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## ***Renewing the Da'wah Narrative***

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### Fundamentalism

In 1988, the University of Chicago, backed by the American Academy of Arts and Sciences, launched The Fundamentalism Project, devoted to researching fundamentalism in world religions. It defined fundamentalism as "approach, or set of strategies, by which beleaguered believers attempt to preserve their distinctive identity as a people or group ... by a selective retrieval of doctrines, beliefs, and practices from a sacred past."<sup>(1)</sup>

The word Fundamentalism was first applied to Christians. According to Britannica,

"Christian fundamentalism, movement in American Protestantism that arose in the late 19th century in reaction to theological modernism, which aimed to revise traditional Christian beliefs to accommodate new developments in the natural and social sciences, especially the advent of the theory of biological evolution. In keeping with traditional Christian doctrines concerning biblical interpretation, the mission of Jesus Christ, and the role of the church in society, fundamentalists affirmed a core of Christian beliefs that included the historical accuracy of the Bible, the imminent and physical Second Coming of Jesus Christ, and Christ's Virgin Birth, Resurrection... They dropped the fundamentalist label, which they left to the separatists, and formed the so-called "neo-Evangelical" movement. *Christianity Today* was founded as their major periodical. Their new intellectual center, Fuller Theological Seminary, was opened in Pasadena, California; many of the schools formerly identified with fundamentalism, such as the Moody Bible Institute, also moved into the Evangelical camp."<sup>(2)</sup>

'Fundamentalism' was commonly applied in the 90's<sup>(3)</sup> to describe Muslims in general and the thought of Sayyid Qutb, Abul 'Ala Mawdudi, and Israr Ahmed in particular. Bernard Lewis wrote,

"It remains unfortunate and can be misleading. 'Fundamentalist' is a Christian term. It seems to have come into use in the early years of last century, and denotes certain Protestant churches and organizations, more particularly those that maintain the literal divine origin and inerrancy of the Bible. In this, they oppose the liberal and modernist theologians, who tend to a more critical, historical view of Scripture. Among Muslim theologians there is as yet no such liberal or modernist approach to the Qur'an, and all Muslims, in their attitude to the text of the Qur'an, are in principle at least fundamentalists. Where the so-called Muslim fundamentalists differ from other Muslims and indeed from Christian fundamentalists is in their scholasticism and their legalism. They base themselves not only on the Qur'an, but also on the Traditions of the Prophet ﷺ, and on the corpus of transmitted theological and legal learning."<sup>(4)</sup>

According to Eli Berman,<sup>(5)</sup> "radical Islam" has replaced "fundamentalism."

Bernard Lewis has correctly stated that the term 'fundamentalism' is problematic because Islamic belief requires all Muslims to be fundamentalists.<sup>(6)</sup> John Esposito has also criticized the

(1) Martin E. Marty and R. Scott Appleby, "Introduction," in Martin and Appleby, eds., *Fundamentalisms and the State* (Chicago: University of Chicago Press, 1993), p. 3.

(2) <http://www.britannica.com/topic/Christian-fundamentalism>

(3) "Fundamentalist Islam: The Drive for Power," (Martin Kramer, 1997)

(4) Bernard Lewis, *The Political Language of Islam* (Chicago: University of Chicago Press, 1988), p. 117, n. 3.

(5) Eli Berman is the Research Director for International Security Studies at the UC Institute on Global Conflict and Cooperation and since 2010 a Professor of economics at the University of California, San Diego

(6) Bernard, Lewis, *Islam and the West*, New York: Oxford University Press, c1993.

term for its association "with political activism, extremism, fanaticism, terrorism, and anti-Americanism," saying "I prefer to speak of Islamic revivalism and Islamic activism."<sup>(1)</sup>

The essence of most of the above was echoed by Bakr Abu Zaid in his book *Mu'jam Manahi al-Lafdhyya*, p. 102. 3<sup>rd</sup> ed.<sup>(2)</sup>

### Terrorism

The term terrorism, on the other hand, is widely associated with Islam today.

To define this term, several issues must be kept in mind. First, is the definition of "terrorism." The second issue is when "terrorism" is translated as '*irhab*,' a word that appears in a derivative form in the Quran in 7:60. (3) Actually, '*irhab*' as used in that verse has nothing to do with **use** of violence, but comes in the context of **preparation** as a deterrent against violence to promote peace.<sup>(4)</sup>

**First**, the Islamic Fiqh Council noted correctly that there is no agreed upon definition of terrorism or '*irhab*' when they stated, "Since there is no international consensus regarding the definition of terrorism to determine its meaning and implication, the Islamic Fiqh Council calls on

(1) John L. Esposito, *The Islamic Threat: Myth or Reality?* (New York: Oxford University Press, 1992), p. 8.

(2) أصولي: من الجاري في مصطلحات العلوم الشرعية: أصول الدين، ويُقال: الأصل، ويقصد به: علم التوحيد. ومنها: أصول التفسير، أصول الحديث، أصول الفقه. وإلى هذا اشتهرت النسبة للمبرز فيه بلفظ: الأصولي. وعنهم أَلَفَ المراغي كتابه "طبقات الأصوليين".

لكن في أعقاب اليقظة الإسلامية في عصرنا، وعودة الناس إلى الأخذ بأسباب التقوى والإيمان، والتخلص من أسباب الفسوق والعصيان، ابتدر أعداء الملة الإسلامية هذه العودة الإيانية، فأخذوا يحاصرونها ويجهزون عليها بمجموعة من ضروب الحصار، والتشويه، وتخويف الحكومات منهم ومن نفوذهم، وفي قالب آخر تحسين المذاهب المعادية للإسلام، وعرضها بأحسن صورة- زعموا، وكان من هذه الكبكية الفاجرة في الإجهاز على العودة الراشدة إلى الإسلام صافياً: جلب مجموعة من المصطلحات المولودة في أرض الكفر، تحمل مفاهيم سيئة إلى حد بعيد، وكان منها هذا اللقب "الأصولية"، النسبة إليها: "أصولي". التزمت. التطرف.

(3) نلاحظ أن القرآن الكريم لم يستعمل مصطلح (الإرهاب) بهذه الصيغة، وإنما اقتصر على استعمال صيغ مختلفة الاشتقاق من نفس المادة اللغوية، بعضها يدل على الإرهاب والخوف والفرع، والبعض الآخر يدل على الرهبة والتعبد، حيث وردت مشتقات المادة (رهب) سبع مرات في مواضع مختلفة في الذكر الحكيم لتدل على معنى الخوف والفرع كالتالي:

يَرْهَبُونَ: "وَفِي نُسُخَتِهَا هُدًى وَرَحْمَةٌ لِلَّذِينَ هُمْ لِرَبِّهِمْ يَرْهَبُونَ" [الأعراف: ١٥٤].

فَارْهَبُونَ: (وَأَوْفُوا بِعَهْدِي أُوفِ بِعَهْدِكُمْ وَإِنِّي فَارْهَبُونَ) [البقرة: ٤٠].

(إِنَّمَا هُوَ إِلَهٌ وَاحِدٌ فَإِنِّي فَارْهَبُونَ) [النحل: ٥١].

تُرْهَبُونَ: (تُرْهَبُونَ بِهِ عَدُوُّ اللَّهِ وَعَدُوَّتُكُمْ وَآخَرِينَ مِنْ دُونِهِمْ) [الأنفال: ٦٠].

اسْتَرْهَبُوهُمْ: (وَاسْتَرْهَبُوهُمْ وَجَاءُوا بِسِخْرِ عَظِيمٍ) [الأعراف: ١١٦].

رَهْبَةً: (لَأَنْتُمْ أَشَدُّ رَهْبَةً فِي صُدُورِهِمْ مِنَ اللَّهِ) [الحشر: ١٣].

رَهَبًا: (وَيَذْعُونَآ رَغَبًا وَرَهَبًا وَكَانُوا لَنَا خَاشِعِينَ) [الأنبياء: ٩٠].

(٤) أن القرآن الكريم استعمل (الرهبه)... (وترهبون) في هذه الآية لزوع الخوف والرعب في نفس العدو وإشعاره بقوة الآخر لئلا يقدم على العدوان. وهذا اللون من الإرهاب هو عمل وقائي ذو دلالات إيجابية وهو من وسائل الردع العسكري وأدوات الحرب الباردة ولا دلالة له على الإرهاب بمعناه المتداول المعرف في القانون الجنائي، بل هو خطوة نحو السلام، لأنه يمنع العدو من ممارسة عدوانه.

the scholars and experts of law, jurisprudence and political science in the world to agree on a precise definition of terrorism..."

In a report to the United Nations Crime Branch in 1992, Alex Schmidt noted, "The question of a definition of terrorism has haunted the debate among states for decades...The UN Member States still have no agreed-upon definition."<sup>(1)</sup>

**Second**, it is significant that the word '*irhab*' has been **adopted** and **defined** by the Islamic Fiqh Council during its 17th Session (13-17 December 2003):

"Terrorism is an atrocity committed by individuals, groups or states against the human being (his religion, life, mind, property and honor). It includes all forms of intimidation, harming, threatening and killing without a just cause and all acts of banditry and violence that take place in the wake of an individual or collective criminal plan aimed at spreading terror among people by exposing their life, liberty or security to danger, including the harm inflicted to the environment or to a public or private utility, or exposing one of the national or natural resources to danger."

The definition adopted by the Indian Fiqh Council states,

"Terrorism is every violent act committed by an individual or a state to terrorize or scare an individual or a group or to threaten their property, life, honor, country, religion, or belief without a legitimate cause."<sup>(2)</sup>

**Third**, in English the word 'terrorism' is a negative term unlike '*irhab*' in Arabic. As Bruce Hoffman<sup>(3)</sup> has noted: "terrorism is a pejorative term. It is a word with intrinsically negative connotations that is generally applied to one's enemies and opponents, or to those with whom one disagrees and would otherwise prefer to ignore."<sup>(4)</sup> '*Irhab*,' on the other hand, is a neutral Arabic word that can gain positive or negative connotation based on usage.<sup>(5)</sup> The word's contemporary usage, though, in modern standard Arabic has developed negative connotations among Muslims.

**In conclusion**, American Muslims imams and scholars should not have any reservation using the term "terrorism" (as adopted by the *fiqh* councils) that is committed in the name of their religion. They should do so clearly, openly, and regularly.

Dar ul-Islam vs. Dar ul-Harb

It is well known that Muslim jurists divided the world into the Dar al-Islam and the Dar al-Harb. These terms do not appear in the Quran and Sunna, but were developed by the *fuqaha*. To comprehend the doctrine of jihad as expounded by the *fuqaha* it is important to understand the meaning and implications of this division.

The real purport of this division has generally been misunderstood. It is often assumed that there is a direct and necessary link between the division of the world into two domains and the

(1) Lanier Burns, "Toward a Contemporary Definition of Terrorism," *Forum on Public Policy: A Journal of the Oxford Round Table*, 2011.

(2) <http://www.ifa-india.org/index.php?do=home&pageid=mutafariq4>

(3) A political analyst known for his views on terrorism and insurgency. He is the Director of the Center for Security Studies and Director of the Security Studies Program at Georgetown University's Edmund A. Walsh School of Foreign Service.

(4) <http://www.nytimes.com/books/first/h/hoffman-terrorism.html>

(5) "الإرهاب" مصدر، أَرَهَبَ، يُرْهِبُ، إِرْهَابًا، وهي لفظة تعني: التخويف، وهي في ذاتها ليست محمودة، ولا مذمومة، إلا أن يُعلم معناها عند قائلها،

وإلا أن ينظر في آثارها" <http://islamqa.info/ar/117724>

view that the normal relationship between Dar al-Islam and Dar al-Kufr is that of hostility. For instance, according to Bernard Lewis:

"The basis of the obligation of jihad is the universality of the Muslim revelation. God's word and God's message are for all mankind; it is the duty of those who have accepted them to strive (*jahada*) unceasingly to convert or at least to subjugate those who have not. This obligation is without limit of time or space. It must continue until the whole of the world has either accepted the Islamic faith or submitted to the power of the Islamic state. Until that happens, the world is divided into two: the House of Islam (Dar al-Islam), where Muslims rule and the law of Islam prevails; and the House of War (Dar al-Harb) ... comprising the rest of the world. Between the two there is a morally necessary, legally and religiously obligatory state of war, until the final and inevitable triumph of Islam over unbelief."<sup>(1)</sup>

Those who reject the theory argue that the jurists made this division keeping in view the realities of their time and, hence, has no permanence.<sup>(2)</sup> Ibn Taimiyya, was asked if Mardin (his birth city in Turkey) is still considered part of the Muslim world after it was occupied by the Mongols. Ibn Taimiyya coined a third category – the 'Composite Abode' (*Dar Murakkaba*) – about which he wrote, "The Muslims living therein should be treated according to their rights as Muslims, while the non-Muslims living there outside of the authority of Islamic Law should be treated according to their rights."<sup>(3)</sup> Furthermore, the prevalent geo-political realities have influenced *Ahl us Sunna's* understanding in the past. For example, they changed their stance on rebelling against an impious ruler after they saw the futility of such endeavors.

The difference of opinion has its bearing on the nature of the relationship between an Islamic state and non-Muslim states on the one hand, and on the relationship of the Islamic state with Muslims living temporarily or permanently in non-Muslim territories, on the other.

The Islamic scholars distinguished between two perspectives of Shariah. We might term the first perspective as a pietistic one. According to this perspective, since the main sanction behind the commands of the Shariah is the love of God and seeking to ward off His displeasure, and the full reward for adherence to, and the full punishment for violation of, God's commands is that which will be awarded in the Hereafter, the law, in this sense, knows no territorial limits.<sup>(4)</sup>

Hence, a Muslim is required to follow the precepts of his religion wherever he might be. If he violates a rule of the Shariah he will be responsible for it before God on the Day of Judgment. In keeping with this perspective, humanity has been divided into two categories:

- those who commit themselves to submit to God's will, i.e. Muslims
- those who do not, i.e. non-Muslims

As a corollary of this, a Muslim forms part of the Muslim Ummah across the world and thus the tie of brotherhood binds a Muslim resident of even a non-Muslim state to his Muslim brethren

(1) Bernard Lewis, *The Political Language of Islam* (Karachi: Oxford University Press, 2004), 73. (Emphasis added). Majid Khadduri, ed. and tr., *Kitab al-Siyar wa al-Kharaj wa al-'Ushr min Kitab al-Asl li 'l-Shaybani* (Karachi: Idarat al-Qur'an, 1996), 22-30.

(2) Wahbah al-Zuhayli, *Athar al- Harb fi 'l-Fiqh al-Islami* (Damascus: Dar al-Fikr, 1981), 192-196.

(3) Tariq Ramadan, *To be A European Muslim: A study of Islamic Sources in the European Context* (Leicester: The Islamic Foundation, 1999), 23.

(4) Majmu al-Fatawa vol. 28, p. 248

(4) al-Sarakhsi, *al-Mabsut* (Beirut: Dar al-Kutub al-'Ilmiyyah, 2001), 10: 104.



in the Islamic state.

So far as the Muslims who live in Dar al- Islam are concerned, they are protected (*ma'sum*) by the law. However, for the Muslims who live outside the Islamic state, their *'ismah* or protection only implies that those who violate their rights will mainly be held responsible in the court of God in the Next World. This is what is called *'ismah bi 'l-Islam*, i.e. protection by virtue of affiliation to Islam.<sup>(1)</sup>

The second perspective of the Shariah is the territorial jurisdiction of the courts in the Islamic state, which we may call the "municipal law" perspective. According to the founder of the Hanafi school, Abu Hanifa (d. 150/767) and Muhammad al-Shaybani (d. 189/805), Muslim courts have no jurisdiction to try a case if the cause of action arises beyond the territorial limits of the Islamic state. In other words, the courts cannot enforce the rights of a citizen beyond the territorial limits of the Islamic state.

Hence, from this perspective, persons outside the jurisdiction of the Islamic state are, legally speaking, *ghayr ma'sum*, that is, they are not guaranteed protection of their rights by the Islamic state.

On the contrary, the Islamic state is required to protect the rights of those who live permanently or even temporarily within its territorial limits, be they Muslims or non-Muslims. Thus, all persons, whether Muslims or non-Muslims, who live within the territorial limits of the Islamic state are guaranteed the legal protection of their rights. This is called *'ismah bi 'l-dar*, i.e. protection of one's rights by virtue of living in the territory under Islamic jurisdiction.

It is from this perspective that the world is divided into two territories: Dar al-Islam (Domain of Islam) and Dar al-Kufr (Domain of Disbelief).

To summarize, from the perspective of ultimate results in the Hereafter, a Muslim and a *mu'ahid* in any part of the world is *ma'sum* (protected). However, from the perspective of municipal law, *'ismah* is guaranteed only to the persons who live within the territorial limits of the Islamic state irrespective of whether they are Muslims or non-Muslims.

Moreover, Islamic law also distinguishes between different non-Muslim political entities depending on their actual attitude towards Islam and Muslims. Thus, if a Dar al-Kufr is in a state of war with Dar al-Islam, it will be called Dar al-Harb. On the other hand, if it has a peace treaty with Dar al-Islam it will be called *Dar al-Muwada'ah* or *Dar al-'Ahd*.<sup>(2)</sup>

Here it will not be out of place to mention the definitions of Dar al-Islam and Dar al-Kufr as given by the Hanafi *fuqaha'*. Dar al-Islam, according to them, is the territory where Islamic law is applied,<sup>(3)</sup> or at least where Muslims have the potential capability of applying Islamic law even if they do not actually apply it.<sup>(4)</sup> In other words, it is the territory under the effective and seemingly

(1) Ibid., 10: 62

(2) *Muwada'ah* is the technical name for the peace treaty which Muslims conclude with other sovereign entities. Such a treaty may either be for a specific period or it may be of a permanent nature. The Hanafi jurists see no need for specifying the time period in such a treaty. By virtue of such treaty the *Ahl al-Muwada'ah* are entitled to some degree of legal protection (*'ismah*). See, for details, al-Sarakhsi, *al-Mabsut*, 10: 94-104. See also, al-Kasani, *Bada'i' al- Sana'i' fi Tartib al-Shara'i'* 6: 75-77.

(3) Al-Kasani, *Bada'i' al-Sana'i'*, 6: 112.

(4) Zakariyya al-Ansari, *Asna 'l-Matalib fi Sharh Rawd al-Talib* (Cairo: al-Matba'ah al-Misriyyah, 1357 AH), 4: 204.



permanent control of Muslims.<sup>(1)</sup> Dar al-Kufr, as distinguished from Dar al-Islam, is the territory under the effective control of non-Muslims in which they apply their own laws. A Dar al-Kufr may become *Dar al-Muwada'ah* by concluding a treaty of peace with Dar al-Islam.<sup>(2)</sup> As compared to this, Dar al-Harb is the territory which is at war with Dar al-Islam.

From the perspective of the territorial jurisdiction of the Islamic state and its courts the people living in Dar al-Harb do not enjoy *'ismah* (legal protection). In the case of *Dar al-Muwada'ah*, however, since the Islamic state has concluded a treaty with that entity, some jurisdiction might be granted to the Islamic state as a consequence of which some kind of *'ismah* might be established for those persons who are living within that *Dar al-Muwada'ah*. This will depend, however, on the actual terms of the treaty that has been concluded.

There is a third hypothetical possibility as well: a non-Muslim state that is neither at war with the Dar al-Islam nor has any peace treaty with it. The *fuqaha'* generally do not discuss the legal consequences of an act committed in such a state. This could be either because such a state did not exist in their surroundings, or more importantly, because in the absence of a treaty the people in such a state did not enjoy the legal protection of the Islamic state. The courts of the Islamic state, therefore, could not exercise jurisdiction over the wrongs committed in a territory outside the boundaries of the Islamic state, unless it had a treaty as a consequence of which some jurisdiction was created for these courts. This was the reason why the *fuqaha'* considered every Dar al-Kufr legally equivalent to Dar al-Harb unless it had a peace treaty with the Islamic state.

Most non-Hanafi jurists do not subscribe to the principle of territorial jurisdiction. *'Ismah*, i.e. legal protection, according to them, is granted on the basis of a person's religious affiliation (*din*) rather than on the basis of his affiliation to a political entity (*dar*). As far as non-Muslim citizens of the Islamic state (*Ahl al-Dhimmah*) are concerned, they enjoy protection because Muslims had concluded the treaty of *dhimmah* with them. They consider these non-Muslims comparable to alien non-Muslims (*musta'minun*) in Dar al-Islam who enjoy protection by virtue of the contract of *aman* given to them by Muslims.

**The bifurcation of the world into two domains - Dar al-Islam and Dar al-Harb - is essentially an affirmation of the principle of territorial jurisdiction.**

Seventh century Arabia was a very special case and Muslim jurists, especially Hanafi jurists, consider it such that it may not be extended beyond its space-time context. The general principle

- (1) "A territory is ascribed to them [non-Muslims] or to us [Muslims] on the basis of [who has] the ruling power and effective control." Al-Sarakhsi, *al-Mabsut*, 10: 39.
- (2) It has been generally assumed that the *fuqaha'* did not approve of peace treaties. Some have even claimed that if a peace treaty is concluded without specifying the time period (which the *fuqaha'* call *al-muwada'ah al-mutlaqah*) it will be invalid by a consensus of the *fuqaha'*. See, Wahbah al-Zuhayli, *Athar al-Harb*, 675-676. This is, however, a wrong assumption, especially with regard to Hanafi *fuqaha'* who have explicitly declared that *al-muwada'ah al-mutlaqah* is valid. See, al-Kasani, *Bada'i' al-Sana'i'*, 6: 77. There is a difference of opinion on this issue among the Shafi'i and Hanbali schools, and Shams al-Din Muhammad b. Abi Bakr Ibn Qayyim al-Jawziyyah (d. 751/1350), the famous Hanbali jurist and disciple of the illustrious Ahmad b. 'Abd al-Halim Ibn Taymiyyah (d. 728/1328), has made a strong case for the validity of such treaties. See, Shams al-Din Muhammad b. Abi Bakr Ibn Qayyim al-Jawziyyah, *Ahkam Ahl al-Dhimmah* (Beirut: Dar al-Kutub al-'Ilmiyyah, 2002), 1: 336-344. Imam Muhammad b. Idris al-Shafi'i (d. 204/820) has himself explicitly stated that such a treaty will be valid if the parties are given the option to terminate the treaty at will. See, Muhammad b. Idris al-Shafi'i, *al-Umm* (Cairo: Dar al-Fikr, 1961), 4: 110. Hence, to declare that the Muslim jurists unanimously reject such treaties is inaccurate.

## Bases for the Principle of Territorial Jurisdiction in the Quran and the Sunna

These verses and traditions lay down varying rules for the Muslims living in Dar al-Islam and those living outside it. For instance, when Muslims were persecuted in Mecca they were ordered to migrate to the Islamic state of Madinah.<sup>(2)</sup> Those who did not migrate were denied the protection of the Islamic state. It was explicitly mentioned that the Islamic state did not have any legal responsibility (*wilayah*) to protect their rights. But if they asked the Islamic state for help "in the matter of religion," it was duty-bound to support them, if needed, even militarily. However, it was required to act within the terms imposed by the treaties, if any.<sup>(3)</sup>

When you meet the enemies who are polytheists, invite them to three courses of action. If they accept any one of these, you too should accept it and restrain yourself from doing them any harm. Invite them to (embrace) Islam; if they do so, accept it from them and desist from fighting against them. (When they accept Islam), invite them to migrate from their lands to the land of

"فصل في قتال الكفار: هل هو بسبب المقاتلة أو مجرد الكفر؟ وفي ذلك قولان مشهوران للعلماء:

الأول: قول الجمهور، كمالك، وأحمد بن حنبل، وأبي حنيفة وغيرهم .

الثاني: قول الشافعي وربما علل به بعض أصحاب أحمد .

فمن قال بالثاني قال: مقتضى الدليل قتل كل كافر، سواء كان رجلاً أو امرأة، وسواء كان قادراً على القتال أو عاجزاً عنه، وسواء سلمنا أو حاربنا. لكن شرط العقوبة بالقتل أن يكون بالغاً، فالصبيان لا يقتلون لذلك. وأما النساء فمقتضى الدليل قتلهن، لكن لم يقتلن لأنهن يصرن سبياً بنفس الاستيلاء عليهن، فلم يقتلن لكونهن مالا للمسلمين كما لا تهدم المساكن إذا ملكت. وعلى هذا القول: يقتل الرهبان وغير الرهبان لوجود الكفر. وذلك أن الله علق القتل لكونه مشركاً بقوله (فاقتلوا المشركين) فيجب قتل كل مشرك، كما تحرم ذبيحته ومناكحته لمجرد الشرك. وكما يجب قتل كل من بدّل دينه لكونه بدله، وإن لم يكن من أهل القتال، كالرهبان. وهذا لا نزاع فيه. وإنما النزاع في المرأة المرتدة خاصة. وقول الجمهور: هو الذي يدل عليه الكتاب والسنة والاعتبار، فإن الله سبحانه قال: ﴿وَقَاتِلُوا فِي سَبِيلِ اللَّهِ الَّذِينَ يَقْتُلُونَكُمْ﴾ إلى قوله: ﴿وَأَعْلَوْا أَنَّ اللَّهَ مَعَ الْمُتَّقِينَ﴾ [البقرة: ١٩٠-١٩٤]. فقوله: ﴿الَّذِينَ يَقْتُلُونَكُمْ﴾ تعليق للحكم بكونهم يقاتلوننا، فدل على أن هذا علة الأمر بالقتال. ثم قال: ﴿وَلَا تَحْنَدُوا﴾ والعدوان مجاوزة الحد، فدل على أن قتال من لم يقاتلنا عدوان، ويدل عليه قوله بعد هذا: ﴿فَمَنْ أَعَادَكَ تَدَيُّ عَلَى كُمْ فَاعْتَدُوا عَلَىٰ هَٰذَا مَا أَعَادَكَ تَدَيُّ عَلَىٰ كُمْ﴾ [البقرة: ١٩٤]. فدل على أنه لا تجوز الزيادة..."

(2) Quran 16: 106-110 and 4: 97-99.

(3) Quran 8: 72 and 4: 75-76.

*Muhajirin* and inform them that if they do so they shall have all the privileges and obligations of the *Muhajirin*. If they refuse to migrate, tell them that they will have the status of Bedouin Muslims and will be subjected to the commands of Allah like other Muslims, but they will not receive any share from the *ghanimah* or *fay'*<sup>(1)</sup> except when they actually fight along with Muslims.<sup>(2)</sup>

Significantly, the Quran calls those Muslims who migrated from Mecca to Madinah as *fuqara'* (poor; empty-handed) (Quran 59:8) although some of them had property in Mecca. The reason, according to the Hanafi *fuqaha'*, is that they lost ownership of their property in their original homeland by virtue of their migration to Dar al-Islam. Another proof of their loss of ownership is that even after the conquest of Mecca the Prophet ﷺ did not return these properties to them.<sup>(3)</sup>

Likewise, different rules have been laid down for unintentional murder or a Muslim depending on whether he was the inhabitant of an Islamic state, or an enemy state, or of a state with which Muslims had a peace treaty.<sup>(4)</sup>

Finally, the case of Abu Baseer (d. 7/628) and his friends establishes the principle of territorial jurisdiction beyond any doubt. Abu Baseer had fled from Mecca due to persecution but was handed over to the Meccans by the Prophet ﷺ under the terms of the Treaty of Hudaibiyyah. Abu Baseer, however, succeeded in fleeing to a place outside the jurisdiction of the Madinan state on the highway to Syria. Subsequently, several other Muslims fled from Mecca and gathered there. They formed a group and started attacking the caravans of the Meccans. Then the Meccans themselves waived the condition of the Hudaibiyyah Treaty under which the Muslims were bound to hand over to the Meccans the persons who had fled from Mecca.<sup>(5)</sup>

Abu Baseer and his group were beyond the jurisdiction of the Islamic state. The Prophet ﷺ did not quite like their activity,<sup>(6)</sup> but he was not legally obliged to hand over these people to the Meccans. Ibn Qayyim al-Jawziyyah, finds a justification for the principle of territorial jurisdiction in this case. He argues that when the Prophet ﷺ did not put a stop to the activities of these people he did not violate any provision of the treaty because they were "out of his hand" and as such

(1) *Ghanimah* is the term used for the goods captured in a military campaign and *fay'* is the term for the goods captured from the opponents without using force against them, such as the tribute they pay after concluding a peace treaty with Muslims. Moreover, moveable property is generally included in *ghanimah* while immoveable property is included in *fay'*. The rule for *ghanimah* is that one-fifth of it will go to the *bayt al-mal* while the rest will be distributed among the *mujahidin* (Qur'an 8: 41). As for *fay'*, it will not be distributed among the *mujahidin*; rather, all of it will go to the *bayt al-mal* and will be used for the benefit of all Muslims (Qur'an 59: 7) within Dar al-Islam. See, for details, al-Mawsu'ah al-Fiqhiyyah (Kuwait: Ministry of Religious Affairs, 1995), 31: 302-321 and 32: 227-234. See also, Muhammad Rawwas Qal'aji, Mu'jam Lughat al-Fuqaha' (Karachi: Idarat al-Qur'an, n.d.), 335 and 351.

(2) Muslim, Tirmidhi, Ibn Majah, Abu Dawud

(3) al-Sarakhsi, al-Mabsut, 10: 60-63; Al-Kasani, Bada'i' al-Sana'i', 6: 130-136. See for further details, Hamidullah, The Muslim Conduct of State, 104-15; Mawdudi, Sud, 281-351; Idem, Islamic Law and Constitution, tr. and ed. Khurshid Ahmad (Lahore: Islamic Publications, 1992), 185-189.

(4) Quran 4: 92

(5) Bukhari

(6) This is evident from the wording of the tradition as reported in Bukhari: "Abu Busayr came and said, 'O Allah's Messenger, by Allah, Allah has made you fulfil your obligations by your returning me to them, but Allah has saved me from them.' The Prophet ﷺ said, 'Woe to his mother! What an excellent war kindler he would be, should he only have supporters!' When Abu Busayr heard that he understood that the Prophet ﷺ would return him to them again, so he set off till he reached the seashore."

were not under his jurisdiction (*taht qahrih*).<sup>(1)</sup>

### Jihad vs. Peace vs. Neutrality

The concepts of war, peace, and neutrality have more to do with international relations between states than what is relevant to Western Muslims. Muslims living in the West are full citizens of their countries. Beyond clarifying that terrorists are not waging some sort of "jihad" in the name of their faith, these matters are for individual states to discuss.

The following discussion will highlight some important issues only from a *da'wah* perspective.

According to most modern scholars of Islam, peace and harmony is the basis of international relations, not war.<sup>(2)</sup> This is based on the Quranic instruction to incline towards peace (Surah al-Anfal:61) and that war is an exception, at times necessary, to the rule (Surah al-Hajj:39). War is inherently hated (2:216-217), but is sometimes necessary to fight oppression and aggression. There is no concept of waging war to force conversion, as there is 'no compulsion in religion' (2:256). It is unimaginable that the tolerant Islam that allows interfaith marriage (5:5) will allow war to covert!

An important question is how do we understand Muslim armed engagements with Europe, Africa, and the Far East during the first century and a half of the Islamic era? The answer given by Abu Zahra is to emancipate people, defend freedoms, establish human equality, and spread justice.<sup>(3)</sup>

*Jihad* is an Arabic term derived from the root "J-H-D" which means, literally, to strive or exert effort. It is the same root from which the legal term "*ijtihad*" is derived since *ijtihad* refers to the exertion of intellectual effort by scholars to come up with an informed religious opinion on a new issue or problem. The term *jihad* and similar terms derived from the same root are used in the Quran and hadith.

Firstly, it is used in the context of prayers, doing righteous deeds and self-purification; inward *jihad* or struggle against evil inclinations within oneself (Quran 22:77-78; 29:4-7).

Secondly, it is used in the context of social *jihad*, or striving for truth, justice and goodness in one's relationship with other human beings. Examples of this usage include the payment of charity to the needy (49:15) and striving to persuade those who reject the divine message by referring to the arguments presented in the Quran (Quran 25:52).

Thirdly, it is used in the context of the battlefield, which is often called, more specifically, *qital*, which means fighting. That later form; the combative *jihad*, is allowed in the Quran for legitimate self-defense in the face of unprovoked aggression or in resisting severe oppression on

(1) Ibn Qayyim al-Jawziyyah, *Zad al-Ma'ad fi Hady Khayr al-'Ibad* (Cairo: Matba'at al-Halabi, 1928), 1: 913.

(2) Among scholars who also advocate such view are Wahbah Al-Zuhaili, Muhammad Rashid Ridha and Muhammad Abu Zahra. See Muhammad Rashid Ridha (1960), *Al-Wahy Al-Muhammadi*, Cairo: Maktabah Al-Qaherah, p. 240; Muhammad Abu Zahra (1964), *Al-Ilaqat Al-Dauliyah Fi Al-Islam*, Cairo: Al-Dar Al-Qaumiyah, pp. 47-52; Wahbah Al-Zuhaili (n.d), *Atsar Al-Harb Fi Fiqh Al-Islami*, Damascus: Dar Al-Fikr, pp. 113-4 cited in Muhammad Khair Haykal, *Al-Jihad Wa Al-Qital Fi Al-Siyasah Al-Syariyah*, pp. 821-3. Hans Kruse wrote that, "In the theory of classical Muslim jurists, the external conduct of the one Islamic state, the Ummah, is governed by a special set of rules exposed in *fiqh* works, under the heading '*siyar*'. It is a well-known fact that these rules demand the peaceful or even friendly relations between the Ummah and independent communities of the non-Muslim outer world." See Hans Kruse, "Al-Shaybani on International Instruments," *Journal of the Pakistan Historical Society* 1 (1953): 90.

(3) Muhammad Abu-Zahra, *Nazariyyat al-Harb fil-Islam*, 4th ed. (Cairo: Wazarat al-Awqaf, 1961), 33

religious or other grounds. In fact, the first verses in the Quran that allowed self-defense were not revealed until the early Muslim community had endured more than thirteen years of suffering and aggression at the hands of the idolatrous Arabs: "Permission (to fight) is given to those against whom war is being wrongfully waged, and verily, God has indeed the power to aid them. Those who have been driven from their homelands in defiance of right for no other reason than their saying, 'Our Lord is Allah'." (Quran 22: 39-40)

Like the above verses, some verses in the Quran sanction fighting. These verses, however, when understood in their textual and historical context deal with war situations and should not be generalized. The description of the aggressors or oppressors as rejecters of faith or idolatrous people does not mean that they are to be fought on account of being non-Muslims. Historically, these aggressors happened to be idolaters. In fact, the Quran allows fighting against fellow Muslims if they are aggressors and other means of restoring peace and justice have failed (Quran 49:8-9). In short, the reason for fighting were to repel aggression, not difference of religion.

**No single verse in the Quran, when placed in its proper textual and historical context, permits fighting others on the basis of their faith, ethnicity, or nationality.** Armed *jihad* is not only restricted in terms of what may or may not justify it, but it is also strictly regulated. There must be a declaration of war by a legitimate authority after due consultation. No non-combatants could be hurt. Looting and destruction is not allowed. Prisoners of war and the injured must be treated humanely.

In the long history of Muslim civilization, there were times when such conditions and rules were met and other times where there were violated. There have also been some misinterpretations of the concept by some scholars influenced by the circumstances of the time in which they lived. The fact remains, however, that Islamic teachings should not be driven either by what some Muslims did in the past, or are doing today, or by misinterpretations from the past or present.

The contemporary context requires looking at the larger Muslim political framework from a scheme of warfare to one, which includes truce, formal diplomatic relationships and membership in the international community of nation-states because any Muslim-ruled entity, which is a member of the UN, is by default, in a peaceful agreement with all other members of the UN by way of the UN charter.<sup>(1)</sup>

Neutrality refers to a status accorded by international law to state that "abstains from all participation in a war, and maintains an attitude of impartiality in its dealings with the belligerents."<sup>(2)</sup> There are two types of neutrality in international law:

- permanent neutrality as practiced by countries like Switzerland, Sweden, Austria and Finland
- non-permanent neutrality where a state proclaims neutrality in a given war

There are some instances of neutrality<sup>(3)</sup> established by the Prophet ﷺ and the third caliph. It

(1) Khalid Yahya Blankinship (1994), *The End of the Jihad State: The Reign of Hisham b. Abd al-Malik and the Collapse of the Umayyads*, New York: State University of New York Press, pp. 6-9.

(2) Lawrence Preuss (1941), "The concepts of Neutrality and Nonbelligerency", *Annals of the American Academy of Political and Social Science*, vol. 218, November, 1941, p.100.

(3) In one of the military expeditions sent by the Prophet ﷺ against the Byzantine territory of Mu'tah, in north Arabia, Banu Ghanam, a branch of Hadas tribe, chose to remain neutral even though others fought



is an option worth considering based on the maxim *tasarruf al-imam ala ar-raiyyah manutun bi al-maslahah* (the conduct of a ruler towards his subject is based on what is in their best interest). It can free resources for developing healthcare, education, science and technology, and infrastructure in many parts of the Muslim world that are in dire need of it.

### **Nature of Our Relationship with the West**

#### **There are a few points that I will like to highlight:**

The Organization of Islamic Cooperation (formerly Organization of the Islamic Conference) is the Muslim world's only intergovernmental body—the largest such system operating outside of the UN. Founded forty years ago, it counts fifty-seven Muslim countries among its members.

#### **The nature of “our” relationship with the West is twofold:**

1. Muslims World and the West: The relationship of the Muslim world with the West as set and defined by OIC is one of cooperation, dialogue and understanding. In the words of Dr. Abdulaziz Al-Twajri, Head of largest Islamic educational organization, ISESCO, and ranked as one of the 500 most influential Muslims in the world,

“Relations between the Muslim world and the West should be built around common interests, the respect of international laws, and serving human causes anywhere in the world.”<sup>(1)</sup>

Maha Akeel, Director of Information at the OIC, wrote, “The world should know that dialogue and cooperation are the routes chosen by the Muslim world —not extremism or violence.”<sup>(2)</sup>

At the same time, more than one third of the World's Muslim population are not represented by the member states of the OIC. These include the Muslims of India, China, South Africa, the EU, and the Americas.

2. Muslims Living in the West: What should be the relationship of Muslims living in a liberal, secular government?

It is important to mention here that Islamic law imposes the respect of covenants and treaties even above the respect of religious solidarity. In other words, if the ‘imam’ (in the classical sense) concludes a treaty with a potential enemy, it is binding on all Muslims (Quran 5:1). Islamic law also prohibits Muslims from assisting their fellow believers if the former were in violation of a treaty of peace concluded deemed as the enemy as the Quran states, “If they seek your aid in religion, it is your duty to help them, except against a people with whom you have a treaty of mutual alliance.” (Quran 8:72)<sup>(3)</sup>

The Muslims living in a non-Muslim country are considered to be living there under a covenant. They must, therefore, comply with the laws of their country of residence without, at the same

against the Muslims and the Prophet ﷺ honored the tribe's neutral stand. See Ibn Hisham (n.d), Sirah Ibn Hisham, vol. 2, Jeddah: Muassasah Ulum Al-Quran, p. 382.

Uthman ibn Affan made a treaty with the Nubians, “We (Muslims) shall not wage war against you, nor prepare for war against you, nor attack you so long as you observe the conditions of the treaty between us and you...But it will not be incumbent upon the Muslims to drive away any enemy who may encounter you, nor to prevent him from you, between the limits of the territory of Ulwah and Aswan.” See Muhammad Hamidullah (1987), *op.cit*, p. 293.

(1) In a lecture given at the University of Chile (Center for Arab Studies) in Santiago, on 26 July 2007.

(2) <http://themuslim500.com/the-oic-more-necessary-than-ever>

(3) “If they seek your aid in religion, it is your duty to help them, except against a people with whom you have a treaty of mutual alliance” Quran 8:72

time, disobeying Islamic Law. What that means is that Muslims are commanded to abide by all Islamic obligations: no distinction is made based on the type of land. Islamic ethics and values are equally valid in either type of land; virtues such as truthfulness, honesty and loyalty are encouraged in both non-Muslim and Muslim lands. Similarly, immoral acts such as lying, betrayal or treachery are discouraged regardless of the type of land.

Allah says: "Oh you who believe! Fulfill (your) obligations." (Quran 5:1)

He also says: "And fulfill (every) covenant. Verily! The covenant will be questioned about." (Quran 17:34)

He says: "And fulfill the Covenant to Allah when you have covenanted, and break not the oaths after you have confirmed them." (Quran 16:91)

A Muslim is not to break or violate oaths or promises. He will not be a true faithful Muslim if he does so. Allah said: "It is not the case that every time they make a covenant, some party among them throws it aside. Nay! The truth is most of them believe not." (Quran 2:100)

Scholars have stated that those who enter non-Muslim countries have to adhere to their respective laws and regulations even if they entered those countries illegally, and they have no excuse for breaking those laws, since they were entrusted to abide by those laws upon entry into those countries.<sup>(1)</sup>

Muslims living in non-Muslim countries have to comply with laws and regulations of the country they have been entrusted though valid visas to enter. At the same time, they have to avoid whatever contradicts Islamic teachings. Prohibitions as dictated in the religion should continue to be observed, regardless of where one lives, e.g. the prohibition of oppression, murder, fornication, theft and alcohol. In case they are obliged by law to uphold something contrary to Islamic teachings, they have to adhere to the minimum that the law requires of them. While a detailed discussion of determining the threshold for indulging in haram is beyond the scope of this paper, suffice it to say that individual situation, local customs, God-fearing imams, and larger *fiqh* bodies all contribute in steering the discussion in this matter. An example is buying commercial auto, home, and medical insurance when required by law in Western countries.

The question arises, what is the contract between the nation and the Muslim that a Muslim is supposed to uphold? The answer is that citizenship is a type of voluntary 'social-contract' that ties a person to the constitution. A Muslim should have no problem as long as the contract of citizenship does not comprise leaving religion, abandoning its symbols or obstructing a Muslim's freedom to live his or her faith. The US Constitution guarantees freedom of religion and thus is not in conflict with Muslim faith and its practice.

### Shariah

"Shariah" is a misunderstood word second to 'Jihad' and is usually translated as 'Islamic Law.' In essence, "Shariah" refers to what Allah has legislated for His slaves,<sup>(2)</sup> whether it be beliefs,

(1) Notable contemporary scholars like Abdullah bin Bayyah, Salman al-Odah, Salah as-Sawi, and Abdullah al-Judai hold this position. Al-Ezz ibn Abd-ul-Salam, one of the earlier scholars, took a similar position, في قواعد الأحكام: (لو استولى الكفار على إقليم عظيم، فولوا القضاء لمن يقوم بمصالح المسلمين العامة فالذي يظهر: إنفاذ ذلك كله؛ جلباً للمصالح العامة ودفعاً للمفاسد السابقة)

(2) *Al-Madkhal li-Dirasa al-Shariah al-Islamia* by Abd al-Karim Zaidan p.38



practice, worship, or morals. It is the totality of Allah's commands.<sup>(1)</sup> Another author defines 'Shariah' to be the 'commands, prohibitions, guidance and principles that God has addressed to mankind pertaining to their conduct in this world and salvation in the next.'<sup>(2)</sup>

### **Shariah includes the following:<sup>(3)</sup>**

1. Creed: including the oneness of Allah, rejection of shirk, belief in Angels, Divine Scriptures, Prophets, and the Last Day.
2. Ethics: being true, trustworthy, keeping promises, and rejection of immorality like lying, breaking promises, etc.
3. Religious Practices: matters related to worship and dealings with fellow human beings.

In short, Shariah guides aspects of Muslim life, including daily prayers, marriage, divorce, family obligations, and financial dealings.

### **Unique Features of Shariah**

1. Shariah comes from Allah.
2. Shariah is timeless and universally applicable. We believe that Shairah is suitable and applicable for all times and places.
3. Shariah is comprehensive.
4. Shariah is humane.
5. Shariah is based on justice.
6. Shariah promotes moderation.

Shairah makes it **obligatory** for Muslims to obey the law of the land they reside in and not to murder, steal, etc.<sup>(4)</sup>

### **Slavery<sup>(5)</sup>**

Considered the worst human rights violation, slavery is banned by international law today. Historically, Islam never required it, but allowed and regulated it when it was the norm. The global movement of abolishment of slavery did not violate any Islamic tenets, therefore its gradual legal ban was accepted by all Muslim countries.

Legalized slavery may have ended, but the institution exists today under different names. United Nations Human Rights states, "Slavery was the first human rights issue to arouse wide international concern yet it still continues today."<sup>(6)</sup> US State Department also recognizes "modern slavery."<sup>(7)</sup>

### **In my opinion, Muslim scholars have a moral obligation to speak against:**

- Revival of slavery by the *Daesh* (ISIS) that violates the *ijma* (consensus) of the Muslim scholars and the Umma

(1) The Schools of Islamic Jurisprudence: A Comparative Study by Mohammad Hamidullah Khan, p. 5

(2) Shariah Law: An Introduction by Mohammad Hashim Kamali, p. 14

(3) Al-Madkhal ila al-Shariah wa Fiqh al-Islami by Dr. Umar al-Ashqar, p.18. Also see Al-Madkhal li Dirasa Shariahh al-Islamiyya by Nasr Farid Wasil, p. 15-16.

(4) See footnote 44

(5) For a detailed comparative study of slavery by the author, please see the link:

<http://imammufti.com/slavery/>

(6) <http://www.ohchr.org/EN/Issues/Slavery/SRSlavery/Pages/SRSlaveryIndex.aspx>

(7) <http://www.state.gov/j/tip/what/>

- Modern day 'slavery' in our Western societies<sup>(1)</sup>
- Slave-like conditions (especially of domestic workers) due to poor labor laws in some Muslim countries

### Apostasy

Most liberal, secular democracies allow freedom of religion. It is what allows Muslims to live peacefully under the rule of law in them. Their contract of citizenship means that they accept people will choose or relinquish faith, including other Muslims. Thus, there is a moral obligation to engage someone who chooses to leave or not practice Islam with patience and compassion. It is enough to say that apostasy today is not new, many people chose to leave Islam in the past and were not dealt with harshly. The author is aware of two different scholarly approaches that address it. Dr. Taha Jaber Alwani took one in an extended discussion in his book "Apostasy in Islam: A Historical and Scriptural Analysis."<sup>(2)</sup> Another approach does not consider it to be a binding *hadd*, but a punishment that can be 'suspended.'

### Polygyny

Polygamy (or more accurately, polygyny) is illegal in the US. Muslims are allowed to marry up to four wives with strict conditions for rationales whose discussion is beyond the scope of this paper. Nevertheless, does this present a problem? Does it conflict with the legal prohibition on polygamy in the US? The answer is no. Polygyny is **not** a requirement for Muslims. Today, a very small percentage of Muslims practice it in Muslim countries. A few observations follow:

- Pro-polygamy reality shows like *Sister Wives* and *My Five Wives* have recently aired on TLC that challenge the existing ideas of family in the society
- There is a small pro-polygamist movement led by Christians in the US<sup>(3)</sup> that follows the changes in the laws related to polygamy
- Muslim imams and scholars must continue to abide by the law of the land and not perform marriages without a state license to protect the rights of both spouses

### Music

The issue of music in Islam is complex. Without going into details, the school setting is where it gets some importance. Some schools require music classes for their students. The first check is to see if it is a state or a district requirement. In most cases, it is required by the district. Public schools fall under the federal government and are required to grant reasonable religious accommodations. You can write a letter as an imam for parents requesting religious accommodation for a Muslim student to be excused from the music / instrumental class and be allowed to sit in the library or some other arrangement agreeable between the parents and school administration.

A Muslim who does not believe in the *ibaha* of music is not sinful when he has to listen to it involuntarily.

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- (1) "...between 14,000 and 17,500 people are trafficked into the United States annually, according to the US government, most forced into the sex trade, domestic servitude, or agricultural labor. At any one time, between 52,000 and 87,000 are in bondage... according to the United Nations, profits from human trafficking rank it among the top three revenue earners for organized crime, after drugs and arms."  
 "Slavery is not dead, just less recognizable" (<http://www.csmonitor.com/2004/0901/p16s01-wogi.html>)
- (2) The book is not without criticism in some of its assertions including its approach to the text of revelation and tradition.
- (3) <http://www.pro-polygamy.com>

**Honor Killings**

First, honor killings violate the law of the land and the Shairah, yet they are done in some Muslim societies. Some media outlets incorrectly equate Shariah with honor killings. Sadly, some Muslims have carried over their purely cultural practices into Western countries with immigration. The fact remains that these are false practices that cannot in any way be attributed to Islam. For the sake of illustration, the mistakes of some Muslims should not be attributed to Islam just as the massacres of the Native Americans and the slavery of Africans should not be attributed to Christianity, even though Christians mainly carried out these atrocities.

Our responsibility is twofold: to clarify to the media and the American public that honor killings are crimes that have nothing to do with Islam and the imams must clarify their prohibition clearly from the *minbars* especially in communities with large immigrant populations.

**Appendix I: Vocabulary**

*Ahl ad-Dhimma*: 'people of the pact,' protected non-Muslim subjects

*Ahl al-Harb*: "the people of war," non-Muslims living beyond the Muslim frontier

*Ahl al-Hudna*: "people of the armistice"

*Aman*: guarantee of safety, safe-conduct

*Dar al- Muwada'ah*: the land with which Muslims have concluded a peace treaty

*Dhimma*: obligation or contract, in particular a treaty of protection for non-Muslims living in Muslim territory

*Dhimmi*: a non-Muslim living under the protection of Muslim rule on payment of *jizya*

*Harbi*: alien non-Muslim

*Mustaminūn*: people who received guarantee of safety are those who stay in the Muslim area temporarily, do not settle and are not obliged to pay *jizya*. These may be envoys, merchants, seekers of refuge and visitors.

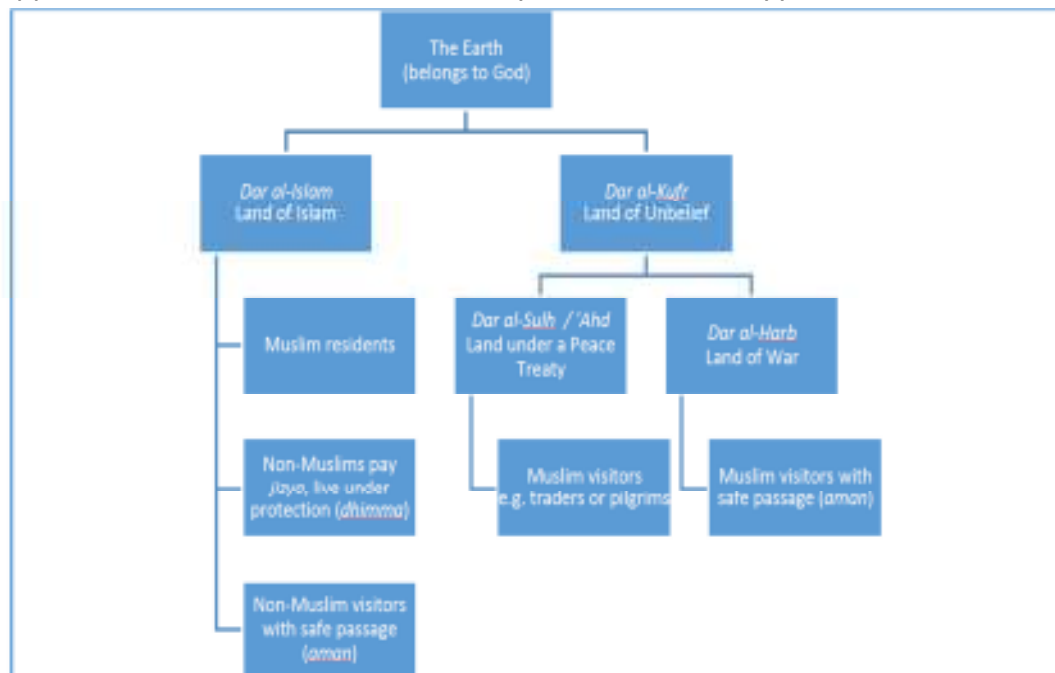
**Appendix II: Territorial Division in Early Islam, Ibn Taimiyya, and the Modern Era**

Figure 1: Territorial division in Early Islam

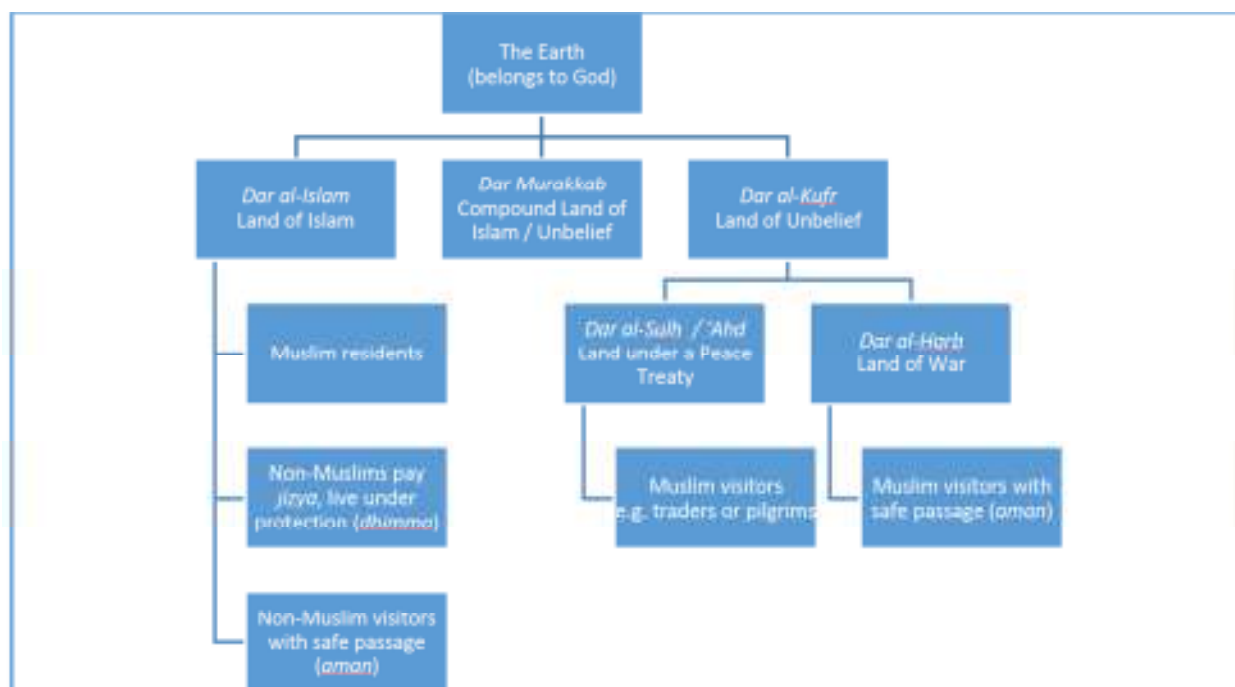


Figure 2: Territorial division according to Ibn Taymiyya's fatwa about Mardin

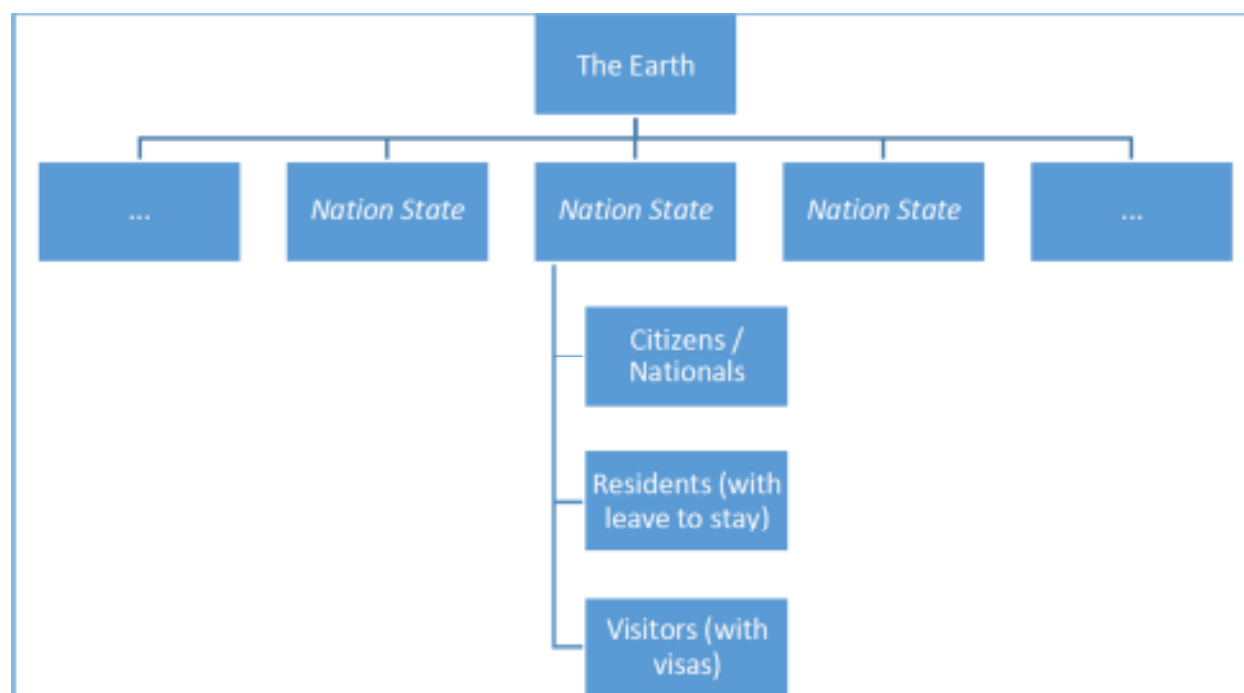


Figure 3: Territorial division in the modern era

Appendix III: Quotations from Hanafi Jurists That '*Dar*' Signifies Territorial Jurisdiction

We shall reproduce below some passages from the writings of various jurists especially that of Hanafi school, to establish that the doctrine of *dar* in fact signifies the principle of territorial jurisdiction. Abu Bakr Muhammad b. Ahmad ibn Abi Sahl al-Sarakhsi (d. 490/ 1097), one of the great Muslim jurists, explains the Hanafi viewpoint as follows:

"If a Muslim enters Dar al-Harb with *aman* and lends money to or borrows money from the inhabitants of that territory, or usurps their property or his property is usurped [by them] there, his case will not be heard (in the courts of Dar al-Islam), because the wrong was committed outside Muslim jurisdiction. For the Muslim who usurped their property after guaranteeing them not to do that, we hold this opinion because he violated his promise, not the promise of the Muslim ruler. However, he will be counselled by way of fatwa to return the property though he will not be compelled to do so by the court. As for the inhabitants of that land who usurped the property of the Muslim, we hold this opinion because they violated their promise at a place where they were not under the Muslim jurisdiction... Yet according to his religion, it is reprehensible for the Muslim to violate his promise with them, for the violation of promise is forbidden... It is on account of this that it would not be desirable for another Muslim to purchase the usurped property, if he knew that it was a usurped property."<sup>(1)</sup>

Burhan al-Din al-Marghinani (d. 593/1197), the author of the famous Hanafi text al-Hidayah, says that if a Muslim trader goes to *Dar al-Harb* and acquires something by stealth, the courts of Dar al-Islam will not punish him, even though he violated his promise and committed a violation of the Shariah for which he will be responsible before God.<sup>(2)</sup>

The statement of Zayn al-'Abidin b. Ibrahim Ibn Nujaym (d. 970/1563) is even more explicit in this regard:

"According to Abu Hanifah, the position of a person who embraces Islam in Dar al-Harb and does not migrate (to Dar al-Islam) is like that of a *harbi* (alien non-Muslim) in the sense that his property is not protected (by the law of the land in Dar al-Islam)."<sup>(3)</sup>

Furthermore, if a citizen of Dar al-Islam commits the murder of even a Muslim inhabitant of Dar al-Harb, the courts of Dar al-Islam do not have the jurisdiction to try the case. So, they can neither award the punishment of *qisas* nor require the murderer to pay *diyyah* to the heirs of the victim.<sup>(4)</sup> However, if a citizen of Dar al-Islam commits a crime against another of its citizens even in Dar al-Harb, he will be liable for it in the courts of Dar al-Islam. This is because even if he was outside Dar al-Islam physically, legally he was under the jurisdiction of the courts of Dar al-Islam.

(1) Al-Sarakhsi, al-Mabsut, 10: 104. Muhammad Hamidullah (d. 1423/2002), while commenting on the above passage, has the following to say: "[The Hanafis] make a sharp distinction between jurisdiction of Muslim court and that of a foreign court over a Muslim, on the one hand, and moral obligations on the other; and they do not hold him responsible in a Muslim court for acts done in a foreign territory. And on the same basis, they acquit a foreign non-Muslim from all acts committed in foreign territory even against a Muslim subject, such as murder or theft." Muhammad Hamidullah, The Muslim Conduct of State (Lahore: Muhammad Ashraf, 1945), 104.

(2) Burhan al-Din 'Ali b. Abi Bakr al-Marghinani, al-Hidayah fi Sharh Bidayat al-Muhtadi (Beirut: Dar Ihya' al-Turath al-'Arabi, n.d.), 2: 395. Other jurists are of the opinion that he should be held liable for his act in the courts of the Islamic state, and the property recovered from him should be given back to the rightful owner, if possible. See, Ibn Qudamah, al-Mughni, 8: 284.

(3) Zayn al-'Abidin b. Ibrahim Ibn Nujaym, al-Bahr al-Ra'iq Sharh Kanz al-Daqa'iq (Cairo: Dar al-Kutub al-'Arabiyyah, 1978), 5: 147.

(4) Al-Marghinani, al-Hidayah, 2: 396.

Again, if two citizens of Dar al- Islam are held as captives in Dar al-Harb and one of them kills the other, the courts of Dar al-Islam cannot take cognizance of the matter because, by virtue of their captivity, they are considered outside the jurisdiction of Dar al-Islam. So, if one of the captives commits unintentional murder of the other, the culprit will not be liable to pay *diyyah*, although he will be required to offer *kaffarah* (expiation).<sup>(1)</sup>

Kamal al-Din Muhammad Ibn al-Humam al-Iskandari (d. 861/1457), while commenting on this opinion of Abu Hanifah, has made a fine distinction between the different perspectives of Islamic Law:

So, according to Abu Hanifah, there is no worldly punishment for the murderer, except *kaffarah* in case of unintentional murder and punishment in the hereafter in case of intentional murder... This is because due to imprisonment he (the victim) became like them (aliens)... and thus, he resembles a Muslim [inhabitant of Dar al-Harb] who did not migrate (to Dar al-Islam), as both lack worldly protection (*al-'ismah al-dunyawiyyah*).<sup>(2)</sup>

Hanafi jurists applied this principle not only in their expositions of the international law of Islam but in other branches of law as well, such as commercial law, criminal law, and even the personal law:

1. According to the Hanafi jurists, non-Muslims acquire ownership of the property they capture from Muslims if they carry it to Dar al-Harb. They put forward several arguments to support this rule. Some of these have already been discussed above. It is worth noting that forcefully taking possession of property does not provide a justifiable reason for its ownership within Dar al-Islam:

Forcefully taking possession (of property) is illegal only when it relates to a legally protected property (*mal ma'sum*) and the basis for *'ismah* (legal protection) is *ihraz* (safe custody) the basis for which is *dar* and not *deen*. This is because of the fact that *ihraz* by virtue of din only occurs where one believes that one should abide by the Shari'ah and that its violation is a sin. Obviously, this does not apply to non-Muslims. For them, *ihraz* takes place only when the property is brought to Dar al-Islam because it [that is, Dar al- Islam] physically defends (its residents) from external attacks. So when the property is protected because of *ihraz* in Dar al-Islam it cannot be owned by virtue of mere possession. However, when this protection is removed because of its being taken to Dar al-Harb, he who possesses it becomes its owner.<sup>(3)</sup>

Another important argument puts forth by al-Sarakhsi is that the enemy is not liable to pay compensation for the damage he caused to the life and property of Muslims. If property were protected by virtue of din, the enemy should have been liable under Islamic law to pay compensation because "liability to compensate is a more obvious consequence of *'ismah*."<sup>(4)</sup> But as this is not the case, it means that *'ismah* is not by virtue of din; rather, it is by virtue of *dar*. Hence, the enemy owns the property when it is taken to Dar al-Harb.

2. If after entering Dar al-Harb with *aman* a Muslim steals the property of a resident thereof and brings it to Dar al-Islam, "it will not be lawful for another Muslim to buy it from him because he brought it by way of treachery, and he is responsible before God to return it to them, although

(1) Kamal al-Din Muhammad Ibn al-Humam al-Iskandari, *Fath al-Qadir 'ala 'l-Hidayah Sharh Bidayat al-Mubtadi* (Cairo: Dar al-Kutub al-'Arabiyyah, 1970), 5: 451.

(2) Ibid

(3) Al-Sarakhsi, *al-Mabsut*, 10: 62.

(4) Ibid



the ruler cannot compel him to do so."<sup>(1)</sup> However, if a Muslim buys it from him the contract will be held valid.<sup>(2)</sup> On the other hand, when a Muslim steals the property of a person in *Dar al-Muwada'ah* (the land with which Muslims have concluded a peace treaty) and brings it to Dar al-Islam, the ruler will award him *ta'zir* punishment. Moreover, if someone else bought the property from him the contract will be held void.<sup>(3)</sup> However, if the people of another non-Muslim entity attack *Dar al-Muwada'ah* and seize some property, it will be lawful for Muslims to buy it from them.<sup>(4)</sup>

3. If a Muslim exchanges one dirham with two dirhams in Dar al-Harb the transaction will be invalid according to Abu Yusuf because "a Muslim is bound everywhere by the laws of Islam."<sup>(5)</sup> However, according to Abu Hanifah and Muhammad ibn al-Hasan al-Shaybani, the transaction will be valid "because he took their property with their consent... unlike the property of *musta'minin*"<sup>(6)</sup> *musta'minin*<sup>(6)</sup> in our territory because their property becomes legally protected by virtue of the contract of *aman*."<sup>(7)</sup>

4. If some Muslims enter one Dar al-Harb with *aman* and another Dar al-Harb attacks the aforementioned Dar al-Harb, it will not be lawful for these Muslims to take part in war "for the purpose of making the word of polytheism supreme but (they can take part in war) for the purpose of defending themselves."<sup>(8)</sup>

5. If a Muslim soldier commits *zina* in Dar al-Harb, the *hadd* punishment cannot be awarded to him because the cause of action arose outside the jurisdiction of the Islamic state.<sup>(9)</sup> However, if he commits this crime within the camps of the Muslim army, and the ruler has already conferred upon the commander the authority to impose *hadd* punishments, or the ruler himself is leading the army, then the *hadd* punishment can be awarded.<sup>(10)</sup> The same holds true for awarding the *qisas* punishment.

6. If a person comes to Dar al-Islam from *Dar al-Muwada'ah* without a fresh *aman* Muslims should still respect his rights.<sup>(11)</sup> Similarly, if he enters Dar al-Harb and Muslims capture that territory they should respect his rights even there and "his position is like a dhimmi who enters a Dar al-Harb, which is later on captured by Muslims."

7. The courts of Dar al-Islam cannot settle any of the disputes of *musta'minin* that arise in Dar al-Harb "because, by entering with *aman* they do not become residents of our *dar* and the cause of action arose when they were not under the control of our ruler."<sup>(12)</sup> However, if they have a dispute after entering Dar al-Islam the courts can settle the dispute "because the cause of

(1) Ibid., 10: 69-70.

(2) Ibid., 10: 104.

(3) Ibid., 10: 98.

(4) Ibid. This passage also shows that the Muslim jurists differentiated between the legal positions of different political entities of non-Muslims and that it is wrong to assume that they considered the whole of the world outside Dar al-Islam to be just one dar.

(5) Al-Sarakhsi, al-Mabsut, 10: 104.

(6) Alien non-Muslims who come to Dar al-Islam on the basis of *aman*.

(7) Al-Sarakhsi, al-Mabsut, 10: 104.

(8) Ibid., 10: 106. This ruling again proves the point that the Muslim jurists differentiated between the legal positions of the different political entities of non-Muslims. The reference to another Dar al-Harb is significant.

(9) Ibid., 10: 84.

(10) See, ibid., 9: 115-116.

(11) Ibid., 10: 98.

(12) Ibid., 10: 102.

action arose when they were under the control of the ruler."<sup>(1)</sup>

8. If a Muslim goes to Dar al-Harb temporarily and leaves behind his wife in Dar al-Islam, their wedlock is not terminated "because a Muslim is legally a resident of Dar al-Islam even if he is physically present in Dar al-Harb and physical separation between the two *dars* cannot terminate the wedlock unless legal separation is also there."<sup>(2)</sup> The same holds true for a *musta'min* in Dar al-Islam.<sup>(3)</sup> It means that wedlock will be terminated only when the spouses permanently settle in two different *dars* (*tabayun al-darayn*).<sup>(4)</sup>

9. If a non-Muslim *musta'min* marries a non-Muslim woman who is resident of Dar al-Islam (*dhimmiyyah*) he does not thereby become a *dhimmi*; rather, he remains a *musta'min* "because by this marriage he does not become a permanent resident of our *dar*. Rather, (we will presume that) he came to us for trade purposes and traders sometimes marry (even) in places where they do not intend to settle permanently (*tawattun*)."<sup>(5)</sup> However, if he overstays in Dar al-Islam the ruler should serve him with a notice to either leave the territory or accept the status of a *dhimmi*. If he chooses to become a *dhimmi* or does not leave the territory after the time prescribed in the notice the ruler may impose *jizyah* on him, thereby making him a *dhimmi*. This is not compulsion "because his overstay after the lapse of the time prescribed in the notice implies that he is willing to settle permanently in our *dar*... and the willingness to abide by the laws is indicated sometimes explicitly and at others implicitly."<sup>(6)</sup> When a non-Muslim woman comes to Dar al-Islam with *aman aman* and marries a Muslim or a *dhimmi* she thereby becomes a *dhimmiyyah* because this marriage implies that she wants to settle permanently in Dar al-Islam.<sup>(7)</sup>

10. Minor children of non-Muslim citizens of Dar al-Islam are considered legally to be non-Muslims.<sup>(8)</sup> The same holds true for children captured in war along with any of their non-Muslim parents. This is because while the child is in Dar al-Islam he does not belong to it; rather, he belongs to his parents.<sup>(9)</sup> So, the original presumption is that he is to be reckoned with his parents. It is only in absence of parents that *dar* takes their position.<sup>(10)</sup> Hence, if a child is captured with any of his parents the law presumes him to be the follower of the religion of his parents. If, however, he is captured without any of his parents and is brought to Dar al-Islam, he will be presumed to be a Muslim until he attains the age of puberty.<sup>(11)</sup> Finally, if any of his parents embraces Islam he is also presumed to be a Muslim "because he follows the better of the parents in respect of religion."<sup>(12)</sup>

**And Allah knows best.**

(1) Ibid.

(2) Ibid., 10: 69.

(3) Ibid., 10: 100.

(4) Ibid.

(5) Ibid., 10: 93.

(6) Ibid.

(7) Ibid.

(8) Ibid., 10: 71.

(9) Parents are considered to be *asl* (root) and their child to be *far'* (branch) in Sacred Law. Ibid., 9: 136.

(10) Ibid., 10: 71.

(11) Ibid., 10: 71-72.

(12) Ibid.