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# **Journal of Islamic State Practices in International Law**

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# THE ETHICO-LEGAL PRINCIPLES OF ARMS TRADE AND ARMS EMBARGO IN EARLY SUNNI JURISPRUDENCE

By Shahrul Hussain\*

## ABSTRACT

Estimated at a staggering 401 billion dollars plus global industry, arms trade is not only a lucrative business but a highly sensitive issue that requires strict government licenses to regulate it.<sup>1</sup> Current national and international regulations and licenses for arms trade is different to what it was over a millennium ago. This article looks at an age where government licences and regulation did not exist in the same form we have today, and investigates the principles early Muslim jurists established to govern arms trade and arms embargo. The article examines the evidences behind these principles. I argue that due a dearth of clear-cut (muḥkam or qat'ī) Qur'anic and sunni precepts Muslim jurists were forced to abandon the traditional method of relying on the apparatuses (uṣūl) of deducing Islamic law and moved to looking at this issue from more of an ethical perspective than an uṣūlī perspective. In conclusion I argue that the jurists' view were not only suitable to meet the needs of their time but still holds valid today. Their principles were not idiosyncratic to their faith nor based on religious text as much as common sense, to wit, universal principles any state would adopt to protect their self-interests.<sup>2</sup> \*

**Keywords:** *Ḥarbī, Dhimmī, Dār al-Islām, Dār al-Ḥarb*

## 1. Introduction

Armed conflict is an inescapable part of human life, whether it is domestic or international. Islam clearly talks about war, and it is well known that jihad is the Islamic institution of warfare. Early Muslim jurists saw Islam to be expansionist and jihad is one of the vehicles by which the spread of Islam is achieved. These jurists also regarded the precept of jihad as an

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<sup>1</sup> Weapons are classified into various categories. The categories vary due to the size and damage impact of the weapon. Most arms trade are small arms and light weapons (or SALW). There are attempts to develop international laws to regulate arms trade. During the 20<sup>th</sup> century the League of Nations opened discussions on this issue. After the birth of United Nations, this momentum did not carry on, and the international arms trade has been pushed to the back burner. Currently individual nations are responsible to grant licences to companies to trade in arms. (Zeray Yihdego, *Arms Trade and International Law*, (Oregon: Hart Publishing, 2007), 3-5.

<sup>2</sup> [Stockholm International Peace Research Institute](http://www.sipri.org). Sipri.org

(<http://www.sipri.org/media/pressreleases/2011/top100companies>) Retrieved on 2012-11-12.

\* Translation of Qur'anic verses are modified versions of widely available translation

offensive mechanism instituted to assist in the annihilation of idolatry and establish Islamic monotheism as the supreme religion reigning over others.<sup>3</sup> There are two reasons why jihad can be declared. Firstly, it is obligatory to defend the integrity of Islam if a nation is openly hostile towards Muslims, declares war or plots and conspires on harming Islam and Muslims.<sup>4</sup> The other reason is for extirpating vice, transgression, mischief and for purposes of propagating Islam.<sup>5</sup> The concepts of expansionism, religious propagation and above all defending the integrity of Islam have been ossified into a religious doctrine. This doctrine in turn legitimised the concept of international armed conflict in Islam. Early jurists also regarded domestic armed conflict against schisms declaring armed insurrection to the authority of the caliphate as a legitimate reason for conflict.<sup>6</sup>

Warfare and weapons are indispensably interrelated to each other. It is reasonable to assume that a superior arsenal portfolio provides key strategic advantage as well as developing a strong and effective army. On the face of it, arms trade in Islamic law is a commercial issue and therefore should be governed by commercial law. However, due to the nature of weapons, Muslim jurists did not see weapons the same as ordinary merchandise. I mainly analysed material from the first six centuries of Islamic jurisprudence to assess the social, political and religious factors that influenced the jurists in their views. I mostly relied on the opinions of the jurists of the four major schools of jurisprudence<sup>7</sup> to argue the Sunni position regarding this issue. As we will see there are two factors pertinent to the discussion

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<sup>3</sup> Reuven Firestone, *Jihad, The Origins of Holy War in Islam* (New York: Oxford University Press, 2002), 47, Bernard Lewis, *The Political Language of Islam*, America; The University of Chicago Press, 1988), 73.

<sup>4</sup> ‘Abdullāh bin Ibrāhīm bin ‘Ali Al-Ṭarīqī, *Al-Isti‘ānah bi Ghayr al-Muslimīn fī Fiqh al-Islāmī*, (Riyad: Mua’ssasah al-Risālah, 1993) 131-132

<sup>5</sup> Ibn ‘Abd al-Barr (d. 463 AH/ 1070) writes, “It is obligatory for the Caliph to dispatch an army once in a year to invite people to accept Islam, to rid any oppression they may be suffering and establish the religion of Allah. They are fought against until they enter Islam or render the *jizyah*.” (Abū ‘Umar Yūsuf bin ‘Abdullāh bin Muḥammad Ibn ‘Abd al-Barr, *Al-Kāfī fī Fiqh Ahl al-Madīnah al-Mālikī*, (Beirut: Dār al-Kutub al-‘Ilmiyyah, nd), 205.

<sup>6</sup> Abū al-Ḥasan al-Māwardī, *Al-Aḥkām al-Sulṭaniyyah*, Eng. Trans. by Asadullah Yate, (London: Ta-Ha Publishers Ltd, 1996), 88-93.

<sup>7</sup> The Ḥanafī, Mālikī, Shāfi‘ī and Ḥanbalī Schools. Please note a short list of the jurists from various schools here.

of arms trade. The first is the definition of the term ‘ethico-legal’, and second, the ancient geo-political map of the world as depicted by the classical Muslim scholars in terms of ‘Muslim territories’ and ‘non-Muslim territories’ or *Dār al-Islām* and *Dār al-Ḥarb*. This is because Muslim jurists of the first six centuries approached arms trade while considering two factors: ethics and territorial differences.

## **2. Ethico-legal Dimensions**

Ethics is a ubiquitous feature present in human life, playing an active role in influencing the affairs of society. ‘Ethics’ etymologically a Greek word (*ethos*) meaning custom<sup>8</sup> has no uniform definition. The general meaning of ethics circulates around the theme that it is a science of the ideal in human character and conduct, attitudes, or standards that guide customary behaviour.<sup>9</sup> Although Islam has not provided a strict definition of ethics, it does not stray from the themes of ethics mentioned by non-Muslim ethicists.<sup>10</sup> Although it is not possible to exactly translate ethics into Arabic, the popular equivalent term for it is *akhlāq*. *Akhlāq* is the plural of *khulq* which literally means to create, shape or innate disposition.<sup>11</sup> The concept of *akhlāq* subsumes all human actions that falls within the ambit of the Islamic

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<sup>8</sup> W. R. Sorley, "Ethics" in *Dictionary of Philosophy and Psychology*, ed. by Baldwin, James Mark, (New York: The Macmillan Company, 1925), 1:346.

<sup>9</sup> Ibid., Please also see William Lillie, *An Introduction to Ethics*, (Methuen & Co Ltd, 1971) , Syed Haneef, *Ethics and Fiqh for Daily Life: An Islamic Outline*, (Kuala Lumpur: International Islamic University Malaysia, 2006), 31.

<sup>10</sup> Generally, the term ethics may be divided into three major sub-disciplines. Firstly, meta-ethics, which explain questions relating to the nature of moral concepts and judgements. Secondly, named normative ethics, which are primarily concerned with establishing standards or norms for conduct and commonly associated with general theories about how one ought to live. Thirdly is applied ethics. This is the application of normative theories to practical moral problems. Agreeing with this division of ethics, Crisp attempts to further add to it and categorises ethics into four parts. Firstly, ethics is the system of value and custom in the lives of particular groups of human beings described as the ethics of these groups. Secondly, the term is used to refer to one in particular of these systems, called morality, which involves notions such as rightness and wrongness, guilt and shame, and so on. Thirdly, ethics can, within this system of morality itself, refer to actual moral principles. Fourthly, ethics is that area of philosophy concerned with the study of ethics in its other senses. (Roger Crisp, "Ethics" in *Routledge Encyclopaedia of Philosophy*, by Edward Craig, (ed.). (London: Routledge, 1998), 3:435-437). Fakhry, a great contemporary philosopher, classifies the ethics theory into four aspects: firstly is scriptural morality, secondly is theological ethics, thirdly is philosophical ethics, and finally is religious ethics. (Majid Fakhry, *Ethical Theories in Islam*. (E.J. Brill: Leiden, 1994), 11-14).

<sup>11</sup> R. Walzer, "Akhlak" in *The Encyclopaedia of Islam New Edition*, by H. A. R. Gibb (et. al.). Leiden: E. J. Brill, 1960, 1:325; Syed Haneef, *Ethics and Fiqh for Daily Life: An Islamic Outline*, (Kuala Lumpur: International Islamic University Malaysia, 2006), 31.

concept of 'righteous actions' or '*amāl ṣāliḥa*'.<sup>12</sup> Ethics in Islam is all about the ways to maintain virtues at their optimum level, avoid wrongdoing and to do what is desirable.<sup>13</sup> When the Qur'an mentioned good deeds it was often mentioned together with faith.<sup>14</sup> This combination affirms the close link good deeds or ethical deeds have with the essence of faith. Whereas faith is inner conviction, good deeds are its manifestations. In Izzi Dien's attempt to define ethics he argues that ethics is a 'state' or *hay'a*, which is inborn into the personality of human beings.<sup>15</sup> He continues by mentioning that all voluntary actions, be they good or bad, beautiful or ugly, are based upon it. This 'state' is influenced by upbringing, which can infuse the perception and admiration of virtue. The continuation of a beneficial upbringing usually leads this *hay'a* to the love of good and the hatred of evil.<sup>16</sup> There is merit to argue that man has an innate natural instinct imprinted in his soul giving him the ability to discern good from bad. Islam plays the role of shaping a person's ethics from external influences dictated by society, culture and custom.

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<sup>12</sup> What is meant by the term 'righteous actions'? Islam is a religion that is based on divinely revealed scriptures. Outlining the purpose of human creation the Qur'an declares in unequivocal terms that humans were created for the sole purpose of worshipping Allah (Qur'an 51:56 ) This is a key point, because if humans were created for the sole reason of worshipping Allah there must be clear guidelines on how to execute the duty of worship. To this end the Qur'an must also clarify the types and acceptable forms of worship. Addressing this point, the Qur'an sketches out the integral ritual acts of worship demand of believers to perform, and then leaves the doors of supererogatory actions open for devotees to excel in virtue. Although the Qur'an extols the virtues of caring for the needy, standing up for justice, philanthropy and the like yet, there are no detailed lists of actions that are classified as good deeds or others as bad. Avoiding the proscribed articles and observing the mandatory precepts is the foremost act of ethical and moral behaviour demand by the Lawgiver from His subjects. It is morally and ethically wrong to consume or buy and sell intoxicants, engage in usurious contracts, kill, lie and the like. At the same time it is a moral duty to observe prayer, fast, hajj and the like. The function of the Qur'an is to set the key fundamental actions demanded to be performed and actions that are demanded to be avoided. In doing so the Qur'an has set a framework by which devotees can deduce actions that are good and actions that are bad. The Qur'an on many occasions talks about 'doing good deeds' and seeking the 'pleasure of Allah' and 'cooperating in good and piety and not cooperating vice and transgression.' The axiom that measures good deeds from bad are entirely based upon a person's intention. The intention must be to seek the pleasure (*riḍwān*) of Allah.

<sup>13</sup> Sheila McDonough, *Muslim Ethics and Modernity*, (Canada: Wilfrid Laurice University Press, 1984), 5.

<sup>14</sup> It is mentioned 64 times in this style.

<sup>15</sup> Izzi Dien, Mawil, *Islamic Ethics and the Environment in Islam and Ecology* by Khalid, Fazlun and O'Brien, Joanne (ed. ). (London: Cassell Publishers Limited, 1992), 25.

<sup>16</sup> Izzi Dien, Mawil, *Islamic Environmental Ethics: Law and Society*, in *Ethics of Environment and Development*, ed. by Engel, J. Ronald and Engel, Jan Gibb. (Ondon.: Belhaven Press, 1990), 191.

The books of Islamic jurisprudence or the principles of Islamic jurisprudence (*uṣūl al-fiqh*) do not seem to make particular reference to the idea of ethics as an institution, tool or source of Islamic law. This of course does not mean that ethics did not play a part in Muslim law. If ethics is understood to be the way to maintain virtues at their optimum level, avoid wrongdoing and to do what is desirable, then it would be impossible to conceive that Muslim law was derived whilst devoid of any principles of ethics.

‘Ethics’ in Islam has less flexibility, unlike other cultures, customs or even religions where ethics exists as a fluid entity, thus capable of change due to societal transformation in attitudes and perspectives. Rather, in Islam it is the existence of a ‘multiplicity of intellectual and spiritual traditions that give shape to the idea of Islamic ethics’.<sup>17</sup> The ultimate objective of Islam is to establish peace and tranquillity, maintain justice and fairness, and to prevent evil, discord and disharmony.<sup>18</sup> To achieve this two things are required: law and ethics. Nomani observes that although the purpose of ethics and law are the same, yet they represent ‘different paths to their goal’.<sup>19</sup> According to Nomani ethics and law, although distinct independent entities they nevertheless operate as a harmonious condiment complementing and compensating the ‘shortcomings’ of the other.<sup>20</sup> This inter-intra marital consonance between law and ethics means that law focusses on preventing evil, but does nothing to cause moral behavioural change. This is where ethics plays a role. The idea of moral and ethical teachings is to compel the soul to achieve higher spiritual objectives of Islamic teachings such as kindness, love, compassion, generosity and the like.<sup>21</sup> In his attempt to identify law

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<sup>17</sup> Andrew F. March, *Islam and Liberal Citizenship: The Search for an Overlapping Consensus*, (New York: Oxford University Press, 2009), 13.

<sup>18</sup> Shibli Nomani & Syed Suleman Nadvi, *Siratun Nabi: Ethics in Islam*, (translated into English by Rizwan Uddin Ahmad & Muhammad Aslam, Karachi: Darul Ishaat, 1999), 6:80.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid. 81

and ethics, Nomani links the former with ‘*adl* (or justice) and the latter with *ihsān* (or excellence in worship). Clarifying his thoughts Nomani continues,

‘In order to safeguard society, all those evils which directly affect others such as murder, theft, waylaying, and slander have been dealt with by Islam through its law. For these crimes the Holy Qur’an has fixed punishments which may be carried out by the Islamic government. All acts which are concerned with the perfection of an individual human being’s soul are placed in the domain of ethics; such acts, for example, as speaking the truth, taking pity and helping the poor. Thus, the social order of Islam is a combination of law and ethics.’<sup>22</sup>

This is a meritorious consideration and connection, and gives a better and more precise rendition of ethics than *akhlaq* does. Therefore the term ‘ethico-legal’ are those precepts represented in the beliefs, rulings, laws, commandments, prohibitions and instructions of the Qur’an and Sunnah. The term ‘ethico-legal’ is described well by Abdullah Saeed. He says,

“The texts that are considered ethico-legal in nature and are represented in the Qur’an’s beliefs, rulings, laws, commandments, prohibitions and instructions. Examples of such ethico-legal content include belief in God, prophets and life after death; regulations related to marriage, divorce and inheritance; what is permitted and prohibited; commandments relating to fasting, spending, jihad and the *ḥudūd*; prohibitions related to theft, dealing with non-Muslims; instructions relating to etiquettes, inter-faith relations and governance.”<sup>23</sup>

However, what I am arguing is that Muslim law was primarily based on a strict methodological deductive process from the two main sources of law, to wit, the Qur’an and prophetic traditions. But, in the case of arms trade, as we will see, the Qur’an and Sunna do not provide clear-cut precepts. In such a case, the jurists through the process of juristic reasoning (*ijtihad*) resorted to find common sense solution. Their conclusions became the ethico-legal code for the followers of their view.

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<sup>22</sup> Ibid.

<sup>23</sup> Abdullah, Saeed, *Interpreting the Qur’an: Towards a Contemporary Approach*, (Wiltshire: Routledge, 2006), 1.

## 2.1 The Division of Territories

Much attention was paid to the political relationship other nations had with the Islamic state regarding arms trade. The classical Islamic world view in how territories were marked out was by dividing the territories as *Dār al-Islām* and *Dār al-Ḥarb* or Islamic territories and non-Islamic territories respectively. The controversial third designation known as *Dār al-‘Ahd*<sup>24</sup> seems to appear in the vocabulary of the jurists of the post-formative period. Jurists disagreed regarding the exact definition of *Dār al-Islām* and *Dār al-Ḥarb*. The primary reason for this can be attributed to the fact that the definition of these terms has not been authentically mentioned in the Qur’ān or *Sunnah*. It therefore lacks detailed and systematic guidance as to how and what qualifies a particular territory to be classified as *Dār al-Islām* or *Dār al-Ḥarb*.<sup>25</sup>

The *Hanafi* jurist al-Sarakhsī (d. 483/1090) defines *Dār al-Islām* as, “A place which is under the authority or ownership of Muslims and the proof (of this) is that Muslims are safe therein.”<sup>26</sup> Emphasizing an alternative theme al-Kāsānī (d. 587/1191) declares the manifestation of Islamic law to be the cause that renders a territory to be *Dār al-Islām*.<sup>27</sup> Al-Dasūqī (d. 1230/ 1814), the prominent *Mālikī*, scholar agrees with al-Kāsānī and asserts that *Dār al-Islām* is a country in which the insignias of Islam are prevalent.<sup>28</sup> The *Shāfi‘ī* had a different understanding. Al-Bujayrimī (d. 1221/1806) maintains that *Dār al-Islām* is a place

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<sup>24</sup> Muhammad Abū Zahrah, *Al-‘Ilāqāt al-Dawliyyah fī l-Islām*, (Cairo: Dār al-Fikr al-‘Arabī, 1995), 58-60, ‘Abd al-Karīm Zaydān, *Aḥkām al-Dhimmiyyīn wa l-Musta‘manīn fī Dār al-Islām*, Beirut; Mu’assasah al-Risālah, 1988), 16: footnote 5; ‘Uthmān Juma‘ah Ḍamīriyyah, *Manhaj al-Islām fī l-Ḥarb wa s-Salām*, Kuwait: Maktab Dār al-Arkām, 1982), 58; Wahba Al-Zuhaylī, *Āthār al-Ḥarb fī l-Fiqh al-Islāmī Dirāsah Muqāranah*, Damascus; Dār al-Fikr, 1998), 175-177, Abū ‘Abdullāh Muhammad bin Abī Bakr Ibn Qayyim, *Aḥkām Ahl al-Dhimmah*, (Beirut: Dār al-Kutub al-‘Ilmiyyah, edited by Ṭaha ‘Abd al-Raū’f Sa‘d, 2002), 1:336.

<sup>25</sup> Shahrul Hussain, *Dār al-Islām and Dār al-Ḥarb: An Analytical Study of its Historical Inception, its Definition by the Classical Scholars and its Application to the Contemporary World*, (Birmingham: Al-Hikma Publishing, 2012), pp. 118-128.

<sup>26</sup> Al-Sarakhsī, *Al-Mabsūṭ*, Vol. 10, p. 23 (quoted via: Al-Ṭarīqī, *Al-Isti‘ānah*, 170).

<sup>27</sup> ‘Alā’ al-Dīn Abū Bakr bin Mas‘ūd bin Aḥmad al-Kasānī, *Badā‘i‘ al-Ṣanā‘i‘ fī Tartīb al-Sharā‘*, (Beirut: Dār al-Kutub al-‘Ilmiyyah, edited by ‘Ali Muhammad Mu‘awwid and ‘Ādil Aḥmad ‘Abd al-Mawjūd, 1997), 9:515.

<sup>28</sup> Shamsh al-Din Muhammad al-Dasūqī, *Ḥāshiyah Al-Dasūqī ‘alā al-Sharḥ al-Kabīr*, (place of publication unknown though most likely it was Cairo: Dār Iḥyā’ al-Kutub al-Arabiyyah, commentary by Muhammad ‘Alīsh, nd), 2:188.

where Muslims reside in, even if there are *dhimmi*s living there. —Or land that Muslims conquered but maintained it under non-Muslims or they resided therein but were later expelled by non-Muslims.<sup>29</sup> The *Hanbalī* definition is concordant to al-Kāsānī and al-Dasūqī's definition. Ibn Muflīḥ (d. 884/ 1479) writes that *Dār al-Islām* is every place where the law of Muslims is predominant.<sup>30</sup> There is hardly any disagreement regarding the definition of *Dār al-Ḥarb*, although jurists have phrased it in different ways. It largely centers on the absence of Muslim law and the dominance of non-Muslim law in a country.<sup>31</sup> Al-Shaybānī (d. 189/805) and Abū Yūsuf (d. 182/798) defined *Dār al-Ḥarb* as, “A country in which non-Muslim law is manifest.”<sup>32</sup> The opinions of al-Dasūqī<sup>33</sup> and Ibn Muflīḥ<sup>34</sup> concur with this definition. It is noteworthy that one of the consequences that were considered to have happened on account of non-Muslim law manifesting is the loss of Muslim authority in that particular land. As a result of that, safety and security provided by the Muslim government has been lost for its inhabitants, and a certain degree of lawlessness manifests.<sup>35</sup>

The importance of having boundaries and borders is mandatory for all aspects relating to land. Borders and boundaries clarify the rights and responsibility for the proprietor. By identifying which territory is ‘Islamic’ clarifies the rights and responsibility of the Muslim government.<sup>36</sup> On an international level, borders and boundaries are crucially pertinent to the question of accountability. If territories are not marked out, then it would be difficult to hold

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<sup>29</sup> Sulaymān bin Muhammad bin ‘Umar al-Bujayrimī, *Sharḥ al-Bujayrimī ‘Alā al-Khatīb*, (Beirut: Dār al-Mā‘rifah, 1978), 4:331-332.

<sup>30</sup> Muḥammad Ibn Muflīḥ, *Al-Ādāb al-Shar‘iyyah*, (Beirut: Mu’assasah al-Risālah, edited by Shu‘ayb al-Arnaūṭ and ‘Umar al-Qayyām, 1996), 1:211-212.

<sup>31</sup> Al-Ṭarīqī, *Al-Isti‘ānah*, 172-173; Abū Zahrah, *Al-‘Ilāqāt al-Dawliyyah*, 56-57; Zaydān, *Aḥkām al-Dhimmiyyīn*, 17-18, Ḍamīriyyah, *Manhaj al-Islām*, 57, Al-Zuhaylī, *Āthār al-Ḥarb*, 176-177, Ibn Qayyim, *Aḥkām Ahl al-Dhimmah*, 1:268.

<sup>32</sup> Al-Ṭarīqī, *Al-Isti‘ānah*, op. cit., p.173.

<sup>33</sup> Al-Dasūqī, *Ĥāshiyah*, 2:188.

<sup>34</sup> Ibn Muflīḥ, *Al-Ādāb*, 211-212.

<sup>35</sup> Abū Zahrah, *Al-‘Ilāqāt al-Dawliyyah*, 56-57; Zaydān, *Aḥkām al-Dhimmiyyīn*, 17-18, Ḍamīriyyah, *Manhaj al-Islām*, 57.

<sup>36</sup> Such as the implementation of *Sharī‘ah* law, the levying of different taxes such as *zakah*, *kharāj* (land tax) and *‘ushr* (tithe), and the like.

people to account.<sup>37</sup> By marking out the Islamic territories, Muslim rulers were able to manage the affairs of Muslims and accordingly apply the law of Islam.<sup>38</sup> Furthermore, jurists were able to develop international law such as trade, criminal law and visa requirements.<sup>39</sup>

In terms of international relationships, the socio-political structure of the world during early period of Islam was that there was a complete absence of international organisations capable and competent of bringing leaders of countries or leaders of the region together onto one platform, and creates mutual understanding of peace and security. This resulted in a lack of security and safety for a person's self and property, in particular when travelling out of their domicile. A lack of security and safety compelled the local communities to work together and recognize the sovereignty of other leaders.<sup>40</sup> Pacts of peace, understanding, co-operation and protection created security. To ignore any political involvement and sovereign recognition resulted in danger and exposure to harms way. During a primitive era, this was the most suitable way of getting people to cooperate.

Muslim jurists argued that Islam welcomes Muslims and non-Muslims to reside as inhabitants of *Dār al-Islām*. Non-Muslim residents of *Dār al-Islām* enjoy a special status which other non-Muslims outside *Dār al-Islām* do not enjoy. Non-Muslim inhabitants of *Dār al-Islām* were known either as *dhimmīs* or *mu'āhids*.<sup>41</sup> The inhabitants of *Dār al-Ḥarb*, on the other hand were known as *ḥarbīs* regardless if they were Muslims or non-Muslims. Domicile and religion played an important factor in the minds of jurists when deciding the legality of arms trade. The nub of the matter of a state being designated as *Dār al-Ḥarb*

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<sup>37</sup> For instance, if a non-Muslim were to enter Muslim territory as a *musta'man* and was killed or his property violated then the Muslim government is answerable for not providing such a person with security as well as rendering compensation, and the same applies vice-a-versa.

<sup>38</sup> Ismā'īl Luṭfī Faṭṭānī, *Ikhtilāf al-Dārayn wa Atharuhū fī Aḥkām al-Munākahāt wa'l-Mu'āmalāt*, (Cairo: Dār al-Salām, 1998), 77.

<sup>39</sup> Ibid.

<sup>40</sup> Akram Ḍiyā' al-'Umarī, *Madīnan Society at the Time of the Prophet*, (Washington: The International Institute of Islamic Thought, translated by Hudā Khaṭṭāb, 1991), 19.

<sup>41</sup> Non-Muslims given safe passage to reside in *Dār al-Islām* or citizens of *Dār al-'Ahd*.

implied that there were no treaties between it and the Islamic state. The absence of any treaties meant that hostilities could take place at anytime between the two countries.<sup>42</sup>

Potential threats of attack were a key factor jurists took into consideration when deciding the legality of arms trade.

### **2.1.1 The Sale of Weapons**

Unlike today where the manufacture of weapons is produced by giant multi-billion pound weapon companies and regulated and control under strict rules and regulations by the state, the sale of arms during the classical period of Islam was very much a private affair. Weapons were manufactured by either individuals or because it is a highly skilled job it was most likely bespoke order from skilled professional artisans or blacksmiths. The Qur'an does not discuss the issue of arms trade in any clear terms. A legal lacuna resulting from a dearth of strong evidence both from the Qur'an and Sunnah forced jurists to look at arms trade from a different outlook rather than the traditional legalistic angle. Shaping and influencing juristic thoughts in this matter were perhaps the fact that weapons are primarily designed to kill. Destruction of life is a grave matter in Islam.<sup>43</sup> In the absence of clear-cut scriptural guidance, the many Qur'anic verses condemning killing and extoling preservation of life pushed jurists towards dealing with arms trade from an ethical angle. The Qur'anic ethical theme of preserving life caused jurists to extrapolate an ethical axiom to regulate arms trade. The axiom focused on the suitability of the contractors as a backdrop to the ethical theme. From the Islamic perspective the sale of weapons is a commercial contractual issue and as such it must fulfil the requirements of Islamic contractual law. There are three main components to a commercial contract: the contractors, the merchandise and the verbal agreement to do business. However, in arms trade the suitability of the contractors is not based on the conventional stipulations pertaining to contractual capacity (*ahliyyah al-'adā'* and *ahliyyah*

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<sup>42</sup> Hussain, *Dār al-Islām and Dār al-Ḥarb*, 130-132.

<sup>43</sup> Qur'an 5:32.

*al-wūjūb*). Instead contractor-suitability in the trading of arms was based on religion. The question of arms trade and arms embargo has to be looked at in two possibilities: the sale of arms between Muslims and the sale of arms between Muslims and non-Muslims. Furthermore, because Islamic law has divided non-Muslims in different categories the issue of trading weapons with non-Muslims varies depending on their political status.

## **2.2 The Sale of Weapons between Muslims in *Dār al-Islām***

Keeping in mind the ethico-legal axiom of arms trade Muslim jurists accordingly regarded the sale of weapons between two Muslims or more as appropriate provided the transaction takes place in *Dār al-Islām*. In like manner, the licence to buy weapons was not restricted to the quantity or size of the weapons. Muslims were permitted to manufacture and trade in arms freely amongst themselves.<sup>44</sup> There are two reasons for this: firstly, the more obvious point is that there is no prohibition from the Qur'an or the Sunnah in arms trade between Muslims. Secondly, as previously pointed out Muslims had to observe the obligation of jihad in defence of Islam. Jihad being an obligation meant that Muslims had to have the necessary equipment to carry out this duty. This was prior to the state providing arms for the army, which according to al-Hassan is traced back to the time of 'Umar where the 'state undertook to provide the regular soldiers, who were unable to secure their own weapons, with the necessary equipment. Weapons which were supplied by the government were specially marked. 'Ali established the armouries or weapons warehouses (*khazā'in al-silāḥ*), and he

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<sup>44</sup>Muhammad bin Ḥasan al-Shaybānī, *Sharḥ Kitāb al-Siyar al-Kabīr*, (Beirut: Dār al-Kutub al-'Ilmiyyah, edited by 'Abdullāh Muhammad Ḥasan Muhammad Ḥasan Ismā'īl al-Shāfi'ī, 1997), 4:284-285; Abū 'Abdullāh Muhammad bin Muhammad bin 'Abd al-Raḥmān al-Maghribī al-Ḥaṭṭāb, *Mawāhib al-Jalīl li-Sharḥ Mukhtaṣar Khalīl*, (Beirut: Dār al-Kutub al-'Ilmiyyah, edited by Zakariyyā 'Imarāt, 1995), 6:49; Saḥnūn bin Sa'īd al-Tanūkhī, *Al-Mudawwanah Al-Kubrā*, (Beirut: Dār al-Kutub al-'Ilmiyyah, edited by, Aḥmad 'Abd al-Salām, 1994), 3:294; Shams al-Dīn Muhammad bin Muhammad al-Khaṭīb, al-Sharbīnī, *Mughnī al-Muḥtāj Ilā Ma'rifah Ma'ānī Alfāz al-Minhāj*, (Beirut: Dār al-Kutub al-'Ilmiyyah, edited by 'Ali Muhammad Mu'awwid and 'Ādil Aḥmad 'Abd al-Mawjūd, 1994), 2:338; Abū Muhammad 'Ali bin Ahmad bin Sa'īd Ibn Ḥazm, *Al-Maḥallā bi al-Āthār*, Beirut: Dār al-Fikr, ed. 'Abd al-Gaffār Sulaymān al-Bandarī, 2001), 7:574, Ibn 'Abd al-Barr, *Al-Kāfi*, 211-212.

marked the government's weapons with special signs.<sup>45</sup> It seems that contrary to there being scriptural reasons banning arms trade between Muslims the scriptures obligated Muslims to produce and possess weapons. This is supported by the Qur'an, "And make ready against them all you can of power, such as steeds of war to threaten the enemy of Allah and your enemy."<sup>46</sup> Also, "Take all precautions and bear arms. The unbelievers wish that you are negligent of your arms and belongings, so they may assault you in single rush."<sup>47</sup>

Although the general message is that Muslims could trade in arms freely and unrestricted amongst themselves, research into *ḥadīth* uncovers a special ground for the prohibition of arms trade. There is a weak (*ḍa'īf*) tradition recorded by al-Bayhaqī banning the sale of weapons during the time of *fitnah*.<sup>48</sup> Explaining the meaning of '*fitnah*', Niyāz in his doctoral thesis remarks that it is when fighting erupts amongst Muslims, regardless if the fight is between two Muslims or more, two tribes or more, civil war or between countries.<sup>49</sup> Despite the prophetic tradition being classed as weak, it is interesting to note that the classical jurists of the formative period agreed with the ban based on a weak *ḥadīth* despite their strictness of accepting weak *ḥadīth*.<sup>50</sup> The absence of clear Qur'anic and prophetic instructions made this issue transcend from the purely legalistic realm into looking at the ethical consequences of such actions. The jurists found the Qur'anic verse, "And co-operate in good and piety and do

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<sup>45</sup> *The Different Aspects of Islamic Culture: Science and Technology in Islam*, (Beirut: UNSECO Publishing, ed. al-Hassan, A.Y., Co. Editors, Ahmad, Maqbul, Iskandar, A.Z., 2001), 4:82-83.

<sup>46</sup> Qur'an 8:60.

<sup>47</sup> Qur'an 4:10.

<sup>48</sup> Abū Bakr Aḥmad bin Ḥusayn bin 'Alī al-Bayhaqī, *Al-Sunan al-Kubrā*, (Pakistan: Irdāra Ta'līfāt Isrāfiyyah, nd.), 5:327 (some have classified this tradition to be weak however al-Bayhaqī asserts that this tradition is suspended (*mawqūf*) (Ibid).

<sup>49</sup> Muhammad Iyāz Muhammad Niyāz, *Al-Aḥkām al-Muta'allaq bi Ikhtilāf al-Dārayn*, (PhD diss., University of Al-Azhar, Cairo, 2004), 441.

<sup>50</sup> Al-Shaybānī, *Al-Siyar al-Kabīr*, 4:284-285, Al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, 6:49, Saḥnūn, *Al-Mudawwanāh*, 3:294, Al-Sharbīnī, *Mughnī al-Muḥtāj*, 2:338, Ibn Ḥazm, *Al-Muḥallā*, 7:574, Ibn 'Abd al-Barr, *Al-Kāfī*, 211-212.

not co-operate in vice and transgression”<sup>51</sup> as the basis for the ethical precept banning the sale of weapons when it came to fuelling war and conflict that will lead to meaningless death.

In the case of civil armed conflict with the state I have not found classical jurists talking explicating about selling arms to either parties. Based on the weak prophetic *ḥadīth* it can be inferred that if it was a matter of unlawful rebellion against the State then selling weapons to the State is lawful. This is because upholding the integrity of the state is a religious duty, and unlawful rebellion necessitates armed conflict.<sup>52</sup> This is contrary to arming the rebels, which would be unlawful because it is fuelling conflict and profiteering from human misery and supporting vice. The generality of the afore-cited traditions imply that the same is true when conflict has erupted among non-Muslims. This is because the tradition makes no distinction between religions. Secondly, fuelling conflict by supplying arms will lead to meaningless death and profiteering from human misery. Unlawful rebellion within non-Muslim countries is also of no consequence to the Muslims, and supplying arms to either party is also unlawful, unless it is known with reasonable certainty that the uprising will be significantly harmful for the Islamic state and Muslims. In such an instance a case can be made for selling arms in order to pre-empt any harm to Muslim interests.

### **2.2.1 The Sale of Weapons to *Ḥarbīs***

Whereas the ethical case of weapons trade was based on the consideration of it causing death in general, the focus of arms trade with non-Muslims shifted to a case of causing death to Muslims. In other words, the question Muslim jurists had to answer was, is it ethical to arm ‘potential enemies’ with weapons that could be later used against Muslims. With this in mind Muslim scholars found reasonable excuse to prohibit the sale of weapons by Muslims to

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<sup>51</sup> Qur’ān 5:2.

<sup>52</sup> Al-Māwardī, *Al-Aḥkām al-Sulṭaniyyah*, 88-93.

*ḥarbīs*.<sup>53</sup> Their ethical approach to this matter was underpinned by the general connotations of the Qur'anic verse which condemns supporting vice as well as the prophetic tradition prohibiting arms trade used to fuel war. Quoting the verse, "And obey Allah and His Messenger and do not dispute lest you loose courage and your strength depart"<sup>54</sup> Niyāz remarks that selling arms to *ḥarbīs* would weaken the Muslims, put them in peril and cost many Muslim lives.<sup>55</sup> For the jurists the anecdotal evidences amassed beings to develop into an undeniable case for the prohibition of selling arms to *ḥarbīs*, and subsequently a unanimous agreement of the impermissibility of unilateral trading arms with non-Muslims.<sup>56</sup> This ruling is irrespective of territorial differences and applies to exports of arms to non-Muslim countries which have treaties of agreement with Muslims. Al-Sarakhsī, writes in the *al-Mabsūṭ*, "There is no problem for Muslim merchants to take merchandise to non-Muslim territories (*Dār al-Ḥarb*) except animals (*kurā'*)<sup>57</sup>, weapons and metal. [...], even if there is a covenant. Do you not see that after the period of the covenant expires they will resume war on Muslims?"<sup>58</sup>

### **2.2.2 Buying Arms from Non-Muslims and International Bilateral Exchange of Weapons between *Dār al-Islām* and *Dār al-Ḥarb***

It seems that jurists regarded the prohibition of arms trade with non-Muslims was a 'one-way' affair. The jurists maintained that although Muslims are prohibited from selling weapons to non-Muslims they are however permitted to buy weapons from non-Muslims. To substantiate their view the jurists argue that the Prophet borrowed an amour off Ṣafwān bin

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<sup>53</sup> Al-Shaybānī, *Al-Siyar al-Kabīr*, 4:284-285, Al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, 6:49, Saḥnūn, *Al-Mudawwanāh*, 3:294, Al-Sharbīnī, *Mughnī al-Muḥtāj*, 2:338, Ibn Ḥazm, *Al-Muḥallā*, 7:574, Ibn 'Abd al-Barr, *Al-Kāfi*, 211-212.

<sup>54</sup> Qur'ān 8:46.

<sup>55</sup> Niyāz, *Ikhtilāf al-Dārayn*, 441.

<sup>56</sup> Al-Shaybānī, *Al-Siyar al-Kabīr*, 4:284-285, Al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, 6:49, Saḥnūn, *Al-Mudawwanāh*, 3:294, Al-Sharbīnī, *Mughnī al-Muḥtāj*, 2:338, Ibn Ḥazm, *Al-Muḥallā*, 7:574, Ibn 'Abd al-Barr, *Al-Kāfi*, 211-212.

<sup>57</sup> Animals capable of carrying a load such as cows, camels and the like.

<sup>58</sup> Al-Sarakhsī, *Al-Mabsūṭ*, 10:105-106.

Umayyah (who was a polytheist then) during the battle of Ḥunayn.<sup>59</sup> Although borrowing is not the same as buying yet in Muslim law the rules of borrowing (*isti'ārah*) falls under the category of contracts in the sense that if the actual item is lost or damaged then it must be paid for or replaced. To further strengthen their opinion jurists assert that this transaction is concordant to the ethico-legal teachings of the Qur'an which states, "And make ready against them all you can of power, such as steeds of war to threaten the enemy of Allah and your enemy."<sup>60</sup> This verse thus commands Muslims to arm themselves against any attacks.

Answering the question whether it was permissible to exchange weapons with *ḥarbīs*, jurists did not see a problem with it, but with the condition that the weapons sold by Muslims should not be inferior to the *ḥarbīs*.<sup>61</sup> The proof jurists use to support their opinion is the tradition related by Dhū al-Jūshan al-Ḍabābī<sup>62</sup> who said, "After the Battle of *Badr*, I came to the Prophet (peace be upon him) with my horse call *al-Qurāa*' and said "O Muhammad! I have come to you with my horse do you want it [i.e. buy it]. The Prophet replied, "I do not need it but if you want you can exchange it for one of the amours." I [Dhū al-Jūshan al-Ḍabābī] replied I cannot exchange something precious for what you offer". The Prophet replied, "Then I do not need it."<sup>63</sup> This tradition proves two points; firstly, that the Prophet was willing to exchange weapons with a non-Muslim and secondly, the Prophet offered him a weapon of lesser worth than what Dhū al-Jūshan al-Ḍabābī was offering. This tradition put together with the afore-cited evidence of not arming non-Muslims was good enough for jurists to come to their opinion.

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<sup>59</sup> Abū Dāwūd, *Sunan Abī Dāwūd*, *Ḥadīth* No. 3562, 3563.

<sup>60</sup> Qur'an 8:60.

<sup>61</sup> Ibn Ḥazm, *Al-Muḥallā*, 7:574, Al-Shaybānī, *Al-Siyar al-Kabīr*, 4:291-292, Saḥnūn, *Al-Mudawwanah*, 3:294.

<sup>62</sup> He is Dhul-Jushan Bin al-Awarbin 'Amr bin Mu'āwiyyah. He later became a Muslim.

<sup>63</sup> Abū Dāwūd, *Sunan Abī Dāwūd*, *Ḥadīth* No. 2577, Abū Bakr Aḥmad bin Ḥusayn bin 'Alī al-Bayhaqī, *Al-Sunan al-Kubrā*, (Lahore: Irdāra Ta'līfāt Isrāfiyyah, nd), 9:108.

### 3.1. The Sale of Raw Materials

‘That which leads to an unlawful act (*ḥarām*) is also unlawful’.<sup>64</sup> This axiom presents a problem. If it is established that arms trade with non-Muslims is not permissible then a bi-product of this ethico-legal edict entails that raw materials which can be used to make weapons should also be proscribed. The embargo of selling raw materials was not agreed by all jurists. The *Ḥanafīs* and *Mālikīs* hold the sale of raw materials to be impermissible.<sup>65</sup> Al-Shaybānī writes, “It is disliked (*makrūh taḥrīmī*) to take any types of weapons whether small or big even a needle into *Dār al-Ḥarb* (if it assists *ḥarbīs* in fighting Muslims) and the same applies to raw metals...”<sup>66</sup> Mālik said in response to a question about selling *ḥarbīs* weapons and raw materials, “Selling any items that can be used to disadvantage Muslims in war [...] such as weapons, animals, copper or the like is not permissible.”<sup>67</sup> However, the *Shāfi‘īs* and *Ḥanbalīs* and some *Ḥanafī* jurists like Ibn al-Humām<sup>68</sup> say it is permissible to sell raw materials such as copper, metal, iron and the like to *ḥarbīs*.<sup>69</sup> Their argument is that metal can be used for weapons as well as other use and *ḥarbīs* have not specified its use therefore there is no reason for its prohibition.<sup>70</sup> Ibn al-Humām says in his commentary of *Al-Hidāyah*,

“As for items not used for fighting there is no problem in [trading in] it, but it is disliked.”<sup>71</sup>

In the *Mughnī al-Muḥtāj* it says,

“...this is contrary to the sale of raw materials which can be used for making weapons such as metals because they have not specified what they will use it for. However, if

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<sup>64</sup> ‘Alā’ al-Dīn al-Kasānī, *Badā’i ‘al-Ṣanā’i ‘fī Tartīb al-Sharā’*, edited by ‘Ali Muḥammad Mu‘awwid and ‘Ādil Aḥmad ‘Abd al-Mawjūd, (Beirut: Dār al-Kutub al-‘Ilmiyyah, 1997), 1:157

<sup>65</sup> Al-Shaybānī, *Al-Siyar al-Kabīr*, 4:284-285, Saḥnūn, *Al-Mudawwanah*, 3:294.

<sup>66</sup> Ibid.

<sup>67</sup> Saḥnūn, *Al-Mudawwanah*, 3:294.

<sup>68</sup> Like Ibn al-Humām.

<sup>69</sup> Al-Sharbīnī, *Mughnī al-Muḥtāj*, 2:338.

<sup>70</sup> Ibid.

<sup>71</sup> Ibn al-Humām, *Fatḥ al-Qadīr*, 6:462.

it is believed that they would make it for weapon then it is the same as selling grapes to a winemaker [i.e. unlawful].”<sup>72</sup>

What becomes apparent from the opinions of the jurists is that they focused on whether or not *ḥarbīs* would use raw materials provided by Muslims to attack Muslims. The overriding concern Muslim jurists had regarding selling readymade weapons to *ḥarbīs* was to protect Muslims from harm by not arming non-Muslims who may attack them in the future. For the *Ḥanafīs* and *Mālikīs* this concern was absolute thus they deemed that the threat was not only limited to selling readymade weapons but also raw materials whence weapons can be made. The *Shāfi‘īs* and *Ḥanbalīs* on the other hand did not see a threat in providing raw materials which could be used for something else due to its versatile nature. However it is unanimously agreed that if the likelihood is that such a nation would produce weapons and be a threat for Muslims then it is not permissible.<sup>73</sup> The *Shāfi‘ī* and *Ḥanbalī* opinion displays a broader thinking in that not all *Dār al-Ḥarbs* are a threat. Engaging in bilateral trade and providing products essential to daily life does not violate the *Sharī‘ah* but also maintains a healthy and friendly relationship which could lead to such a nation becoming *Dār al-‘Ahd*. However, if there is a threat that *ḥarbīs* may use such material for making arms or re-sell it to other hostile nations then it would not be reasonable to assume that such nations would face an embargo.

Developing the rule further, Niyāz argues that any product, which is not apparently seen to be ‘raw materials’ but can be used either directly or indirectly as weapons is also unlawful to sell to ‘non-Muslims’.<sup>74</sup> He gives examples of uranium and crude oil as ‘raw materials’ and qualifies ‘non-Muslims’ as those countries who have taken a hostile stance against Islam

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<sup>72</sup> Al-Sharbīnī, *Mughnī al-Muḥtāj*, 2:338.

<sup>73</sup> Ibid.

<sup>74</sup> Niyāz, *Ikhtilāf al-Dārayn*, 448.

and Muslims, occupying Muslim land and aiding other non-Muslims in transgressing against Muslims.<sup>75</sup> Niyāz argues that although uranium and crude oil are not weapons yet they are as effective as weapons since it is used to fuel weapons of extreme power.<sup>76</sup> The crux of Niyāz's argument is that if the ethico-legal axiom of arms trade is to retain the upper hand in the event of war, then the *Shāfi'ī* and *Ḥanbalī* view needs to be revised. Although legalistically speaking raw materials (of which crude oil and uranium are) are not forbidden in transactions between Muslims and *ḥarbīs* yet the shift in the political paradigm means that the reality Muslims face today where certain non-Muslim countries have manifestly declared hostilities either directly or indirectly through war or aiding other belligerent nations in the killing and persecution of Muslims necessitates a comprehensive arms embargo upon such nations. Niyāz asserts that this view would be concordant with the *Shāfi'ī* and *Ḥanbalī* view because they allow the trading of raw materials to *ḥarbīs* provided it is not used in aggression against Muslims.<sup>77</sup>

### **3.2. The Sale of Weapons to *Ahl al-Dhimmah***

Does the ethico-legal paradigm of arms trade to non-Muslims change if the non-Muslim was an inhabitant of *Dār al-Islām*? Jurists did not see this as a problem.<sup>78</sup> There were two factors which shaped this position. Firstly, jurists believed that a *dhimmī* would not act against the interest of his country, since his life, wealth and prosperity all lay in the existence of the state. On the other hand, if there is the possibility that a *dhimmī* would sell the weapons on to *ḥarbīs* the jurists reacted by regarding it as impermissible.<sup>79</sup> The second factor was that it is recorded that the Prophet Muhammad died and his armour was left as a pawn with a *dhimmī*

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<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Al-Sharbīnī, *Mughnī al-Muḥtāj*, 2:338, Niyāz, *Ikhtilāf al-Dārayn*, 448.

<sup>78</sup> Niyāz, *Ikhtilāf al-Dārayn*, 450-451, Al-Sharbīnī, *Mughnī al-Muḥtāj*, 2:338, Al-Shaybānī, *Al-Siyar al-Kabīr*, 4: 285.

<sup>79</sup> Al-Sharbīnī, *Mughnī al-Muḥtāj*, 2:338, Al-Shaybānī, *Al-Siyar al-Kabīr*, 4:285.

Jew.<sup>80</sup> There are two noteworthy points deducible from this tradition: firstly, the Prophet left an item used in warfare with a non-Muslim, and secondly, although a pawn contract and a sale contract are different yet a pawn contract shares common features to that of a sale contract, in the sense that if the person cannot repay his debt then the pawned item becomes the property of the pawnbroker.

#### **4. Conclusion**

The jurists' approach to arms trade focused on two points: 1- preventing Muslim death and, 2- avoiding arming potential enemies. Warfare in Islam is governed by strict rules of engagement. Not only were the rules of engagement important, but other external and peripheral factors linked to conflict were also considered by jurists. If the objective of war is to defeat the enemy it would be imprudent to supply them with arms. The recent extradition of the British businessman Christopher Tappin<sup>81</sup> to the United States of America to face allegations of attempting to supply missile components to Iran is an example of how serious arms trade is regarded to a hostile nation. The ethico-legal principles of arms trade and arms embargo developed by Muslim jurists was typical to what any nation would have as its commercial foreign policy regarding arms. The main concern of any government would be to preserve territorial integrity and maintain the best interest of the people it serves.

What this research discovers is that early Muslim jurists could not find explicit texts from the Qur'an or Sunnah detailing the rules of arms trade. Unable to deal with weapons as a normal mercantile commodity, the jurists broke away from the traditional approach of deducing law and changed their method by looking at arms trade from an ethical angle or a common sense approach. Although it would be difficult to argue that *qiyās* did not have any

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<sup>80</sup> Abū 'Abdullāh Muḥammad bin Ismā'īl al-Bukhārī, *Saḥīḥ al-Bukhārī*, (in the Mawsū'ah al-Ḥadīth al-Sharīf) Riyad; Dār al-Sālām, edited by, Ṣāliḥ bin 'Abd al-'Azīz bin Muḥammad bin Ibrāhīm Āl al-Shaykh, 1999), 234, *Ḥadīth* No. 916.

<sup>81</sup> He was extradited to the United States of America on the 24<sup>th</sup> February 2012.

role in juristic thought in this issue, it can however be safely argued that *qiyās* did not play a major role as did common sense in this issue. I maintain this on the grounds that jurists changed the rules regarding contractual capacity and added a new stipulation of ‘religion’ to regulate this type of transaction. This addition was more based on pragmatical ethical grounds rather than textual grounds (*nuṣūṣ*). Furthermore, the traditions of Ṣafwān bin Umayyah and Dhū al-Jūshan al-Ḍabābī only provide circumstantial and anecdotal evidences, but nothing in the way of clear allowance or prohibition of arms trade. Hence, it is not surprising to see books of jurisprudence largely silent from quoting *nuṣūṣ*.

The issue of arms trade or embargo is a rare example of how ethics/common sense dominated and influenced juristic thoughts more than a legalistic investigation of the primary sources of the law. The meta-ethics behind the juristic thought becomes clear in the applied ethics in that the rules of arms trade was a case of ethico-pragmatic jurisprudence rather than the traditional root of it being extrapolated from pure Qur’anic or *sunnī* precepts. This so-called ‘ethico-pragmatic approach’ is not a unique feature to Islamic jurisprudence or a principle developed by early Muslim jurists. It came about through a process of pragmatically dealing with a sensitive issue that lacked clear-cut guidance from the primary sources of its law. If normative ethics suggests that the government’s primary responsibility is to protect the people it serves, then the policy of arms embargo to potential hostiles was not only suitable for the era of the early Muslims, but still holds good today.

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