

AN ISLAMIC PERSPECTIVE ON RESTRAINT IN WAR

A PAKISTAN CASE STUDY

Dr. Muhammad Mushtaq Ahmad
Dr. Ziaullah Rahmani
Dr. Muhammad Asghar Shahzad
Muhammad Rafeeq
Murad Ali





ICRC

International Committee of the Red Cross

31, Shabbir Sharif Road,
G-11 Markaz, Islamabad.
T 051 8842001, F 051 8314788
E-mail: islamabad@icrc.org
www.icrc.org
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CONTRIBUTORS

Dr. Muhammad Mushtaq Ahmad is Associate Professor of Law at the International Islamic University, Islamabad. He served this institution as Chairman, Department of Law (2016-2018) and Director-General, Shariah Academy (2018-2020). He has also assisted the Supreme Court of Pakistan as amicus curiae and the Federal Shariat Court as jurisconsult in many cases.

Dr. Ziaullah Rahmani has obtained LLB, LLM and PhD in Shariah from the International Islamic University, Islamabad, where subsequently, he has taught for over 12 years as an assistant professor. For the past over eleven years he has been serving, first as a Senior Programme Officer, and currently as a Regional Advisor for Islamic Law & Jurisprudence at the International Committee of the Red Cross Pakistan.

Dr. Muhammad Asghar Shahzad is Lecturer at the Department of Training, Shariah Academy, International Islamic University, Islamabad. He specialized in Islamic Banking and Finance and serves as Associate Editor of the Islamabad Law Review.

Muhammad Rafeeq Shinwari is Doctoral Candidate at the Department of Law, International Islamic University, Islamabad, with research interest in the Islamic law of armed conflict and Islamic legal theory. He is also Associate Editor of the Islamabad Law Review.

Murad Ali is a Postgraduate Scholar at the Department of Politics and International Relations, International Islamic University, Islamabad, with research interest in Islamic political theory and contemporary Islamic movements.

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GLOSSARY OF TERMS

<i>'Azimah</i>	Original legal rule for ordinary circumstances.
<i>Fiqh</i>	Islamic Law.
<i>Hadd</i>	Specific punishments for specific crimes prescribed in the Qur'an or the <i>Sunnah</i> .
<i>Idtirar</i>	Duress/necessity.
<i>Ikrah</i>	Coercion.
<i>Istihsan</i>	Juristic preference.
<i>Jizyah</i>	Poll-tax levied on non-Muslim permanent residents of the Muslim territory.
<i>Maslahah Mursalah</i>	An interest acknowledged by Islamic law at the level of genus.
<i>Maslahah</i>	Protection of the higher objectives of Islamic law.
<i>Mithl</i>	Similar/equivalent.
<i>Mu'amalah bi 'l-Mithl</i>	Action in reciprocal terms.
<i>Mubashir</i>	The one who actually performs an act.
<i>Mutasabbib</i>	The one who makes another person perform an act.
<i>Muthlah</i>	Mutilation of human body.
<i>Nikayat al-'aduww</i>	Deterring the adversary.
<i>Qisas</i>	Punishment in equal terms for offences against human body.
<i>Qiyas</i>	Syllogism/analogy.
<i>Rukhsah</i>	Exemption granted in special circumstance.
<i>Siyasah</i>	Authority of the ruler for administration of justice within the constraints of the general principles of Islamic law.
<i>Sunnah</i>	Sayings, acts and tacit approvals of the Prophet, peace be on him.
<i>Ta'zir</i>	Punishment in general criminal law, prescribed by the government.
<i>Tirs</i>	Shield.
<i>Zina</i>	Illicit sexual intercourse.

PREFACE

الحمد لله رب العالمين والصلاة والسلام على رسوله الكريم

This study was conducted jointly by the Shariah Academy of the International Islamic University Islamabad (IIUI) and the International Committee of the Red Cross (ICRC) in Pakistan, and is a continuation of the ICRC's interaction with Islamic academic circles for the promotion of humanitarian law and humanitarian principles. The ICRC is a custodian of international humanitarian law (IHL) and its core mandate includes promotion of this body of law and humanitarian principles. One of the means used for this aim has been to explore compatibility with corresponding religious laws and rules. This work is most developed with Islamic religious circles as the ICRC has been operating for many years in large parts of the Muslim world including Afghanistan, Palestinian Occupied Territories, Somalia, Sudan, Syria, Yemen, Libya, Indonesia, Southern Philippines, etc.

The efforts made in this direction in Pakistan spread over decades, starting with bi-lateral meetings with Islamic scholars and gradually evolving into discussions/debates in the form of seminars and conferences. The first milestone in this regard was the first three-day international conference arranged in Islamabad jointly by IIUI and the ICRC Pakistan in 2004. Renowned Muslim scholars Dr. Mahmood Ahmad Ghazi, the then President of IIUI, the late Dr. Wahbah Al Zuhaili from Syria, Dr. Abdurrahman Aba al Khail from Saudi Arabia, and a selected group of Pakistani scholars from all schools of Islamic thought participated in the event along with legal experts from the ICRC including Dr. Ameer Zemmali from Tunisia. The conference aimed to discuss the rules about protection of the most vulnerable such as women, children and the elderly during armed conflict under Islam and IHL. The three-day deliberations concluded that most of the modern humanitarian laws and principles are compatible with the basic teachings of Islam on the subject.

This pioneering activity was followed by a consultation in the ICRC's headquarters in Geneva where a small selected group from the Muslim world including Dr. Mahmood Ahmad Ghazi and Dr. Wahbah al Zuhaili, among others, were invited and consulted on the conclusions of the conference and how to proceed further in that regard. The scholars agreed that the ICRC should pro-actively reach out to Muslim scholars and institutions to promote dialogue on Islam and IHL.

This was the beginning of the intellectual journey in Pakistan aimed at the protection of the vulnerable in situations of armed conflict and violence and to alleviate unnecessary suffering. The interaction with Islamic circles began and went on in all the Muslim contexts where the ICRC operated including South Asia, the Middle East, South East Asia and Africa. Various seminars, conferences, workshops and symposia took place in partnership with renowned Islamic institutions including Al Azhar University Egypt, Zaytuna University Tunisia, Islamic University Gaza, Islamic University Uganda, Islamic University Bangladesh, Qom Hawzah Ilmiyyah Iran and many other institutions.

In Pakistan, the ICRC began to reach out to Islamic scholars and institutions across the board including all Islamic schools of thought. Beginning from bilateral engagements with Muslim scholars and intellectuals, the ICRC arranged one-day seminars on institutional and city levels, two-day certificate courses for teachers and students of Islamic law, four-day trainings for Islamic studies professors and seminary teachers about Islam and IHL. The ICRC was assisted by professors that have a solid background both in Shariah and law in addition to their knowledge of Arabic and English. The four-day training on Islam and IHL for Islamic Studies/Shariah professors has proven to be particularly productive, and has been upgraded to regional level with the participation of professors from Bangladesh, Afghanistan and Iran.

In 2013 the ICRC arranged for the first time a national conference on *The Protection of Health Care Personnel & Facilities under Islam and Humanitarian Law*. Around 30 Islamic

scholars from all schools of Islamic thought and from all over the country presented their papers on various themes around the main topic. In 2014, 10 years after the first international conference, the ICRC and IIUI jointly arranged another international conference in Islamabad on *Neutral & Independent Humanitarian Action under Islam and IHL*. Muslim scholars and legal experts from 17 countries came together in this event and discussed the subject at length. Likewise, in 2019 a national round table was organized by the ICRC and the Institute of Policy Studies (IPS) Islamabad where a select group of scholars were invited to present papers on Islam and Humanitarian Principles. Based on the round-table discussions, a booklet on the subject was published jointly by IPS and the ICRC in 2021.

Developing on the important discussions at seminars and conferences the ICRC has partnered with educational institutions to produce research on themes of common interest. This has led the ICRC to join hands with the Shariah Academy, and an MoU was signed between them to carry out various activities in this respect. The current study is the first product of this collaboration. The study report in its current form would not have been possible without the input and meticulous editing of the ICRC Global Affairs colleagues in Bangkok and Jakarta. The research team highly appreciate their effort.

The study explores Islamic perspective on restraint in war. Undoubtedly, Muslims have a rich heritage of rules governing the conduct of hostilities, restrictions on the means and methods of warfare and other aspects relevant to the law of armed conflict. The present study highlights some significant aspects of this discourse and then explores the reasons for violations of these rules in the contemporary Muslim world. It also tries to find ways for ensuring compliance with the law of armed conflict.

1. INTRODUCTION

In 2018 the International Committee of the Red Cross (ICRC) released an important research study titled *The Roots of Restraint in War* which explored the social and psychological processes that condition the behaviour of fighters during armed conflict and sought to identify ways in which the ICRC might persuade them of the need to comply with the rules and principles of international humanitarian law (IHL).¹ The study found that there is a need for both the law and the values underpinning it, with the emphasis of each influence dependent on the target audience. The role of law is vital in setting the standards but ensuring that the values it represents are internalized seems to be a more durable way of promoting restraint. The report explores socialization as the process by which people adopt the norms and rules of a given community. The study highlighted that for many non-state armed groups (NSAG), particularly those with a more fragmented command structure, religious values were a major source of influence on behaviour.

There is therefore a need to have a study examining how the teaching of IHL can be supported with religious values in the context of Pakistan where rules and principles of Islamic law are often cited for justifying or criticizing various acts of hostilities. The present study is a first, and necessarily preliminary, attempt to fill this gap.

THE CONTEXT IN PAKISTAN

The present study is based on the idea that in the context of Pakistan the same efforts need to be made in light of Islamic law because of its significance for armed groups. Some significant questions ought to be explored: the belligerent's behaviour; efforts for making the law better known; socialization of the norms and values underpinning the rules of IHL. Particularly in the case of non-state actors, more robust efforts are required for making the rules of IHL better known and for socialization of underlying norms and values.

A very important question for Muslim countries is non-state armed actors raising concerns about the compatibility of IHL rules with Islamic law. Since they perceive that IHL rules are apparently made and advocated by Western institutions, why should a follower of Islamic law ensure compliance with them? Hence the first and foremost question raised is about the justification of IHL rules and their compatibility with Islamic law. To answer this question from the perspective of the scriptural law of Islam, some significant works have already appeared in Pakistan, including, *inter alia*, *Islamic Law of War and Peace* by Dr. Muhammad Munir (2019);² *Jihad, Muzahamat and Baghawat Islami Shariat awr Bayn al-Aqwami Qanun ki Roshni men* (Jihad, Resistance and Rebellion from the Perspective of Islamic Shariah and International Law) by Dr. Muhammad Mushtaq Ahmad (2008);³ and *Rebellion: A Comparative Study of Islamic and Modern International Law* by Dr. Sadia Tabassum (2020).⁴ Indeed, the practice of Muslims

¹ Terry, F. and McQuinn, B. (2018) *The Roots of Restraint in War*. ICRC

<https://www.icrc.org/en/publication/4352-roots-restraint-war> (accessed on 7 September 2021)

² Islamabad: Iqbal International Institute for Research and Dialogue, 2019. Some of the earlier works of the author include: "Who Can Declare Jihad?", *Research Papers*, 12:1-2 (2012):1279-1294; "Compatibility between Anti-Terrorism Legislation and Shari'a", *Pakistan Journal of Islamic Research*, 8 (2011): 63-107; "The Prophet's (Peace be Upon Him) Merciful Reforms in the Conduct of War: The Prohibited Acts," *Insights*, 2:2-3 (2009/2010), 221-260; "Suicide Attacks and Islamic Law," *International Review of the Red Cross*, Vol. 90: No. 869 (2008), pp. 71-89; "The Layha for the Mujahidin: An Analysis of the Code of Conduct for the Taliban Fighters Under Islamic Law," *International Review of the Red Cross*, Vol. 93: No. 881 (March 2011), pp. 81-102.

³ Gujranwala: Al-Shariah Academy, 2008. The second edition was published in 2012, while the third (revised and updated) version appeared in 2016. See: Ahmed Al-Dawoody, "Islamic law and International Humanitarian law: An Introduction to the main principles" in *International Review of the Red Cross*, Vol. 99: Issue 906 Conflict in Syria, (December 2017), pp. 995-1018; Ahmad Al-Dawoodi (ed.), *Experts' Workshop Report on IHL and Islamic Law in Contemporary Armed Conflict*, which is available here: <https://www.icrc.org/en/document/experts-workshop-report-ihl-and-islamic-law-contemporary-armed-conflicts> (accessed on June 17, 2021); and Niaz A. Shah, *Islamic Law and the Law of Armed Conflict: The Armed Conflict in Pakistan* (London and New York: Routledge, 2011).

⁴ Islamabad: Iqbal International Institute for Research and Dialogue, 2020. See also by the same author: "Combatants, Not Bandits: The Status of Rebels in Islamic Law," *International Review of the Red Cross*, 93:881

spanning over centuries and developed in the form of *fiqh* manuals can help us, too. However, developing an accurate understanding and explanation of those manuals and putting them in perspective so that their relevance is proven remains very important.

In addition to this question, another aspect that needs to be considered is the interpretation of Islamic law by Muslim non-state armed groups. Islamic laws have been, and are, interpreted in different manners leading to differing conclusions. It leads to the need of evaluating such differing conclusions arrived at by Muslim non-state armed groups. In this regard, several documents and legal rulings (*fatawa*) have been issued by the leaders of those non-state actors that have an enormous impact on the weapon-bearers' behaviour, for example, regarding the issue of suicide attacks and rules regarding the conduct of war. These rulings are based on a specific kind of interpretation of scriptural laws and follow a separate line of argument. Thus, they require to be critically evaluated, especially in light of authentic classical and well-recognized *fiqh* manuals.

Moreover, there are certain religious figures and institutions (*Madaris*) which have far-reaching impact on the behaviour of weapon bearers. The opinions of those figures and institutions may duly be conceived as a key source of influence. All such institutions and figures need to be communicated with to get their responses to those questions. In this regard, a list of the questions would be prepared and sent to them. Their responses would be compiled and compared with what the leadership of the non-state actors maintain.

The approach of armed groups to the compatibility of Islamic law and IHL needs to be understood based on a research-based document. Steps should then be taken towards propagating the rules and what the *Roots of Restraint in War* study termed as 'socialization'. Based on the prepared research document, one such mechanism is to hold a workshop with well-known scholars and opinion makers for better socialization of the norms and values of the law of armed conflict.

The major points to consider are as follows:

1. Compatibility of IHL rules with Islamic laws, particularly contentious points raised by Muslim non-State armed actors;
2. Critical evaluation of the justifications given by non-State armed groups for their acts;
3. To collect the opinions of certain well-known figures and institutions that are equally respected among the masses as well as with non-state actors;
4. Preparing a research document containing the clarifications of points thus far; and
5. Conducting a workshop on the basis of that document.

2. THEORETICAL BACKGROUND

Recently, several scholarly works have appeared regarding the analysis of the legal reasoning used by Muslim militant groups.⁵

These works show that Muslim militants do not deem all and everything permitted against the adversary on the battlefield, but they do have a particular framework and paradigm for application of the law regarding the conduct of hostilities. In many cases they have their own understanding (*fiqh*) of the Qur'an and the *Sunnah* that is different from the understanding of mainstream Muslims. It is, therefore, imperative to critically evaluate their methodology for understanding the Qur'an and the *Sunnah*. Some scholars have tried to analyze this peculiar *fiqh* of the militants. The work of Yusuf al-Qaradawi is particularly important in this regard and it may not be out of place to give a summary of his analysis here.

Yusuf al-Qaradawi⁶, in his monumental work *Fiqh al-Jihad*, explains the ideological roots of those Muslim fighters (as non-state actors) who are active in Muslim territories. While quoting Ibn Tammiya's *Fatwa of Mardin*, these groups use violence and call for taking up arms against rulers claiming that they have become apostates. Some groups argue that permanent non-Muslim residents in the Muslim countries have broken their contractual obligation because they do not pay *jizyah* to Muslims and that non-Muslim tourists and merchants are legitimate targets because their governments are in a state of war against Muslims. Al-Qaradawi sheds light on this minority understanding, refuting what he perceives as their erroneous reasoning and highlighting where he sees flaws in their *fiqh*.

UNDERSTANDING THE JURISPRUDENCE OF VIOLENCE

Examples of this *fiqh* can be found in the context of Pakistan as well. For instance, after the attack on the Army Public School (APS) in Peshawar on 16th December, 2014, the Tehreek e Taliban Pakistan (TTP) tried to make an explanation for the attack by citing a tradition in which the Prophet (peace be upon him) was reported to have allowed killing the children of the enemy saying: "They are from them."⁷ This understanding of the tradition goes against the well-known position of the Hanafi school of Islamic law, a school to which many, if not most, of the TTP fighters subscribe.

Hanafi jurists hold that targeting children during war is prohibited and that there is only one exception from this prohibition, namely, when they directly participate in hostilities. Imam Muhammad b. al-Hasan al-Shaybani (d. 189 AH/805 CE), the disciple of Imam Abu Hanifah (d. 150 AH/767 CE), begins his *al-Siyar al-Saghir* with a well-known tradition of the Prophet (peace be upon him) containing instructions for conduct of warfare. These instructions include: "Do not kill any child."⁸ The Hanafi jurists derive a general principle from this ruling and extend this prohibition to other cases. Thus, they hold that if a common noun is used in a negative sentence, it will convey generality. Similarly, they hold that a general rule includes everyone and that exception can be created only by a rule which is equal in strength to the general rule. As far as the other tradition is concerned, the Hanafi jurists in light of these principles confine it to

⁵ John Kelsay, *Arguing the Just War in Islam* (USA: Harvard University Press, 2009); Kepel, Gilles, Jean-Pierre Milelli *Al Qaeda in Its Own Words* (Cambridge, Mass: Belknap Press of Harvard University Press, 2008); Aaron, David. 2008. *In Their Own Words: Voices of Jihad: Compilation and Commentary*. Santa Monica, CA: RAND.; Yahya Michot, *Muslims under non-Muslim rule* (Oxford: Interface Publications, 2006); Michot, Yahya. (2011). *Ibn Taymiyya's "New Mardin Fatwa". Is genetically modified Islam (GMI) carcinogenic?*. The Muslim World. 101. 130 - 181. 10.1111/j.1478-1913.2011.01351.x.

⁶ Yusuf al-Qaradawi, *Fiqh al-Jihad: Dirasah Muqaranah li-Ahkamih wa Falsafatih fi Daw' al-Qur'an wa al-Sunnah* (Qatar: Markaz al-Qaradawi, 2009)

⁷ Mahmood Ahmad Ghazi, *The Shorter Book on Muslim International Law* (Islamabad: Islamic Research Institute, 1998), 43.

⁸ *Sahih Muslim*, Kitab al-Jihad wa'l-Siyar, Bab Tahrim qatl al-Nisa wa al-Sibyan fi al-Harb.

situations where an attack was inevitable, all precautionary measures were taken for sparing the children and still some of them were hit unintentionally.⁹

Another serious issue in this regard is that the distinction between the perpetrator of an act (*mubashir*) and the one who caused it (*mutasabbib*) is given prime importance by the jurists for determining responsibility for various acts, while this distinction seems to have blurred in the *fiqh* of some Muslim non-state armed groups. Thus, the jurists attribute an act to the *mubashir*, unless it is shown that he was just like a tool in the hands of the *mutasabbib*.¹⁰ Moreover, they attribute an act to the nearest cause.¹¹ They also distinguish between the consequences of direct and indirect participation in hostilities.¹² It is, therefore, not possible in this paradigm according to the position held by these jurists to hold ordinary taxpayers legitimate targets of attack, as claimed by some armed groups.

A deeper analysis of the *fiqh* of the more radical among these groups reveals the following significant points about their legal position:¹³

1. Rulers and armed forces of the State are apostates and, hence, liable to be killed;
2. Supporters of such rules and forces, whether police, politicians or civilians, are also apostates and must be killed;
3. All people from among the adversaries are legitimate targets, be they ordinary taxpayers or young school boys and girls who attained the age of puberty;
4. Hence, phrases like 'civilian population' or 'civilian property' do not carry any meaning for them;
5. For inflicting pain on the enemy and demoralizing them, even minor children can be targeted;
6. Acts, otherwise prohibited, become lawful on the basis of the doctrine of necessity (*idtirar*), particularly if they result in demoralizing the adversary (*nikayat al- 'aduww*);
7. Violations by the adversary makes it permissible for the other party to commit the same violations on the basis of reciprocity (*mu'amala bi 'l-mithl*);
8. Suicide attacks are the weapons of the weaker party in an asymmetric conflict.

There may be other details also, but this line of argument shows that the doctrines of necessity and reciprocity have been used as foundations for the *fiqh* of these groups and, as such, these two doctrines need detailed analysis in light of established principles of Islamic law and jurisprudence.

NECESSITY AND ITS LIMITS

It is an acknowledged principle of Islamic law that necessity renders some prohibited acts permissible. It does not mean, however, that the whole law is suspended during the state of necessity, but rather some part of the law remains applicable. Moreover, if some of the prohibited acts become permissible in a state of necessity, certain consequences of those acts continue to follow. Muslim jurists have given details of these rules in their manuals and have developed an intricate system for *azimah* (original rule/general rule) and *rukhsah* (exemption/exception).

⁹ Muhammad b. Ahmad b. Abi Sahl al-Sarakhsi, *al-Mabsut* (Beirut: Dar al-Ma'rifah, 1993), 9: 82; 24: 91; 26: 181.

¹⁰ Wahbah al-Zuhayli, *Nazriyat al-daman* (Damascus: Dar al-Fikr, 1998), 43-48; 164-177

¹¹ *Ibid.*

¹² Muhammad b. Ahmad b. Abi Sahl al-Sarakhsi, *Sharh Siyar al-Kabir* (Beirut: Dar al-Kutub al-'Ilmiyyah, 1997), 1: 128.

¹³ See for details: Yusuf al-Qaradawi, *Fiqh al-Jihad: Dirasah Muqaranah li-Ahkamih wa Falsafatih fi Daw' al-Qur'an wa al-Sunnah* (Qatar: Markaz al-Qaradawi, 2009); Muhammad Mushtaq Ahmad, *Jihad, Muzahamat and Baghawat Islami Shariat awr Bayn al-Aqwami Qanun ki Roshni men* (Gujranwala: Al-Shariah Academy, 2016), 720-722.

STATE OF NECESSITY: DEFINED

The Qur'an after prohibiting the consumption of certain items gives exemption in case of necessity in the following words:

لَا تَأْكُلُوا حَرَمًا عَلَيْهِمْ أَلْمِيتَةَ وَالْدَّمَ وَلَحْمَ الْخِنْزِيرِ وَمَا أُهْلِيَ بِهِ لَعَنَ اللَّهُ فَمَنْ اضْطُرَّ غَيْرَ بَاغٍ وَلَا عَادٍ فَلَا إِثْمَ عَلَيْهِ إِنَّ اللَّهَ غَفُورٌ رَحِيمٌ

(He hath forbidden you only carrion, and blood, and swine flesh, and that which hath been immolated to (the name of) any other than Allah. But he who is driven by necessity, neither craving nor transgressing, it is no sin for him. Lo! Allah is Forgiving, Merciful.)¹⁴

Abu Bakr al-Jassas (d.370 AH/980 CE), a renowned Hanafi jurist, derives the following definition of necessity from this verse: "Necessity is the fear of harm to one's life or of bodily injury if one abandons eating. Hence, when one consumes the quantity which alleviates from him this fear of harm, necessity vanishes." This concept of necessity is explained by two legal maxims:

الضرورة تبيح المحظورة-

"Necessity renders the prohibited (thing/act) permissible."

الضرورة تقدر بقدرها-

"Necessity is measured by its own quantity."

Are these maxims meant to suspend all rules in a state of necessity? The jurists answer this question in negative and hold that some acts remain prohibited even in a state of necessity. To quote Jassas again:

The jurists say about the one who is coerced to kill another, or commit *zina* (illicit sexual intercourse) with a woman, that he is not permitted to do so because the other person's right has the same sanctity like the right of the person coerced. Hence, he is not allowed to cause death to another person for saving his life. Similarly, he is not permitted to commit *zina* with that woman, violate her dignity and bring shame and disrespect to her.¹⁵

After a detailed analysis of this issue, Jassas offers the following summary:

1. Some prohibited acts become not only lawful, but also obligatory.¹⁶
2. Some prohibited acts remain prohibited but exemption is granted to those who commit them in such a situation;¹⁷ and
3. Some prohibited acts remain prohibited and no exemption is granted for committing them even in such a situation.¹⁸

We will present additional details regarding the last category of acts and will take the killing of an innocent person as an example.

INTENTIONALLY KILLING AN INNOCENT PERSON IN THE STATE OF NECESSITY

The famous Hanafi jurist 'Allamah Ibn 'Abidin al-Shami (d. 1252 AH/1836 CE) says:

¹⁴ Qur'an 2:173.

¹⁵ Abu Bakr al-Jassas, *Ahkam al-Qur'an* (Karachi: Qadeemi Kutub Khana, n.d.), 3: 285.

¹⁶ Ibid., 1: 285-286. He gives the example of eating carrion for saving life and argues that if a person avoids it and consequently dies, he shall be guilty of suicide because the law had suspended the prohibition of eating carrion, while saving life remains obligatory.

¹⁷ Ibid. Examples include uttering a statement of disbelief due to coercion. Thus, if he remains steadfast and is killed, he is deemed a martyr because the prohibition remained in the field and permissibility was only an exemption which he could avail.

¹⁸ Ibid. Examples include the prohibition of rape and murder.

The issue of shedding blood is very serious. That is why if the ruler conquers a fort, or a city, and he knows that there is a Muslim in the inhabitants thereof, it is not permitted for him to execute any person among them because of the possibility that he may be that Muslim.¹⁹

What if Muslims attack the enemy fort and they certainly know that there is a Muslim prisoner who may also get killed? Imam Sarakhsi (d. 490 AH/1097 CE), one of the most respected jurists of all times, holds that Muslims may attack the fort but they must not intend to kill the innocent prisoner. The argument is based on the interplay of the relevant maxims of necessity:

If we prohibit them from attack, it will lead to a complete ban on fighting the enemy and overpowering them because rarely do we find an enemy fort which does not have a prisoner. Moreover, killing enemy women and children is prohibited like killing a prisoner. Still this does not prevent us from burning their forts even if their women and children may also be with them. Similarly, even if a prisoner is there, it does not prevent us from attack. However, while launching attack they must intend to target the enemy, not the prisoner, because if distinction were possible for them it would be obligatory on them to spare the prisoner. The same is the rule when they can make distinction in intention, it becomes obligatory on them.²⁰

Can we imagine a situation where intentional murder of an innocent person may become permissible? Imam Ghazali (d.505 AH/1111 CE), the famous jurist-cum-philosopher, takes up this question while analyzing the doctrine of *maslahah* (often mistranslated as 'public interest'). It is generally assumed that public interest prevails private interest. Will this allow intentional killing of an innocent person for the larger benefit of the community? Ghazali talks about this issue in his famous example of *tirs* (shield). He begins his exposition with an analysis of the literal and technical meaning of *maslahah*:

As for *maslahah*, it is essentially an expression for acquiring benefit or repelling harm, but that is not what we mean by it because acquiring benefit or repelling harm represents human goals, that is, the welfare of human beings through the attainment of these goals. What we mean by *maslahah*, however, is the preservation of the objective of the law (*al-muhafazah 'ala maqsud al-shar'*).²¹

Although Ghazali is considered the foremost expositor of the principle of *maslahah*, yet it may surprise many that he places *maslahah* in the category of *al-usul al-mawhumah*, that is, 'uncertain principles', reasoning that:

This is among the uncertain principles and whoever considers it as a fifth source is mistaken. This is because we linked *maslahah* to the objectives of the law (*maqasid al-shari'ah*), which are known by the Book [Qur'an], the *Sunnah* and consensus. Thus, a *maslahah* which cannot be linked to an objective derived from the Qur'an, the *Sunnah* or consensus, and is of those alien interests (*al-masalih al-gharibah*) which are not compatible with the propositions of the law (*tasarrufat al-shar'*), is void and abominable. Whoever uses such interests assumes the position of the Lawmaker, just as whoever presumes a

¹⁹ Muhammad Amin b. 'Abidin al-Shami, *Majmu'at Rasa'il Ibne 'Abidin* (Damascus: al-Maktabat al-Hashimiyyah, 1325 AH), 1: 344.

²⁰ Sarakhsi, *al-Mabsut*, 10: 32.

²¹ *Ibid.*, 1:216-217.

rule on the basis of his personal preference (*istihsan*)²² assumes the position of the Lawmaker.²³

Thus, from the perspective of compatibility with the objectives of Islamic law, *maslahah* may be divided into three categories:²⁴ the one proven compatible (*maslahah mu'tabarah*), the one proven incompatible (*maslahah mulghah*),²⁵ and the one which is neither proven compatible nor incompatible (*maslahah gharibah*).²⁶

The first of these, the 'compatible interests', are acknowledged by Islamic law either at the level of a species (*naw'*) or at the level of a genus (*jins*).²⁷ Ghazali explains that *qiyas* (analogy) is nothing but extending the law to a new case on the basis of an interest acknowledged at the level of species.²⁸ He further explains that the law can be extended to some new cases on the basis of an interest acknowledged at the level of genus, calling it *maslahah mursalah*, provided three conditions are fulfilled:

- That the new principle does not conflict with any text (*nass*) or modifies its implications;
- That the new principle does not conflict with the general propositions of the law, i.e., the existing principles and rules of the system; and
- That the new principle is not alien (*gharib*) to the system,²⁹ i.e., it finds a basis in the system.³⁰

An alien principle cannot be accommodated in the legal system, unless it fulfills three further conditions:³¹

- It is related to any of the five primary objectives of the law (*darurat*), i.e., it must aim at preserving and protecting religion, life, progeny, intellect or wealth;
- It is definitive (*qat'i*), i.e., it must certainly lead to the preservation and protection of the above-mentioned objectives; and
- It is absolute (*kulli*), i.e., it must concern the *whole* of the Muslim *ummah* and not be limited to a certain group or individual.

After elaborating these pillars of his theory of *maslahah*, Ghazali presents many hypothetical cases to see if they fulfill the criteria he mentioned for acknowledging various forms of *maslahah*. One such example is that of *tirs*. Following is his analysis of the hypothetical case:

If disbelievers take shield of a group of Muslim prisoners;

²² Shafi'i rejected the principle of *Istihsan* considering it to be a way of following personal whims. As already explained above, the Hanafi principle of *istihsan* is absolutely different from this. Ghazali also acknowledges that the explanation of *istihsan* by the great Hanafi jurist Karkhi is acceptable to him asserting that if this is what is meant by *istihsan* he could only object to its title! (Abu Hamid al-Ghazali, *Al-Mustasfa min 'Ilm al-Usool*, (Beirut: Dar Ihya' al-Turath al-'Arabi, n.d.), 1:215-16.) Sarakhsi explains that even the title *istihsan* is not objectionable. (Muhammad b. Ahmad b. Abi Sahl al-Sarakhsi, *Tamhid al-Fusul fi'l-'Usul* (Hyderabad: Itha al-Ma'arif Usmaniyyah, 1993), 2:199-200)

²³ Ghazali, *al-Mustasfa*, 1:222.

²⁴ *Ibid.*, 1:216.

²⁵ The example given by Ghazali is that of *y fatwa* (legal verdict) given by a jurist to a rich person who had intentionally broken his fast and had sought the verdict about expiation. The jurist had told him that he was supposed to keep fast for sixty consecutive days, although the text of the tradition about expiation puts it on the third number in the priority list: manumission of a slave; feeding sixty needy people; fasting for sixty days. The argument forwarded by this jurist was that the purpose of expiation was to deter the lawbreaker from breaking it again and as the person was rich the first two forms of expiation could not achieve the purpose! Ghazali and other jurists deem this line of reasoning flawed and consider this presumed "*Maslahah*" as *mulghah* because it goes against the text (*Ibid.*). In other words, the *Maslahah* determined by God cannot be defeated by the *Maslahah* presumed by human beings.

²⁶ Ghazali says that the example of this kind of *Maslahah* is difficult to find. Hence, he came up with the hypothetical example of a situation of war in which *all* Muslims were facing a definite death if they would not kill the few Muslims whom the invading enemy had taken as shields (*Ibid.*, 1:218). It must be noted here that the choice is not between saving a few Muslims on the one hand or more Muslims on the other; rather, it is between saving a few Muslims or saving *all*. Thus, the choice was between *juz'* (part) and *kull* (whole), not between *qalil* (few) and *kathir* (more). That is why Ghazali goes into great details in order to find out the *Maslahah* upheld by the Lawgiver in this situation (*Ibid.*). Some details are discussed below.

²⁷ Ghazali, *al-Mustasfa*, 1:222.

²⁸ *Ibid.*

²⁹ *Ibid.*, 1:217.

³⁰ *Ibid.*, 1:218.

³¹ *Ibid.*, 1:222. Ghazali then discusses various hypothetical examples to explain these three conditions. In each of these examples one of the conditions is missing. These examples are not only illustrative of the genius of that great jurist-cum-philosopher but also of the simplistic approach which many modern scholars have adopted towards this issue.

If we avoid fighting them, they will attack us, dominate the domain of Islam and kill all Muslims;

But if we target the shield, we will kill a Muslim whose life is protected and who did not commit a crime [punishable with death] and this has no basis in the law;

However, if we avoid it, we will let the disbelievers dominate all Muslims; they will kill them [Muslims] and will then kill the prisoners as well. Hence, a person may say: "This prisoner is going to be killed in any case; so, protection of all Muslims is closer to the objective of the law because we definitely know that the objective of the law is to minimize killing, as it aims to eliminate it – if possible. So, if we cannot eliminate it, we can minimize it."

This is reliance on a *maslahah* which is known *a priori* to be the objective of the law; not from a single evidence, or a specific source, but from innumerable sources. However, achieving this objective by this way – the killing of a person who did not commit a crime [punishable with death] – is alien for which no specific source testifies.

So, this is the example of a *maslahah* which is not extracted by way of analogy and it can be acknowledged only if it has three features: being necessary, definitive and absolute.³²

Ghazali, then, comes up with several other cases to apply the principle and its conditions, for instance, he says:

The situation where disbelievers in a fort take shield of a Muslim does not fulfill these conditions and it will not be permissible to target this shield because there is no necessity, for we do not need the fort and we can avoid it; hence, this is probable, not definitive.

Similarly, the following situation does not fulfill these conditions where a group in a boat are caught in such a trouble that if they throw one of them, they all will be saved, or else they all will be drowned. This is because this is not absolute as only a certain number will die which is not like annihilation of all Muslims. Another reason is that the one who deserves to be drowned is not determined with certainty, as the only way is to cast lots but that has no basis in law.

The same is the case with a group of the people who face starvation and if they eat one of them, the rest will be saved.³³ There is no exemption for this because this *maslahah* is also not absolute.³⁴

This clearly illustrates the strictness of Islamic law on the issue of protection of human life.

³² Ibid., 1: 218.

³³ Lon. L. Fuller, a renowned American legal philosopher, had published "The Case of Speluncean Explorers" in *Harvard Law Review*, Vol. 62: No. 4 (1949), pp. 616–645. As fictional judgment, the article presents a legal philosophy puzzle to the reader and five solutions of the judges sitting on the fictional "Supreme Court of Newgarth" in the year 4300. The case involves five explorers who are caved in following a landslide. They learn via intermittent radio contact that, without food, they are likely to starve to death before they can be rescued. They decided to select one of them to be killed and eaten so that the others may survive. After the four survivors are rescued, they are charged and found guilty of the murder of the fifth explorer. The article offers five possible judicial responses. Each differs in its reasoning and on whether the survivors should be found guilty of breaching the law. Emphasizing a literal approach to the statutory law, two judges affirm the convictions. Two other judges overturn the convictions; one focuses on common sense and the popular will while the other uses arguments drawn from the natural law tradition, emphasizing the purposive approach. A fifth judge, who is unable to reach a conclusion, recuses himself. In the 50 years following the article's publication, a further 25 hypothetical judgments were written by various authors whose perspectives include different theories and approaches.

³⁴ Ghazali, *al-Mustasfa*, 1:218.

COERCION AND DURESS (*IKRAH*)

Superior command is frequently used as an excuse for violations of the law of armed conflict.³⁵ Islamic legal literature has detailed discourse on the meaning and scope of coercion as well as on its legal consequences.

One of the issues which has been specifically addressed in the Qur'an relates to uttering a statement of disbelief under coercion.

coercer's threat against him because he is not deemed coerced unless he is in such a position. The threat must be such that it kills or severely damages or destroys an organ or any other act which negates his consent. The act on which a person is coerced must be such that he avoided it before he was coerced to commit it, either in view of his right, the right of another person or the right of the divine law. The rules of coercion will be different if these circumstances are different.⁴⁰

On the basis of these principles, the jurists divide coercion into two kinds: *ikrah tamm* (complete coercion), which is so compelling that it altogether negates the consent of the victim; and *ikrah naqis* (incomplete coercion), which is not so overwhelming and the victim retains some part of his consent.⁴¹

The above quoted passage of Sarakhsi shows that for the consequences of coercion, the jurists also consider the affected right. Thus, coercion may affect the right of the victim alone, it may also affect the right of other persons, or it may affect the right of the divine law, also called the right of God. Thus, the victim may be exempted from certain rules even in case of *ikrah naqis* if its effects were confined to his rights only. However, if the rights of other persons, or the rights of God, are also affected, the victim can take an exemption only if it was *ikrah tamm*.⁴²

Furthermore, acts may be either physical or verbal. Physical acts are generally criminal in nature, such as murder, rape, and destruction of property, while verbal acts are mainly civil, such as conclusion of contracts, pronouncement of divorce, acknowledgement of debts and so on. In general, only *ikrah tamm* affects physical acts, while *ikrah naqis* can also affect some verbal acts.⁴³ Sarakhsi has given the following general principle for the effects of coercion on verbal acts:

The principle for this issue is that, in our opinion, all transactions of the coerced are enforced, except that where the law allows [later] repudiation, such as sale and lease, can be repudiated, while those transactions cannot be repudiated for which the law does not allow repudiation, such as divorce, marriage, manumission and others.⁴⁴

Another important principle in this regard is the choice of the lesser evil and consideration of proportionality. Thus, if one is threatened to cut his hand or else he will be killed, he may choose to cut his hand and for such a situation Imam Muhammad b. al-Hasan al-Shaybani (d.189 AH/805 CE) says: "It is hoped that he would be forgiven [by the Almighty]."⁴⁵ Sarakhsi explains this ruling by saying: "Undoubtedly, to injure oneself is better than to be killed."⁴⁶ However, if he is asked to cut his hand or else the coercer will cut it, he is not allowed to cut it himself because both choices are equal and in such a situation "if he cuts it himself, the act will be attributed to him and it will definitively happen. But if he refuses, his hand may be cut by the act of the other person and that may not happen because the coercer may be only threatening him without doing it."⁴⁷

ACT AFFECTING OTHERS' RIGHTS

More often than not, acts committed under coercion affect the rights of other individuals, which is why the standard becomes stricter. Hence, the jurists unanimously hold that one should resist coercion and should try to remain steadfast and that if he

⁴⁰ Ibid., 24: 39-40.

⁴¹ See for details: Khaled Abou el Fadl, "Law of Duress in Islamic Law and Common Law: A Comparative Study," *Islamic Studies*, Islamic Research Institute, International Islamic University, Islamabad, 30: 3 (1991), 305-350, 310.

⁴² Ibid., 314-315.

⁴³ Sarakhsi, *al-Mabsut*, 24: 56.

⁴⁴ Ibid.

⁴⁵ Ibid., 24: 66-67.

⁴⁶ Ibid.

⁴⁷ Ibid., 24: 68.

resultantly gets injured or killed, he deserves great reward in the hereafter for acting on 'azimah (original rule).⁴⁸ However, if a person under coercion feels compelled and unwillingly commits an illegal act against another person, some consequences shall follow.

Thus, if a person kills another person under coercion and the nature of coercion was that of *ikrah naqis*, the coerced shall be deemed guilty of intentional murder and he shall be liable to the punishment of *qisas*, while the coercer may be given the punishment of *ta'zir*. However, if it was a case of *ikrah tamm*, the standard position of the Hanafi School is that the coercer shall be liable for intentional murder because the coerced was just like a tool in his hands. Abu Yusuf, however, holds that the coercer may not be given *qisas* punishment because the act cannot be fully attributed to him.⁴⁹ The same rules apply to threats about other forms of bodily injury.

As far as the destruction, or taking the property, of other people is concerned, this type of coercion often takes place by government officials. The jurists hold that the subordinates cannot take the plea of coercion by their bosses, unless the conditions make it abundantly clear that they were facing the situation of *ikrah tamm*. Sarakhsi says:

The supporters of the tyrants do not have an excuse for snatching the property of the people. Thus, the tyrant sends an official to a place to snatch property and the official enforces his illegal command because he fears sanction from him if he disobeys him. But this is no excuse for him, except when the one issuing command is physically present there. When he is far away from him, there is no coercion presently, except when the agent of the tyrant is present to punish him if he does not enforce the command... If he refuses to obey and resultantly faces death, he will be rewarded, God willing, because he refrained from injustice to people and this is 'azimah.⁵⁰

It is worth noting here that Islamic law gives the principle of individual responsibility and, accordingly, prohibits obedience to unlawful commands. The Prophet, peace be on him, is reported to have said:

لا طاعة لمخلوق في معصية الله عز و جل-

“There is no obedience to any creature when it amounts to disobeying the Creator.”⁵¹

Once, a commander got angry with his subordinates and ordered his subordinates to jump into fire telling them that they were supposed to obey him. The subordinates refused arguing that they embraced Islam so as to save themselves from fire. Later, when the incident was reported to the Prophet, peace be on him, he said:

لو دخلوها ما خرجوا منها الى يوم القيمة- اما الطاعة في المعروف-

“Had they entered it, they would not have come out of it till the Day of Judgment; only lawful commands are to be obeyed.”⁵²

Moreover, the commander has a greater responsibility because of his position vis-à-vis his subordinates. Thus, when Khalid b. Walid, God be pleased with him, mistakenly killed some people of Banu Jadhima, the Prophet, peace be upon him, expressed his displeasure at it and they paid compensation for the loss of life and property.⁵³

Some more details will be given below on this point in the analysis of the principles of Islamic law about reprisals.

⁴⁸ See: Muhammad Amin b. 'Abidin, *Radd al-Muhtar 'la al-Durr 'l-Mukhtar* (Beirut: Dar al-Fikr, 1992), 6: 135

⁴⁹ Muhammad Mushtaq Ahmad, *Jihad, Muzahamat aur Baghawat*, 391-392.

⁵⁰ Sarakhsi, *al-Mabsut*, 24: 78.

⁵¹ Ahmad b. Hanbal, *al-Musnad* (Cairo: Dar al-Hadith, Edr. Ahmad Muhammad Shakir, 1995), Hadith No. 3889.

⁵² Sarakhsi, *Sharh Kitab al-Siyar al-Kabir*, 1: 117.

⁵³ *Sahih Bukhari*, Kitab al-Maghazi, Bab. Ba'th al-Nabi Salla Allah 'layhi wa Sallam Khalid b. al-Walid 'ila Bani Jadhimah.

REPRISAL (MU'AMALA BI 'L-MITHL)

Muslim jurists have generally acknowledged that international relations are based on the principle of reciprocity. Sarakhsi, for instance, mentioned the following maxim in the context of imposing taxes on non-Muslim traders:

الأمر بيننا وبينهم مبني على المجازاة-

“The matter between us and them is based on reciprocity.”⁵⁴

However, the question is whether reciprocity allows deviation from the norms of the law. For example, targeting non-combatants is prohibited by several Qur'anic texts and Prophetic traditions. Will it be permitted for Muslims to deviate from this norm, if the adversaries already violated it? Some militant groups answer this question in the affirmative and rely on the following verse:

وَأَنْ عَاقِبْتُمْ فَعَاقِبُوا بِمِثْلِ مَا عُوِّبْتُمْ بِهِ

[If ye punish, then punish with the like of that wherewith ye were afflicted.]⁵⁵

Similarly, the Qur'an while prohibiting war during the sacred months, permitted people to defend themselves if the adversary imposed war on them in these months:

أَلَشَّهْرُ الْحَرَامِ بِالشَّهْرِ الْحَرَامِ وَالْحُرُمَتُ قِصَاصٌ فَمَنْ اعْتَدَى عَلَيْكُمْ فَاعْتَدُوا عَلَيْهِ بِمِثْلِ مَا اعْتَدَى عَلَيْكُمْ

[The forbidden month for the forbidden month, and forbidden things in retaliation. And one who attacks you, attack him in the manner as he attacked you. Observe your duty to Allah, and know that Allah is with those who ward off (evil)].⁵⁶

The same is true of war near the Inviolable Mosque:

﴿وَلَا تَقْتُلُوهُمْ عِنْدَ الْمَسْجِدِ الْحَرَامِ حَتَّى يُقْتَلُوا فِيهِ فَإِنْ قُتِلُوا فَانْتُلُوهُمْ كَذَلِكَ جَزَاءُ الْكٰفِرِينَ﴾

[And fight not with them at the Inviolable Place of Worship until they first attack you there, but if they attack you (there) then slay them. Such is the reward of disbelievers.]⁵⁷

However, two points are worth of consideration:

One, whether Islamic law always allows treating the adversary in the same manner, or whether there are some restrictions on it?

Second, and this is more important, what is meant by treatment in the same manner?

RESTRICTIONS ON 'SIMILAR TREATMENT'

The first and foremost principle in this regard is that the option of 'treatment in similar manner' is not available in cases where the law has given specific provisions. For instance, in case of usurpation (*ghasab*) of property, the usurper is initially under an obligation to return 'the same' property (*'ayn*) which he has usurped. It is only when the

⁵⁴ See: Sarakhsi, *Sharh Kitab al-Siyar al-Kabir*, 5: 288.

⁵⁵ Qur'an, 16: 126.

⁵⁶ Qur'an, 2: 194.

⁵⁷ Qur'an, 2: 191.

usurped property does not exist, or cannot be returned, that the option of 'compensation in similar terms' (*mithl*) is considered. Now, for the option of *mithl*, it is available only for fungible items (*mithliyyat*) because the law does not allow it for non-fungible items (*qimiyyat*). In such cases, the law allows compensation by evaluation (*taqwim*) of the property. So, each of the three options – return of 'ayn (the same property), compensation by *mithl* (similar property) and compensation by *qimah* (market-value of the property) – has its own limitations and restrictions and the option of *mithl* is not available for every situation.

Sarakhsi's analysis of this rule is based on some important principles of Islamic law. Thus, if there is a situation where while imposing similar treatment, we may exceed limits and inflict more harm, the rule of imposing similar treatment is suspended because "the wrongdoer cannot be wronged; rather, justice will be done to him and the sanctity of his property [and other rights] remains intact."⁵⁸ He further points out that if we hold that the law imposes similar treatment even in such a situation where it causes injustice, such injustice will be attributed to the law, which is not permissible. On the other hand, if we refrain from inflicting similar harm because we cannot be sure of confining ourselves within the limits of similarity, this shortcoming is attributed to us, not to the law, and this is acceptable.⁵⁹ Does this mean that the wrongdoer goes scot-free? Sarakhsi answers in negative and asserts forcefully: "We have imposed *ta'zir* punishment and imprisonment for deterring usurpers."⁶⁰ Moreover, asserts Sarakhsi: "The right of the one who has been wronged does not go to waste; rather, its enforcement is deferred to the hereafter!"⁶¹

Thus, an act prohibited by Islamic law cannot be considered a lawful equivalent, because one wrong does not justify another wrong. Jassas says: "If a person commits injustice against you, it is not permissible for you to commit injustice against him."⁶² Thus, Imam Muhammad cites an incident of the Fourth Caliph 'Ali, God be pleased with him, who ordered the release of a person who had abused him. This astonished his companion and he told him: "You may also abuse him, if you wish, but it will be better if you do not do even that!" Sarakhsi explaining the true purport of this statement says:

"By his statement: "You may also abuse him," he did not mean to attribute to him something which does not exist in his character because that is lie and false allegation for which the law gives no exemption. He, rather, meant that he may attribute to him what he knew of his character, such as calling him: "o wrongdoer," or "o evildoer" because he intended to do wrong and mischief."⁶³

To conclude, where retaliation may result in causing injustice, it is not allowed. This is further elaborated below with the example of "equal punishment" or *qisas*.

MODE OF 'EQUAL PUNISHMENT'

In the context of criminal law, the issue of *mithl* arises in the context of the punishment of *qisas*. There are two opinions among Muslim jurists on the mode of execution of *qisas*: one, that it must be done through the use of the sword;⁶⁴ and two, that the murderer may be executed in the same manner in which he committed the murder, unless it involves a prohibited method, such as causing death by burning at the stake.⁶⁵ This difference of opinion is caused by two different sets of traditions on the issue.

⁵⁸ Sarakhsi, *al-Mabsut*, 11: 80.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² See Jassas, *Ahkam al-Qur'an*, 3: 573.

⁶³ Sarakhsi, *al-Mabsut*, 10: 125.

⁶⁴ This is the opinion of the Hanafis and of some Hanbalis. 'Uthman b. Ali al-Zayla'i, *Tabyin al-Haqa'iq Sharh Kanz al-Daqa'iq* (Cairo: al-Matba'at al-Kubra, 1313 A.H.), 6:106; Ibrahim b. Muhammad b. Muflih, *al-Mubdi' Sharh al-Muqni'* (Beirut: Dar al-Kutub al-'Ilmiyyah, 1997), 7:235-236.

⁶⁵ This is the view of Malikis, Shafi'is, Zahiris and some Hanbalis. See for details: Muhammad b. Ahmad al-Dusuqi, *Hashiyat al-Dusuqi 'ala al-Sharh al-Kabir* (Beirut: Dar al-Fikr, n.d.), 4:265; Muhammad b. Ahmad b. Khatib al-Shirbini, *Mughni al-Muhtaj 'Ila Ma'rifat Ma'ani Alfaz al-Minhaj* (Beirut: Dar al-Kutub al-'Ilmiyyah,

Thus, one set of traditions makes it obligatory to use sword in executing the punishment of *qisas*:

لا قود الا بالسيف-

“There should be no *qisas* (execution) except through sword.”⁶⁶

On the other hand, some traditions show that the culprits were given the punishment in the same manner in which they had committed the offence. A famous example is that of the people of the ‘Uraynah tribe who had brutally killed some of the Companions and had also looted property. When they were captured, they were blinded, their hands and legs were amputated and then they were left lying in the scathing heat of the desert till they died.⁶⁷ Another instance is that of a Jew whose head was crushed by stones in the same way as he had done to his victim.⁶⁸ Then, there is the tradition which prescribes such punishment in a general way:

من غرق، غرقناه؛ و من حرّق، حرّقناه-

“If a person drowns another, we will drown him; if a person burns another, we will burn him.”⁶⁹

The jurists relying on these traditions also argue from the literal meaning of *qisas* which implies similarity in treatment.⁷⁰ They further argue based on texts which prescribe inflicting similar pain to the culprit that he inflicted on the victim:

(وَإِنْ عَاقَبْتُمْ فَعَاقِبُوا بِمِثْلِ مَا عُوقِبْتُمْ بِهِ، وَلَئِنْ صَبَرْتُمْ لَهُوَ خَيْرٌ لِلصَّابِرِينَ)

“If ye punish, then punish with the like of that wherewith ye were afflicted. But if ye endure patiently, verily it is better for the patient.”⁷¹

Finally, they highlight that one of the purposes of the punishment of *qisas* is to satisfy the desire for vengeance which is best served if the culprit is given the same punishment.⁷²

The counterarguments forwarded by the first group of jurists are also worth of consideration. Thus, they point out that “similar” (*mithl*) treatment is permitted by law only when it does not violate other rules and principles.⁷³ For instance, the law does not allow *mithl*, if keeping within the limits of the *mithl* cannot be ensured and there is a possibility that one may exceed those limits because in such situations it will be transgression which is prohibited by the Almighty:

(وَقَاتِلُوا فِي سَبِيلِ اللَّهِ الَّذِينَ يُقَاتِلُونَكُمْ وَلَا تَعْتَدُوا إِنَّ اللَّهَ لَا يُحِبُّ الْمُعْتَدِينَ)

“Fight in the way of Allah against those who fight against you, but do not transgress. Lo! Allah loveth not transgressors.”⁷⁴

Moreover, they highlight that the verse prescribing *qisas* requires similarity only in the fact that the murderer be killed:

1994), 5:281-283; ‘Ali b. Ahmad b. Hazm al-Zahiri, *al-Muhalla bi ‘l-Athar* (Beirut: Dar al-Fikr, n.d.), 10:255-256; and Ibn Muflih, *al-Mubdi‘ Sharh al-Muqni‘*, 7:235-236.

⁶⁶ *Sunan Ibn Majah*, Kitab al-Diyatm Bab La Qawad Illa Bi ‘I-Sayf.

⁶⁷ *Sunan Abi Dawud*, Kitab al-Hudud, Bab Ma Ja’ fi ‘l-Muharabah.

⁶⁸ *Sahih al-Bukhari*, Kitab al-Diyat, bab Idha Aqarra bi ‘l-Qatl Marratan Qutala bihi.

⁶⁹ *Sunan al-Bayhaqi*, Kitab al-Juruh, Bab ‘Amd al-Qatl bi ‘l-Hajar wa Ghayrihi.

⁷⁰ Al-Mubarak b. Muhammad b. al-Athir, *al-Nihayah fi Gharib al-Hadith wa ‘l-Athar* (Beirut: al-Maktabat al-‘Ilmiyyah, 1979), 4:72.

⁷¹ Qur’an, 16:126.

⁷² Shirbini, *Mughni al-Muhtaj*, 5:281-282.

⁷³ For instance, a rapist cannot be raped by way of punishment!

⁷⁴ Qur’an, 2:190.

﴿يَا أَيُّهَا الَّذِينَ ءَامَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلِ ۖ الْحُرُّ بِالْحُرِّ وَالْعَبْدُ بِالْعَبْدِ وَالْأُنثَىٰ
بِالْأُنثَىٰ﴾

“O ye who believe! Retaliation is prescribed for you in the matter of the murdered; the freeman for the freeman, and the slave for the slave, and the female for the female.”⁷⁵

The word used here is *القَتْلَى* which is the plural of *القَتِيل*, the one who has been killed. Hence, the verse only requires that the murderer be killed. It does not necessitate that he be killed in the same manner. In other words, *qisas* does not mean similar punishment: it only means equal punishment.⁷⁶

As for the case of the Jew whose head was crushed, these jurists hold, first, that it was not a case of *qatl ‘amd* because the weapon used in killing was not the one specifically manufactured for killing; and two, that the culprit was a habitual offender who was given this punishment by way of *siyasah* (discretionary authority of the government for curbing mischief) to deter others.⁷⁷ They hold the same position about the tradition which prescribes the punishment of drowning or burning. They also point out that the Prophet, peace be upon him, later prohibited burning a person by way of punishment.⁷⁸ Similarly, in their view, the punishment given to the people of ‘Uraynah was neither *hadd* nor *qisas*; rather, it was a *siyasah* punishment.⁷⁹ Moreover, these jurists hold that this punishment also involved the element of *muthlah* (mutilation) but the Prophet, peace be upon him, later prohibited *muthlah*.⁸⁰ Hence, even in the *siyasah* punishments, *muthlah* stands prohibited now.

Finally, they hold that decapitation through sword (or some other sharp tool)⁸¹ is more in consonance with the spirit of Islamic law and the general injunctions which obligate perfection (*ihsan*) and prohibit transgression (*‘udwan*).

It is worth noting that even those jurists who permit similar punishment by way of *qisas* put a proviso here: similar punishment will not be awarded if the mode in which the murder was committed is prohibited *per se*, such as killing by way of burning has been specifically prohibited by the Prophet, peace be upon him.⁸² Moreover, they hold that the preferred mode for *qisas* is decapitation through sword.⁸³ In other words, in their view, similarity in punishment is only permitted, not preferred.

EQUAL/SIMILAR TREATMENT IN WAR

Now, we are in a better position to examine the limits of equal or similar treatment with the adversary in war.

The first and foremost principle of Islamic law in this regard is that Muslims are bound by the rules of Islamic law in all situations.⁸⁴ This principle has been deduced from various Qur’anic verses and Prophetic traditions. For instance, the Qur’an says:

⁷⁵ Qur’an, 2:178.

⁷⁶ Jassas, *Ahkam al-Qur’an*, 1:164-167.

⁷⁷ Sarakhsi, *al-Mabsut*, 26:126.

⁷⁸ *Sahih Bukhari*, Kitab al-Jihad wa ‘l-Siyar, Bab al-Tawdi‘.

⁷⁹ Sarakhsi, *al-Mabsut*, 10:7.

⁸⁰ Burhan al-Din ‘Ali b. Abi Bakr al-Marghinani, *al-Hidayah fi Sharh Bidayat al-Mubtadi* (Beirut: Dar Ihya’ al-Turath al-‘Arabi, n.d.), 2:380.

⁸¹ It is significant that some of the traditions mention the word ‘iron’ generally in place of ‘sword.’ لا قود الا بحديدية.

(“No *qisas*, except through iron.” *Sunan al-Daruqutni*, Kitab al-Hudud wa al-Diyat wa Ghayrihi.

⁸² Shirbini, *Mughni al-Muhtaj*, 5: 281-283.

⁸³ *Ibid.*

⁸⁴ Qadi Abu Yusuf (d. 182 AH/798 CE), the disciple and successor of Imam Abu Hanifah, expressed these principles in the following words: “Muslim is bound by the rules of Islam wherever he may be.” *Ibid.*, 6: 116. Sarkahsi adds: “Muslim is bound by the rules of Islamic law even in *Dar al-Harb*.”

وَمَا كَانَ لِمُؤْمِنٍ وَلَا لِمُؤْمِنَةٍ إِذَا قَضَى اللَّهُ وَرَسُولُهُ أَمْرًا أَنْ يَكُونَ لَهُمُ الْخِيَرَةُ مِنْ أَمْرِهِمْ وَمَنْ يَعْصِ اللَّهَ وَرَسُولَهُ فَقَدْ ضَلَّ ضَلَالًا مُبِينًا⁸⁵

[And it is unbecoming of a believing man or a believing woman, when Allah and His messenger have decided an affair (for them), that they should (after that) claim any say in their affair; and whoso is rebellious to Allah and His messenger, be verily goes astray in error manifest.]

If a believer follows the rules of Islamic law only when they benefit him and avoid them if they do not serve his purpose, he is not following the law but his whims:

وَإِذَا دُعُوا إِلَى اللَّهِ وَرَسُولِهِ لِيَحْكُمَ بَيْنَهُمْ إِذَا فَرِيقٌ مِنْهُمْ مُعْرِضُونَ وَإِنْ يَكُنْ لَهُمُ الْحَقُّ يَأْتُوا إِلَيْهِ مُذْعِنِينَ أَفِي قُلُوبِهِمْ مَرَضٌ أَمْ ارْتَابُوا أَمْ يَخَافُونَ أَنْ يَحْيِفَ اللَّهُ عَلَيْهِمْ وَرَسُولَهُ أَلَّا يَكُونَ لَهُمُ الْفُتُورَ⁸⁶

[And when they appeal unto Allah and His messenger to judge between them, lo! a faction of them are averse; But if right had been with them they would have come unto him willingly. Is there in their hearts a disease, or have they doubts, or fear they lest Allah and His messenger should wrong them in judgment? Nay, but such are evil doers.]⁸⁶

If it is argued that international relations are based on reciprocity expressed in treaties and that violation by one party absolves the other party of the treaty obligation, the answer is that this is true for those obligations only that arise purely from treaties. As far as the obligations imposed by law independent of treaties, they remain intact even if the other party violates them. Rather, they are not negated even by express provisions in a treaty because such provisions are deemed *ultra vires*.⁸⁷ Thus, the Prophet, peace be upon him, is reported to have said:

كُلُّ شَرْطٍ لَيْسَ فِي كِتَابِ اللَّهِ فَهُوَ بَاطِلٌ

“Every condition which violates the law of Allah is void.”⁸⁸

Thus, for instance, even if it is mentioned in a treaty that attacks on women and children will be allowed on the basis of reciprocity, this provision shall be deemed invalid, as it will not only violate the expressed prohibition found in the Qur’an and the *Sunnah*, but will also violate another fundamental principle of Islamic law, namely, the principle of individual responsibility.

Thus, the Qur’an says:

وَلَا تَكْسِبُ كُلُّ نَفْسٍ إِلَّا عَلَيْهَا⁸⁹ وَلَا تَزِرُ وَازِرَةٌ وِزْرَ أُخْرَى

[Each soul earns only on its own account, nor does any laden bear another’s load.]⁸⁹

Sarakhsi refers to a provision of a treaty concluded by the Abbasid Caliph Abu Ja’far al-Mansur (d. 158 AH/775 CE) with the Christians of Mosul, which was violated by the

⁸⁵ Qur’an, 33: 36.

⁸⁶ Qur’an 24: 48-50.

⁸⁷ There are certain basic principles which States are not allowed to opt out of. The technical name given to them is ‘peremptory norms of general international law,’ also known as *jus cogen*. Article 53 of the Vienna Convention on the Law of Treaties (1969) states as follows: “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

⁸⁸ *Sahih al-Bukhari*, Kitab al-Buyu’, bab idha-shtarata shurutan fi ‘l-bay’la tahill

⁸⁹ Qur’an, 6: 164.

adversary. When the Caliph asked the jurists if he could commit the same act, Imam Abu Hanifah responded in negative, saying:

You cannot do this because they accepted a condition for you which was invalid, and you accepted a condition for them which was invalid. Every condition that violates the law of Allah is void. And “no laden bears another’s load.”⁹⁰

Hence, Abu Hanifah concluded that if the adversary killed some innocent persons, this does not allow Muslims to kill other innocent people just because they belonged to the community of the adversary. Everyone shall individually bear the consequences of his acts. This precedent clearly shows the limits of reprisal and retaliation.

⁹⁰ Sarakhsi, *Al-Mabsut*, 10: 129.

3. SURVEY, WORKSHOP AND ROUNDTABLE

For verifying the veracity of these theoretical foundations, we decided to conduct a survey of a selected group of scholars in Pakistan. For this purpose, a questionnaire was prepared for wide circulation in religious circles in Pakistan. Afterwards, a two-day workshop was organized for a selected group of scholars and opinion-makers. At the end of the workshop, the questionnaire was again filled by the participants. A detailed analysis of the pre-workshop and post-workshop answers was conducted, and the findings were presented to a group of experts during a roundtable discussion. In light of the feedback of these experts, further improvements were made in the presentation of this work.

QUESTIONNAIRE AND HYPOTHESES

Based on the theoretical foundations, the following hypotheses were made:

1. That some Muslim armed groups do not deem themselves bound by IHL because they consider it an alien system;
2. That for moral disengagement, the armed groups cite the concepts of necessity, coercion and reprisal for their violations of IHL;
3. That providing adequate knowledge about Islamic *jus in bello* and making it part of their training can ensure better compliance by Muslim armed groups.

The questionnaire contained twenty questions in four parts:

- The first part had six questions about the relationship of international law and Islamic law;
- The second part also had six questions about various aspects of Islamic *jus in bello* and conduct of hostilities;
- The third part had five rigorous questions about violations and atrocities during hostilities; and
- The fourth part had three questions regarding detainees during war.

The questions offered multiple choices, but the participants could come up with their own answer if none of the available options would satisfy them.

QUESTIONNAIRE

PART ONE

1. What is the nature of the relationship between modern international law and Islamic law?
Partially compatible.
Incompatible.
Any other (Explain) _____
2. Can contemporary Muslim countries be called *Dar al-Islam*?
Yes.
No.
Any other (Explain) _____
3. Is *khuruj* (armed resistance) against rulers in Muslim countries permissible?
Yes.
No.
Any other (Explain) _____

4. Can Muslim countries sign peace agreements with non-Muslim countries?
Yes.
No.
Any other (Explain) _____
5. What is the underlying cause of jihad?
Disbelief.
Elimination of non-Muslim supremacy.
Aggression (muharabah).
Any other (Explain) _____
6. Is ruler's permission needed for jihad?
Yes.
No.
Any other (Explain) _____

PART TWO

7. Is it necessary to abide by the rules of war?
Yes.
No.
Any other (Explain) _____
8. What is the main cause for violation of the rules of war?
Negligence.
Lack of training.
Any other (Explain) _____
9. If the enemy is violating the rules of war, whether the other party can violate these rules on reciprocal basis?
Yes.
No.
Any other (Explain) _____
10. Is the command of a superior a valid excuse for violating the rules of war?
Yes.
No.
Any other (Explain) _____
11. Where the state has signed a treaty, is it compulsory for individuals to abide by the provisions of the treaty?
Yes.
No.
Any other (Explain) _____
12. Does necessity render the violation of the laws of war permissible?
Yes.
No.
Any other (Explain) _____

PART THREE

13. What is the primary reason for violation of the laws of war by organised armed groups?
Psychological effect of military training.
Cruelty from the enemy side.
Following superior's command.

Any other (Explain) _____

14. What is main reason for targeting mosques, hospitals and other public places?
 Personal interest.
 Psychological problems.
 Retaliation.
 To create chaos, deterrence and inflict maximum damage.
15. Is suicide attack permissible in war?
 Yes.
 No.
 Any other (Explain) _____
16. What is the main cause for suicide attack?
 Sacrifice for ideology.
 Social and financial problems.
 Frustration and psychological problems.
17. What is the best method for implementation of Islamic law in Muslim countries?
 Electoral politics.
 Armed struggle.
 Political protest.

PART FOUR

18. How compliance to the rules of IHL by armed groups may be ensured?
 Imparting Islamic education.
 Enforce sanctions.
 Any other (Explain) _____
19. Is it permitted to kill prisoners of war or take them as hostages?
 Yes.
 No.
 Any other (Explain) _____
20. Is causing physical injury permissible to a suspicious prisoner of war for obtaining information?
 • Yes.
 • No.
 • Any other (Explain) _____

This questionnaire was circulated among 335 scholars belonging to all four provinces of Pakistan as well as the State of Azad Jammu and Kashmir and Gilgit-Baltistan representing the various prevalent schools of thought, i.e. Hanafi (both Deobandi and Barelvi), Shia and Salafi (Ahl al-Hadith).⁹¹ Later, a group of 30 religious scholars and opinion-makers⁹² was invited to attend the workshop. After the two-day workshop on *Ensuring Compliance with IHL: Problems and Prospects*, the questionnaire was again filled by the participants. Details about the participants and the answers they gave before and after the workshop, along with graphs illustrating the data, are given below.

⁹¹ A close-ended online questionnaire was distributed among different Ulama (*Shari'ah* scholars) of all schools of thought across Pakistan, including Gilgit-Baltistan and Azad Jammu and Kashmir. The questionnaire was distributed through email and other social media tools and in hard copy as well.

⁹² Out of the responses of the pilot survey we selected and invited 40 *Shari'ah* scholars from all over Pakistan including five female scholars on the basis of their qualification and experience. Out of these 40 *Shari'ah* scholars a total number of 30 participants attended the workshop.

TWO-DAY WORKSHOP ON ENSURING COMPLIANCE WITH IHL: PROBLEMS AND PROSPECT

Thirty participants attended the workshop which was moderated by Dr. Muhammad Asghar Shahzad. Four different presenters addressed the participants. Presentations were followed by lively question and answer sessions.

On the first day of the workshop, Dr. Ziaullah Rahmani gave a detailed presentation on the mandate and working modalities of the ICRC. After this, Dr. Muhammad Mushtaq Ahmad gave an overview of various aspects of the Islamic law of armed conflict. Dr. Asif Khan presented a general overview of the Geneva Conventions, its Additional Protocols and general principles of international humanitarian law. Finally, Dr. Muhammad Munir gave an analysis of the rules and principles of Islamic law for conduct of hostilities. He argued that the Prophet (peace be upon him) and his successors did not allow the destroying of buildings, cutting down trees, committing perfidy, breaching the trust of the enemy, the killing of women, children, old, sick, wounded and envoys. He added that the destruction of harvests, livestock and forests was prohibited. The same was the rule for looting, plundering and acts of indiscipline.

Instead of lecturing on the issue, the instructors raised questions and made the participants answer them and, thus, draw conclusions for themselves on issues of individual and command responsibility and reasons for non-compliance with the law of armed conflict. The discussion mostly revolved around the concepts of necessity, duress, coercion and reprisals.

At the end of the day, Murad Ali and Muhammad Rafeeq Shinwari presented an overview of the ICRC study titled *The Roots of Restraint in War*. After explaining the background of that study, they discussed various groups participating in armed conflict and sources of influence on the behaviour of group members. They explained that for state forces and centralized non-state actors, these sources of influence included: top leadership, junior commanders, written rules of the groups and mate-ship; while for non-centralized non-state groups the objectives of such groups and the global ideology to which these groups associate themselves can form the sources of influence. They also highlighted the 'process of socialization', by which the principles underpinning the rules of IHL may be instilled into the behaviours of weapon-bearers. Dr. Mushtaq concluded the session by recommending to the participants the Platonic dialogue *Crito* in which Socrates analyzed the foundations of the obligation to obey the law.

The second day started with Dr. Mushtaq's presentation on the rules and principles of Islamic law regarding coercion, necessity and reprisals. This was followed by the presentation of Siraj Khan Wazir on the IHL perspective on coercion, necessity and reprisals. Both scholars conducted group studies on fictitious and real-life scenarios, which greatly benefited the participants.

At the end of the workshop, the questionnaire was again filled by the participants. As shown below, some profound changes in the opinions of the participants were observed.

DATA ANALYSIS

DEMOGRAPHIC INFORMATION

The scholars of different schools of thought participated in this survey. There were 25 male and 5 female participants as seen below. (Figure – 1, 2).

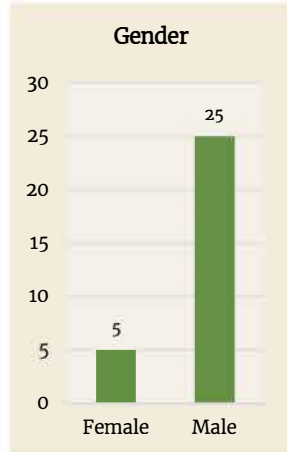


Figure 1: Gender

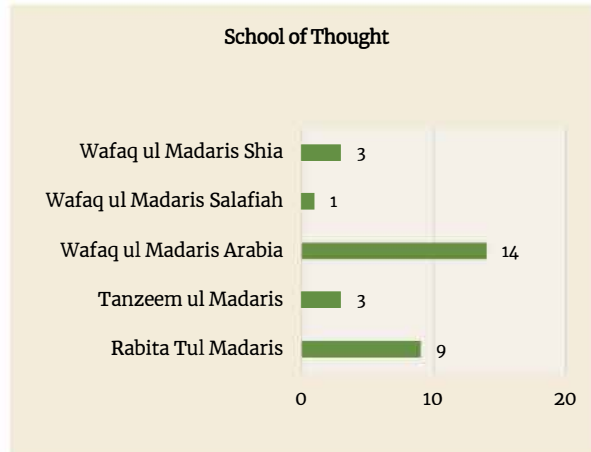


Figure 2: School of Thought

The scholars participated from different provinces of Pakistan, with 12 participants from Khyber Pakhtunkhwa, 10 participants from Punjab, 5 from Islamabad, 2 from Azad Jammu and Kashmir, and 1 from Gilgit-Baltistan. (Figure - 3) The participants were between 21 and 48 years of age. (Figure - 4)

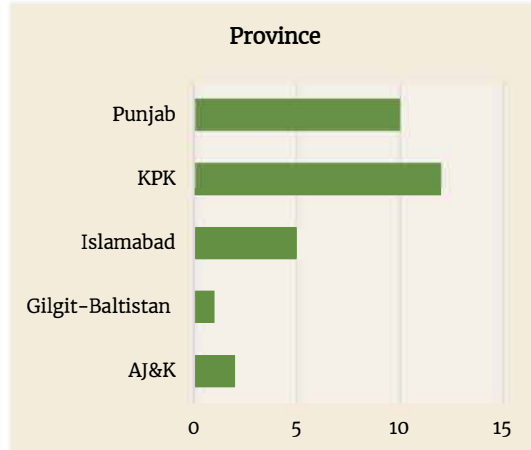


Figure 3

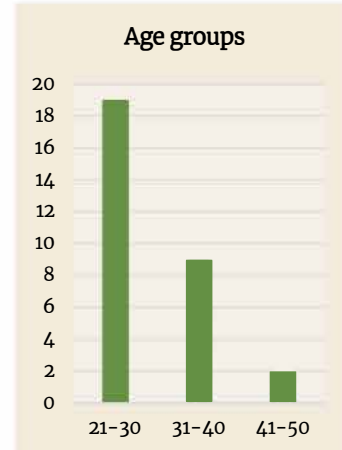


Figure 4

QUESTION NO. 1

The first question was about the relation between Islamic law and modern international law. Before the workshop, 27 participants were of the view that the prevailing international law is compatible with Islamic law, while 3 participants were of the view that the prevailing international law is not compatible with Islamic law. After the workshop all participants agreed that the prevailing international law is compatible with Islamic law. (Figure – 5)

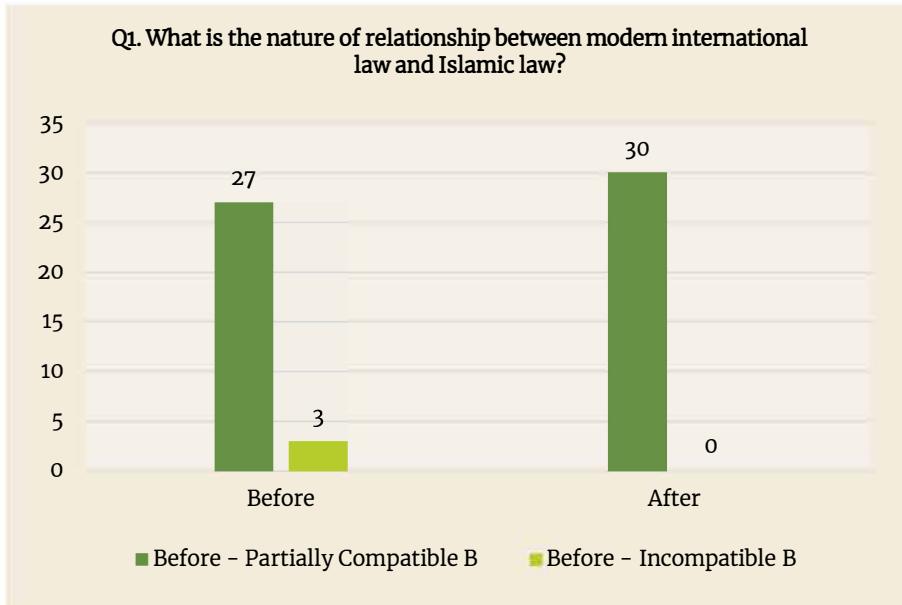


Figure 5

QUESTION NO. 2

“Can contemporary Muslim countries be called *Dar al-Islam*?” Before the workshop, 26 participants were of the view that the Muslim countries are *Dar al-Islam* and 4 were against. After the workshop, one participant changed his opinion. (Figure – 6)



Figure 2

QUESTION NO. 3

“Is *khuruj* (armed resistance) against rulers in Muslim countries permissible?” In response to this question, before the workshop, 12 participants answered in affirmative and 18 participants disagreed. After the workshop, 15 participants answered in affirmative and 15 participants expressed their disagreement. (Figure – 7)

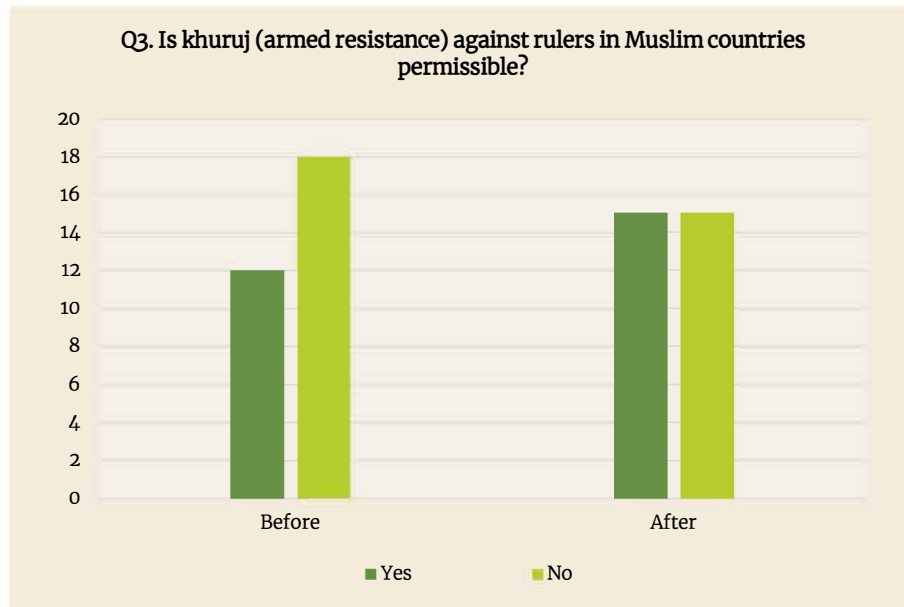


Figure 3

QUESTION NO. 4

“Can Muslim countries sign peace agreement with Non-Muslim Countries?” Before the workshop, 29 participants answered in affirmative and one participant disagreed. However, after the workshop, all participants answered in affirmative. (Figure – 8)



Figure 4

QUESTION NO. 5

“What is the underlying cause of jihad?” Only 4 participants were of the view that the *ratio* of jihad is disbelief, 15 were of the opinion that elimination of supremacy of non-Muslims was the *ratio* and 11 thought that aggression (*muharabah*) was the *ratio*. However, after the workshop, 17 participants opted for aggression, while the number opting for elimination of supremacy of non-Muslims dropped from 15 to 10. (Figure – 9)

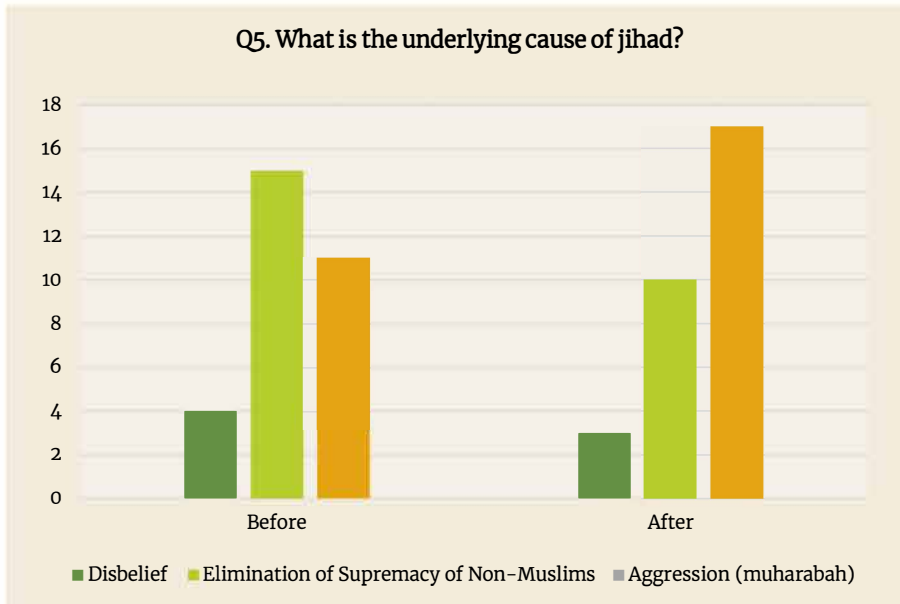


Figure 5

QUESTION NO. 6

“Is the ruler’s permission needed for jihad?” Before the workshop, 23 participants answered in affirmative, while 5 answered in negative. However, after the workshop, one additional participant answered in affirmative. (Figure – 10)

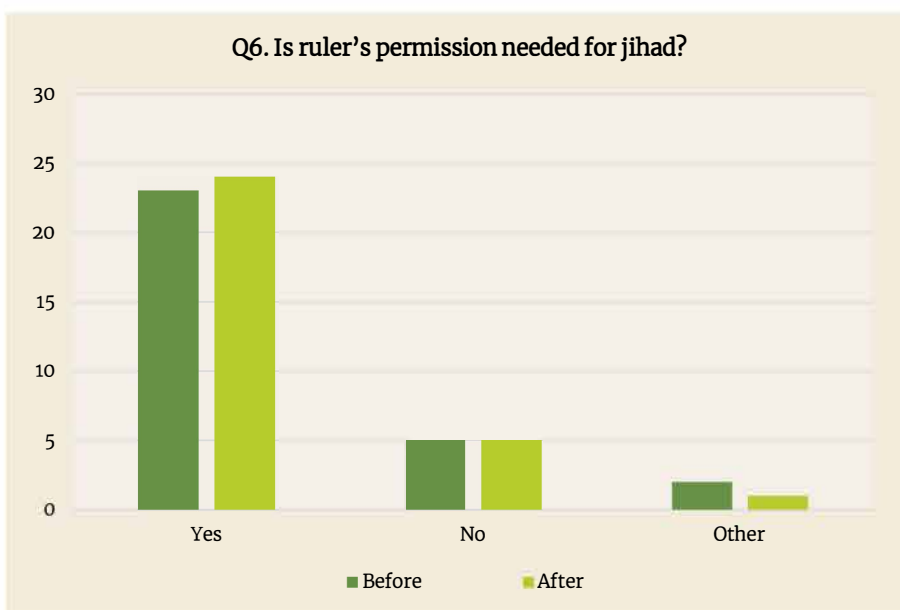


Figure 6

QUESTION NO. 7

“Is it necessary to abide by the rules of war?” 28 participants agreed before the workshop, while 2 disagreed. However, after the workshop, these 2 participants expressed their opinion as “Yes, if laws were not against Islam” and “Yes, but if the enemy violates the law, then not” respectively. (Figure – 11)



Figure 7

QUESTION NO. 8

“What is the main cause for violation of the rules of war?” Before the workshop, 9 participants opted for “Ignorance”, 9 for negligence, 4 opted for duress and 8 came up with their own options. However, after the workshop, the participants changed their views. (Figure – 12)

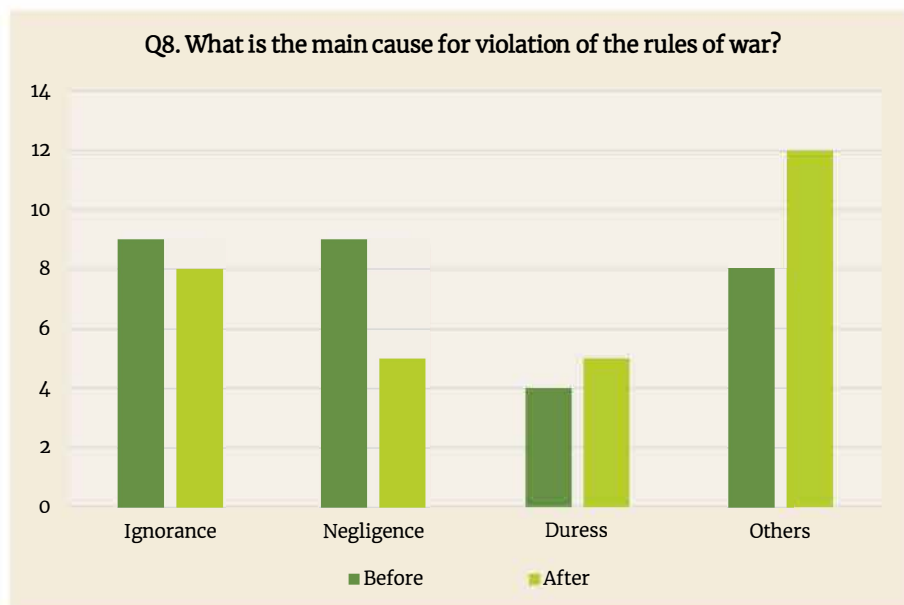
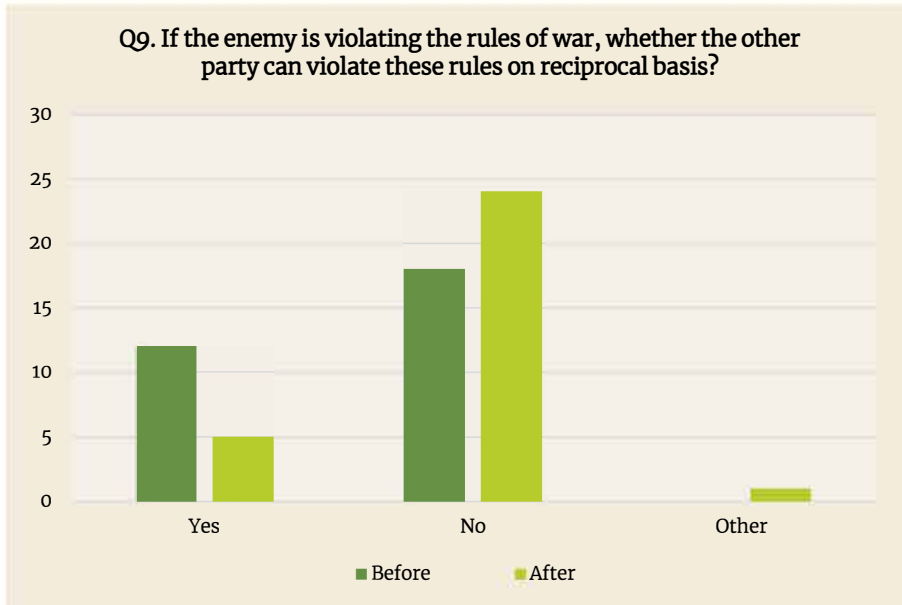


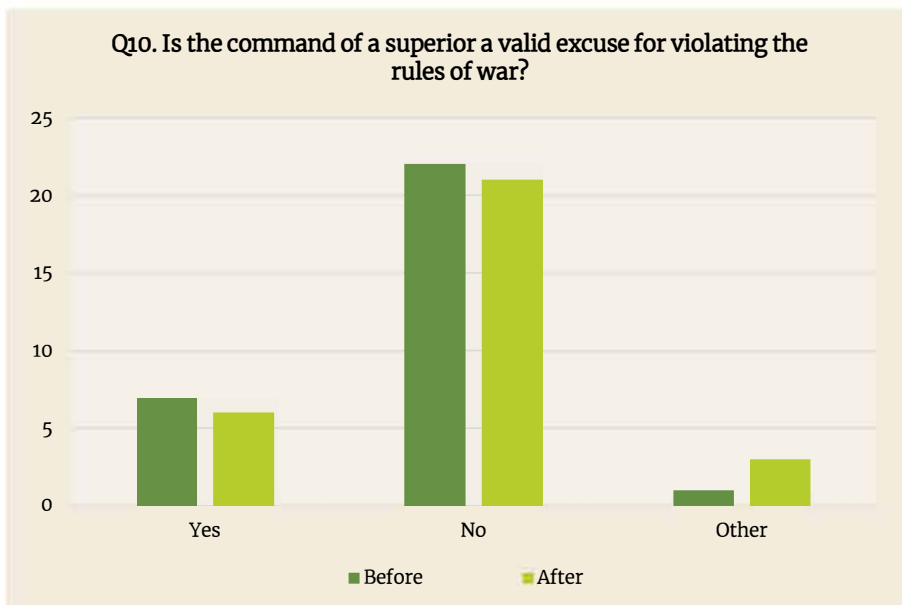
Figure 8

QUESTION NO. 9

“If the enemy is violating the rules of war, whether the other party is allowed to violate these rules on reciprocal basis?” 12 participants answered in affirmative, 18 participants disagreed. However, after the workshop, only 5 participants answered in affirmative, while 25 answered in negative and one conditionally agreed. (Figure – 13)

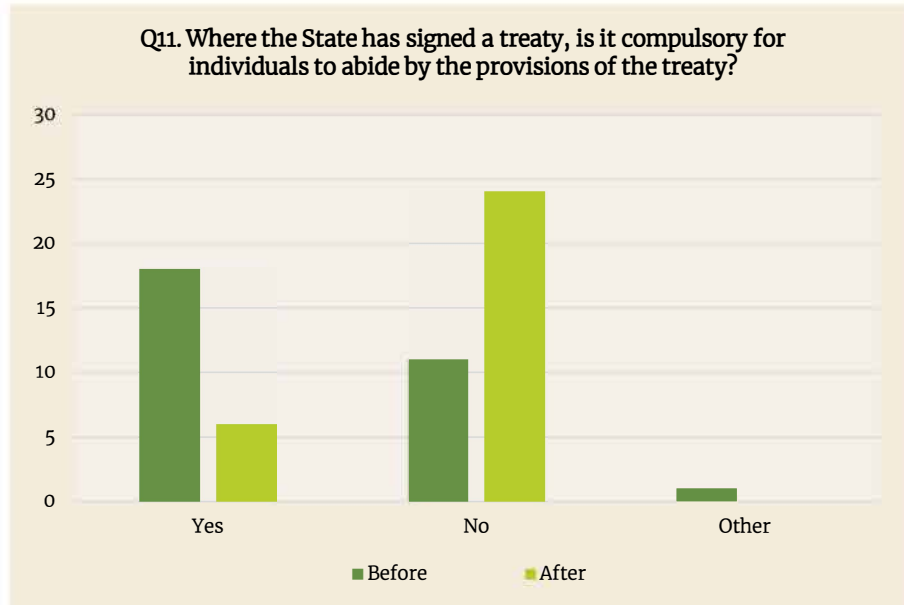
**Figure 9****QUESTION NO. 10**

Is the command of a superior a valid excuse for violating the rules of war? Seven participants before the workshop and six participants after the workshop answered in affirmative. (Figure – 14)

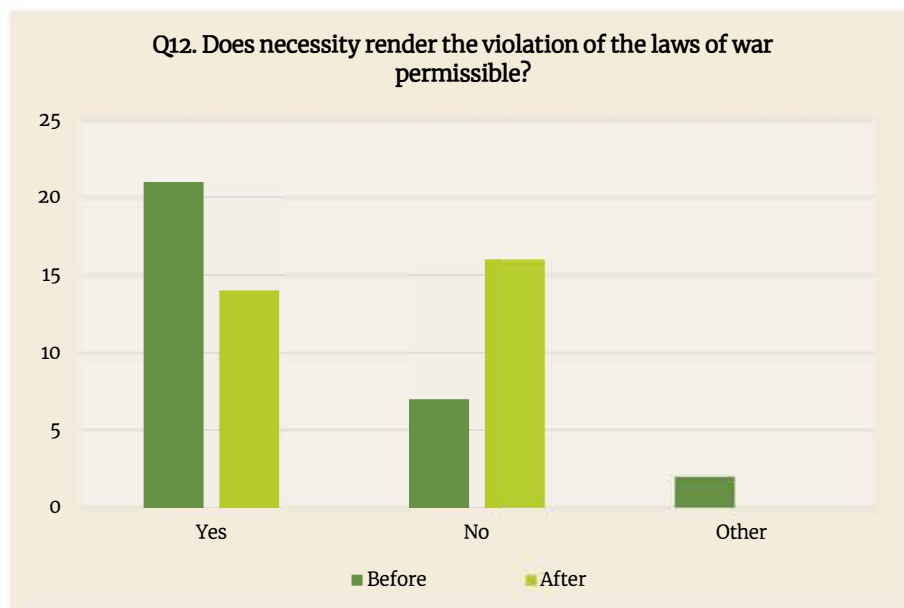
**Figure 10**

QUESTION NO. 11

Where the state has signed a treaty, is it compulsory for individuals to abide by the provisions of the treaty? Before the workshop, 18 participants agreed, 11 disagreed and one participant gave details. However, after the workshop only six participants answered in affirmative, while 24 expressed their disagreement. (Figure - 15)

**Figure 11****QUESTION NO. 12**

Does necessity render the violation of the laws of war permissible? Before the workshop, 21 agreed and seven disagreed. However, after the workshop, the number of those in agreement dropped to 14, while the number of those who answered in negative rose to 16. (Figure - 16)

**Figure 12**

QUESTION NO. 13

In response to the question “What is the primary reason for violation of laws of war by organised armed groups?”, before the workshop, 18 participants mentioned “violations from the enemy side”, 4 “following superior's command”, 7 “psychological effect of military training” and one agreed with all of these. However, after the workshop, 15 participants were of the view that “violations from the enemy side” is the main reason, 1 opted for “following the superior’s command”, 4 “psychological effect of military training”, and 8 agreed with all of these. (Figure – 17)



Figure 13

QUESTION NO. 14

“What is the main reason for targeting mosques, hospitals and other public places”? Before the workshop, 18 participants opted for “retaliation”, four for “duress”, five for “psychological reasons” and three mentioned other reasons. However, after the workshop, 16 participants mentioned “retaliation”, four “duress”, and one “psychological reasons”, while nine mentioned other reasons. (Figure – 18)

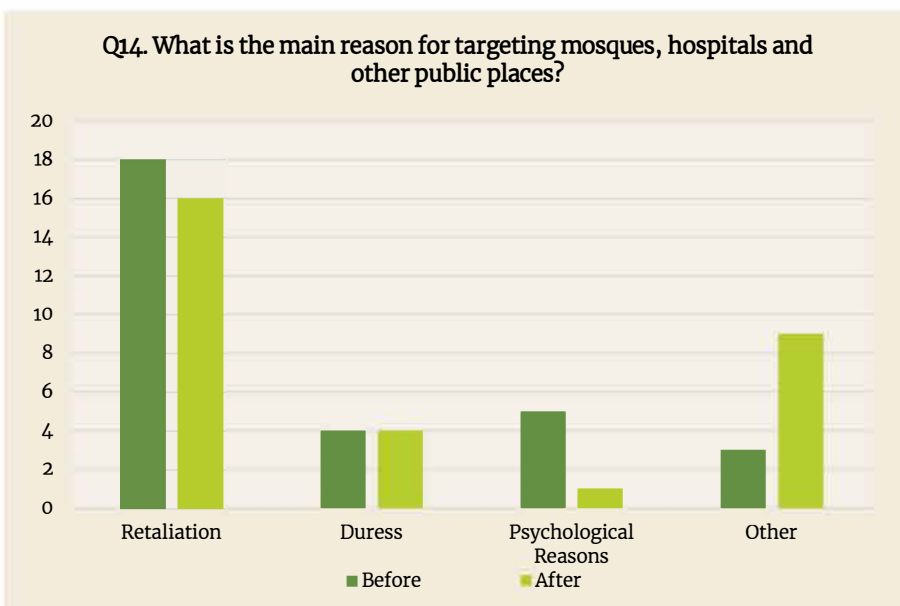


Figure 14

QUESTION NO. 15

In response to the question about suicide attacks against the enemy, before the workshop nine participants were of the opinion that it was permissible, while 15 disagreed and six conditionally allowed it. However, after the workshop, only six thought it was permissible, 22 disallowed it and two conditionally allowed it. (Figure-19)

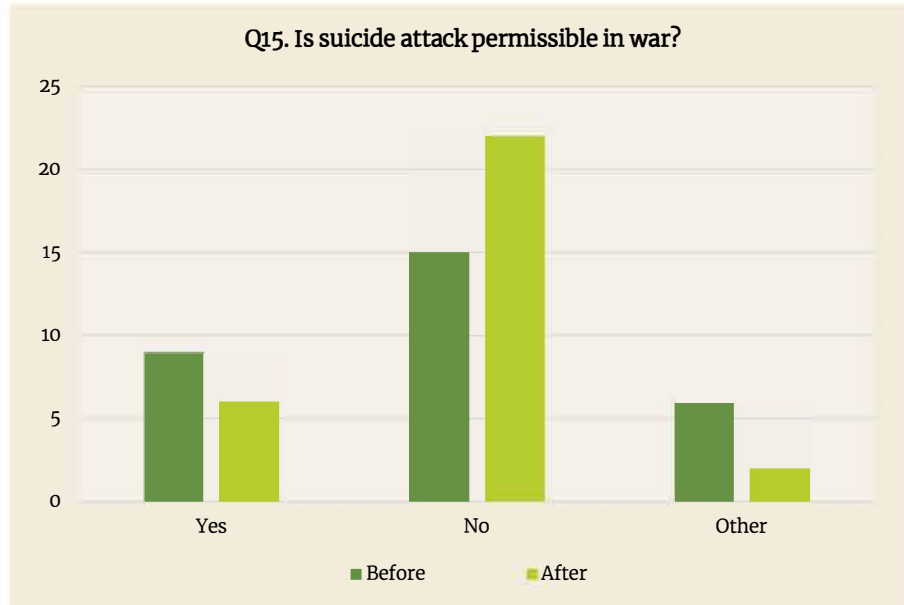


Figure 15

QUESTION NO. 16

When asked about the reason for suicide attacks, before the workshop, 20 participants thought it was “sacrifice for ideology”, four opted for “social and financial problems”, two chose “frustration and psychological problems” and four mentioned other views. However, after the workshop, eight opted for “frustration and psychological problems”, three for “social and financial problems”, 14 for “sacrifice for ideology” and five mentioned other views.

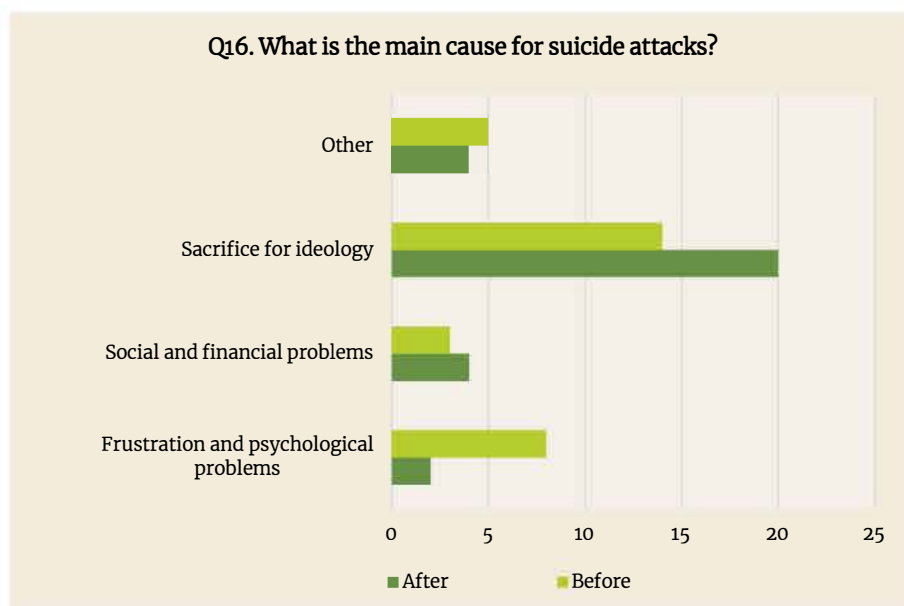


Figure 16

QUESTION NO. 17

“What is the best method for implementation of Islamic law in Muslim countries?” 19 participants before workshop and 20 participants after it opted for electoral politics. (Figure - 21)

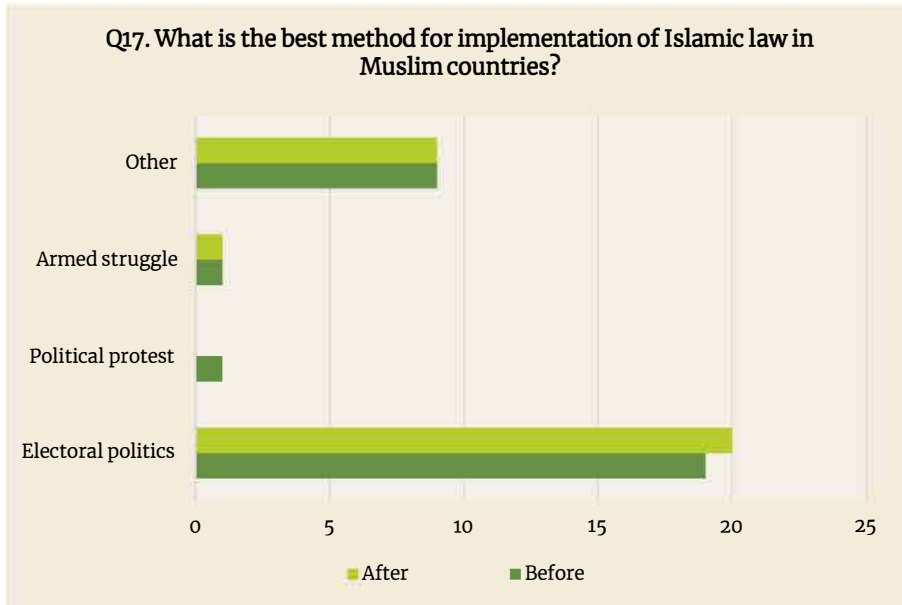


Figure 17

QUESTION NO. 18

“How compliance to the rules of IHL by armed groups may be ensured”? Before the workshop, 24 participants chose “imparting Islamic education”, and one emphasized on enforcing sanctions, while five opted for both of them. After the workshop, there was a slight change. (Figure – 22)



Figure 18

QUESTION NO. 19

“Is it permitted to kill prisoners of war or take them as hostages?” Before the workshop, 14 answered in affirmative, 15 in negative and one opted for other. However, after the workshop, only four answered in affirmative and 26 answered in negative. (Figure – 23)



Figure 19

QUESTION NO. 20

“Is causing physical injury permissible to a suspicious prisoner of war for obtaining information?” Before the workshop, 13 answered in affirmative, 14 answered in negative and three conditionally agreed. However, after the workshop only four answered in the affirmative, while 26 answered in the negative. (Figure – 24)

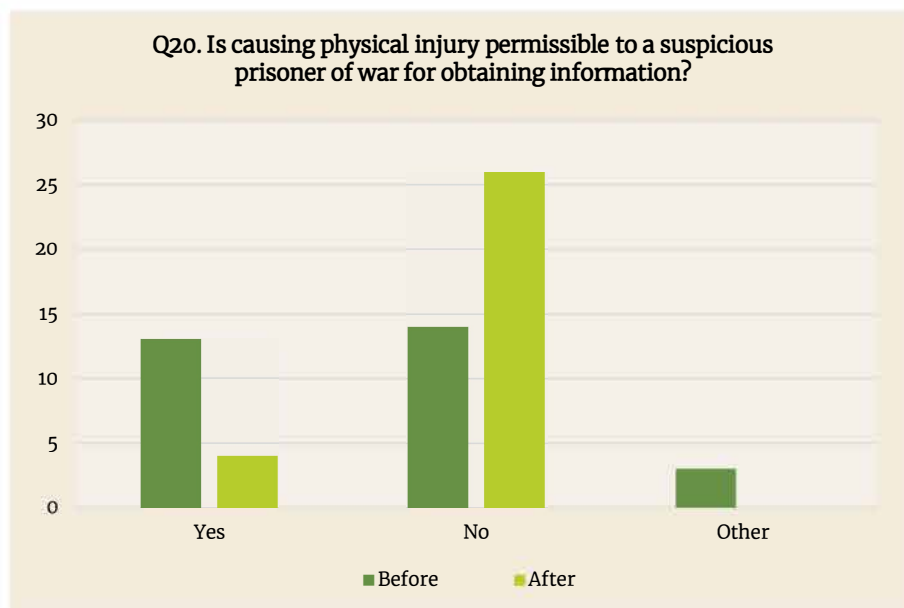


Figure 20

ROUNDTABLE

Before finalizing the report, a roundtable was held in which Dr. Inamullah, Director-General, Council of Islamic Ideology, Dr. Zahid Siddique Mughal, Associate Professor, School of Social Sciences, NUST, and Dr. Ataullah Khan Wattoo, Assistant Professor, Department of Law, IIUI, were invited to critically review the data analysis. Several improvements were made in light of their invaluable suggestions.

4. CONCLUSIONS

This study affirms the hypotheses which were formulated based on a theoretical framework and a literature review. They are:

1. That Muslim armed groups often do not deem themselves bound by IHL because they consider it an alien system;
2. That for moral disengagement, the armed groups cite the concepts of necessity, coercion and reprisal for their violations of IHL;
3. That providing adequate knowledge about Islamic *jus in bello* and making it part of their training can ensure better compliance by Muslim armed groups.

In this regard, the famous incident of 'Ali b. Abi Talib (God be pleased with him) may also be cited wherein he was about to kill his adversary during combat but let him go when he abused him. What prevented him from killing him, except his God-consciousness and faith? In a Muslim context, therefore, it is very important to show the religious roots of the humanitarian obligations of weapon-bearers. This will, surely, help in improving compliance with the law of armed conflict.

This study, therefore, emphasizes the need for further research on issues of armed conflict from the perspective of Islamic law. For this purpose, it specifically recommends translating some of the classic texts into English, Urdu and local languages. It also recommends thematic studies for exploring the principles of Islamic law on some significant issues, such as necessity, reciprocity, duress, the notion of direct participation in hostilities and protection of non-combatants, particularly religious and medical personnel as well as protection of religious and cultural objects and places, and the like. It further recommends actively engaging religious scholars and opinion-makers for better dissemination of IHL and for exploring compatibility of IHL and Islamic law.

The International Committee of the Red Cross (ICRC), established in 1863, is one of the world's largest and oldest humanitarian organizations. Three-time Nobel Prize recipient, the ICRC works to help people affected by armed conflicts and other situations of violence. The organization has been working in more than 80 countries and is also at the origin of the International Red Cross and Red Crescent Movement. Building on the core principles of humanity, the ICRC in Pakistan has been serving the needs of the vulnerable populations since 1947, when the government of Pakistan requested it to respond to the humanitarian consequences of the partition. In Pakistan, the ICRC strives to create lasting change in the fields of health, physical rehabilitation, community risk education, restoring family links, promotion of international humanitarian law, and humanitarian forensics.

The Shari'ah Academy, International Islamic University, Islamabad, since its inception, has been playing an active role for a better understanding of the Shari'ah perspective of various legal disciplines, through training programmes, research and publications, and correspondence courses. The Academy has so far published about 130 titles comprising translations of multivolume reference books, research-based original titles and monographs.



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