Rights of Armed Non-State Actors: A Comparative Analysis of Islamic and International Humanitarian Laws in Context of Contemporary International Crises

By:

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Peace and Conflict Studies

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Dedication

To my grandfather, Muhammad Nawaz Khan.

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Abstract

The Islamic law of war and International Humanitarian Law (IHL), both aim at preserving the human dignity of combatants and non-combatants by defining the parameters for the belligerent parties in the conduct of war. Armed non-state actors (ANSAs) involved in conflict in recent years, however, negate this very principle of avoiding unnecessary suffering by targeting civilians and the most vulnerable segments of society. Rational choice of employing violence over non-combatants in pursuit of their objectives by armed non-state actors weakens legal position of IHL that demands to be applied equally to all sides in every armed conflict. Social constructivism's framework is used to analyse how identities of actors involved in the conflict are constructed through their interaction. This study aims at highlighting an alternative discourse other than realism to avoid state centric approach towards international law. This is based on whether inequality between armed non-state actors and state's armed forces is encouraged or prevented through articles of IHL. In order to comprehend complexities of the stated problem, 23 interviews were conducted from people that had theoretical or practical knowledge about the subject. Experts of international law and scholar of Islamic law were consulted for theoretical understanding, where as members of Pakistan Army and former militants/ effectees of conflict were given equal weightage to know practical realities of the conflict. Recognition of combatant status for members of armed group and devising a deed of commitment to engage some armed non state actor are key findings of this study. Applicability of these conclusions on contemporary conflicts may result in considerable reduction in violence witnessed around the world.

Key words: Armed non-state actors, International Humanitarian Law, Islamic law on armed conflict, Social constructivism, Global war on terror, POWs, Enemy combatant, Terrorism.

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LIST OF ABBREVIATIONS

IHL: International Humanitarian Law

NIAC: Non-international armed conflict

ICRC: International Committee of Red Cross

ANSAs: Armed non state actors

NSAs: Non state actors

MNCs: Multinational corporations

INGOs: International non-governmental organizations

ICC: International Criminal Court

PMSC: Private Military and Security Companies

FLN: Front De Liberation Nationale (National Liberation Front)

VCLT: Vienna Convention on the Law of Treaties

ISIL: Islamic State of Iraq and Levant or Islamic State

LTTE: Liberation Tigers of Tamil Eelam

GWOT: Global War on Terror

NCHR: National Commission for Human Rights

ILAC: Islamic Law of Armed Conflict

CHAPTER ONE:

INTRODUCTION

1.1 Introduction

War is not just a well-established historical fact but also an unchangeable reality in the foreseeable future. The death and mayhem caused by wars over the years has encouraged the sympathizers of humanity to establish a set of laws to regulate the conduct of hostilities. These laws established through international treaties and customary international law are not a modern innovation but have their basis in ancient history. Hammurabi, the King of Babylon established laws to protect the weak from the oppression of the strong. Various religious texts like Mahabharata, Bible and Quran also contain rules that invoke respect for the adversary and limit the tactics used in war within humane parameters (Mahboub, 2007). In the nineteenth century, however, the codifying of these set of rules and law began and are now known as 'International Humanitarian Law' (IHL). These modern set of laws have two streams. The Hague laws pertaining to the limitations or prohibitions on certain means and methods of warfare and the Geneva laws seeks to protect the civilians and those who are no longer involved in fighting (Scott, 2004).[1]

IHL functions around the central idea of treaties and conventions recognized by states on the conduct of international and non-international conflicts. The conventional warfare between states, however, has been evolving in the past few decades especially after the initiation of the so-called Global War on Terror (GWOT). Growing role of armed non-state actors (ANSAs) in the world politics has raised serious questions on the adequacy of IHL in

[1] Hague laws or law of The Hague are colloquial terms referring to Hague Conventions of 1899 and 1907 where a series of international treaties were negotiated at two international peace conferences. Whereas, Geneva laws include four Geneva Conventions of 1949 and three Additional Protocols of 1977. First Geneva Convention protects wounded and sick soldiers on land during war, second Geneva Convention pertains to wounded, sick and shipwrecked military personnel at sea during war. Third Geneva Convention relates to prisoners of war and fourth Geneva Conventions offers protection to civilians, including in occupied territory. Additional Protocols were further added to strengthen the protection of victims of international and non-international conflicts.

present times.[2] Asymmetrical warfare employed by ANSAs especially against civilians has exposed the grey areas in the international law, as non-state actors cannot be parties to treaties governing the conduct of armed conflict.

Additionally, International Humanitarian Law applies only in situations of armed conflicts and it does not regulate terrorist acts committed in peacetime. Domestic anti-terrorism law regime devised to address peacetime incidents have loopholes of its own including vague definition of terrorism used more for political victimization rather than punishing actual terrorists. Factors (Bassiouni, 2008) that demand special attention for armed non-state actors in respect of International Humanitarian Law is the asymmetrical nature of relationship between non-state actors and the government they oppose. Such unequal relationship compels them to use unlawful means of warfare to equalize their economic and military imbalance. Moreover, the decentralized command and control of militias of non-state actors lack proper training and discipline of a proper army, hence has room for dissent among individuals on the tactics used to conduct hostilities. Furthermore, no expectation of accountability encourages non-compliance in non-state actors. These factors and other contextual political scenarios hinder voluntary compliance to the International Humanitarian Law by armed non-state actors. Universal jurisdiction is further complicated with not having agreement on the definition of terrorism as an international crime under customary international law (Cassese, 2001). Moreover, the fact that only states can become parties of treaties (Scott, 2004) governing international humanitarian law makes the situation more uncertain and creates loopholes in the legal protection of the combatants as well as non-combatants.

[2] ANSAs are at times successful partially in influencing and pressurizing governmental policies, like the hijackers of Indian airliner negotiating for release of prisoners (24 December, 1999), or become full members of international political arena like Taliban forming government, in August 2021, after US withdrawal in Afghanistan.

It is also important to evaluate the Islamic law specifically on the issue of armed conflict as in the contemporary world the most dangerous armed non-state actors claim their affiliation with this religion and attempt at justifying their actions through its teachings. Islamic military jurisprudence provides clear ethical guidelines for the conduct of war and has unambiguous injunctions regarding protection of the non-combatants and enemy property. Abu Bakr al-Siddiq, the first Caliph of Muslims, gave these instructions to his armies: "I instruct you in ten matters: Do not kill women, children, the old, or the infirm; do not cut down fruit-bearing trees; do not destroy any town . . ." (Malik, 1985, Kitab al-Jihad; Morkevičius, 2018). Armed non-state actors claim to be fighting in the name of religion, however, ignore the privileges of the civilians and specifically focus their brutality on the soft targets defying religious and humanitarian laws. Islamic law emphasizes that state has the authority over the use of force against external and internal threats and respect for authority by the people is generally considered obligatory. Allah commands in Quran: "O you who believe, obey God and obey the Messenger and also those in charge among you" (The Holy Quran 4:59). Armed non-state actors defy this principle when they challenge the writ of the state.[3] Quran identifies the actions of these elements as: "And when it is said to them: - Do not make mischief in the land, they say: We are but peace-makers." (The Holy Quran 2:11). The punishment prescribed in Quran of such wrong doers is also very severe both in this world and hereafter (The Holy Quran 5:33).

For the sake of clarity international armed conflicts are generally considered jihad under Islamic law of armed conflict[4], whereas internal strife or NIACs are further divided into four categories according to most Muslim jurists: "*ḥurūb alriddah* (wars of apostasy), *qitāl al-bughāh* (fighting against rebels or secessionists), *ḥirābah* (fighting against bandits, highway

[3] Except for the few cases of justifiable rebellion like against an oppressive ruler or enjoying good and forbidding evil. This too has to be done with permissible *modus operandi* in order to abide by the Islamic law of conflict.

[4] Particularly referring to a Muslim state army fighting non-Muslim belligerents.

robbers, terrorists or pirates) and *qitāl al-khawārij* (fighting against violent religious fanatics)" (Al-Dawoody, 2017, p 7). Distinction between these categories are necessary as rules of war differ from one type to another (Al-Dawoody, 2015). *Hirabah* (unlawful warfare) is a kind of robbery that is used to spread fear and helplessness (Jackson, 2001). Whereas, qital al-khawarij (fighting against violent religious fanatics) is an armed struggle against religious deviants or extremists. These two kinds of violent opposition to the government have the closest resemblance to the modern-day phenomenon of terrorism. Although categories of *ridda* (apostasy), *baghy* (rebels) and *khuruj* (expulsion) are dealt under the law of war in Islamic jurisprudence. Yet the act of *hirabah* is to be treated as a violation of criminal law of the land (Tabassum, 2020). Islamic law commands to treat such a violation as a *hadd* (limit), having fixed punishment, which is compulsory to be imposed as a right of God. Punishment for such an act is severe in order to create deterrence. Thus, both International Humanitarian Law and Islamic Law aim at preserving human dignity and limit the ills of war (Shah, 2011), whereas, armed non-state actors (terrorist to be specific) thrive on harming humanity. Thus, there is a need of establishing a nexus between these two bodies of laws and to evolve international laws that address the contemporary issues of warfare and to serve humanity better.

1.2 Theoretical Framework

Key role of International law is norm creation, their evolution and destruction (Khen, 2016). In doing so it is influenced by moral opinions and moral standards are also affected by it as a consequence, thus debate on moral theories in context of finding ways to include ANSAs in law creation is significant to resolve the issue of disregard for IHL by ANSAs (Koller, 2005). Additionally, social creation of identity and role of norms in international politics and international law is an emerging dimension of social constructivist school of thought. Social constructivist worldview basically is an attempt to analyse a problem thoroughly before reaching a solution that is socially situated and constructed through interaction with all stake

holders involved (Agius, 2013). In this perspective it is very promising to explain how social norms can be created through dialogue/interaction and resultantly impact actors. These thinkers interested in norms are labelled as 'constructivists'. This school of thought basically challenges rationalist theories such as neorealism and neoliberalism, thus providing alternative framework to security studies that is not just based on power and interests. Constructivists are based on three ontological ideas. Firstly, it posits that normative or ideational structures are as much important as the material ones, if not more so. This ensure that ideas are at the centre stage and are privileged, rather than giving material entities like state interest the complete focus as is done by neorealist and neoliberalists. Secondly, constructivists believe that identities of the actors are significant as they decide on how they behave and the goal they pursue. These identities are also not predetermined or given, instead they are constituted through interaction. Thirdly, social constructivists address the agency-structure debate by suggesting that agents and structures are mutually constituted, which means people create the world they live in and it influences them as well (Agius, 2013).

International law's focus on norm creation, evolution and their destruction makes international law theorists especially close to the constructivists. Norms are standards of behaviours created in a social setting due to mutual expectation. Although many social norms never transform into legal norms, yet many pluralist lawyers keep no distinction between law produced by states and norms formed by voluntary associations, as both are equally effective in shaping behaviour. On the other hand, the international lawyers with positivist frame of mind, believe in the necessity of the fixed state hierarchies for the creation of legal norms and law can exist regardless of its link to social norms (Brunnée & Toope, 2010). Yet some other theoretical perspectives fall between these two points of view or include some elements of both, for providing competing descriptions of how international law works.

Furthermore, social constructivism framework redefines the ethical decision-making process as it aims at making it more interactive rather than an individual or intrapsychic practice. Ethics being the rules that define the good or bad behaviour. This approach involves negotiating, assenting and at times even arbitrating to make the process more successful (Cottone, 2001). Moreover, social and cultural factors are also incorporated in determining what an acceptable ethical practice is. Need for establishing universality of ethics is the need of time as now it's widely accepted that moral norms and ethics matter in world politics (Price, 2008). Social constructivist theoretical contenders defend ethical positions in the norms of warfare in empirical terms by showing their necessity rather than claiming normative grounds that such norms are ethically desirable (Price, 2008). Based on this idea various moral theories and ethical conceptions are evaluated to judge the rights of armed non-state actors in the contemporary international crises like recently witnessed in Afghanistan, Pakistan and Syria, just to name a few. Required are the ethics that puts forward the principle of universality based on the idea that respect for law can only be created when individual impacted by it are contributing in its formation and a rational consensus is reached rather than the law created by the powerful becomes binding on others.

A more encompassing approach towards ethics while considering social constructivism is establishing moral law by giving equal weightage to the opinions of those upon which it becomes binding. Majority of IHL practitioners believe that customary international law and additional protocol II is binding even on those armed non-state actors that are not parties to treaties of IHL (Bellal & Heffes, 2018). Whereas, constructivists would offer a different path, which is more appropriate as it recognises that it's not legitimate to be legally bound by something in whose creation your opinion was not sought. Therefore, ethics and norms in constructivist framework can offer a solution to the problem faced by International Humanitarian law in the respect of armed non-state actors by either getting consent from them

for the applicability of the law or make them parties while its formation. Furthermore, these actors not only infringe upon the rights of others but at the same time demand the fulfilment of their rights. They neglect their duty in an armed conflict but are not willing to give up their rights. Thus, the dilemma of contemporary conflicts is hinged on combatants not respecting rights of other while demanding their rights to be fulfilled. Analysing competing moral theories and religious teachings in this perspective may offer a plausible solution to this problem.

1.3 Research Questions

The specific goals of this study are defined by the following key research questions:

Question 1: What are the criteria to legally categorize armed non-state actors under International Humanitarian Law and Islamic Law of armed conflict?

Question 2: Who has the authority to categorize and label armed non-state actors under International Humanitarian Law and Islamic Law of armed conflict?

Question 3: What are the distinguishing criteria between some ANSAs regulated under international law and others under the domain of national laws?

Question 4: How to make rules of International Humanitarian Law and Islamic Law of armed conflict binding on states and ANSAs?

1.1 Research Hypothesis

H_0: Rights of armed non state actors (ANSAs), protected under Islamic and International Humanitarian Law, are invalidated due to their subjective categorisation in contemporary international crises.

H_1: Rights of armed non state actors (ANSAs), protected under Islamic and International Humanitarian Law, are validated despite of their subjective categorisation in contemporary international crises.

1.5 Methodology

Exploratory and comparative research methodologies were employed to judge the articles of treaties concerning armed non-state actors in International Humanitarian Law and primary sources of Islamic Law (i.e. The Holy Quran and the Sunnah). It was analysed whether dominance and inequality are enacted, reproduced or resisted by the text of laws in the social and political context through descriptive research. Data collection was done through interviews on how power relations are established and reinforced by the laws on armed conflict especially for armed non-state actors. Particularly, Article 3, common to all Geneva Conventions and Additional Protocol II relating to non-international conflicts were evaluated as they are directly related to non-international armed conflict (NIAC) usually involving armed non state actors (ANSAs). Secondly, this research also employs comparative methodology as it attempts at identifying, analysing and explaining similarities and differences between IHL and Islamic Law on armed conflict.

Research was further augmented by face-to-face interviews conducted with the help of a semi-structured questionnaire (See Appendix 1). Renowned lawyers specializing in IHL were interviewed to understand the intricacies involved in international law making. High ranking officers of Pakistan Army, police and intelligence organizations were also interviewed to encompass practical realities of the armed conflict. Additionally, scholars of Islamic jurisprudence and Fiqh were interviewed to understand Islamic law regarding armed conflict in depth. In order to include the perspective of the opposite side, former militants that are being rehabilitated after the conflict, were also included along with few effected in the conflict area. In total about 23 interviews were conducted to enrich this qualitative research that is undertaken (See Appendix-2). Furthermore, the conclusions drawn were analysed with contemporary international crises to prove its generalizability.

As for the procedure of conducting these interviews, the sample was first selected through snowball sampling as the interviewees were experts in their relevant fields. Then the interviewees were approached with a consent form (See Appendix-3) to formally ask their approval for participation in the study. During the course of face to face interviews, the participants usually replied to the questions in English language, however, Urdu was also used, which was later translated to English by the researcher while transcribing the interviews. Few interviews of former militants were conducted in Pashto language. As the researcher does not speak Pashto and these participants were uncomfortable being interviewed by a female, assistance from a Pashto speaking colleague, belonging to Bajour Agency, tribal district, Khyber Pakhtoonkhawa (area of conflict) was taken. Former militants had some level of trust and comfort with the chosen interviewer as they knew him previously through some acquaintances or from belonging to the same area. Pashto speaking colleague also assisted in translating and transcribing these interviews in English, to avoid any mistakes while comprehending the dialect or context of the statement. In order to ensure diversity Punjabi Taliban particularly former members of JuA (Jamat-ul-Ahrar), predominantly operational in Lahore, were also interviewed.

Each group of interviewees was interviewed based on separate set of questions prepared according to their area of expertise. For interviewees having knowledge of IHL, interview guide explored status of armed non-state actors under the IHL and IHRL. Interviews started from generalized questions to more specific ones demanding explanation of ideas related to Guantanamo detention centre, drone strikes and ongoing conflict in Pakistan. Similarly, interview guide for Islamic scholars specializing in Islamic law on armed conflict, revolved around the theme of strength and weaknesses of Islamic law of armed conflict in context of contemporary conflicts. Interviews with member of Pakistani armed forces and other law enforcement agencies, revolved around determining their knowledge about IHL and Islamic

law on armed conflict, while considering the actual situation of the ongoing conflict within Pakistan. Questionnaire for former militants was devised to explore their knowledge about their rights under IHL and Islamic law on armed conflict. Furthermore, their thought towards ongoing conflict in Pakistan and the tactics employed by them and Pakistan army was also enquired.

Ethical considerations while conducting the interviews were given due weightage by approaching the interviewee through informed consent and proceeding only when interviewee assured voluntary participation. While conducting the interview, permission for recording the interview was taken from the interviewee. Confidentiality and anonymity was maintain where the interviewee requested, especially in the case of former militants. Only the relevant components were approach during the interview in order not to diverge from the topic. Researcher faced several limitations while conducting interviews due to Covid-19 pandemic. Few interviewee were reluctant to face to face interviews and declined to participate in the study. Inability to travel to tribal district during the pandemic was another reason why assistance from a local was taken to conduct interviews from former militants.

1.6 Objectives

The objectives of this study are:

1. To devise an operational definition of armed non-state actors (ANSAs) that is not politically charged or framed.
2. To determine the criteria to legally categorize ANSAs under IHL and ILAC.
3. To determine who has the authority to categorize and label ANSAs.
4. To distinguish between domains of IHL and national laws used to regulate ANSAs.
5. To give practical suggestion on how to make IHL and ILAC binding on states and ANSAs.

6. To understand the distinction between unlawful enemy combatants and prisoners of war and the consequent difference in their rights.
7. To understand the impact of non-traditional tactics in the conflict on the rights of the individual.

1.7 Contribution to knowledge

Traditionally international law on armed conflict is based on the concept of nation-states and their power relations. Social constructivism approach through this research offers an alternative to this conventional rationalist thinking. Inclusion of armed non-state actors in contemporary warfare demands a novel idea on how to include them in IHL focused on state relations. States have played a significant role in creation of the identity of ANSAs. Consequently, it has a negative impact on ANSAs relations with the state and their consequent actions. In order to more aptly define agency-structure relations in these situations, ANSAs opinions are purposed to be included in the discourse designed to define their rights. This research offers an alternative treatment to the ANSAs under IHL, which is not state centric.

This study covers the grey areas in international law regarding application of rules over those individuals and groups that use terrorism as a warfare tactic. Attempt has been made to redefine the criteria of who qualifies for the humanitarian treatment in the conflict situation through thorough research in different theological and philosophical moral conceptions. An action centric definition of armed non-state actor, devised after research, may prevent politically charged framing and narrating of groups and individuals. Furthermore, new parameters would be set to clearly demarcate domains of IHL and national laws dealing with ANSAs. Analysis of common Article 3 of all Geneva Conventions and Additional Protocol II, can have great practical implications as declaring internal war of secession as an international conflict and aims to provide equal rights to all parties involved in the conflict.

1.8 Thesis structure

This thesis highlights the rights of ANSAs under IHL and Islamic law of armed conflict, while analysing contemporary armed conflict. In order to comprehensively understand these interwoven themes, second chapter is dedicated to review of literature of key concepts of ANSAs, rights, IHL and Islamic law of armed conflict. After identifying gaps in existing literature, theoretical framework based on moral theories, discussed in third chapter, offers social constructivism as the alternate solution to the problem of right of ANSAs by discussing theoretical contributions of Immanuel Kant and Jurgen Habermas. Chapter four attempts to trace the origin of ANSAs in world and Islamic history. Moreover, legal categorization of armed groups is also discussed in order to formulate an operational definition of ANSAs (addressing the first two research questions). Next chapter reviews Jus ad bellum and Jus in bello rights of ANSAs under IHL and Islamic law of armed conflict. Criteria set to distinguish between applicability of IHL and national criminal law is also addressed (covering the third research question). Chapter six highlights challenges faced while ensuring implementation of rights of ANSAs during contemporary conflicts, and proposed solutions for those challenges, especially how to make IHL binding on ANSAs, are also discussed (related to the fourth research question). The study concludes by expressing need of inclusion of ANSAs opinion in the process of formulating laws that define their rights.

CHAPTER TWO

REVIEW OF LITERATURE

2.1 Introduction

As an aftermath of cold war era, non-state actors have become the new norm in the global politics. Concepts of authority and right of use of power is being transformed due to inclusion of non-state actors in equation of international politics along with the states. Due to this reason Westphalian nation-state traditional system is undergoing change, as they are experiencing erosion of power and their sovereignty is being challenged. Globalization has further facilitated the emergence of non-state actors, especially multinational corporations (MNCs) and international non-governmental organizations (INGOs). Most severe threat towards the state, however, comes from armed and violent non-state actors. They operate out of the boundaries of state control and they are involved in internal and transnational wars and conflicts. Their addition in the warfare domain has increased complexity of the traditional conflict, its management and resolution making the situation more complicated. This is particularly challenging because international law regarding the use of force and norms regarding warfare was formulated according to the context of nation-states. Furthermore, most of the renowned contemporary armed non-state actors proclaim their affiliation with Islam, which adds religion as one of the variables in the already complex and rapidly changing scenario. Thus, the rights of the non-state actors involved in conflict with states demands a debate in the framework of both International Humanitarian Law and Islamic Law of armed conflict.

Vast amount of literature is available on all the components covered in this thesis, especially International Humanitarian Law, Islamic Law, concepts of individual rights and armed non-state actors. Works of Marco Sassòli, Ahmad al-Dawoody, Aneesa Bellal, Abou El

Fadl, Jackson and Davey have been explored extensively. Literature discussed in this chapter broadly encompasses explanation of armed non-state actors, concept of use of power and authority under International Humanitarian Law and Islamic Law and worldview of contemporary Islamist militant movements. This chapter is structured along the above-mentioned generic themes and each theme is examined in global perspective with emphasize on development of competing narratives over the years.

2.2 Armed non-state actors

Security challenges faced by contemporary world has made armed non-state actors a cause of concern both for the state and the general public. Armed non-state actors, also known as violent non-state actors are individuals or a group having socio-political and economic power to exert influence at national and international levels. A study group on the Causes of War at University of Hamburg (AKUF) in 2010 estimated that there were at that time 32 wars or major conflicts in the world and armed non-state actors played major roles in all of them either as instigators or by emerging from these ongoing conflicts (Langer & Brown, 2012). International Committee of the Red Cross (ICRC) estimated in 2020 that almost 60-80 million people are living under the control of ANSAs and another 100 million (approx.) were living in areas where the control is contested. Non-international armed conflict fought by the armed groups have more than doubled between 2001 and 2016 reaching to 70 conflicts, the world over, from fewer than 30 (El Deuch, 2022, pp 2-3). Thus, the Westphalian system where nation-state enjoyed the monopoly over use of coercive force, is being challenged by local and transnational non-state actors assuming these very roles (Mamdani, 2005). This alarm is considerably significant where poor governance and weakened state legitimacy has provided such elements a space to grow and exert pressure on government through their activities. Despite of this immense significance there is no single internationally recognized definition of armed non-state actors. A standard definition is essential to avoid politically motivated framing

of ANSAs and subsequently their members being marginalized to have even basic human rights. Although ANSAs nature, reason of origin and modus operandi are very diverse, a single definition applicable on all ANSAs is a challenging task. Yet, the literature consulted is to explain the common characteristics of such groups. Armed non-state actors in international and non-international violent conflicts are identified as 'central protagonists of regime instability, political disorder, violent conflict, and overall conditions of insecurity and violence' (Davis, 2009, p. 221). Insurgents, rebels, rogue groups and terrorist are some of the labels attached to these elements which vary in the degree of their negative connotation and they are misused to dismiss even any legitimate dissent against government. State forces and ANSAs are not always opposed to each other. Several examples of mutual assistance between the two are also present especially in the shape of proxies.[5] Thus, a proper definition of these destabilizing elements should be based on their primary motive.

The motive of armed non-state actors cannot be fully encompassed by greed versus grievance dichotomy but requires a third dimension of criminality (Collier, 2000). Economics of the conflict explained though Collier-Hoeffler model links poverty and conflict (Collier, 2005). 'Greed' may provide justification for drug cartels or piracy mafias due to the huge monetary benefits involved but does not explain movements with nominal financial gains and high expenditure to sustain warfare capability. The other commonly cited aspect of 'grievance'

[5] It is estimated that post-World War II period, 104 states internally fought armed groups and almost 75 percent of these states fought groups that were supported by foreign states through funds, arms and safe havens. This alliance between state and ANSAs are either based on strategic basis (when state supports a group involved in fight against its enemy) or ideational and principled basis (when states supports a group based on ethnic, religious or ideological ties). Example of strategic type of relationship is America and Kurdish fighters cooperating to defeat Islamic State in Syria and Iraq. Alliance between Iran and Yemeni Houthis is an example of relationship between state and ANSA based on ideological affiliation. For more details see Belgin San-Akca, (2017). States and Non-state Armed Groups (NAGs) in International Relations Theory. In *Oxford Research Encyclopedia of Politics*. Another emerging feature of proxy warfare is the cooperation between two non-state actors for achieving political objectives without carrying out terrorist or guerrilla-style attacks. Hezbollah's support to Yemeni Houthis is an example in this regard. See Tarik Solmaz, (2022). Non-State-Led Proxy Warfare: The Missing Link in the Proxy Wars Debate. *Small Wars Journal*. https://smallwarsjournal.com/jrnl/art/non-state-led-proxy-warfare-missing-link-proxy-wars-debate#_edn3.

as a motivation of armed non-state actors alone, may also not be fully able to explain functionality of such elements, as it may help in group formation and promoting unity within but does not explain motivation of financial support needed to sustain it in the long run and in order to make its pressure tactics effective. Thus, Collier's conception of rebellion as a quasi-criminal (2000) activity provides the most plausible explanation of motivation of armed non-state actors that also captures greed-grievance duality. It combines economic models with political dynamics of the place of origin of armed non-state actors to establish general motive behind ANSAs creation.

Matters on identification of armed non-state actors is complicated by the fact that some of these elements act covertly on behalf of states or in collaboration with state's own armed actors for proxy wars. Furthermore, when they fall out of favour of government, the previously legitimate elements are declared illegal and their prosecution is initiated. The relationship between state and armed non-state actors are further complicated by their inversely dependent association as the strength of one results in the weakness of the other. Furthermore, networks of these actors are fluid and constantly changing making them difficult to locate and monitor (Cozine, 2013). Factors contributing to the creation of armed non-state actors are: extreme poverty coupled with 'local problems, ethnic disputes, religious conflicts and ecological crises' (Miroiu & Ungureanu, 2015, p 153). Thus, characteristics of non-state armed groups identified for this study includes; "…violent and destructive capabilities, the predatory and rent-seeking behaviour in which they engage locally, regionally, and trans-nationally, and the damage that they inflict on human rights, public security, the rule of law, and prospects for inclusive social and economic development" (Krause & Milliken, 2009, p 202). These characteristics further need to be differentiated from secessionist groups demanding their right of self-determination from the groups violently working against a legitimately elected government by the masses.

The differentiation between armed secessionist group and groups challenging the writ of the state without objecting its territorial integrity is important as it generates different responses from the state and the international community. Right of self-determination, enshrined in Article 1 of International Covenant on Civil and Political Rights, is an internationally recognized right by the United Nations (Coulter, 2010). Whereas, challenging the legitimately elected government is not looked upon favorably by international community. International Humanitarian Law, however, attempts at covering up both, albeit with a few complications. For International Humanitarian law to be applicable on a conflict it has to pass the legal threshold to be classified as a conflict. Additionally, for the Additional Protocol II to apply, the non-state group must be 'under responsible command, exercise such control over [a High Contracting Party's] territory as to enable [it] to carry out sustained and concerted military operations and to implement this Protocol' (Article 1 (1) of Additional Protocol II). Common Article 3 (Convention addressing non-international armed conflict), however, has a bit lower threshold of application as it does not require territorial control (Ryngaert, 2008). Both conflict and non-state armed actors, however, are not clearly defined in International Humanitarian Law (Sassòli, 2007). Consequently, International Humanitarian Law would not be applicable on a violent situation that does not rises to the level of armed conflict technically. This indicates that many violent actions by non-state actors, terrorism particularly are not bound by International Humanitarian Law but rather by criminal law of the state they are operating upon and International Human Rights Law (Ryngaert, 2008). This traditional exclusion has been challenged by the changing nature of warfare and initiation of war on terror.

Literature on ANSAs has developed rapidly in the last two decades. Their influence on international relations as independent and autonomous players has been recognized as early as 1970s (Keohane and Nye 1977). International relations is no longer considered an exclusive domain of states, yet criteria to define ANSAs differ among scholars and they do not agree on

one definition. Additional Protocol II Article 1.1 defines ANSAs as 'dissident armed forces or other organized armed groups' (AP II, 1977). ANSAs most distinguishing feature is considered to be their ability to make decisions and implement them beyond state's borders (Aydinli, 2015). Schneckener (2006) defined ANSAs as those willing and capable of using violence for achieving their objectives. Secondly, they are not integrated into formal state institutions like regular armies, police and other law enforcement agencies. Due to the increasingly transnational role of ANSAs, scholars have also defined ANSAs based on their foreign policy for being able to conduct coherent, consistent polices formulated along a strategic line aimed at other actors in international arena (Hill, 2016). Exploration on how and when ANSAs use violence provides insight on the different types of ANSAs i.e. either they are involved in an active civil war/ insurgency or terrorist acts to destabilize the government (Chenoweth and Lawrence, 2010). Violence is not the only means used by ANSAs for exhibiting influence and achieving international recognition. They employ 'rebel diplomacy' a phenomenon to engage in strategic communication with other actors especially states and also to attain visibility, recognition and credibility at the international level (Coggins, 2015, p 107). Social media is one of the most widely used medium these days to achieve the before mentioned aims. Better recognition at international stage not only makes ANSAs more powerful but also enhance their position in the conflict (Darwich, 2021).

Extremely violent nature of chaos caused by non-state armed groups has confronted Human Rights activists with the daunting task of formulating rights-based codes of conduct for those who challenge the writ of the state by compromising the security of general masses. Nature of warfare has been changing since World War II, close to 250 conflicts around the world has caused an estimate of 70-170 million causalities, most of whom were non-combatants (Bassiouni, 2008, p 712). Such violations of International Humanitarian Laws was also contrary to the values and beliefs of most involved in these conflicts. Tactics of warfare

employed by non-state actors are primarily chosen due to three factors (Bassiouni, 2008, pp 714-715). Firstly, non-state actors involved in a conflict of internal nature are usually in an unequal or asymmetrical relationship to the resources of the state they oppose, putting them at a military imbalance and pushing them to use unlawful means of warfare. Secondly, poor command and control of militias and private armies results little social control and large probability of defiance. The third factor is that non-state actors involved in a violent conflict enjoy impunity from accountability. In these circumstances moral values and belief system are more appropriate deterrent for these elements than the international law.

Islam, a religion of millions of peace-loving people, is presently most maligned due to the actions of certain armed non-state actors professing their allegiance to this faith and justifying their brutality by misinterpreting its sacred texts. Such non-state armed groups are perfect example of weakening connection of citizens with nation-states in the globalizing world and the rise of substitutive "imagined communities… (whose) loyalties built either on essentialist identities like ethnicity, race or religion or on spatially-circumscribed allegiances and networks of social and economic production and reproduction." (Davis, 2009, p 226) Religion is a motivational force for mobilization of public and enflaming popular emotions among the masses (Wahab, 2021). Such coercive actors are overlapping both state and the civil society and are impacting global political landscape due to the peculiar nature of conflict and crime caused by them. Thus, the conceptual framework in which the legality of these contemporary non-state armed groups needs to be analysed is the Islamic law, used to establish a political domain of justice and fairness for all.

2.3 Concept of authority and use of force in Islam

The term armed non-state actor is not present in historic Islamic literature, however, presence of these elements cannot be denied since the very beginning of the religion. Time and again a dissenting group has risen from within the community to challenge the writ of the state

and the authority of the caliph or the ruler of the time. It started even during the time of the Prophet Muhammad PBUH when he established the city state of Medina but the Jewish tribes residing in the area, that were also in contract with the Prophet, conspired against state as an accomplice to the foreign powers. Later, challenge to the authority started coming from within the Muslim ranks, rise of false prophets, *Kharijis* and *Hashashins* are just a few initial rebelling elements. Thus, Islamic scholars since the beginning have been discussing the rights of authority and use of force in the perspective of smooth functioning of the government. Opinion of classical Islamic scholars on the above mentioned topics have been included in the literature review to understand the changes adopted in these concepts over the years.

Use of force has been considered the exclusive right of the state in the western conceptions. Islamic law also gives jurisdiction to the state/government over the use of force (Khadduri, 2010; Rosenthal, 1958; Iqbāl, 2003). It is interesting to examine the conditions under which injunctions of *Jihad* were first given to Muslims. When Muslims migrated to Medina and established a city-state under the leadership of Prophet Muhammad PBUH, it is only then the permission for Jihad was given to the Muslims who suffered persecution and trial (Kabbani, & Hendricks, 2006). In Makkah when Muslims were a persecuted minority this permission to retaliate in kind was not given but injunctions of observing patience was given initially and commandments of migration were given later. The Muslim minority in Makkah before migration was essentially non-state element in a city state dominated by *Quraish* tribe of polytheists. Armed struggle with the state was not allowed in these circumstance and permission of defense from aggression was only given after an independent city-state was established in Medina under Muslim authority and leadership. Henceforth, Muslim army and weaponry was created to safeguard its territory and repel any form of aggression from others.

Later, the first Caliph *Abu Bakar* faced rebellion in the form of *Ridda* wars (Apostasy wars) by the rebels who followed *Tulayha, Musaylima* or *Sajjah* who all claimed to be prophets.

Their followers were first invited back to Islam but when they denied they were severely punished and most of them were slain (Armstrong, 2007). The second category of dissenter or *Baghi* group confronted the fourth Caliph *Ali* in the shape of *Kharijis.* Initially few propositions were negotiated to keep them in *Dar-ul-Islam* but once they opposed the Caliph they were dealt according to the law. This precedence delineate the principles under which the groups opposing the government are to be treated. Due to these instances, opinion of classical Islamic scholars tend to support the authority of imam/Caliph/Ruler opposing any individual or group revolting against them. This theory was upheld even if the imam committed an error as Sunni jurist support that rebellion is even worse than tyranny (Khadduri, 2010, p 78). There is, however, a clear shift in the ideology regarding Jihad in modern Islamic revival movements.

Since the 17th and 18th century, the Muslim world has been witnessing puritanical and revivalist movements aimed at achieving the lost glory of Islam's golden era (Dallal, 1993). This almost coincides with the initiation of Westphalian system of sovereign state established after treaty of Westphalia in 1648. Violent dissenting groups have always been present under Caliphate and the have been condemned by scholar and neutralized by the authority. However, in the revivalist movements, Islamic scholars themselves supported armed conflict aimed at regime change and hope of replacing it with government willing to enforce *Sharia* or establish society according to Islamic principles (Rizvi, 1980; Maududi, 1982; Haj, 2002). Their intent may be noble but the consequence of this shift has been disastrous for the social wellbeing of general masses that Islam aims at protecting at all cost. First cause of concern is that groups in individualistic capacity have started declaring state as morally corrupt and not fulfilling Islamic injunctions according to their narrow interpretations. Secondly, such non-state groups are injuring human sense of security by employing terrorism as their warfare tactic and using public as shield against the retribution of the state. These both elements qualify non-state armed actors to spreading mischief in the land, which is severely criticized under Islamic law.

The concept of state in Islam is essentially modelled around the first city state of Medina, which did not separate religion from worldly matters rather it was completely guided by Islamic law. Thus, the political Islam or Islamism is much used to refer to the movements that idealize and work towards revival of Islamic state to its initial glory. It is misleading to consider that political Islam or Islamism (March, 2015) is a new phenomenon initiated in late 1970s and early 1980s with Islamic revolution in Iran and struggle of 'Mujahidin without borders' (Volpi, 2013) against Soviet Union in Afghanistan. On the contrary, it is a much older trend to engage in activities to promote Islam as a body of faith that has an ideology of how society should be organized. One such attempt at Islamic modernization and radical challenge to western hegemony was advocated by Sayyid Jamaluddin Afghani (1839-1897) through ideas of Pan Islamism. Pan Islamism essentially negated nationalistic tendencies and aimed at Muslims unity under one caliphate or international organization (Ansari, 2014). Contemporary movements idealizing Islamism range from violent groups like Al Qaeda[6] or Islamic State, to the government of Rajab Tayyip Erdoğan in Turkey[7] (Ersel, 2013). However, due to generalized criticism on all political Islamist movements for their violent and extremist tendencies, advocates of Islamism having positive contribution like in Turkey, are now refereeing to political Islam as 'Islamic activism' (Al-Ghannouchi, 2014). Linking these efforts to return to the Golden Age of Islam, however, has been the key element of modern evolution of Islamism which is simultaneously conservative and revolutionary.

> It is conservative in the sense that it harks back to a very old social and political tradition and ethos. Yet it is also revolutionary in the sense that

[6] For more details, see Cristina Hellmich, (2014). "How Islamic is al-Qaeda? The politics of Pan-Islam and the challenge of modernisation." *Critical Studies on Terrorism, 7*(2), 241-256.
[7] Concept of *Ittihad-i-Islam* introduced by Ottoman Empire is being revived by present Turkish government. See Birol Baskan, (2019). Turkey's pan-Islamist foreign policy. *The Cairo Review of Global Affairs*, (33).

it requires a dramatic change of practices and institutions to be realized

in the contemporary context. (Volpi, 2013, p.2)

According to the perception created by western media and political powers, *Jihad* has been the central element to bring about this dramatic change giving rise to both national and trans-national armed struggles by armed non-state actors. The identity and socio-political agenda of those who employ this term, however, is crucial to understand its morphed meaning. Although Jihad is an Arabic noun for the word 'struggle', which can be an individual or communal pursuit for self-betterment, but it's now more commonly equated to "Holy war…prescribed by the *sharia* against the infidels" (Kepel, 2006). Promotion of biased definition has defamed the concept as well as instigated rogue elements to manipulate religious texts to use it for their own vested interests. Thus, correct theoretical perspectives to understand modern evolution of Islamism, especially after 9/11, requires fresh contemplation on the concept of armed *Jihad* by non-state groups in contemporary globalized world especially in perspective of their socio-political agenda.

Islamic scholars, since the very beginning of Islamic history have been categorizing *Jihad* in several categories. Ibn Qayyim al-Jawziyyah has classified *Jihad* into four distinct categories in his book Zad al-Ma'ad; namely Jihad against self (*jihad al-nafs*), Jihad against the devil, Jihad against the hypocrites and Jihad against the non-believers.[8] Ibn Rushd, also differentiates four types of *Jihad* (of the heart, tongue, hand and sword) in his *Muqaddimat.*[9] War or combative Jihad is just one of these several categories. Combative Jihad also has several pre-conditions to qualify as legal and legitimate. Under Islamic law the decision of armed

[8] Ibn Qayyim Al-Jawziyya (1292-1350 CE) is among the most cited scholars for Jihad fatwas. Being a student of Ibn Taymiyyah, he defended and propagated his teacher's views, for which he was persecuted and imprisoned along with Ibn Taymiyyah. His writings on theology and Islamic law had a profound influence on Salafi and Wahhabi traditions.

[9] Ibn Rushd (1332-1406) is particularly held in high regard by European scholars for his preference towards reason even in religious matters. Ibn Rushd's work Muqaddimat has been translated into several languages, its most famous English translation is by Franz Rosenthal (1958).

struggle cannot be taken randomly but only by the nation's leader (Kabbani, & Hendricks, 2006). However, his decision must be guided by the greater interest of his people. Furthermore, following the instructions of the leader or imam is compulsory unless it's against the injunctions of Islam (The Holy Quran, 4:59).

Classical Islamic scholars like *Shaybani* (750-804), *Abu'l-Hasan al-Mawardi* (972–1058), *Abu Hamid al-Ghazali* (1058-1111) and *Ibn Taymiyyah* (1263–1328), representing different Islamic schools of thought, have consensus on the monopoly over use of force is for the ruling authority or recognized government (Khadduri, 1956; Mattson, 2001; Iqbal, 2003).[10] In order to address special circumstances faced due to declining Abbasid Caliphate, Sultan entrusted to wage war on the behalf of caliph would appointed new caliph. Al-Ghazali acknowledged such appointments as valid under *sharia* in order to avoid chaos and lawlessness that might arise due to power struggle (Iqbal, 2003). This, however, weakened the role of caliph and opened door to challenge the ruling authority. Whereas, *Ibn Taymiyyah* initiated a movement for a return to puritanical Sharia-government that has also been the demand of many contemporary non-state armed groups in the Muslim world. However, their modus operandi devised to introduce government based on Sharia is poles apart (Hoover, 2016).

Shah Wali Allah Dehlawi's (1702–62) religio-political thought was grounded on the 'Perso-Islamic theory of kingship' (Rizvi, 1980) and ideology of Pan-Islamism. He worked towards restoring political dominance of Islam in South Asia by creating integrated Muslim community. His reformation movement aimed at removing sectarian divisions and dissenting

[10] Muhammad ibn al-Hasan Shaybani, an early Hanafi scholar and student of Imam Abu Hanifa wrote Siyar al-Kabir (a shorter version translated by Mahmood Ahmad Ghazi in 1996) which is considered first book on Muslim international law. Al-Mawardi belonged to Shafi school of thought is famous for Quranic interpretation and book on governance by the name of *Al-Ahkam As-Sultaniyyah* (The Ordinances of Government translated by Asadullah Yate in 1998). Al-Ghazali a Shafi scholar, turned to mysticism and was a member of Nizam Al-Mulk, a grand Wazir of Seljuk Empire. Ibn Taymiyyah a Hanbali scholar wrote several treatises advocating "creedal Salafism" (*al-salafiyya al-iʿtiqādīyya*), based on his distinct interpretations of the Quran and the Sunnah. This interpretation later proved to be the most popular classical reference for Salafi movements and contemporary Islamist militancy.

elements in the society. His struggle was against the various groups of Sikhs, Jats and Marathas competing for political dominance in the region, due to the weakening Mughal Empire. For this purpose he invited Ahmad Shah Abdali of Afghanistan to attack the Maratha and asked Najib al Dawla to fight against Jats. Shah Wali Allah justified his actions of inviting foreigners to restore Islamic rule in the sub-continent on the basis that those opposing groups were creating chaos and anarchy in the region and dominance of Muslim rule needed to be restored in order to establish just society (Nizami, 1969; Sayeed 1960). This, however, reintroduced to concept of jihad, especially in the subcontinent (Sevea, 2009). He is regarded as the savior of the religion from dominant influences of other religions and continues to inspire various individuals and organizations till this very day.

One such individual inspired by Shah Wali Allah and his son Shah Abdul Aziz (1746-1823), was Syed Ahmad Barelvi (1786-1831). He initiated a *Jihad* movement against the Sikh Kingdom by whom he was greatly outnumbered and it resulted in his defeat and death. Although unsuccessful but he initiated a new concept of individualistic initiative of establishing Islamic rule of law without backing of a state, rather even against established rulers. Religious justification of these actions was derived from the distinction of state in *Dar-ul-Islam* (country of Islam) and *Dar-ul-Harb* (country of war), established by the Fatwas of Abdul Haye and Shah Abdul Aziz.[11] It was declared that India has become *Dar-ul-Harb*, hence certain things considered prohibited in *Dar-ul-Islam* were now permissible (Iqbal, 2003). Thus, Syed Ahmad's Jihad was mainly focused against Sikh who were prosecuting Muslim at that time and not against British Government.

[11] Imam Abu Hanifa is considered the originator of these concepts and terms. According to him dar al-Islam implies that Muslims should be able to enjoy peace and security within the country and are ruled by Muslim government. Whereas, dar al-Harb implies that implementation of un-islamic laws within the country. Secondly safety and security of the Muslims are not ensured in that land. For details Yohanan Friedmann, (2017). Dār al-islām and dār al-ḥarb in Modern Indian Muslim Thought. In *Dār al-islām/dār al-ḥarb* (pp. 341-380). Brill.

Muhammad ibn Abdul Wahhab (1703 –1792) founded the controversial *Wahhabi* movement (preferred to be known as *Salafi* movement) based on Hanbali school and ibn-Taymiyya's teachings. It basically aimed at returning to the fundamentals of the Islam and removing any innovations added over the years. He severely criticized innovation of veneration of the dead by visiting their tombs and adjudicating those transgressors as infidels or apostate (*Takfir)* (Haj, 2002). Moreover, he prescribed punishment of apostasy for them. His contemporary scholars opposed his interpretation of *Takfir* based on the argument of unintentionality. [12] They argued that acts committed unconsciously should not have such harsh repercussions. This *Takfiri* ideology has been taken up by violent non-state actors as the prime excuse to carry out their brutal activities. They claim that since, established government is not willing or unable to act against the *Takfiri*, they themselves would take up this task of punishing them in a manner that is deterrent for others. The menace of terrorism has emerged from this kind of interpretation of Islam and the consequent challenge to the writ of the state.

Abu'l A'la Maududi (1903-79) established Jama'at-i-Islami in 1941 in the sub-continent as a vanguard organization promoting Islamic order. His commentary on the Holy Quran, *Tafhim al-Koran*, presented Islam as a complete ideological system that dominates all public (political, social, economic) and private areas of life. For the political aspect, he described the concept of 'theocracy' as a state ran by a viceroy who represented the population and most importantly its run according to the book of Allah and the practice of his Prophet. For him *Jihad* is a wide encompassing term which is not synonymous with '*Harb'* (Arabic term for war) (Maududi, 1982). He argues that word 'war' is used to categorize conflict between nations and states motivated by individual or national interests. Whereas, Islam has its own

[12] The term *Takfir* is not found in Quran and the Prophet's hadith. The word was first introduced in the post-Quranic period by the Khawarij during the battle of Siffin (657 AD). Also see Jamileh Kadivar, (2020). Exploring Takfir, its origins and contemporary use: The case of Takfiri approach in Daesh's media. *Contemporary Review of the Middle East*, *7*(3), 259-285.

ideological standpoint pivoted on the welfare of mankind through justice and moderation. According to him, this vision requires revolutionary spirit, exemplified by the Prophets of God and expected by their viceroys after them. He is of the opinion that a group of people should strive to change government and establish Islamic system of equal rights for all if it's not previously practiced. Furthermore, he did not confine the revolution to a single state rather wanted a world revolution by eliminating rule of an un-Islamic systems through *Jihad*. Moreover, he also considers it permissible to protest against the tyranny of government (Maududi, 1982). After Shah Wali Allah, Maududi provided fresh impetus to deflecting elements to initiate struggle against the government for not following Islamic principles as they envisioned, which in some instances, later mutated to an armed struggle.

Sayyid Qutb (1907-66) is considered as the ideologue of the Muslim Brotherhood in Egypt during the rule of President Nasser (1954-70) and is viewed to have spearheaded Islamist radicalism. His major works comprise of a commentary '*Fi Zilal al-Koran'* (In the Shade of the Quran) and Islamic manifesto '*Ma'alim fi-l-Tariq'* (Milestones). According to him Muslim community has reverted back to *Jahiliyya* period due to ignorance of *Sharia* law by ordinary Muslims and due to the *hakimiyyah* (rule) over the people by the people, instead of *hakimiyyah* of Allah over people (Khatab, 2002). In order to change the traits of this *Jahili* society, Muslims have to ignore learning and culture of non-Muslim groups and refer to Quran for order to obey and not just consultation. He argued that this can be only achieved through a movement that preached people to be true Muslims by physical power. Force is necessary, according to him, because it is irrational to expect "those who have usurped the authority of God" (Qutb, 2007) to relinquish their power without a fight. Thus, he encouraged group of people to challenge a government which they consider is not following *Sharia* properly.

Ali Shariati (1933-1977) is regarded as one of the most influential Iranian intellectuals and an ideologue of Iranian Revolution. In the essay 'Red Shi'ism vs. Black Shi'ism' he

discussed the prevalent duality of Shia religion observed throughout history. He begins by claiming that Shi'ism is the Islam that is distinct in the fact that it started by opposing the path chosen by the Islamic history and it rebels against it. Followers of Red Shi'ism protest against the wrongs of a tyrant rulers and corrupt clergy and give hope to the oppressed masses. He explained that for an organization to rebel against the oppressor successfully, it is important that it organizes works under a camouflage (Kitchell, 2019). This would help in protecting its people and leadership from the harassment of the tyrant rulers and when the time is ripe the final physical attack would render the government ineffective. According to him this is the pure form of the religion which focuses on social justice and salvation of the masses based on the twin principles of imamate and justice. Thus, Red Shi'ism is a religion of martyrdom in contrast to the passivity of Black Shi'ism making it a religion of mourning. This distinction was different from Khomeini's traditional brand of theology and made Iranian revolution possible. This also provided ideological backing to Shiite Militia fighting amid the Syrian Conflict against ISIS (Basit, 2018).

Islamic law emphasizes that state has the monopoly over the use of force against external and internal threats and respect for authority by the people is considered necessary. Armed non-state actors defy this principle of respecting authority when they challenge the writ of the government. Quran identifies the actions of these elements as, mischievous and trouble makers disguised as peace-makers (The Holy Quran 2:11). The punishment prescribed in Quran of such wrong doers is also very severe both in this world and hereafter. Furthermore, the ideology of Takfir i.e., declaring Muslims as non-believers, is a severe allegation that the non-state actors employ to justify killing of believing Muslims. Furthermore, the concept of *Hirabah* in Islamic jurisprudence has the closest likeness to the present-day phenomenon of violence employed by armed non-state actors to fulfil their goals. Spread of fear and helplessness for money or power are the central themes of Hirabah.

> The Spanish Maliki jurist Ibn `Abd al-Barr (d. 1070) defines the agent of hiraba as: 'Anyone who disturbs free passage in the streets and renders them unsafe to travel, striving to spread corruption in the land by taking money, killing people or violating what God has made it unlawful to violate is guilty of hirabah . . . (Jackson, 2001, p 295).

Severe punishment is prescribed for those who commit Hirabah and rulers are ordered to prevent publicly directed violence at all costs. Thus, the legitimacy of armed non-state actors is seriously questionable due to their warfare tactics, nature of quasi-criminal activity to sustain themselves and having no authority to challenge the writ of the government.

Jihad is one of the most controversial Islamic concepts in the contemporary world and there is wide range of differences present in its interpretation. However, majority of schools of thoughts present in the mainstream Islam declare combative Jihad is in self-defense and to attack the aggressor. Muslim Jurists, however, distinguish between Jihad against a believer and a non-believer. *Al-Mawardi's* classification of Jihad against believer is categorized as Jihad against apostasy (al-ridda), dissension (al-baghi) and secession (al-muharibun) (Al-Mawardi, 1996, pp 83-93). This categorization is based on the motives of the conflict but does not encompass the mode of warfare. Thus, the characteristics used to define armed non-state actors should focus on both the motive and the tactics employed to express opposition of the established government by using physical violence against the general public and having an element of criminality to ensure its logistic support. Views of classical scholars are consistent in a manner that the all want to maintain social peace and stability even at the expense of tolerating tyranny of the ruler. However, there is variation found in retaliation of the government against the different categories defined by *Al-Mawardi* throughout the Islamic history.

State making, to a great degree, has been linked to war-making since ages. In other words, in order to gauge the level of state's durability one has to look at its degree of monopolization over the means of coercion. Since the time of the Prophet PBUH, *Jihad* has been a prerogative of the state. But when the west was establishing and cherishing the sovereignty of states in Westphalian system, Muslims were simultaneously promoting non-state armed actors challenging that very authority. These non-state armed actors very passionately argue with the state government to revert back to the practices of the Prophet and the pious caliphs. Return to original ruling on non-state armed groups would, however, injure their own cause. As they were considered illegitimate in the initial Islamic days and were harshly dealt with. The means and the tactics used to propagate their rebellious and revolutionary ideas are in stark contrast to the basic teaching of Islam and their Takfiri ideology is the root cause of their illegitimacy.

Like all other aspects of life, Islam also addresses the conditions under which rebellion by an armed group against state becomes permissible and also the principles governing the conduct of this act. Rebellion is considered as 'the act of resisting or defying the authority of those in power' (Fadl, 2006). This act may range from passive non-compliance to a more active armed insurrection. Muhammad Hamidullah's work titled 'The Muslim Conduct of State' further elaborates five different types of violent opposition to government (Hamidullah, 2011). Insurrection, mutiny, war of deliverance, rebellion and civil war have different level of hostility attached to it, requiring subjective assessment on deciding its befitting response by the opponent government. Insurrection may only require law of the land to decide on its retribution. Yet, if it grows more powerful it may become rebellion or even a civil war, demanding a more firm response from the ruling government.

As for the rulings of Islamic law in regard to the violent opposition to the government, early Muslim jurists have used the terms of riddah, hirabah, baghy and khuruj, to categorize

different types of the conflict (Al-Dawoody, 2017; Tabassum, 2020). The Arabic word riddah is generally referred to apostasy and is literally translated as 'turn back' suggesting that someone has reverted from the religion of Islam to Kufr or disbelief which may be intentionally announced or expressed through actions (Saeed, 2011). Although *hadd*[13] offence of apostasy and its capital punishment is criticized for being against freedom of expression and freedom to change religion, yet some consider this punishment equivalent of punishment of high treason and thus justified (Adeyemi, 2018).

Hirabah denotes a particular category of robbery on which *hadd* is imposed, which is a fixed punishment, obligatory to be enforced as a right of God. Whereas, Baghy is equated to creating mischief (*fasad*) in the land by disturbing peace and order. In legal terms, this can be associated with rebellion against a just ruler. The third category of *khuruj*, literally refers to 'going out' and originally refers to the rebellion against the fourth Caliph Ali (God be pleased with him). Historically, however, this term is also used in positive connotation for the leaders of *Ahl al-bayt* (the members of the household of the Prophet PBUH) against the unjust and tyrannical Umayyad and Abbasid rulers. Code of conduct established for rebellion by early Muslim jurists is irrespective to whether the war is just or not, as it is a subjective matter. Due to this reason, *khuruj* and *baghy* terms are interchangeably used and are dealt under the law of war. Whereas, hirabah is treated through criminal law of the land (Tabassum, 2020).

On the contrary, contemporary international law considers rebellion as an internal affair of the state. However, UN Security Council has the authority to take appropriate actions, whenever the internal affairs of the state pose threat to the international peace (Cogan, 2015). Although, legality of such 'Humanitarian Intervention' remains debatable. In order to regulate

[13] In Arabic *hadd* literally means to 'to separate' or 'to prevent' and is used to define the limit prescribed by Allah. Thus, *hadd* describes the fixed punishment as ordained by Allah, regarding certain offences. For more details see; Fazlur Rahman, (1965). The concept of hadd in Islamic law. *Islamic Studies*, *4*(3), 237–251. Islamic Research Institute. http://www.jstor.org/stable/2083280.

the code of conduct for hostilities during rebellion, International Humanitarian Law (IHL) is primarily approached. However, due to its state centric nature, it has several loopholes for regulating a non-international conflict. One of the several challenges face by IHL is that state usually do not admit a secessionist conflict within their boundaries in order to avoid interference of international organizations in the guise of monitoring the conflict. Secondly, by avoiding existence of the conflict state evade the responsibility to give combatant status to the insurgents or belligerent fighters, as doing so may lend legitimacy to the secessionist movement or their cause. This is due to the reason that state are apprehensive that even if they admit of the conflict, the law is not binding on the armed non-state actors, whereas, state would be held accountable of their actions in the conflict.

Muslim jurists as early as 8th century developed a comprehensive and detailed law on rebellion, as Muslim community faced several revolutionary and rebellious movements in their early history. Islamic law on armed conflict and especially rebellion is a comprehensive model code as it offers an objective approach for ascertaining existence of internal conflict and also admits combatant status for the rebels. Consequently, state also has to admit repercussions of accepting de facto authority of rebelling non-state actors in the territory under their control (Tabassum, 2011). Yet at the same time Islamic law also emphasizes that territory under the control of the rebels remains to be the de jure part of the parent state. This on one hand offers some sense of peace to civilians and non-combatants during rebellions and civil war and on the other hand ease the apprehensions of the state that considers granting combatant status to the rebels would lend legitimacy to their movement.

Despite the clarity in the Islamic law of rebellion itself, there is a lot of difference of opinion surrounding whether Islamic law recognizes the right of community to ouster an unjust

ruler from his position or challenge the system of government. Hanafi jurists[14] support the removal of unjust ruler as it is stated to come under the doctrine of enjoining right and forbidding wrong. Yet modern scholars generally conclude that there is no provision to rebel against the unjust ruler in the Islamic legal discourse, as removal of ruler is declared a fitnah (mischief) itself that needs to be avoided. Abou El Fadl, however, points out that declaring rebellion a crime would imply that some of the most esteemed companions of the Prophet (PBUH) have committed this crime (Fadl, 2006). Qaradawi, on the other hand, explicitly regards use of force by individuals in their private capacity as unacceptable in Islamic Law (Al-Qaradawi, 2009).

Dr Muhammad Munir mentions that contemporary non state Islamic actors claim that presence of imam or some central authority of Muslim state is not necessary for the declaration of jihad (Munir, 2018). The *jihadis* argue that they have a legitimate right to declare and conduct jihad. In conclusion to the question on whether armed groups have a right to wage jihad, Dr Munir states that if such a group is small and is not operating with the consent of the state then they may be treated as criminals (Munir, 2018). As for the law dictating conduct during the conflict by the state and the armed group, Majid Khadduri believes that Islamic law offers the most humane approach to provide immunity to non-combatants as they are regarded as the 'protected persons' (Khadduri, 2010). Dr Sadia Tabassum further elaborates that fighters of armed groups are also given the status of combatants under Islamic law, rather than treating them as bandits, preventing mass injustices in a non-international armed conflict (Tabassum, 2011). Thus, Islamic law of armed conflict offers a more comprehensive and encompassing approach towards dealing with armed groups rebelling against the state. This approach may

[14] Hanafi school of thought is one of the four schools of thought regarding religious jurisprudence within Sunni Islam. Other schools of thought are Shaifi, Maliki and Hanbali, all named after their founding Imams.

offer valuable contributions towards IHL in dealing with armed groups having Islamic affiliation in the contemporary non-international armed conflicts.

2.4 Worldview of contemporary Islamist militant movements

The rise of Islamist movements around the world are usually rooted in the ideology of jihad, yet practically they have a lot of variations. Labelling all armed struggles by Muslims as jihad is not justified and has complicated the matter further. The term jihad, popularly translated as 'Holy war' has much deeper meaning and significance in Islamic worldview. Jihad is literally translated as 'effort', 'striving' or 'exerting oneself'. There is not much mention of term jihad in Quran as out of 6236 verses jihad is mentioned only 41 times (Mostfa, 2021, pp 1). Jihad is of various types, ranging from spiritually cleansing to physically defending oneself. The physical armed aspect of jihad is usually used in equivalence to the term 'use of force' (Bashir, 2018). Jihad has several *Jus ad bellum* and *Jus in Bello* pre-requisites that need to be fulfilled for it to qualify as jihad. Declaring use of force by notorious Islamist movements like Al Qaeda and ISIL (Islamic State of Iraq and Levant, also known with Arabic acronym Daesh), as jihad needs careful examination on these qualifying pre-requisites. The consequential treatment offered to these transnational actors in conflict with states also differ due to conditions in application of international humanitarian law and Islamic law in armed conflict.

First and foremost aspect that needs to be analysed in the justification given by Al Qaeda and ISIL to take up arms and initiate a conflict situation while claiming to perform jihad. Al Qaeda originated as a reaction to Soviet invasion of Afghanistan in late 1980s (Rollins, 2010). This Islamist political movement is an amalgamation of several different nationals, converging on religious grounds, using force to defend Muslim states against physical or ideological intrusion of non-believers. Soviet-Afghan war viewed internationally through the lens of cold war hostilities, lends support and legitimacy to Mujahideen fighting invading

communist forces (Rubin, 2013). They started off as Muslim insurgents that took up arms against Afghan communist government supported by soviet forces. This Salafist extremist organization was founded by Abdullah Azam, Osama Bin Laden and several other Arab volunteers in 1988. They were financially and tactically supported by Osama Bin Laden, son of a Saudi millionaire construction magnate, (Atwan, 2008). This network grew further as Soviets withdrew from Afghanistan in 1989 and Bin Laden aimed at establishing global reach for the future holy wars. He shifted the operational setup of the organization to Sudan in 1994 when he was stripped of his Saudi citizenship. Al Qaeda became notorious in international arena when they undertook several attacks, primarily targeting United States of America. In 1996, he was expelled from Sudan and he returned to Afghanistan under the patronage of Taliban, where military training to hundreds of Muslim insurgents was given by him. Soon after, he issued a fatwa against United States and declared war against them (Bin Laden, 2005), particularly due to their military presence in Saudi Arabia and elsewhere on the peninsula after the Gulf war. On September 11, 2001, Osama succeeded in his transnational Jihadi agenda when Al Qaeda hijacked four passenger airplanes and collided them in several buildings resulting in mass murder of nearly three thousand people (Linschoten, Strick & Kuehn, 2012). The consequent American invasion of Afghanistan to neutralize the threat of Taliban and Al Qaeda resulted in killing of Osama in 2011 after a decade long ‘war on terror’ (Bowden, 2012).

Origin and formation of Al Qaeda to defend against invasion of Soviet Union provided them a legitimate cause of self-defense, which is needed to recognize them as lawful combatants under International Humanitarian Law (Dinstein, 2007). This is also enough justification for declaration of jihad in accordance to Islamic law on armed conflict (Bashir, 2018). However, the ideology espoused by them and the tactics employed by them in the warfare, delegitimizes their just cause of war. Interestingly the genesis of ISIL is also traced to American invasion of Iraq in 2003 and the resultant civil war. However, it soon shifted its focus

to give sectarian dimension to the civil war. ISIL's aim to establish a caliphate was to suppress the Shiites and it was also the reason to diverge from Al Qaeda. ISIL or Islamic State actually emerged out of Al Qaeda in Iraq due to their differences on treatment of Shiites and on questions of *Takfir*.

ISIL originated as an organization by the name of Jama'at al-Tawhid wal-Jihad in 1999, which later pledged allegiance to al-Qaeda and participated in Iraqi insurgency following 2003. The split from Al Qaeda, however, was on the behest of a Jordanian jihadist and the head of Al Qaeda in Iraq, Abu Musabal Zarqawi, who is also attributed to primarily shape the ideology of ISIL and its anti-Shiite tendencies (Hashim, 2014). Though he was killed in 2006, yet his vision was realized in 2014 as ISIL overran most of northern Iraq and eastern Syria. By June 2014, the group proclaimed worldwide caliphate and claimed religious, political and military authority over all Muslims around the world (Roggio, 2014). Furthermore, it began to refer itself as an Islamic State or *Ad Dawalah Al Islamia*, giving the indication of statehood established by an armed non-state actor. Abu Bakr al-Baghdadi, a former US detainee and leader of the group since 2010 was declared as the Caliph and a worldwide call to pledge allegiance to him was given. This idea of caliphate and statehood was vehemently rejected by United Nations, various governments and mainstream Muslim groups (Akyol, 2015).

Islamic State not only developed further on the idea of caliphate given by Al Qaeda by incorporating statehood in it but also took *Takfirism* to a new level. Practice of *Takfirism*, to declare a Muslim an apostate by judging and accusing someone who is not following your ideology or sect of the religion was a dangerous innovation practiced by Al Qaeda. Islamic State's practice of Takfirism, however, particularly focused on Shiite community, by declaring them outside the realm of the faith, Jihad was declared on them (Kadivar, 2020). This anti-Shiite motive made their so-called Jihad unlawful and without any just cause under Islamic law of armed conflict. Prominent contemporary Islamic scholars including Grand Imam of Al

Azhar University and Grand Mufti of Saudi Arabia Abdul Aziz ibn Abdullah Al Ash-Sheikh, unanimously denounce and criticize the Islamic State for exploiting Islam by twisting its teachings (Reuters, 2014 & AFP, 2014). Shiites were not the only ones at the receiving end of the Islamic State's brutality. ISIL not only fought with the State, the invading parties but also other armed non-state actors that previously collaborated while fighting the more powerful state machinery in the asymmetrical warfare. They particularly were against and physically fighting Al Nusra Front (in Syrian civil war since 2011) that pledged allegiance to Al Qaeda central (Styszynski, 2014).

The differences in justification given by Al Qaeda and Islamic State to take up arms against the state is as varied as their modus operandi of waging war. Both militant groups are poles apart in the tactics employed to wage the asymmetrical war. Although ISIL separated from Al Qaeda based on ideological differences, yet it is Al Qaeda that distances itself from Islamic State due to the brutal and gruesome modus operandi employed by them. Although Al Qaeda itself does not differentiate between civilian and military targets and attacks on both with equal conviction, yet the extent of brutality militants of Islamic State practice, has perturbed even the leadership of Al Qaeda. Al Qaeda's leader Al-Zawahiri has repeatedly denounced the means used by Islamic State to wage war and has even termed it as exceeding the limits of extremism (Dearden, 2017).

Burning captives alive, beheading prisoners, treating female captives as slaves, mass murdering dissenting population and recording these acts of brutality to spread fear among masses through electronic and social media. Zarqawi may be the ideological brains behind ISIL, however, its radical modus operandi was introduced by Abdulrahman al-Qaduli, an Iraqi from Nineveh (Hassan, 2018). Although he was considered Zarqawi's second in command, however, his influence in employing this harsh approach is found to be deeper and longer lasting. Such military tactics, nonetheless, are considered against the norms of jihad established

through Islamic law of armed conflict and law of war (*Jus in Bello*) in the International Humanitarian Law. Islamic Law of armed conflict is covered in great detail by the 8th century Islamic Scholar Al-Shaybani in his book *Al-Siyar Al-Kabir* (Al-Shaybani, n.d./1966). *Siyar* refers to the rules concerning international relations of the Muslim state both in the time of peace and war. Humanitarian rules mentioned in Siyar to be the pre-requisites of Jihad, like prohibition of indiscriminate killings, protection of lives of women and children and humane treatment of Prisoners of war (Al-Shaybani, n.d./1998, pp 43-44), are repeatedly violated by Islamic State. Cruel practices of beheading enemy soldiers and mutilating dead bodies, clearly forbidden in Islam (Al Dawoody, 2017) has been widely practiced by Islamic State. Furthermore, identification and protection of non-combatants mentioned in *Siyar* (Al-Shaybani, n.d./1998) has also been ignored by this militant group rather it is considered more effective to target them in order to get their message across more effectively and to spread fear among the masses.

From deadly suicide bombing at Shia Mosques all over Iraq to killing more than 1500 Shia Iraqi Air Force cadets in an attack on Camp Speicher in Tikrit (RT, 2014), Islamic State has been brutal in practicing their version of Jihad. Their reach and operational capability also spreads across continents as they attract people across globe to join their ranks. Their modus operandi in comparison to that of Al Qaeda may be more vicious, however, Al Qaeda has also committed its share of atrocities. Al Qaeda has mounted attacks both on civilian and military targets in various countries including biggest terrorist incident of September 11 2001, killing nearly three thousand people. Other attacks like 1998 US embassy bombings and 2002 Bali Bombings were also gruesome. Yet they take a more restrained and community-based approach to conduct Jihad. General Guideline for Jihad issued by Al Qaeda in 2013 (Al-Zawahiri, 2013) aimed at incorporating local population rather than to alienate them as done by ISIL. Taliban published third version of their *La'ihah* (code for conducting hostilities) in May 2010, stating

they want to limit civilian casualties and win the hearts of local population (Munīr, 2018). Local concerns like corruption and marginalization were incorporated into its agenda of global Jihad, which helped them to create the image of saviour at local level in contrast to the image of Islamic State as thugs involved in plundering (Kendall & Stein, 2015). Despite having communal acceptance or not, the tactics employed by both organizations in the warfare and not to differentiate combatants from non-combatants render their actions to be a total violation of Islamic Law of armed conflict and International Humanitarian Law as well.

Al Qaeda considers it military objectives to be as important as the aims of propagation of their ideology (Al-Zawahiri, 2013). However, their brutal execution of attacks or video footage of beheadings is seldom seen on the internet. Their preference is generating ransoms or liberating comrades from prisons in return to their kidnappings and other actions. Despite the extent of cruelty practiced by both militant groups, their intent to undertake Jihad is also debatable. For Jihad to be permissible in Islam, the intent or Niyah has to be for the sake of serving Allah (Aboul-Enein & Zuhur, 2004). Additionally, Jihad is only permissible in self-defence, defence of the oppressed or defence of the religion (Bashir, 2018). Al Qaeda had some genuine reason to perform Jihad to defend Afghanistan from Soviet invasion. However, their pretext to perform jihad in declared Muslim states to prevent ideological invasion and political influence from the non-believers is a little farfetched. Furthermore, idea of performing jihad for the religion by attacking non-Muslim civilians also does not constitute Jihad as it is clearly ordered in the Islamic scriptures that there is no coercion in the religion and non-believers cannot be forced to convert to Islam by fear or intimidation (Bashir, 2018). Militants of Islamic State do not even have justification of jihad for self-defence as they emerged from the civil war that ensured after the US invasion of Iraq and their focus of fight remained more on the eradicating Shiite population and Christian minorities rather than foreign invaders.

Ideologically, Al Qaeda and Islamic State has broadly similar objectives of establishing caliphate over the entire Muslim world. Both organizations aim to administer such a caliphate based on the literal interpretation of Sharia law and Prophet's traditions as practiced by Muslim societies and empires in the initial era of Islamic history. To fulfil this objective both are willing to use violent means. Al Qaeda had some degree of legitimacy to conduct jihad against US invasion of Afghanistan in 2001 as they had total support of then Afghan government of Taliban (1996-2001), and there was a general understanding that Al Qaeda was fighting on behalf of and for Taliban (Linschoten & Kuehn, 2012). Their actions were not against the state rather to defend the state of Afghanistan against invading foreign forces. Although, the act of hijacking planes and colliding them in building to kill thousands of innocents was widely condemned by Muslims scholars and general public across the globe (Wiktorowicz & Kaltner, 2003), however, Al Qaeda's actions after US invasion of Afghanistan do not seem to be in contradiction to Islamic Law. They took up arms in defense of the ruling government against the foreign invader.

Islamic State on the contrary attempted to over throw Syrian Government in Syrian civil war since 2011 and in Iraq it began to dominate the former ruling Ba'ath party after US invasion in 2003 (Gerges, 2017). Taking up arms against even the unjust ruler of the Muslim state is considered a big violation under Islamic Law as it is believed that rebellion is worse than tyranny of the ruler (Khadduri, 2010). Islamic State violated this rule by attempting to depose the established government or by subjugating them, respectively. Their claim of performing jihad is once again found unjustified on this pretext. In the perspective of International Humanitarian Law, however, ISIL's claim of defending rights of Sunni majority from the unjust behaviour of Shiite ruling elite can find little acceptability as right of self-determination or protection of distinct identity is protected under international law, however, terrorism or war crimes in the disguise of claiming rights is still not allowed (Chadwick, 1996).

Interestingly as a relatively recent development, fighters of armed non-state actors, who are given rights under IHL while fighting non-international armed conflicts, are at times not even recognized as Prisoners of War (POWs) by the rival states. Military Commissions Act 2006, represented by United States for vested political benefits, introduced a new term to define the enemy fighters caught as a result of war started after act of terrorism. Prisoners taken as a result of Global War on Terror are now referred as unlawful combatant in order to strip such individuals from the rights of POWs (Maxwell & Watts, 2007). This terminological innovation serving vested political interests, is used for those armed non-state fighters that employ terrorism as a warfare tactic. Logically this should not be the case with state actors not directly involved in violent acts, however, due to politically motivated nature of the conflict Taliban soldiers are not treated as POWs in the Afghan war against allied forces (Maxwell & Watts, 2007). They are also declared as unlawful combatants as Al Qaeda fighters in order to have leverage over treating them in any manner needed to extract information while ignoring international law on armed conflict.

Contrary to the confusion created in IHL to serve political and military objectives, Islamic law of armed conflict offers a uniform approach towards enemy captives and no discrimination is made based on political incentives or non-state status of the enemy (Abdullahi, 2019). Ideological differences and fighting tactics hold little significance on the consequent treatment of the fighter. Whereas, international response to curb expansion and activities of two different militant organizations is not uniform rather it differs due to changing political benefits in the international arena. Treatment for Al Qaeda and Islamic State also differ as United States eventually signed a peace deal with Taliban on 29 February 2020 after two decades of war, whereas, for Islamic State the response has been an attempt at avoiding direct involvement. US avoided boots on ground by using airstrikes and instigated partner forces to

do the job of eradicating the ISIS threat (Blanchard & Nikitin, 2014). Peace talks with Islamic State does not seem to be an option for United States (Smeltz, Kafura, & Martin, 2016).

Another major difference between the jihad of Al Qaeda and Islamic State is on the use of social media. Although, Al Qaeda has a number of print publications and presence on social media, yet, Islamic State has exploited the potential of social media to a greater extent. Al Qaeda's media strategy is against circulating gruesome videos of the execution of their terrorist attacks or execution of their captives (Lynch, 2006). On the contrary, IS thrives on widely disseminating the most gruesome images and videos of their attacks in order to spread fear and panic in maximum number of people. These tactics of cyber terror has not only made general public fearful, but also has attracted new followers who admire such practice of brutality (Giantas & Stergiou, 2018). Acts of violence especially appeal to the youth, who have been joining ISIS from across the globe, after being convinced that it is a worthy cause to even endanger their lives (Wilson, 2017 & Awan, 2017).

Despite having different motives, policies, tactics of fighting and the consequent treatment rendered to them by international community, both Al Qaeda and Islamic State stemmed from same ideology. Ideologues of both groups envisioned confederation of Muslim Countries free from any international influence by creating a new caliphate ruling over the whole Muslim world. Narratives of both groups originated from Salafi extremist school of thought. Followers of Al Qaeda majorly comprises of Salafists, especially in the higher ranks but has also drawn its followers from Deoband school of thought in the South Asian region. Divergence in ideology of both groups, however, occurred primarily on the selection of their targets and greed for political dominance. Main difference between the groups is on the idea of fighting Shiites due to takfir or excommunication, which is pursued by Islamic State in addition to fighting the non-believers. Whereas, Al Qaeda has been focusing on fighting the non-Muslim invaders rather than limiting their goal to sectarian dimension only. In light of foregoing

observations it can be established that beyond the difference of Al Qaeda and Islamic State in their reasons to conduct war and tactics employed, the consequences of their actions are similar and can be categorized as creating mischief in the land rather than being a source of corrective action in the world, which is the true need and essence of Jihad.

Their argument of elimination of infidelity or subjugation of non-Muslims is completely baseless as Allah forbids any compulsion in religion (2:256, The Holy Quran). Scholars from all schools of thought have time and again issued fatwa against non-state armed groups involved in brutal violence against people in the guise of religious service (Dash, 2008). The Holy Quran categorically mentions killing of even a single human being unjustly is equal to killing whole of the humanity and hence is forbidden (5:32). Furthermore, safety of a non-Muslims living under the protection of a Muslim Government is considered of great importance by the holy prophet PBUH, as is evident from his hadith: "Whoever killed a *Mu'ahid* (a person who is granted the pledge of protection by the Muslims) shall not smell the fragrance of Paradise though its fragrance can be smelt at a distance of forty years (of traveling)" (Sahih Bukhari Vol. 9, Book 83, Hadith 49). Thus, any armed group proclaiming to be true defenders of Islam and propagators of the religion cannot even think to harm any Muslim or non-Muslim living under its controlled areas, let alone killing them in the most brutal fashion and boasting about it to the rest of the world through social media.

2.5 International Humanitarian Law:

In the traditional view of international system only legal entities such as states are the basis of establishing relations. The state is the legal custodian of both authority and the power to ensure that it is obeyed inside its borders. The debate, however, remains on who and what determines the relation between the states. Legally each state is characterized by the attributes of sovereignty, territorial integrity and legal equality. Yet, in the practical sense, 'might is right' is still a cherished belief and victor makes the rules for the losers to abide by and accept in the

situation of war (Moslemi & Babaeimehr, 2015). Prior to the emergence of modern state system, divine or natural laws were considered as a system behind the state law. This view, however, was rejected by Thomas Hobbes, whose pessimistic views about man were replicated on the states as well in the international system by many observers. They viewed the states to be not only ungoverned but also ungovernable (Hobbes, 1561/1967). This view was contradicted by Immanuel Kant who believed that even in the absence of governmental sanctions, humans are governed by universal moral imperatives. His work 'Perpetual peace' is regarded as one of the first works on the topic of international relations that has philosophical value (Kant, 1795/1983). His work was not accepted by the practitioners of international relations based on the argument that bargains with people cannot be made when they had no assurance that they would be kept (Molloy, 2019).

Consequently, in the modern world, the view that has dominated the international relations is the Grotian view, named after Hugo Grotius, a well-known writer on international law in the seventeenth century. He believed that international society is neither an anarchy nor an idealized political community, rather a structure of self-interested agreements. Due to this reason breach of any agreement would threaten the credibility of the whole structure. Thus, effectiveness of any bargain should be ensured even at the cost of one's own interests (Neff, 2012). This laid the foundation of international law.

International Law are set of rules that regulate the relations between states. International law is regarded as consent based governance as state members are not obliged to abide by it unless expressly consented in treaties (Scott, 2004). International Humanitarian Law is one of the component of International Law, providing legal framework applicable to the situations of armed conflict and occupation. Like other International Laws, International Humanitarian Law comprises of treaties and customary International Law. Treaties are binding on those states that have ratified the treaty after signing or acceding to it according to the idea of *Pacta sunt*

servanda (agreements must be kept). Whereas, customary International Law, especially the peremptory norms of *jus cogens,* are compulsory to be respected and followed by every state and non-state actor (Matsumoto, 2020).

Armed non-state actors are of particular concern in International Law as, "Non-state armed groups pose a direct challenge to the Westphalian project of constructing sovereign states that possess both the Weberian legal and practical monopoly over the legitimate use of force within a given territory" (Krause & Milliken, 2009). Furthermore, bilateral and multilateral treaties that govern the International Law cannot encompass non-state actors because only state can become parties to treaties (Sveinbjörnsson, 2009). Thus, non-state actors are governed by customary International Law that has a broader scope than treaties.

International Humanitarian Law, also known as law of armed conflict, are rules to limit the effects of international and non-international war or armed conflict for the humanitarian reasons. These laws are contained in agreements between states such as treaties or conventions and customary rules which are legally binding and their violation can be challenged in International Criminal Court (ICC). These set of laws are universal codification of rules derived from ancient civilizations and religions after bitter experience of modern warfare (Gasser, 1993; Mahboub, 2007). Major portion of International Humanitarian Law is found in the four Geneva Conventions of 1949, which are agreed upon by nearly every state in the world. These conventions are further supplemented by Additional protocols of 1977 regarding the protection of victims of armed conflicts. There are various other agreements that prohibit the use of weapons that have indiscriminate impact and cause unnecessary suffering (Gasser, 1993). Biological Weapons Convention 1972, Chemical Weapons Convention 1993 and Ottawa Convention on anti-personnel mines 1997 are some of the examples of these conventions banning certain type of weapons. Although Geneva Conventions and weapon banning treaties are ratified by large majority of states, however, there is considerable reservation regarding

Additional protocols among some states. Additionally, these protocols complicate the matters regarding the legitimacy of armed non-state actors working for secession from the state and demanding a right of self-determination.

Both Additional Protocols that augment the Geneva Convention are for the protection of the civilians involved in the armed conflict. Protocol I is applicable on international conflict only whereas Protocol II is applicable on non-international conflict and it is an extension and explanation of common article 3 of Geneva Conventions. It is important to mention here that civil war or conflict for secession from a state is declared an international conflict under this protocol's article 1 and not an internal matter of the state (Gasser, 1993). Due to this reason many states have their reservation to accede or ratify these additional protocols, including India and Pakistan. Additionally, these protocols complicate the matters regarding the legitimacy of armed non-state actors working for secession from the state and demanding a right of self-determination. Furthermore, the commonly used tactics by armed non-state actors like targeting the civilians and suicide bombing are prohibited means and methods of warfare under International Humanitarian Law due to involvement of civilians and inhumane indiscriminate impact. Thus, debate that is required in light of present circumstances is regarding the rights of armed non-state actors under International Humanitarian Law when they themselves are violating the same very law by harming civilians and committing other war violations.

In order to deliberate on the rights of armed non-state actors the need for discussing their tactics, mainly terrorism, is crucial. Terrorism itself is a contested concept with no single definition that has been agreed upon (Neville, 2010; Calvert, 2010). The controversy attached with the word is due to the fact that states often use it to delegitimize their opponent, domestic or foreign and also justify their own use of terror against them. This confusion has led to the creation of saying that 'one man's terrorist is another man's freedom fighter' (Daly, 2008, p 128). This, however, does not make them exempt from having any moral responsibility on the

acts of terror or individual terrorists. Terrorist like to think of themselves as soldiers for a higher cause (Calvert, 2010, p 3). Thus, this war of ideas is actually a battle for the perception of legitimacy and accompanying popular support (Gallagher & Patterson, 2009). For this purpose politics is employed as a process through which institutions rule and distribute social benefits and obligations on the philosophical ideas that people have attached legitimacy to.

War is an alternate political philosophy, where violence in used as a mere tool to psychologically and physically defeat the opponent. Terrorism, a common tactic of psychological warfare, is an overt act whose responsibility is openly claimed and in order to have a larger impact civilians or non-combatants are targeted but killing them is not the ultimate goal rather they are the means to get the message across. Due to this particular modus operandi, some researcher believe that definition of terrorism does not have to be subjective rather it can be defined in a correct and objective manner based on international laws and principles regarding permitted behaviors in conventional wars between states (Ganor, 2002). These laws particularly written in Geneva and Hague Conventions are centred on the principle that during the wartime, deliberate harming of the soldiers is a necessity and hence permissible, however, deliberate action against the civilians to harm them is still forbidden under any circumstances. Attacking military adversary is permitted behavior in conventional wars, yet people attacking civilians are declared as war criminals.

This established principle of war between states can be extended to the conflict between a state and non-state actor, however, it would still require a differentiation between guerrilla warfare and terrorism. Though similar aims, but they are differentiated based on the target of their operations, as guerrilla fighters target military men, terrorists full-intentionally target civilians (Ganor, 2002). Even the genuine goals lose their legitimacy due to the use of terrorism as the means to achieve them. Thus, any organization that employs terrorism by deliberately targeting civilians is a terrorist organization. Furthermore, characteristic of non-state actors'

aid their operations, as their networks are fluid and ever-changing. Strategic assets of the states are easier to locate and monitor. Whereas, non-state actors enjoy the ease of changing location, making it difficult to locate and monitor them (Cozine, 2013). Furthermore, using the word war, for retaliation of the September 11 attacks on America, as to define the conflict between a state and non-state actor is a misnomer, as war is an armed conflict between states (Cassese, 2001). Undoubtedly terming this asymmetrical attack as 'war' has an immense psychological impact on public opinion, however, the legal characterization of a terrorist incident is still ambiguous from the viewpoint of international criminal law.

International crimes can be categorized into war crimes, genocide, and crimes against humanity. War crimes are generally defined as violation of rules/laws of war which is not limited to but include murder or ill treatment of civilians or POWs, plunder of property or destruction beyond military necessity (Boot, 2002). There is no single document in international law that codifies all war crimes. International Criminal Court statue article 8 codifies 51 war crimes (See Annexure A), however, the list is not exhaustive and is frequently updated. Whereas, crimes against humanity include atrocities and offences against civilians during an attack, such as extermination, enslavement deportation and sexual enslavement or mass rape. Scholars usually refer genocide and crimes against humanity to be more severe than the war crimes (Frulli, 2001). The US army manual defines war crimes in *stricto sensu*, as:

> A war crime is any act, or omission, committed in an armed conflict that constitutes a serious violation of the laws and customs of international humanitarian law and has been criminalized by international treaty or customary law (Humanitarian Law, International) (Schwarz, 2014, p 2).

The above-mentioned definition sets at least two qualifying conditions for an act to be declared as a war crime. Firstly, it has to be a violation of international humanitarian law and secondly the conduct has to be criminalized under some treaty or customary international law

(Cassese, 2013, p 67). Crimes against humanity and genocide are established as independent crimes under international law, whereas, war crimes is linked between primary rules regarding prohibited acts under IHL and secondary rules regarding the punishment of war crimes, which makes them ambiguous and subject to change (Cassese, Gaeta & Jones, 2002, p 381). War crimes are distinct in the fact that they may go beyond collective state responsibility and may impose liability upon individuals as well (Schwarz, 2014). One of the necessary elements of war crimes is that it is committed during an armed conflict. Traditionally, war crimes were considered within the scope of international armed conflict. For non-international armed conflict the sufficient intensity of the armed violence is a pre-requisite for the existence of the armed conflict. Thus, International Criminal Court statute article 8 incorporated notable violation of IHL committed during non-international armed conflict. Prosecution of war crimes can be directly done by International Criminal Tribunals or indirectly by national courts.

In addition to lack of an encompassing codification of war crimes, international criminal court statute has loopholes that are exploited by the criminals. In regards to the war crimes committed during non-international armed conflicts, ICC Statute needs to be harmonized with IHL to encompass the broader scope of crimes recognized under IHL.[15] List of war crimes codified under ICC statute needs to be further broadened and member states may encouraged to use review possibilities in order to do so. Impunity gap can be reduced by categorically prohibiting indiscriminate attack on civilian population through ICC statute (Schwarz, 2014). Although ICC statute addresses the war crimes committed in non-international armed conflict, however, terrorist acts either committed in peace or below the prescribed threshold of recognized armed conflict are beyond its scope.

[15] For example, starvation of civilians used as a method of combat is prohibited under article 14(2) of Additional Protocol II, however, it is not enlisted under ICC statute. For more details, Alexander Schwarz, (2014). War crimes. *Max Planck Encyclopaedia of Public International Law*.

Serious nature of offence caused by terrorist attacks are usually prosecuted and punished under national legislation by national courts. Additionally, various international treaties obligate the contracting parties to engage in cooperation on matters dealing with such offences. UN resolutions on terrorism and other related matters are also state oriented and expect that it may be dealt under the domestic criminal laws of the country. Even though trans-national, state-sponsored or state-condoned terrorism is prohibited under the international customary law, terrorism is still not considered an international crime under the jurisdiction of the International Criminal Court (ICC) (Cassese, 2001). A proposal to consider this as a crime against humanity was opposed by many states including US on four grounds that: (i) the offence is not categorically defined; (ii) this inclusion would politicize the court; (iii) not all offence are so grave that require prosecution from an international court; (iv) national courts are considered more efficient to prosecute and punish these culprits than the international tribunals (Cassese, 2001). Need to distinguish between terrorism and fighting for the right of self-determination or independence from colonial powers also led to the rejection of this proposal from developing countries. This development is especially worrisome in the present scenario where states use a wide range of means, even extra-judicial assassination, of the terrorists in order to legitimize their resort to violence against people. Thus, the nature of terrorist offence needs to be clearly defined for it to be made justly prosecutable at national and international levels.

Terrorism is a means to achieve an objective and is not an end in itself. Thus, this modus operandi can be characterized by structure of the actor employing this tactic, ideology used to mobilize and motivate the actor to use this particular means, a rational intent which is invariably justified to harm others and a careful choice of the target. All these characters hold true to both state and non-state actors. The distinguishing feature between terrorist and the freedom fighters, both operating as armed non-state actors, is that terrorist are certain of what they are

rebelling against rather than comprehending what they are fighting for (Neville, 2010). Whereas, guerilla forces are clear about their goals as well as the selection of their target of state machinery. Terrorists, however, blur this distinction and attack both the military or state law enforcing personnel's and the civilian non-combatants. Which delegitimizes the objectives of the terrorists under the international humanitarian law, which operates under the general principle of insuring respect for human rights especially of the non-combatants and repression of international crimes by bringing the alleged culprits to the court.

2.6 Conclusion

Involvement of armed non state actors in international relations and contemporary conflicts is rapidly increasing. Literature reviewed regarding armed non state actors highlighted several common characteristics, yet remained inconclusive regarding a generalized definition. A single definition may not be able to address different types of ANSAs having diverse reasons of formation, modus operandi and nature of relations with other actors especially states. Islamic sources consulted on the matter of ANSAs clearly favoured government over monopolization of use of force and dissent against government is categorized into four categories *ḥurūb alriddah*, *qitāl al-bughāh*, *ḥirābah* and *qitāl al-khawārij*. War against apostasy, rebels/ secessionists and religious fanatics are dealt under the Islamic law of war, whereas, fight against the bandits and robber is dealt under criminal law of the land. Concepts of *hirabah* combined with religious fanaticism is classifies the terrorism menace created by contemporary transnational Islamist militant groups. Thus, an answer to terrorism by Muslim majority states may require merging boundaries between Islamic law of war and criminal law of the land.

International humanitarian law adds another dimension to non-international armed conflict as all states are bound by being signatory to its treaties or through customary international law. Similar to Islamic law of war, IHL is also confronted with how to respond to the brutal violence caused by ANSAs. Presently, international criminal offences especially war

crimes does not enlist terrorism as an offence as it does not fulfil the pre-requisites set to qualify as an armed conflict. However, the transnational nature of contemporary armed groups like Al Qaeda and Islamic State, present gap between domestic criminal law and IHL for non-international armed conflict. This problem is further intensified due to politically motivated labelling of the non-state actors involved in the conflict. The most pressing problem, however, remains to be regarding ensuring compliance to IHL by ANSAs. States centric international law makes it easier to bind states to observe IHL through treaties and customary international law. ANSAs cannot be parties of treaties, thus enjoy impunity from any international prosecution. Thus, present research will attempt at addressing these gaps to devise mechanism to make ANSAs bound by IHL, identify their legal categorization that is not politically motivated and bring clarity regarding the domains of IHL and domestic criminal laws.

CHAPTER THREE

THEORETICAL FRAMEWORK BASED ON MORAL THEORIES

3.1 Introduction

Morality is often argued to be a domain completely separate from law, however, morality is often a source of law's binding power. The Hart-Fuller debate led Professor Fuller to claim that legal systems need to be grounded in morality in order to have justice and long-term stability (Fuller, 1958). Their relationship is quite interlinked and even more so for IHL due to inclusion of Martens clause (Sparrow, 2017). This clause, which is included in several key instruments of IHL, offers a mechanism to use ethics and principles of humanity in case of inadequacy of law according to changing nature of warfare. Marten's clause states:

> In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience. (Additional Protocol I, 1977)

The meaning of Marten's clause can roughly be interpreted into three categories. Powerful states usually prefer a narrow interpretation, suggesting that this clause just affirms application of customary international law on the signatories to the treaties. Human rights organizations and some other commentators, preferring a broader interpretation, claim that this clause can be an independent source of law in itself as established customs and dictates of public conscience can prohibit certain practices even if it's not specifically mentioned under any IHL treaty document. Based on this argument use of autonomous weapon systems is considered prohibited by human rights organizations due to lack of human oversight (Sparrow, 2017). The most moderate interpretation of Martens clause may aid to interpret the text of existing treaty from the perspective of local traditions rather than supporting any specific

prohibition. Thus, morality or local standards of right and wrong of a specific community does play an important role in determining acceptable behaviour during an armed conflict.

Similarly, contemporary rights-based theories of ethics suggest that peace can only be achieved when justice is established. Justice is moral state of affairs where actors enjoy goods to which they have a right. Based on this idea in the perspective of social constructivism all three major school of thoughts regarding moral theories have been looked into and they have been compared to the religious ideals of morality and ethics regarding the rights and obligations of individuals. Deontological idea of ethics have been found to be closest to the ideal of justice, hence Kantian and Habermasian ethics have been examined in detail. Firstly, the Kantian ethics claims that individual alone can determine what moral law is and that moral law becomes binding on everyone. It focuses on the intrinsic worth of people linked to their ability to think and act rationally and believes in sacredness of human life (Kant, 1795/1983). Secondly, the Habermas's variant of this notion called *Discourse Ethics* puts forward the principle of universality based on the idea that respect for law can only be created when individual affected by it are involved in its formulation and a rational consensus is established (Habermas, 1988). The third section focuses on the concept of morality presented by Islamic religion especially Ghazali's ethical system, which provides a syncretic approach towards contemporary moral theories and useful insight on the dilemma of human rights of individuals that violate the rights of others. Thus, the main aim behind these moral conceptions to protect the universal norm of human dignity for all, is crucial to get correct perspective on present international crises and crimes against humanity experienced in our times.

Moral theories or normative theories of ethics are means of distinguishing between right and wrong actions. Although the words 'ethics' and 'moral' are interchangeably used yet they have difference in meaning. Ethics is regarded as the philosophical study of morality, whereas, morality is a system or a guide towards good or right conduct. Thus, a moral theory is basically

the study of ‘substantive moral conceptions’ (Rawls, 1974), aiming at providing a framework in which moral issues are evaluated in a reasoned manner. It deals with ideas of the right, good and moral worth that are organized to create various moral structures. In the light of this explanation, clear demarcation between moral theory and applied ethics becomes a difficult task. For example, critically evaluating any moral issue as right or wrong cannot be done independent of what it takes to determine or thinking regarding right and wrong conduct. Actions are dependent upon moral conceptions and so are their consequences. Over the years a number of common moral theories and traditions have evolved, broadly categorized into consequentialism, deontology and virtue ethics.

Consequentialism believe in judging an act as moral or immoral solely based on its consequences. Outcome of the act is enough to judge its moral worth, according to this school of thought. Utilitarianism is the most common form of consequentialism. Jeremy Bentham, founder of modern utilitarianism, has described its ‘fundamental axiom, it is the greatest happiness of the greatest number that is the measure of right and wrong.’ (Bentham, 1776; Burns, 2005). Thus, according to him the best moral actions is the one having largest utility. However, this race of ends justifying the means can have negative implications on justice. The belief that rights of some may be compromised for the greater good is against the fundamental principle of equal universal human and humanitarian rights for all. It also ignores the fact that it’s impossible to determine accurately the possible consequences of an act and moral subjectivity is bound to label others in minority as deviants. Thus, a more suitable criteria to judge the morality of an action is through the act itself, as is done in deontological theories.

Deontology is a moral theory that focuses on the act itself and claims that morality is intrinsically attached to it. It is basically a duty based moral theory as the name suggests (as Greek word *deon* means duty). Its primary emphasize is on duties and obligation that are right or wrong in themselves and not on the consequences that follow those actions. The most well-

known formulation of deontological ethics is by Immanuel Kant's standard on rationality, termed as 'Categorical Imperative' (Wood, 1999; Johnson, 2008). It demands action that can be generalized as a universal law based on rational human behavior. For example, if defending myself in self-defence is justifiable then it should be universally acceptable. Thus, conformity with moral norm is the primary criteria for an action to be deemed right. According to Kant it's not the prerogative of the agent to act in certain way rather it is his duty to act in accordance with a moral norm even ignoring more tempting benefits to act otherwise. In this case ends do not justify the means but cultural relativism may prove to be a hindrance in its universality. Actions considered morally right in one culture or circumstances may be wrong in other settings. Furthermore, rational control over conscious actions is also debatable (Nadelhoffer et al., 2010). In order to solve this dilemma another moral theory is considered which focuses on the character of the agent called Virtue Ethics.

Virtue Ethics posits that a virtuous agent would act morally despite of consequential benefits of the act or the nature of act itself. Modern virtue ethics are defined by the concept of eudaimonism which derives heavily from Aristotelian ideas that argue happiness is the ultimate goal and people should actively work towards achieving happiness, flourishing and well-being (Hursthouse, 1999; Lewis, 2013). Eudaimonism demand a person to live a life of moderation that creates virtuous character. It is, however, criticized for not recognizing inherent moral worth and lacking recipient dimension of morality (Wolterstorff, 2010). Thus, to eliminate the gaps of moral subjectivity and cultural relativism of before mentioned moral theories, contemporary rights-based theories of ethics need to be evaluated.

3.2 Kantian Ethics

Kantian approach of ethics is distinct from other theories as it focuses on the intrinsic worth of individuals. Intrinsic worth, also referred to as dignity of individuals, is linked to their ability to think and act rationally (Lewis, 2013; Rawls, 1980). Moral requirements, for Kant,

were based on a standard of rationality that he termed as 'Categorical Imperative' (CI). Categorical Imperative are principles that are intrinsically good in and of themselves and in order to observe the moral law they should be observed by everyone. The principle of Categorical Imperative is based on an autonomous rational will (Johnson, 2008). Accepting the presence of such free will provides grounds for declaring every one of equal worth and respect (Wood, 1999). Kant's most influential work on this idea is found in 'The Groundwork of the Metaphysics of Morals' (1785) and he later modified and enriched these ideas in 'The Critique of Practical Reason' (1788), 'The Metaphysics of Morals' (1797) and 'Religion within the Boundaries of Mere Reason' (1793). His novel idea of moral obligation drives its legitimacy from the concept of good will, moral worth and duty.

In order to understand Kantian ethics, analysis of moral concepts like goodwill, moral worth, obligation and duty is essential. The idea of goodwill is quite similar to the idea of 'good person'. Goodness of a person is determined by his possession of a will that makes decisions or is determined by the moral law. It is the conformity with the inner principles that matters and not the actions that one sees (Johnson, 2008). Moral law is viewed as a constraint to the desires of people. A will constructed on moral law is, thus, driven by the idea of duty (Wood, 2007). Good will is associated with acting with a sense of duty and such actions have true moral worth according to Kant. Acts done on the basis of self-interest and natural inclination lack moral worth. Sense of obligation to act dutifully despite of circumstances and consequences expresses act's moral worth. All these elements of categorical imperative are centered on man's rationality which is necessary for an act to become a universal law.

Universality of categorical imperative is dependent upon the idea of rationality of human behavior. It demands individuals to act in a rational manner which is considered rational to everyone. Robert Johnson (2008) categorizes the steps that can be used to determine the permissibility of an act under categorical imperative. Firstly, a 'maxim' or motivational

principle that guides the act is formulated to establish the reason of acting in a certain manner. Second, the action is transformed into a universal law of nature that everyone should comply to. Third step considers the applicability of the maxim as universal law of nature to check its generalizability in the world. If the act passes the third step, then, fourthly that maxim has to be checked by self-applicability, that is, an individual shows rational will to act on his own maxim in the world. If the action successfully passes these steps, then it's considered morally permissible. To judge the moral acceptability of an action based on categorical imperative, its rational generalizability for everyone else needs to be checked in the same situation. To test present-day applicability of Kant's principles, it needs to be evaluated on issues confronted to basic human rights in international law.

There is a hike in prominence of Human Rights in international law due to various on-going international and non-international conflicts around the world but its dominant discourse fails to recognize importance of normative status of the individuals. There is a continued focus on the rights and duties of the states as was in the traditional international legal theory. The statist conception of international law distinguishes between justice and legitimacy. It argues that domestic systems struggle for promoting justice, whereas, international systems only work for order and compliance (Tesón, 1992). This dual paradigm: one domestic and other international, ignores that rights of states are derived from the rights of individuals that reside in them. Immanuel Kant was of the view that domestic justice and international law are fundamentally connected and inseparable, contrary to the popular belief that one deals with individuals and other with states only (Tesón, 1992). His theory commits to the premise of normative individualism and considered individual as a unit of analysis instead of the state. He redefined the notion of state sovereignty by stating respect of states is derived from respect from individuals. He introduced his normative moral philosophy in international law by linking respect of states with the concerns of individual freedom and human rights.

Human rights, enshrined in liberal theory and influenced by Kant, cover a broad spectrum of rights from individual freedom, respect for individual preferences to individual autonomy. Contemporary researchers argue the universality of human rights but they are universal only because they are derived from the Kantian categorical imperative (Tesón, 1992). This argument links international law to human rights and individual autonomy, decentralizing international authority and emphasizing ideas of justice for all. International law in backdrop of Kant's moral theory provide rationale for the international organization capable of establishing a lasting peace if allowed to work without political biases. Kant essentially foresaw a revolution of human rights and provided philosophical basis for it. Kant's essay 'Perpetual Peace' (1795) mentions an unattainable moral ideal that states should aspire to in the international relations. He advocates for pacifism and internationalism throughout the articles mentioned in this essay, much like an international law treaty.

The idea of duty and obligation is always associated with the rights of others. The international order that Kant is proposing is, however, a law not a right in subjective sense (Tesón, 1992). Underlying principles that Kant gives in his essay of Perpetual Peace (1795) are to eliminate; chances of war in future, forceful interference in affairs of foreign states and use of deceitful tactics in wars that shatter the trust of the opponent. Furthermore, the second section has articles related to the matters among nations. He proposes a republican civil constitution for every nation, an international law based on a federation of free states and cosmopolitan law based on the idea of universal hospitality. All these prepositions are based on Kant's primary analogy of the state as a moral person (Tesón, 1992). Hence, international and domestic law, according to him, was to protect individual freedom by giving priority to human rights over the state.

Human rights, for Kant, are linked to the intrinsic worth of the human beings that is based in the idea of rationality. Human reason makes a person worthy of respect and an end in

themselves. This faith in individual reason and autonomy leads him to envision a republican state based on the principles of freedom and equality (Tesón, 1992; Wood, 1999). Kant phrases the idea of 'your freedom ends where mine begins' as:

> No one can compel me (in accordance with his belief about the welfare of others) to be happy after his fashion; instead, every person may seek happiness in the way that seems best to him, if only he does not violate the freedom of others to strive toward such similar ends as are compatible with everyone's freedom under a possible universal law.... (Kant, 1795/1983, p 72)

Universal Declaration of Human Rights (UDHR, 1948), adopted by United Nations General Assembly on 10 December 1948, also expresses freedom and equality as the primary element of its thirty articles. Right to life, liberty, personal security, freedom from discrimination, slavery, torture and degrading treatment are declared inalienable rights of all human beings. This universality of law has another important component of equality, argued by Kant as well in his theory of morality.

Principle of equality is the primary requirement to make a law universal and it is ensured through accepting that everyone has exactly the same right as everyone else. Ascribed and acquired status does not prescribe anyone to get preferential treatment. Kant's moral philosophy is thus, considered a protest against distinctions and privilege (Tesón, 1992). This principle of equality, however, also demands same rights for the aggressor and the victim which goes against its primary validation of rationality. Aggressor consciously and with reason commits the acts of aggression, for example in a war, killing and aggression is justified as a duty towards state or self. The victim, however, may or may not have provoked these acts of aggression. For instance, non-state armed actors committing crimes against civilians, justify their acts are done for a fair moral cause in their own eyes but the victims have not directly provoked this treatment of aggression. Under these circumstances, equality of right of life,

security and freedom of both parties involved in the conflict does not appeal to the very reason that establishes the intrinsic worth of the human beings. Furthermore, brutal acts committed by ANSAs are universally unacceptable and are infringing upon the rights of others. Thus, according to categorical imperative intrinsic worth of members of armed groups is not the same as others as their actions are not based on universal rationality.

Critics of Kantian ethics debate that linking intrinsic worth of human being to their ability to reason is not an all-encompassing approach for whole mankind. Relating moral worth to a capacity paradigm negates the principle of universality. On the contrary, recipient centric rights-based theories of ethics argue for the inherent worth of human beings instead of intrinsic worth (Wolterstorff, 2010; Lewis, 2013). Thus, grounding human rights in the fact of one's status of being human. This, however, still poses the problem of equality of rights of aggressor and the victim, which goes against the understanding of justice. Furthermore, Kant's focus on individual to decide for himself what is wrong and right is also troublesome. While establishing the authority of reason in the moral theory, Kant, ignores the fact that human reason alone cannot fully comprehend reality. Subjective morality is the prime reason behind initiating a conflict. In order to remove this subjectivity from moral theory, later philosophers have started to put weigh into the opposing viewpoints to achieve a rational consensus.

3.3 Discourse Ethics by Habermas

Moral theories like Kantian Ethics and Discourse Ethics by Jurgen Habermas provide interesting framework to judge the impact of one's actions over his basic rights. The Habermas's variant of idea of morality called Discourse Ethics believes on the principle of universality rooted in the idea that respect for law can only be established when individual affected by it, are contributing in its formulation and a rational agreement is developed (Smith, 2014). His work is inspired by critical theory and in ethics he comes closest to the Kantian tradition. He supports cognitivist position that contemplates the ideas of the right and the just

(Rehg, 1994). He deviates from Kantian ethics in defending 'just' over the 'good'. This neo-Kantian moral theory defines moral theory based on the importance of justness and individual rights, however, misses the role of shared conceptions of good life play in grounding our moral intuitions. It is, however, more appropriate and relevant explanation of moral theory in contemporary circumstances as it admits the possibility of validity of opponent's point of view. Discourse ethics presented by Habermas shifts the focus from rule guided, rational choice realm to the jurisdiction of sociological institutionalism through his theory of communicative action and the ideas of discourse.

In addition to utility-maximizing action and rule-guided behavior governed by rational choice, human actors participate in truth seeking by establishing mutual understanding through reasoned consensus. This reasoned consensus challenges the rationality claims in communication and it's theorized by Habermas as critical theory of communicative action. Habermas regards this behavior oriented towards mutual understanding as '*verstandigungsorientiertes Handeln*' (communication-oriented action) and explains it as:

> I speak of communicative actions when the action orientations of the participating actors are not coordinated via egocentric calculations of success, but through acts of understanding. Participants are not primarily oriented toward their own success in communicative action; they pursue their individual goals under the condition that they can co-ordinate their action plans on the basis of shared definitions of the situation. (Habermas, 1981, p. 385).

This argument of reasoned consensus or *Verstandigung* (communication) is contrary to the idea of *Verstehen* (comprehension) given by Max Weber, which means to understand act from actor's point of view (Elwell, 1996). Thus, Habermas's communicative action helps in conceptualization of the logic of arguing in empirical settings.

Logic of arguing is differentiated on the basis of meta-theoretical approaches that focus modes or logics of social action characterized by different rationalities or goals. In real life it rarely occurs that each of these modes of social action are considered as ideal type. The distinction between 'logic of consequentialism' and 'logic of appropriateness' introduced by James March and Johan Olsen (1989; 1998) comprehends this problem of real life. Rational choice approaches that in the realm of 'logic of consequentialism' interests and inclinations of actors are inflexible and their interactions are based on a strategic behavior. Thus, actors work towards maximizing utility and collaboration is possible only when it optimizes actor's interests. Contrary to the consequentialist, the social constructivists follow different rationality called 'logic of appropriateness'. It argues that actors follow rule guided behavior by trying to 'do the right thing' rather than maximizing utility (March & Olsen, 1998; Risse, 2000). This type of rationality, however, is influenced by social norms and institutions that not only regulate behavior but also shapes social identities. For example, it defines that good people perform certain duties or acts in a certain manner considered appropriate socially. All those deviating from these social norms and ideals are labelled as bad, wrong, immoral or even criminal. Consequently, norms regarding Human Rights are to protect citizens from state interference and also to define civilized state vis-à-vis the modern world.

Social constructivist's contribution towards establishing collective norms and understanding of social identities helps in defining the rules that govern social interactions of all the actors involved. This does not provides safeguard to these norms against change or violation, rather define their present status. For example, norm of state sovereignty has transformed dramatically in relation to Human rights over the years, yet we cannot define state without the reference to sovereignty (Risse, 2000). Norms, however, are internalized through the process of socialization which makes it part of sub-conscious behavior of individuals. Similar is the concept of communicative action, according to Habermas, it is any social

interaction which is accepted without objection by the particular population in question (Smith, 2014). Now in order to bridge between groups that are socialized with different set of norms, Habermas puts forward the idea of discourse that aims at establishing rational consensus between the differing groups.

Discourse is any social interaction involving opposing or differing viewpoints aimed at achieving a new rational consensus. The concept of appropriate norm by March and Olsen (1998) is a conscious process of selecting norm in accordance to the situation confronted to the actor (Risse, 2000). Through discourse that appropriate norm would be selected in consideration to the viewpoints of others. First preconditions for such an argumentative consensus is the ability to empathize with the opponent. Secondly, there is need of 'common lifeworld' provided through common language, norm system or shared culture. This is important to establish common understanding towards truth claims. Last factor is that actors should identify each other as equals and equally able to access discourse which should also be public in nature. Due to these pre-requisites elements of power, force and coercion are eliminated from argumentative consensus by giving equal rights to all parties involved (ibid). This recognition of equality of rights in accessing and contributing to discourse laid the foundation for the principle of universality given by Habermas. Reaching a rational consensus between ANSAs and states requires discourse where power disparity and preconceived notions of right or wrongs committed by opposing groups need to be set aside. Only then equality of contributing towards discourse by both sides will be respected.

Habermasian ethics develops on the principle of universality given by Kant which focuses on an individual to determine what moral law is and believed in its universality. Kant encourages individuals to act in a manner that may by your will to become universal law of nature. Hence, universality of the law, according to Kant, can be judged by considering the consequences of masses acting in manner considered right by an individual. On the contrary

Habermas seeks to establish universal law after incorporating point of views of opposing parties. He highlights the acceptability by all to the consequences and side effects by those involved in discourse due to sense of satisfaction that their interests are catered for (Smith, 2014). Habermas puts a condition on universally binding nature of law to the mutual agreement on a maxim established through discourse. Kant's golden principle of respect for humanity has been validated by Habermas. He, however, considers that respect for laws protecting humanity can be ensured only through taking everyone on board while formulating these laws. Discursive and argumentative processes leading to creation of international regimes regarding human rights drive heavily from discourse ideas presented by Habermas.

International institutions provide a normative framework to carry out structured interaction on a particular issue area and deliberation on international policy. Similar is the case of Universal Declaration of Human Rights (UDHR) that was adopted by United Nations General Assembly in Paris on 10 December 1948. This milestone document was drafted by representatives with legal expertise belonging to different cultural backgrounds from around the world. Now it serves as a common standard for all people belonging to different nations to protect their fundamental human rights by recognizing "…the inherent dignity and of the equal and inalienable rights of all members of the human family." (UDHR, 1948). This lays the foundation for freedom, justice and peace in the world. The rational consensus established on this document was through discourse and argumentative processes, in terms of Habermasian ideology. This argumentative consensus is, however, not absolute and it is bound to evolve and change over time.

Informal interactions leading to argumentative rationality in international domain differs from bilateral or multilateral diplomatic negotiation in many ways. Firstly, they are more open to non-state elements (like NGOs or advocacy groups) rather than being confined to state actors. Secondly, international public discourses are more apt at initiating debate on

social identity related aspects of the actors involved. Thirdly, there is a civilizing impact of the public discourse on the actors as it encourages them not to act considering their egoistic interests only rather work for a greater common good (Risse, 2000). This common normative framework developed through discourse helps in recognizing and providing a platform to less privileged actors to voice their arguments. Consequently, opinions of actors having moral authority and knowledge are more likely to be accepted than the actors promoting vested interests or having access to power. This method, thus, establishes power parity between state and non-state actors in matters of having opportunity to express their opinion and its acceptability in public discourse. Furthermore, any ambiguity regarding identities, interests and views of the actor will transform discursive activity into 'truth-seeking' mission which leads to 'argumentative self-entrapment' (ibid). Thus, although discourse has contributed positively in many aspects, it still has few drawbacks that makes it less productive.

Criticism on discourse ethics stems from same pre-requisites that are considered its positive point. Michel Foucault argues that external power relations impact the actors involved in the discourse (Gordon et al., 1991; Risse, 2000). These power relations penetrate the discourse itself by setting the rules governing public debates and consequently they even help in sustaining power disparities in social structures. Another precondition for the argumentative consensus, the availability of common language, norm system or shared culture, is also problematic in making discourse universal. It demands that in order to establish common understanding towards truth claims, individuals should share some sense of socio-cultural commonality. This condition, however, the very principle of universality that discourse ethics aims to establish. In the context of human rights discourse has helped in establishing norms to protect dignity and sanctity of human life but it also provides opportunity to competing norm of state sovereignty and humanitarian intervention to overrule the norms of human rights. Thus, this peculiarity of the situation demands that other school of thoughts regarding ethics and

morality to be consulted to get a better understanding regarding formulation and implementation of human rights in the contemporary world.

3.4 Islamic Ethics

Theological and philosophical based ethics are the initial theories constructed to explain and demand moral behavior in the society. Modern normative ethics present today derive heavily from these theological and philosophical debates and have evolved from western ideas of rational theology and philosophy. These modern ethical theories have some linkages even with ideas found in East Asia but western intellectual history has largely ignored and neglected Islamic thought in this perspective (Hourani, 2007). Ethics form the core of Islam as the Holy Quran repeatedly mentions belief in God and good deeds in the same phrase, linking the two. One instance of exemplifying this linkage is:

> …if they fear Allah (by keeping away from His forbidden things), and believe and do righteous good deeds, and again fear Allah and believe, and once again fear Allah and do good deeds with Ihsan (perfection). And Allah loves the good-doers. (The Holy Quran, 5:93)

Many intricate things get lost in translation of Quran from Arabic to English, one such thing is the concept of '*Ihsan',* an adverb that defines the kind of good commanded in the verse. 'Ihsan' is an Arabic word which is roughly translated as 'perfect', hence the divine command is to do good deeds with perfection.

The criteria of doing good deeds with perfection demands best intensions on the part of the actor among other things. Moral worth of an action is defined in a Hadith as "Actions are according to intentions, and everyone will get what was intended" (Sahih Bukhari, Book 1, Hadith 1). Linking actions with intentions shows the connection between physical and spiritual components of any human being. Consequences of an act are linked to its underlying intention. Act with good intentions but undesirable consequences would still be rewarded as a good act

contrary to the beliefs of consequentialists. This, however, can be troublesome if not regulated by other laws to guide an individual's behavior. A person may have a valid justification of harming another person in his mind but the consequence of these actions may not be just for the victim and go against the rule of law. To check these tendencies legal professions in the initial days of Islam formulated the law of shari'a to cover various ethical situations, paving the foundation for the Islamic civilization.

In Islam the divine law and the ethics are interlinked. The debate on the ontological position of values in ethics and the source of human knowledge regarding such values, however, still continues in Islamic thought. Historically, Mu'tazilite theologians were on the position that values have objective existence that can be interpreted through human reason or from scripture (Quran and traditions of the Prophet) or both. Ash'arites, on the contrary, believe that values are in essence commands from God and reason can only be used in subordination of the scripture. Third school of thought belonged purely to philosophers that believe that values are objective and can be perceived by reason, independent of any other aid (Fahrī, 1991). Philosophy (or *al-falsafa*) had been a foreign science at the time of the Holy Prophet, inspired mainly from Greeks. But as the empire grew and Persian influence came on the caliphate, theology and philosophy increasingly interacted. Decline of Muslim civilization in about eleventh century A.D. led to the bifurcation of the two once again. Difference of opinion about the concept of justice in these school of thought highlight the theological and philosophical debate of ethics in Islam.

Concept of justice is derived from God's attributes in Islam but its interpretation varies according to the theological and philosophical underpinnings. God's attributes of omnipotence, all knowing and wisdom, results in linking standards of 'value' to the 'will of God', in the opinion of Mu'tazilites (Moris, 2020). This means that whatever God wills is good by definition. Thus, making this 'ethical voluntarism' underlying principle of Islamic law in the

opinion of Shafi'i (d. 820), an Islamic jurist. But the traditionalist theologians or Ash'arites claim there is no ethical limit to God's will, as He is not being 'unjust' when He punishes someone for what He has predestined. For them justice is obedience to divine law and God is superior to all laws. This theory of divine justice leaves man responsible for the acts that he commits and culpable for his sins as it still can practice by freewill in addition to the element of predestination. Consequently, divine law were extracted from the Holy Scripture, Quran and traditions of the Prophet, to define civil liberties of individuals and protect their basic human rights.

The responsibility of consequences of every act done by human agent is upon him, even though God creates and enables man to do that act. The correctness of an act is determined by what is permitted by divine authority and it supersedes even rationality. In terms of human rights, right to life is of utmost importance in Islam. Islamic perspective on war, however, shows a commitment towards peace but not to pacifism (Brockopp, 2003). This is depicted in the Holy Quran as:

> Fighting is enjoined upon you, while it is hard on you. It could be that you dislike something, when it is good for you; and it could be that you like something when it is bad for you. Allah knows, and you do not know. (The Holy Quran, 2: 216)

In this context it is important to mention, even though fighting in permissible in Islam not only for a just cause (*jus ad bellum*) but also mentions rules related to the conduct of war (*jus in bello*) to prevent any transgression or '*zulm'*.

Acts of transgression or '*zulm'* are repeatedly mentioned in negative terms in the holy scripture in Islam. Various authoritative lexicographers have defined 'zulm' as 'placing in a wrong place'. In the perspective of ethics, it means 'to act in such a way as to transgress the proper limit and encroach upon the right of some other person' (Hourani, 2007, pp. 30-31).

Committing a forbidden act is considered a wrong done to the self, as Islam believes in the innate goodness of a person and crime is considered as offensive as usurping the rights of others. Death penalty prescribed by Islam is primarily for two offences. Firstly, for person who is guilty of killing of another individual and as a retribution or 'Qisas' the one who has committed the crime has to be dealt in similar manner. Second instance for prescribing death penalty is for the one who commits crimes against the community or state, which is termed as 'Hiraabah' or 'Fasaad fil Ardh' in Quran (Holy Quran, 5:32). Depending upon interpretation the second instance may include treason, apostasy, terrorism, piracy, rape and adultery etc. In these circumstances the punishment used to circumscribe the rights of the transgressor or one found guilty of the crime is to establish justice in the society and is done for the greater good of the people.

In Islam punishment is used as a reformatory act for the guilty, a source of retribution to the victim and a deterrent for the society. Islam differentiates between the rights of the transgressor and the victim in order to establish and sustain justice in the society. To express the concept of justice the terms used are '*adl'* and '*qist'*, both are antonyms of '*zulm'* but have slight difference in meaning. '*Qist'* refers to the action of an agent towards another, whereas, '*adl'* refers to the equitable distribution of something between two or more recipients (Salim & Hossain, 2016). Equal compensation for all, however, at times may not be just in the situation and it may demand reparation according to one's input or act. Thus, although there is a general rule of equality of all in basic rights but it is reinforced by the concept of equity in order to make justice more appropriate to different circumstance and point of view of people that led them to commit an act. Consequently, idea of justice and rights in Islam do not focus of any particular element rather encompass all aspects ranging from consequence of the act, nature of the act itself, intent of the agent and conformity to divinely ordained laws.

The treatise on ethics by Al-Ghazali, a 11th century Ash'arite-Sufi jurist, is an interesting mix of western scholarship with Islamic ideas. He declares Quran as the means of attaining truth, hence he calls it 'the Just Balance' (Netton, 1980) as it expounds the moral relations between persons and the consequent balance in their actions. Al-Ghazali's idea is similar to the ancient Greek tradition of justice which defines giving and taking one's due in interpersonal relationship. Like Plato he was of the opinion that justice is sum of all virtues rather than being a single independent quality (Black, 2011). Similar to Plato he indicated a need of Harmonious relationship between the king, the army and the people with a distinction that according to him justice can only be established if you treat people in a manner in which you would deem right to be treated yourself. This decree applies on the ruler and the subjects alike. Furthermore, he considered controversy among people as necessary and an eternal condition (Netton, 1980, p.76) that can be contained through ethics of power, indicating the inseparability of religion and the government.

Al-Ghazali's ethico-religious system is a balance between all three major schools of thoughts regarding moral theories. He encourages people to strive for the end goal of greatest happiness or the state of 'blessedness' as he terms it and also talks about excellence ingrained in Human Nature (Umaruddin, 1996, p.123). The term blessedness, however, encompasses both the ultimate end and the means to achieve that end. Usefulness of the means is categorized on the benefits that can be acquired in this world and the hereafter. Contrary to the utilitarian scholars, Al-Ghazali is not concerned with the end of greatest happiness of the greatest number of people he rather emphasizes the advantages gained by individuals whose excellence and perfection of action may benefit the society as well. Similarly, Ghazali's ideas bear resemblance with Kant's categorical imperative as it demands only those actions to be undertaken that are acceptable to oneself when done to you by others. This duty bound imperative, according to Kant however, should be rooted in freewill of the individual instead

of attraction of benefits of the results or some other ulterior motive. Ghazali differs from Kant regarding the absoluteness of freewill as he accommodates pre-destination with individual will in determining the every action of the individual. Thus, Ghazali's ethico-religious system rooted in Islam offers interesting blend of philosophical moral theories that developed centuries after him.

3.5 Analysis of three moral conceptions

Depending upon the source of ethical knowledge, traditions of ethical thinking can be termed as secular or religious. Similarly, ethical theories in theological and philosophical modes is different from normative ethics. The difference between the two lies in the importance given to rationality as a source of knowledge. The debate on which one is the superior source of knowledge, either its reason or divine revelation has been going on since ages. This bifurcation, however, got augmented by the argument of mind body duality presented by Rene Descartes in 17th century. This idea of dualism laid the foundation of secularism in the modern west, thus making reason to be supreme and only source of knowledge for the realm of worldly affairs (Hatfield, 2017). And religion or divine revelation was restricted for the fulfilment of spiritual needs. Determining course of action in worldly affairs through reason only, however, has its limitations due to confines of reason itself.

Human reason or rationality is the power of mind to think, comprehend and form logical judgements. This ability is aided by the five senses that are used to perceive the world around us. These sensory perceptions are, however, not absolute and are restricted by simple barriers like walls and other hindrances. Reason based on these imperfect perceptions cannot be trusted to make right decisions under all circumstances that can be generalizable. Thus, in order to eliminate this gap divine revelation is consulted as a source of superior knowledge, which at times would not even appeal to reason but has to be trusted to be just. Sceptics of the religion, however, have a hard time believing in such a justification and question this very premise. The

issue of human and humanitarian rights in contemporary world is also debated on similar lines that either it can be construed independently from religion on secular or philosophical normative knowledge or divine revelation provides a more just alternative to define human rights.

Philosophical moral debate in the main schools of thought of consequentialism, deontology and virtue ethics focuses on only one aspect of the act i.e, end result, act itself or moral standing of the agent, respectively. Concept of rights and duties in Islam, however, is a synthesis of all the main traditions of moral theories categorized into consequentialism, deontology and virtue ethics (Abdallah, 2010). Islam promotes those acts that do not violate the rights of anyone as a consequence and the act itself needs to be well within the limits of permissibility as it does not adhere to the doctrine of 'ends justifies the means'. Furthermore, since the act is dependent upon the intention of the agent, hence a lot of focus is on the individual to create a virtuous character in them. This virtuous character is guided by the golden principle of reciprocity, which is a moral maxim promoting altruism in most religions and cultures around the world (Kidder, 1995; Blackburn, 2003). This idea is repeatedly expressed in Islam as well and once it is stated by the Holy Prophet (PBUH) as: "None of you will have faith till he wishes for his (Muslim) brother what he likes for himself." (Sahih Bukhari, Book 2, Hadith 6) This principle makes the concept of ethics in Islam not just a recipient centric rights based theory rather it also aims at protecting the rights of the agent. Thus, establishing a fundamental difference between religion and other duty based ethical codes.

Moral theories like Kantian Ethics and Discourse Ethics by Jurgen Habermas provide interesting framework to judge the impact of a person's actions over their basic rights. Kantian ethics focuses on the intrinsic worth of the human being linked to their ability of rationality. Categorical Imperative presented by Kant aims at establishing a principle for the permissibility of an act based on its universal applicability. An act considered permissible by an individual

should remain acceptable by that individual if everyone in the universe starts doing the same act. However, if an act performed by others is not acceptable to an individual than its morally obligatory upon him that he should refrain from that act. Whereas, Habermasian discourse ethics aims at establishing a mutual consensus after discourse on an issue and believes in equal right of participation in that debate. These both theories, however, derive a lot from individual reason to establish justice without any sense of accountability. Islam also emphasizes on the importance of universal dignity of human beings as is seen in the case of deontological ethics but differs from them on the idea of its absolute inviolability.

Islam gives the space of taking revenge if a wrong is committed against ones rights, although forgiveness is always considered a superior action. Repeatedly it's mentioned in Quran to 'return evil with kindness' (13:22, 23:96, 41:34, 28:54, 42:40). Yet, in order to accommodate human nature and reason, right to inflict as much pain unto others as has been experienced due to action of others is also given. Right to life is the most protected right in the light of Islamic law but even this is violable if demand arises. Quran mentions: "…And do not kill the soul which Allah has forbidden except for the requirement of justice; this He has enjoined you with that you may understand" (The Holy Quran, 6:151). Thus, establishment of justice is a higher priority than rights of transgressors. The concept of punishments to establish justice is also profound as it is used to create empathy for others by making the culprit experience the same pain as it has inflicted on others.

Empathy is the root from which Islam's moral theory is derived (Sahin, 2017) which is contrary to rationality of Kantian ethics. Empathy is a unilateral moral commitment towards the welfare of others without expecting same favor in return. Whereas, rationality compels man to consider and prioritize worldly benefits over likely benefits of others. Thus, rationality may dehumanize others by considering them a threat or competition to the rights of self and consequently compromising the human rights of others. Empathy, on the other hand,

encourages work to be done for the greater good of the humanity inspired by spiritual rewards to be gained in this and after life. Secular ethical knowledge lacks the spiritual incentives that religion attracts people with, in order to govern their relation with others. Similar is the case with discourse ethics that offers a cognitivist position to resolve the questions of rights and justice, but lacks the supra-human knowledge that the divine revelation can offer. Acceptance of absoluteness and superiority of divine knowledge by secular philosophers is an impossibility but needs to be kept in consideration while driving moral argumentation and normative justification for the acts of those overwhelming majority of people that follow religion very passionately and justify their worldly acts in religious context.

3.6 Conclusion

Some individual not only infringe upon the rights of others yet demand the fulfilment of their own rights. Thus, the dilemma faced by contemporary world in establishing a lasting peace is regarding the rights of individuals that don't have respect for the rights of others. Analysing competing moral theories offers solution to this problem. The main theme behind these moral conceptions is the universal norm of human dignity of all and the ways it can be preserved. Nature and purpose of morality and ethical theories is to distinguish right from wrong and are broadly categorized into school of thoughts of consequentialist, deontology and virtue ethics. These normative conceptions of morality offer partial solution while discussing their application in various situations. Each one of them focuses only on one aspect of the situation like the end result, the act itself and the motivational force of the agent rooted in its character. This piecemeal approach does not offer wholesome understanding of the criteria to judge an act as right or wrong. Among others, Kantian ethics and Habermasian Discourse Ethics offer an attempt to create a moral theory that can be universalized.

Kantian ethics posits that human beings have moral worth due to their intrinsic ability to reason. This rationality makes an individual capable to judge right from wrong and the

criteria to judge the correctness of this decision is that it remains acceptable to that individual if everyone else in the world did the same act or behave in a similar manner. Kant's idea of categorical imperative was further enhanced by Habermas as he suggested that a decision on an act cannot be made individually rather it has to be deliberated collectively through discourse and constructive argumentation. Decision made by such mutual understanding has universal value and appeal as everyone has an equal opportunity in deciding upon it. Both these ideals, however, have limitation of human reason which is surpassed by religion through divine knowledge in revelation but is still viewed with skepticism by the rationalists.

Thus, in the light of above-mentioned discussion it is deduced that rights of ANSAs cannot be judged based only on their actions, the consequences of those actions or the moral standing of the actor, rather a deeper understanding of the motive behind those actions can be achieved through discourse with the armed groups. Ethical or moral framework, recognized by IHL through Marten's clause, for such a discourse is necessary due to religious affiliation proclaimed by majority of armed groups.

CHAPTER FOUR:

ARMED NON-STATE ACTORS: CONCEPT AND THEIR ORIGIN

4.1 Introduction

Everything is not fair in war. Even the inhumane acts of injuring and killing of the opponent or enemy, considered necessary during war, has limits that are internationally recognized and respected. Changing nature of contemporary conflicts pose challenge to these codified principles of International Humanitarian Law (IHL) governing the armed conflicts. Asymmetrical warfare with terror attacks and deliberate targeting of civilians is used to manipulate interpretations of IHL to fit vested interests. However, by employing such tactics the true purpose of creation of IHL is being ignored. IHL and armed non-state actors are essentially in contradiction to each other as one aims at limiting the effects of armed conflict especially for civilians/ non-combatants, whereas, the other is increasingly targeting civilians to communicate their message more effectively and to achieve their targets efficiently. Thus, it's essential to study the challenges posed by armed non-state actors by reflecting upon their underlying concept and their historic origin in order to gather from their past precedence.

4.2 Concept of non-state actors

In order to truly appreciate the concept of non-state actors it is essential to fully comprehend the idea of the nation states as conceived in the Treaty of Westphalia (1648). Nation-states, conceptually represents the idea of a distinct ethnic group, living in a specified territory and has formed a state that it governs. Sovereignty of the state ensured through this treaty has made it the defining principle of the international state system (Heiðarsson, 2012). This treaty lent legitimacy to the sovereigns to govern their people without any external interference on any pretext; political, legal or religious (Kelleh, 2012). This power over the subjects became widely accepted right of the sovereigns. However, over the years sovereign state system has evolved, transforming the concept of nation-states and sovereignty. The idea

of absolute sovereignty has now being replaced by new view of sovereignty with responsibility (Kelleh, 2012). Permanent status of the control over sovereignty in the nation state is now conditional to states responsibility towards its people, making feasible conditions for the rise of non-state actors to address people's grievances towards state.

Armed non-state actors is an interesting subject in its own right. Concept of non-state actors and their influence in the international relations is not a new phenomenon, yet their repercussions and consequences have been becoming more serious in the recent years. Non-state actors can broadly be explained as 'all entities other than state' (Santarelli, 2008, p 1). This general definition can encompass a wide variety of actors ranging from meaningful players like transnational corporations (such as fast food franchises like McDonald's, KFC and Dominos), non-governmental (for example Amnesty International) and inter-governmental institutions (for instance NATO, European Union, Organization of Islamic Cooperation) to more destructive players like armed non-state actors or violent non-state actors. Relationship of non-state actors with states can be of cooperation or competition. Consequently, the present prevalent menace of terrorism arose when the armed non-state actors used violence and force to challenge the state authority and power. Although, the label of armed or violent non-state actors has recently gained fame, but their existence has a long history. This present spike in prominence of the term is attributed to increasing nature of destruction and killings caused by them and their projection by the media. Concept of non-state actors, however, is as old as of the states itself, if not older (Stratton, 2008). Thus, in order to trace their history a general criterion for recognition needs to be identified.

A universally acceptable definition of the armed non-state actors is not available presently and difficulty in its creation is due to their various types and characteristics (Hofmann and Schneckener, 2011). However, there are two main criteria used to generally define armed or violent non-state actors. Firstly, they operate and function outside state control and challenge

its ‘authority, power and legitimacy’ (Petrasek, 2000). Secondly, they rely on unconventional and asymmetrical use of violence and force to achieve their objectives (Shultz, Farah & Lochard, 2004). Furthermore, they have political, economic or ideological goals that are legitimate and justified in their worldview. Also, their structure has at least some level of command, control and coordination along with clear distinct group identity (Hofmann, 2006; McHugh & Bessler, 2006). By the above specified criteria such actors can include a vast range of group of people ranging from militias, terrorists, insurgents to criminal groups, armed gangs etc. (Rodgers & Muggah, 2009).

With the changing nature of warfare, armed or violent non-state actors have occupied the place of enemy as observed in the traditional or conventional warfare in the past. The increase in prominence of these groups in the post-cold war era is due to changing nature of modern wars concentrating on internal conflicts between states, sub-states or non-state group (Sarkees et al., 2003). This shift in warfare is due to the weakened states, poor economies, little control on natural resources and administrative territories. Additionally, easy access to inexpensive weapons and arms further makes it easier to organize a rebellion (Weinstein, 2003). Also states’ capacity and effectiveness is eroding due to growing state fragility and supra-national level reallocation of state sovereignty. Consequently, armed non-state actors are not only challenging states’ monopoly over use of force but also are providing alternative systems of governance that compete with state (Rosenau, 2001).

4.3 Origin and development of armed non-state actors

Existence of non-state actors is not new, rather their presence pre-dates nineteenth and twentieth centuries. Mercenaries, merchant associations and other banking enterprises had their presence since Roman Empire and they operated across wide area with little governmental regulations or control. Jesus Christ himself is considered a particularly influential non-state actor within Roman Empire, who promoted a transnational non-governmental religious

movement in the form of Christianity (Suri, 2005). Pre-modern non-state actors, however, operated for different idealistic, commercial and violent reasons in the form of Christian martyrs, wealthy merchants and seafaring pirates, in order to benefit from the resources of various societies while functioning in parallel with officially recognized governments. While tracing the history of the modern non-state actors French Revolution constitutes an important event which spurred their growth. Rise of secular state power as the result of this event created the need of new mediating players between contending and expanding states with powerful government (Saurugger, 2020). Consequently, inter-governmental organizations formed to fill the void of international society were often encouraged by the states. Since the following time period was dominated by era of state expansion, hence the inter-governmental cooperation focused on technical matters like, postal delivery, seafaring standards and cable communication among other concerns mostly related to naval affairs.

The intergovernmental cooperation of nineteenth century further encouraged and even legitimized activities of non-state actors. Creation of International committee of the Red Cross is an example of this particular time period (Van Steenberghe, 2011). What began as a private venture soon transformed into a global body offering impartial health facilities to the victims of war and natural disaster, with extensive non-governmental support from individuals belonging to different states. Consequently, the First Geneva Convention signed in 1864 by 12 nations recognized Red Cross as neutral group and offered protection to the medical facilities and personnel helping the wounded in war. Due to non-governmental nature, Red Cross not only gained extensive access to people affected by war but also became a trusted evaluator of civilian attacks due to its independence from state control. Non-governmental organizations and non-state actors operating specifically in technical fields created impartial knowledge and assistance that was impossible for the states to do so due to their competition against each other in the international system. Such impartiality was imperative for the formation of agreed

standards of conduct during war and peace time. Utilitarianism school of thought provided premise for the creation and acceptability of NGOs and NSAs (Zack, 2010).

The golden age of NSAs, however, came with the increasing international education and transnational flow of ideas in the late nineteenth century. Post 18th century, globalization also contributed in increased interaction and integration, thus shifting the focus of international relations to NSAs rather than states (Baumann & Stengel, 2014). Consequently, the number of NSAs and NGOs swelled exponentially before the outbreak of First World War. Resulting in growing impact on public opinion and influence on governmental policies (Suri, 2005). The creation of the Nobel Foundation in 1900 by Alfred Nobel also acted as an NSA in order to further the cause of international peace activism. The heighted tensions between states due to nationalism and imperialism in this period was counter-checked by internationalist efforts by such NSAs and NGOs. Scientists, academics, doctors, lawyers and others opted for cooperative alternative instead of fuelling rivalries of the competing states. Despite this development the international peace activists failed to outlaw armed conflict and horrors of world war were witnessed.

The most positive contribution of NSAs and NGOs, however, was the development of common understanding regarding human rights that also emerged from their work after 1960s. Amnesty International, established in 1961, became the leading public advocate of human right in this period, attracting attention for the dissidents and threatened groups by keeping their stories alive in the international media (Iriye, Goedde & Hitchcock, 2012). The resultant public pressure ensured that state policy makers add human rights to their agenda. In the decades of 1960s and 1970s Amnesty International focused on the human rights violations committed by state agents only. However, as the time progressed Human rights abuse during conflict by non-state actors became more prevalent internationally (Walling &Waltz, 2011). In order to address this problem of violent non-state actors, Ken Roth, Executive Director of Human Rights Watch,

invoked that during conflict principles of IHL may be applicable to both states and non-state actors. In order to address the idea of political actors, defying the governmental authority while using force, Amnesty International coined the term non-governmental entity (NGE) in 1980s and used it till 1990s for the violent groups fighting against the state (Walling &Waltz, 2011). Although the term non-governmental entity did not gain much popularity and has now been replaced by the term non-state actors (NSA).

NSAs and NGOs played a significant role in cold war, as they helped infuse new thinking in their societies and constructed common understanding regarding human rights across the Cold War divides. Such successes and communication development like internet gave further impetus for the number of NSAs and NGOs to grow. Consequently, they also became emboldened to challenge state institutions on issues of social justice and political rights. Terrorist attacks on United States on 11th September 2001, however, highlighted negative potential of NSAs and NGOs and their effectiveness to employ violence across globe. Same institutions and communication networks were used through which peaceful NSAs and NGOs functioned, making their future contribution doubtful. Such anti-state destructive activities are not new phenomenon, rather violent non-state actors also have a long history.

4.3.1 Mercenaries

One of the oldest recorded armed non-state actors were the Greek mercenaries that took part in hostilities with incentive of personal gain. Some pre-requisites for the mercenaries in Greek and Hellenistic period were, firstly a war or prospect of war outbreak, secondly someone (or a community) willing and able to hire someone else to fight for them and thirdly a person willing to risk his life to earn livelihood by fighting in a cause that is meaningless for him or he is adventurous enough to take that big of a risk (Griffith, 1935). Recognized as the most notorious force of their era, Greek mercenaries, who were once defending city-state of Carthage most famously played pivotal role in the revolt that led to its fall in third century BC. This

episode of history also offers insight regarding future of civic-militarism and the repercussions of hiring mercenaries. Although mercenaries pre-date soldiers and they were employed by warlords and sovereigns for their territorial pursuits and not for nationalistic motivations.

This trend of hiring mercenaries was challenged by the French Revolution in 1789 and the resultant rise of nationalism that promoted citizen-soldiers as combatants (Varin, 2014). The differences between the two are not only related to the motivations impacting efficiency but also the sense of accountability resulting in legal and moral implications. The trend of hiring mercenaries is declining since eighteenth century (Liu & Kinsey, 2018) when all major European armies relied heavily on foreign mercenaries as troops. Despite being an old practice, mercenaries are still quite relevant as secessionist states, disgruntled or ousted leaders hire them to undermine the legitimacy of the government. Lack of accountability is the biggest factor exploited by such non-state elements to tilt the table in their favor during any such conflict. Many leading countries in the world are intentionally adapting hybridization of professional armed forces and non-state mercenaries in order to further their interests and especially for use in proxy war as seen during the Soviet invasion of Afghanistan leading to its disintegration (Stratton, 2008; Varin, 2014). This emergence of public-private military partnership is a popular military strategy aimed at shifting the moral and legal responsibility away from the state while multiplying its interests.

The precursor of modern private military companies, however, has been the 'White Company' established in 14th century by the famous Englishman John Hawkwood as a result of commercialization of war (Varin, 2014). It operated on a corporate structure based on the concept of mercenaries and entered into proper contracts with states that hired them to defend their territory and to conduct offensive attacks on their enemies (Caferro, 2006). Interestingly he also developed a network of spies throughout Italy and sold his information services to foreign and local dignitaries (Varin, 2014). Such corporate entities of mercenaries are still

present in the contemporary world with the sanction of present global powers. The most pertinent illustration of this was observed after the 2003 invasion of Iraq, when 25,000 to 50,000 mercenaries from several companies operated in the conflict beyond the jurisdiction of international law. The biggest of these companies was Blackwater. It was hired by the United States Government in order to reduce the official figures of the American military deployed in Iraq (Abrisketa, 2007).

An extension of this scenario, however, is that mercenaries themselves do not have any legal rights or protections recognized in the law governing the armed conflict. Cause of concern in such arrangement is that these companies operate in the legal grey areas of international law, of neither having any rights nor any obligation, thus being involved in mass violations of IHL due to no sense of accountability.

In order to address this problem of modern-day mercenaries, ICRC in collaboration with Swiss Government made efforts to create 'The Montreux Document' after taking inputs from 17 countries in 2008 (Cockayne, 2008). This document although is not legally binding, yet highlights the good practices for the State regarding the operations of Private Military and Security Companies (PMSC) hired during armed conflicts. This document states that Private Military and Security Companies are private business entities that are not bound to respect IHL, however, it's the responsibility of the contracting state to make sure that PMSCs comply with IHL through training, supervising their conduct and awarding penalties in case of violation (Cockayne, 2008). The Montreux Document not only places responsibilities upon states for hiring PMSCs but also facilitates them proposing that PMSCs personnel are entitled to have a Prisoner of War status in an international armed conflict. This is applicable both for PMSCs personnel who are combatants and those who do not directly participate in hostilities (Cockayne, 2008).

4.3.2 Pirates

Another armed non-state actor that was very common in the past and is still very relevant are the pirates. Pirates primarily commit the act of robbery or criminal violence on a ship or boat, using the same. Pirates are self-proclaimed to be state less people, who are at war with rest of the world (Rediker, 2004). Instances of piracy have been recorded as early as fourteenth century BC, when ocean raiders would attack ships of Aegean and Mediterranean civilization, however, there has never been an authoritative definition of piracy in international law, adding to the existing confusion regarding the consequences of their actions (Pennell, 2001). Although piracy has been economically motivated but it has political dynamics as well. This is particularly true for privateering which is an extension of piracy. The modus operandi for both are similar, but in privateering, the captain follows the orders of a state, authorizing it to capture enemy nation's merchants ships (Rediker, 2004). Such actions constitute war-like actions committed by armed non-state actors at the instigation of the state.

Pirates exist since ancient times. One of the early examples of pirates are of European origin. Vikings originated from Scandinavian countries in the late 8th century. They raided and settled in areas as far as North Africa and North America (Heebøll-Holm, 2012). Another commonly cited example is that of the Barbary pirates that also acted as privateers under the directions from the Ottoman rulers from the 16th century onwards. Barbary pirates or Ottoman corsairs, as they are also known, operated from North Africa along the Barbary Coast with ports at Rabat, Algiers, Tunis and Tripoli (Gawalt, 2011). They aimed at capturing merchant ships and raided European coastal towns to capture slaves to be sold in the slave market. The extent of their predation stretched from West Africa's seaboard to South America and even into North Atlantic as far as Iceland. The intensity of their actions can be estimated from the fact that about 850,000 people were enslaved between 1580 and 1680 by them (Davis, 2011).

In reaction to these unacceptable acts America fought its first unconventional international war (Gawalt, 2011). Soon after America's independence through American Revolution 1783 they had to protect their naval commerce from the dangers of Barbary pirates by negotiating a tribute of $80,000 to them as was previously done by their British predecessors. The problem started when despite the payment of tribute, Algerians captured two American ships in 1785 and demanded $60,000 ransom. Consequently, United States minister to France, Thomas Jefferson not only opposed the payment of tribute but also attempted at forming an association of powers who were repeatedly suffering at the hands of these pirates (Turner, 2003). He was of the opinion that paying tribute would lead to further demands and piratical states need to be compelled to pursue peace with them through war by a strong navy. After initial failure, he eventually managed to compel the pirates in retreat during his own presidency in December 1806 through use of force in Lewis and Clark expedition. This eventually led to treaties ending all tribute payments by the United States, which was much earlier than the European nations who continued tribute payment till 1830s (Gawalt, 2011). United States early on in its history might have succeeded against foreign armed non-state actors instigated by other states, however, states have not been very lucky in this matter down the years both internally and in foreign lands.

4.3.3 Humanitarian actors

Approach of dealing with armed groups witnessed a shift in late nineteenth century onwards, as humanitarian actors began talking to armed groups in the name of both combatants and civilians. This change was equally true for officially recognized civil wars, in fighting against occupation, in anti-colonial wars and conflicts of secession. This engagement with the armed group, however, recognize them as security threats instead of as interlocutors (Keogh and Ruijters, 2012), ignoring the relief wings of armed groups even if they were present. Spanish Civil War (1936-39) experience highlighted the requirement of stronger legal and

normative framework to govern the operational role of humanitarian actors in civil war, while also minimizing atrocities and human rights violations. In General Francisco Franco's military coup, the republican front government chose not to recognize insurgent groups as belligerents (Schabas, 2002), as by doing so it would have allowed the application of IHL. In the initial months of the conflict, an ICRC representative gained guarantee for openness to relief efforts and establishment of an information service for detainees, both civilian and military (Junod, 1951). However, the civil war witnessed widespread brutality and blatant violation of humanitarian and human rights due to no respect for laws of war.

In the Spanish Civil War some NGOs and humanitarian non-state actors worked on both sides of the conflict providing relief to everyone involved in the conflict. This war, however, was distinct in the manner that it exposed a tendency by state to disregard the differences between international and internal wars while applying certain principles of humanitarian law. Most importantly, despite the republican government and third States refusal to recognize the rebels as belligerents, rules regarding sanctity of civilian individuals and objects were ignored (ICRC, 2005). In such scenario, ICRC worked on the both sides of the conflict without having any legal recognition, yet succeeded in negotiating two agreements ensuring respect for its emblem and got authorization to carry out work on both Republican and Nationalist sides. ICRC's efforts to negotiate an agreement between Republican government and the Nationalist rebels came to not much benefit for the people involved, yet its experience led one of the delegate to reflect that it's more important to 'draw on factors other than international law and authority to a convincing humanitarian argument [and] merely evoking the law has never been enough' (Jackson & Davey, 2014, p 7). This fact has not changed ever since, despite the continued elaboration of IHL. The war ended with the toppling of republican government by the nationalist insurgents led by General Franco, who were labelled fascists by their opponents due to alleged support from Nazi Germany.

4.3.4 Armed groups

The trend of negative labelling of armed non-state actors, having different ideology or worldview from the widely acceptable one or from the one having greater political power within the state or in the international arena, continued till late twentieth century and has become even more common presently. Situation in Afghanistan since 1979 till present and the conflicting parties involved pose an interesting case study in this respect. Armed non-state actors that were encouraged to fight the invading Soviet forces in Afghanistan and were endorsed by the opposing world powers had to witness complete contrast to the situation during American invasion after the 9/11 attacks. Due to this confusing situation, it was hard for the humanitarian actors or the aid agencies to stay neutral and impartial (Shannon, 2009). Neighbouring states of Afghanistan, particularly Pakistan, were alleged that aid for the refugees in the established camps was manipulated in order to increase support and control of *mujahedeen* that were fighting invading Soviet forces. This manipulation, however, was on the consent and even instigation of America in the 1980s as admitted by the former secretary of the state, Hillary Clinton while addressing the congressional meeting in 2009 (Dawn, 2009). In order to undertake this political manoeuvre, political objectives determined the recipients of the aid. Kabul based UN backed Afghan government, whereas, NGOs working in Pakistan and Afghanistan were widely believed to be supporting *mujahedeen* (Donini, 2010).

International support to an armed non-state actor in defending its country against foreign invasion turned out to be a modern form of hiring mercenaries to fight for the political objectives of a superpower. On the other hand, it also gave legitimacy to the armed non-state actors as the defenders of national sovereignty in international conflicts. This positive contribution of armed groups was internationally recognized and appreciated at that time so much so that some workers of humanitarian organizations had great sympathy for the struggle of mujahedeen and worked for them even at great risk (Jackson & Davey, 2014). However,

when political benefits of the world powers shifted the connotation attached with this same group of people also transformed. The civil war that ensured after the Soviet withdrawal from Afghanistan resulted in the emergence of Taliban in 1996, yet the aid agencies obliged them hoping that they would gradually soften their religious stance through working together (Jackson & Davey, 2014). Attempts were made to counter the armed non-state actor the world powers once created through other non-state actors in the form of NGOs. These NGOs were declared as a 'force multiplier' and 'important part of combat team' by US Secretary of State Colin Powell when the tables turned and America was on the invading side rather than the one equipping Afghani non-state actors to defend against foreign invasion (Powell, 2001).

In addition to the traditional view of non-state actors of armed groups or humanitarian agencies, other types of actors also came to the front in the recent most war in Afghanistan. Involvement of private contractors for the implementation of the development projects, were one such actor, primarily intended to win the hearts and minds of people of the war torn region. However, involvement of such non-state actors, had the negative result of blurring the line between civilian aid workers and the belligerents against whom the locals are fighting (Jackson & Davey, 2014). This resulted in targeting of aid workers mistaking them for enemy funded spies. This apprehension of the locals is not baseless, rather it is rooted in the past experiences of the war that military led aid and funding to the humanitarian actors usually focused on the areas that were considered insecure and difficult to win by the foreign invader, in order to deploy softer measures for taking over the territory (Fishstein & Wilder, 2012). Inclusion of aid activities into military strategies, however, weaken their legitimacy and made aid workers suspicious even in the eyes of people labelled as the most wanted terrorist.

Labelling opponent with a negative name is not a new trend in the history of warfare, yet, it is something that has grown to be a common practice now. Classifying an opponent as a terrorist is basically intended to create an image which is so brutal that it is beyond any

redemption and it effectively dehumanizes them (Steuter & Wills, 2009). Terrorism is considered direct violation of laws of war due to its indiscriminate impact and lacking sense of proportionality. As a consequence, it indirectly suggests that no law should be applicable while resolving this problem. Under this pretext legitimacy was gained for the 'war on terror' by America and enemy was portrayed to be ineligible for any human sympathy (Paust, 2007). Consequently, all means were used that ignored the prohibition of indiscriminate and unnecessary cruelty in the warfare, by throwing the mother of all bombs over a large population and undertaking torture tactics in the name of national security (Cooper & Mashal, 2017). Results of these tactics were obviously not positive and violence begot more violence, continuing its vicious cycle. This, however, posed an interesting dilemma that terrorism not only remained the forte of the armed non-state actors, but concept of 'State terrorism' was also introduced (Chomsky, 2015).

America remains one of the most cited examples of state terrorism due to their fighting strategies and blatant disregard for the prisoners of war status. Creation of detention centers or military prisons on foreign lands to avoid accountability under national and international law is only one of its examples. Illegal/irregular rendition, is another forte of America, wherein they authorize abduction and extrajudicial transfer of an individual from one country to another in order to prevent applicability of former country's laws on the detained person (Parsad, 2008). Creating the label of 'enemy combatants' for prisoners of war is yet another innovation by America to avoid answerability under international humanitarian law (Woolman, 2005). Innovation of 'enemy combatants', however, also depicts a further degradation for armed non-state actors, especially regarding the rights individuals have while being imprisoned. Indefinite period of detention and allegations of severe torture have exposed the violations of the law of armed conflict (Sands, 2008). In American led war on terror, labels have played a key role, firstly to gather support to go on war to eliminate the cruel dehumanized enemy called terrorist

and secondly to avoid culpability in international community for doing the wrongs while they were neutralizing the threat. Same approach was used in Algerian war by France against National Liberation Front (FLN), as anti-colonial armed groups were described as terrorist and even existence of war was denied (Jackson & Davey, 2014), causing hindrance in the provision of assistance and protection. French authorities practiced systematic torture and FLN counter that through acts of terror, however, the main difficulty between these two groups remained to distinguish civilians from the terrorists and that turned the war brutal (Jackson & Davey, 2014). Similar examples can be found in conflicts in Sri Lanka and Chechnya.

On the other end of the spectrum, we now have alleged terrorist organizations as the governing bodies, as is seen in the case of Gaza. After Hamas's win in the parliamentary elections in the 2006, it became the democratically elected government. This posed problems for US, Canada, EU and other countries that had listed it as a terrorist organization (Jackson & Davey, 2014). Hamas has always shown willingness to cooperate with aid agencies, mainly because it wants international recognition and also because it's dependence upon population support. This is similar to the case of Taliban in Afghanistan in the past. A simple non-state armed struggle by Afghan Mujahedeen against Soviet foreign invasion, gradually evolved to be so powerful that one faction, Taliban, declared its government calling it Islamic Emirate of Afghanistan in 1996 (Crews & Tarzi 2009). This government did not gain wide international recognition yet it was formally recognized by America's two close allies, Saudi Arabia and Pakistan. Although it was short lived, with US invasion of Afghanistan after Taliban backed Al Qaeda attacked America on 11th September, 2001, yet it was a tremendous achievement on the part of armed non-state actors both for establishing a government and challenging a super power.

Another common practice observed in the perspective of armed non-state actors is their use in proxy wars. Though this practice is old yet, it's still very relevant. During Soviet invasion

of Afghanistan, Mujahedeen were used as a proxy by America, making it exemplary common practice of cold war era.

Similar practice was been observed in Syria, with the revival of cold war rivalries. The Syrian civil war to overthrow President Bashar al-Aasad's Baathist party has been ongoing since 2011, however, it has been complicated through the inclusion of several opposing armed non-state actors that are supported by numerous international players. Syrian Government is supported by Russia and Iran both directly and also through pro-government armed groups and Hezbollah (Hughes, 2014). On the other hand, their opposition includes States like Turkey, United States and Saudi Arabia involved directly in the conflict as well as lending support to Free Syrian Army, an armed non-state actor (Sharp & Blanchard, 2012). The situation is further made complex due to the inclusion of a third dimension of Kurds fighting for an independent homeland as armed anti-government group (Gunes & Lowe, 2015), who are also fighting the terrorists of Islamic State of Iraq and Syria (ISIS/ Daesh). Interestingly, Kurds are supported by both the cold war rivals as they unitedly fight against the ISIS. Moreover, Syrian war also witnessed the non-state actors turning into humanitarian actors, as is seen in the case of White Helmets, also called Syrian Civil Defense. They are a volunteer service originating from the affected communities that are operating in the rebel held areas, assisting the civilians injured in the bombardment, despite the Syrian Government's reservations (Solon, 2017). Thus, Syrian war is truly representative of the potential of non-state actors equally for positive and negative dimension.

4.4 Origin of armed non-state actors in Islamic history

Like the International Humanitarian Law (IHL), the Islamic international law, known as *Siyar*, very comprehensively deals with the issues posed by the armed non-state actors. Topics of rebellion, civil wars, and internal conflicts, that usually involve anti-state armed group, are discussed under the chapter of *Siyar* in every manual of *Fiqh* (Islamic Law) i.e.,

Hanafi, Maliki, Hanabali and Shafi schools of thought. Primary source of Islamic law, the Holy Quran, provide guideline on warfare in general and also specifically for civil wars and rebellion. Prophet Muhammad's (PBUH) way of life, *Sunnah*, elaborate these rules and the precedence set by the Caliphs that followed, set standards for the future generations in Muslim countries to follow. Detailed rules have been developed in this perspective as Islamic history records quite a few instances of rebellion in its early years and much debate has been done on it by the jurists. Thus, both rights and obligations of the warring parties are deliberated upon by the jurists, which can be understood from the examples of the rise of armed non-state actors in the course of the Islamic history.

4.4.1 Jewish tribes within Medina

The rise of armed non-state actors or rather armed non-government actors, started right at the beginning of the Islamic history as they even existed at the time of the Prophet Muhammad (PBUH). During Prophet's life time, however, it was the non-Muslims, Jewish tribes of Medina to be specific, that can be categorized as armed non-state actors that existed within the 'state system' (Al-Dawoody, 2011, p 20) of Medina. Three Jewish tribes lived in Medina at the time the holy Prophet PBUH, namely; Banu Qaynuqa, Banu Qurayza and Banu Nadir (Ruthven, 2012). They earned their livelihood through farming, money lending, jewels and weapon trade, along with maintaining commercial relations with Arab merchants of Mecca (Stillman, 1979). In order to establish cordial relations between the previously warring local tribes of Aws and Khazraj with the emigrants and the non-Muslims tribes of Jews, a pact was made by the Prophet Muhammad PBUH catering to all stakeholders of the city (Ruthven, 2012). This document not only made Jews part of Medina's community but also ensured them certain rights and responsibilities (Stillman, 1979).

This agreement to ensure peaceful co-existence, however, proved to be very fragile as differences soon surfaced between Muslims and Jews of Medina. First tribe to go against this

contract was Banu Qaynuqa due to the rise of civil dispute involving disrespecting a Muslim women and resultant killings of both Muslims and Jews (Ramadan, 2007). This was regarded as the breaking of the contract due to which this Jewish tribe was banished from Medina (Stillman, 1979). After the battle of Uhud in 625 Banu Nadir was also reprimanded as they instigated Meccans to avenge their defeat in the battle of Badr and plotted to kill the holy Prophet PBUH (Ramadan, 2007), thus transforming into an ANSA within the state system of Medina. Also they did not come to the aid of the Prophet PBUH as per the contract in the battle of Uhud, citing that they were observing Sabbath. However, their joy over the losses of the Muslims was quite obvious and it brought upon the severe retribution. They were besieged but they resisted eviction as they were expecting aid from Banu Qurayza. However, they had to face disappointment as they did not come to their rescue and they had to leave their lands and houses with only their movable property except for weapons (Che & Pappas, 2011).

The remaining tribe of Banu Qurayza also sided with Arabs of Mecca during the battle of the trench, due to their trade relations with them, however, this resulted in breaking of the pact they had with the Muslims of Medina. Out of three, Banu Qurayza had to witness the worst consequences for having the status of an armed non-state actor within the premises of Medina after opposing the ruling majority of Muslims. They were besieged for 25 days after which an arbitrator was assigned from within their prior supporters, to decide upon their punishment for betrayal. It was expected that the arbitrator would act generously while deciding upon their fate, however, he made the judgment of making women and children captive and executing the men of the tribe, while dividing their property. Verdict was implemented to the letter, until 600 to 700 of them were all finished off (Stillman, 1979).

4.4.2 Ridda wars or the wars of Apostasy

Severe consequences to the armed non-state actors that rose afterwards was continued even after the demise of the Prophet Muhammad PBUH. First Caliph of Muslims, Abu Bakr,

safeguarded the legacy of the Prophet by taking up arms against those that wanted to deviate from the basic principles of Islam, like *Zakat* (poor's due) from within the Muslim community and also against those that declared themselves false prophets (Donner, 1999). Such deviants were declared armed non-state actors as they challenged the authority of the Caliph and took up arms against him. Ridda wars or the wars of Apostasy, during early caliphate against the followers of the false prophets put the unity of Muslim community at stake (Donner, 2014). Caliph reacted against them with utmost severity, however, those means were employed only after exhausting all peaceful means of calling them towards the mainstream religion from which they departed. Most famous of the self-proclaimed prophets, Musaylima (the liar) appeared in Yamamah city in central Arabia. He was defeated and killed by Muslims in the year 632 and the fortified city surrendered peacefully within a week (Sieny, 2000).

A series of well-planned campaigns were undertaken over a period of few months to completely root out apostasy from Arabia for the time being. Similar campaigns were pursued against rebels that declined the payment of *Zakat*. Initially Caliph Abu Bakr called upon rebelling tribes to remain loyal to Islam and continue payment of *Zakat* by sending envoys to them. However, when they still persisted on defiance, rebels were subdued by force. Both these campaigns against apostasy and enforcement of *Zakat* were fought simultaneously indicating complete unacceptability for any sort of armed non-state actor challenging the authority of the state. Taking up arms against them, however, was not the first step to neutralize their threat, rather talks were made to convince them towards compliance. When peaceful means failed to generate results, harsher tactics were employed. Civil wars caused by armed non-state actors at the time of First Caliph Abu Bakr was just the start of their presence throughout in the Islamic history. Later Caliphs were not always successful at crushing the dissenting group that rose at their time, and the next three caliphs were assassinated at the hands of the similar anti-state groups.

Later prominent Islamic scholars, particularly Al Shaybani deduced that the punishment for the apostasy committed by the man is death after trying to convince them to return to Islam within three days. However, a little leniency was given to women apostates as their punishment was set as life imprisonment if they do not repent for their action within three days (Al-Saybani, n.d./1998, pp 67-74).

4.4.3 Rise of Kharijites or Khawarij

Events that led to the assassination of the fourth Caliph Ali bin Abi Talib was a defining moment in Islamic history as an armed non-state actor conspired against his wishes to put him in the leading position and his martyrdom also came at the hands of a similar but different armed group. A number of protests broke out in the latter half of the third Caliph Uthman bin Affan's Caliphate and his house was eventually besieged leading to his assassination. The dissenters were protesting against Caliph's alleged favors to his tribe by putting them in position of power.

The same group of rebels later demanded that Ali bin Abi Talib assume caliphate as he was most appropriate candidate for the position (Anthony, 2011). In order to settle the prevailing chaos, Ali assumed the charge of fourth caliph, although unwillingly, yet other contenders from the tribe of last caliph emerged. Conflict between the two groups resulted in the emergence of another armed non-state actor that initially fought on Ali's side but parted their ways as Ali agreed to arbitration with his rival to resolve the matter peacefully. This armed group, known as Kharijites or Khawarij, ended up assassinating the Caliph Ali and continued to be a source of insurrection for hundreds of years (Anthony, 2011). Their doctrine of extremism sets them apart from the mainstream Islam. Their radical approach of declaring self-proclaimed Muslims as non-Muslims, known as *takfir*, has a lot of similarity with the ideology of present Islamist extremist militants in the world (Al-Yaqoubi, 2015). In addition to peculiar commonalities between the armed non-states of the past and the present, their historical account

also exhibits their importance in raising and lowering people in authority by using their power. In such a situation, Sarakhsi, a Hanafi jurist, advises people to remain aloof when fitnah occurs, however, once it is established that people that took up arms have committed wrong then masses need to support the ruler as it is better to be united under one ruler to establish peace in the society (Tabassum, 2017). Hanbali school of thought also agrees that revolt against the ruler is a sin. Al-Ghazali offered a little leniency and accepted that the ruler can be criticized so long it does not lead to general upheaval. Ibn Taymiyyah's ruling in this regard is most liberal. Not only he sanctioned revolt against unjust ruler, but also presented it to be a religious obligation (Ghobadzdeh, & Akbarzadeh, 2015).

4.4.4 Origin of Assassins

A number of groups rose against the reigning power in Muslim world over the years, however, *Hashashins* or Assassins were one of the most significant ones having immense impact on Islamic history. Formally known as the Nizari Ismailis, was a secret order led by mysterious Grand master Hassan bin Sabbah in late 11th century (Daftary, 2001). Clash in Shia and Sunni sects originated after the assassination of fourth Caliph Ali bin Abi Talib (Abdo, 2017), also gave motivational backing to Hashahins, belonging to a Shia branch of Islam fighting against Sunni Seljuq in power. This particular armed non-state actor was very strategically advanced as it captured the mountain fortresses in throughout Persia (now Syria) and under took asymmetric psychological warfare by using surgical strikes to create fear in the hearts of their opponents compelling them to submission. Among their community, people involved in direct conflict were very few, known as *fida'i* (Virani, 2007). These selected warriors had specialization in carrying out espionage and assassinations of important rival leaders. Over the course of 300 years, their activities resulted in killing of two caliphs and a number of viziers, sultans and other leaders (Stanton, Ramsamy, Seybolt, & Elliott, 2012). Despite being feared even by the Crusade leaders, their eventual elimination came at the hands

of invading Mongols. European sources, especially the writings of Marco Polo depict this armed group as trained killers that operated very systematically against their enemy. This armed non-state actor was not only feared a lot among people of authority but also played significant role in shaping the outlook of future armed groups till present day, learning from their terrorizing tactics (Komel, 2014).

4.4.5 Mercenaries in Islamic History

Moving further down the Islamic history, another armed non-state actor emerged, initially in collaboration with the people in power but eventually overthrew them. The Mamluks or the slave soldiers were trained mercenaries (Morillo, 2008) that had their presence in the wide spread regions of Muslim territory ranging from India to Egypt for nearly 1000 years, starting from ninth to the nineteenth centuries. Their most powerful presence, however, was in Egypt, so much so that they eventually over threw the rulers to form Mamluk Sultanate in 1250 till 1517. They were extraordinarily capable and even succeeded in driving the last crusader out of the Levant region, ending the era of the crusades (Stanton, Ramsamy, Seybolt, & Elliott 2012). Mamluks are a perfect example of armed state actor, turning rogue and eventually overpowering the rulers in coup and forming their own government, which was not very acceptable by the foreigners yet worked very effectively on the local level. Their precedence reinforced that the threat posed by any armed group is very significant as their change in loyalties can have drastic consequences.

Furthermore, Islamist movements that deemed secular concept of nation-state as illegitimate and rejected the idea of the state, also provide an interesting case study to treat them as non-state, transnational actors that even oppose these ideas through armed struggles (Dalacoura, 2001). Such Islamist movements have multiple links between different members of societies that even bypassed governments. These links ranged from social and cultural ties to terrorist and criminal collaborations. Ideas of the political authority of the state is contrasted

with the notion of *Ummah* in political Islam, which ignores the artificial drawn boundaries of the states introduced mainly in 19th century (Lindenfeld, 2008). These movements can be treated as an armed non-state actor due to their transnational ideological and political struggle that often turned violent in order to achieve its objectives. These armed struggles were even more complicated if foreign occupation was one of the elements in this mix, as seen in the case of sub-continent. Campaigns of Muslim unity or Pan-Islamism was initiated especially against the colonial powers and the concept was championed by Jamal al-Din al-Afghani in late 19th century (Keddie & Afghānī, 1983). He feared that nation states would divide the Muslim world and nationalism would create confusion regarding their identity. However, with the passage of time these Islamist movements became more conservative and volatile.

4.4.6 Contemporary movements

Ideas of leading Islamic scholars like Sayyid Qutb, Abul Ala Maududi and Ayatollah Khomeini all emphasized the need of implementation of Shaira law, to return Muslims to their past glory. These ideas translated into Muslim Brotherhood in Egypt, Jamat-i-Islami in Pakistan and Iranian revolution respectively. These relatively new movements challenged significantly the secular nationalist and the monarchical states. When their core objectives faced strong opposition, these movements started an armed struggle, starting the still continued militancy (Moaddel & Talattof, 2000). Regarded as great thinker by his supporter on one hand, Sayyid Qutb, is also cited to have inspired violent groups such as Al-Qaeda (Zimmerman, 2004). Violent groups, such as Al-Qaeda, are also been often criticized for distorting the Islamic teaching to fit their political objectives. These ideologically inspired armed non-state actors have grown strategically to an extent that they are transnational groups that are able to operate across border and can even subdue commonly regarded the super power of the world as was seen in the September 11, 2001 attacks on United States by Al Qaeda (Booth & Dunne, 2002). Impact of their tactics used for warfare, mainly terrorism, was so much that the whole

world shook. Al Qaeda has diversified and even fragmented since then, however, has inspired a new generation of armed groups that are much more brutal and ruthless than them.

On the other hand, armed struggle by state less groups (such as Palestinians and Kashmiris) is hardly acknowledged internationally as a legitimate means to resist against foreign occupation forces. Their armed resistance against oppression is often delegitimized and equated with terrorism e.g. India does not spare any opportunity to blame for the so-called terrorism in the disputed area of Kashmir. This is notwithstanding the fact that Pakistan's diplomatic backing to the right of self-determination of Kashmiris, is in accord to the internationally recognized UN resolutions on the conflict (Fai, 2018).

The situation in Palestine is even more complicated due to the visible division of opinion of international community over the occupation of Palestinian lands by Israelis. With a lot of historical and religious significance for a number of groups, Palestinian region has been a matter of debate since ages. However, with the beginning of establishing Jewish homeland in Palestine after the World War I, a Jewish-Muslim conflict was started that has witnessed several wars with the neighboring states as well as between both claimants of the land (Machover, 2012). The modus operandi of the both parties, however, has left the global opinion divided on the legitimacy of their claims. The balance of favorable opinion and support is tipping in favor of state of Palestine against Israel as 138 UN members have recognized it as a modern *de jure* sovereign state and also given it non-member observer status at the platform of United Nations (UN, 2012). Despite this recognition and debate on the illegal occupation of Palestinian settlements, Israel still portrays their non-state elements as terrorists and their claim on the land as illegal (Bishara, 2002). United States also supports the Israeli stance and ignores the human rights violations in Palestinian territories (Machover, 2012).

Other relatively recent developments caused by the unarmed protesters against the ruling elite, was in Middle East and North Africa. This wave of uprisings, demonstrations and

riots that began with Tunisia on 18th December 2010, swept the whole Arab region and thus, is popularly known as Arab Spring. After Tunisian Revolution, its effects spread to Libya, Egypt, Yemen, Syria and Bahrain, where struggle to topple the regime either succeeded or resulted in intense social violence (Bellin, 2012). Morocco, Iraq, Algeria, Saudi Arabia, Jordon, Lebanon, Kuwait and Oman also witnessed sustained street demonstration that were controlled through strict response from the authorities and pro-government counter demonstrators. The consequent unrest continues till present day in the form of Syrian Civil war, Libyan Civil war and the Yemeni Crisis.

Those states that succeeded in toppling the regime are experiencing power vacuum due to the inability of the dissenting armed non-state actor to take the reins of power in their hands or to handle it with responsibility. Consequently, the contentious conflict between religious elite and the growing supporters of democracy ensured. Most of the states that witnessed Arab Spring are still awaiting transition to constitutional democratic governance instead they are presently undergoing widespread violence and unrest. Despite of inability to form government after changing the regime, armed non-state groups' significance cannot be denied.

Armed non-state actors have evolved to such an extent that most of the conflict presently happening in the world involve them as a party against a state or at times, more than one state (DCAF, 2015). Many states coming together against a joint non-state opponent, can be seen in the example of war going on in Syria. Traditionally known Cold War rivals have found a common enemy, in the shape of Islamic State of Iraq and Syria (ISIS). Although, both superpowers have different political stakes in the conflict in Syria, however, they agree about eliminating ISIS from the region (Sackelmore, 2014). This armed group has not only limited transnational presence, rather extended global reach making it a common threat for the whole world. No other armed non-state group had elicited such widespread international threat perception (Gerges, 2014) e.g. Al Qaeda based in Afghanistan focused on United States and its

allies alone (Burke, 2004). Extent of following Islamic teaching by all proclaimed Islamist militant organization is, however, highly debatable. Yet their portrayal internationally depicts them as the representative of Islamic religion, a claim that they themselves endorse despite a much larger majority of Muslims denying it completely.

4.5 Legal Categorization of Armed non-state actors

Characteristics, capabilities, goals and modus operandi of armed groups vary significantly. Consequently, a wide range of groups can be qualified as violent or armed non-state actors. This remains one of the reasons why international law and its practitioners cannot agree upon its definition. Under IHL, members of armed groups paradoxically belong to the category of civilians. However, they lose their protections as civilians when they directly participate in hostilities (El Debuch, 2022, p 15). Despite of not having combatant status they are expected to respect IHL rules. Additional protocol II of 1949 Geneva Conventions categorically labels ANSAs as 'dissident armed forces' under non-international armed conflict (article 1.1) and groups involved in national liberation movements, declared as international armed conflict. Fighters of national liberation movements, however, are given the status of combatants. Category of dissident armed forces are not further sub-divided into specific categories based on their original aim. Even a detailed general categorization is disputed due to its overlapping nature. However, pragmatic observations and normative-legal qualifications entail following entities to be classified as armed groups or ANSAs (Bellal, 2018, p 45):

i) De facto regimes or governing authorities that are not recognized as states but exercise effective governmental authority and to some degree has acquired a legal status. Autonomous region of Kurdistan in Iraq is an apt example of 'engagement without recognition' with the parent state (Palani, Khidir, Dechesne, & Bakker, 2021). Additionally, they follow their own foreign policy evident from their armed struggle against Islamic State which was supported by United States.

ii) National liberation or secessionist movements that are internationally recognized. National liberation movements are present in every corner of the world, Catalonia's separation from Spain and Scotland's secession from England are just to name a few.

iii) Warlords or armed opposition groups that not necessarily have separatist intentions. Tehreik-e-Taliban Pakistan's opposition to the government fits perfectly in this category as it does not have secessionist aims yet it wants to impose their version of sharia instead of constitution of Pakistan (Cassidy, 2012). Their violent and predatory activities are typical to insurgent and guerilla warfare.

iv) Paramilitary groups or militias working as irregular combat units having some governmental patronage but are not formally integrated into state's security structures. On this pattern a grand tribal *Lashkar* was formed by a *Jirga* held in Bajaur Agency against suspected militants similar to the one formed in Mahmond Agency, tribal district in Pakistan. These militias were raised in support from sector commander North of Pakistan Army. Their aim was to aid Pak Army in the operation Zarb-e-Azb by identifying and arresting militants fleeing across border to Afghanistan (Mohammad, 2014).

v) Self-defence groups or vigilante with low degree of organization are formed to temporarily defend themselves. Such groups are common in neighborhoods with precarious security situation in Pakistan. They are formed to prevent criminal activity in the neighborhood primarily through vigilance and deterrence of guards possessing private weapons. Their presence is neither warranted nor prohibited by LEAs. Yet it is a private initiative that is not anti-state.

vi) Territorial gangs without any political purpose, trying to control a territory for pursuing criminal activities. Choto and Landi gangs controlling Kacha area of

Punjab and Sindh are notorious for their kidnapping, murder and other criminal activities. However, they do not have any long term political aim yet they use their occupied territory as a safe haven to pursue their criminal activity.

All of the above mentioned categories differ from each other not only on their ultimate goal but also on their desire to acquire legitimacy from other international actors. Armed groups holding territory or stable structure and striving for legitimacy will provide security governance to local population, whereas groups which do not hold territory lack the capacity to provide such governance (Kasfir, 2015, p 23). Armed groups with criminal intent are least interested in acquiring legitimacy as they do not aim towards any political status. Similarly territorial gangs especially the short lived one are not inclined to provide any governance to their population as they also do not need legitimacy (Bellal 2018, p 52). Militias, on the other hand, may provide some services to the people but their aim is not to gain legitimacy rather they already have 'barrowed legitimacy' form the government that sponsors them (Schneckener, 2017, p 799). Only those political actors that have long term political goals seek legitimacy as it further strengthens their cause (Seymour, 2017, p 818). Such rebel groups use legitimacy as a strategic resource to either overthrow the government or demand governmental reforms. Despite the various categories mentioned, International humanitarian law refrains from judging the political cause of these groups[16] and uses a relatively neutral term of 'armed groups' in its legal texts (Krieger, 2018, p 566). ANSAs engaged in providing security governance to its local population also actively work in the domain of diplomacy (Kasfir, Frerks, & Terpstra, 2017, p 259). Fragmented armed groups of civil war in South Sudan in 2016 is an example of such diplomatic efforts[17]. Most armed group although have self-centred claims, yet pursue norms

[16] This of course is with the exception of national liberation movements especially in the context of decolonization. Such civil war aimed at national liberation is declared as International armed conflict under Additional Protocol I article 1 paragraph 4, due to the recognition of right of self-determination.

[17] Civil war in South Sudan was a political power struggle between then vice president Machar and President Kiir backed by Dinka ethic group and other rebel groups. After almost five years of armed struggle peace

and values in order to be accepted as legitimate political actor. Back-channel diplomacy or parallel diplomacy may help in bridging the gap between states and armed groups to reach a special agreement which can even be negotiated with the help of any third state (El Debuch, 2022, p 17).

ANSAs may not have legal status in international arena, yet they can acquire legitimacy by communicating their agenda and convincing others about their proclaimed truths. The primary audience that lends them validity are of following types (Mampilly, 2015, pp 84-87). Firstly armed groups need to have active followers both at local/national and international level that may help in propagating their views and to look out for their interests. Secondly, ANSAs need recognition and sympathy from NGOs and international organizations to gain certain sense of legitimacy. The common article 3 of Geneva conventions I-IV and Additional Protocols hold armed groups legally responsible for the area under their control in a non-international armed conflict. Armed groups benefit from this responsibility through the practice of 'rebel diplomacy' (Coggins, 2015, p 105). Practicing foreign affairs further encourages compliance with international law. Binding ANSAs to the international humanitarian laws remains to be the real task which can be achieved through a treaty particularly addressing a certain armed group. Self-urge to be recognized as an international actor in addition to compulsion by some formal treaty should consequently result in better compliance to IHL.

In the state centric international system, the task to categorize armed groups primarily depends on the parent state or the international organizations. The practice of categorization by parent state is not standardized and is heavily biased. Whereas, legal categories presently recognized under Geneva Conventions and Additional Protocols are not very diverse to cover various aspects of different armed groups. Actor who has the authority to classify other actors

agreement mediated by Uganda and Sudan was signed in 2018. This agreement finalized power sharing structure and reinstated Machar as vice president.

play a crucial role on determining the outcome of the conflict. Categorization by parent state leads to over generalized practice of labelling every armed group as terrorists and consequent abuse of human rights. Classification of armed groups by international organizations is avoided by the states as it poses the risk of declaring a secessionist movement as an international conflict thus invoking IHL obligations on the states. States prefer suppressing a separatist movement declaring it as an internal matter. States delegitimize nationalist struggle and dehumanize its fighters by labelling them as terrorists. Declaration of Kashmiri and Palestinian freedom fighters as terrorists by India and Israel respectively, is case in point (Bishara, 2002).

Determining the exact category of the ANSAs is very important as the response of state and international community to different armed groups vary significantly depending upon the legitimacy of their cause in the eyes of international community. An unbiased categorization by states is not possible due to their vested political interests and power dynamics between states and non-state actors. States are also reluctant to accept the interference of international organizations like ICRC and Geneva Call in their internal conflicts adding to the ambiguity attached to such situations. It would be very useful if Geneva Convention further categorizes 'dissident armed forces' into subsections based on the ultimate goal of such actors. Sub-category of armed groups working towards complete regime change/takeover need to be separated from other demanding/negotiating certain amendments in law. Another criterion to reclassify armed groups need to be based on their area of reach. A local movement demands completely different response than a transnational movement.

A transnational militant group cannot be treated under the domestic criminal law only, rather IHL also becomes applicable wherever violence crosses the threshold of an armed conflict (Sassoli, 2006, pp 3-6). For example, British campaign against Irish Republican Army is declared just criminal terrorist activity that does not qualify application of IHL due to its impact on a single state. However, war on terror against transnational actor called Al Qaeda,

fought by several states should qualify IHL application, yet that is not the case. Common article 2 states that all conventions and additional protocols are applicable on war between high contracting parties. Al Qaeda is not a state and only states can be parties to Geneva Conventions and Additional Protocols, thus it's not applicable on them technically (Sassoli, 2006, p 4). Additionally, the conflict did not take place on 'territory of one of the High Contracting Party' (common article 3 of Geneva Conventions and Additional Protocols) for it to qualify as non-international armed conflict. Thus, scholars and international law practitioners that believe in the all-encompassing nature of IHL need to recognize its shortcomings especially in regards to the dissident armed groups. Rather than adding new rules or changing the law completely, it is more feasible to end the unequal status between state combatants and fighters belonging to armed groups by giving them recognized status i.e. recognition as combatants while fighting and status of prisoners of war during captivity, instead of being declared as unlawful enemy combatants. Presently IHL categorizes dissident armed groups as civilian due to lack of clear distinction as uniformed armed force. However, ICRC's Direct Participation in Hostilities Study significantly clarified when civilians lose their protection from deliberate attack by introducing the concept of Continuous Combat Function (Corn & Jenks, 2011). Attempt to promote this concept was done to enhance civilian protections under principle of distinction rather than protecting rights of armed groups.

4.6 Conclusion

Historic references of armed groups suggest that whatever the actual reality, contemporary militant organizations or armed groups have adopted few characteristics of the past armed groups and represent a mutated form of armed resistance. Despite their continuous presence in global history (Islamic history in particular), states have never accepted their existence and have worked actively to eliminate them. Examples from Islamic history depict that states are threatened by even the presence of armed group within their territory even when

they do not offer armed resistance. However, in western history there are instances when armed groups has been used by states as well for the ulterior political motives. Despite the attempt of violently neutralizing armed groups rising against the state, they have considerable presence among the masses and exert extraordinary influence by employing terrorism as their offensive strategy.

There is a wide variety of ANSAs ranging from criminally motivated ones to some having more political aims. The legal categorization of armed groups is highly dependent on the level of legitimization they require from the local population and the international community. International law texts label ANSAs as ‘dissident armed groups’ and broadly categorizes them as civilians, which restricts the application of combatant rights on such groups. By keeping these past precedents and legal categories in mind it would be helpful to evaluate the rights of armed non state actor in the perspective of IHL and Islamic law of armed conflict, which would be done in next chapter.

CHAPTER FIVE:

RIGHTS OF ARMED NON-STATE ACTORS

5.1 Introduction

Civil wars and armed groups is a common phenomenon, present throughout history and in every part of the world from most remote to the most developed. From the Spartacus rebellion in ancient Rome to the more recent American and Spanish civil wars, armed groups have significantly shaped history, quite a few times[18]. Success in these struggles of armed groups at times results in the formation of new states that exist even today or they were included in mainstream politics in order to end a civil war. Despite the conventional ideas of war in inter-state conflicts and state army, armed non-state actors have a definite presence in the international politics and their significance is growing with the passage of time. Similar to the protections through international humanitarian law provided to the state actors involved in a conflict, armed groups also have some securities while facing a stronger state army. However, this is a difficult task as safety of rights of combatants in war between the state actors is protected by treaties and conventions agreed upon by conflicting states. Whereas, binding a non-state actor to such treaty to which they cannot be a party to is a tricky task. This chapter would highlight *Jus in Bello* and *Jus ad Bellum* rights of ANSAs recognized by IHL and Islamic law in order to compare the two frameworks.

[18] The Spartacus revolt or Third Servile War started in 73 BC and lasted about two years. It is considered one of the largest slave revolts in history, where tens of thousands of slaves broke free from their masters and fought against Roman Republic. For more details see Barry Strauss, (2009). *The Spartacus War*. New York: Simon and Schuster. The American Civil War (1861-1865) was fought between Union (the Norther states) and the Confederacy (the seceded Southern States), over the issue of whether slavery would be permitted to expand to western states or not. After four years of intense combat, US President Abraham Lincoln issued the Emancipation Proclamation, declaring all slaves in rebellious states to be free. As a result more than 3.5 million of the 4 million slaves in the country were freed. See Steven E. Woodworth, (2011). *This Great Struggle: America's Civil War*. Rowman & Littlefield Publishers. The Spanish Civil War (1936-1939) was fought between Republicans supported by Soviet Union and the Nationalists supported by Nazi Germany. The Republican's democratically elected government of Spain was over thrown by Nationalist General Francisco Franco capitalism on the issues of class and religious struggle. For more: Stanley G. Payne, (2012). *The Spanish civil war*. Cambridge University Press.

In the international arena treaty formation and its application is a state centric practice due to which rights of armed non-state actors (ANSA) especially at times of war are left in a grey area. Article 34 of the Vienna Convention on the Law of Treaties (VCLT), affirms that '[a] treaty does not create either obligations or rights for a third state without its consent' (Bellal & Heffes, 2018, p 124). As only states can be part of treaties and only their input is solicited to finalize its clauses. Thus, such a treaty is applicable only on those states that are party to it or have rectified it. Despite non-state armed actors cannot be party of Geneva Convention or the laws of war, there are certain provisions they still need to observe. Common Article 3 of Geneva Convention dealing with armed conflict of non-international character, demands that each party may observe certain minimum provisions while fighting against each other. Furthermore, Additional Protocol II agreed upon on 8th June 1977, also deals particularly with non-international armed conflict (usually involving armed non-state actors), offering basic protection and security for each human person. However, there are still two requirements that need to be met for this treaty to be applicable on ANSAs. Firstly, the High Contracting Parties in the conflict must intend that the Protocol may bind ANSAs. Secondly, ANSAs themselves must accept the rights and obligations conferred upon them through this Protocol (Bellal & Heffes, 2018).

Despite the apparent unequal status of states and the armed non-state actors in an armed conflict, Additional Protocol II offers very promising equality of rights between the two. However, in order to qualify for those humanitarian rights, one has to be classified as combatant or civilian, as the protections offered are accordingly different both in terms of use of force and how you are targeted. For the purpose of clarity all these terms explaining the nature of conflict need to be defined as mentioned in the Geneva Conventions and the Additional Protocol I and II. First and foremost part of a conflict is the combatant, which is the legal status given to an

individual who has a right to participate directly in an armed conflict. Legal definition of combatant is found in the article 43 of Additional Protocol I (AP-I), which states:

> The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command…even if that Party is represented by a government or an authority not recognized by an adverse party.

By this legally accepted definition an organized ANSA having an established command responsible for the conduct of its subordinates should be recognized as a legitimate combatant having a right to take part in hostilities of a conflict.

On the other hand, another widely used term while explaining the conflict in international law is the non-combatants. According to article 50 and 51 of AP-I, Non-combatants include civilian who are not directly taking part in hostilities and the other auxiliary persons of armed forces like combat medics and military chaplains, who although are part of belligerent forces, yet they are protected by nature of their job as they are not directly taking part in the fighting. Conflicts fought by ANSAs are usually termed as non-international armed conflict (NIAC). NIAC is when some ANSA from within starts fighting the state or when some ANSA attacks the state from outside its territory. One ANSA fighting another ANSA does not qualify as NIAC. Rules of war for NIAC are stated in Additional Protocol-II. In the perspective of NIAC the term High Contracting Party has a lot of significance. Under Geneva Convention High Contracting Party refers to the state that are party to the conventions and due to this reason are bound to respect and to ensure respect for this Convention in all circumstances. Furthermore, the common article 3 of Geneva Convention particularly emphasizes that in the case of armed conflict of non-international nature occurring in territory of a High Contracting Parties, each party in the conflict is bound to apply certain stated provisions to ensure the protection of the right of all parties involved. Rights of armed non-state actors in NIAC are as follows.

5.2 Right to wage war

First and foremost, right of armed non-state actor is its right to wage war which is addressed by the jus ad bellum (right to war) part of international law. It is the legal justification to take part in hostilities and its assessment is at times based on morality. This normative side of law deals with classification of the conflict. Moral perspective against use of violence and aggression led to the formulation of rules of jus ad bellum in international law, to provide justification for use of violence and war. A just war has to be based on a just cause, which is generally believed to be self-defense against aggression only (Walzer, 2006). The term aggression is defined by United Nations General Assembly, in 1974, as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State" (Article 2(4), Charter of the United Nations).

This right of territorial integrity and political sovereignty of the state is based on rights of individuals to build social life together. As long as, state is performing its function to protect the lives and interests of its citizens, state's sovereignty cannot be challenged for the sake of life and liberty by any other state (Walzer, 2006). Any state doing so would be committing aggression. United States' relatively recent military endeavours, attempt at neutralizing ANSAs' potential ability to attack their country or to exercise ANSAs' right to wage war. US attacked Afghanistan in 2001 on the pretext of avenging acts of aggression committed by Al Qaeda on September 11th 2001. The so called war on terror was expanded to Iraq in 2003 with the excuse of conducting pre-emptive attack to neutralize weapons of mass destruction and eliminate leadership supporting terrorist networks. United Nations, however, refused to endorse this invasion raising questions on its legality (McWhinney, 2004). America again led an intervention in Iraq in 2014, however, this time it was on the invitation of Iraqi government that was facing the threat of ISIL (Islamic State of Iraq and Levant or Islamic State). Interestingly, Iraq's bordering neighbour Syria was also facing same threat of Islamic State,

even with more severity as the group's headquarters was established in Syria. Yet due to political differences with Syrian government, patronized by Russia and Iran, United States faced an intense foreign and military policy dilemma.

Despite of not having any direct acts of aggression committed against United States, it conducted air strikes on Syrian territory against Islamic State (Holland & Rampton, 2014). Syrian government at that time was facing civil war and it was internationally propagated that government has lost the trust of the people as it was crushing rebellion with the use of chemical weapons, creating an ideal situation for humanitarian intervention (Cozma & Kozman, 2015). This situation highlights that another principle needed to fulfil the requirements of jus ad bellum is the necessity of right authority enjoying legitimacy of state sovereignty and popular consent of the citizens (Hubert & Weiss, 2001). Individuals and groups without socially sanctioned authority are unjustified to initiate war. However, corrupt and unjust governments results in disintegrated sovereignty and individuals in such situation have a right to defend or protect themselves from illegitimate governments (Moseley, 2009). Moreover, distinct communities are at times also justified in undertaking armed struggle for independence (Walzer, 2006). Syrian civil war addressed all these dimensions with groups like ISIS and Al Nusra front having some degree of socially sanctioned authority and distinct communities like Kurds morphed their independence struggle to war on terror, consequently succeeding in gaining control over a quarter of Syrian territory (Kajjo, 2020).

Principle of right intention is also of great importance as war needs to be aimed at re-establishing justice and peace. War mongering may not be driven by narrow and selfish national interests or even vengeance. Furthermore, war needs to have reasonable hope and chance of success or achieving the desired outcome (Hubert & Weiss, 2001). Lastly, it is important that war may be taken as the last resort after exhausting all other non-violent means of resolving conflict. All these principles leave narrow space for ANSAs to fight a just war as

they usually don't fulfil one or more principles. Firstly, their cause is legitimate in their eyes but does not have generalized acceptance by the masses. Secondly, they lack legitimate authority as may be enjoyed by an elected government. Moreover, their chance of success while fighting a bigger, well equipped and organized army are very slim. ANSAs also do not use war as a last resort rather prefer it over peaceful means of resolving conflict.

Explanation of having justification for war is theorized in the Just war theory. This predominantly Christian Philosophy attempts to reconcile three principles; it is wrong to take human life, states duty to defend its citizen and establish justice and protections of innocents and value system at times require willingness to use force and violence (Ethics guide, BBC). However, it is pertinent to mention that this theory is not an attempt to justify wars rather on the contrary it intends to prevent them by highlighting that going to war except for certain extreme cases is wrong and undesirable. Hence it aims at providing motivation to states to find alternative ways of resolving conflicts. Yet many theorists criticize this conception to be very narrow firstly by stating the states tend to defend themselves against violence that is imminent even when it's not actual. Such military acts done in anticipation may be considered morally justified. Pre-emptive strikes, for example are justified in presence of sufficient threat to states or when failure to exercise military force "would seriously risk their territorial integrity or political independence." Secondly, wars of interventions against a government violating human rights of their citizen resemble law enforcement or police work (Walzer, 2006) hence making 'aggressor-defender' dichotomy unapt generalization. One of the most recognized rights of armed groups to wage war against the government is while exercising their right of self-determination. IHL not only recognizes such secessionist movements but also categorizes them as international armed conflict, ensuring combatant status for the fighter of armed groups (Krieger, 2018). States, on the other hand, attempt at suppressing such nationalist movements by painting the conflict as mere criminal disturbance that needs to be dealt as an internal matter

of the state. Internationalization of the conflict would bind the government into IHL obligations, which states prefer to avoid.

5.3 Rights during war

The second element of Just War Theory in addition to Jus ad bellum, is Jus in Bello (the law in waging war), which addresses the conduct of war in an ethically correct manner. Both these elements are crucial for Just War as wars fought for noble cause would be rendered unjust due to use of morally corrupt war tactics. Jus in Bello has two central principles of proportionality and discrimination. The idea of proportionality posits that the force or violence used in war should be proportional to the initial provocation and the means used to retaliate should commensurate with the ends (Hubert & Weiss, 2001). In addition to avoid excess in use of force, it is also desired that minimum amount of force may be used to achieve objectives. Thus, wars fought for limited objectives may also show restraint on the quality and quantity of weapons used (Johnson, 1981). Firstly, weapons that are unable to discriminate between combatant and non-combatant are prohibited (Green, 2008). Secondly weapons causing unnecessary suffering like asphyxiating or poisonous gases, pallet guns and chemical weapons etc, are also considered illegal. Moreover, weapons having long term negative impacts on the environment are also proscribed (Hubert & Weiss, 2001). The basic aim of this principle is to restrict the combatants to not go beyond defeating their opponent and cause unnecessary damage and destruction.

ANSAs employing terrorism as a warfare tactic apparently violate the principle of proportionality, however, in their perspective they are using as much force as needed to achieve their objectives and to counter more equipped state army in the asymmetrical warfare. States in war with armed group, on the other hand, usually violate this principle as well. For example, United States air force dropped the largest non-nuclear bomb ever used also colloquially known as ‘mother of all bombs’ on ISIS caves in Afghanistan (Ohl, 2019). Although no collateral

damage was reported but environmental impact usually not considered in such a remote war zone, definitely compromised the principle of proportionality. Similarly, Syrian government in its civil war since 2011 has at several instances violated this principle with no special reason but just blatant disregard for international law. Deliberate use of non-discriminatory weapons like barrel bombs and chemical agents by Syrian government even lack the justification of proportionality despite the brutal means used by ISIS in this war (Koblentz, 2019). There generally appears to be a relaxation on prohibition of targeting non-combatants in war against terrorism, as is seen from the causal behaviour over the collateral damage from drone strikes conducted by US in Pakistan, violating the principle of discrimination as well (Shelton-Frates, 2018). Moreover, reaction to the Palestinian and Kashmiri practice of stone throwing by civilians against occupying armed forces is an apt example of non-proportional use of weapons.

The limited, restrained and non-lethal act of stone throwing by Palestinians is treated as an act of terrorism by Israeli military as they claim that intrinsic intent is aggressive (Hallward, 2013; Mallat, 2015). This primitive act of retaliation depicts lack of power equivalency, which is further confirmed by use of bullets as the counter attack by the opposing forces. Such a sharp contrast in the potency of weapons highlights that in contemporary conflicts state terrorism is also witnessed (Mallat, 2015). Noam Chomsky introduced the concept of state terrorism, especially in regard for the US foreign policy for sponsoring fascism in the third world countries (Chomsky & Herman, 1979). The new wave of torture sponsored by states especially in the global war on terror and the impunity attached to it offers a different dimension of state terrorism. United States once again came forth as the main culprit for torturing prisoners at illegal detention centres, however, no legal action has been taken against such demeaning activities (Pearse, 2006). The portrayal of these detainees as inhuman psychopath killers and their status of unlawful combatant prevents them to be given the privileges of POWs recognized under the IHL (Hoffman, 2002). The term unlawful combatant

is legal jargon created to describe stateless belligerents, who are disguising themselves as non-combatants, hence violating laws of war while creating ambiguity for the principle of discrimination as well (Bialke, 2004).

The second principle of discrimination, defines legitimate targets during war. It aims at restraining the harm done to non-combatants and other individuals protected under humanitarian laws. The inherent moral standing of individuals are recognized under the principle of discrimination. Since killing is morally problematic, non-combatant immunity is driven from the fact that the soldiers temporarily forfeit some of their rights when they assume the combatant status making them the legitimate targets (Moseley, 2003). Furthermore, it also addresses that a combatant's status changes based on whether its cause is just or not (Walzer, 2006). This holds a lot of significance in the case of ANSAs as this distinguishing factor of who can be attacked may at times be politically driven. Additionally houses, schools and places of worship are also considered immune from attacks. Fighting a just war demands not to attack non-combatants intentionally and only military objectives are legitimate targets. However, at times civilian causalities are unavoidable and are termed as 'collateral damage' while targeting something of military significance. This makes even non-combatant immunity not an absolute principle (Johnson, 1981). Civilian casualties are justified as long as they are unintended and accidental.

Modern warfare, however, makes identification of combatant from non-combatant a difficult task as some ANSAs like guerrillas disguise themselves as civilians. Another problem is who has the authority to define who is a combatant or not. Some argue that the burden is on the government to identify the combatants, while others believe that nature of contemporary warfare makes the possibility of discrimination an impossible task (Moseley, 2003). Another ambiguity in this principle arises when inhabitants of non-occupied territory pick up arms to resist invading troops even they are not organized. Under International Law they count as

armed forces (Green, 2008). However, without uniforms it's difficult to differentiate them from unarmed civilians. Taking advantage from this ambiguity Sri Lanka's insurgent group Tamil Tigers used around 100,000 civilians as human shields in the final days of the counter insurgent war (The Telegraph, 2009). Tamil Tigers (also known as LTTE or Liberation Tigers of Tamil Eelam) started an armed struggle for a separate Tamil homeland in 1983. Their war was characterized by suicide bombing and attacks on civilians and politicians (Hashim, 2013). Sri Lankan government was able to get international support especially from European Union to proscribe them as terrorist in 2006. This insurgency culminated into a deadly civil war, especially at its end in 2009, when the cornered insurgents (hardly 1000 in strength) prevented a large number of civilians to leave the war zone. Consequently, Sri Lankan state and its aiding militaries launched an indiscriminate attack with full vengeance resulting in large number of causalities. Later on the Sri Lankan Army was severely criticized for their indiscriminate action and some of their commanders were even sanctioned.

Thus, in perspective of ANSAs principle of discrimination holds little meaning as they prefer targeting civilians as it makes their message for state more powerful. On the other hand, while state fights ANSAs the chance of collateral damage is many folds as the conflict is not fought in battle field rather in densely populated cities. In NIAC civilians are targeted both intentionally and unintentionally by ANSAs and state army, respectively. As seen in the Tamil tiger's civil war, Sri Lankan government projected Tamil Tigers as terrorists, however, their own counter terrorism measures were questionable. Yet, after generating international support, Sri Lankan state went for total extermination of insurgents along with a heavy collateral damage of Tamil civilian population. These brutal counter insurgency measures raised alarm among human right circles, who blamed the Sri Lankan government for committing war crimes

of genocidal proportions (Thampapillai, 2011)[19]. This proves that principle of discrimination is neither absolute nor without uncertainty in present age of warfare.

5.4 Right of combatants

Before the rights of combatants, the main focus of NIAC is on what qualifies as conflict. NIAC defined in the common article 3 of the Geneva Convention is termed as 'armed conflicts that are non-international in nature occurring in one of the High contracting parties' (Geneva Convention, common article 3, 1949). This implies that one of the parties involved in such a conflict is non-governmental or non-state in nature. It is also mentioned in common article 3 that it does not apply to riots or isolated and sporadic acts of violence. This generalized definition has left on the political will of the state to classify or recognize any situation as an armed conflict or not. States generally tend to avoid recognizing presence of a conflict as is seen in the example of Arab spring, where few of the internal disturbances or revolt against the dictatorial regime, culminated to outbreak of an armed conflict (Breen, 2013). Use of force in Libya and Syria being case in point. In comparison to Syria, conflict in Libya deteriorated at a much faster pace. Violence in Libya started as a consequence of attempt to ouster Colonel Muammar Gaddafi's government and it soon crossed the threshold for the application of humanitarian rules observed in Non-international armed conflict (NIAC). It further evolved into an international armed conflict (IAC) due to the military intervention of North Atlantic Treaty Organization (NATO) on the authorization of United Nations (Harsch, 2012). Thus, despite Libyan government's initial approach to suppress the revolt by denying any such uprising, it climaxed into a full war based on foreign humanitarian intervention.

[19] Sri Lankan military defeated the Tamil Tigers in May 2009 after a 26-year long military campaign. UN estimated a total of 80,000-100,000 deaths at the end of the war. High Commissioner of Human Rights also under took a comprehensive investigation into crimes and alleged serious violations and abuses of human rights by both parties in Sri Lanka. Sri Lankan Army and police still have several complaints against them regarding forced disappearances, sexual violence and lengthy preventive detentions from Tamil population for alleged involvement with LTTE. For more see, Talha, K. Burki, (2014). Sri Lanka: 5 years on. *The Lancet*, *383*(9929), 1623-1624.

There is now a new two pong standard to classify conflict which is based on two variables. Firstly, hostilities have to reach a certain level of intensity by crossing a predefined threshold and secondly presence of certain level of organization of the parties involved (Chelimo, 2011). There are different criteria acceptable world over on whether any situation of violence can be classified as conflict or not. For the annual Armed Conflicts Report, armed conflict is defined by Project Ploughshares as

> A political conflict in which armed combat involves the armed forces of at least one state (or one or more armed factions seeking to gain control of all or part of the state), and in which at least 1,000 people have been killed by the fighting during the course of the conflict. (Project Ploughshares).

An international armed conflict (IAC) has clarity regarding who is classified as a combatant i.e. the army soldiers of the belligerent states. Whereas, in NIAC only one fighting party is state while other party is ANSA, giving state involved in conflict the discretion to recognize whether the unrest in its territory has crossed the threshold for it to be recognized as a conflict or not. As recognizing a situation as an armed conflict implies that IHL comes into force immediately (Chelimo, 2011). Thus, due to legal and political reasons states usually do not recognized NIAC, so that ANSAs would not have to be given status of combatant and their due rights. Despite of this common impression there is a generally accepted principle in IHL that *jus in bello* in its application is considered independent of the *jus ad bellum* (Cerone, 2012). This implies that rights and obligations ensured through IHL, are applicable even if the war is not considered to have a just cause.

Like an International armed conflict between the states, army soldiers of both sides (combatants of states and ANSAs) in NIAC, forfeit some of their basic rights, making their death morally justified. Yet in order to limit the effects of war in NIAC, IHL covers two crucial areas; protection of persons and limits on the means and methods of warfare. IHL is driven

both from treaties and customary international law. Hague regulations, Geneva Conventions along with Additional Protocols have assumed the level of customary international law aimed at protection of persons. Whereas, limits on non-discriminatory and inhuman weapons being produced, stockpiled and used, in war are agreed upon through treaties signed by the states. The Convention on Cluster Munitions and The Treaty on the Non-Proliferation of nuclear weapons are just two examples of such treaties. Thus, IHL aims at establishing balance between humanity and military necessity for both combatants and non-combatants.

Rights of combatants are mentioned in the common article 3 of Geneva Convention that specifically deals with the armed conflict of non-international nature. It aims at providing minimum criteria of provisions applicable on each party of the conflict, including ANSAs. Firstly, it states that individuals not taking active part in the hostilities or those who have laid down their arms and are *hors de combat* (unable to fight) due to sickness, wounds, detention or some other cause, are to be treated humanely under all circumstance. This treatment has to be without any distinction based on colour, race or any other distinguishing criteria. Mutilation, torture and cruel treatment is also forbidden through this article. Common article 3 also mentions that these persons cannot be taken as hostage and any humiliation or degrading treatment against personal dignity are also prohibited. Contemporary armed Islamist groups like ISIS have gone against this principle in every possible manner and to the worst extent. From burning captives alive to making videos of beheading detainees, ISIS has been involved in the most gruesome war tactics that are witnessed in the recent times (Hassan, 2018).

Combatants who give up fighting are also protected from passing of sentences and carrying of execution without judgement pronounced by a regularly constituted court. Thus, offering all judicial guarantees recognized in the civilized world. In this regard, the decapitation of nearly entire leadership of Tamil Tigers by Sri Lankan Army in the final phase of its civil war in 2009 remains to be unprecedented in the struggle between recognized government and

an irregular armed group (Hashim, 2013). Furthermore, it is also the right of combatants that once they are wounded or sick, they would be 'collected and cared for' (Geneva Convention, Common article 3). International Committee of Red Cross, an independent humanitarian body is allowed, through this article, to offer services to wounded and sick belonging to all parties involved in the conflict. Parties taking part in the conflict are also given right to establish special agreements in order to ensure enforcement of all or part of the provisions of the convention. Application of these provisions, however, would not impact the legal status of the Parties to the conflict (See Annexure-B for text of Common Article 1, 2 and 3).

Another instance of great importance is when the combatant is captured by the enemy. In such a situation Geneva Convention relative to the treatment of prisoners of war (POW) is applicable. This convention is applicable for both members of regular armed forces having allegiance to some government as well as members of other militias or individuals who spontaneously take up arms to fight invading forces. For militias and volunteer corps certain conditions are needed for them to be recognized as an armed force, like it needs to have a command structure, fixed distinct sign, carry arms openly and conduct operations according to the laws and customs of war. Article 13 of this convention ensures the right of humane treatment to the POWs. It also provides protection from any unlawful act or omission, by the detaining power, which may cause death, injury or endanger POW in its custody. Physical mutilation, medical or scientific experimentation on POWs is also prohibited.

The dilemma faced by POW is truly captured by Winston Churchill, when he said: 'A prisoner of war is a man who tries to kill you and fails and then asks you not to kill him' (Doyle, 2008). Despite of all laws to protect POWs, the fate of such captured fighters is solely dependent on the captors. In contrast to the brutal acts committed by ISIS and other contemporary militant groups, the states fighting the so-called war on terror, particularly

United States is involved in some serious violation of rights of these declared terrorists on the battlefield as well as after their capture as detainees.

Prisoners of war cannot be prosecuted for taking direct part in the conflict. Their detention is not a punishment rather a measure to prevent further participation in the fighting. They are to be released and repatriated without any delay at the end of hostilities (Geneva Convention III, article 118). However, detaining power has the right to prosecute POWs for possible war crimes but not for violence permissible under IHL committed during war (Heberer, & MatthÜus, 2008). Furthermore, rules regarding the treatment of civilian internees during detention are similar to those applicable to POWs. In the case of non-international armed conflict, common article 3 to the Geneva Conventions and Additional Protocol II preserves the right of humane treatment in all circumstances of the persons who are deprived of liberty during conflict. It serves as a prevention from murder, torture, humiliating and degrading treatment. Despite these safeguards detained persons are not immune from criminal prosecution under the domestic law of the state.

POWs are also entitled to respect and dignity in all circumstances and their maintenance should be free of charge organized by the detaining power. Furthermore, POWs must be provided with sufficient food, portable water, necessary clothing and medical attention when required. Although restriction on their freedom is permitted yet it needs to be ensured that their internment camp is in safe and secure place outside the combat zone. In addition of creating conditions of hygiene, it is also required that their right to practice religion and recreation is also protected under compliance with the disciplinary routine prescribed by military authorities. In return of all these rights, all armed parties of the conflict have obligation to respect law and the customs of war even when state of war is not recognized by one of them. Although combatants are obliged to respect rules of Geneva Convention, however, their violation does not deprive combatants its rights as a combatant or (if captured) its rights as

POW (Article 44, Additional Protocol-I). Despite of these well-defined rules to protect the dignity of the captured combatants, American detention centres at Guantanamo Bay imprisoning detainees captured during war on terror are marked with instances of torture, sexual degradation, religious prosecution and indefinite detention[20]. An excuse has been created by labelling Al Qaeda and Taliban fighters as unlawful combatants, thus creating room for not the complete application of Geneva Convention over them (Fallon, 2017). It is, however, pertinent to mention that spies and mercenaries are neither given the status of combatant nor are treated as POWs upon their arrest/capture (Article 46 & 47, Additional Protocol-I).

The terminology of unlawful combatant is not an innovation introduced in just War on terror, rather it has a long history. The legal literature, military manuals and case law of the past century use the term unlawful combatant from time to time yet there is no mention of it in The Hague or the Geneva Conventions. The terms combatant, prisoner of war and civilian are in frequent use in international law, hence, have clarity regarding their meaning, whereas

[20] The Guantanamo Bay camp was established in 2002 in Cuba on orders of US President George W. Bush's administration following initiation of War on Terror in Afghanistan. President Bush also granted the USA Patriot Act just few weeks after the events of September 11 to restrict the right of *habeas corpus* of resident aliens. It was done so to allow suspected terrorists to be detained without legal counsel or trial. Consequently, United States Department of Defense operated the Guantanamo Bay camp in great secrecy, not disclosing the number or identity of its detainees. However, they could not defy the court request from Associated Press citing Freedom of Information Act and had to acknowledge holding 779 prisoners in 2006. In 2002, Gitmo detainees petitioned in US federal court for a writ of *habeas corpus* in order to review the legality of their detention. This right was initially denied judging that an alien in Cuba had no access to US courts. However, in June 2004 in Rasul v. Bush it was concluded that US has extensive propriety rights over Guantanamo Bay as a lessee. Later, in Hamdi v. Rumsfeld (2004) it was ruled that US citizens detained as unlawful enemy combatant have a right to challenge their detention. For more, see Daniella Schneider, (2004). Human rights issues in Guantanamo Bay. *The Journal of Criminal Law, 68*(5), 423-439. In Boumediene v. Bush (2008) it was established that all Gitmo detainees have a right to file *habeas corpus* petition in US courts and are entitled to the legal protections of the US constitution. From then onwards, the Combatant Status Review Tribunal was rendered inadequate and many detainees refiled their petitions. See Gerald L. Neuman, (2008). The Extraterritorial Constitution after Boumediene v. Bush. *S. Cal. L. Rev., 82*, 259. For a long period of time American personnel operated at Guantanamo detention center with far less exposure to litigation in comparison to other detention centers. For example, eleven US military personnel were convicted of war crimes in 2005 for the torture conducted by them at Abu Ghraib prison in Iraq. For details Ronald Kramer, (2005). "The supreme international crime": how the US war in Iraq threatens the rule of law. *Social Justice, 32*(2 (100), 52-81. Repatriation of two Pakistani brothers in February 2023 after being held for 20 years without any charge highlights the plight of Gitmo detainees. According to latest statement by Pentagon, 32 detainees are still held at the facility, of whom 18 are eligible for transfer to their countries, as a step towards ultimately closing the facility.

unlawful combatant lacks clarity for the same reason (Watkin, 2005). Unlawful/ illegal/ unprivileged combatant or belligerent are those civilians who directly engage in armed conflict, however, are violating the laws of war. As early as 1863, Francis Lieber identified partisan, free corps, robbers, the spy, the war rebel, the rising en masse and the 'arming of peasants' as some of the irregular actors involved in warfare (Hartigan, 1983). In those days punishment of such captured guerrilla forces in most instance was death sentence, which is evident from examples witnessed in United States-Mexican War, the American Civil war, the Franco-Prussian war, the Philippine Insurrection and the South African war (Watkin, 2005).

One of the prominent cases of trial of irregular or unlawful combatant was the 1942 United States Supreme Court Case of Ex Parte Quirin regarding eight Germans (two of whom were American citizens) who reached United States through submarine to carry out sabotage operations. These captured personnel were executed based on charges of espionage, aiding the enemy and unlawful combat (Kent, 2013). In doing so the court equated unlawful combatant to spies, who actually are not illegal under international law, however, are offenders of international law of war (Watkin, 2005). Thus, even if a person is acting lawfully for his own country yet they are war criminals for their enemy and may be treated as such. It further concludes that if such an unlawful combatant is detained and prosecuted it is done so under the domestic law of the detaining state most commonly through military tribunals (Holmes & Perron, 2007). The international committee of the Red Cross (ICRC), however, is of the opinion that these terms are not defined under any international agreement (ICRC, 2011). Yet the third Geneva Convention states that in case of doubt about the status of a detainee, a competent tribunal may decide on the status of that combatant and while doing so they may be treated as POWs (Kanstroom, 2003). However, in case they are not found to be lawful combatants or being a national of a neutral state or not a national of co-belligerent state, their

fate may be decided by the detaining power. Even in doing so the principles of humanity and provision to fair trial has to be maintained (Dörmann, 2003).

The Military Commission Act of 2006 codified the legal definition of the term unlawful combatant for United States, while putting it on the discretion of the US President to determine whether a combatant is lawful or not (Beard, 2007). This is in clear contradiction to the findings of the International Criminal Tribunal for the Former Yugoslavia in regards to the Celebici judgement (Swart, Zahar, & Sluiter, 2011). The commentary on the Fourth Geneva Convention by ICRC, while quoting the judgement states that an individual in enemies captivity can either be a POW or a civilian and in both cases they are protected by third and fourth convention respectively, not leaving room for any intermediary status (ICRC, 2011). Moreover, since the Quirin case, United States have signed and rectified Geneva Convention, which are now considered a part of US federal law due to supremacy clause in its constitution. US Supreme Court further ruled in Hamdan vs Rumsfeld case that Geneva Convention's common article three is applicable on detainees of War on Terror and any Military Commission established to try such captives is violation of not just international law but law of United States as well (Villoen, 2012).

Additional Protocol II of 8th June 1977, specifically relate to the protection of victims of NIAC, thus it is most relevant for the case of ANSAs. It drives from the humanitarian principles enshrined in common article 3, however, it is broadened to include cases that are not addressed by the law in force and offers protection to such individuals under the principles of humanity and public conscience (Preamble of Additional Protocol II). It is distinctly mentioned that AP-II does not apply to internal disturbances like riots and isolated acts of violence. It also aims at being applied without any adverse distinction based on race, colour, sex, religion, political belief, national origin or economic status etc. Despite addressing conflict of non-international nature, AP-II aims at respecting state sovereignty, territorial integrity and elected

government by not getting involved in internal or external affairs of High Contracting Party in whose territory the conflict is taking place. Acts of terrorism, violence, mutilation, torture, collective punishment and taking hostages are particularly prohibited. Children who have not attained fifteen years of age are proscribed from being recruited in armed forces or groups and are not allowed to take part in hostilities. All other provisions applicable in the IAC through Geneva Conventions and AP-I, are also applicable equally in NIAC on both state and non-state actors involved in the conflict. An additional obligation on the High Contracting Party is that they cannot denounce this protocol in the middle of the conflict and its denunciation would require six months to take effect. Non state party of the conflict does not have any such obligation, yet their right are the same as the state they are fighting against. So long as the means used in the warfare are according to the Protocol, ANSAs are at the advantageous side.

The distinguishing criteria for whether armed group may by dealt under IHL or domestic criminal law is ambiguous and often manipulated by states in order to avoid recognition of conflict within their territory. However, protracted nature of the conflict between state and the armed group resulting in deaths greater than 1000 in limited time span is recognized to be the criteria for the declaration of an armed conflict. International customary law and IHL treaties obligate states to deal such armed conflict under IHL regulations (Chelimo, 2011). National criminal law is applicable on the sporadic acts of violence and riots that are not of protracted nature. Furthermore inclusion of transnational armed groups in the conflict dynamics also demands the application of international law rather than sufficing with national criminal law. By the above mentioned criteria the conflict between state of Pakistan and the TTP factions' operational thorough out the country needs to be declared as a non-international armed conflict. Yet in practicality terrorists caught in this conflict are tried under the domestic criminal law and special military courts (Bakhsh, Fatima, & Bilal, 2019). This was confirmed by a lawyer of JAG Branch of Pak Army during an interview when he confirmed

that situation in Pakistan does not attract IHL in *stricto sensu,* as armed groups do not have control over any territory in the country.

5.5 Islamic law of armed conflict

Historically writers on international law begin with the period of Greek City-States, followed by Roman period and then jump right to the modern times, ignoring the gap of nearly a thousand years when Islamic civilization was flourishing (Hamidullah, 1968). Despite the fact that Islamic civilization like others used laws to establish order in society and govern its inter-civilizational relations. Islamic legal system relies on divine sources, however, with the expansion of Islamic territory with spread of Islam, need for establishing new legal occurrences were realized by Muslim jurists (Bashir, 2018). Muslim powers developed relations with its neighbours in a manner that served their interests, as peace was not the norm of international community and the world was ruled by war. With the increase of non-Muslims becoming subjects of Islamic territories, Muslim scholars felt the need of establishing and compiling rules that governed both internal and international affairs. These rules later came to be known as Islamic Law of Nations or '*Siyar'* (Bsoul, 2008). One of the most important works covering topics of international law was done by an Islamic Scholar Al-Shaybani, who wrote a book called *Al-Siyar Al-Kabir* in the 8th century. This book 'serves as a standard work of reference to-date' (Bouzenita, 2007). Siyar is the term used for rules and regulation concerning the topics of international law, or the relations of Muslim state with other states, domestically and internationally, both in the times of peace and war.

Sources of Islamic International Law or *Siyar* is the same as *Sharia* (Islamic Law or literal translation 'the way'). *Sharia* is derived from the primary sources of the Holy Quran and *Sunnah* (Prophetic tradition). Additionally, it has secondary sources including *Ijma'a* (consensus of scholars) and *Ijtihad* (reasoning) (Weeramantry, 1988). Some important sourcing principles of *Siyar* includes, flexibility to cater to the needs of all times and places, without

violating the core principle of law. It also has structural hierarchy to prioritize divine revelation (Quran) over human reasoning (*Ijtihad*). Moreover, *Siyar* has jurisdiction over both state as well as individuals (Al-Shaybani, n.d./1966). Al-Shaybani's understanding of the world is based on classical division of international community into *Dar-ul-Islam* (Islam's state) and *Dar-ul-Harb* (Foreign land, instead of common translation of abode of war) (Al-Shaybani, n.d./1998, pp 60-64).

This dichotomy is usually the legal term used to differentiate Muslim state from the rest of the world. Al-Shaybani also covers several other topics like declaration of war, use of force, POWs and laws during war etc. Most importantly he addressed civil or internal wars, participation of foreign fighters in civil war and principle of non-intervention.

5.5.1 Jus ad Bellum in Siyar

In contrast to St Augustine's permission to participate in war only when it is just, *Siyar* holds the key to wage war only if it's in accordance with the religious principles; i.e, bellum pium (literally translated as pious war or war according to God's will) (Aboul-Enein & Zuhur, 2004). *Siyar* aims at limiting the right to wage war to three cases only or else it would be illegal. Firstly, it is permissible only in self-defence, secondly defence of the oppressed and thirdly in defence of the religion. Jus ad bellum permitted in *Siyar*, firstly include war in self-defence for which it becomes compulsory on everyone to fight the attacker in case the regular army is not sufficient to defend the state. Second cause is '*istinqaad'* which is very similar to the idea of humanitarian intervention. Such intervention is encouraged for rescuing Muslims (as it is duty of every Muslim) and even non-Muslims living in a Muslim state. Thirdly, the permission to go to war is in defence of freedom of religion. Al-Shaybani states that the third condition of permission was for the sake of spreading the message of Islam to all human beings and giving them choice to convert to Islam if they freely choose to do so without coercion (Tibi, 2017).

Similarly, it is generally believed by scholars that war is only compulsory when it is imposed on Muslims (Ahmed, 2015). Any other case of use of force is prohibited. There is also consensus of scholars that no one should be forced into or out of religion. Another criterion on which just war has to be based on in Islam is '*Niyah'* or intent (Aboul-Enein & Zuhur, 2004). For a war to be both legal and acceptable to God, it not only has to fulfil either one of above mentioned three cases, it also has to be based on the intention for sake of serving God. Only those who follow these criteria are recognized to be doing Jihad and if they die in such a war they are considered martyrs (Bashir, 2018). Thus, it can be inferred that war for nationalistic or patriotic interests are not recognized as jihad.

In regard to jus in Bello, Siyar includes many humanitarian rules that were only recently added into other systems. Indiscriminate killing, for example is absolutely prohibited in Islam as it is mentioned in Quran that killing an individual unjustly is like killing the whole humanity (Surah Al-Ma'ida, verse 32). Moreover, the Messenger explicitly disapproved of killing of women and children (Al-Shaybani, 1966, p 61). Also, POWs are ordered to be treated humanely. Such examples depict that violence and punishment of the enemy was never the aim of wars fought on Islamic agenda, rather it is completely the opposite. *Siyar* rejects many cruel practices of pre-Islamic Arabia like, beheading enemy soldiers and displaying them as war trophies (Hamidullah, 2011). Furthermore, *Siyar*, both identified and protected the non-combatants like women, children, elderly, frail and worshippers in places of worship, prohibiting their killing during and after the war (Al-Shaybani, n.d./1998).

Exploring war laws offered by Islam require the concept of *jihad* may be expounded in details. Contrary to the western influence that translate *jihad* as holy war, its more appropriate translation is 'struggle', 'effort' or 'striving' (Kelsay, 2003). Although Al Shaybani did not offer any formal definition of *jihad* in his *Siyar*, yet he used the term in equivalence to the term 'use of force' (Al-Shaybani, n.d./1998; Sabuj, 2021). He, however, explained that *jihad* is a

war that has to be carried out according to the laws given by God, for His sake and by people that accept authority of God and are followers of his last prophet. Some scholars mention *jihad* as public duty i.e, if it is carried out by some it is not required by the rest. Al-Shaybani never denies support of fighting unbelievers if they decline Islam or peace deal to come under rule of Muslim state. In contrast, however, he also claims that being strong and showing readiness for war, has a deterrent impact on the enemy, hence making world a safer place. According to *Hanafi* school of thought war is obligatory on Muslims only if necessary. Whereas, Al-Shaybani considers jihad an obligation that cannot be discontinued until non-believers accept Islam or sign a peace treaty (Al-Shaybani, n.d./1998, pp 60-62). It is pertinent to mention that the context in which such thought arose was a constant environment of war and threats of annihilation of Muslim community in early days of Islam. Furthermore, from the wars fought by the Prophet Muhammad (P.B.U.H.) it can be concluded that he never practiced aggressive *jihad* or offensive war rather he fought only in the defence of his nation (Albader, 2018).

Jihad as public duty and tool for peace, imposes several duties and requirements on individual participating in it. Under Islam the most important duty of the combatant is having right intention (Bashir, 2018). Having intention of worldly gains is clearly prohibited. This discourages people from starting war based on unjust causes or for egoistic aims. The word *Qital* (killing or fighting) is also used repeatedly in Quran to denote when the actual fight is started, however, it is followed by the phrase *fi sabil Allah* (in the path of God) (Aboul-Enein, 2004).

Since, the war is being fought for a noble cause, the combatant also has the responsibility that the means and methods used in the warfare are also within recognized permissibility. Military necessity, humanity, distinction and proportionality are the four basic principles of *qital* under Islamic law (Shah, 2013). These principles are discussed in detail in next section, however, the Jus ad Bellum part of Islamic law of conflict does not allow non-

state actors within a Muslim state to declare jihad or rebel against the government if the state enjoys public support. The armed group acquires a new status when their rebellion grows as they become equal or larger than the government, in such cases they cannot be regarded as a non-state actor. However, there are certain conditions when individuals or armed groups can declare jihad such as when a Muslim land is attacked and the ruler is unwilling or unable to protect lives and properties of Muslims as it was witnessed in the Russian invasion of Afghanistan in 1979 (Shah, 2013). However, armed groups or individuals belonging to a Muslim state cannot declare jihad on another Muslim state on behalf of their state. Thus, TTP's support to Al Qaeda or Taliban to fight International Security Assistance Force (ISAF) forces in Afghanistan is invalid. In a third scenario, armed groups having affiliation with Islam existing outside the writ of Muslim states can have a different status as they don't come under the authority of a caliph or ruler of a Muslim state. Leadership of such groups make their own decisions that are not considered against any Muslim ruler.

5.5.2 Jus in Bello in Siyar

Whenever Prophet Muhammad (P.B.U.H.) sent an army or some troops he would advise its leader to fear Allah in his personal conduct (Al-Shaybani, 1966, p 75) and ensure immunities to the non-combatants like women, children, elderly, frail and worshippers. The first Caliph Abu Bakr also forbade destroying of fruit bearing trees and killing of animals except for food during the conduct of war (Al Dawoody, 2017). Furthermore, Al-Shaybani explained that fighters should abstain from unnecessary killing or injuries as aim of war is not to persecute the enemy rather use of force has to follow the rule of proportionality. Act of targeting a non-combatant is permissible only when they are captured for killing a human being or targeting the soldiers and even then they are to be tried under criminal law (Bashir, 2018). Contemporary militant groups claiming Islamic affiliation, clearly are negating all these principles. ISIS and Al Qaeda are known for their brutal violent means of warfare where

principle of distinction and proportionality introduced by the Holy Prophet (PBUH) hold little meaning. Attacks on funerals, hospitals and wedding parties are the norm of these extremist armed groups.

Siyar also addresses the topic of military tactics and limitations on the conduct of war by recognizing that practical needs of fighting may compromise immunities of the combatants. For example, in order to break in the enemy fortification, some non-combatants may be killed in the process resulting in unavoidable collateral damage (Al-Shaybani, 1966, pp 95-100; Al Dawoody, 2017). Additionally lying and breaking promises or mutual agreements is prohibited while fighting with the enemy. Treatment of enemy personnel is also explicitly addressed in *Siyar*, prohibiting unnecessary brutality and mutilation of corpses (Zawātī, 2001). Another change that Islam brought in the warfare is the treatment of the prisoners of war (POW). Before all the captured men, properties or land during war was considered right of the possessor and were treated at most as war booty (Neff, 2005). Prisoners of war were enslaved and it was considered legal to subject them to humiliating treatment and torture (Bashir, 2018). For the regulation of post-war affairs, Islamic international law offers very humane treatment of POWs. For the Muslims captured by enemy it is ordered that he should faithfully follow his parole and liberty. However, if parole is not available then he is allowed to escape or wait for his state to pay ransom to free him from captivity.

On the other hand, enemy prisoners captured by Muslims enjoy the protection of not being killed merely because they are POW. This, however, does not impede the trial and punishment of prisoners for committing crimes beyond the primitive actions of belligerency (Hamidullah, 2011). POWs are also ensured the right to the practice of exchanging prisoners along with the compulsion to feed, clothe and treat them well under all circumstance until final decision regarding them is made. Furthermore, women, children, elderly, visually impaired or crippled, and according to some jurist even the peasants and serfs are exempted from execution

unless they were actively involved in fighting (El Fadl, 1999). POWs were treated humanely even if they were enslaved. *Siyar* also introduced the system of ransom and also freeing prisoners just for the sake of God (Al Dawoody, 2017). By doing so Islam tried to limit the practice of slavery and attempted to eventually eliminate it.

Siyar also offers comprehensive injunctions on how to respond to rebels. It is stated that when people of justice defeat people of rebellion then it is not suitable to chase a retreater, execute a prisoner or kill the wounded, however if the rebel fighters have an army to return to then above mention three acts are considered permissible (Al-Shaybani, n.d./1998, pp 75-81). Weapon and cavalry of rebels captured during war are to be returned at the end of the conflict. In regards to the prisoners of war, it is repeatedly advised in Siyar that they should not be killed and they should either be ransomed or set free with grace (Al-Shaybani, 1966, p 91).

5.6 Comparison of the two frameworks

Framework of both International Humanitarian law and Islamic law in armed conflict has been developed in different time period, aimed at addressing different civilizations and social norms. Islamic law in armed conflict is relatively older in origin and is driven from divine revelation. Whereas, IHL is relatively recently formulated. IHL is not a static body of law, it is constantly evolving according to new arising needs of warfare. Although there are many similarities between the two bodies, however, attempts to declare Islamic law in armed conflict compatible with IHL is regarded by Prof. Dr. Muhammad Amin, an expert on Islamic jurisprudence (during an interview) as an apologetic approach used by some scholars in order to get acceptability for Islamic law at international platform. He believes that IHL is not a standard to which Islamic law has to comply with. Due to ever changing nature of IHL, even if it is compatible today it might not be compatible tomorrow. Thus, both of these law bodies need to be treated and recognized to be distinct.

Both bodies of law approach the concept of ANSAs in a different manner. Dr Mushtaq Ahmad, DG Sharia academy, reinforced the idea of supremacy of Islamic law of conflict and explained in an interview that idea of a modern term, nation-state was given after Westphalian treaty. In Islamic law there is difference in the concept of governmental and non-governmental forces. But Islamic law has always directly addressed individuals rather than the concept of State. One challenge for International Law for a long time was that it did not address individuals rather it addressed states. Oppenheim, a guru of international law used to say 'States and only states are subjects of international law' (Kingsbury, 2002). This barrier, however, was crossed by international law due to the developments in the past 60-70 years in the IHRL, 150 years in IHL and now also in International criminal law. Due to these key developments, international law is now addressing individuals as well.

International law has now reached the stage where Islamic law can be compared to it, as Islamic law was already addressing individuals but now international law has also targeted individuals. Now the problem for international law is that the whole system of IHL was developed by states and for inter-states conflicts and developed by keeping in view the interests of states. So by definition there is no space for ANSAs in it. Even till now ANSAs have gained recognition for themselves by use of force. ANSAs traditionally did not have any role in the system but gradually they had to be accommodated either through APII or common article 3 of Geneva Conventions or through later developments.

One common dilemma faced by both law frameworks is who has the authority to classify the actors involved in the conflict? IHL being based on Westphalian system, the focus has always been on the state. NIAC involving ANSAs may seem to be a challenge to states, yet it is state that decides the definition of NIAC. ANSAs have to reach a certain level of belligerency to qualify to be fighting a conflict. The threshold of belligerency can be manipulated by states that don't want to recognize the conflict happening in its territory nor

wants to give rights of combatant to ANSAs. Mr. Sikandar Ahmad Shah, associate professor of international law at LUMS, believes customary law in such a situation is more protective and inclusive for the state in comparison to the parallel regime of common article 3 on which AP-II is based. He considers AP-II to be very generalized and it does not give state the authority to classify ANSAs, for domestic purposes as terrorists or criminals.

Another problem in the contemporary world is that most of the conflicts are involving ANSAs in one way or other. Now organizations like ICRC are faced with the problem of how they ensure compliance when most of the conflicts involve ANSAs and they do not have any recognition in law. For example, the ANSAs are in a weaker position in comparison to the state and it's not acknowledged. Even if they comply with the rules of war, even then their status is equivalent to a criminal. Consequently, their compliance to the law also becomes doubtful. However, in order to ensure compliance, ICRC gives them incentives like, unilateral declaration that they won't attack mosques, mall, civilian, in order to create good image. And image of course counts as it's linked to the issue of legitimacy of their cause in front of international community.

Dr Mushtaq Ahmad in an interview expressed that even in Pakistan all outfits in the Taliban's name lost their public support and sympathy due to acts of brutality like, the Army Public School incidence (2014), attack on funeral, Jirga and hospital. But of course, those involved in the actual fight are not convinced by this. Another option available is that states provide general amnesty to ANSAs if they are within the boundaries of law. But why would state give general amnesty. If state can crush the opposition it would definitely crush it with power. It will give amnesty when they would consider that they are not able to eliminate the threat as swiftly as required. Yet ICRC tries to negotiate for a middle ground between states and ANSAs.

In the past under the state framework once a group or individual was classified as combatant, they were treated as a combatant in terms of rights. Whereas, now there is a movement within ICRC task force of terrorism that believes on making a distinction between a combatant and a non-combatant based on the nature of their activity rather than their pre-assigned status, explained Sikander Ahmed Shah, during an interview. For example, if a civilian undertakes an action that can be classified as acting as an armed combatant than his status would change from a civilian to a combatant. In order to address such deviation labels such as 'Enemy Combatants' are now being used. Trying to give a new label to such person is an example of just creating ambiguity in an already complex body of law ensuring their rights. Mr. Muhammad Oves Anwar, Director of the Conflict Law Centre (CLC) at Research Society of International Law (RSIL), during an interview expressed that the term enemy combatant is legal fiction used to differentiate them from POWs. And by doing so state has no link with such detainee, essentially making them stateless prisoners.

Yet due to changing nature of warfare, problem of rights of ANSAs arose. There are two school of thoughts regarding these rights; the positivist framework is state driven and believes that ANSAs should have lower rights than states. On the contrary Universalist framework believes that humans are humans and everyone should have equal rights. On this point, Mr. Sikandar Ahmad Shah is of the opinion that presently IHL does not provide equal rights to ANSAs similar to those given to the states, because in IAC rights are more preserved than in a NIAC. He believes that in IAC states have vested interests of respecting each other's sovereignty even when they are fighting each other. Whereas, in a NIAC states gang up together to protect sovereignty challenged by ANSAs. As it's a common perception that in the present age people don't go to war rather nation-states do. He further added that states have authority driven from power, whereas ANSAs don't have right to use force as they lack legitimacy, consequently their rights are different.

On the same idea, Ms. Ayesha Alam Malik a research associate at RSIL (while being interviewed) added that ANSAs don't have the right to wage war unless it is done for the cause of self-determination or self-defense. In Islam, however, this idea is blurred, due to the encouragement of waging war in *Dar-ul-Harb* (lands ruled by non-Muslims), in order to establish *Dar-ul-Islam* (land where Muslims have freedom to practice their religion). This conception is usually stated by those who believe that Islam is coming from different historical background and its laws are not updated for the past thousand years after the decline of Islamic civilization.

Ayesha Alam Malik considers that ANSAs are more likely to break the rules of war which is not driven from their status rather due to necessity. ANSAs use more lethal and disproportionate force as they don't have any other option in order to meet their target. They also claim that since state has more power and authority hence, they should be held accountable for their conduct in the conflict. She further added that IHL applies to all parties of the conflict even when one party breaks the law and goes against IHL. This does not provide justification to the other party to abandon the law as well. Additionally, Mr. Muhammad Oves Anwar (during an interview) highlighted that as there is no enforcement mechanism of IHL, hence it not binding on ANSAs. Although IHL demands every party in the conflict to be responsible for their actions, however, some states even do not respect the reciprocity of obligations and privileges.

Another related problem is use of terrorism as warfare tactic by ANSAs. Although there is no universally accepted definition of terrorism, however, international lawyers have consensus that there is no terrorism *per se* in IAC under IHL. Any action violating war laws are considered as war crimes and they are treated in that perspective. Terrorism as a warfare tactic has to be defined in state-based framework under the laws of peace rather than laws of war. Mr. Sikandar did not consider it as in Bello categorization rather regarded it as political

categorization that may be addressed by United Nations, Security Council. Furthermore, he added that it is the states that are exploiting the weakness of IHL on the premise of terrorism and states are attempting to make their own rules of engagement for addressing terrorism which is different from IHL. Creation of special detention centers like Guantanamo Bay and Bagram prisons, in addition to using the term unlawful enemy combatant are such attempts to change the rules of engagement on the pretext that the ANSAs are now involved in the armed conflict. Dr Mushtaq Ahmad's interview highlighted that terrorism is an elusive concept, as it does not have internationally recognized definition, making it hard to measure. It is a very heavy loaded term, due to which no one wants to be called terrorists, yet they call others terrorist. It is a label to marginalize a group or individual.

Application of IHL in Pakistan's war against terrorism is also a tricky matter. Army officers, who actively participated in this conflict, when interviewed, revealed that following IHL or IHRL in this conflict would curtail their military objectives. Very little to no understanding of rules of warfare or IHL was found in these army officers fighting in the conflict against ANSAs. Their only interest was in following orders of high command and achieving objectives. They genuinely believed that those who kill civilians through terrorist incidents, do not deserve to have any rights. International lawyers and researchers are also silent on the situation in the war zone as there is paucity of data that is coming out of the region. ICRC personnel overseeing this conflict were interviewed on this topic and they revealed that there have being instances when Pakistan Army demanded that terrorists that they were fighting should not be given medical facilitation in order to corner them to fulfil military objectives.

In order to judge the level of accountability of Pak army while fighting war against terrorists a lawyer from Judge Advocate General (JAG) Branch of Pak Army was interviewed who categorically stated that all army officers undergo different staff courses/ trainings where they are taught about all national and international legal obligations. He further explained that

role of JAG branch is to maintain discipline while looking after pre/post trial matters of army personnel, litigation and carrying a statutory role to assist Chief of Army staff in all legal matters. However, he also stated that terrorism witnessed in Pakistan during the recent years and counter terrorism measures by Pak army does not constitute as an international armed conflict and does not attract IHL in *stricto sensu*. Yet, he claims that cases that were required to be dealt under laws governing IHL, were disposed of accordingly. Additionally, he added that Pakistan's superior courts can be approached in case someone believes that their rights have be infringed upon. On the same issue, Dr Kaleem Imam, IG Police, while being interviewed suggested that criminal justice system of Pakistan and high acquittal rate of terrorist is the main cause behind extra judicial means adopted by LEAs to deal with the menace of terrorism. On the contrary, LEAs and intelligence agencies are still accountable for their actions through National Commission for Human Rights (governed by NCHR act 2012), as claimed by Director of Intelligence Bureau (IB) working in counter terrorism section (during an interview). NCHR is mandated to take *suo moto* action on the petition of any victim that claims violation of any human right or negligence in prevention of such violation by any public servant. In regards to the enforced disappearances Supreme Court of Pakistan has established Commission of Inquiry on Enforced Disappearances. Additionally, NCHR also has 100 complaints till date regarding enforced disappearances of which 23 complaints have been settled after successful intervention as claimed by director from IB. He, however, further revealed that there is a general environment of impunity as not a single perpetrator has been held accountable in such cases even if the missing person is recovered. Thus, despite being a counter check mechanism on civil law enforcement agencies and army, this commission has made little tangible progress to prevent enforced disappearances.

In order to understand the other side of the picture interviews of several former militants (for details see Appendix 2) involved in combat with Pakistan Army were taken. In regard to

the pre-emptive arrest in conflict it is generally witnessed that once a person is arrested there is a lack of understanding regarding, under which law he is arrested, which intelligence agency has taken him and where? The kin are afraid of asking these questions as well. Even if the location of the internment centre is found out, family of the detainee is afraid of the Army while visiting him and claim that they are treated harshly and humiliated by the armed forces.

While sharing experience of his arrest, one former militant said that when he was arrested, he was blindfolded and taken to an unknown place, where he was tortured for two years, while he maintained that he was neither involve in any terrorist incident nor was he a terrorist sympathizer. He claimed that Pakistan Army does not follow any type of law neither Islamic nor international law of armed conflict. Additionally, there is no forum on which he can complain about the injustice experienced by him. Torturing, humiliation and killing in custody is a routine matter for the Army in this conflict. These views of the interviewee could not be verified as interrogation tactics and actual ground situation of armed conflict in Pakistan is not disclosed in detail by Pakistan Army officers (for details see Appendix 2) interviewed for this research. However, judging from the high acquittal rate of suspects from Anti-Terrorism Court, suggest that above mentioned views are over generalized militant rhetoric based on anti-state preconception. Another former militant that accepted to be involved in fight along Kashmiri Mujahideen claimed that despite everything they were never involved in any activity against Pakistan Army or civilians. Several times they missed a target just to avoid civilian causalities as it was believed by them that Islam does not allow targeting of even sinful Muslims even in the heat of war.

Some family members of former participants of armed groups were also interviewed to understand their worldview and conception about law enforcement agencies. A young wife of former militant active in Lahore was initially indoctrinated by her husband but her strong militant conviction and religious fanaticism was evident in her talk during interview. She

considered the killing of LEA personnel to be justified and even a virtuous act as they are defenders of an un-Islamic government in Pakistan. She stated that her own interrogation experience with police and intelligence agencies for being an active facilitator of terrorist activities was quite respectful and negated instance of any torture by LEAs. She attributed her experience to be in accordance to cultural practices of respect towards women in Pakistan. She explained that her husband and brother, on the other hand, had to experience torture at hands of LEAs and she fears for their extra-judicial death in police encounter eventually. She was not only prepared for such an outcome but also considered it to be a great religious victory. Her life story disclosed that before the attraction of religious fanaticism offered by her husband, it was poverty and indifferent behaviour of her father that pushed her in this direction. Her staunch beliefs cannot be attributed to her young age, as an older former member of militant organization interviewed for the study also expressed similar vigour for religious extremism to an extent that she recruited other females for extremism. She taught Quran and thus was reasonably qualified in Islamic law of armed conflict. Her gender, age, qualification and middle class economic background makes her an atypical participant of armed group yet she played the key role of recruitment. Despite of having knowledge of Islamic instructions during war she firmly defended her group's brutal modus operandi during conflict.

Publications of militant organizations particularly Dabiq and Al-Naba (both published by ISIS), were reviewed for this study to include the militants' worldview as they propagate it. One thing common in both these publications is excessive use of infographics to attract reader to the content related to the number of attacks conducted in the recent past. In addition to claims of recent attacks, these publications offer Quranic interpretation that may appeal extremist minds and validate their belief systems. A reoccurring theme in these magazine is the portrayal of death of infidels and mention of rewards for the martyrs (Al-Naba, 2015). This creates rigidity in minds of extremists and justifies their actions. These publications further provides

encouragement and detailed plan of action to carry out lone wolf type of attacks. It idealizes the ultimate goal of martyrdom and is least concerned about the rights of fighters during conflict or after capture. It views physical and mental struggle or hardship as means of achieving greater reward in hereafter.

Another perspective on this issue was taken from pro-Taliban clerics. A founding member of Milli Majlis-e-Sharai, a joint religious forum of various school of thoughts, during an interview claimed that scholars have a consensus that Taliban have rightly exercised their right to defend their state when they took up arms to fight USSR and US invaded Afghanistan. He further added that as Pakistan Army is pressurized to attack Taliban in Pakistani territory in order to avoid any foreign intervention, Taliban fighting Pakistan army are also justly practicing their right to defend their lives and their families. On the question regarding use of terrorism as a warfare tactic by Taliban and other ANSAs, he claimed that it is only propaganda done by western nations in order to malign an Islamist movement and it is done by infiltrating agents in the ranks of Taliban to conduct such activities. Furthermore, he believed that those who are generally declared as terrorists are actually brave fighters who are defending themselves against aggression.

5.7 Conclusion

There are a number of similarities between IHL and Islamic law in armed conflict, e.g. mass killings of innocent civilians or indiscriminate attacks are completely forbidden in both frameworks. Moreover, combatant has the obligation to distinguish himself from the civilian population and protection of certain categories of population like women, elderly, and children is also ensured. Yet IHL is not a uniform body within, nor is it static even now. It is challenged by both state and non-state actors based on changing war tactics and circumstances. IHL is by no means a gold standard with which Islamic law has to measure up to. Islamic law in armed conflict attempted to limit use of force to self-defence which the rest of the world did not realize

till twentieth century. It was after establishment of United Nations that the world came to the conclusion that use of force should be limited only to self-defence.

As for the rights of armed non-state actors, IHL attempts to directly address the issue though AP-II, whereas, in Islamic law all rulings are generalized for regular war between states, however, same rules are considered admissible in a NIAC. Both laws, however, are not absolute and deviations do occur in actual practice. Political manipulation in determining status of the fighting parties is one of the hurdles in the implementation of these laws. Actual situation can only be understood by looking at the past and present precedents in implementation of these laws in the conflicts involving ANSAs, but one thing that is pertinent is that terrorism has to be viewed in war paradigm rather than an act committed during times of peace. Transnational nature of contemporary armed groups and foreign funding to local armed groups, instigated to destabilize country demands application of war paradigm on acts of terrorism without even the presence of interstate conflict.

CHAPTER 6

CHALLENGES POSED BY ARMED NON-STATE ACTORS

6.1 Introduction

Armed non-state actors pose a number of challenges to IHL, while it attempts at regulating non-international armed conflict. These challenges range from recognition of rights of ANSAs at local and global level to attempts at annihilating them to protect vested political interest of their enemy states. Challenges to IHL in perspective of ANSAs is of growing concern as most of the contemporary armed conflicts are non-international in nature (Sassòli, 2010). Although theoretically IHL is equally binding on ANSAs and the state, yet the legal mechanism for its implementation is mainly directed towards the states. While not being involved in developing and interpreting the law, the perspective of ANSAs is usually ignored, not creating any sense of ownership for the law. For IHL to be more realistic and more respected by ANSAs, the need of the time is that ANSAs may be involved in all phases from creation to operationalization of the law. Carrot stick approach is to be applied for ensuring strict compliance to it.

In the past denying the existence of the armed conflict by the states especially while engaged with an armed group was preferred practice in order to avoid the consequent applicability of the IHL (Aldrich, 2000). This was especially done in order to evade restrictions of IHL and the rights states have to ensure to their enemy in the conflict situation. Presently, however, Human Rights law and its monitoring bodies have strengthened to the extent that it is placing greater restrictions than IHL. Consequently, now there is a tendency that states are willing and quick to accept that they are involved in an armed conflict and seek IHL to regulate their matters in order to avoid applicability of Human Rights Law or its law enforcement paradigm in non-international armed conflict (NIAC) (Lubell, 2011). This clearly depicts that loopholes exist in IHL that states intend at exploiting particularly while engaged with an armed

group. Loopholes that are of major concern are the special categorization of fighters of ANSAs, labelling them terrorists in order to demonize their existence and their consequent non-compliance of IHL despite its binding nature.

6.2 Challenges to IHL by ANSAs

The challenges to IHL in regards to ANSAs starts even from the categorization of individuals defined under the laws of armed conflict. The dual categorization of combatants and civilians that IHL offers does not seem all-encompassing especially in a NIAC. This issue was made part of contemporary debate due to direct participation of civilians in NIAC, particularly in the so called 'war on terror' (Lubell, 2011). The actual effects of such labelling through categorization, especially in the conduct of hostilities, has a long-lasting impact. IHL places emphasis on different categories of individuals like combatant, non-combatant, civilian etc. and has rules that regulate the behavior of parties of the conflict varying upon the category of the individual. This categorization is crucial for the applicability of the principle of distinction which mainly aims at distinguishing military objects and people from civilian objects and people (Lubell, 2011). This principle ensured through Article 48 of Additional Protocol I, is regarded as the cardinal principle in the conduct of hostilities. The concept of combatant, however, is defined only in regard to the international armed conflict. Their status ensures that they are given immunity from prosecution for the lawful actions of war. This is particularly of great importance in determining who can be targeted or detained. Corresponding definition of combatant in NIAC would mean that rebel groups would be also given immunity so long as they kill only the soldiers and attack the military (Lubell, 2011).

Due to unavailability of a clear definition of combatants in NIAC, the concept of civilians also becomes blurred as civilians are usually termed as individuals that do not meet the criteria of combatants. Another problem occurs when individuals that are at prima facie civilians, yet engage themselves in active fight. This results in the loss of protection given to

civilians by IHL due to direct participation in hostilities. This unclear boundary between civilian and combatant posed a great challenge for IHL (Bellinger III & Padmanabhan, 2011). In order to delimit these boundaries ICRC has interpreted a cumulative criterion that any civilian involved in firing a weapon on the opposing side resulting in a minimum threshold of harm and achievement of some military objective would be considered a combatant (Lubell, 2011).

Contemporary debate highlighting this issue, of civilians becoming combatants, has been in regard to detainees held by the United States for their alleged involvement in acts of terror. In order to define the grounds for holding members associated with Al Qaeda, former US President Bush issued a military order on 13th November 2001, explaining authorization for detention. It broadly stated that any individual (who is not US citizen) that is determined by him is a member of militant organization Al Qaeda and has been involved in or was found conspiring to commit acts of international terrorism by harming US citizens or its national politico-economic interests, could be detained by US military. In 2004 the definition of enemy combatant was added through an order issued by Department of Defense stating any individual who was part of or supported Taliban or Al Qaeda in committing hostile acts against US or its allies can be declared as an enemy combatant on multiple reviews by officers of Department of Defense (Martinez, 2004 & Perkins, 2004). Later military commission act of 2006 differentiated between lawful and unlawful enemy combatant. Subsequently, during Obama's presidency, a policy decision resulted in refrain from using the phrase enemy combatant, however, practically the substantive elements remained the same (Lubell, 2011). Introducing this new categorization in the law of war meant not only blurring the line of combatant and civilian but also to avoid giving POW status and rights to the captured enemy combatant. Unlawful enemy combatant label means indefinite period of detention even on insubstantial evidence and deprivation from the due process of law (Walen & Venzke, 2007). In short, the

status of unlawful enemy combatant essentially endangers combatant and civilians engaged in fight, with every possible problem that the status of POW protects one from.

In addition to using new confusing labels to the already defined categories of individuals involved in the conflict under IHL, the tactics US is employing in its 'War on terror' is also raising legal, practical and ethical questions. Another unusual practice in regard of this war is the use of unmanned aerial vehicles, more commonly known as drones, to target individuals. Some supporters of this tactic believe that principle of distinction of IHL actually encourages use of drones as it can be used to target militants in asymmetrical warfare that hide among civilian populations, attempting at using them as shields. Use of conventional warfare tactics would cause massive civilian casualties; thus drones are a more ideal means of approaching such targets (Lewis & Crawford, 2012). Questions arise on who has the authority to select the target list and on what criteria. Some critics even go to the extent of calling such kinds of military attacks as target killing (Lubell, 2011), which in literal meaning seems to be true. This practice becomes even more controversial when drone attacks are conducted on some other sovereign country with which the attacker is not even in a direct conflict with. In the context of war on terror by the US, researchers generally believe that IHL is not against use of drones for targeted killing of a combatant, a fighter or a civilian directly involved in hostilities in a NIAC (Kramer, 2011). Others also defend the United States right to conduct drone attacks in Pakistan as an act of self-defense even without the express consent of Pakistan (Paust, 2009). All this legitimacy for such attacks has been established by labelling the enemy as terrorists and then by demonizing this label with the help of the media and moulding public opinion.

Terrorism itself has become a big challenge for IHL due to the exploitation of the term by the powerful state actors. A wide variety of legal regimes, both domestic and international (including IHL) prohibit the acts of terrorism, despite the fact that international law does not have any universal definition of terrorism (Policinski, 2020). This lack of clarity encourages

states to use the situation for their vested political benefit through dehumanizing rhetoric against individuals and groups that are their opponents by labelling them as terrorists. Such demonization is not only dangerous for the dissenting armed group or individuals but also for the humanitarian actors and civilian populations believed to be associated with the 'terrorists' during armed conflict. All these efforts to dehumanize your enemy is done to create a sense of exceptionalism in order to use any usually considered unacceptable tactic in the guise of counter-terrorism efforts (Policinski, 2020). By creating a sense in the general population and the international arena that the enemy that your state is tackling is less than human, a tacit acceptability is created for torture and other atrocities to be unleashed on your opponent that may otherwise be categorized as war crimes. Generally, in the counter-terrorism narratives, an impression is created that existing rules of IHL do not apply particularly related to detention and use of lethal force as threat is exponentially great from the enemy that is devious (Jackson, 2005). Despite the recently reinforced belief that terrorism is an exceptional case in which general laws of war do not apply, the Geneva Conventions were negotiated to address the worst of the circumstances as they were formulated right after WWII (Policinski, 2020). Naïve thinking that counter terrorism measures may not need to comply with IHL would be more damaging and counterproductive as it might further feed extremist mind-set rather than eradicating it (Harris, 2012).

In the contemporary situation both terrorism and counter-terrorism tactics are equally under debate especially in the perspective of IHL. Interestingly, the term used to express the United States response to the 11th September attacks as, 'War on terror', has itself became a source of controversy. Terrorism is a war tactic, yet war was declared against it. In international law, it is logically more established that armed conflict needs to be between identifiable parties (Lubell, 2011).

Moved by this logic and demands of International Law, president Obama's administration distanced itself from the use of the term war on terror and began to explain that Americans were at war with a militant organization, Al Qaeda. With the rise of extraterritorial conflicts with transnational armed groups like Al Qaeda and Islamic State, the term 'foreign fighter' is commonly found in international discourse. France and Denmark are among others that have used this term to define their nationals returning from the war zone in Syria and Iraq. This term is not present in the literature of IHL and also does not provide any specific guidance on how they may be treated and what are they entitled to (Sommario, 2016), creating another gap in literature that is presently being exploited by making them live in inhumane conditions and with a stigma for the rest of their lives (Policinski, 2020).One of the biggest defiance of IHL by ANSAs is targeting of the civilians. ANSAs are usually involved in asymmetrical warfare with a more powerful and resourceful state, having a well-trained army who is equipped with better weapons. In order to counter all the benefits that the state enjoys, ANSAs mostly resort to choosing soft targets that are more vulnerable and easily accessible. Such civilian targets require little expertise and weapon/ammunition to create a larger impact on the whole society. The justification given by ANSAs for targeting civilians is always different but always justified in their perspective. For example, in 2002 Osama bin Laden wrote a letter to American people explaining that since American army is selected from the people of America, hence they are liable to all the actions of the Army. He further claimed that since American army is involved in killing Afghani civilians, hence he is divinely given the right to kill American general public (Martinovic, 2016). Such justifications even though vehemently reject one of the basic principles of IHL, yet are acceptable in the worldview of ANSAs making it difficult to generate compliance for IHL by ANSAs.

Extraterritorial conflict adds another dimension in the set of already existing problems due to the presence of ANSAs in a conflict. With the increase of conflicts involving states

against transnational actors based outside the state's territory, debate has been generated on whether the human rights law is applicable on such a conflict or the law of armed conflict. Researchers now have a consensus that human rights law applies in full along with IHL (Cerone, 2007). Another legal complexity arises when extraterritorial conflict with an armed group is not considered an international conflict rather it has to be identified as NIAC (Lubell, 2011). As IHL is more state centric and has catered to interstate conflict more in the past, it has much more protections available for the belligerents of the international armed conflict. However, with the evolution of the law there is a significant degree of convergence between these two bodies of law addressing different nature of armed conflict (Cerone, 2007). Now individuals involved in NIAC enjoy many of the rights that were once available in the interstate conflict only. Ambiguity, however, still remains on how the Human rights law is applicable on the transnational conflicts.

6.3 Challenges of making ANSAs party to a treaty

Beyond the confusion created through terminologies and categories the bigger challenge faced by IHL is in terms of ensuring compliance to it. ANSAs are apprehensive about the law as they cannot be party to any of its treaties and were not consulted for its formulation (Bongard, 2013). Whereas, states that are signatory to treaties and are obligated to follow it, claim that it is unfair to apply laws to an armed conflict with an enemy that is not willing to comply by any rules. Nonetheless, IHL is an obligation that is binding on both states and ANSAs (Sassòli, 2010). As the most contemporary conflicts are non-international in nature involving ANSAs that are extremist in their ideology and practices. For example, extremist groups like Boko Haram and Islamic State do not seek any legitimation from the international community, hence they do not care about what IHL has to offer (Martinovic, 2016). On the other hand, there are other ANSAs like PKK in Turkey and Maoist in Nepal that comply with

IHL in their conduct in order to generate partial recognition from the international community (Martinovic, 2016).

The primary question, however, remains that what prevents non-state groups to become the part of any IHL treaty? The answer is simple, that it is beyond the scope of Vienna Convention 1969 (the law of treaties) as its article 1 specifies that it deals with treaties between the states only[21] (Aust, 2013). The very nature of armed groups challenges the writ of the state through the use of illegal violence.

Consequently, governments consider armed groups illegal and illegitimate for disrupting public order and weakening state's capabilities. International law grants armed groups' formal legal status only when states recognize them as belligerents or being part of national liberation movements (Krieger, 2018). The modus operandi and fighting tactics also devoid any type of legitimacy based on legality. Additionally, IHL does not grant privileged status of combatants to the fighters of armed groups and they can be criminally prosecuted by the de jure government for their participation in a NIAC (Sassòli & Shany, 2011).

ANSAs cannot participate in IHL formulation as they do not have recognized status under national and international law. IHL practitioners are unanimous on the view that IHL is binding on all armed groups, forces and even individuals who are a party of an armed conflict (Kleffner, 2011). Since they are bound by IHL already, there is usually little need felt to make them part of any treaty, rather only their compliance is demanded.

[21] The international agreement regulating the treaties between states is called The Vienna Convention on the Law of Treaties (VCLT) or commonly known as treaty on treaties. It provides comprehensive rules, procedure, and authoritative guidelines on how treaty is defined, drafted, amended, interpreted and operated. The Vienna Convention is regarded as a codification of customary international law and guideline for state practice concerning treaties. The convention was adopted on May 23, 1969 and entered into force on January 27, 1980. Since then it has been ratified by 116 states. Interestingly United States have only recognized parts of it as a reiteration of customary international law. For more details, Chang-fa-Lo (2017). Treaty interpretation under the Vienna Convention on the Law of Treaties. *A new round of codification*. Springer.

Furthermore, ANSAs do not have proper command and control over its army due to lack of training and discipline in comparison to the state army. This results in a decentralized authority with no sense of accountability, creating high chances of dissent and non-compliance to the orders of the leaders (Bassiouni, 2008). This also creates a higher chance of non-compliance to IHL by fighters of ANSAs in lower ranks as they may not know any better. This also proves troublesome on who to approach for treaty negotiations due to frequent group faction formations and decentralized command system.

Another key hurdle in recognizing ANSAs is giving combatant status to them. The state finds it difficult because it lends legitimacy to their cause. However, treating ANSAs as mere criminals and punishing just for fighting, regardless of their compliance with IHL, is an unjust behaviour being practised by states. National criminal laws will equally qualify the killing of a government soldier and a peaceful civilian as murder, entailing a harsh punishment. On the other hand, combatant status lends them the right to directly participate in hostilities. They cannot be punished for fighting but could be rightfully attacked by government forces until they surrender or otherwise become hors de combat (Sassoli, 2006, p 15). Making ANSA part of treaties would recognize them as a High Contracting Party under IHL regulations which ensures a combatant status for its fighters during any type of conflict.

Criteria set out in third Geneva Convention and Additional Protocol I, to attain combatant status is ambiguous and lacks precision. Prerequisites of having combatant status are; belonging to a party to the conflict, organization and responsible command, fixed signs and open carriage of weapons and compliance with the laws/customs of war (Watkin, 2005, pp 25-37). The very nature of guerrilla fighters or member of dissident armed groups suggest that more than one above mentioned criteria will not be met by them.

Compliance to rules and customs of war are the most difficult requirement to meet due to asymmetrical nature of the conflict. However, even if all the requirements are met there is

still a chance that a group may be denied combatant status due to action of its participants. The debatable decision by the United States government to deny combatant status to the Taliban was done under this rule of exception. Although the Taliban claimed to be the *de jure* rulers of Afghanistan at the time of American attack in 2001, yet they were treated as a group rather than armed forces of a functioning state. This was done to deny them the combatant status (Watkin, 2005). Al Qaeda was denied the combatant status on the grounds of its terror campaign targeting civilians and being an irregular force, despite the fact they were fighting on behalf of Party to the conflict, i-e; Taliban.

State's response towards giving combatant status to members of armed groups is not very encouraging as it undermines state's authority and takes away their leverage while fighting such groups. However, in order to encourage compliance to IHL and bringing transparency to non-international armed conflicts, it is crucial that combatant status may be given to fighters of armed groups, while they observe certain pre-requisites. Although there is little doubt that prominent armed actors like Al Qaeda, Islamic State and TTP belong to a party to the conflict and have organizational hierarchy and responsible command. The nature of their clandestine activities prevent armed groups to carry fixed signs, wear military uniforms or carry weapons openly. Moreover, ANSAs ignore or purposely break laws and customs of war to cover up their military imbalance in comparison to the strong governmental forces.

States realizing their greater responsibility should ensure prisoner of war status to the captured personnel of armed groups despite the nature of their activities during the conflict. It would not lend credibility or legitimacy to the cause of ANSAs rather government would gain more acceptability internationally and better standing in the conflict. As POW status is entitled to legally categorized combatants, such action would encourage better compliance to IHL customs by the ANSAs. Although there is not fixed mechanism on how to universally declare armed groups as combatants, yet positive give and take relationship between government and

ANSAs may help both parties to reach an agreement suitable to that particular conflict. One rule of thumb that needs to be observed in non-international conflict is that government party to the conflict should not have authority to deny combatant status to any armed group they are fighting. International organizations or a neutral third state may be able to unbiasedly judge the situation and may be given this responsibility to possibly decline combatant status based on any above-mentioned objections.

As Geneva conventions and Additional Protocols hold ANSAs legally responsible for the area under their control in a NIAC, it is important to categorically declare that state has de jure authority over that territory. Ignoring the problem will not make IHL compliance any easier, due recognition of armed groups through special agreement will offer an alternative solution to non-inclusion of armed groups in treaty under the rules of international law.

6.4 Challenges to Islamic law on armed conflict

In addition to a number of challenges posed to IHL by ANSAs, Islamic law on armed conflict is not immune to any such problems. The biggest and the most common challenge faced by both bodies of law in regards to ANSAs is ensuring implementation of relevant principles (El Zeidy & Murphy, 2009). Like IHL, Islamic law of war has a number of protections for civilians as well as combatants, along with punishments for the violator of these protections. However, Islamic law on armed conflict is unique in the perspective that armed groups having Islamic affiliations often attempt at twisting and moulding Islamic law in order to legitimize and lend credibility to their worldview. Osama bin Laden's justification of killing American civilians by quoting it as a divine permission, is just one of the examples of this problem (Martinovic, 2016). Another issue with implementation of Islamic law of war is that it lacks international appeal as it is hardly even implemented in states having majority Muslim population. Presently, international community views with scepticism anything that is associated with Islam, mostly due to the bad repute brought by self-proclaimed Muslim

Militant groups and their acts of terrorism.

The concept of jihad is the most misused and distorted notion of Islamic law of armed conflict in the contemporary conflict especially involving an armed group proclaiming it to be their justification to fight. Jihad is not to be performed in individual capacity rather it is communal or general duty, which means that if it is performed by a sufficient number, others will not be condemned for the neglect of it, making administration of jihad a matter to be decided by the governments (Ali & Rehman, 2005). In the contemporary conflicts, however, the most common claim made by the young fighters coming to the conflict zones from all over the world is that their government is part of *Dar-ul-Harb*, hence they migrant to *Dar-ul-Islam* to fight the opponents. The idea of perpetual fight between *Dar-ul-Harb* and *Dar-ul-Islam*, in order to eliminate the former is used to attract the vulnerable minds by depicting it as the ultimate goal of every Muslim. However, many instances of their peaceful co-existence, where jihad remained suspended, can be found even in the life of the Prophet Muhammad PBUH. Ten years of peace through the Treaty of *Hubaybia* signed by the Prophet PBUH himself is just one of the examples (Ali & Rehman, 2005). Thus, people misinterpreting Quranic verse, 'to kill them till the religion only be for Allah' (Quran 2:193), very conveniently ignore the second part of the verse which limits this reaction by stating that 'there is no aggression except against the aggressors'.

Another challenge faced by the Islamic law of war is implementation of *Takfiri* ideology by the armed groups. *Takfir* in literal sense is to declare a Muslim an apostate or non-believer, in contemporary times, however, it is an excuse to sanction violence against any sect or individual that practices Islam in a different manner than those who pronounces *Takfir*. Mainstream Sunni scholars consider it wrong to engage in the practice of *Takfir* or excommunication as declaring a Muslim a non-believer or *Kafir* is a right held solely by Allah (Badar, Nagata & Tueni, 2017). Yet its practice has been observed in the historic precedence

of *Khawarij* movement till present day by the so-called insurgent group Islamic State in Iraq and Syria. Muslims have been the main targets of Islamic State since 2014 based on the same ideology (Kadivar, 2020). *Takfir* is been used by Islamic State as tool to discredit Shia sect as they consider only those following their version of Sunni Islam are the true Muslims and consequently they feel responsible to purge the society from the misguided versions of Islam. Practice of *Takfiri* ideology appears to be the common feature of most contemporary Islamic militant groups as Al Qaeda also embraces it although in a much more selective manner than the Islamic State. Al Qaeda's Ayman Al Zawahiri considers governments ruling over Muslims as illegitimate and apostate, including all the employees and security forces employed by such governments (Drennan, 2008). Moreover, Muslims of Shia sect are also considered apostate by him as he believes it is a religion based on falsehood (Drennan, 2008).

The most complicated part of proclaimed Muslim armed groups is that even if they out rightly reject IHL in their actions yet they prefer that they appear to be following the Islamic law despite the fact they might be misinterpreting it for their own benefit. Suicide bombing is an apt example for this. Suicide by an individual is considered one of the most abhorrent acts that a Muslim may commit as it is seen as a direct violation of the will of Allah (Rosenthal, 2015). Whereas, suicide bombing is regarded as the biggest spiritual achievement for any Muslim by the Islamist militant organizations. It is portrayed as an act of chivalry and absolute devotion that one is willing to sacrifice his/her life for the cause of Islam and a great reward of martyrdom is promised in the hereafter. Contrary to this portrayal, suicide bomber in reality is violating Islamic law by committing crimes of killing civilians, mutilating their bodies, destroying civilian objects or properties, violating the trust of enemy soldiers and committing suicide (Munir, 2008). Such paradox practices tarnish the image of Islam in the international community at one hand and on the other hand it drives the vulnerable Muslims away from the

true teachings of Islam.

6.5 Proposed solutions to the challenges

The biggest challenge of non-compliance of IHL (particularly customary international law) by both state and the non-state actor, despite its binding nature is mainly due to the fact that ANSAs are not part of its treaties and were not engaged while its creation. In an interview international legal expert Oves Anwar emphasized that from the outset there is a complete difference in the rights and the obligations, which are given to the state which is the high contracting party through the Geneva conventions and IHL obligations internationally and to the NSAs, in fact NSAs have a very limited recognition under international humanitarian law. Rebel groups are not even generally expected to comply with the law, making the state more susceptible to ignore IHL as well, while dealing with such groups. In order to avoid these violations of law from both belligerent sides it is important that ANSAs may be allowed formally to accept IHL (Sassòli, 2010; Bellal & Heffes, 2018).

This among other things would create a sense of ownership among the armed group ensuring more respect for the law. In this regard, an interview carried out with Dr Mushtaq Ahmad emphasized that IHL should acknowledge combatant status for the ANSAs. State definitely has reservations over that, combatant status is like a license or legitimacy. However, when you acknowledge combatant status you not only admitting their privilege but also putting a responsibility on them. It is further observed that compliance to IHL is more dependent on non-legal factors like public opinion, religion, ethics and reciprocity as its violation is also due to the same factors rather than shortcomings of the law or its implementation mechanism (Bouvier & Sassoli, 2006).

The prime example of inclusion of ANSAs in the political arena for dialogue and gaining adherence to a basic humanitarian principle was by an NGO ‘Geneva Call’ on banning use of landmines. In exception to the Geneva Conventions and Protocol II, other IHL treaties

for example Ottawa Convention banning landmines are still addressing the states only. This gap became the reason why the Geneva Call tried to engage armed groups to respect humanitarian rules by signing a Deed of Commitment on not to use landmines in 2000 (Bongard, 2013). Two other similar documents relate to Deed of Commitment for the Protection of Children from the Effects of Armed Conflict in 2010 and the Deed of Commitment for the Prohibition of Sexual Violence in Situations of Armed Conflict and towards the Elimination of Gender Discrimination in 2012. These documents are signed by ANSAs leadership and then countersigned by Geneva Call and the Government of the Republic and Canton of Geneva which also serves as the custodian of the signed documents. In regard to the Commitment of Deeds against landmines, 50 ANSAs renounced these weapons by signing the Deed or otherwise committing to it. Geneva Call's experience is although not completely positive, yet it demonstrates a potential to actively engage armed groups in ensuring protection to the civilians belonging to the conflict zone and creating respect towards humanitarian laws. These deeds depict that in contrast to gaining respect for the whole IHL by ANSAs, it is far more likely that agreement may be made on a more specific code of conduct (Sassòli, 2010). Scepticism regarding applicability of such agreements on militants like ISIS was addressed by Aneesa Bellal (legal advisor for Geneva Call), declaring that it is not only possible but also efforts are already under process by them to do so.

Furthermore, it is also needed that armed groups may be rewarded when they comply with IHL and punished when they violate it (Sjöberg, 2020). In order to do so both internal and external monitoring mechanisms need to be established so the information can be corroborated (Sassòli, 2010). ANSAs may be educated on the rules of IHL through neutral parties like NGOs in order to generate better understanding on what is required of their conduct by the international community. Geneva call is already performing this function and also encouraging self-monitoring of the armed groups by requesting a report on their compliance to the Deed of

Commitment (Sassòli, 2010). This is then counter checked by some neutral external monitoring mechanism in order to ensure unbiased reporting. This creates a positive discipline (Nelsen, 2006) approach towards the ANSAs by trying to empathetically comprehend their version of reality rather than demonizing their existence and all actions (Sjöberg, 2020).

A simple reward for the fighter of an armed group is the assurance that he would be given rights and status of a combatant during the conflict and at time of detention (Sassòli, 2010). This would not only increase their interest in complying with IHL in order to retain the immunity offered to combatants but also make them more observant of acts of their companions. Additionally, violations of IHL should not remain without consequences in order to fully benefit from the commitments and monitoring mechanisms. Fixing the responsibility of violations and sanctioning the transgressions has several different legal resources including both civil and international. Instead of collective responsibility on the whole group, only the transgressor or the violator of the law need to be punished, as it is already practiced in international criminal law. Different methods of sanctions may include disciplinary sanctions within the armed group through warning, demotion, dismissal, assignment of extra duty or withdrawing weapon from the fighter (La rosa & Wuerzner, 2008). For the serious nature of violation, criminal prosecution is necessary that can be conducted through the state involved in the conflict or by involving a third state that can bring to trial the perpetrators through universal jurisdiction or use traditional indigenous justice systems (La rosa & Wuerzner, 2008). For guaranteed independent and impartial justice international or mixed tribunals can be formed, as is the approach adopted by the International Criminal Court where crimes committed by not only the state but the non-state armed group are also prosecuted.[22]

[22] Example of non-state armed group being prosecuted by International Criminal Court (ICC) is available in the armed conflict in northern Uganda. It's one of the longest armed conflicts of non-international character in Africa that last almost two decades. It is fought between rebels of Lord's Resistance Army (LRA) and the Ugandan government. During the course of the conflict serious war crimes like regular use of torture, mutilation, murder and abduction was committed by LRA against the civilians. Since 2000, Ugandan

Pakistani law, however, has a number of articles addressing the issue of armed groups taking up arms undermining the supremacy of the state. Oves Anwer from RSIL, is of the opinion that non-international armed conflict is clear on the fact that when some individual/group takes up arms against the state, then state has the authority to punish them in a befitting manner. On a similar pretext Pakistan Penal Code (PPC) considers militarily challenging the state as a criminal offence for which one can be tried. Several examples of application of Anti-Terrorism Act (ATA) 1997 has been found in acts of terrorism though out the country, yet it has a very high acquittal rate of 75% (Parvez, & Rani, 2015).

The reasons of this high acquittal rate is embedded in the flawed legal system of Pakistan. During an interview with prosecutor general Punjab, Ch. Khaleeq-uz-Zaman attributed high acquittal rate of ATC to the flawed FIR registration and mismanagement of evidence. He further added that systematic flaws in Pakistan's Anti-Terrorism Act contribute significantly to potential human rights violations especially due to ambiguity attached to definition of terrorism under section 6 of ATA. He was of the opinion that most human rights abuses occur during the remand period through excessive use of force, inconsistent case diaries or even fake encounters.

Despite being the basic framework of anti-terrorism in Pakistan ATA has several flaws and consequent misuse, predominantly due to its broad definition of terrorism. Under the section 6, subsection 1, ATA defines terrorism as:

The use or threat of action where:

government offered amnesty to the rebels and expressed readiness to forgive LRA rebels and their leader Joseph Kony for the war crimes on the condition of denouncing the rebellion. Since 2004 ICC has been investigating war crimes committed during this conflict and has issued arrest warrants of LRA leaders Joseph Kony and others. Despite of earnest efforts of ICC to prosecute the criminals, it is hard to categorize the victims as almost 80 per cent of the LRA's soldiers are children abducted from their families and forced to commit horrendous crimes against their own people. For more details: Manisuli Ssenyonjo, (2005). Accountability of non-state actors in Uganda for war crimes and human rights violations: Between amnesty and the International Criminal Court. *Journal of Conflict and Security Law*, *10*(3), 405-434.

(a) the action falls within the meaning of sub section (2) and

(b) the use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or a foreign government or population or an international organization or create a sense of fear or insecurity in society or

(c) the use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause or intimidating and terrorizing the public, social sectors, media persons, business community or attacking the civilians, including damaging property by ransacking, looting, arson or by any other means, government officials, installations, security forces or law enforcement agencies. Provided that nothing herein contained shall apply to a democratic and religious rally or a peaceful demonstration in accordance with law. (ATA, 1997)

Section 6, subsection 2 put forwards seventeen types of actions (or threat of actions) that may cause grievous violence, death or damage to the property (See Annexure-C complete list of offences and their respective punishment). Subsection 1(c), however, makes it optional for declaring a crime as an act of terrorism based on its political or ideological motivation. Thus, it loosen the criteria for application of ATA, overburdening police, prosecution, and Anti-terrorism courts (ATCs) and inviting misuse of the law. A police officer from Counter Terrorism Department (CTD) Quetta, Ms. Arsala Salim interviewed on the subject believed that police officials involved in writing FIR are to be blamed as well for procedural delays and high acquittal rates. They commit procedural defects due to lack of adequate legal knowledge. Delaying and improperly lodging FIR, nominating unnecessary number of persons and even fabricating events in case diaries results in gaps in investigation. She believed that due to such gaps the accused has to spend lengthy period in custody resulting in human rights violation but

usually eventually results in discharge or acquittal on the grounds of insufficient evidence or defects in the investigation. The resulting frustration from the acquittal of terrorists pushes LEAs to pursue extrajudicial means to prevent the criminals from further terrorist activities and save the lives of the innocent masses.

Internationally defining terrorism is a cumbersome task as well. US Department of State in 1983, devised one of most widely used definition of terrorism. It referred terrorism as a "premeditated, politically motivated violence perpetrated against non-combatant targets, usually intended to influence an audience" (Sinai, 2008). The term non-combatant encompasses civilian and military personnel who are off duty or unarmed. Contemporary challenge faced by IHL is the introduction of new labels and the resultant confusion created in the existing categories defined in IHL. The traditional bifurcation of combatant and non-combatant in IHL is made ambiguous through the recent rise of unlawful enemy combatant category most commonly used in the war on terror initiated by the United States to try detainees captured in the war. Contrary to its use as a potential source to generate criminal liability, there is a general agreement that this term is not present in the positive law of war and is a source of confusion for the United States domestic law (Maxwell & Watts, 2007). Its use, however, reflects legal convenience rather than objective contribution to the existing law and customs of war. Similar is the case of labelling fighters of armed groups as terrorists. Absence of universal definition of the term terrorism has also added to the ambiguity that is at times deliberately created by the state to demonize the existence of the opponent group. In order to address these problems a simple solution is to stick to the classic categories mentioned in IHL rather than to create new ones. Furthermore, a general definition can be universally agreed upon is that any violation of IHL would be classified as acts of terrorism (Sassòli, 2010). Violations of this kind are categorized as war crimes under IHL, which broadly constitutes deliberate attack on civilians (Schmid, 2011). Such a definition would be beneficial in two ways, firstly it would

provide a universal parameter to identify acts of terrorism and secondly it would create more respect for IHL.

Interaction of IHL and international human rights law during armed conflict, especially of non-international nature is also a growing area of concern. Although both bodies of law aim at promoting protection of humans and conservation of humanitarian values, there are several conceptual, legal and practical differences between them. Attempts at converging the two bodies may not have the desired impact of humanization of the armed conflict rather it may create more confusion (Kamatali, 2013). A growing concern among military advisors is that convergence of these two bodies may render any activity that is lawful under IHL, as unlawful under IHRL or human rights norms as is seen in the issue of detention in the armed conflict (Cathcart, 2018). For the sake of clarity, it should be comprehended that IHL provides states the authorization to detain persons during an armed conflict, including NIAC, contrary to the confusion created through the attempt to apply IHRL to NIAC (Aughey, & Sari, 2015). In order to avoid any ambiguity, the lex specialis status of IHL for armed conflict needs to be universally accepted and reinforced. Furthermore, states need to accept that IHL applies to every armed conflict whether IAC or NIAC (Cathcart, 2018). Consequently, states would be required to offer better recognition and incentives to ANSAs, creating a major shift in the concept of illegality or criminality of members of armed groups when they rebel against the state. Resultant would be the more equitable application of IHL to all parties involved in the armed conflict.

As for the challenges posed to the Islamic law on armed conflict, the major concern is that Islamist militant groups do not out rightly reject its rules rather misinterpret them in order to create legitimacy for their existence in the society. Groups like Al Qaeda, Tehreek-e-Taliban Pakistan (TTP) and Islamic State (IS) proclaim to be the torch bearers of true Islam and attempt at validate their actions by citing religious excuses. In interviews taken of former militants, the

general impression was that they do not know much about the Islamic Law on armed conflict. Yet, the fact that these groups claim to be following Islamic laws on war, indicate they can be opened up to some sort of dialogue, if not with the international community than with Islamic law scholars about their interpretations (Bellal, 2016).

Unanimous *fatwas* of Islamic scholars against their so-called jihad, however, is also not generating desired results (Dash, 2008). A more apt way of engaging these groups in order to ensure humanitarian principles are respected in the conflict is through engaging their constituency (Bellal, 2016). Despite of giving religious dimension to their actions, the Islamist militant groups primarily have political aims of dominance that cannot be established without the support of the people or their members. Educating and disseminating information of humanitarian principles enshrined in Islam to the masses would not only expose the misinterpretations of Islamic teachings by the armed group but also curtail the number of people joining them with false hopes.

6.6 Conclusion

As the nature of warfare has been evolving over the years, the challenges posed to IHL have also increased in number and complexity. With the majority of armed conflicts presently around the world are non-international in nature, involving armed groups as a party, it has become a growing area of concern in IHL. Political interests of the powerful states, however, have been undermining the rights of these armed groups through the practice of labelling them as terrorists. Religious dimension is also added in these conflicts as quite a few of these armed groups have shown affiliation with Islam. In this context, religion should also be made part of the solution for the challenges posed by ANSAs to international law. In order to generate respect for law by the armed group, the ideal solution is to engage them formally in its interpretation and operationalization. Islamist armed groups are additionally inclined to have apparent religious and ethical outlook despite of their violations of the same principles. This

can be used to the benefit in order to generate compliance to the law by educating the community from which they attract their fighters about correct interpretation of Islamic laws. IHL and Islamic law on armed conflict both complement each other and in order to enhance compliance to both bodies of law in the contemporary conflicts, benefits should be driven from each. Additional feature in Islamic law of war providing combatant status to fighters of armed group, may prove to be the key element needed to resolve some of the challenges posed to IHL by armed non-state actors.

CHAPTER SEVEN

CONCLUSION

Presence of armed non-state actors is the reality of the contemporary armed conflicts. Actions committed by such actors in an asymmetrical conflict usually results in violation of laws of war and domestic law. In order to obligate members of armed groups to respect international and domestic laws, this study aimed at reviewing rights committed to ANSAs under both Islamic and international bodies of law. Legal categorization of ANSAs was studied in order to devise an operational definition of armed non-state actors that is not politically determined and to define their rights under Islamic and International Humanitarian Law. Furthermore, this study aimed at determining whether non-traditional warfare tactics makes rights of armed non-state actors void under law while using example of enemy combatant (*Guantanamo Bay Detainees*) to highlight this point.

In order to address the above stated problems, descriptive and comparative research methodologies were used to judge the articles of treaties concerning armed non-state actors in International Humanitarian Law and primary sources of Islamic Law. Assistance was taken from face-to-face interviews conducted with the help of a semi-structured questionnaire to analyse whether dominance and inequality is promoted or resisted by the implementation of laws of war. In order to compare practical situation on ground with privileges/obligations offered through law a diverse sample from different strata of society was taken. Renowned lawyers specializing in IHL and Islamic law scholars were consulted for IHL and Islamic law of armed conflict, respectively. Whereas, high ranking officers of Pakistan Army were interviewed to understand the ground situation of the Pakistan's war against terrorism. In order to encompass the perspective of the opposite side, interviews of former militants that are being rehabilitated after the conflict and residents of conflict areas were also included. In total about 23 interviews were conducted for the purpose of this research.

Theoretical framework used to support this thesis is Social Constructivism. This framework challenges rationalist theories such as neorealism and neoliberalism, by providing an alternative view towards security studies that is not based on power and interests. Furthermore, its focus on normative or ideational structures instead of material ones provides an interesting substitute to conventional ideas focused on promoting state interests, thus offering a distinct theoretical contribution through this research. Constructivists focus on identities of the actors, constituted through interaction, to decide on how they behave and the goal they pursue. This idea that identities are not predetermined or given, rather created through interaction is significant for answering how identity of ANSAs are formulated in the contemporary conflicts, in presence of IHL that primarily focuses on safeguarding state interests.

Presence of ANSAs in contemporary conflicts around the world is maligned for the acts of terrorism committed both in the times of war and peace. Terrorism, however, is an elusive concept that is used more as a label to delegitimize any actor or their struggle (Chapter 5). It is also used to dehumanize the opponent in order to avoid giving them their due rights that are recognized in the frameworks of international law as well as domestic law. Unrecognition of rights of ANSAs usually push them to act more recklessly toward the rights of others involved in the conflict whether they are combatants or non-combatants. Another grievance of such actors is that they are not involved in the formulation of these law and resultantly have little knowledge about them. States, on the other hand, are apprehensive of IHL governing conflicts involving ANSAs as there is a general perception that its rules are not applicable on the armed groups yet states are bounded by its law. Diverse legal categorizes of ANSAs, seek certain levels of legitimacy from local population and international community for their survival. This holds equally true for armed groups involved in separatist movements based on right of self-

determination and armed opposition to government demanding political recognition. Struggle for legitimacy can be used to seek better compliance to humanitarian rules during conflict.

International Humanitarian Law (IHL) governing non-international armed conflicts (Common article 3 and Additional Protocol II) is explicitly designed to address the issue of armed groups. Yet practically fighters of armed groups are not recognized as combatants and thus are not able to enjoy POW status after capture (Chapter 6). This exemplifies the power imbalance patronized and enacted by the laws governing conflict involving ANSAs in order to protect and prioritize state sovereignty. Efforts to redress this doctrinal disparity has achieved little success due to reluctance of states to recognize the combatant status of the ANSAs opposing them in a conflict. There is, however, one exception that since war of national liberation is treated as international conflict, the fighters of such secessionist groups are given combatant status. Recognition of such separatist conflict, based on right of self-determination, by the states is still debatable. For all other non-state actors in non-international conflicts common article 3 provide rights equivalent to those offered to civilians in international conflict, except for POW status given to combatants in an international conflict. Resultantly this sets forth a minimum standard of humanitarian protocol for conflicting parties. These protections include that all persons that are hors de combat must be treated humanely and prohibitions against murder, cruel treatment, torture, mutilation, humiliation, extra-judicial sentences/execution, taking of hostages is also mentioned.

In Islamic perspective threat opposed by ANSAs can be categorized into Alriddah, Hirabah, Baghy and Khuruj. Hirabah has more resemblance with internal strive within the state, whereas Baghy and Khuruj are more of a secessionist movement against a state. All these elements may illustrate the concept of terrorism (Chapter 2). Islamic law treats Hirabah under the domestic framework, whereas, Alriddah, Baghy and Khuruj are dealt under the law of war. Despite of the harsh punishment for the perpetrators of these offences, the basic principle of

humane treatment during the conflict is still maintained. In addition to the protections offered by IHL, the Islamic Law of armed conflict extends combatant status to the fighters involved in these acts. Thus, offering incentives to members of armed group to comply with the laws of war. Yet contemporary armed groups claiming to be affiliated with Islam are committing atrocious violations of every humanitarian principle known to man. These acts of terrorism committed in the heat of the conflict or peace time, however, does not nullify the rights of combatants given to non-state actors. Islam offers equality of basic human rights for all but curtails the rights of the transgressor as a repercussion of its acts. It goes on to the extent that if a man takes the life of another unjustly then as a compensation, life of the aggressor too should be taken. Normative ethics, on the contrary, advocate against the death sentence if consensus is established on that and also because intrinsic worth of an individual makes every life sacred. Thus, Islam more appropriately addresses the innate psyche of people that demands retribution for the wrongs committed against self rather than suppressing emotions in order to establish higher moral ideal.

When individual's rights are protected including their right to take revenge, then justice has a better chance to be established (Chapter 3). Whatever may be the case, growth and development of ethical and moral norms can have a positive contribution in creating respect for human life and act as a deterrence against wrongs. In this perspective social constructivist school of thought proposes an inclusive approach towards including and involving the concerned parties in the formulation of a law that aims at governing them. The diversity of armed groups in the contemporary conflicts, however, hinder in development of a uniform universal law that may aptly address every conflict situation. A more ideal solution would be to engage specific armed actor to agree on a deed of commitment that specifically addresses their most significant concern. Deed of commitment explicitly formulated for the targeted

ANSA, neutral judging of conflict intensity by international organization and recognition of combatant status for the members of ANSAs is the key practical contribution of this research.

As for the comparison of IHL and Islamic Law of armed conflict it is concluded that both frameworks have a lot of similarities in principles of discrimination and proportionality. Yet their basic premise is quite different as IHL is state oriented whereas, Islamic law aims at addressing individuals. Thus, in the case of ANSAs, Islamic law offers a more appropriate approach towards dealing with this contemporary problem. Furthermore, Islamic law treats terrorism as a crime that is to be reprimanded based on its intensity rather than politically manipulating the acts to dehumanize a certain section of the society. Moreover, states inclination of declaring war captives as unlawful combatant is another political manoeuvre to avoid giving them due rights of POWs. The category unlawful combatant does not have any recognition under IHL and is a trick to treat such captives under the domestic law rather than the laws of war. This is enabled by the non-combatant status of ANSAs under IHL in most cases. Islamic law on the other hand does not believe in such distinction and recognises their status of combatant as well as POW.

However, the rights of ANSAs protected under Islamic and International Humanitarian Law are invalidated due to their subjective categorization such as terrorists and unlawful enemy combatant etc. Thus, this research's null hypothesis is proven. Analysis of articles of Geneva Conventions and Additional Protocols prove that it has the basics that may help in protection of rights of armed groups. Yet they still have room for further clarity. In the end it really comes down to the intent behind the application and implementation of the law. Whether the law is used to uphold the humanitarian principles or it is misinterpreted and misused for dominating the weak to maintain the power disparity in the world.

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Appendix 1

Research questionnaire

Research questionnaire to international law experts

1) In the domestic framework are the rights of armed non-state actors during non-international armed conflict impacted by the writ of state?
2) Can IHL and IHRL be applied simultaneously in the situation of non-international armed conflict?
3) Is any distinction being made between different armed non-state actors based on nature of their activity?
4) Who has the authority to judge applicability of IHL in an asymmetrical warfare?
5) Can rules of engagement in international prisons like Guantanamo Bay exist parallel to IHL?
6) What is the legal standing of Status of forces agreement under IHL and can it provide exemption from trial for war crimes?
7) How targeted killings through drone strikes is a violation of IHL?
8) What legal justification does a country has to conduct drone strikes against armed groups in another sovereign country who is not even directly involved in the conflict?

Research questionnaire to Islamic law experts

1) What should be the rights of armed non-state actors involved in an armed conflict under the Islamic law on armed conflict?
2) Does Islamic law on armed conflict provide equal protection to both armed non-state actors and states in the armed conflict?
3) Should use of terrorism as a warfare tactic limit the rights of actors involved in the armed conflict?

4) Can the treatment given to armed non-state actors that rose in the initial phase of Islamic history (Khawarij, Hashashins etc), still be applicable in the present day world?
5) Would imposing obligations to follow Islamic law on armed conflict on armed non-state actors, make them automatically eligible to have rights equal to states in an armed conflict?
6) Are there any weaknesses/ loopholes in the Islamic law on armed conflict that are being exploited in the case of conflict with the terrorists?
7) How can the applicability of Islamic law on armed conflict be ensured in contemporary asymmetrical conflicts involving armed non-state actors fighting comparatively powerful state army?
8) To what extent Pakistan is following the Islamic law on armed conflict in its war against terrorism?
9) What are the rights of enemy combatant (*Guantanamo Bay Detainees*) available under the Islamic law on armed conflict?
10) Are the rights of enemy combatant (*Guantanamo Bay Detainees*) under the Islamic law on armed conflict similar to the rights of prisoners of war?
11) Is Islamic Law in armed conflict compatible to the International Humanitarian Law/ International law on armed conflict?
12) Can terrorism be curtailed through application of Islamic law on armed conflict?

Research questionnaire to members of armed forces

1) What is your perception about the armed non-state actors?
2) What are your views about rights of armed non-state actors?
3) Are armed non-state actors different from states as an enemy in conflict/war?

4) Who poses a bigger threat as an enemy to Pakistan presently; states or armed non-state actors?
5) Should use of terrorism as a warfare tactic limit the rights of actors involved in the conflict?
6) Can obligation/responsibilities be placed on armed non-state actors if they are not given rights in the situation of war/ conflict?
7) Are terrorist prisoners treated differently than the prisoners of war?
8) Are war laws applicable in the war against militants/terrorists?
9) Do the Guantanamo Bay Detainees have same rights as prisoners of war?
10) How terrorism can be curtailed?

Research questionnaire for former militants

1) In your opinion what are the rights of a fighter in a conflict under Islamic law?
2) Were you given those rights by the Pakistan Army in the conflict in the FATA region or NATO forces in Afghanistan?
3) Were those rights given by you and your group to the fighting Pakistan Army and the civilian population?
4) Was distinction between fighter and civilian maintained by you in the conflict?
5) Is it justified to kill civilians by suicide attack or other form of target killings under Islamic Law?
6) What was your treatment after being captured by the Pakistan Army?
7) Did you had any resentment over this treatment and how did you express that resentment?
8) Did you feel/experience any inequality in law governing the conflict with the Pakistan Army?

Appendix 2

LIST OF RESEARCH PARTICIPANTS

Sr. No.	Identification details	Interview date and duration	Remarks about their narrative
1.	Prof. Dr. Muhammad Amin, an expert on Islamic jurisprudence, faculty member at The University of Lahore.	20.05.2018 Interview duration: 45 minutes	He considered Islamic Law of armed conflict an independent body of law that does not need an endorsement from IHL to prove its usefulness. He stated use of violence by militants and armed force in conflict in Pakistan as transgression from both Islamic and international humanitarian law.
2.	_____, Founding member of Milli Majlis-e-Sharai, a joint religious forum of various school of thoughts.	25.06.2018 Interview duration: 20 minutes	He had pro-Taliban views, stating that they were justified at taking up arms to fight invading forces in Afghanistan. He considered use of terrorism by militants in Pakistan a conspiracy to malign the struggle of Taliban by western powers.
3.	Dr Mushtaq Ahmad, DG Sharia academy, Islamabad.	24.09.2020 Interview duration: 25 minutes	He believed the state-centric approach of IHL to be the biggest hurdle in its applicability to conflicts involving ANSAs. Islamic law addresses this problem by providing an alternative approach of addressing individuals rather than states.
4.	Dr Humaria Ahmad, Associate Professor at Department of Islamic Thought and Civilization, University of Management and Technology, Lahore.	15.06.2018 Interview duration: 30 minutes	She believed in the compatibility of Islamic and international humanitarian law as they are based on similar principles rooted in protecting human dignity.
5.	Mr. Sikandar Ahmad Shah, associate professor of international law at LUMS, Lahore.	23.05.2018 Interview duration: 1 hour 20 minutes	He believed in existence of disparity between rights of states and armed groups recognized by IHL. He further added that states are creating their own rules of engagement for the conflict that runs parallel to IHL and that is at times conflicting to it.

6.	Ms. Ayesha Alam Malik a research associate at RSIL.	23.05.2020 Interview duration: 20 minutes	She considered Islamic and international humanitarian law to be incomparable as they have different source of origin and time period/circumstances for its evolution.
7.	Mr. Muhammad Oves Anwar, Director of the Conflict Law Centre (CLC) at Research Society of International Law (RSIL).	25.09.2020 Interview duration: 30 minutes	He debated on the applicability of domestic law and IHL, simultaneously on any conflict involving ANSAs, thus questioned legality of Gitmo detainees under American domestic law.
8.	_____, Retired Captain from Pak Army, served in Waziristan during operation Rah-e-Nijat (2007-2009)	30.04.2018 Interview Duration: 20 minutes	He defended Pakistan Army's stance of military operation against militants involved in terrorist acts in Pakistan. He shared experiences on how ruthlessly militants attacked Army posts in Waziristan and demanded that there should be no leniency while countering such a menace.
9.	_____, Retired Brigadier from Pak Army, participated in the operation against Nawab Akbar Bugti, Dera Bugti, Balochistan (2006).	25.04.2018 Interview Duration: 15 minutes	He expressed need for devising a tactful counter terrorism strategy addressing socio-economic factors in order to stop violation of IHL by the armed groups.
10.	Dr Syed Kaleem Imam, IG NH & MP (former IG Punjab and Sindh Police)	25.08.2021 Interview Duration: 15 minutes	He believed that Pakistani government is employing COIN strategy to counter terrorism, however, softer measures leading to human development is presently missing. He also strongly suggested that revamping criminal justice system needs to be the top priority where protection of human rights are ensured.
11.	_____, Director Counter Terrorism Wing, IBHQs Islamabad.	03.08.2021 Interview Duration: 15 minutes	He believes that coercion and conquering dissenting groups within Pakistan is the only right way to deal with menace of terrorism. Breaking any human rights law or IHL in the process of establishing the writ of the state is an unavoidable necessity.
12.	_____, Grade 17 Lawyer , Judge Advocate General Branch, Pak Army	30.08.2021 Interview Duration: 40 minutes	He stated that terrorism as witnessed during recent years was not an international armed conflict. Furthermore, no terror organisation

			were holding the control of any territory / piece of land prior to war against them. Those organisations were not only attacking military instalments but the civilians as well. Hence, it does not attract IHL in stricto sensu. However, the cases which were required to be dealt under laws governing IHL, surely were disposed of accordingly.
13.	_____, Director, Counter Terrorism Field office, Intelligence Bureau Lahore.	16.08.2021 Interview Duration: 30 minutes	He disclosed that high acquittal rate from ATC pushes LEAs and intelligence agencies to use extra judicial means to create deterrence in the minds of the terrorists.
14.	Abdul Hadi (Brigadier retd), member managing body, Pakistan Red Crescent Society.	06.05.2019 Interview Duration: 25 minutes	He believes that Pak Army deliberately attempts at restricting ICRC's access to conflict zones in Pakistan.
15.	Dr. Ilam Khan, resident of Bajour Agency, Pakistan affected by Pakistan military operation.	20.11.2018 Interview Duration: 20 minutes	He believes that TTP is not politically motivated rather they have grievances that need to be addressed by the state/government in order to rehabilitate such individuals back to mainstream society. He proposes that militants may not be treated as enemy rather as citizens of the state gone rogue that may be brought back to normal life.
16.	_____, resident of Swat, KPK, Pakistan	20.11.2018 Interview Duration: 15 minutes	He believes that both parties involved in the Swat operation have violated both domestic and international. He added those behind terrorist incidents attacking civilians should be given severe punishment, however, after proper trial and judicial proceedings.
17.	_____, former militant (graduate from Islamic International University, Islamabad) allegedly affiliated with Al Qaeda.	21.12.2020 Interview Duration: 20 minutes	He narrated his life story of how he was picked up by army for having alleged links with Al Qaeda. He claims that during his one year captivity he was subjected to severe torture in order to get statement about his involvement in militant activities. Although he expressed ignorance about his exact rights under IHL and Islamic law, yet

			believed such torture is bound to be illegal under any law.
18.	_____, former militant claims to remain captive for two year.	23.12.2020 Interview Duration: 15 minutes	He claims that during his two years of captivity allegedly by Pakistan Army he was subjected to torture and his family was humiliation whenever they tried to plead for his release. He added his grievance that no law is followed by Army rather every officer has devised his own rules for the suspected militants.
19.	_____, former militant, resident of Bajour Agency.	27.12.2020 Interview Duration: 10 minutes	He claimed that torture tactics are employed by both parties involved in the conflict. He added whenever an army personnel is captured by militants he is subjected to severe torture as well. He stated that civilians were attacked during conflict as army is allegedly using them as human shields.
20.	_____, wife of JuA militant involved in terrorist activities in Lahore.	03.08.2022 Interview Duration: 75 minutes	She was 16 years of age and was approached by a hard core militant for marriage. He later indoctrinated her entire family including her mother and brother. She had fanatic religious opinions and viewed members of law enforcement agencies as defenders of un-Islamic government, thus Islamically justified to be killed. She considered herself and her family defenders of the cause of Islam and were not bothered by any hardship or loss of life in that process. Her education regarding Islam was limited to only the videos sermons of extremists and operational videos of militants. She was least bothered regarding any rights she possessed while fighting Pakistani LEAs. On the contrary, she appeared certain that her brother and husband will be killed by police without a fair trial and she seemed to be at peace with any such eventuality.
21.	_____, 60 years old female Quran teacher, covertly	23.12.2022	Her staunch views on jihad made her believe that any suffering on this path will be rewarded in the

	working for Daesh to recruit female extremists.	Interview Duration: 25 minutes.	hereafter. She appeared indifferent to the brutal tactics employed by ANSAs despite having knowledge about the Islamic code of conduct during war.
22.	Ch. Khaleeq-uz-Zaman, Prosecutor General Punjab.	29.11.2022 Interview Duration: 30 minutes.	He mainly attributed high acquittal rate of ATC to the flawed FIR and mismanagement of evidence in Pakistan. He believes that systematic flaws in Pakistan's Anti-Terrorism Act contribute significantly to potential human rights violations especially due to ambiguity attached to definition of terrorism under section 6 of ATA. Most human rights abuses occur during the remand period through excessive use of force, inconsistent case diaries or even fake encounters.
23.	Ms. Arsala Salim, SP, CTD Quetta.	11.12.2022 Interview Duration: 40 minutes.	She believes that police officials involved in writing FIR commit procedural defects due to lack of adequate legal knowledge. Delaying and improperly lodging FIR, nominating unnecessary number of persons and even fabricating events in case diaries results in gaps in investigation. Due to such gaps accused has to spend lengthy period in custody resulting in human rights violation but usually eventually results in discharge or acquittal on the grounds of insufficient evidence or defects in the investigation.

Appendix 3

Topic: Rights of armed non-state actors: A comparative analysis of Islamic and International Humanitarian Laws in context of contemporary international crises

Dear Participant,

The following information is provided for you to decide whether you wish to participate in the present study. You should be aware that you are free to decide not to participate or to withdraw at any time without any compulsion.

The purpose of this study is to understand the Rights of armed non-state actors while comparing Islamic and International Humanitarian Laws in context of contemporary international crises for a qualitative research for a doctoral degree. Data will be collected through semi-structured interviews, informal discussions and observations.

Do not hesitate to ask any questions about the study either before participating or during the time that you are participating. I would be happy to share my findings with you after the research is completed. However, your name will not be associated with the research findings in any way, and your identity as a participant will be known only to the researcher.

There are no known risks and/or discomforts associated with this study. The expected benefits associated with your participation are the information about your experiences and knowledge in the field of law and its implementation on the violent conflicts around the world.

Please sign your consent with full knowledge of the nature and purpose of the research.

A copy of this consent form will be given to you to keep.

Signature of Participant Date:

Researcher
Asma Nasar Chattha
PhD candidate at CIPS
Cell No: 0321-4021472
Email: asmanasar307pcips@nipcons.nust.edu.pk

Annexure A

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

Article 8
War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Willful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Willfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations,

as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which 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;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

(**ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT**. Retrieved from https://legal.un.org/icc/statute/99_corr/cstatute.htm)

Common Article 1

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances. (Common Article 1, Geneva Conventions I-IV)

Common Article 2

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof. (Common Article 2, Geneva Conventions I-IV)

Common Article 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

   To this end, the following acts are and shall remain prohibited at any time and at any place whatsoever with respect to the above-mentioned persons:

a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
b) taking of hostages;
c) outrages upon personal dignity, in particular humiliating and degrading treatment;
d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2) The wounded and sick shall be collected and cared for.

An impartial Humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
The application of the preceding provisions shall not affect the legal status of the Parties to the conflict. (Common Article 2, Geneva Conventions I-IV)

Annexure-C

Section 6, ATA, 1997

Terrorism

1) In this Act. "terrorism" means the use or threat of action where:

(a) The action falls with the meaning of sub-section (2). And

(b) The use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or create a sense of fear or insecurity in society; or

(c) The use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause.

2) An "action" shall fall within the meaning of sub-section (1), if it:

(a) Involves the doing or anything that causes death;

(b) Involves grievous violence against a person or grievous body injury or harm to person;

(c) Involves grievous damage to property:

(d) Involves the doing of anything that is likely to cause death or endangers a person's life;

(e) Involves kidnapping for ransom, hostage-taking or hijacking;

(f) Incites hatred and contempt on religious, sectarian or ethnic basis to stir up violence or cause internal disturbance;

(g) Involve stoning, brick-batting or any other form of mischief to spread panic:

(h) Involves firing on religious congregations, mosques, *imambargahs*, churches, temples and all other places of worship, or random firing to spread panic, or involves any forcible takeover of mosques or other places of worship;

(i) Creates a serious risk to safety of public or a section of the public, or is designed to frighten the general public and thereby prevent them from coming out and carrying on their lawful trade and daily business, and disrupts civil (civic) life;

(j) Involves the burning of vehicles or another serious form of arson;

(k) Involves extortion of money (bhatta) or property;

(l) Is designed to seriously interfere with or seriously disrupt a communications system or public utility service;

(m) Involves serious coercion or intimidation of a public servant in order to force him to discharge or to refrain from discharging his lawful duties; or

(n) Involves serious violence against a member of the police force, armed forces, civil armed forces, or a public servant.

3) The use or threat or use of any action falling within sub-section (2) which involves the use of fire-arms, explosives or any other weapon, is terrorism, whether or not subsection 1 (c) is satisfied.

4) In this section "action" includes and act or a series of acts.

5) In this Act, terrorism includes any act done for the benefit of a prescribed organization.

6) A person who commits an offence under this section or any other provision of this Act, shall be guilty of an act of terrorism.

7) In this Act, a "terrorist" means:

(a) A person who has committed an offence or terrorism under this Act, and is or has been concerned in the commission, preparation or instigation of acts of terrorism;

(b) A person who is or has been, whether before or after the coming into force of this Act, concerned in the commission, preparation or instigation of acts of terrorism, shall also be included in the meaning given in Clause (a) above.

Section 7, ATA, 1997

Punishment for acts of terrorism- whoever commits an act of terrorism under Section 6, whereby

(a) death of any person is caused, shall be punishable, on conviction, with death or with imprisonment for life, and with fine; or

(b) he does anything like to cause death or endangers life, but death or hurt is not caused, shall be punishable, on conviction, with imprisonment for description for a term which shall be not less than five years but may extend to fourteen years and with fine:

(c) grievous bodily harm or injury is caused to any person, shall be punishable, on conviction, with imprisonment of either but may extend to imprisonment for life and shall also be liable to a fine; or

(d) grievous damage to property is caused, shall be punishable on conviction, with imprisonment, of either description for a term not less than ten years and not exceeding fourteen years, and shall also be liable to a fine: or

(e) the offence of kidnapping for ransom or hostage-taking has been committed, shall be punishable, on conviction, with death or imprisonment for life and shall be liable to forfeiture of property; or

(f) the offence of hijacking, has been committed, shall be punishable, on conviction, with death or imprisonment for life, and shall also be liable to forfeiture of property and fine;

(g) the act of terrorism committed falls under Section 6(2) (f) and (g), shall be punishable, on conviction, with imprisonment of not less than six months and not more than three years and with fine; or

(h) the act of terrorism committed falls under clauses (h) to (n) of sub-section (2) of Section 6, shall be punishable, on conviction, to

imprisonment of not less than one year and not more than ten years and with fine; and

(i) any other act of terrorism not falling under Clauses (a) to (h) above or under any other provision of this Act, shall be punishable, and not less than six months and not more than five years or with fine or with both]

Section 8, ATA, 1997

Prohibition of acts intended or likely to stir up sectarian hatred.-

A person who:-

(a) uses threatening, abusive or insulting words or behavior; or

(b) displays, publishes or distributes any written material which is threatening, abusive or insulting: or words or behavior; or

(c) distributes or shows or plays a recording or visual images or sounds which are threatening, abusive or insulting: or

(d) has in his possession written material or a recording or visual images or sounds which are threatening, abusive or insulting with a view to their being displayed or published by himself or another, Shall be guilty of an offence if:-- i. he intends thereby to stir up sectarian hatred; or ii. having regard to all the circumstances, sectarian hatred is likely to be stirred up thereby.

Section 9, ATA, 1997

Punishment for offence under section 8.- Whoever contravenes any provision of section 8 shall be punished with rigorous imprisonment for a term which may extend to seven years, or with fine, or with both. (Sections 6-9, ATA 1997)