Amery, the then British minister of colonies offered explanation for why Palestine was brought under British protection when he spelt out the strategic importance of Palestine to Britain his speech to the house of common in 1936. He said:

> *"Palestine represents a military point of overriding importance with regard to the defence of the empire it is the point where all the air routes between the*

[427] Al-Faruqi, I, R Ibid, p. 57
[428] Muhammad I. D, "The Palestinian Question" p. 16

kingdom, Africa and Asia converge. Moreover, it is by far the most important marine sport in the Mediterranean."

It was this British interest that corresponded with the Zionist desire to have a Jewish homeland established in a Palestinian land. Besides this fact, the influence of Zionist within the British Administration effectively pave the way for the Balfour Declaration in 1917. Commenting on the Balfour declaration, Edward wrote "The Balfour Declaration, made in November, 1917 by the British Government… was made (a) By a European Power (b) about a non-European territory, (c) in flat disregard of both the presence and wishes of the native majority resident in that territory ….(As Balfour himself wrote in 1919). The contradiction between the letter of the covenant (the Anglo French Declaration of 1981 promising the Arabs of the former ottoman colonies that as a reward for supporting the Allies they could have their independence) is even more flagrant in the case of the independent nation of Syria. For in Palestine we do not propose even to go through the form of consulting the wishes of the present inhabitants of the country…..

The four powers are committed to Zionism and Zionism, be it right or wrong, good or bad is rooted in age-long tradition, in present needs, in future hopes, of far profounder import than the desire and prejudices of the 700,000 Arabs who now inhabit that ancient land[429]"

Britain, having asserted its control over the territories granted her by the Sykes-pico agreement, and having secured full mandate on Palestine she left no stone untouched in mapping out the required plans and necessary programmes to administer the colonies including Palestine.

[429] Muhammad I.D, Ibid, p. 53.

Due to the British interest in Palestine particularly for the protection of the other side of the Suez Canal, that is defending the overland route to the last and keeping France influences at bay as far as possible[430], in 1920 a well-known Jew called Herbert Samuel was appointed the first British High commissioner in Palestine. The appointment was motivated by two factors. First to satisfy British interest as indicated above and secondly to realize the Jewish dream of founding a Jewish homeland in Palestine. Inspite of non-stop opposition and big political demonstration coupled with violent attacks on some Jewish settlement by the Palestinians, Herbert Samuel aided further influx of Jews into Palestine and encouraged them to embark on buying lands through the use of all crooked and illegal methods. As the situation continued unchecked and Excesses of the Jews was inevitably growing beyond control, John Chancellor, a subsequent British high commissioner for Palestine with high sense of justice recommended total suspension of Jewish immigration and land purchase in order to protect Arab agriculture. According to the Honourable high commissioner, "all cultivable land was occupied, that no cultivable land now in possession of the indigenous population could be sold to the Jews without creating a class of landless Arab cultivators. Nevertheless, the colonial office rejected this commendable recommendation [431] It was not surprising because if such recommendation was favorably considered, it would negate the basic objectives of the British administration in Palestine.

In reacting to the political and social oppression of the Jews in collaboration with British, the Palestinians started off Palestinian conferences in 1919. This effort only recorded unimpressive success to the sneaking of some luminaries and Land Owners from among the Palestinians who were disposed towards Britain, wanted to adopt a

[430] Mahmud Z, Tarikh Filistin' (History of Palestine) p. 31
[431] John Q, "Palestine and Israel: A challenge to justice"

compromising stance. However, the educated youths insisted on restoring Palestine – whole, undivided, sovereign and independent nation. Consequently, the conferences produced the charter of 1919 by which the Balfour Declaration, the Jewish immigration and the British mandate were categorically rejected. By the provisions under the charter, the participants called for the unification of Palestine with Syria and a true independence with the framework of Arab unity.[432]

To dampen the situation, Britain issued the 'white Book' in 1922 wherein Churchill said that the Balfour Declaration did not mean to subjugate the Arab population or undermine their culture, and that the Jewish immigration should not run counter to the accommodating capacity of the country. To placate the Palestinians, he further added in the white book that his administration wished to bring about total autonomy through a gradual process. Despite the Britain's attempt to prevail on Hajj Amin al Hussein, the leader of the Palestinian revolution, he was offered and accepted the appointment as chairman of Islamic council but refused to adopt a moderate policy toward Britain and he did not give up his revolutionary activities[433]. With the presentation of the white book, the Palestinian Revolutionaries realized that the only way to resist the mandate and Zionist policy was to vehemently oppose the British mandate absolutely and to move toward full independence, and set up a unified state of Palestine and Syria. Although the political atmosphere then was conducive for the accomplishment of such goal but it remained a dream as the prominent figures in the national movement favored peaceful methods. However, between 1936 and 1939, the Palestinian Arab could no longer adopt peaceful methods, thus they attempted a nationalist revolt.

[432] Mohammed I. D, Ibid. p36
[433] See Daiiratul – Maarif Ash-Shiryyah, (Shiite encyclopedia) a. Vol. 3, p. 188

David Ben-Gurion,[434] eminently a realist, in an internal discussion, he admitted before his fellow Jews that:

> *"Let us not ignore the truth among ourselves. The truth was that politically we are the aggressors and they defend themselves… the country is theirs, because they inhabit it, whereas we want to come here and settle down, and in their view we want to take away from them their country, while we are still outside… The revolt was crushed by the British with considerable brutality[435]"*

This is the truth of the matter. Even prior to the declaration of Israel as a state in 1948, the Jews only legally owned a little more than 6 percent of the land of Palestine. After the British mandatory authority had restricted Jewish land ownership to specific zones inside Palestine in 1940, the Jewish illegal land transactions (including buying and selling) within the 65 percent of the total area restricted to Palestinian Arabs continued. To worsen the situation immediately after Israel announced its statehood, series of oppressive laws by which huge tracts of Arab land were assimilated were made. The affected Palestinian Arabs who had become Refugees by then were pronounced "Absentee Landlords" in order to expropriate their lands and to prevent their return under any circumstances[436]. Britain concluded its mission in Palestine by presenting the pre-determined partition scheme to the United Nations. In September 29, 1947, the UN adopted the resolution which partitioned Palestine into two parts granting the larger portion of fifty six percent (56%) of the Palestinian territories to the Jews while the lesser portion of forty-four percent (44%) was allotted to the indigenous people of Palestine – the Arabs. The partition decision of the UN was a violent shock particularly to the Muslim and generally to the Arabs of the world. In

[434] Ben – Gurion was the then prime minister of Israel.
[435] See Noam Chomsky's article entitled- "The fateful Triangle"
[436] See further 'The Palestinian Question' p. 85

protest, the Palestinian Arabs condemned the UN resolution, declared it null and void for it ran counter to the united nations charter, they threatened to oppose it by force[437]. This threat was not impotent. It was carried out to the letter. Internal conflict commenced with violent clashes all over the Palestinian territories. Both British and Zionist forces were attacked country – wide. Fierce battle ensued even though there was weakness in organization and lack of weapons on the part of the Muslim masses of Palestine, but they were determined and prepared to fight the course with their lives. The military head – on confrontation between the oppressed Palestinian people and the British forces paved the ground for the Zionist gangs to strengthen themselves militarily and assume a reasonable height of political power in Palestine. By that time Britain had successfully executed its objectives in Palestine. It decided to withdraw from Palestine and the decision took effect on May 15, 1948 when it started vacating the Jewish areas handing over its strategic points with military camps to the Zionist gangs. Britain also ensured that it secured all the required means to compel the Arabs to yield the areas considered to be vital to the founding of the state of Israel and to guarantee its security. Britain did not just surrender the Jewish area to the Jewish agency but also handed over the airports and ammunition depots which were of great significance at that material time, to the Jews. The outgoing British authority provided the Jews a good and wide opportunity to set up an administrative and military apparatus barely six months before its full-scale pullout[438].

On the other hand, Britain remained in occupation of the Palestinian areas (according to the partition resolution) till the last days of the deadline, using all the powers available against the people of Palestine, discouraging their military preparedness to defend themselves. They were not allowed to secure weapons from outside their

[437] See 'Military Encyclopedia" 652
[438] Ibid. P. 654

territories, volunteers from neighbouring Arab countries were prevented from entering Palestine to prevent such volunteers from taking part in the defence of the usurped Palestinian land. Nonetheless, the Palestinian did not helplessly stand-by watching. They re-grouped their militant units under the name of Jihad, a concept which is equivalent to the UN concept of 'just war'. Numerous internal conflicts occurred between the Palestinians and Zionists of Haganah, Argun, Stern and Palmach.

In these series of clashes, the Zionist gangs perpetrated the most horrible pogroms under the British mandate in attempt to terrorize and scare the Palestinian people and break their spirit of resistance and steadfastness. All-this not-withstanding, the Palestinians succeeded in putting up defense in protection of their cities and villages until the arrival of Arab armies on May 15, 1948 when Britain finally vacated Palestine.

Coincidentally, it was in this same month of May, 1948 that the state of Israel was established fulfilling the Zionists' dream of founding a Zionist home land in Palestine. The Arab forces were about 24,000 in strength deployed from Egypt, Iraq, Jordan, Lebanon, Syria and Saudi Arabia. Whereas the Zionist forces were in the neighborhood of 25,000 soldiers in addition to about 60,000 men affiliated to the gangs within the country[439].

The battle line was drawn. The Arab armies advanced, scoring a number of victories and thus the Israel – Palestine armed conflict started and yet to be resolved till date. The question to be addressed now is what is the impact of the age-long war on the peace and security of the International community. The first notable impact of the conflict on the global peace and security was the politico – religious effects of the war.

[439] Military Encyclopaedia, p. 654

The Arab world read political motive into the UN decisions to partition Palestine and then to grant admission to the state of Israel. It has been observed that those decisions were made, on one level, as an emotional response to the horrors of the holocaust experienced by the Nazis of Germany[440]. The compelling claims to sovereignty of the Palestinian Arab majority would have prevailed under more normal circumstances. Although, it is clear that the decisions reflected the reaction of guilt on the part of the Western Allies who should have protected the European Jewry against the Nazis but the Palestinians should not have been made to pay for crimes committed by others. It was purely a classic example of two wrongs not making a right. More so when the Holocaust is often used as the final argument in favor of Zionism, the question is: what is the justification in this connection? For this singular reason, coupled with the fact that the western Allies with Britain in the fore-front agreed to and indeed prop up the Zionist state, granted it international recognition and lawful legitimacy, the Muslim-cum-Arab nations of the global community considered the UN decisions as naked injustice, international conspiracy and unprecedented tyranny against the *bonafide* people of Palestine[441]. The Arab nations of the world rose in concert and decided on April 12, 1948 to dispatch Arab armies into Palestine. The political effect of the 1948 war still lives with the International community today. The Palestinian struggles remain a big problems in the hand of the UN. British and American interests in the Middle East remain a clog in the wheel of progress as far as the Israel – Palestine conflict is concerned.

A.S Khalidi, in his opinion, the final destination of a Palestinian – Israel peace settlement has begun to emerge from the political haze. Such a settlement must…. give the Palestinian people a sovereign, uncontested, independent state of their own.

[440] See further, articles on 2 Net @ www.Ibbs org &www.commondreams org/ viewsarchive htm.
[441] Muhammad A.K, "Al-Azhar in one thousand (1,000) years" vol. 2, p. 98

This is a matter of justice and practicality. If a truly lasting and stable peace is the goal, there is no other option. The mere trappings of statehood will not suffice. The state has to be real and workable[442]. He went further to analyze the essential conditions as stated below:

There must be territorial integrity and contiguity, should there be any further dissection of Palestine, it would be politically and economically difficult to maintain a state. There can be no civilian pockets under Israel rule on Palestinian land.

A sovereign capital in Jerusalem. East Jerusalem is Palestine's historical spiritual and commercial heart. To exclude if from a Palestinian state is unthinkable.

Finally, there should be Justice and fairness for refugees. As a matter of principle of International law, the Palestinian refugees' right to return or be compensated for their lost homes and land is non-negotiable. Israel must acknowledge the suffering and hardship Palestinian refugees have faced as a result of their eviction from their homeland, and must assist in their rehabilitation and re-absorption, from the foregoing, to reduce the impact of the Israel – Palestinian age-long conflict on the global peace and security, the above-stated conditions must have to be fulfilled. Concerning the religious effects, from the on-set, the Arab nations considered the persecution, displacement, ethnic cleansing and usurpation of Palestinian land by the Zionists as a cause for *Jihad*, a holy war that had to be fought against a foreign entity created forcibly in the heart of the Muslim homeland.

Precisely the battle in the understanding of the Muslim cum-Arab states was a real struggle between Islam and global arrogance which occupied the front position in Palestine in full support of Zionism. With this strong feeling. The strong spirit of *Jihad* and great sacrifice in the cause of Allah spread rapidly. As the Jewish (Zionist)

[442] See The New York Times, February 11, 1997 Edition.

creed and the Arab (Islamic creed) one, were two diametrically opposite ones, faith and the creed were the first key weapons employed in the armed conflict[443]. The active participation of the leadership of Hassan Al-Banna of Ikhwanul-Muslimin (Muslim Brotherhood) in Egypt in the 1948 war on the Egyptian front disclosed their true power and preparedness to fight and even to die. Followers of the Islamic movement in Egypt volunteered to fight in the cause of Allah, spurred on the spirit of *jihad*, setting the most glorious examples of sacrifice and self-denial. They constituted six battalions trained in the tactics of partisan warfare.

The recognition of the Zionist state and establishment of diplomatic and commercial relations with Israel by the government of Iran in 1950 exposed the true color of the Iranian Government as well as its long-time established ties with the Zionist world through the Bahai, Jewish and Masonic big shorts in the government. This unpopular policy of the government resulted in a spontaneous reaction and the Iranian streets were aroused. To a greater extent the 1948 war religiously affected the peace and security of the world. With the intention, of defending the cause of Islam, the people of Iran took to the streets of Tehran and Qum. Multitude of Devotees staged a big rally after the observance of Friday weekly congregational prayer at Al-faydiyya theological school. The Imam in person of Ayatuallh Sayyid Khunsari who led the prayer condemned the government resolution and described it as a treachery to Islam and the Muslims. He urged the Iranian government to re-consider its stand and warned it of its dire consequences of going on trifling with the popular feelings of the people and Islamic sanctities. The Islamic Republic of Iran had its own remarkable share in the effect of the Israeli-Palestine war on the global peace and security.

[443] See Al-Dahawah Magazine, No 14, 26th year, July 1977, p.52.

The news of Iran's recognition of the state of Israel attracted a lot of protests and correspondences among the Muslim clerics like Ayatullah Al-Udma Sayyid Muslim. Al-Hakim from the city of Najaf in Iraq whose letter to the Iranian government via sayyid Muhammad Al-Batibau read in part thus:

> *"The news of Iran's recognition of Israel has caused a great outcry among the Muslims and elicited a severe condemnation from them, it is hoped that the officials would be adviced to observe their Islamic duty and respect Muslims' feelings….*[444]*"*

It seemed that the government of Iran feared the reprisals of the muslims worldwide to admit the truth. So it denied the occurrence of anything of sort and would never happen in the future. However, the Muslim spiritual leaders held a position of ensuring that Israel is not strengthen and the Muslims should close their ranks and unify their stands. This position was reflected the shaikh of Al-Azhar Mosque when he wrote.

> *"If we condemn every measure taken to strengthen the entity of Israel by any party, we draw the Muslims' attention everywhere to the hard conditions they are going through, and call on all of them to close their ranks and unify their stands. Only then could front, in the face of the oppressive trends which represent the powers of injustice, infidelity and tyranny…*[445]*"*

Conclusively, the post-1948 defeat period witnessed an increasingly mounting growth of nationalist trend. Pan- Arabist groups and parties began to bloom. For instance the Baith party which was established on April 7, 1947 prior to the war, made inroads into the circles of cultured youths, students at the American University of Beirut as well as some political circles. The victory of the Zionists planted in the mind of the Muslim masses a double hatred and animosity toward both the western

[444] Muhammed H.K, Al-Ghita, 'Jannat Al-Ma'wa ("Paradise"), p. 95.
[445] Ibid. P. 97

colonial power and the Zionists. The pan-Arabist organizations and parties started disseminating their thought and views with the slogans of patriotism, revolutionization and containment of the defeat. Furthermore, key political system in the Arab states, transparently exposing its flaws and thereby causing effective forces to advance. Thus, a new tide of violence engulfed the Arab nations. This is a great impact of the war on global peace and security.

In February, 1949, the leader of the Muslim Brotherhood in Egypt Hassan Al-Bannah was murdered by the Royal Egyptian police. By March of same year, the Syrian army toppled the civilian regime in Damascus while the Iraqi government experienced a popular uprising against a new treaty with Britain. The prime minister of Egypt, an-Naqrahi was assassinated in December, 1949. The year 1949 was full of violent effects of the 1948 Israel-Palestine armed conflict. Abdallah, the king of Jodan was assassinated in 1950, while the Lebanese premier, Riyard-al-sulh was killed in 1951.[446]

Various Arab parties, governments and leaderships engaged in fierce race of evolving revolutionary and patriotic movements, calling for the liberation of Palestine which was their topmost priority. This is one unique consequence of the 1948 Israeli-Palestine war which pose a great danger to the global community.

No doubt, Palestine is actually the heart of the Arab countries, it is in the midst of the different Arab nations, surrounded like a halo by Egypt, Syria, Lebanon, the countries of Maghreb, Iraq Jordan, Hijaz and the states of the peninsula, it is this strategic position of Palestine that made its tragedy great.

As the consequences of the 1940 war continued, a Palestinian conference was officially held in Quds on May 28, 1964. A number of resolutions was taken at the

[446] See, 'Changes of Thought and Polities in the Arabian East, p. 217.

conference mostly in the areas of armed struggle, mass media and organization. Some of them were implemented immediately. For examples, setting of camps for the military training of all able-bodies Palestinians on a regular and compulsory basis and commissioning disciplined and armed Palestinian battalions, which were strong and effective. On September 5, 1964, the second Palestinian Arab summit was held, like the May 28 conference, important resolutions were adopted. They include formation of Palestinian liberation organization' (PLO), setting up an affiliated Palestinian army and setting aside a Budget for the army. In the following year, 1965, the Palestinians who were compelled to leave their home country by force constituted armed divisions in their respective places of refuge. Therefore, such divisional forces emerged in Syria as Hitting division, Atl-Qadissyyah in Iraq, and Ayn Jalut in Egypt. The door to mobilization was flung open in Lebanon, Jordan and Kuwait. That was how the Palestinian armed struggle was born in an Islamic atmosphere. This is one significant effect of the Israel-Palestinian war of 1948 that linger on to date with its continuous impact on peace and security of the world.

5.5 INTRA-NATIONAL CONFLICTS

This portion of the fourth chapter of the present work will be incomplete if the on-going intra-national conflicts in some of the Arab nations are not briefly discussed. In most cases, internal crises are occasioned by general discontent among the citizenry of a nation. When the government of a country can no longer fulfill its obligation to its citizenry, there is bound to be civil disobedience which eventually transform into uncontrollable uprising. Once there is breakdown of law and order, the condition will degenerate to serious crisis that may eventually dethrone the government. This is what the world has witnessed in Tunisia and Egypt recently. Like

contagious disease, the process that ousted former President Zine El-Abadine Ben Ali of Tunisia and the former President Muhammad Hosni Mubarak of Egypt spread to other Arab countries which include Algeria, Syria, Yemen, Bahrain, Jordan, Mauritania and particularly Libya where a full scale rebellion broke out. Tunisian and Egyptian intra-national conflicts will be briefly discussed as case studies for the purpose of this dissertation.

5.5.1 Tunisia

The Tunisian revolution was an intensive campaign of civil resistance that led to the ousting of a long time President Zine El-Abaden Ben Ali. The revolutionary process began with protest by the people in December, 2010. Among the causes of the revolution in Tunisia are: High unemployment, Food inflation, Corruption, Lack of freedom of speech, Poor conditions of living, and lack of political freedom.

By 14th day of January,2011 Ben Ali had fled to Saudi Arabia from where he officially resigned and dissolved his government oftwenty-three years (23yrs). After the departure of Ben Ali, a state of emergency was created and a care-taker coalition government was established. Key members of Ben Ali's political party (Constitutional Democratic Rally-RCD) were appointed to key positions in the coalition government. The care-taker administration is expected to conduct election within sixty days. However, there was massive protest against the coalition government for including members of Ben Ali's party in the coalition administration. The Protestants also demanded for RCD itself to be disbanded. The protest continued until all the members of the RCD were removed from the coalition government and disbandment of the Ben Ali's party was ordered by the court.

Al-Qaeda Organization in Islamic Maghreb declared unflinching support for the Demonstrators against both Tunisian and Algerian governments in video rleased on

13th,January 2011. The leader of the organization, *Abu Mus'ab Abdul-Waheed,* offeredmilitary assistance and training to the demonstrators. He called on them to overthrow the 'Corrupt, Criminal and Tyrannical' regime.

Ban Ki-moon, the UN Secretary General stated that "the political situation is developing fast and every effort must be made by all concerned parties to establish dialogue and resolve peacefully to prevent further loss, violence and escalation."

Amr Mousa, the Secretary General of the Arab League warned at a summit in Egypt that "the Arab soul is broken by poverty, unemployment and general recession. This is the mind of all of us. The Tunisian revolution is not from us. The Arab citizen entered an unprecedented state of anger and frustration"

The hosting president, Hosni Mubarak, did not make reference to the demonstration in Tunisia. Perhaps if this meaningful warning were adhered to, probably, the wide spread of the protest or intra-national conflict all over the affected Arab nations could have been averted.

Another interesting but objective comment on the internal crisis of Tunisia is that of Ali Larijani, the Speaker of Iranian Parliament. He praised and commended the demonstrators but accused the West of being 'the main cause of autocracy in Tunisia, while they are pretending that they are sympathetic with the nation. The hypocrisy is reflected in the statement of Jeffery Feltman, a US leading Envoy in the region. He said : *"The US was hopping that the 'example' of Tunisia would bring reform to the rest of the region"*. He stated further : *"I certainly expect that we'll be using the Tunisian example"* (in talks with other Arab governments). The challenges being faced in many parts of the world, particularly in the Arab world, are the same and we hope people will be addressing legitimate political, social, economic grievances." It is

pertinent to note here that this statement was made despite the US's enormous support for the ousted President, Zine Ben Ali.

5.5.2 Egypt

Few days after the exit of Zine El-Abidine Ben Ali of Tunisia from power, an unprecedented protests on the streets of Cairo caught the attention of the world. The 2011 Egyptian Revolution began on 25, January, 2011 with a popular uprising. It was an uprising of mainly a campaign of non-violent civil resistance, that featured a series of demonstrations, marches, various acts of civil disobedience and work- to- rule.It was a combined forces of variety of socio-economic, religious and opposition groups with a common demand to overthrow the regime of Hosni Mubarak. By the succeeding week, on 11, February, the President resigned from office after thirty years of governance. He handed over power to the military. The highest ranking US official to visit Egypt after the handing over was Hillary Clinton, the US secretary of state. She urged the Egyptian military Authority to commence without any delay; the process of a democratic transition and she offered support to those who have been protesting. She reaffirmed the ties between the two nations. Above all, $150 millions was offered by the US as economic assistance to help Egypt's transition to democracy. How does one interpret this kind of gesture in international relations? Or one may curiously ask : '*What is the US interest in Egypt?* The fact of the matter is that should an Islamist Egypt emerge, it would be a strategic catastrophe for the US simply because Egypt is the center of gravity in the Arab world. If true Islamic government emerges in Egypt, it would enhance the dynamism of the Arab world and at the same time it would severely undermine the US strategy.

Factors responsible for the revolution in Egypt could be premised on legal, socio-political and economic issues. These include state of emergency laws, police brutality,

denial of freedom of speech, absence of fair and free election as Hosni Mubarak failed to put in place a credible succession plan. It was observed that he wanted his son Gamal to succeed him and this is not acceptable to his opponents and majority of the Egyptians at home and abroad. Other causes of the revolution are *inter-alia* uncontrollable corruption and economic factors which include high rate of unemployment, food price inflation and low minimum wages. Coupled with the foregoing, the Tunisian revolution is a prominent factor that was responsible for the Egyptian revolution. The uprising in Tunisia was enough to push the Egyptian youths to the streets for the first time in their national history.

The common and primary demands of the Protesters and the opposition groups are as stated below :

- The end of Hosni Mubarak regime with the end of emergency law.
- Dismantling of the State Security Investigation Services.
- Releasing all prisoners arrested since 25, January, 2011.
- Public announcement by the Vice President, Omar Suleiman that he will not run in the next Presidential election.
- Ending the curfew and withdrawal of police from the state controlled university.
- Thorough investigation of state official responsible for violence against Protesters.
- Dismissal of the minister of information, Annas El-Fiqqi and stop him from the use of government owned media propaganda.
- Freedom to all fundamental human rights and Justice for all.
- A responsive non-military government and participation in the management of the resources of Egypt.
- Public announcement of all the above-stated Demands on government television and radio.

Success of the 2011 Egyptian revolution became established when the Vice President Omar Suleiman came on the air on 11, February to announce that Muhammad Hosni Mubarak would be stepping down as President and to surrender power to the Supreme Council of the Armed Forces under the able leadership of General Muhammad Hussein Tantawi.

The concept of cause and effect commences this chapter with highlights of some selected cases of wars as causes and their respective consequences as effects which represent the impact of war on the global peace and in Africa. International armed conflicts in Africa, Iraqi-Iranian war and Kosovo genocide with the Israeli-Palestinian age-long conflicts were all discussed. Current Intra-national or Internal conflicts in the Arab world are also considered in this fifth chapter.

CHAPTER 6

INTERNATIONA TREATIES AND RULES OF CONDUCT OF HOSTILITIES

6.0 INTRODUCTION

All activities of Muslim Nations are regulated by Islamic Law. Hence what is Intended in this portion of the present work is to elaborately discuss treaty with its effect and other rules applicable to conduct of war. Furthermore principles of distinction, Precaution, Proportionality, Prohibition of indiscriminate attacks and Protection of Prisoners of war are to be discussed in a clear and elaborate manner. Also to examined in this chapter are Terrorism, Means and Methods of warfare.

6.1 Treaty And The Effect Of Treaties

Treaty constitutes a source of law of war and peace as already treated under the second chapter of this work. Under the International customary law, armed conflicts may be terminated by unilateral action on a consensual basis.[447]

Armed conflict can be said to have been terminated unilaterally when a party to the conflict is destroyed as an independent and organized entity. A relevant illustration of this proposition is the Extinction of the German Reich by the Western Allies in 1945. the instrument of unilateral termination of conflict has been aptly described by the International Military Tribunal of Nuremberg (1946) as: "the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrender.[448]" The instrument on International level is known as debellatio. Both successful and suppressed revolution in intrastate or non-international conflict provide equivalents to international dilation.[449]

In most case, the conflicting parties reach some understanding on the termination of an armed conflict. By such mutual understanding, they may prefer that kind of

[447] G. Schwarzenberger, Ibid, p. 730
[448] Emd. 6964 (1946), p. 38
[449] See, M.Koch, "Tableav des Revolutions de L'Europe (1823 – 3 vols)

arrangement to be tacit rather that articulate. Thus they may work on the common assumption that, with the passing of time, an armistice will be transformed into a state of de-jure or de-facto peace. Probably, they may achieve the common goal by unilateral but parallel acts under their own legislation, and in this way terminate a state of war.

None-the less, treaty remains the most typical and effective from of putting an international armed conflict to an end. Treaty is a pact or written agreement or more comprehensively, a legal instrument by which conflicting parties put final end to the contents of a peace treaty or any other treaty for that matter in an unorganized international society.[450]

Honourable Judges Anzilotti and Huber, in their joint dissenting opinion, defined treaty as the "re-establishment of a state of peace between the belligerents[451]"

Likewise in the case of Ahmed Emin Bey (1927), the Brisitish-Turkiish mixed Arbitral Tribunal held that the "state of war, in the legal meaning of the term, continues until the conclusion of the peace treaty[452]"

The question to be addressed here is: what are the legal effects of treaties?

First and foremost, once a peace treaty comes into force, the law of war becomes inapplicable in the relations between the belligerents[453]. This is however subject to any reservations contained in the peace treaty, the intent is for the relations between the belligerents to be governed by the international law of peace[454]. Another important effect of treaties is the obligations and rights created by the treaty become legally binding on the parties to the treaty. However, there can be justification for non-performance of the obligations created by the treaty.

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[450] See Zgainski V.Germany (1958), The Arbitral Commission, Vol. Iv, p. 207 at p. 220
[451] Wimbledon Case (1923)
[452] 7 M.A.T, p. 920 at 922
[453] See George. S., Ibid pp. 725 & 744-6
[454] Ibid, p. 59

A state may plead necessity or force majeure, for instance the effects of natural catastrophe or foreign invasion[455]. A more particular justification is provided by legitimate military defense in case of armed conflict and civil strife. The Vienna convention did not prejudge any question of state responsibility[456].

Application of law of neutrality ceases, the very moment a peace treaty comes into force. Third states or neutral parties are no longer sound nor entitled to apply to the former belligerents, the law of neutrality while absolute compliance with the law of peace is expected from the belligerents[457].

Besides the parties that are signatories to a treaty, a third party may indirectly lawfully enjoy certain rights and obligations. It is indisputable that there is a legal maxim of pacta tertiis express the fundamental principles that a treaty applies only between the parties to it,[458] but there is exception to this general rule.

As it is often said that there is no general rule without exception. The existence and extent of exception to this general rule have been matters of acute controversy.[459] According to the International law commission in its unanimous view, a treaty can not on the strength of its own force create duties for non-parties. Under Article 35, of Vienna Convention, it is provided that: An obligation arises for a third state from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third state expressly accepts that obligation in writing".

The Vienna convention provides for exception subject to the written acceptance of the third state. George schwerzeberger[460]opines that, the fact that, in time of war, self-

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455 See UN Secretariat Study, St/LEG/13,27 June, 1977.
456 See Article 73, Vienna convention
457 Schwerzenberger G, Ibid, P.549
458 See Article 34, Vienna convention
459 Ian Brown, 'Principles of Public International Law', 3rd Ed., Oxford University Press, 1079, p. 620
460 Schwerzenberger G, Ibid, p. 733

denying ordinances on themselves of their own peacetime rights explains the mystery of the apparently automatic third party[461]. Precisely, the re-establishment of peaceful relations between former belligerents merely removes restrictions and imposed International customary law on neutral powers.[462]

Thus, two apparent exceptions to the principle in respect of obligations exist. Therefore a rule in a treaty may become binding on non-parties if it becomes a part of international custom.[463]Such international custom covers the Hague conventions concerning rules of land warfare and perhaps, certain treaties governing international water ways. Moreover, a treaty may provide for lawful sanctions for violations of the law which are to be the law which are to be imposed on an aggressor state.

Having considered the third state's obligations in a treaty looking at the other side of the coin reveals that the conferment of rights on third parties by a treaty is more controversial. The stipulation *poor autrui*, i.e conferment of rights on third states in a peace treaty, is not infrequent. Treaties make provisions in favor of specified third state or for other states in general. The only problem is to determine when, if at all, the conferred right becomes perfect and enforceable by the third state.

The rule is very clear, the third partly will only benefit in this circumstance if it implicitly or expressly assents to the creation of the right, a proposition accepted by the leading authorities.[464]

Another opinion supported by some members of the International law commission, was that the right which was intended to create in favor of the third state was not conditional upon any specific act of acceptance by the latter.[465]

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461 Schwerzenberger G, Vol. 1, p. 462

462 See for example, the formulation in Article 2 of Hague Convention III of 1907 on the opening of hostilities (scott, the Hague Convention p. 96)

463 See Article 38, Vienna convention

464 Rousseau, "Principles Generauxi". P. 452 at 484. See also the Final Draft, 1966, Art. 32

465 See Reports by Cavterpacht, year book. (1953) Fritzmaurice, year book (1956)

Authority for this view of theirs is found to exist in the free zones case[466]. In this case, the rights contended for by Switzerland, viz, the benefit of a free customs zone in French territory under multipartite treaties to which France was a party, but Switzerland was not, rested in fact on agreement of 1851 and 1861 to which Switzerland was a party[467]. The statement by the court, however seems to accept the principle that the creation of rights for third sates is a matter of the intention of the grantor states.

In its final analysis, the international law commission held that the two opposing views indicated above, did not differ substantially in their practical effects. Article 36 of the Vienna convention creates a presumption as to the existence of the assent of the third state. It states thus:-

i. A right arises for a third state from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third state or to a group of states to which it belongs, or to all states, and the third state assents thereto. Its assents shall be presumed 30 long as the contrary is not indicated, unless the treaty otherwise provides.

ii. A state exercising a right in accordance with paragraph I shall comply with the conditions for its exercise provided for in the treaty established in conformity with the treaty. Nonetheless, the third state may disclaim any conferred right tacitly or expressly by failure to exercise the right. Except with the consent of third state its right cannot be revoked or modified by the parties.[468]

[466] 1932, P.C.I.J, Ser. A/B, no. 46, pp. 147-8
[467] See Report by Mc Nair, pp. 311 - 12
[468] See Article 37(2), Vienna Convention.

6.2 RESTRICTIONS

Warring Parties are restricted in the manner they wage war. The restrictions are placed on the parties to protect the Warriors (Soldiers), Women, Aged persons, the Young persons and the Minors. Whatever form the restriction takes, it has to do with methods and means of warfare. These restrictions are legally backed up by the provisions under the International Law through various Conventions and some other legal concepts such as Principles of distinction, Precaution, Proportionality, Prohibition of indiscriminate attacks and Protection of Prisoners of war (POW); which will be discussed in succession in the subsequent portion.

6.2.1 Principles of distinction through the Conventions

Convention is defined as an official agreement between countries or leaders.For examples :the Geneva convention and the United Nations convention on the rights of the child[469]. However, in Gilbert Law summaries, a pocket size law dictionary, anything *conventional* is "that made by agreement between parties rather than by law, for instance,a conventional lien or a conventional estate."[470]

an excellent title "constraints on the waging of war[471]" coined longest time ago by the world acknowledged 'founder' of modern international law, called 'Grotius'. The relevance of this portion of the present dissertation is underlined by the fact that International conventions on armed conflict are primarily aimed at bringing to the barest minimum, the human suffering and hardship in various degrees caused by war; be it intra or international.

If war is reduced to a low level, it will be easy for mechanism of convention to effectively manage the ugly consequences of war. The rehabilitation of war victims

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469 Hornby A.S, Oxford Advanced Learner's Dictionary of current English,6th ed.,Oxford University Press,2000,p.252.

470 Gilbert, Law Summaries, Harcourt Brace Legal and Professional Publications,1997, p.64.

471 Kalshoven F, "Constraints on Waging war, ICRC, 2nd Edn. 1991, p.ix.

including the unarmed civilians and the captives otherwise known as prisoners of war will be less difficult. The essence of this present study is to minimize the cruelty and ruthlessness with which the belligerent State execute war and the wicked manner by which they treat the captives without distinction between children and adult, between women and men, between old and young men and between armed and unarmed men . Conduct of war is therefore subject to certain legal restraints. Such constraints are indicated in the title of the work of Grotius which is 'De jure belli ac pacis[472] rendered in English language as "constraints on the waging of war". Rules regulating conduct of war, rules relating to the captives, citizens of the conquered states, rules of law of occupation as well as law of neutrality; are all components of legal constraints in waging war. Grotius when writing at the time of the 30 years (1618-1948) compared in his famous treatise the practice of conducting virtually unlimited war pointing to all the barbaric things belligerent states could do with impunity as far as the positive law of his time was concerned – with another, more commendable mode of conducting war in respect of legal rules with regards to the rights and welfare of the war victims.[473]

For the purpose of emphasis, without legal restraints, war may all be too easy to degenerate into utter barbarism resulting to negative development and highly devastating situation. Human dignity will be lost. Reconciliation and ultimate restoration of peace between the parties that have ruthlessly dealt with each other in the hostility will definitely be more difficult than ever.[474]

The conventions as constraints on war or armed conflicts between states or a collection of states has a major part of it dealing with international armed conflicts for

[472] Verri, P., 'Diritto per la pace e Diritto nella guerra,' Rome, 1980 ; I.R.C. Handbook 12the Edn., Geneva,' 1983

[473] Friedman, L, "The Law of war, A Documentary History" vol. 2, New York, 1972

[474] See further, Frits Kalshoven's "Constraints on Waging of War," ICRC, 2nd Ed., 1991, p.5

which comprehensive rules are provided; while only a few of the Humanitarian Law provisions relate to intra-national or international armed conflict[475]. Although of relatively recent origin in its present shape, the contemporary convention on war in its present form, has a long history behind it. For a long time in the history of war, war commandants occasionally ordered their troops to spare lives of captured enemies, gave them good treatment, spare the enemy non-combatant or unarmed population and in most cases upon ceasefire or even actual termination of hostilities, belligerent parties agreed to exchange the prisoners in their respective custodies. Eventually, these and similar practices developed in piecemeal into a body of conventional rules in relation to conduct of war.

According to Frits K.[476], such rules must have to be respected by parties to the armed conflict even in the absence of a unilateral declaration or reciprocal agreement to that effect. At a latter period, the status of these supposedly conventional rules which somewhat beclouded by uncertainty and elusiveness; charged to that of internationally accepted and binding instruments. The instruments are conventionally called treaties. Some of the treaties are called protocol or convention.

A brief summary of the conventionally essential rules of distinction applicable to all armed conflicts are embodied by:-

i)-Article 3, common to the Geneva conventions of 1949 (G.C.I. – iv Article 3)

ii)-Article 4 of the Hague convention for the protection of cultural property of 1954 (H.CP-Art.4) It is pertinent to note here that the above-stated articles apply in armed conflicts occurring on the territory of a state that is a party to these conventions.

[475] See Ladan M.T. op. cit, p. 133
[476] See Frits K, Op. cit., p.7.

However, no explicit requirements as to intensity and level of conflict is required. On the other hand, a longer summary of the International Humanitarian Law is constituted by Additional protocol II to the Geneva conventions of 1949 (GP II). This protocol II was designed to develop and supplement article 3 common to the Geneva conventions of 1949. The application of additional protocol II is limited to situations that involve more than internal conflicts in form of disturbances and tensions such as isolated sporadic acts of violence, riots and other acts of similar nature. The circumstances or conditions under which this protocol applies are when the non-governmental armed forces like rebels or groups like the non-governmental organizations (NGOs):-

a. are under responsible command;

b. are able to respect the law of armed conflict

c. exercise such control over a part of the state's territory as to enable them to carry out sustained and concerned military operations.

In a situation where there are no specific applicability requirements, both article 3 common to the 1949 Geneva conventions and article 4 of the 1954 Hague convention for the protection of cultural property, would apply to a wider range of conflicts than additional protocol II to the Geneva conventions. It therefore implies that there can be conflicts already considered armed conflicts under the two above-referred articles, without them necessarily been armed conflicts within the context of additional protocol II.

However, the tendency to commence treaty-making process with regards to warfare was dated back to 1860s when on two different occasions a world-wide conference was convened purposely to address a particular highly specific aspect of war. The first one was in 1864 held in Geneva and specifically dealt with the fate of

the wounded soldiers on the battle field, and the second one was in St. Petersburg in 1868 which specifically dealt with prohibition of the use of Explosive rifle bullets.

It was from these modest beginnings that two distinct, though not entirely separate trends in the law of war developed each characterized by its peculiar perspectives. One is called 'Law of Geneva', while the other was known as 'the law of Hague'. While the law of Geneva is more particularly concerned with the condition of war victims who have fallen captives in the hands of the enemy; the law of Hague is concerned with conduct of war proper and lawfully permissible of war. Eventually, the United Nations in the 1970s began to play active role in the development of the law of armed conflict mainly concentrating on the aspect of implementation of fundamental human rights in situations of armed conflict. This United Nations involvement brought to existence the third trend in the law of war. Thus, there are three main currents of international law of war which constitute in wholesome the legal constraints on waging war. Each of these currents will be briefly discussed as sub-paragraphs below to enhance better understanding of this segment of the thesis.

6.2.1 (a) Geneva

By the middle of the 19th century the condition of wounded soldiers on the battle-field was so pathetic and seriously inhumane. There was nothing like medical or auxiliary personnel, no surgery; the available treatment was not only applied in a primitive condition but also not sufficient.[477] what has been considered to be the worst fact of all was the Napoleonic wars at the inception of the century which

[477] See further; 'Introductory report on "Re affirmation and Development of the Laws and Customs Applicable in Armed Conflicts" Geneva, 1969

brought to an end the customary practice of sparing the enemy's field hospitals and leaving both the medical personnel and the wounded untouched.[478]

The scenario then was the shelling of field hospitals, subjecting the doctors with stretcher-bearers to fire and taking whoever fell into the enemy hands regardless of his status whether combatant or non-combatant as war prisoners. Consequent upon this, whenever the enemy forces approached, or merely rumored, the doctors and nurses in the field hospitals fled with the primitive ambulances at their disposal, taking with them as many wounded as they could and leaving others to their predicament.

All this notwithstanding no form of assistance could be expected from the inhabitants of nearly localities. No one could be entirely sure of which way the fortunes of war would go. It was also a rule that whoever attended to the dieing soldiers of the belligerent party ran the risk of being regarded as a staunch supporter of that party by the other side.

Due to the initiative of one man, the Genovese businessman *Henry Dunant*, the international community effectively rose to tackle the challenges of the disastrous consequences of war particularly in respect of the wounded and prisoners of war. In 1859, in the aftermath of the battle of solferina in Norther Italy, Dunant accidentally found himself in the midst of Austrian and French wounded soldiers who were brought to the nearby village of castiglione.

It took him and a few other volunteers to do what they could to treat the wounded and reduce the sufferings of the dying. Profoundly concerned about the misery he had seen, he withdrew from active life and recorded his experiences in a book which he entitled – "Un souv enir de solferino" – (a memory of solferino).

[478] Friedman, L. "The Law of War, A Documentary History", 2 vols, New York, 1972

This book was published in 1862. In the book, Dunant indicated two steps he considered as indispensable. Firstly is a step whereby in each state, a national private aid organization to assist the military medical services to be established. The second indispensable step according to Dunant is the execution of treaties by states by which assignments of the private aid organizations would be facilitated and simultaneously guarantee a better and effective treatment of the wounded.[479]

Within a short time, the realization of two indispensable steps was effected. As early as 1863 a few Genevese citizens including Henry Dunant formed the "International committee for aid to the wounded" which eventually metamorphosed into what is known in our contemporary world as 'International Committee of Red Cross' (ICRC). The committee was then established with the self-appointed task of promoting the twin aim of the creation of national aid societies and the conclusion of a treaty to facilitate their work. In the same year, the first national society sprang up in three states vis-avis: wurtemberg, Oldenburg and Belgium while that of Prussia was established in the Hague – Netherlands. Subsequently, these early national societies were succeeded in the course of years in almost every part of the global community under the name of Red Cross or Red Crescent societies.

The next step which is the desired treaty became difficult to be concluded. However, a concerned group seized upon the first opportunity which was an international congress on statistics held in Berlin in 1863 to start propagating the idea that such treaty was urgently required to facilitate the functions of the national societies. Consequent upon this and similar efforts, by invitation of the Swiss government, a diplomatic conference convened in 1864 in Geneva as well as on 22 August 1864 the "convention for the Amelioration of the condition of the wounded in

[479] Boissier P., 'Histoire du comite international de la croix-Rouge: De solferino a Tsoushima", paris, 1963.

Armies in the field" was adopted by the Geneva conference. Perhaps, this is the process Georg Schwarzenberger terms as "Humanitarian Law-making at Geneva"[480]. The tradition stemming from the said Geneva conventions of 1864 was revived by the International committee of Red Cross. The revived tradition was further strengthened in the 1906 Geneva conventions and that of the Hague in 1899 and 1907. It was further advanced in the Geneva conventions of 1929 for the protection of wounded soldiers and prisoners of war.[481]It is highly pertinent to highlight the most important features of the August 22, 1864 Geneva conventions. In armed conflict on land, ambulances and military hospitals would be 'recognized as neutral and as such, be protected and respected by the belligerents as long as they accommodate the wounded and the sick." Moreover, the hospital and ambulance personnel must not be targets of attack or be taken as war prisoners. They would rather be accorded the benefit of the same neutrality when on duty and while there remaining wounded to be brought in for assistance. Irrespective of nationality, the wounded and the sick combatants shall be collected and cared for. Finally, another important feature of the 1864 convention is that hospitals, ambulances and evacuation parties would be distinguished by a uniform flag, or armlet bearing "a red cross on a white ground." Applicability of the principles entrenched in 1864 treaty was extended to the wounded, sick and shipwrecked at sea by virtue of a treaty concluded in 1899. for the first time in 1906, the 1864 treaty was revised and in the following year – 1907, the 1899 treaty[482] was adjusted to the 1906 revision.

At the instance of the International Committee of the Red Cross (hereinafter referred to as 'ICRC'), a diplomatic conference was covered in Geneva in 1929. The

[480] Schwarzenberger G, 'International Law as Applied by International Courts and Tribunals", vol. II, stevens & sons ltd., 1968, p. 540.
[481] Scott, The Hague Convention, p. 116
[482] The 1899 Treaty and its Revision in 1907 took place in The Hague.

conference adopted a much improved treaty in relation to treatment of the wounded and the sick on land given the experiences of the first world war. The said conference further adopted a meaningful negotiation for a separate convention on the treatment of prisoners of war. This latter treaty adopted by the conference significantly widened the scope of persons protected under the law of Geneva. The unexpected long duration of the 1st world war and its huge number of prisoners of war on both sides exposed the need for more comprehensive of this class of war victims. Thus, the 1929 convention achieved this important goal of international Humanitarian law as more particularly important improvements on the old law could be mentioned: like the far greater clarity and completeness of the rules and principles on capture and captivity of the captives, introduction of a categorical ban on reprisals against such captives or prisoners of war as well as the acceptance of the principles that application of the agreed rules would be open to international scruing.[483]

Frits Kalshoven, in his own thinking, it was the tragic events of the Spanish civil armed conflict and the second world war that occurred successively that were responsible for the incentive for yet another major revision and further development of the law of Geneva[484]. His position as stated above may be acceptable because it was the ugly and unpalatable consequences of the two successive wars that informed the 1949 diplomatic conference in Geneva. For the second time, this conference also initiated by the ICRC and by invitation of the Swiss Government. At the diplomatic conference held in Geneva between 21st April and 12th August, 1949, four (04) conventions for the protection of war victims were adopted.[485] The laws of war in a wider sense were reformulated and further developed with the intent to elevate by

[483] See further, Forsythe, D. P.: 'Humanitarian Politics: The International Committee of the Red Cross", Battimore, 1979

[484] See Frits K: Ibid. p. 10

[485] Cmd. 550 (1949), see also Schwerzenberger G, Ibid. p. 81

general consent the standard of civilization and provide allowance for its prevalence. Thus, the three conventions in force (one of 1907 and two of 1929) were substituted by new conventions providing improved versions of a number of existing rules and filling the vacuum that practice had brought to light. For instance, the armed resistance in several western countries under the German occupation during the second world war led to the express recognition that members of organized resistance movements that satisfy a number of severe conditions would qualify as prisoners of war. An entirely novel convention on the protection of civilian person in time of war enriches the law of Geneva beyond reasonable doubt. This particular convention of the 1949 diplomatic conference serves to protect two categories of civilians: Enemy civilians in territory of belligerent party, and the in habitants of occupied territory – this is a category of civilians, that is those who as a consequence of the armed conflict find themselves in the jurisdiction of the enemy. With this development, the law of Geneva was then made up of four conventions applicable to the wounded and sick on land, the wounded, sick and shipwrecked at sea, prisoners of war and finally the civilians.

In the final analysis, the diplomatic conference of 1949 produced one additional innovation of a great import that is difficult for any student of international humanitarian law to ignore. Hitherto, the conventions of Geneva had always been considered as applicable primarily in wars between states.

The Spanish civil war had made it impossible to apply even the most basic principles of the law of Geneva to parties in an internal armed conflict. It is therefore in the light of this situation that the conference concluded that on one hand, the conventions would continue to apply in their totality to international armed conflicts. On the other hand, it introduced into all the four conventions of 1949 a common Article 3

"applicable in the case of armed conflict not of an international character occurring in the territory of one of the High contracting parties" and providing for such an event a list of fundamental rules the parties are bound to apply as a minimum".

The adoption of the common Article represents a giant step forward for it established the possibility of laying down rules of international law expressly and exclusively addressing the situation of internal armed conflict or civil war.

Within the context of penal sanctions for breaches of the 1949 conventions, there is another novel feature that deserves one's attention. The feature is the universal and mandatory character of the jurisdiction of parties to the conventions over persons charged with serious war crimes which are specifically classified as "grave breaches" of the Geneva conventions.[486]

The parties to the conventions are empowered to enact the legislation necessary to provide effective penal sanctions for persons committing, or ordering others to commit, any such grave breaches of the conventions. It is not material whether the culprit is a participant to international armed conflict or not, such person or persons regardless of his/their nationality must be brought before their own national courts. However, there is one alternative open to such nations if they should so prefer, and in accordance with the provisions of their own municipal legislation, it is to hand over such culprits for trial to another contracting party as long as the other contracting party concerned must make out a prima facie case, presumably one considered adequate by the contracting party handing over the alleged criminal.[487] To say the least, the ICRC and the Geneva conference of 1949 were able to advance in protecting war victims of all categories ad carry matters further than the United Nations' efforts

[486] Convention I: Article 50 (cmnd. 550 (1958) p.32). Convention II : Article 51 (Ibid, p.78); Convention III: Article 130 (Ibid, p. 174) and Convention IV : Article 147 (Ibid., p. 296)

[487] cmnd. 550 (1958), Art.49 of convention I ; Art. 50 of convention II; Art.129 of convention III & Art.146 of convention IV.

to generalize the Nuremberg principles. It has also been considered that a new level for their activities was desirable. In fact, it has also been indicated with growing emphasis that their work should be known and publicized as the development of Humanitarian law.[488]

Over the years, the four 1949 Geneva conventions in their turn began to show flaws. The endeavor to mend these defects agrees with the most recent developments in the other regions of the IHL and this will be treated in the subsequent parts of the present chapter.

6.2.1 (b) The Hague

The second trend in the development of conventional rules/law of armed conflict by which legal constraints on the execution of war were imposed was the emergence of another branch of the law of war that is usually referred to as "Law of The Hague". In accordance with the available historical records, this trend did not start in the Hague at all but, rather in two different localities each of which is a long distant to the Hague. They are Washington and St. Petersburg.

In 1863 when American civil war (1861-1865) was going on, the United States' President promulgated a popular order headed: 'Instructions for the Government of Armies of the United states in the field.' The full text of the instructions is often referred to as 'leiber code' because it was prepared by a German born International Lawyer[489] who had emigrated to America. The famous Instructions provide detailed rules on the entire range of land warfare, ranging from the conduct of war proper and the treatment of the civilian population to the treatment of specified categories of persons such as prisoners of war, the wounded, the sick e.t.c.

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[488] See J. S. Pictel, 76 Hague Recueil (1950) p.5.

[489] The lawyer who prepared the American Presidential instructions was known as Francis Leiter.

It is never the less pertinent to note that technically a purely internal document and written with intent to apply it to internal armed conflict or civil war, the leiber code has nonetheless ever served as a model or precedent for the efforts undertaken later on in the 19th century on global level, to attain a generally acceptable codification of the laws and customs of war. Thereby, it has thus exerted great influence on subsequent development.

At St. Petersburg in 1968 a remarkable document was made known to the world. it was the *'Declaration'* renouncing the use of Explosive projectiles under 400 Grammes weight in time of armed conflict. Comparatively, the Declaration was in more than one regard an antipode of the lieber code. The code was just a piece of domestic legislation, which covered an extremely wide range of issues, while the Declaration on the other hand was an international treaty bearing on one single but highly specific aspect of the conduct of war. On the discovery of the Declaration, there arose a question as to the employment of certain recently developed light explosive or inflammable projectiles; particularly the explosive rifle projectiles which had already proved their tragic effects on enemy. When used against human beings, the new projectile was more effective than an ordinary rifle bullet, though it could put just one adversary hors de combat. This notwithstanding, it caused far graver wounds and thus greatly aggravated the suffering of the victim.

To provide solution to this problem, the Russian government invited the International Military Commission which convened in St. Petersburg in 1868 to examine the expediency of forbidding the employment of certain explosive projectiles in time of war between civilized nations. The military commission had no difficulty in arriving at a conclusion that the new projectiles must be banned from use. The commission premised its decision on an interesting line of reasoning. The starting

point is that: "the progress of civilization should have the effect of alleviating as much as possible the calamities of war", it also considered in its decision that "the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy." According to the commission, for this purpose it would be "sufficient to disable the greatest possible number of men", and "this object" would be exceeded by the employment of arms which uselessly aggravate the suffering of disabled men, or render their death inevitable". The employment of such weapons "would therefore be contrary to the laws of humanity".

A decisive position in the Declaration of the St. Petersburg concerns the question of future developments in weaponry. This once again made the text of the Declaration remarkable in more than one respect as it provides inter alia thus:

> *"The contracting or Acceding Parties reserve to themselves to come hereafter to an understanding whenever a precise proposition shall be drawn up in view of future improvements which science may effect in the armament of troops, in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity"*[490]

It was this position at St. Petersburg that finally takes us to The Hague, where in 1899, for the second time the Russian Government initiated a meeting of delegates from many states to discuss matters of peace and war. The meeting is often referred to as the *"First Hague Peace Conference"*. The main objective of the said conference was to create conditions precluding further wars. The expectation was that this laudable objective might be achieved by making it mandatory for all states to submit their disputes to international arbitration in addition to convening at regular intervals of an international conference to discuss any existing problems that might

[490] See Clark, I, "Waging war, A Philosophical Introduction," oxford, 1988.

emanate from maintenance of peace. However, there was a itch as the peace conference failed to achieve its primary goal because the idea of founding a compulsory arbitration was not accepted.

Undoubtedly, it was agreed that international arbitration was acknowledged as an excellent means to settle disputes between states. Despite this fact, only a few states portrayed themselves unwilling to waive the right to decide in future, with respect to each dispute as it presented itself as well as in the light of all prevailing circumstances, whether to submit it to arbitration or not. Notwithstanding the fact that maintenance of peace in the world was the main goal of the first peace conference, the initiators were realistic enough not to overlook the possibility of future global and national hostility. With a view to that possibility, the conference was requested to deliberate on a number of proposals relating to the conduct of war.

One and probably the first of such proposals was in respect of codification of the "laws and customs of war on land". This proposal was largely premised on a text drafted by an earlier global conference which took place in Brussel in 1874.

The 1874 Brussels Declaration had not even for once acquired binding force. It had in turn been strongly influenced by the Lieber code. Through the inspiration by these earlier precedents in line with the spirit of 1868 St. Petersburg Declaration, the first peace conference of 1899 succeeded in adopting the text of a converting with regard to the laws and customs of war on land, with annexed regulations.

The regulations (to be hereinafter referred to as 'the regulations on land warfare') provide competent set of rules with respect to all aspects of land warfare on which the contracting states had been able to concur with the singular exception of the treatment of the sick and wounded just as that matter was already a subject of the Geneva convention of 1864. Matters regulated inter alia are: the categories of persons

that were to be regarded as combatants (often referred to as "belligerents"), the treatment of prisoners of war, restrictions on the adoption of means and methods of inflicting injury on the enemy, restriction on the behavior of an occupying power etc.

According to the views of the High Contracting Parties, the provisions and the wording of which has been inspired by the desire to diminish the evils of war to the extent of what the military requirements allow, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.

On the other hand, it is the clear intent of the High Contracting Parties that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.

The High Contracting Parties considered it expedient to declare that in cases prior to the issuance of a more complete code of the laws of war, which are not inclusive in the Regulations adopted by them, the inhabitants and the belligerents would remain subjects to and protected under the rule to the principles of the law of nations consequent upon the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.[491]

Precisely, the core of the laws of war which emanated from "the Hague" that is the second trend in relation to conduct of war, is the prohibition of use of specific weapons commencing from St. Petersburg Declaration of 1868. The Declaration prohibits in time of war, the use of explosive projectiles under 400 grams weight.

The Hague Declaration of 1899 prohibits the use of bullets that expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.

[491] See further ICRC publication entitled "International Law concerning the conduct of Hostilities; collection of Hague conventions and some other international instruments" Revised and updated Ed., 1994, 1996, p.13

By the provisions under Article 23 of the 1907 Hague Regulations, the use of poison or poisoned weapons in time of armed conflict is prohibited. It is pertinent to mention here that similarly under the Geneva Protocol of 17 June, 1925, the use in war of asphyxiating, poisonous or other gases, all analogous liquids, materials or devices, and bacteriological methods of warfare were prohibited.

With this second Peace Conference of 1907 at The Hague, the main goal to ensure universal peace, once again remained beyond reach. The planned third conference was frustrated by the outbreak of the first world war in 1914. The activities of the second peace conference with regard to the law of land warfare were confined to a minor revision of the convention and Regulations of 1899. A unique important addition to the Regulations was connected with the bombardment of undefended towns. The conference had sufficient reasons to add to the existing prohibition in respect of bombardment, the words "by whatever means".[492] this addition constituted a step further in the Hague law of armed conflict. The implication of the added words is that it extend the protection to naval operation. Other notable results of the second Hague peace conference in the sphere of naval warfare include the convention (vii) relative to the laying of Automatic sub-marine contact mines (which placed certain restrictions on the use of such mines and of torpedoes, mostly in the interest of merchant shipping) and series of conventions on matters of neutral and enemy commercial shipping interest.

Chief among these was the convention (xii) which relate to the creation of an international prize court. The major problem, however, was the absence of meaningful accord among the leading interested states in respect of the material rules to be applied by such a court, governing blockade, contraband, visit and search with

[492] See further, Kalshoven F, Ibid. p.15

possible destruction of merchant vessels etc. Unfortunately this entire area of disagreement remained unattended to in 1907[493]. Nonetheless, the prize law as developed in Anglo-American practice, is based on three basic and inter-related rules:

i. Prize courts look to realities rather than appearances.

ii. Prize courts look to the substance rather than form

iii. Prize courts look to the effect rather than intent.

Regarding the prohibition[494] of the use in war of Asphyxiating, poisonous or other dangerous Gases and of Bacteriological methods of warfare, the Hague Regulations of 1899 had already codified the ancient prohibition on the use of "poison and poisoned weapons". However, the insufficiency of this prohibition was reflected in the first world war wherein various chemical agents like chlorine, phosgene and mustard gas were freely used. In response to the condemnation of this use of chemical means of warfare by the public opinion, the participants in the conference of 1925 which produced the protocol of 1925; did not hesitate to ban the use of such chemical agent once and for all.

Finally, as at the time of the outbreak of the second world war, the principles and rules embodied in the 'Hague convention and Regulations on land warfare of 1899/1907 have been widely accepted by states so much so that they had become part of international conventional law.[495]

6.2.2 Precaution

The United Nations as a major constraint on war can also be represented by the New York current which is a precautionary control measure of conventional rules.

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[493] Scott, 'The Hague Convention, p. 188

[494] Protocol to the 1925Geneva Conference

[495] In post second world war era, this opinion has been endorsed in so many words by the International Military Tribunal at Nuremberg in its judgment of the many criminals of the European theatre.

In the early years of the United Nations, little or no emphasis was placed on the law of armed conflict. Immediately after the second world war, the UN still put on the same picture of the defunct league of Nations period which was a period full of attention for the maintenance of peace but very minimal interest for the law of armed conflict and even "law of the Hague" had lesser attention. In spite of the lackadaisical attitude of the UN to law of war, two specific matters attracted attention in this period. First was the prosecution of war criminals and secondly was the problems posed by the introduction of the atomic bomb, as the most recent and particularly horrifying addition to the arsenals.

However, the focus on nuclear weapons dates from the first hours of the UN. The very first Resolution[496] ever adopted by the General Assembly provided for the establishment of an Atomic Energy commission, charged inter-alia with the responsibility of formulating proposals designed to eliminate nuclear weapons from national armaments. In the succeeding years, an important aspect of disarmament apparently in these terms of reference largely dominated the debate in the General Assembly as well as in the Atomic Energy Commission.

The General Assembly on 24 November, 1961, voted a Resolution[497] focusing more particularly on possible use of nuclear weapons.Thus the use of nuclear weapon was declared unlawful. This is a remarkable precaution and an effective legal constraint on armed conflict between nations as at then.

The year 1968 as declared by the UN as the "Human Rights Year" marked the beginning of a broader and more active interest of the United Nations in the law of armed conflict. An international conference on Human Rights held between 22 April and 13 May, 1968 in Tehran, the capital city of Iran under the auspices of the UN

[496] Resolution 1 (1) of 24 January, 1946
[497] Resolution 1653 (xvi), 24/11/61

adopted a number of Resolutions of which Resolution xxiii was prominent. This particular Resolution xxiii gains prominence because it requested inter-alia an enquiry into the "need for additional Humanitarian international conventions or for possible revision of existing conventions of civilians, prisoners of war and combatants in all armed conflicts as well as the prohibition and limitation of the use of certain methods and means of warfare"[498]. This initiative was approved by the General Assembly when it adopted a Resolution[499] by which the secretary General was invited to undertake the studies requested in the 1968 Tehran Resolution in consultation with the ICRC.

Subsequent series of resolutions adopted by the General Assembly in the 1970s had to do with the question of possible prohibitions or restrictions on the use of certain specified "conventional weapons". That is weapons of mass destruction such as nuclear, chemical and bacteriological weapons. Without any fear of contradiction, one can say that the General Assembly of the United Nations had through the series of Resolution adopted in the 1970s; created meaningful constraints on waging wars in the contemporary world. It could also be said that, with the adoption of Resolution 2444, the General Assembly had clearly prohibited the use of 'coarsive warfare' as method of waging war against a population in its entirely, in an attempt to force the adversary to give up.

Thus, the roles of the United Nations in imposing constraint on war with regard to development of the law of war in the 1970s have been of great significance from three dimensions.By these roles, the UN succeeded in promoting the idea of protection of human beings in their fundamental rights even in times of war. Secondly,it had immensely contributed to the reduction of dehumanization of victims

[498] Frits Kalshoven, Ibid., p.19-20
[499] Resolution 2444 of 19/12/68

of war. And thirdly the UN made valuable contribution to the debate on a number of specific issues of armed conflict, prominent among which is that of the position of guerrilla fighters a in the war of national liberation and mercenaries in armed conflict between nations.

6.2.3 Proportionality

Proportionality as a constraint on waging of war is largely based on economic factors. Economic factors constitute a great constraint on the waging of war. The economy of a nation determines the political power and subsequently the military capability of such nation. In most cases war is motivated by economic interest as it was in the Iraqi-Kuwaiti war. Michael Mann is of the opinion that a single historical explanation of the emergence of a nation unambiguously reveals that economic power is centralized in hands of a few selected feudal Lords who eventually transformed their relational and land-based entitlement to their respective tenants.[500] The 1789 French Revolution which happen to be one of the great events of armed conflict in human history; was primarily caused by economic factors. According to *Peacock*, "Besides political grievances, the merchants and industrialists had economic grievances."[501] It is an undisputable historical fact that the European colonization of Africa during the colonial era was mainly motivated by economic factors. History has shown that at a time in point the European powerful nations like France, Britain, Germany and Austria did scramble for some African states which are enormously blessed with natural resources.[502] Similarly, another economic factor that can restrict the conflicting parties from embarking on future war effects on their

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[500] See M.Mann, The Sources of Social Power; Vol.1, A History of Power from the Beginning to 1760 A.D., Cambridge University Press, Cambridge and New York, 1986, pp.410-411.

[501] H.L.Peacock, A History of Modern Europe 1789-1976, 5th Ed., Heinemann Educational Books, London,p.7

[502] Ade Ajayi, J.F & Crowther, Michael (Editors), History of West Africa, Longman, London,1974, Vol.2,p.405

respective commercial activities. As a result of war, whether within a nation or between two or more countries, companies are wound up while many industries are fold up or relocated to a peaceful nation that can provide a more conducive environment. Thucydides, in his own opinion when analyzing the causes of hegemonic war, he stated :

> " *Athens began its imperial career from demographic pressure and economic necessity".*[503]

In spite of the fact that combatants are not allowed to destroy economic trees, at the end of the war or even during the war, the post war effect on economy of a nation may lead to food scarcity, inflation and famine. A nation that has these ugly experiences may be naturally deterred from going into another war.

Going by the Islamic Law principles in relation to war, the economic factors which place constraint on war are founded in the instructions given by Prophet Muhammad (SAW) to the troops dispatched against the Byzantine forces who threatened to invade the Muslims. The Prophet of Islam said *inter-alia* :

> **"---**destroy not the means of their subsistence, or their fruit
> Trees and touch not the palm[504]."

This prophetic tradition forbids combatants in war from destroying the sources of economic power of the enemy. Lack of economic power, especially means of livelihood will naturally weaken the combatants and eventually reduces the pace of

6.2.4 Prohibitions of indiscriminate attacks

The law of Islam prohibits indiscriminate attacks in whatever form in armed conflict. Few among such prohibitions law are Terrorism, Means and Methods of warfare.

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[503] Robert Gilpin, Theory of Hegemonic War, Princeton University Press, 1943,p.21
[504] See Ibn Hisham, Sirat Rasul Allah, Lahore, p.458

6.2.4.1 Terrorism

In the opinion of Noam Chomsky, *Terrorism*is "the use of coercive means aimed at civilian population in an effort to achieve political, religious, or other aims"[505]

The Oxford mini-reference dictionary of over 35,000 definitions simply defines Terrorism as 'Use of violence and intimidation.'[506] From these two out of other multi-dimensional definitions of terrorism, one may be correct to say that terrorism is a kind of war or armed conflict which does not conform with the conventional rules of war. The reason being that it is the application of force directed to armless civilians in a peaceful atmosphere. Former President Bill Clinton of the USA claimed in his paper-presentation that between 1995 & 2001, 'twenty one hundred terrorist attacks took place.'[507] The one and only group which is synonymous with terrorism is a network called *Al-Qa'idah*.Ironically the said network originated from the mercenary army jointly organized, trained and armed by the American CIA, Egypt, Pakistan and French intelligence[508]. It is further revealed by President Jimy Carter's National Security Adviser, in person of Zbigniew Brzecinski when he said that the organization of this group started in mid-1979. The members were drawn from the *'most militant sectors'* that the organizers could find. They numbered one hundred thousand (100,000) or more. According to him, the aim was to use them to give secret support to the Mujahidin Islamic Liberation Movement of Afganistan, who were waging a war against the pro-Russian pro-Communist government in that

[505] Noam Chomsky, 9/11 (Seven Stories Press, New York,2002)
[506] See Joyce M.Hawkins, The Oxford Mini-refrence Dictionary,Oxford University Press,UK.,1995, P.432.
[507] Bill Clinton (2001), Dimbleby Memorial Lecture.
[508] N. Chomsky, op.cit.

country. Brzecinski is further reported to have said that this was 'an effort to draw the Russians into what he called the 'Afghan trap'.

Terrorism, by whatever name it is called has no place in any law especially in the Islamic Law. It is worst than war. Under the law of Islam, to kill just only one person without lawful justification is like killing the entire people of the world[509].

There is no way by which Islamic law would tolerate terrorism when even during war condition, the Muslim soldiers are not allowed to attack unarmed innocent individuals like non-combatants, women or children. They are not also allowed to destroy farms or cut down the trees of the enemies. The same Law disallows them to kill even the animals of the enemies. This position of Islamic Law make terrorism a sort of constraint on war.

6.2.4.2 Means of Warfare

A combatant is a participant in war fare *simplicita*. However in technical sense, any member of the armed forces with exception of medical and religious personnel can be regarded as a 'combatant. The meaning of a combatant is widened by virtue of Article 43 of the Additional Protocol I, Article 4 of the 3rd Geneva Convention and Article 2 of the Hague Regulations of 1907 in respect of laws and customs of war on land. In addition to the members of armed forces "the inhabitants of a territory which has not been occupied, who, on the approach of the enemy spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with the requirement of Article of the Hague Regulations"[510] as long as they carry arms openly and submit to the law of war, are considered as combatant persons who participate in such a *levee en masse* and fulfill

[509] See Qur'an 5:32
[510] Article 2, The Hague Regulations, 1907

two out of the four conditions stipulated under article of the Hague Regulations viz-a-viz:

i)-To carry arms openly and

ii)-To conduct their operations in accordance with laws relating to armed conflict.

They are to be regarded as 'belligerents' a term that is synonymous to 'combatants.' Means of combat is the concern in this segment of the thesis. By the provisions under Article 57 of the Additional protocol I to the Geneva conventions, the means of combat shall

be selected and employed in order to:-

> *"avoid civilian casualties and damage; minimize in event unavoidable casualties and damage".*[511]

Based on this provision, Article 48 of same protocol I requires that distinction shall be made at any given time between who is a combatant and who is a civilian. This is exactly what has been done above. For a better understanding, a civilian person has been accurately defined under Art. 4, 4th Geneva convention and Article 50 of the Additional Protocol I, as "any person who does not belong to the armed forces and does not take part in a massive spontaneous armed resistance to invading forces. Should there be uncertainty as to whether a person is a civilian or not, such person shall be regarded as a civilian. Likewise, a civilian population shall comprise of all persons who are civilians. However, the presence of some individuals perhaps military personnel within a civilian population does not deprive the said population of its civilian character. In the same strength, brave journalists engaged on dangerous professional missions in areas of armed conflict are not considered as combatants, they are civilian persons.

[511] Article 79, Additional Protocol I to Geneva convention

Further line of demarcation as drawn between civilian objects and military objectives. Articles 43 and 52 of the Additional Protocol I in agreement with Article 2 of the Hague convention of 1907 provide that 'military objectives' are:-

> *"The armed forces with exception of medical service and religious personnel and objects; The establishments, buildings and positions whereby armed forces or their materials are located such as barracks and stores"*

By implication, objects which by nature, purposes and location 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; are regarded as 'military objects'. It is however important to note that by virtue of Articles 50-52 of the Additional Protocol I and Article 2 of the 1907 Hague Convention respecting naval bombardment in time of war, remains a military objective regardless of the presence of civilian persons. The civilian persons irrespective of their designations within such objective or its immediate surroundings share the danger to which it is exposed.

To the contrary, "civilian object', according to Article 52 of the Additional Protocol I is any object whatsoever, which is not a military objective. Sometimes, objects which are normally civilian objects can, become military objectives depending on military situation (e.g. house or bride tactically used by the defender and thus a target for an attacker). In a doubtful circumstance where it is difficult to determine whether an object which is ordinarily dedicated to civilian purposes like a house or a school or a place of worship) is a military objective or not; it shall be considered as a civilian object.

In compliance with the provisions under Articles 57-58, Additional Protocol and Article 23, 1907 Hague Regulations in respect of laws and customs of war on

land, constant and adequate care must be taken to reduce to the barest minimum in any event unavoidable civilian casualties and damage to property. Precisely, extraordinary caution must be taken to spare the civilian population, civilian persons and civilian object at the time of war. The purpose of such care is primarily to avoid and in any event to minimize civilian casualties and damages (e.g. consideration of populated areas, possibilities of shelter, movements of civilian persons, important civilian objects different danger according to time of the day, moment and direction of fires, disabling non-military ship or aircraft rather than immediate destruction to allow rescuer of persons).

It is further required under the law that in the process of planning action which could endanger civilian persons and objects, the same extent of care and precautions which are to be taken in the conduct of operations must also be taken at this stage. It is also legally required that when and where tactical situation permits, warnings and recommendations (e.g. for shelter, removal) shall be given to civilian persons and objects in danger through appropriate means (e.g. voice and signs).

The principal basic rule regarding the employment of means of warfare is found in Article 22 of the Hague Regulations where it is stated thus:

"*The right of belligerents to adopt means of injuring the enemy is not unlimited*"

This appears to be the most basic principle on means of combat as it was reaffirmed in Resolution xxvii of the 20th International conference of the Red Cross in Vienna in 1965. The same principle was subsequently strengthen in 1968 by Resolution 2444 (XXIII) adopted by the General Assembly of the UN.

A number of more specific prohibitions have been deduced from this most general principle which incidentally, has been identified with some justification as the foundation of the entire International Humanitarian Law. Therefore, Article 23 (e) of

the Hague Regulations provides a general prohibition on the use of "arms, projectiles, or material calculated to cause unnecessary suffering". The word "unnecessary" in this context implies suffering caused by a particular means of warfare not justified by its military utility, either because such utility is absolutely lacking or at best negligible, or because in weighing utility against suffering the scale and, in so doing to prohibition. In other words, provisions under Art. 23 (e) E Art. 35 (2) the Additional protocol I should be interpreted as referring to any assault on the life or physical and mental integrity of persons who in accordance with the customary rules of the law of armed conflict and Additional Protocol I may lawfully be the object of acts of violence more so if such acts are lawful in themselves.

In the thinking of M. T. Ladan[512] the qualifying terms of "superfluous" and 'unnecessary' that prefix the words 'injury' and 'suffering' respectively indicate both characteristics as instruments that render the employment of the methods and means of warfare referred to in the above referred Article 23 (e) of the Hague Regulations and Article 35 (2) of Additional Protocol I unlawful. Moreover, it is pertinent to note that the idea of unnecessary suffering or/and superfluous injury had been a rule of the codified law of armed conflict for about a century.

Under Article 23 (a) of the Hague Regulations, the employment of poison or poisonous weapons was prohibited. This prohibition is absolutely relevant even to the contemporary warfare yet, a greater importance is attached to the more recent Geneva Protocol of 1925 which states thus:

> *"the use in war of asphyxiating poisonous or other gases, and of all analogous liquids, materials or devices has been justly condemned by the general opinion of the civilized world"*

[512] M. T. Ladan, Ibid. p.141.

It goes further to include the agreement of contracting states; "to extend this prohibition to the use of bacteriological methods of warfare" The 1925 Geneva Protocol reveals a number of knotty problems. Firstly was the problem of ratification; quite a few states of the global community have never ratified it. Does this mean that those states are independent of employing chemical and bacteriological means of combat? This question is often answered in the modern world in the negative. It is a legal assumption generally that the ban on use of those means of warfare has in the meanwhile; has been incorporated into the body of customary international law and therefore hence is binding on all states of the world. From the reservations made by a number of ratifying states; the prohibition on the use of chemical agents of war applies only on the basis of reciprocity. In other words, any use of chemical weapons by one party to any armed conflict discharges the other party from its obligation respect the prohibition.

Whenever, the use of bacteriological means of warfare is concern, matters become somewhat different. These 'weapons' inspire such horror; and their military value is open to so much doubt; that deliberations first in the Geneva convention of the committee on Disarm ament and subsequently in the UN General Assembly have led to the signature; on 10th April, 1972, of the convention on the Prohibition of the Development, production and stock piling of Bacteriological and Toxin Weapons and on their Destruction. The essence of reference to this 1972 convention here is to show that the disarmament law produced by the convention has significantly reinforced the existing law of war which prohibit the use of bacteriological means of warfare.

Premised on the motivations for the basic rule stated under Article 35 (2) of Additional Protocol I, it has been opined that resort to means or methods of warfare

that continue to produce harmful effects after hostilities have ended, should be considered as unlawful.

In effect, such consequence affect not only the civilian population at the time when the later has ceased fire.[513] Any order issued to the effect that there should be no survivors or that constitute a threat to an adversary or to execute war on this basis; is highly prohibited. Therefore, any military attacks or aggression conducted with such a purpose in mind are strictly prohibited by this article whether such attacks have been ordered or are spontaneous and whether the intent of leaving no survivors is made known to the enemy of not.

In summary, means by which wars are conducted is regulated by rules of International law as legal constraints on the waging of armed conflict.

Thus, employment of the following weapons is prohibited.

1868 St. Petersburg Declaration prohibits in time of war, the use of explosive projectiles under 400 grams weight, which are either explosive or charged with fulminating or inflammable substances.

The Hague Declaration of 1899 prohibits the use of bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.

Article 23 of the 1907 Hague Regulation in respect to the laws and customs of war on lnd prohibits the use of poison or poisoned weapons, in time of armed conflict. Similarly, under the Geneva Protocol of 17 June, 1925, employment of asphyxiating, poisonous or other gases, all analogous liquids, materials or devices and bacteriological methods of warfare is prohibited.

Other specific weapons prohibited as means of warfare include mines, boobytraps, incendiary weapons and other devices.

[513] CF. the second sentence of Protocol I, Article 55(1) prohibiting "the use of methods or means of warfare that are intended or may be expected to cause such damage (widespread, long time and severe) to the natural environment.

6.2.4.3 Methods of Warfare

It is important to note from the on-set that Article 23(e) of the Hague Regulations, 1907 and Article 35 (2) of Additional Protocol I prohibit the use of methods or means of combat whose use is not made unlawful by other rules of the law of armed conflict; mostly of which are concerned with military objectives as defined in Article 52 (2) of Additional Protocol I. Some prominent rules relating to methods of warfare are contained in the 1907 Hague Regulations. By Art.23 (6). Killing or inflicting injury on individuals belonging to the hostile nation or army in a treacherous manner is prohibited. Simultaneously, under Art. 24 "Ruses of war …are permissible" It has been asserted by Frits Kalshoven that these rules are unassailably correct. The only question generated from the said rules centers on the correct determination of what act will be concrete enough to constitute a ruse of war and also what other act can be done in a treacherous mode of acting. To determine what a ruse of war is, Art. 23 (f) of the Hague Regulations provides some examples which include "improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy as well as the distinctive badges of the Geneva convention". The Flag of truce is a white flag for the protection a messenger or negotiator; the distinctive sign of Geneva convention is a red cross or a red crescent on a white background on a flag, an armlet, a banner etc.

A treacherous act is any conducts that undermines the basis of trust which is indispensable for a return to peace. For the cruelty and lowered standard of civilization the prohibited methods they betray the Hague Regulations prohibit any such act "to kill or wound any enemy who having laid down his arms or no longer having means of defense or has on his own discretion has surrendered." And "to declare that no quarter will be given" – meaning that no prisoners shall be made" nor

should there be "pillage of a town or place even when taken by assault". The two former rules of not to kill or/and wound treacherously are not simply identical to a rule in the law of Geneva which also prohibits the killing of prisoners of war. Although, the may be understood to include that prohibition but more importantly they bridge the gap which may lie between the moment a combatant becomes horse de combat (i.e. laying down his arms or form any other cause) and the moment he is effectively taken prisoners.

In accordance with the provision under Art. 35 (2) of Protocol I, methods of combat is to be understood as the mode of use of means of warfare in line with a certain military tactic. There is need to interpret such rule in the above cited Article 35 (2) with future development in mind. It is in this regard that Art. 36 of the Protocol I is particularly relevant as it pertains to "the study, development, acquisition or adoption of a new weapon, means or methods of warfare."

Under Art.54(1) of Protocol I, the following methods of combat are prohibited:-

i)-"Starvation of civilian persons as a method of warfare" and

ii)-"to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population like food stuffs, agricultural areas where food stuffs are produced, crops, livestock, drinking water installation and supplies with irrigation works) for specific purpose of starvation.

However, there is a proviso by which objects indispensable to the survival of the civilian populations are excluded from protection if:-

> *"they are used solely for sustenance of the armed forces, or they are used in direct support of military action (but the civilian population may not be thus reduced to starvation or forced to move). Or the military defence of*

the national territory against invasion imperatively so requires".

The sole goal which reflects the only object which states should endeavour to accomplish at the time of war is in the words of the 1868 St. Petersburg Declaration thus: "to weaken the military forces of the enemy." One singular method by which a belligerent state may seek to accomplish this goal is by eliminating those objects which may thereby to prejudice the health or survival of the population" and not of the civilian population.

6.3 GLOBALIZATION

The term '*Globalization*' has been interpreted in different forms. It has been defined as :'a *coalescence of various transnational processes and domestic structures, allowing the economy,politics,culture and ideology of one country to penetyrate another'*[514]

In another thought, globalization is regarded as the *'widening, deepening and speeding up'* of the inter-connection of the variety of peoples of the world in all phases of life including the cultural and spiritual[515].There are certain features of globalization which reveal its status as a form of constraint on war. Among these main features are Democracy, The World Trade Organization (WTO),and Culture. Understanding each of these features will help us to determine the extent to which globalization is constraint on war.

[514] Muhammadi A and Ahsan M, Globalization or Reconciliation? The Muslim World in the 21st century, Ta Ha Publishers Ltd., London, 2002.

[515] Zakaryyah, A.H, Religious Movements, Globalization and Conflict; Transnational Perspectives :Why do Arabs & Muslims fear Globalization? A paper presented at the 2005 CESNUR conference in Palermo. Sicily.

6.3.I Democracy: The international political dimensions of globalization are embodied in western concept and practice of democracy. The principles of '*government of the people, by the people and for the people'* emanated from the ancient Greece, Today it is generally acknowledged across the entire universe especially after the fall of communism. The governments of the west particularly that of the United States of America make pretence about their desire to ensure that all Nations of the world adopt the western concept of democracy inherited from the Greece.

In accordance with concept of western or secular democracy, sovereignty belongs to the people. Theoretically,the government is accountable to the people absolutely. It is believed in the western democracy that the people are to elect and equally remove their political leaders as they wish; but that is more of theory than practical. The truth of the matter is that, in practice , the political machinery hijacks power from the people. What obtains in the contemporary world is that the political parties in the so-called democratic nations formulate the manifestos and select their respective candidates for different political offices. The wealthy and political giants dominate the party machinery. Even at the global level, the governments in the developing nations are often under pressure from developed nations and lack the freedom to implement policies that would be in best interests of their people at a time they are supposed to be operating democracy. The world is witnessing how the USA is interfering in the internal affairs of some developing nations in the name of exporting *democracy.* It is being used as a double edged sword by which is restricted or promoted. For example, in Afganistan, the American government assisted to impose constraint on the Russian invasion of Afganistan and finally put an end to the

war all in the name of democracy. It is this same American democracy that promoted armed conflict within the nation-state of Afganistan.

The Law of Islam provides solution to the universal challenges of democracy as it disallows autocracy and dictatorship. This is one idea that is distinctly accommodated by the notion of *Shura* (The Islamic political doctrine of consultation) within the frame work of Islamic law. As against western concept of democracy, sovereignty solely and absolutely belongs to Allah, the Lord of the world simply because the *" dominion of the heavens and the earth belong to him"*.[516] *De-facto,* the laws of Islam are meant to for the guidance of all generations to the end of time. Thus,their interpretation and implementation will always take into cognisance the reality of each generation.

6.3.2 World Trade Organization (WTO) : The World Trade Organization is regarded as the 'third sister'[517] of the World Bank and the International Monetary Fund (IMF). While the World Bank and IMF work in collaboration to develop and reform the financial affairs of the global community, the WTO emerged to facilitate trade reforms, to empower their credibility and promote a open trade regime in the world.

At inception the WTO was managed with fairness as one of the important vehicles of globalization, but regrettably the closer integration of developing nations into the international trading and financial system did not bring about quick development, rather it is leading to greater loss in form of external deficit and unstable economy. This position is substantiated by the 1999 Trade and Development Report issued by the United Nations Conference on Trade and Development.[518] However the WTO plays a key role in restricting war by reducing poverty level in the

[516] See Qur'an 3:189 and Qur'an 42:49
[517] Ali Muhammadi and Ahsan Muhammadi, op.cit.
[518] UNCTAD Report.2000. See further Ali Muhammadi & Ahsan Muhammadi, p.61

world. Bill Clinton, the former President of America attested to this in his 2001 Dimbleby memorial lecture when he made the following remark :-

> **"***The global economy lifted more people out of poverty in last twenty years than at any time in history. It's been great for Europe and the United States"*

In the same Dimbleby Memorial lecture, Clinton suggested reduction of global poverty and increase in the economic empowerment of the poor countries. He said:

> *"We know how to do this and it doesn't cost that much*
>
> *You can only get this debt relief if you put the money*
> *Into education, healthcare,and development"*

By inference, the essential message in the above-quoted statements of level of poverty which in turn constitute a great constraint on war.

When peoples of the world are free of poverty, there will be peace world-wide and incidents of war will be reasonably reduced.

WTO as a mode of global economy controlled by the West as an important feature of globalization is obviously not in compliance with Islamic Law provisions. It is more of a curse than blessing to the majority of the member nations of the International community. Bill Clinton who as the then President of the US was at a vantage position to see the adverse effects of the partial benefits of the so-called global economy could not help but to contrast the great wealth which the world economy had brought to the developed nations of the West with the abject poverty it imposed on majority of the world when he observed thus :-

> **"***Global poverty – half the people on earth are not part of that new economy I talked about. Think about this when you go home tonight. Half the people on earth live on less than two dollars a day. A billion go to bed hungry every night and a*

billion and a half people –one quarter of the people on earth never get a clean glass of water. One woman dies every minute in child. So you could say: 'don't tell about the global economy, half the people aren't part of it; what kind of economy leaves half the people behind?"

Whereas the first rule relating to trading in Islamic Law highly encourages honest and equitable trade. The glorious Qur'an provides that:

'Allah makes trade lawful and makes usury unlawful'[519]

When the Prophet of Islam was asked about what was the best means of livelihood , Prophet Muhammad (SAW) declared that it was what one earns through working with his own hands and honest trade. The Prophet (SAW) was himself a trader and he travelled abroad on a trade journey. No doubt, the contemporary international trade as a segment of globalization is to greater extent contradictory to Islamic values and Islamic Law provisions with regards to trade.

6.3.3 Culture: Culture which is another significant feature of globalization is basicallycharacterized by the use of one or more foreign languages in a country as well as under-usage of the local language(s). This particular feature of globalization is commonly found in most African nations. Language, as a great instrument of communication conveys among other things cultural values and societal norms. With the widespread of European languages in the 3rd world countries; the European cultural values and norms are increasingly dominating the native cultural heritage (including languages) of the people in the 3rd World or developing nations. For instance, St Valentine'sday is being celebrated annually like a birthday and it is becoming increasingly popular in the developing countries. The young people in the third world have unconsciously submitted themselves to cultural colonization of the

[519] Qur'an 2:275

West. The European, particularly the American and British music, films (both moral & immoral) and sports in the English language have displaced the African cultural practices. No more folk tales, African traditions are fastly loosing recognition while local foot-ball clubs are no more popular as they have been substituted by various foreign clubs such as Chelsea and Manchester United.

The American government takes a step further in the globalization process by introducing visa lottery for the 3rd world countries only. In my humble opinion, this is nothing but *modern slavery*.

According to ProfessorDawud O.S Noibi, Jeans and McDonalds are reflections of the globalization process, and it has been suggested that,in fact, globalization is another name for '*Americanization'* and *McDonaldization*'.[520]

If the entire world is reduced to a global village in the true sense of the word, the natural consequence is that there will be peaceful global communal relationship which will automatically place an effective constraint on war or armed conflict.

In Summary, this portion of the dissertation is unveiled with a query as to whether the behaviors of the belligerent parties are legally subjected to any limitations or not. Such limits exist de-law and de-facto. The limitations were discussed as the legal constraints under both Islamic Law and the contemporary Law that relate to war or armed conflict. The constraints on waging war under Islamic Law were aimed at Treaty, Legal principles of distinction, Protection of victims of war, combatants and non-combatants alike. Precaution, Prohibition and Protection of Prisoners of war were all addressed in this church. The imposed constraints gain legality from the cornerstones of the Islamic law vis-à-vis the divine legislation (Holy Qur'an),the Prophetic tradition (Sunnah), the consensus of opinion (Ijmaa) and analogical

[520] Dawud O.S Noibi's contribution to AL-ADL (The Just), Essays on Islam, Islamic Law and Jurisprudence, Edited by Is-haq O. Oloyede, NAMLAS, University of Ibadan Chapter, Ibadan,2009, pp225-226.

deduction (Qiyas). On the other hand, the legality of the constraints on the waging of war emanated under the contemporary law from three main currents of international law of war which were; the Geneva current, the Hague and the New York currents. At different dates and places as implied by the three currents, various conventions, declarations and treaties of universal application were made with the common motive of minimizing the effects of armed conflict on the victims and participants of war essentially, to balance humanity against military necessity.

Terrorism is also considered as though unlawful under any legal systems, but a typical constraint on war.

Means and methods of warfare as prominent features of armed conflict, were discussed in relation to the provisions under the various conventions that impose constraints in respect of what means and methods to be adopted by combatants in the battle fields. Clear distinction between a combatants and non-combatant is established. The means of combatant were required under Geneva Convention for instance to be selected and employed cautiously in order to avoid civilian casualties and avoidable damage. Precisely means employed in wars are regulated by rules of international law as legal constraints on the waging of wars. Concerning methods of warfare all forms of warfare namely land, sea and aerial warfare are restricted in terms of methods adopted. Modern concept of *'Globalization'* is discussed as a kind of restriction in armed conflict.

CHAPTER 7

7.0 CONCLUSION

The intent of this chapter is to recapitulate and present an overview of the preceding chapters for further and better understanding of the entire study. It is also the main thrust of this chapter to highlight the findings established in the course of this research work. Necessary recommendations will be made in this chapter. All these are intended to satisfy the aims and objectives of the work in the first place and to serve as the Researcher's major contribution to knowledge and development of Islamic International Law.

7.1 Summary

The present work is opened with the general and conceptual introduction of its subject matter as *Concept of War and Peace under the Law of Islam*.

Its background as contained under the introduction segment of chapter one, is founded on the different forms of conflicts in various parts of the universe. The main objective of the dissertation has been addressed and presented as providing alternative panacea to the global problem of peace in relation to its incessant armed conflicts[521]. Method adopted in the dissertation is known as 'Doctrinal research approach[522]. The opening chapter is finally sealed up with Justification for the dissertation.

Following the opening chapter is the second chapter entitled '*The Concept of Islamic Law.'* Nature, Origin, Scope, Sources and Characteristics of Islamic Law are all enumerated in this segment of the work. Various sources of the Islamic International

[521] c/F. Ladan M.T, 'Introduction to International Human Rights and Humanitarian Laws' ABU press, Zaria, 1999, Pg 1

[522] See Gasiokwu, M.U, Legal Research and Methodology, the A-Z of writing thesis and Dissertations in a Nutshell, Fab Arieh (Nig_ Limited, 1993, pp.13-16.

Law are considered. The principal sources of Islamic international Law of War and Peace are mainly the *Quran*, the *Sunnah*, the *Ijma'a* and *Qiyas.* Besides these principal sources under Islamic law, there are subsidiary sources such as *Istihsan*, *Masalih-al-Mursala*, *Urf* and *Istidlal*[523]. *Fat'wa* and Treaty are equally considered as subsidiary sources of Islamic Law in the modern days.

The Islamic Law concept of peace was extensively discussed. The understanding of war, its nature and type of war,[524] with functions of war in Islamic Law were also considered.

In a chronological order, discourse on concept of peace was featured. With wide references to the divine legislation in form of the holy Qur'an and traditions of the holy Prophet Muhammad (S.A.W), 'Peace' is conceived as a rule in human society while war is a necessary exceptional phenomenon[525].

One is made to understand that war or armed conflict is a cause while the consequence of war is the effect. Following this was the brief but thorough examination of conflicts in African, Iranian-Iraqi war, the genocides in Kosovo and finally the conflict generated by the gradual process of displacing the Palestinians from their home land by Israel. Their respective effects or impacts on the regional peace and security as well as their impacts on global peace and security were equally considered.

The peculiar constraints in waging war under the Islamic legal system is considered in the 6th chapter of the thesis. It is indicated that the imposed constraints under the Islamic law gain legality from the principal sources[526]of the law of Islam. Each constraint is discussed along with its proffered solution from the Islamic Law

[523]Doi A.R, 'Basis of Shariah (Islamic Law)', ABU, Zaria, 1980, pp. 115-120
[524] See Art. 1, Additional protocol 2, 1977.
[525] Mutahari M., 'Jihad' The Holy War of Islam and its Legitimacy in the Quran, Translated by Muhammad Salman Tawheed,1st Ed, Bethat Foundation, Tehran, 1981, p.7
[526] The principal sources are: The Holy-Quran, Sunnah, Ijma'a and Qiyas.

perspective.The main motive of imposing constraints in waging war is to protect the victims of war, whether such victims are combatants or not, regardless of their faith. This portion of the dissertation covers sub-headings such as :- Principles of distinction,Precaution, Proportionality, Prohibition of indiscriminate attacks and Protection of Prisoners of war.

Here in this dissertation, Impact of war or armed conflict on the world peace and security is discussed in form of '*Cause and Effects'*. War represents 'Cause' and its impact on the global peace and security is represented by 'Effects'. Few countries where there were/are international and/or Intra-national conflicts are made case-studies. Effect of treaty, terrorism, means and methods of warfare were all featured in the work.

In conclusion, the entire work is summarized with findings, recommendation, and suggested reforms are made to seal the research work essentially as a contribution to the knowledge of International Law.

7.2 OBSERVATIONS

7.2.1 From the foregoing, certain observations in terms of lessons derivable from the present research work have been established. It has been discovered that the Islamic law of war and peace is basically sourced from the divine law of ***Allah,*** the Supreme Law Maker. This divine law of Islam is naturally a perfect legal system for all times.Commenting on the perfect legal system, Charles Gide and Charles Rest said:

> *We may say that the natural order which seemed obviously the best, not to any individual whomsoever, but to rational, cultural and literal minded men, it was not a product of observation of external facts; it was the revelation of the principle within. This order was supernatural and so raised above the contingencies of everyday life with its double attribute of universality and immutability. It remains*

the same for all times and for all men. Its fiat was unique, eternal, it was universal in scope[527]

7.2.2 It is part of the findings that the Islamic legal principles on war and peace have been part of a juristic culture which has remained closer to its pre-modern roots. This has made the pre-modern Islamic rules to be at odds with the contemporary international standards[528]. What is meant by '*Pre-modern roots'* here are the first two basic major sources of Islamic Law which are the Glorious Qur'an and Sunah.However, with the advancement in knowledge of Islamic law, the Muslim Jurists in modern times have exposed the world to what is now recognized as modern norms of 'human treatment' that should be accorded both combatants and non-combatants.

Dynamism of Islamic law is another important finding made in the present work. The law of Islam has its own specific and peculiar rules on matters of war and peace.

7.2.3 It is further discovered that the concepts of *Jihad* and war are similar, because the classical Muslim Jurists have defined war as effort made by expending one's ability and resources in fighting in the path of Allah through means of life and property. *Jihad* is justifiable at any given time because it can be categorized as 'Just war'[529].It is therefore a sacred obligation on the Muslim nations and the universal Muslim brotherhood in general to set forth defensive or offensive campaigns depending on the prevailing circumstances. The type of *Jihad*envisaged is what is recognized in the contemporary world as *'Just War'*.

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[527] Gide and Rest, 'A History of Economic Doctrines', London, (1960), p.29. n.d

[528] See Mahmmassani, S. 'International Law in the light of Islamic Doctrine", Academic de droit International Recueil des cours, 177(1966) pp.307 – 8.

[529]See Moinudeen, B.A. "Charter of the Islamic conference, and 'legal frame work of Economic, cooperation among member-states, Oxford Claredon Press, 1987, pp.21-28

Such just causes include the inherent right of self-defense and it has to be conducted with genuine intent and particularly not for spoils of war nor for glory and power[530]. It is provided in the glorious Qur'an that "Muslims are to fight in defense of the cause of their Lord and to redeem their weak Muslim brethren and sisters and children who are oppressed……Muslims are to fight in defence of the cause of Allah; while the unbelievers fight to defend the cause of the devil; surely the struggle of the devil is so weak."[531]

7.2.4. No historical record has shown that international, continental or regional bodies of Nations are converging severally or collectively to work out modalities to proffer effective solution to the global problems of armed conflict and insecurity.

7.2.5. It is observed that the Muslim nations are divided among themselves. They do not speak with one voice. They show little or no concern for the deplorable condition to which their co-Muslim nations are subjected to by the enemy of Muslims in general. Another important finding discloses that the singular effect of abandoning Islamic rules of peaceful co-existence is responsible for the armed conflict in the global community.

7.2.6. Another significant observation is the fact that disarmament policy of the UN has failed to serve the purpose of checks and balances. Some powers among the developed nations of the world have exhibited their military might in the process of disarmament to render impotent the UN and its security council. A relevant case of recent time is the failed arms inspection in Iraq which eventually led to America's invasion of the sovereign state of Iraq and ultimately captured the Iraqi president, Saddam Hussein. According to the Malaysian Prime Minister, Abdullah Badawi, "the hopes sparked by Saddam Hussein's fall had not been met[532].

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[530] Ibid.p. 28

[531] Qur'an 4: 75 – 76.

[532] See the Nigeerian 'This Day' April 23,2004 Vol.10, No 3287, p.17

7.2.7. Peace is conventionally acknowledged as conflict Resolution mechanism, but reverse is the case in most contemporary cases. For example the age-long conflict between Israel and the Muslim nation of Palestine is yet to be resolved.

At different times various peace attempts have been made without any success. Breaches of terms of settlement were at the instances of Israel. The conflict is prolonged unnecessarily because of the precinct diplomatic supports from some powerful Nations of the world, enjoyed by Israel. At the 10th O.I.C. meeting held between 11 – 17th October, 2003 in Malaysia, the Muslim nations berated United States of America over Israel's treatment of the Palestinians. The main feature of the middle-east crisis has been the conflict between Israel and Palestine since 1948 up to 1967, which linger on hitherto. Consequences of the armed conflict reflect its great impact on the peace and security of the global community.

7.2.8. It is observed that war crimes tribunals seem not to be sufficient in terms of volume of work arising from the large number of armed conflicts within individual states and/or between two or more states. Cases of unprecedented genocide in Rwanda, Kosovo, Palestine e.t.c are good instances that expose inadequacy of effective war tribunals particularly in the developing countries otherwise called the third world.

7.2.9. The Bosnian genocidal head over the Schrebreneza massacre Ratko Mladic was arrested on 26th May, 2011,[533] but culprits of the worst crimes against humanity in the above-mentioned states are yet to be brought to book.

7.2.10. It is also observed that the Judicial settlement of international disputes between states remains the sole facet of the enormous problem of maintenance of peace and security in the international community. Under the UN Charter, peaceful settlement is the only

[533] 122649724.html

available means[534]. The use of force by individual states to settle disputes should not be permitted by the UN. However, there is no rule of general international law that prescribes peaceful settlement of disputes. Thus, procedures for settlement by formal and legal means largely depend on the consent of the parties. It is true that the UN through the General Assembly has provided a useful forum for settling disputes, but its responsibility in this regard tends to be forgotten.

7.2.11 Another significant observation is that most people cannot differentiate conciliation from mediation. Treaties that ordinarily establish machinery for peaceful settlement frequently make provision for mediation *inter-alia*as informal methods of settling disputes[535].

Whereas conciliation emanated from commission of inquiry provided for in the Hague conventions for the pacific settlement of International Disputes of 1899 and 1970 as well as the commissions that feature in the series of arbitration treaties concluded by the US in 1913 and 1941 (the Brayan treaties).Thus, conciliation has a semi-judicial aspect, since the commission of persons empowered has to elucidate the facts, may adjudicate between the parties and arrive at a settlement which may not be binding on the parties.

7.2.12. A number of discoveries on the Islamic law concept of war and peace were derived from Mahmassani's contribution to the subject of "International law in the light of Islamic doctrine' when he wrote thus:

> *"Islamic law is essentially a law of peace, built on human equality, religious tolerance and universal brotherhood. War, in theory, is just and permissible only as a defensive measure, on grounds of extreme necessity, namely to protect the freedom of religion, to repel aggression, to prevent injustice and to protect the freedom of religion..*

[534] See Boweth, 'Self Defence In International Law, (1958)'.
[535] See Oppenheim ii, 6-20 & Hackworth vi, 1- 57.

..... This defensive war when permissible is moreover subjected by Islamic jurisprudence to strict regulations and rules. In their humane character, they were unparalleled in their time and are comparable in content only to modern regulations recognized today by international conferences and treaties ……. Provision is also made for the termination of war and settlement of its consequences.[536]"

The findings in the above-quoted opinion of Mahmmassani reveal inter-alia the fact that justification for launching war under Islamic law may include justifications for war that are not recognized in the modern public international law. This factor alone places the law of Islam in a vantage position over the modern international law. It makes it distinct as the panacea for the world's problem of armed conflict.

Essentially, the obligation of *Jihad* or war under the law of Islam is to make the divine law of ALLAH supreme. Universal peace is partially the ultimate goal of the nation of Islam. Therefore, the Islamic law concept of war and peace can be comfortably accommodated by the contemporary world legal systems.

7.3 RECOMMENDATIONS

In view of the observations analyzed above, it is desirable to make recommendations solely for the purpose of accomplishing the objective of this work. Thus the observations are made to correspond with the said observations according to the Islamic law provisions for perpetual peace and security in the international community.

7.3.1 If the rule of peaceful international relation is strictly observed, persistent hostility armed conflict world-wide could have been averted or at least could have been drastically reduced to the barest minimum.

[536] Mahmmasani, S Ibid., PP 320 -321

7.3.2 The unity of the entire Muslim ummah worldwide regardless of geographical boundary and racial status is hereby recommended. The Organization of Islamic Conference (O.I.C) can be a springboard for such a united body. This is one goal if achieved, will no doubt discourage war of any form and enhance peace, dignity and security in the international community. Armed-conflict in the world will also be drastically reduced.

7.3.3 It is hereby recommended that there should be various *fora* whereby all the regional and continental bodies of the world such as the Economic Community of West Africa (ECOWAS), the African Union (A.U), the European Economic Community (E.E.C), will be converging to mainly find lasting solutions to global problems of insecurity, conflicts of various degree and insurgents that constitute threat to world peace and security. Such conferences may be periodic and whatever is the resolution should be forwarded to the General Assembly of the UN for final resolution which will subsequently be binding on all nations of the world. This will, to a great extent assist the UN in effectively playing its role as a unifying force among the nations of the world.

7.3,4 There should be an effective global political mechanism in place to serve as checks and balances among the leading powerful Nations of the world. None of such countries should be allowed to use her power to frustrate the efforts of the UN to ensure peace and stability in the International community.

7.3.5 It is therefore recommended that peace as conflict resolution mechanism be redefined by the UN specifically directing the US and her Allies to hands off completely from the Israeli Palestinians conflict. The security council of the UN should take up its responsibility and act accordingly.

7.3.6 Thus, this situation calls for establishment of more war crimes tribunals to be strictly under the supervision and management of the International Court of Justice in The Hague (ICJ).

7.3.7 At regional level, the Economic Community of West Africa (ECOWAS) has established its own court. This is commendable as a right step in the right direction.

7.3.8 It is therefore recommended that the General Assembly should be resuscitated to its responsibility by effectively using the forum for disputes settlement between the conflicting National-members of the United Nations. A good case study is the recent peaceful judicial settlement of the conflict between Nigeria and Cameroun over the Bakasi peninsula. The peaceful settlement made a good judicial precedent in the contemporary world, for the governments of the two countries conducted negotiations with a view of settling the disputes amicably after the ICJ decision in favor of Cameroun, they now came to a round table talk, set up a boundary Commission at the instance of Nigeria and got the matter resolved in the general interest of the international community. Nonetheless, primarily the judicial machinery may be given powers to act in a legislative capacity, as testimony to the power of the ICJ to decide *ex aequo et bono* provided the parties involved agree thereto[537].

7.3.9 It is recommended in this dissertation that efforts should be made by the UN to effect global enlightenment program on the distinction between mediation *and conciliation. UNESCO can be of greater instrumentality in this* respect. The Law of Islam accommodates mediation and conciliation as Alternative Dispute Resolution(ADR) mechanism in a wider scope.The very first step prescribed by Islamic Law in conflict resolution, even if it is armed-conflict, is mediation which in most cases normally leads to conciliation. In this regard the Qur'an provides thus :

[537] See Corfu Channel case, ICJ. Reports (1947-8), pg.27

"*If two parties among the Believers fall into a quarrel,make peace betweenthem*; *but if one of them transgresses beyond bounds against the other, thenfight ye(all) against the one that transgresses until it complies, then make peace between them with justice,and be fair:for Allah loves those who are fair and just*"[538]

This is the Islamic Law provission regarding resolution of conflict among individuals or among nations. To mediate in individual conflicts is easier than mediating in international conflicts. However, the nation of Islam should be supreme over any other entities or nations. The Muslim nations are expected to act justly and attempt to resolve conflict through mediation and conciliation, because peace is far better than war or armed conflict. The Law of Islam requires the entire forces of the Muslim nations to fight against any one of them that persists in aggression. The essential condition for effective mediation and concliation in Islamic Law is perfect fairness, justice and respect for the highest Islamic legal principles. Islamic Law recognises every just and legitimate interest without separating spiritual from temporal matters. In this respect, the UN fails woefully because these required essentials are absent in all its efforts to resolve the modern international armed conflicts.

Thus, it is hereby recommended that, for the global problem of war to be effectively dealt with, the UN and other international bodies of nations should adopt the essentials prescribed by Islamic Law for conflict resolution. Such essentials include Fairness, Justice and Respect for legal principles.

In the final analysis, recommendations as prescribed under the Islamic law must be objectively examined by the UN with a view to reconcile the Islamic law principles on war and peace with the contemporary international law principles.

[538] Qur'an 49 :9

This will go a long way to serve as panacea to the constant global problem of war or armed-conflict. Perhaps,this may be the only way the problem of war in the international community can be solved. Allah (SWT) knows best.

The contemporary world is currently facing possible imminent danger of chaos and anarchy. It is at a serious political crossroads. As indicated above, there are a series of intra and international conflicts all over the world yet to be resolved. These conflicts are mostly based on religious intolerance and ethnic distrust. Violence and hatred are increasingly becoming deep-rooted in many parts of the world. Such conflicts that even constituted a grave violation of humanitarian law in forms of genocide were witnessed in former Yugoslavia where the Albanians of Kosovo were ruthlessly and inhumanly dealt with. It is still a problem unresolved. In the light of this condition that is responsible for absence of peace and security in the modern world, there is need for reforms in international organization, which will ultimately enhance the activities seeking to discover identity and finally resolve the root causes of armed conflict in the international community.

Reforms to be effected in international organization at all levels, be it global as represented by UN, continental as represented by A.U or regional as represented by ECOWAS are as analytically presented in the subsequent paragraphs:

i. The first and foremost reform to be effected in the international organization is that there must be unambiguously defined norms and standards for dealing with the causes and manifestation of armed conflicts in the global community. This kind of reform will enhance effective response mechanism. Since the establishment of O.A.U (now A.U) the African states have declared inviolability of borders as a norm. The organization and its counterparts should carry out reforms to the effect that similar norm-building should occur on matters such as democratization, sovereignty as well as border delimitation and demarcation.

With regard to democratization, efforts should be directed towards upholding fundamental human rights by governments of member states. Opposition must be tolerated and election results must be reported. The norm-building reforms should cover issues of sovereignty which may address for instance, the role of minorities in a given state and attention should be given to the degree of autonomy the state can afford to grant the minorities that seek it.

This kind of norm-building could to a large extent, contribute to the development of criteria for action and in more extreme cases of military intervention.

Full collapse of a state, threat of tyranny to others in the region and low cost and low risks constitute few criteria for the most extreme intervention (i.e. deployment of a military force with a peace enforcement mandate authorized under *CAP viii U.N chapter*, This suggested reform should not be seen as an advocacy for democracy as a permanent solution to the world's problem.

ii. There should be a meaningful reform in the area of conflict resolution mechanism. The international organizations like A.U for example should determine at what condition can they engage international community in conflict resolution exercise. One way out for attending to conflict situation is the concept of layered responses. A major aspect in the implementation of the concept of capacity building at each layer. For example local NGOs, states, sub-regional organizations and the continental values, all having comparative advantage for attending to certain kinds of conflict situations found in certain circumstances.

What capacity- building entails is the development of ability to act immediately and to institutionalize the ability to react over a longer term. By this reform, armed conflict may be nipped in the bud before unnecessary escalation if the international organization in whose jurisdiction the war occur act immediately. A conflict resolution mechanism of this nature will definitely minimize the degree and

number of conflicts in the international community and thus there by ensure peace and security of the world.

iii. Reforms can be effected by the international organizations from Islamic law dimension. Islam was a revolution in the sense that it abolished group system based on blood ties and offered a better replacement of International community of love and faith in one God. All abominable practices were discarded, while security and genuine peace were founded on a strong pillar of faith and application of divine rules of law. Pride of nobility and arrogance of the period of *Jahiliyya* (times of ignorance) dwindled into insignificance with the declaration of the noble prophet of Islam that "all men are equal and no one is superior to another except on point of righteousness[539]".From this prophetic tradition, Islamic equality is well distinguished from equality in the West by "*righteousness*". Thus, the law of Islam only recognizes equality of men universally on basis of piety.

The contemporary international organizations may adopt this Islamic law reform to establish or protect the peace and security of the global community. This can be made possible if the said international organizations eradicate class system and introduce the principle of equality of all nations while fairness and justice in the light of righteousness should be the sole basis for supremacy among the nations.

It has been observed that agreements between conflicting parties is a critical stage in the process of moving from armed conflict or war to peaceful and more secured relations as exhibited in the tragedy of renewed fighting in Angola in the post November 1992 elections to implement the Bicesse Accords. There should be a reform whereby the warring parties may be easily brought to table to reach an agreement as these are most important steps in the peace process. However most

[539] See Surah Al-Hujrat (49):13

delicate aspect is how to ensure effective implementation of the agreement. The international organization should introduce a reform whereby adequate resources are made available to aid the consolidation of agreements once they are executed by the parties.

iv. In addition to the above, reforms should be effected with regards to conflicting parties in intra-state conflicts. The international organizations introduce a reform where by they should make it mandatory on their member-states to adopt an outstanding constitutional frame work to which all parties will be willing to subscribe, a framework that will create a durable structure capable of mediating social conflict through legitimate, democratic political institutions. By so-doing peace, political stability and security in the global community will be guaranteed.

v. Reform should also be considered in the area of fair distribution of economic resources and political opportunities among all segments of a nation's population. For example, in Africa under-development, deprivation, environmental stress and flows of refugees and migration constitute major sources of conflict. These situations call for reform to empower the state sufficiently in order to avoid creation of additional and potentially critical economic crisis, thereby stimulating conflict and intensifying unhealthy rivalry over limited scarce resources. A meaningful reform in this direction will positively influence the success of conflict resolution in the African continent.

vi. There is a great need for the AU to effect a kind of reform that will strengthen its newly created mechanism for management, prevention and effective conflict resolution. Moreover, the AU as an international organization at continental level, should have a reform policy by which it will clearly define in which aspect of the mechanism the best support of the larger family of the international community is required. For

instance, huge support is required in the areas of capacity building for the AU mechanism which include development of a center for information or/and documentation, training and upgrading staff to the level of professional status, creation of a cadre of capable diplomats who are well trained in negotiation, mediation, conciliation and arbitration as well as problem-solving skills. This category of skilled workers can be instantly deployed to attenuate incipient conflicts.

These reforms as suggested by this thesis will inject into the society, true civilization such as compassion for the weak, fairness in individual transactions, incorruptible administration of justice and above all a war-free international community will emerge. Any human society that enjoy this kind of reform will no doubt experience true peace and security, for the divine law is intended to build the world on virtues and to evolve for this purpose a band of the righteous who will command good conduct and forbid indecency that may be capable of threatening the peace and security of the universe.

Finally, if the recommendations with the suggested reforms are implemented by international organizations at all levels, it would be a panacea to war or armed conflict and peace and security will be comfortably promoted in the global community. All these can be made up into a sustainable conflict resolution mechanism in the contemporary world, without which socio-economic development, political stability and peaceful co-existence among nations of the world will not be sustainable, whereas, it is not a mystery or unsustainable (if attained), as long as there is mutual understanding in international relations, mutual trust, constant dialogue and harmony[540]. Where these needs are satisfied there is bound to be peace and security in the world. It is very clear that war, terrorism, hatred, or any form of acrimony will

[540] M.T. Ladan, "International to International Human Rights and Humanitarian Laws", A.B.U Press, 1999, p.456.

continue to make the situation worse in the contemporary world if the international organization like UN, AU and ECOWAS and their counterparts do not take positive steps to effect meaningful reforms. Peace can be practically achieved in the modern world only when one can be sure of sincerity and peace of mind. The prescriptions of Islamic Law as discussed in this dissertation could be considered as a major contribution to the knowledge of Law of War and Peace. More over, a policy regarding the crisis particularly in Palestine, Afghanistan, Pakistan, and Iraq, is formulated in the *Fat'wa* of the various Islamic Scholars/ Muslim Jurists enumerated in the second chapter of this work thus:

> *'It is obligatory on the Muslims to fight in Afghanistan, Palestine andIraq even with disunited leaders because fighting is for the defense of the Muslims against the aggression of Infidels'.*

It will not be out of place to adopt a part of the last sermon of the holy Prophet Muhammad (S.A.W.) as a seal to this dissertation; thus he (S.A.W.) said:

> *"All mankind is from Adam and an Arab has no superiority over non-Arab nor a non- Arab has any superiority over an Arab, also a white has no superiority over black nor black has any superiority over white except by piety and good action. Learn that every Muslim is a brother to every Muslim and that the Muslims constitute one Brotherhood. Nothing shall be legitimate to a Muslim which belongs to a fellow Muslim unless it is given freely and willingly"*

The import of the above quoted prophetic tradition is that the Muslim nations should not trade their brotherhood for unity with the Disbelieving nations such as those in the membership of the UN and the Common Wealth.

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