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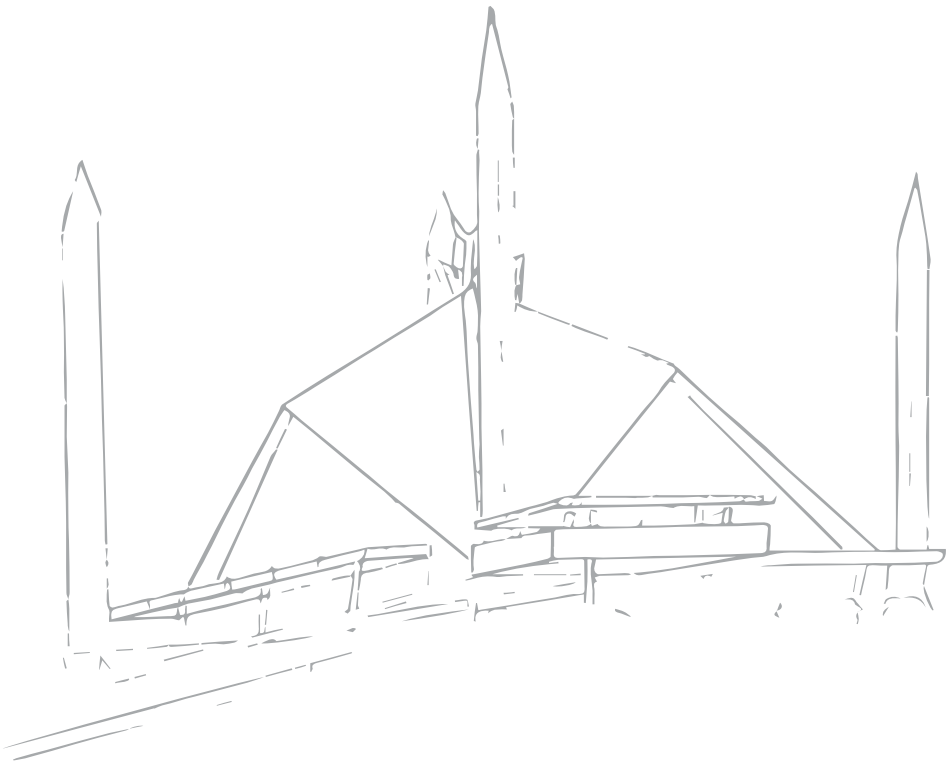

General Principles of Islamic Law about Combatant Status: From *Sharḥ Kitāb al-Siyar Al-Kabīr*

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Abstract

This paper discusses more than fifty principles and rules concerning the combatant that are employed by Imām Shaybānī and Imām Sarakhsī in Sharḥ kitā al-Siyar al-Kabīr. Initially, certain rules in respect of theoretical aspect of the discussion, that is, qawā'id uṣūliyyah, are embarked upon then the legal maxims of Islamic law, expounded by Ḥanafī jurists, are mentioned. The paper strives to reproduce the maxims in exact wordings and phrases of the great authors; however, slight changes, that are very rarely, took place according to the needs.

Keywords: *combatant, Hanafi law, Shaybani, Sarakhsi, war.*

1. Introduction

The "law of war in Islām" has footings in the earlier period of Islām itself. The Qur'ān has talked about it in hundreds of its verses, the Prophet peace and blessings of Almighty Allah be upon him had lived a considerable part of his life involved in wars, many traditions and number of the *Sunna*, therefore, inevitably had come into existence. The era of rightly caliphate and the lives of all the companions by their interpretations and practices supplemented the foundations for this branch of Islāmic law. Later on, it has been pursued by the jurists through the history of Islām and it was constructed as a skeleton under the title of "*Siyer*". Imām Muḥammad bin Al-ḥasan Al-Shaybānī, is doubtless to say, a major part of the galaxy that worked on "*Siyer*" and he produced two valuable books, "*Al-Siyer Al-Ṣaghīr*" and "*Al-Siyer Al-Kabīr*". Both these two books have, since very

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beginning, been referred to in the debates by the jurists regarding the law of war in Islām. The jurists throughout the history owed a great tribute to Imām Shybānī for his tremendous work which is acknowledged as a richest source among them.

Nevertheless, the need for the further search and inquiries, however, persisted. Because today the political order of the glob and especially that of the Muslim world witnesses an immense violence in its nature and thus it faces multiple challenges. The terrorism and armed confrontations are, unfortunately, the day to day incidents. All these unfortunate incidents themselves, the perpetrators and conditions before, during and after of the strategies made and steps taken to cope with them are to be measured on legal criteria. Meanwhile, most of the cases in this regard necessitate the rules of Islāmic law of war to be cautiously applied thereon. Whereas many other issues need the extension of the already established rules of Islāmic law of war via a fresh analogy; as they in their nature are 'hard cases'. Since the discussion on new and contemporary issues must be founded on texts of the Qur'ān and the Sunna and the determined rules of interpretation are ought to be followed, the easy and safe way for doing so is to pursue the methodologies of the earlier jurists. Moreover, since the classical works for the contemporary scholars in midst of their raging debates on the issues of before, during and post-war situations are indispensable, a scholar would gain strength for his view from the earlier jurists' works. A need, therefore, would always be felt for establishing and strengthening the relationship between a today's scholar and classical works on Islāmic law including law of war.

Since our focus, through this work, would be on the general principles of Islamic law and their application to regulating the combatant status issue, a need is felt for identifying such rules. In the following, the texts of such rules are reproduced from *Kitāb al-Siyar al-Kabīr* and Sarakhs┘'s *Shar┌* thereon with English translation. In footnote a precise explanation of the rules and contexts in which they are mentioned by the authors, are also provided. The following rules are only those that are applicable to

various aspects of the 'combatant'. In order to provide a useful and conceivable proposition, rules are classified into different categories. All the rules are mentioned in words of the authors, however, on feeling a need alternative phrases are also, but very rarely, given. Similarly, other Ḥanafī jurists are also quoted for further explanation. First of all qwā'id Uṣūlihhah are mentioned that will be followed by the …

2. Principles of Interpretation (*Qawā'id 'Uṣūliyyah*)

١. "الثابت بالعرف كالثابت بالنص"[1]

Proved by custom is as to be proved by the text.

٢. "الحكم (حكم الحاكم) في المجتهدات نافذ بالإجماع"[2]

The ruler's rule shall be enforceable by consensus in cases where there no text is found.

Sarakhsī mentioned the disagreement in a case when *Zimmzī*s participate in war with Muslims soldiers; whether they would be entitled a specified share in spoils as all other Muslim soldiers or not? He mentioned several opinions and concluded that the issue, at least, is disputed and no text, determining a way or another, is found. In such a case if the ruler issues an order that such *Zimmzīs* would be given the share as all Muslim soldiers. The consensus of jurists is held that this rule shall be enforceable and if a successor would implement another rule he would rebut the *Ijmā'* (consensus).[3]

٣. "أكبر الرأي كاليقين فيما لا يمكن معرفة حقيقته"[4]

[1] See: Shams al-'Aimmah Muḥammad b. Aḥmad b. Abī Sahl al-Sarakhsī, *Uṣūl al-Sarakhsī* (Hyderabad: rep. Dār al-Kutub al-'Ilmiyyah, 1993, Abū al-Wafā' al-Afghānī Edtr.), 1:120

[2]Ibid., Sharḥ kitāb al-Siyar al-Kabīr (Beirut: Dār al-Kutub al-'Ilmiyyah, 1997), 3:43.

[3] Ibid.,

[4] Ibid., 4:247.

Most probable view is like certainty wherever to know the actual position did not remain possible.

Sarakhasī has applied this rule in a case where if non-Muslim besieged a fortress for Muslims and they already have captured a Muslim. They coerce him to let them know how they could enter into the fortress, and consequently kill the Muslims, or inform them about source of water for Muslim so that they could stop the water and compel the Muslims this way to come out, otherwise they will kill him. The captured Muslim is sure or his most probable view is that they would kill all those who are in the fortress if he may let them know. The rule is that he shall not give information in this concern. This rule is based on the maxim that most probable view is like certainty wherever to know actual position did not remain possible.[5]

٤. "اليقين لا يزول إلا بيقين مثله"[6]

Certainty will not be removed except by similar certainty.

This rule is extensively been applied in Islamic law not only in the law if war, rather, many other issue of other branches of Islamic law are based on it. The context, where this rule has been discussed by Sarakhsī herein, is that if a non-Muslim teenager falls into the hands of Muslim army and they are not sure whether he is adult or not? Here the maxim of "Most probable view is like certainty" shall not be applied therefore it is not permissible for them to kill merely on the basis that in their probable view he is adult. Rather, another maxim is to be applied which says that infancy and childhood of this teenager is certainly known while the adulthood is indefinite. So, the definite and certainly known shall be preferred over indefinite and the Muslims are, therefore, not allowed to kill him.[7]

[5] This rule has been applied to other cases as well. For instance see: Ibid., 4:253, 200, 114, 201 and 204.

[6] Ibid.

[7] See also for the application of same principle Ibid., 4:200 and 253.

٥. "إنما يبنى الحكم على الظاهر حتى يتبين خلافه"[٨]

Rule shall be constructed on what is apparent until an adverse appears.

Sarakhsī has applied this principle in a context that if Muslims enter into the abode of non-Muslims (*Dār al-ḥarb*) forcibly everyone shall be presumed as combatant and, *inter alia,* they are allowed to kill them except than if a sign is seen over any among them that signifies him as Muslim or a *Zimmī*. Those sign holder shall not be killed. It has been explicitly stated in *Fatāwā 'Ālam Gīrī* that the *Dār* is evidence which signifies that whoever is found therein he is among its inhabitants. The sign, however, is stronger evidence than *Dār*. Therefore, one is to be presumed as the sign may signify.[9]

٦. "الحكم للغالب والنادر لا يظهر في مقابلة الغالب"[١٠]

Rule of the usual shall be taken into account while the rare does not appear in the face of the dominant.

The phrases of this principle seem to be approximate to the previous principle. It says that if there are two options and one is dominant and adopted frequently whereas the other is adopted rarely. The ruling shall be based on which is adopted frequently. For instance, generally it is not permissible for Muslims to conduct business transaction of weapons by which non-Muslims may strengthen themselves. As far as raw materials or all non-weapon materials are concerned, if those materials are frequently used in manufacturing weapons and non-Muslims may increase their power through business of such materials, business thereof shall not be permissible. On the other hand, if those materials are

[8] Ibid., 4:206.

[9] See: Committee of the 'Ulamā' under the Supervision of Niẓām al-Dīn al-Balkhī, *al-Fatāwā al-Hindiyyah*, (Beirut: Dār al-Fikr 2nd edn. 1430 A.H) 2:236. See *Sharḥ kitā al-Siyar al-Kabīr* for another case where the same principle has been applied 1:142.

[10] Ibid., 4:285.

frequently used for other purposes and may rarely be used for weaponry purposes, those materials can be sold to them. [11]

٧. ''ليس من الصواب أن يترك فرضاً عيناً ليتوصل إلى ما هو فرض كفاية''[١٢]

One shall not escape individual obligatory for fulfilling communal obligation.

٨. ''مطلق فعل المسلم محمول على ما يحل شرعاً''[١٣]

An absolute act of a Muslim shall be construed on what is lawful.

According to this principle, acts of a Muslim are, principally, to be construed on what is permissible. If something contrary is latent therein, the rule may change then. The case where Sarakhsī has applied this principle to is that if during war there is a Muslim on the non-Muslims' side and he is supporting them. A Muslim shoots him an arrow and he lies killed. The guardian of such Muslim claims that shooter Muslim knew that killed person was coerced by non-Muslims to come and despite of it he killed him. While, the shooter Muslim denies it saying I did not know that, his opinion is to be preferred. Because he act of shooting arrow towards non-Muslims was principally lawful. Hence, if a Muslim, even though coerced by non-Muslims to come there, is killed and he is claiming to be not aware of this fact, his claim is to be preferred and the law of *Qiṣāṣ* or *Diyat* shall not be applied.

٩. ''التكليف بحسب الوسع''[١٤]

Obligation is to be imposed as per capacity.

١٠. ''عند اجتماع الحقوق يبدأ بالأهم''[١٥]

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[11] Ibid.,

[12]Ibid., 1:35

[13] Ibid., 4:277.

[14] Ibid., 1: 133.

[15] Ibid., 4:209. This principle is applied by Sarakhsī to various cases. One of them, for example, is if a Muslim intends to go out for *Jihād* but there are certain other rights due to him i-e he is indebted or his parents

The most important right, among all others, shall be fulfilled firstly.

In his book on *'uṣūl*, Sarakhs┘ provides a proper classification of rights and laws relate to them. "Rights are", as Nyazee have summarized the whole discussion, "classified into four categories;

1. Rights of Allah (حق الله تعالى)

2. Rights of individual (حق العبد)

3. Mixed right of Allah and individual; this is further divided into two kinds;

    a. Mixed right of Allah and individual in which the right of Allah is predominant

    b. Mixed right of Allah and individual in which the rights of individual is predominant

4. Rights of individuals collectively or of the communal, this is also referred to as the *ḥaqq al-salṭanah* or *ḥaqq al-Sulṭān.*

Rules relating to the right of Allah are of eight kinds, namely; Pure Worship like *'Īmān* (faith in God); Pure Punishment like *ḥdūd* penalties; Imperfect Punishments like prevention from inheritance in case of murder; Those vacillating between a worship and a penalty like *kaffārāt*; Worship in which there is an element of a financial liability like *ṣadaqat al-fiṭr*; Financial liability in which there is an element of worship like *'ushr;* Financial liability in which there is an element of punishment like *kharāj* tax; Those that exist independently. These are three: those which are laid down initially as rule; those that are imposed as an addition to a rule;

need him; he is not allowed to go out for *Jihād* if the call for it is not general. Because the rights of others, due to him, are *farḍ 'ayini* (individual obligation) and the right of Almighty to go out for *Jihād,* if the call for it is not general, is *farḍ kifā'ī* (collective obligation). And *fard 'ayni* (individual obligation) prevails over *farḍ kifā'ī* (collective obligation).

and those that are associated with the initial rule. The examples are *khums* levied on cattle, minerals, and treasures troves."[16]

Here again a question arises concerning the priority to one over the other in the time of clash. For Islamic law, all interests, inter alia rules and rights protecting those interests and objectives are divided into purposes of the Hereafter and worldly purposes; and primary and secondary. Further each primary purpose is supposed to have been supported by needs and complementing norms. This way a coherent and consistent structure of purposes is attempted by Islamic law, then rules are provided for removing clash and giving priority to one over the other. Such rules are, for example; "stronger interest shall prevail; public interest is prior to private interest; and definitive interest prevails over the probable."[17]

١١. "أن مواضع الضرورة مستثناة من الحرمة"[18]

> *The instances of necessity are excluded as exceptions from sanctity.*

This is a very general principle and its influences have expanded to almost all branches of Islamic law. The origins of it are, even, found it the Qur'ān itself. The case where Sarakhsī has applied to: is that usually Muslims are not allowed to have a gold ring, wear brocade or use anything on which a picture of a living is made. Similarly, Muslims are not allowed to have those kinds of weapons on which picture of a living is made, but, under this

[16] See for further details: Sarakhsī, *'Uṣūl al-Sarakhsī*, 2:232. And See for English summery of this entire discussion: Nyazee, *Islamic Jurisprudence*, (Islamabad: 6th Reprinted edition, 2016, Islamic Research Institute) p.93-97

[17] The discussion of rights and relevant rules has been well elaborated by Sarakhsī and the discussion of purpose of law or objectives of Sharī'ah has been provided by Shāṭibī in his *Al-Muwāfaqāt* second volume. Nyazee has succinctly summarized it, along with his comments from the current developed legal systems, in his *Islamic Jurisprudence* (p. 195-212) also his *Theories of Islamic law* (Rawalpindi: 2007, Advanced legal Studies Institute) p.239-337

[18] Ibid., 4:218.

principle, if need is immense for having such weapon during warfare, he may use it.[19]

١٢. "مطلق الأمر يقتضي اللزوم"[٢٠]

Absolute order requires obligation

١٣. "لا طاعة للمخلوق في معصية الخالق"[٢١]

No obedience to creature in disobedience to the Creator.

This principle has been extensively applied to different cases by Sarakhsī through the entire law of war. For example if non-Muslims demand a Muslim prisoner to kill other Muslim prisoner, he is not allowed to commit it because one must not obey in a manner that leads to disobedience to the Almighty.[٢٢]

١٤. "الوفاء بالشرط واجب"[٢٣]

Fulfilling of the condition is mandatory.

١٥. "التمسك بالعزيمة خير من الترخص بالرخصة"[٢٤]

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[19] Ibid.,

[20] Ibid., 1:131-132. This principle has been mentioned in the context where Sarakhsī gives his interpretation of Qur'ānic verses of combat. For him, all such verses, describing different rulings, were revealed in different times. Therefore, all those verses are divided in different stages. In very beginning, the prophet was ordered to preach without confronting (Qur'ān, 15:94); he was enjoined to confront with argumentation (Qur'ān, 16:125); in third stage the permission for fighting was revealed (Qur'ān, 29:46); in fourth stage Muslims were enjoined to wage war against those who initiated aggression against them (Qur'ān, 2:193); in the final stage the prophet Peace be upon him was enjoined to wage war against all unbelievers unconditionally (Qur'ān, 2:244). See for further details: Sarakhsī, Ibid., 1:131 and *al-Mabsūṭ* (Beirut: Dār al-Ma'rifah, 1993), 10: 5.

[21] Ibid., 4: 245.

[22] Ibid.

[23] Ibit., 4: 254. This principle has been referred to at several places. See for example: Ibid., 4: 255, 256 and 281.

[24] Ibid., 4: 282.

Acting according to 'Azīmah is better than acting according to Rukhṣa.

In his work on *'uṣūl*, after defining the terms *'Azīmah* and *Rukhṣah*, Sarakhsī provided with extensive discussion on *rukhṣah* or exemption and its kinds. In addition, he provides too illustrations from Ḥanafī positive law while arguing on each kind. In bellow an attempt of a summery is made. Sarakhsī defines the term *'Azīmah* as 'a *ḥukm* which was imposed initially as a general rule without any cause of defective legal capacity' and the term *rukhṣah* as 'based on the excuse of subjects, as an exemption from general rule that makes a prohibited thing lawful in spite of the reason of prohibition being there. The rulings will be varying according to the subjects' excuses.' Elaborating various kinds of *rukhṣah*, he says it is of two kinds; *ḥaqīqa* (actual or perfect exemption) and *majāz* (imperfect or figurative exemption). The former is of two kinds; full-perfect and less perfect, the latter is also of two kinds; full figurative and less figurative. *Rukhṣah* is, therefore, of four kinds.

1. The one that is full perfect exemption. This one where the cause and rule of prohibition both persist but due to the excuse (or very emergent condition of the subject) that prohibited thing becomes lawful. For instance to take the other's thing to eat without the owner's permission is prohibited but one may take it if he scares of his death in case of not taking it. To avail this kind of *rukhṣah* is although lawful. Yet, to act on *'Azīma* or general rule is preferable.[25]

2. The one which is lesser in being perfect exemption. This is one where the cause persists but the consequence has yet to take place. As the cause of prohibition is still standing and the prohibited became lawful nevertheless, it would be a *rukhṣah*. On the other hand but the prohibition has not yet taken place it would be lesser in being *rukhsah* or exemption. The

[25] See: Sarakhsī, *'Uṣūl*, 1:119.

example is the holy month of *Ramaḍān* as cause of fasting. In the case of traveler or sick this rule of fasting would be belated because of journey or sickness. Nevertheless, if, acting upon '*zīmah*, the traveler or sick may fast; it would counted as of the holy month of *Ram╒ān*. The question arises what is preferable; fasting as acting upon '*zīmah* or intermit it and make up in other days as acting on *rukhṣah*? For Ḥanfīs the former would be preferred as it contains submission to Almighty Allah instead of enjoyment by him-or-herself.[26]

3. Those burdens and shackles which were imposed on past nations and we are relieved of them. In fact, these are not exemptions in true sense that initially they were imposed on us and then, based on our excuses, we were relieved of them. Rather, such things were never imposed. Therefore, such burdens are called 'figurative exemptions'. Because real figurative is one where the cause of a rule/prohibition exists but, on the basis of the subject's excuse, the rule of the prohibition turns belated.[27]

4. In this kind those exemptions are falling where that cause is supposed to persist but its role has been changed from 'leading towards prohibition' to 'leading towards permissibility'. If we look that there is no cause that may lead to prohibition it is to be called '*rukhṣa*' or an exemption, but if we look that the cause is there it is supposed to be *rukhṣa majāzī* or a figurative exemption. For example the *Salam* transition. As general principle, for all transition the determination of good, that is being sold, is indispensable. But in case of *Salam* not only this condition is dropped for permissibility of transition but this condition, i-e determination of good that is being sold, would cause deficit. Now, the role of the cause – that is, determination of good, has been changed from 'leading

[26] Ibid., 1:119-120.
[27] Ibid., 1:120.

> towards prohibition' to 'leading towards permissibility' and thus there is cause of prohibition of this kind of transition; it should be *rukhṣa* or exemption from a general principle. Similarly, if we look that the same cause still exists it is supposed to be *rukhṣa majāzī* or a figurative exemption.[28]

This detail is to be kept in mind while determination the role of this general principle of 'preference of acting upon *'Azīmah* over acting upon *Rukhṣa*'.

١٦. "الواجب علي المسلم أن يشتغل بدفع أعظم الضررين"[٢٩]

> *It is mandatory on Muslim to involve in removing general harm at first.*

This general principle has been applied to different cases of various chapters of the law of Islam. The context in which this has been mentioned is that it is a general principle that if the call for jihad is not general it is not permissible for one who has to fulfill the individuals' rights, to go out for jihad. The reason, as has been mentioned earlier, is that fulfilling the individuals' rights are *fard 'ayinī* (individual obligation) while going out for jihad is *farḍ kifā'ī* (collective obligation). And *farḍ 'aynī* is to be preferred over *farḍ kifā'ī* (collective obligation). On the other hand if the call for Jihad is general, he must leave the rights unfulfilled and go out for Jihad. Because in such case abandoning Jihad would cause a general harm and not fulfilling the rights will give rise to an individual harm. According to the principle at hand, repelling the general harm, by going out for Jihad, is to be preferred over repelling individual harm. Moreover, Imām Ghazālī says: "وأهون الشرين خير بالإضافة، ويجب علي العاقل" اختياره this means that *a relatively lesser harm is better than a greater harm; it is indispensable on a wise man to adopt it.*[30]

[28] Ibid., 1:121.

[29] See: Sarakhsī, *Sharḥ*, 4:212.

[30] See: Abū Ḥāmid Muhammad b. Muhammad al-Ghazālī, *al-Iqtiṣād fī al-I'tiqād* (Saudi Arabia: Dār al-Minhāj, 1st edn. 2016), p.400.

١٧. "ما يرجع إلى مكايدة الحرب فلا بأس به للمسلم"[٣١]

There is no harm in to resort [or learn] whatever is related to the strategy of warfare.

2. Legal Maxims (Qawā'id Fiqhiyyah)

2. 1. On the combatant's duty towards the ruler

A. On the appointment of a commander

١٨. "ينبغي للإمام إذا بعث سرية قلت أو كثرت أن لا يبعثهم حتى يؤمر عليهم بعضهم وإنما يجب هذا اقتداء برسول الله عليه السلام"[٣٢]

Whenever a ruler sends a group of troops, whether small or a big, he should not send them out until he appoints a commander amongst them. This is indispensable as following the Prophet peace be upon him.

Geneva Convention-III stipulated certain criteria or conditions for considering one as combatant. One of them is that of being commanded by a person responsible for his subordinates.[33]

B. On the obedience to the commander

١٩. "الجهاد مع كل أمير ، أي عادلاً كان أو جائراً فلا ينبغي للغازي أن يمتنع من الجهاد معه"[٣٤]

Jihād is to be fought under the command of every one [appointed so by the ruler], whether he is just or unjust. So, a Ghāzī [Muslim soldier] should not deny fighting under his command.

Sarakhsī stated at another place:

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[31] Ibid., 4:227

[32] Ibid., 1:45. At another place Sarakhsī says: "أن المسافرين يستحب لهم أن يؤمروا عليهم أميراً فما ظنك في المحاربين" it is preferable for travelers to appoint a chief for themselves, then what do you think of warriors! (Ibid., 1:124)

[33] Geneva Convention-III, Article 4(A)(2).

[34] Ibid., 1:111.

"وعن جماعة من الصحابة رضوان الله عليهم قالوا: إذا عدل السلطان فعلى الرعية الشكر وللسلطان الأجر وإذا جار فعلى الرعية الصبر وعلى السلطان الوزر فهذا كله لبيان أنه لا ينبغي أن يترك الجهاد بما يصنعه الأمراء من الجور والغلول"

On the authority of the Companions, may God be pleased with them, they said: If the Sulṭān is doing justice with the people they have to thank and the Sulṭān shall be awarded *'Ajr* [by Almighty], if the Sulṭān is unjust with them, they must sustain and the Sulṭān shall bear burden thereof. All this is to explain that *Jihād* should not be abandoned just because of what the injustice and corruption are committed by rulers [or commanders].[35]

٢٠. "طاعة الإمام فرض عليهم بدليل مقطوع به"[36]

The obedience to ruler is mandatory over the masses through definitive evidence.

It is a well-known principle of Islamic law that the ruler must be obeyed. However, Imām Sarakhsī in phrasing the words of this principle, mentioned the terms "*Dalīl Maqtū'*" whereby he intends to highlight a significant role of this principle that might have been hidden had it would not been explicitly focused on. He says that if Imām ordered all the groups to not leave their places and even not for helping each other. If a group, then, apprehends the other group to be killed if not be assisted, it must not leave its place to help and save that group; because the obedience of the ruler is obligatory by a definitive evidence that must be preferred over their apprehension which may or may not become true. Sarakhsī, at another occasion, said that if the ruler [or commander] orders soldiers and they differ. Some of them are of the opinion that the obedience of the ruler would lead to death and others view that there is salvation in it, they must obey the ruler; as

[35] Ibid., 1:112.
[36] Ibid., 1:121.

Ijtihād does not appear in the face of *naṣṣ* [text] and the text rendered his obedience obligatory on them.[37]

٢١. "ومن يراع أمره في شيء يراع صفة أمره"[38]

> *Whose order is to be taken care of, the condition of his order should also be considered.*

On the basis of this rule if the ruler orders to be there under the flag and not leave the group. One can only go, to fight, as much far from the group as he could be assisted if he needs the help of the group and he is not allowed to leave the group at all. Because the intention of the ruler, when he said 'don't go out except under a specific flag', be under that flag so that you could come back safely. So, in going out under the flag or being far from that flag or group the condition or intention of the ruler must be considered.[39]

C. On the limitation of the obedience to the commander

٢٢. "إنما الطاعة في المعروف لا في المنكر"[40]

> *The [ruler's] obedience is related to lawful matters not unlawful ones.*

The prophet (peace be upon him) is reported to have said: "to listen to and obey the ruler is obligatory until unless his orders involve disobedience to (Almighty); if an act of disobedience (to almighty) is imposed, he will not be listened nor will he be obeyed."[41] With reference to International Humanitarian Law, the rule that persons are responsible for war crimes committed pursuant to their orders is contained in the Geneva Conventions and the Hague Convention for the Protection of Cultural Property and its Second Protocol, which require States to prosecute not

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[37] See: Ibid., 1:117

[38] Ibid., 1:١٢٥.

[39] See: ibid.,

[40] Ibid., 1:117. See also: Ibid., 1:126 and 118 and 4:215.

[41] Muḥmmad b. Ismā'īl al-Bukhārī, *al-Ṣaḥīḥ*, Kitāb al-Jihād: Bāb al-Sa' wa al-Ṭā'ah li al-Imām.

only persons who commit grave breaches or breaches respectively but also persons who order their commission.[42]

٢٣. ''أن العصيان فيما لا يتيقن فيه الخطأ من الأمير لا يحل بحال''[43]

If the mistake of the ruler is not ascertained, disobedience is not permissible

2.2. On who is combatant

A. On the cause of engaging into combat

٢٤. ''العلة الموجبة للقتل هي المحاربة'' [44]

The reason of killing [enemy] is aggression.

According to this principle only those are combatants who participate in war. The words of Ḥanafī jurists are different in phrasing this rule to an extent that may ostensibly give rise to distinct consequences. Here the term "*al-'Illah al-Mūjibah*" (affirmative cause) has been used. The same term has been used too by another Ḥanafī Jurist al-Mauṣilī. He says " لِأَنَّ الْمُوجِبَ لِلْقَتْلِ هُوَ الْحِرَابُ" (because the affirmative cause of killing is aggression).[45] On the other hand some other Ḥanafī jurists adapt the term "*al-Mubīḥ*" (permissive cause). For instance Kāsānī says " بَلْ الْمُبِيحُ هُوَ الْكُفْرُ الْبَاعِثُ عَلَى الْحِرَابِ، " (*the cause that renders his blood permissible is his unbelief that may compel him on aggression*).[46] Similarly, imam Marghinānī says "لأن المبيح للقتل عندنا هو الحراب(*because, for us, the reason that permitted killing of those persons is the aggression*). A question that may be asked based on such distinct in the phrases of this rule, is that whether the killing of unbelievers, who are aggressors

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[42] See for further detail: Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, (ICRC, Cambridge University Press: 2009), 1:556

[43] Ibid., 1:118. Kāsānī says: "لأن اتباع الإمام في محل الاجتهاد واجب كاتباع القضاة في مواضع الاجتهاد". This means that "*following of Imam is obligatory in cases where Ijtihad is do resorted to, like obey to the judgment of a judge in cases where Ijtihad is to be conducted.*" See: al-Kāsānī, *Badā'i' al-Ṣanā'i'*, 9:390

[44] Ibid., 4: 187.

[45] See: Abdullah b. Mahmūd *al-'Ikhtiyār li ta'līl al-Mukhtār* (Cairo: Egypt, Maṭba'ah al-Ḥalabī 1937, and reprinted in Beirut) 4:120.

[46] *Badā'i' al-Ṣnā'i'*, 7:237.

too, is only *Mubāḥ* (permissible) or *Wājib* (affirmative or obligatory)? The answer for why this distinction in terms of *ibāḥ*a and *'Ījāb* is there in propositions of the jurists, is found in the context of these terms. The term *ibāḥ*a is used where the rule of Islamic law is discussed regarding the civilians, children, women, religious personages and all those who are in fact prohibited to kill, but on meeting their case a certain position, for instance active participation in hostile activities, the rule may change and thus their killing become *mubāḥ* or lawful; although it would not be *wājib* or obligatory to kill them. As far as the term *'Ījāb* is concerned, it is used in the context of combatants, meaning thereby that in the case of aggression their killing for Muslim soldiers is not only lawful but, rather, indispensable. Once the context of both terms has been clarified the question may be answered that killing of combatants when they aggress against Muslims is *wājib* or obligatory.

The UN Charter prohibits the use of force except for two situations: firstly, collective action in order to maintain international peace and security; the power of which is provided for under the Articles 24, 25 and Chapter VII; secondly, for Self-defense —individual or collective, under Article 51.

٢٥. "ليس للمرأة بنية صالحة للقتال"[47]

Women have no capability to fight.

٢٦. "أن ظهور القتال من بعضهم كظهوره من جماعتهم في حكم إباحة قتالهم"[48]

Waging war by some of them is as the waging war by all of them in rendering the war legitimate against them.

The context wherein this maxim has been mentioned by Imām Sarakhsī is that if there are some Muslims with non-Muslims and Muslim soldiers do not know are they coerced to fight against Muslims or have they come by their own choice. In this case

[47] Ibid., 1: 129. As the prophet peace be upon him said when he saw a slain woman, "she was not one who engage in combat, so why was she killed?"

[48] Ibid. 4:207.

Muslim Soldiers must not kill them until they ask them if possible or know by other means or they begin fighting against Muslim soldiers then killing them is permissible for Muslims. If Muslim soldiers are lesser in numbers and they think if those Muslims are let begin fighting a huge, destruction would be caused or Muslim soldiers would be killed, then Muslim soldiers may target those Muslims who stand there with non-Muslims; because as soon as non-Muslims begin fighting it would be considered fighting from the side of those Muslims too even though they did not begin actually. Since they are standing with non-Muslims and ascertaining about them, whether they have come being coerced or by their own choice to fight, did not remain possible Muslim soldiers and non-Muslims began fighting and Muslim soldiers are lesser in number, in such case beginning to fight from non-Muslim shall be deemed as fighting from those Muslims too and thus Muslim soldiers are allowed to kill them.[49]

B. On the official registration of combatants

٢٧. ”من كان مكتوب الاسم في الديوان فعليه طاعة الإمام في الخروج على الوجه الذي يكون على المملوك لسيده“[٥٠]

Whose name is officially registered, he has to obey the ruler, to go out, in the same manner as a slave has to obey his master

٢٨. ”وفي الجهاد إنما يجمعهم الديوان لا البلدة“[٥١]

For the purpose of Jihad, the unification (affiliation) is based on registration and not on town (of residence).

According to this rule, if someone belongs to town *A* but he has been registered in the Unite of town *B*, the ruler orders town *A* to go out for Jihad, he would not has to go out.[52]

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[49] Ibid.

[50]Ibid., 4:213. This rule implies that in order to consider one as combatant must has been registered officially as a soldier. After having been registered he has to obey the ruler to go out for Jihad. In case if the ruler does not allow going out, he must not go.

[51] Ibid., 1: 120.

[52] Ibid.,

٢٩. "إن كان النفير عاماً فالخروج فرض عين على كل أحد ممن يقدر عليه"[٥٣]

If the call for Jihād is general then going out for it is mandatory on all of those who are capable.

2.3. Rules on Non-combatants; and if they participate in war

٣٠. [لا بأس بقتل من لم يقع الأمن عن قتاله] "لا بأس بقتلهما لأنه لم يقع الأمن عن قتالهم"[٥٤]

[There is no harm in killing of those from whom the apprehension of engaging in combat still exists]. There is no harm in killing them because an apprehension of their involvement in combat still exists.

٣١. "كل من لا يقتل إذا باشر القتال أو حرض على ذلك أو كان ممن يطاع فيهم فلا بأس بقتله"[٥٥]

Whoever may not be killed, if fights or incites to fight or is among those who may be obeyed by non-Muslims there is no harm in killing such person[s].

These two rules signify that non-combatants are protected on the basis of assumption that may not take arm and not participate in hostile activities. But if they leave their status of civilians by participating in war they will lose their protection and hence will become legal target for the enemy. The same rule has been determined in IHL too. Such persons are deemed as the second category of combatants.[56]

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[53] Ibid. 4:212. To go out for Jihad is *Farḍ kifā'ī* (collective obligation) If the call for Jihad is not general, and it would be *Farḍ 'aynī* (individual obligation) if the call is general. According to this principle, if the call for Jihad is general and going therefore turned into *Farḍ 'aynī* (individual obligation) one must leave all other individual rights (of creditors or parents for example) even unfulfilled and shall go out for Jihad and thus he would acquire the combatant status.

[54] Ibid. 4:200

[55] Ibid. 4:198.

[56] See for further detail the Fourth Chapter of this work.

A. On non-combatants if killed by Muslims

٣٢. "وجوب الكفارة أو الدية باعتبار العصمة والتقوم في المحل وذلك بالدين أو بالدار"[٥٧]

> *The obligation of expiation is based on the legal protection or the value of locus which may be gained only by [embracing] Islam or [entering into] the territory of Islamic.*

If a Muslim kills any of children, insane, women or elders, who are principally not to be killed, nothing is imposed on such Muslim killer; because the obligation of *Kaffārah* (expiation) or *Diyyah* (blood money) is based on infallibility of blood, that may be gained by embracing Islam, and value thereof which may be acquired by moving to *Dār al-Islām* and none of these two is found here. So, no *Kaffārah* (expiation) or *Diyyah* (blood money) is imposed on the killer.[58] Sarakhsī at another place says: "ومن أسلم منهم حرم قتله" (*it is forbidden to kill who embraces Islam; from non-Muslims*).[59] And another place he further stated: "إن الإسلام يؤمن من القتل" (*Indeed, Islam protects from killing*).[60]

B. On non-combatants if kill any Muslim

٣٣. "الصبي أو المجنون ما كان مخاطباً (لا يكون مخاطبا) فلا يكون فعله جناية يستوجب به العقوبة جزاء عليه"[٦١]

Since the child and insane are not the subjects of law, their acts are not crimes whereby they may be sentenced as reward for that act.

The context in which this maxim has been mentioned is that principally speaking children, insane, women and elders are not allowed to be killed. In case, they fight and kill a Muslim then they are captured by Muslims, if the killer of Muslim is a child or insane they shall not be killed because they are not subjects of law, so no law is directed towards them. If the killer is a woman or an

[57] Ibid. 4:187.
[58] See also: Ibid. 1:90-91 and 4:197
[59] See, 3:126
[60] See, 3:126
[61] Ibid. 4:187.

elder person they may be killed because they are subjects of certain laws therefore, they may be killed as *qiṣāṣ*.[62]

C. On medical personals

٣٤. ''ولا يعجبني أن يباشرن القتال''[٦٣]

I don't encourage (young) women to participate in war

— ''أما العجائز فلا بأس بأن يخرجن مع الصوائف لمداواة الجرحى''[٦٤]

As far as elder women are concerned, there is no harm if they go out (for Jihad) with huge corps for the treatment of wounded.

These two excerpts show that women are not participating directly in war.

— ''لا يسهم للنساء ولكن يخدين من الغنائم أي: يعطي لهن رضخاً''[٦٥]

No share is to be given to women; rather, they would be given a small gift from the spoils.

Jurists consider her treatment of wounded as participation in war though not direct and actual. Imām Marghīnānī clearly stated:

''والمرأة يرضخ لها إذا كانت تداوي الجرحي ، وتقوم علي المرضي لأنها عاجزة عن حقيقة القتال فيقام هذا النوع من الإعانة مقام القتال''[٦٦]

The woman is to be given a gift if she gives treatment to the wounded, and looks after ill, because she is unable to actually participate in battle. This form of help is made to stand in the place of actual fighting.

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62 Ibid.

63 Ibid., 1: 140.

64 Ibid.

65 Ibid., 3:42.

66 See: Marghīnānī: *Al-Hidāyah* (with Nyazee English translation. Rawalpindi — Lahore: Federal law house, , 2015), p.1397-1398. See also: Sarakhsī, *Sharḥ Siyar kabīr* 3:98.

The crux of these rules is that women do participate in war —as medical personnel—; this is why they are given gifts from the spoils and they can give *Amān* to enemy, but their participation is not considered direct and/or actual participation.

D. On wounded

٣٥. "المرض يعجز المقاتل عن القتال ولا يخرجه من أن يكون من المقاتلة ؛ فلا يقع به اليأس عن قتاله مع المسلمين ، إلا أن يحيط العلم بأنه لا يعيش مع هذا المرض أو يكون عليه أكبر الرأي فحينئذ لا ينبغي أن يقتلوه"[٦٧]

Illness causes failure of the combatant of fighting anymore and does not exclude him from the ambit of the combatants; so, Muslims cannot despair of his fighting against them unless until it is categorically or probably known that he may not survive with this disease then he should not be killed.

E. On religious personages

٣٦. "إنما لا يقتل من لا يخالط الناس"[٦٨]

> *(Among religious personages) those are not to be killed who do not merge with the people.*

F. On the children of enemy

٣٧. "إنما عليهم الامتناع من الإساءة"[٦٩]

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[67] Ibid. 4:203.

[68] Ibid. 4:201. Sarakhsī at another place clearly stated that:

" أئمة الكفر إذا كانوا يخالطون الناس إما خروجاً إليهم أو إذناً لهم في الدخول عليهم وكانوا يحثونهم على قتال المسلمين والصبر على دينهم فأما إذا كانوا في دار أو كنيسة قد طينوا عليهم الباب وترهبوا فيه فإنهم لا يقتلون"

Religious personages are to be killed if they merge with the masses by hanging out to them; or permitting them to come in and hence incite them to fight against Muslims and endure calmly on their religion. If they are within their houses or churches, closed the doors behind themselves and adopted monastic lives then they shall not be killed.

See: Ibid., 4:196.

[69] Ibid. 4:283.

What is mandatory on Muslims that they must refrain from abuse?

The context in which this principle has been mentioned is that if Muslim soldiers took children of non-Muslims in battleground and then they felt unable to take them (to *Dār al-Islām*). Then they came across a fort of non-Muslims and they asked them for those children to foster and take care of them. This is not obligatory on Muslims. Rather, they may keep them somewhere if those non-Muslims may come and take them or not. Because what is mandatory on Muslims concerning the children of non-Muslims is to refrain from committing abuse and leaving them on earth is not abuse. However, giving them to the non-Muslims of fort is a sort of kindness that is not obligatory on Muslims regarding the children of non-Muslims.[70]

٣٨. "الامتناع من الإحسان لا يكون إساءة"[٧١]

Refraining from kindness is not an abuse.

The case where to this principle has been applied is that if Muslims capture a woman along with her child and they are unable to take them both (to *Dār al-Islām*). They are not allowed to kill the woman nor her child; because it is forbidden by the text. Instead, they may leave them at a dangerous or a place of loss. Because leaving them at such a place is refraining from being kind with them by taking them to peaceful place. And refraining from kindness is not abuse.[72]

2.4. On the combatants' behavior towards hostages by non-Muslims

٣٩. [الدفع المأمور به شرعا لا يوجب دية ولا كفارة]"وذلك دفع مأمور به شرعاً فلا يكون موجباً دية ولا كفارة"[٧٣]

[70] Ibid.
[71] Ibid. 4:277.
[72] Ibid.
[73] Ibid., 1:74.

[The defense, ordered by Sharī'ah, shall not be reason for diyyah or kaffārah]. That is a kind of defense which Sharī'ah has ordered for. So, it shall, therefore, not be reason for diyyah or kaffārah.

The context, to which this maxim has been applied, contains two parallel cases helps in better understanding of this maxim. One, if two groups of Muslim soldiers are to fight against non-Muslims in night and each one conceives the other group of non-Muslims and thus begun fighting. If any Muslim is killed nothing shall be imposed on the killer. The reason is that the Muslim who has been killed was intending to kill him. That intention of killing has rendered the defense obligatory and therefore to kill him became a permissible act that is to impose nothing if the defender would have killed him.[74] Another case, if during fury war some Muslim soldiers attacked a Muslim, conceiving him non-Muslim, and thus killed him it is *Qatl e Khaṭā* that imposes *diyyah* and *kaffārah* through the text. The reason is that the Muslim, who has been killed, had no intention to kill. His blood is still infallible.[75]

٤٠. "الفعل متى كان مباحاً مطلقاً لا يصير ذلك سبباً موجباً للدية ولا الكفارة"[٧٦]

The act, when it is absolutely permissible, does not become cause for Diyyah (blood money) or Kaffārah (expiation).

This maxim has been applied by Imām Sarakhsī to various cases: for instance, if there are some Muslims along with non-Muslims in battlefield even though coerced by non-Muslims to join them and fight against Muslims. In such case all non-Muslim combatants along with Muslims are legal target for Muslim soldiers. Thus meanwhile, if a Muslim is killed no *diyyah* (blood money) or *kaffārah* (expiation) shall be imposed on the one who killed. Because they were legal target for Muslim and subsequently killing them was permissible and a permissible act does not cause any responsibility in form of *diyyah* (blood money) or *kaffārah* (expiation). Second, if there were children of Muslim. This

[74] Ibid., 1:74.
[75] Ibid., 1:75.
[76] Ibid., 4:227.

principle has been repeated by Imām Sarakhsī and defined it well by different phraseologies.[77]

2.2.1 **2.5. Rules on Conduct of war**

A. On the stage just before to engage into combat

٤١. [يجب البداية بعرض الإسلام علي الكفار] .”وفي تقدم عرض الإسلام عليهم دعاء إلى سبيل الله تعالى: بالحكمة والموعظة الحسنة فيجب البداية به“[٧٨]

[First of all, Islam must be offered to infidels] offering Islam in very inception contains to call to the path of Allah with wisdom and good exhortation; therefore, it is necessary to begin with it.

٤٢. ”المرتدون وعبدة الأوثان من العرب فإنه لا يقبل منهم إلا الإسلام أو السيف“[٧٩]

Nothing shall be accepted from apostates and worshipers of idols among Arab except than Islam or they must face the sword [of Muslims].

B. On who may be killed during war

٤٣. ”إنما يقتل منهم من يقاتل دون من لا يقاتل“[٨٠]

Only those are to be killed who may fight not those who do not fight.

٤٤. ”يباح قتل من له بنية صالحة للمحاربة يتوهم القتال منه“[٨١]

It is permissible to kill whoever is capable to fight and from whom an apprehension of fighting still persists.

C. On who may not be killed

٤٥. ”لا ينبغي للمسلمين أن يقدموا على قتل حرام باعتبار الموهوم“[٨٢]

[77] See for example, 4:277, 208, 221 and 224
[78] Ibid. 1:56.
[79] Ibid. 1:57.
[80]Ibid. 4:196.
[81]Ibid. 4:186.

> *Muslims should not dare a Ḥarām (forbidden) killing on an imaginary basis.*

The context to which this rule has been applied is that if Muslim soldiers capture a *Sabī* or a slave (a woman or child) who was fighting against, and killed some of, Muslims, they should not kill him because he remained no longer as a combatant. If they are unable to carry him out to *Dār al-Islam* and they think he would participate again in war against Muslims if left alive here. Then, he may be killed on the basis of such comprehension of fighting. On the other hand, if they are satisfied that he will not come out fighting against them but he may fight against another group of Muslim soldiers after them, they cannot kill him on this imaginary basis. Because entry of another group of Muslims on this way specifically and coming across this *sabī* is an imaginary that may or may not take place. It, therefore, does not render the *ḥarām qatl* (forbidden killing) permissible.[83]

٤٦. [يكره للابن أن يكتسب سبب إعدام من يكون سببا لإيجاده] "الأب سبب لإيجاد الابن ؛ فيكره للابن أن يكتسب سبب إعدام أبيه بالقصد إلى قتله"[٨٤]

> *[It is disprovable to be the reason of execution of whom that has been the reason of his coming into existence]. Father is the cause of son's coming into existence; therefore, it is disprovable for the son to be the cause of his father execution by intending his murder.*

The son is not forbidden from killing his father at all as it seems from this rule. Rather, wherever, father attacks his son and he would not find any way to avoid his attack except than killing him. In such case it is obligatory on son to defend himself by killing his father. And in this case the father would himself cause the reason of his execution as in the case of suicide according to the other rule which says that the coerced is means at the hands of coercer.[85]

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[82] Ibid. 4:200.
[83] Ibid.,
[84]Ibid., 4:199.
[85]Ibid., 1:76

٤٧. "أن تحكيم السيماء أصل فيما لا يوقف على حقيقته"[٨٦]

The arbitration by mark or sign is a principle (that is to be sorted to) wherever the actual position could not be apprehended.

Imām Shaybānī has applied this principle to the case that if Muslims enter into a city of non-Muslim and conquered it forcefully they may kill all men –capable of fighting–, unless if they see a man having a mark or sign of being Muslim or *Zimmī*, they must not hasten in killing him. Rather, his position is to be examined and ascertained. Sarakhsī infers the principle latent herein i-e a mark or sign plays the role of a principle if the actual position could not be understood. Sarakhsī articulates the reason that if he is killed hastily and later he is known Muslim, nothing would have remained to rectify or straighten out. In contrast, there is no difficulty in adjourning his killing and ascertaining the actual position. In addition to this, the case of mark or sign is of the lesser category than the information of *Fāsiq* and we are bound to not act accordingly until we examine. So, the case of mark or sign is to be preferably examined. Categorizing what may help us in arriving at the actual position, it is stated in *al-Fatāwā al-Hindiyyah* that:

"الأصل أن الدار دليل ظاهر لكون من فيها ، من أهلها والسيماء أقوى من المكان والبينة أقوى من الكل".[٨٧]

The dār (or abode) is a clearer indication that all those who are therein, are its inhabitants (if the Dār is of Islam all those who are there would be considered as Muslims and vis-à-vis), and the mark is stronger than the place while evidence is stronger than all.

2.5. Rules on treatment with weapons in the territory of war

٤٨. "فإن الاحتياط في هذا الباب واجب"[٨٨]

[86] Ibid. 4:206.
[87] See, *al-Fatāwā al-Hindiyyah*: 2:236
[88] See: Sarakhsī, *Sharḥ*. 4:292 and also 4:287

Indeed, precaution in this regard is indispensable.

٤٩. "أنه لا يستحب للمسلمين أن يدخلوا دار الحرب شيئاً مما فيه منفعة أهل الحرب"[٨٩]

It is not preferable for Muslims to inter the territory of non-Muslims with what may benefit them (against Muslims).

٥٠. "وما يقدرون على إخراجه من الكراع والسلاح فإنه يكره لهم تركه في دار الحرب بعد التمكن من إخراجه لأن هذا مما يتقوى به المشركون على قتال المسلمين"[٩٠]

Those arms which Muslims can take out of the territory of non-Muslims are not to be left over there because this may strengthen non-Muslims against Muslims.

٥١. "وما كان له من الحق في العين الأول فقد سقط حين أخرجه من ملكه بيعاً بالدراهم"[٩١]

The right of non-Muslim [of returning his property to the territory of war] ceases the moment he droves it out of his ownership by sale it against Dirhams.

٥٢. "المعتبر عادة كل قوم فيما يبتني عليه مما يكره أو لايكره"[٩٢]

In constructing of what is preferable or otherwise the costume of each nation is to be considered.

2.6. Suicides and assisting non-Muslims killing himself or other Muslim[s]

A. On self-defense

٥٣. "مأمور بدفع سبب الهلاك عن نفسه بحسب الوسع"[٩٣]

Muslim is ordered to defend himself, as much as he can, against every cause of his death

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[89] Ibid. 4:284.

[90] Ibid. 4:198.

[91] Ibid. 4:292. At another place he says: لأنه قد سقط حقه بالتصرف الأول (because his right has ceased by his first act). See. Ibid. 4:291.

[92] Ibid. 4:286.

[93] Ibid. 4: 248.

٥٤. "الواجب على كل أحد الدفع عن نفسه بجهده أولا ثم النيل من عدوه"[٩٤]

Everyone is bound to defend himself first as much as he can, then by imposing harm his enemy.

The defense —individual as well as collective— is allowed by the UN Charter. Article 51 of the Charter reads:

> "Nothing in the present Charter shall impair the inherent right to individual or collective self-defense if an armed attack occurs against a state."

B. On suicide

٥٥. "وليس للمسلم أن يقتل نفسه ولا أن يعين على قتل نفسه فتعين عليه جهة الامتناع حتى يصير مقتولاً بفعلهم إن قتلوه"[٩٥]

It is not permissible for a Muslim neither to kill himself nor to help other killing him. So, he is bound to restrain from doing so until he is killed by their act if they do so.

٥٦. "لأن يهلك بفعل غيره أولى من أن يهلك بفعل نفسه"[٩٦]

To be killed by other is better than being killed by his own act.

The IHL seems to have allowed the commission of suicide attacks. Because it stipulates certain conditions for taking arms and participating in hostile activities: such as being commanded by a responsible person; having a distinctive sign; carrying arms openly; and conducting war operations in accordance with the law of war. If all these conditions are fulfilled and suicide attack is committed it would be lawful.

C. On assisting non-Muslims killing himself or other Muslim[s]

٥٧. "لا رخصة في التصريح بالأمر بالمعصية في حق نفسه ولا في حق غيره"[٩٧]

[94]Ibid., 4: 249.
[95]Ibid. 4: 248; and 242.
[96]Ibid. 4: 248.
[97]Ibid., 4: 243.

There is no permission for explicit order to commit sin concerning himself or others.

Sarakhsī has mentioned several, and parallel, cases and applied this rule. Briefly speaking, if a Muslim captive became unable to sustain any more the torture of prison, he cannot demand of his murder. Or if enemies have determined to kill him but offered him different ways giving option to choose any of them, he should not explicitly state '*kill me this way*', rather, he ought to utter words that do not contain an order or permission to kill him; for instance, he may say '*killing by that way might be easier*'. The same rule is to be applied if the case concerns another Muslim.[98]

٥٨. "وليس للمسلم أن يجعل روح جماعة المسلمين وقاية لروحه"[٩٩]

It is not permissible for a Muslim to make the soul of the Muslim community protective of his own soul.

For instance, if non-Muslims have besieged the fortress of Muslims and they capture a Muslim. They ask him to help entering into the fortress and he knows such a side whereby they could enter and, *inter alia*, kill the Muslims. He is not allowed to let them know. Nevertheless, even if he imagines that they would kill him if not let them know it; he is still not allowed to do so. The reason is that in the meanwhile he would be making the soul of the Muslim community protective for his own soul which is not permissible. At another occasion Sarakhsī has applied the same rule when he stated that if two Muslims are prisoned by non-Muslims and one of them is demanded by non-Muslim to kill the Muslim prisoner otherwise they would kill him. He is not allowed to make the soul of the other Muslim protective of his own soul. Because both souls are equal in dignity; none could be preferred over the other.[100]

٥٩. "لا رخصة في الإعانة على قتل المسلم"[١٠١]

[98] Ibid.
[99] Ibid. 4: 230.
[100] See, Ibid. 4: 245 and 280.
[101] Ibid. 4:246.

No one is allowed to assist killing a Muslim

٦٠. "لا رخصة لهم في قتال المسلمين بحال ولا في إلقاء الرعب في قلوبهم ما لم تحقق الضرورة"[١٠٢]

Muslims are not allowed to fight Muslims nor to terrorize unless necessary.

[102] Ibid. 4: 248; and 253.