



THE CONDUCT AND REGULATION OF JIHĀD UNDER ISLAMIC INTERNATIONAL LAW

By

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Abstract

The event of September 11 attracted wide condemnation of jihād, with some seeing it as the source that gave right to Muslims to engage in terrorism. The Orientalist views of jihād tend to be dominant in the West that portrays the system as violent, intolerant, barbaric and backward. Islamic law, has, however contributed immensely to the laws of war, by introducing rules and procedure in the event of war which today can be found in the Humanitarian laws and the Geneva Conventions. This doctrine called as-Siyar forms the backbone of the doctrine of the Islamic law of war. Using doctrinal legal research methodology combined with historical and analytical techniques, this paper highlighted the concept of jihād and its classes under Islamic International law, clarified the misconception surrounding jihād as ‘holy war’ and examined the concept of as-Siyar, the use of force and its limitations in the conduct of military form of jihād. It concluded with a key finding that peace is the normative rule regarding the relations between Muslims and non-Muslims, while the use of force in the form of military form of jihād is only an exception.

Keywords: Jihād, Siyar, Qitāl, Islamic International Law

1.0 INTRODUCTION

The semantic meaning of the Arabic term, *Jihād*, is unrelated to holy war and not an equivalent synonym of war in general terms. In reality, the term *jihād* is derived from *ja-ha-da*. It means to struggle or strive, exert oneself, or take extraordinary pains.¹ *Jihād* is a verbal noun of *jā-ha-da*, which is defined classically as exerting one’s utmost power, efforts, endeavours, or ability in

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¹M Khadduri *War and Peace in the Law of Islam* (The Lawbook Exchange Ltd New Jersey 2006) 55

contending with an object of disapprobation. Such an object is often categorized in the literature as deriving from one of three sources: a visible enemy, the devil, and aspects of one's own self. Thus, there are many kinds of *jihād*, and most have nothing to do with warfare. '*Jihād* of the heart', for example, denotes struggle against one's own sinful inclinations, while '*Jihād* of the tongue' requires speaking for good and forbidding evil.² In Islam, any act done for the sake of Allāh that requires hardship, struggle and persistence can be called *jihād*. This may come in diverse forms including intellectual ability, wealth, physical strength etc. in so far they are used in the way of Allāh. The *raison d'être* is that one who practices *jihād* will gain tremendously in the hereafter, more so for one who dies in a military form of *jihād*.³

Jihād is primarily an emphasis on the individual. *Jihād* also includes the striving and establishing of justice. Before one can strive for justice in his or her community, justice must be one of his or her main religious and moral principles. *Jihād* may also reflect the war aspects in Islam. The fighting of a war in the name of justice or Islam, to deter an aggressor, for self-defence, and or to establish justice and freedom to practice religion, would also be considered a *jihād*.⁴ The Prophet Muhammad (PBUH) was reported to have said, '*The best jihād is speaking a word of justice to a tyrannical ruler*'.⁵ The activity of *jihād* can as well be represented in striving to behave ethically and by speaking without causing harm to others or by actively defending Islam and propagating the faith. *Jihād* as religiously grounded warfare, sometimes referred to as '*Jihād al-Saif*' (*Jihād* of the sword), is subsumed under defending Islam and propagating the faith, though this need not be accomplished through war means alone. When the term is used without qualifiers such as 'of the heart' or 'of the tongue', however, it is universally understood as war on behalf of Islam (equivalent to '*Jihād* of the sword'), and the merits of engaging in such *Jihād* are described plentifully in referenced religious works such as *Fiqhī* literature.⁶

Muslims scholars cite textual evidence from the Qur'ān and Sunnah to put forward the argument that in Islamic tradition (as opposed to popularly held belief), war is an aberration and a condition which may be resorted to only under unavoidable circumstances. The merit of this view as advanced lies in the fact that Islam's relations with other nations –as originally expounded by the Prophet (PBUH)– was based on the principle of peaceful and non-hostile

²F Reuven *Jihad: The Origin of Holy War in Islam* (Oxford University Press, New York, Oxford, 1999) 16-17

³ T Muhammad and MK Muhammad, *Translation of the meanings of The Noble Qur'an in the English Language*, (King Fahd Glorious Qur'an Printing Complex, Madinah, Saudi Arabia, 1983)

⁴ G Hyder *Islam, Law and War*, available online at <https://hyderg.files.wordpress.com>, accessed on 05/04/2023.

⁵ I Abu Dawud, *Sunan Abu Dawud* (Hadith 2332, Vol. 1, Muassasat al kitab al-Thaqafiyah, Beirut, 1408/1988) 712

⁶Reuven F., op.cit., 17

relations among nations.⁷ There is also legal authority in the Qur'ān on settlement of disputes through arbitration and negotiation and avoidance of the use of force in international relations.⁸

Although, an array of Qur'ānic verses and *Hadīth* literature render *jihād* obligatory on every Muslim male, yet it is not considered a personal duty but rather a general duty which, if accomplished by a sufficient number, the rest will not be condemned for the neglect of that duty – this fact places conduct of *jihād* entirely in the exercise of political authority. The section of the population exempted from participating in *jihād* include children and the blind, lame, old, sick or the very poor. Women and slaves are also generally exempted from military service.⁹

2.0 CONCEPTUAL CLARIFICATION: SIYAR, JIHĀD AND QITAL IN CONTEXT

Siyar is an Arabic term and the plural form of *sīrah*. It literally means conduct, practice, comportment, behaviour, way of life, attitude, or acceptable behaviour. It can also be translated to mean campaigns.¹⁰ *Sīrah* also denotes condition, state; situation or form, shape; exterior appearance, guise, aspect. Allāh says regarding Prophet Musa's staff: 'We shall return it to its former state'.¹¹ The term, *siyar* has been subjected to various interpretations and used to denote different things by Islamic scholars, historians and traditionists. Muslim Jurists use it to designate the conduct of Prophet Muhammad (PBUH) relating to the laws of war, dealing with rebels, apostates, and non-Muslim citizens of Muslim state. In *Shari'ah*, *siyar* is described to refer to issues regarding the laws of war.¹² *Siyar* has been defined as "that part of the law and custom of the land and treaty obligations which a Muslim *de facto* or *de jure* state observes in its dealings with other *de facto* or *de jure* States."¹³ *Siyar* is also understood as an extension of Islamic law "designed to govern relations of the Muslims, whether inside or outside the world of Islam."¹⁴ Another definition of the science of *siyar* was attempted by a researcher who asserted that, "these are rules for relations with non-Muslims in *dār al-Harb* and *dār al-*

⁷ SA Shaheen. and R Javaid *The Concept of Jihad in Islamic International Law* (2005) Journal of Conflict & Security Law, 10, 3: 331

⁸ An injunction from the Glorious Qur'ān states: 'If two parties among the believers fall into a quarrel, make peace between them' (Al-Hujurāt: 9); 'And if they incline to peace, then incline to it [also] and rely upon Allāh. Indeed, it is He who is the Hearing, the Knowing.' (Al-Anfāl: 61)

⁹ Shaheen S.A. and Javaid R., op. cit., 333

¹⁰ Muhammad M., *Islamic International Law (Siyar): An Introduction*, 1. Available online at <http://ssrn.com>, accessed on 05/04/2023

¹¹ Tāhā: 21

¹² M Muhammad, op. cit., 3

¹³ M Hamidullah *The Muslim Conduct of State* (Sheikh Muhammad Ashraf, Lahore, 1996) 3

¹⁴ K Majid *War and Peace in the Law of Islam* (The John Hopkins Press, Baltimore 1955) 46; Majid K., *Al-Harb wa Al-Silm fī Shari'ah al-Islām* (Al-Dār al-Mutahidah, Beirut 1973) 17

Islām during war and peace.”¹⁵ The last definition, however, seems to be an abstract object that is irrelevant and does not fit in the present day circumstances, because Muslim states of the contemporary time deal with their non-Muslim citizens according to their constitutions and not according to *siyar* (Islamic international law). Since the emergence of the concept of modern state, following the colonial division of territories, are regarded as Abode of Covenant (*dār al-Ahd/dār al-Sulh*) premised on a defined territory, constitutional order and citizenship. Muslims today are not completely able to fully implement the laws of *Sharī’ah* and have, thus, become partners in nation-building with non-Muslims and enjoy equal rights and duties. Consequently, the term, *ahl adh-Dhimmah* as used for non-Muslims in the context of *dār al-Islām* (abode or territory of Islam) no longer applies in many countries of the world.¹⁶

The definition that seems to be much better than others as it seems to be in accord with the present day scenario is the one where *siyar* is described as “that set of norms and rules of Islamic law that are binding for the Muslim state in its relations with other states.”¹⁷ Those rules and principles of Islamic law that regulate relations between the Muslim state and other states are designated as Islamic International law. These rules are binding on the Muslim state because of *Sharī’ah*. However, owing to the absence of Caliphate, there are more than 50 Muslim states today rather than a single Muslim state. It is for this reason that the focus should be on the obligations of these states under Islamic law as well as treaties regulating the same.¹⁸

Jihād is lawful in Islam as a necessity to suppress aggression. It was prescribed in the second year of the *hijrah*,¹⁹ after Muslims had patiently borne for fourteen years the harm done to them by the pagans. The proof can be found in the Qur’ān where Allāh says:

Indeed, Allāh defends those who have believed. Indeed, Allāh does not like everyone treacherous and ungrateful. Permission to fight has been given to those who are being fought, because they were wronged. And indeed, Allāh is competent to give them victory. They are those who have been evicted from their homes unjustly – only because they say, “Our Lord is Allāh.” Had Allāh

¹⁵JZ Usman *Usul Al-’Alaqat Al-Duwaliyya* (Dar Al-M’ a’li, ‘Amman, 1999) 240

¹⁶ This position partly informed the work Fahmi Huwaidi titled, ‘*Muwātinūn La Dhimmiyyūn*’ (Citizens, not protected persons). According to him, “If we admit that certain dynamics relating to time and place impact upon the Sharī’ah rulings, then it is nothing short of admitting that those dynamics also influence on prevailing thoughts and terms in Muslim societies. In particular, the term “*Ahl Dhimmah*” (i.e protected persons) has been expunged from the legal framework in the Arab world since the promulgation of the first Ottoman constitution in 1876, which affirmed the concept of equality of rights and obligations among all citizens of the Empire, regardless of their religious differences. (Translation mine) See F Huwaidi *Muwātinūn La Dhimmiyyūn*(Dār al-Shurūq Egypt 1999) 126

¹⁷AZ, *Majmū’ah Buhūth Fihiyyah*, (Mu’assasah-Risālah, Beirut, 1981) 16.

¹⁸ M Muhammad, op. cit., 10

¹⁹*Hijrah* connotes the emigration of Prophet Muhammad from *Makkah* to *Madīnah* in 622 AD as a result of the persistent torture he and his followers were been subjected to by the pagans of *Makkah*. It also signifies the first year of the commencement of the Muslim Calendar.

not repelled some people by means of others, surely monasteries, churches, synagogues and mosques, wherein the name of Allāh is mentioned frequently, would have been demolished. Indeed, Allāh will support those who support Him. Allāh is surely Powerful and Exalted in Might.²⁰

The expressions, ‘they were wronged’ and ‘those who have been evicted from their homes’ illustrate the reason for the legality of war – a case of Muslims’ oppression by others (the unbelievers). Whereas Allāh had forbidden warfare in more than seventy verses, this was the first verse it was prescribed, as confirmed by another verse: ‘Fighting is ordained for you, though you dislike it, and it may be that you dislike a thing which is good for you, and that you like a thing which is bad for you. Allāh knows but you do not know’.²¹ The inevitability of carrying out *jihād* in the meaning of fighting in the cause of Allāh is emphasised in the Qur’ān where the Muslims are commanded to fight the enemies of Islam: ‘And fight in the Way of Allāh those who fight you, but transgress not the limits. Truly, Allāh likes not the transgressors’.²²

After the success of the early conquests and the expansion of the realm of Islam that followed, early Muslim scholars split the world into two distinct spheres: the abode of war or disbelief (*dār al-Harb* or *dār al-Kufr*) and the abode of peace or Islam (*dār al-Islām*).²³ The abode of Islam consists of territories where the power and authority lie with the Muslims, the rules of Islam are implemented and Islamic rituals are performed. People of that abode are either Muslims or people of the covenant otherwise called *ahl adh-Dhimmah* (non-Muslims who live and enjoy protection in Islamic territory according to a covenant). The abode of disbelief or war comprises territories which are outside the scope of Islamic sovereignty and where the religious and political rules of Islam are consequently not implemented.²⁴ This distinction was based on the implicit division in the Qur’ān of the world into spheres of belief and disbelief.²⁵ For the sake of *jihād*, there was a distinction between how *jihād* could be waged under what circumstances or situations. Fighting within the sphere of Islam is reserved for the restoration of peace and justice. Thus *jihād* in the sense of military combat was established essentially as a means of self-defence, and if it ever occurs against *ahl adh-Dhimmah* (protected persons who have paid the poll-tax); once the conflict has ended they are to be restored to

²⁰Al-Hajj: 39- 40

²¹ Al-Baqarah: 216

²² Al-Baqarah: 190

²³The classical concept of division is, old though it may be, not laid down explicitly anywhere in the Qur’ān. Instead, it is understood to be a legal and political structure developed by means of *Ijtihad* i.e. individual logical deduction and conclusion by the Hanafi jurists based on certain indications in the religious sources. See R Tina *Traditional Islamic Approaches to Public International Law – Historic Concepts, Modern Implications* (Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, 2012, 2012) 527. Available online at <http://www.zaoerv.de/>, accessed on 05/04/2023

²⁴A Wahbeh *Islam and international law* (2005) International Review of the Red Cross, 87; 858: 278

²⁵ RS Nico, ‘Jihad and Just War: Comparative Analysis’, 33. Available online at www.soundideas.pugetsound.edu, accessed on 20/04/2023

their protected status.²⁶ *Jihād* against the *dār al-harb* is considered obligatory by some scholars. There are, however, several recourses believers were instructed to take before a military form of *jihād* could be allowed.

Before the declaration of either war or *jihād*, the enemy should be made to choose one of three options: Islam, as a token of peacefulness; reconciliation or a peace treaty with Muslims; or finally the option of war as a last resort where the enemy insists on waging war. It is evident that given the choice between three options excludes the character of compulsion.²⁷ *Jihād* is permitted, so long as it is justly declared by an Islamic sovereign (or Caliph in Islamic law literature), and waged by a legitimate Islamic state. When *jihād* is legitimately declared, there are specific and strict rules on how it should be conducted.²⁸ Islamic law provides comprehensive rules regarding relations between an Islamic state and non-Muslim states both during war and peace times. It has an elaborate set of rules concerning the use of force (*jus ad bellum*) and the conduct of hostilities (*jus in bello*), especially those who should not be killed during the course of war, objects that should be protected, rights of prisoners of war (POWs), termination of their captivity and the effects of war.²⁹ The opinion which claimed that Islam was established by all means inherently contradicts the freedom of religion verses in the Glorious Qur’ān.³⁰ More so, how practicable can such opinion be sustained in the modern world where constitutional order and territorial limitation reign supreme.

There is a clear distinction between *jihād* and *qitāl* (combat), as the command to engage in *jihād* was revealed in *Makkah* where there was no combat or fighting between Muslims and the unbelievers. In *Makkah*, the *jihād* of preaching (*da‘wah*) was contemplated with the Qur’ān as the tool as referenced in the verse, ‘And strive against them with the utmost endeavour with it (the Qur’ān)’.³¹ The permission granted to the Muslims to fight (*qitāl*) in self-defence was necessitated due to persecution of the Muslims by the unbelievers. The earlier cited verse granting permission to fight underscores the need to establish justice as a just cause for waging military form of *jihād*. The expansion of Islam, therefore, cannot be traced to the use of force but rather a variety of factors with use of force or aggression forming only an ancillary element. It, thus, becomes clear that while *qitāl* is limited to combat, fighting or military form of *jihād*, *jihād* includes the meaning of *qitāl* and many more.

3.0 THE CLASSES OF JIHĀD

²⁶ K John *Arguing the Just War in Islam*, (Harvard University Press Cambridge 2007) 103

²⁷ A Wahbeh, op. cit., 280

²⁸ SJ Mohammed *An Analysis of the Doctrine of Jihad in Islamic Jurisprudence* (2015) International Journal of Information Technology and Business Management, 41;1: 43

²⁹ *Jihad and the Islamic law of War*, The Royal Aal Al-Bayt Institute for Islamic Thought (Jordan 2009) 3. Available online at www.rissc.jo/books/en/003-Jihad-Islamic-Law-War.pdf, accessed on 05/04/2023.

³⁰ Al-Baqarah: 191, 217

³¹ Al-Furqān: 52

Jihād is multi-dimensional, referring to struggles of varying levels and circumstances. Though Western convention tends to refer solely to the military form of *jihād* as holy war (a misnomer which resulted from English rendition of *jihād*), most Muslim jurists have continued to rely on the Prophet's distinction to classify *jihād* into two; *al-Jihād al-Akbar* or greater *jihād*, and *al-Jihād al-Asghar*, or lesser *jihād*.³² However, recent studies have shown inclusion of *jihād al-Kabīr* (the great *jihād*) as a class of *jihād*. With this classification, the triple nature of *jihādīs* espoused. *Jihād* initially means the struggle pertaining to the difficulty and complexity of living a good life: struggling against the evil in oneself in order to be virtuous and moral, enjoining good and condemning evil, fighting injustice and oppression, spreading and defending Islam, and creating a just society through preaching, teaching and, if necessary, armed struggle.³³

3.1 Al-Jihād Al-Akbar (the Greatest Jihād)

Jihād in the sense of personal moral struggle is called *al-Jihād al-Akbar* (the greater *jihād*). It is divided into what is called 'Jihād against the self; and 'Jihād against the devil'. This greater sense of *jihād* continues to be widely regarded as an inner struggle to overcome personal temptations and the carnal self as a necessary part in the process of gaining spiritual insight and upliftment. This 'greater' and often less discussed aspect of *jihād* best represents the morally rich and peaceful nature of Islam.³⁴

In order to clarify the vast scope of *jihād*, which makes every Muslim a *mujāhid* (he who struggles), as opposed to a *muqātil* (combatant) by necessity, Yusuf Qardawi in his book, '*Jihād in Islam*'³⁵ seeks support from Ibn al-Qayyim, who concluded from his study of the process of Islamic *da'wah* that there are thirteen (13) levels of *jihād*: first, *jihād al-nafs* (*jihād* of the self) which comprises four (4) levels; exerting oneself to learn the guidance, to act upon it, to call to it, and to persevere on those actions; second, *jihād* against *shaytān*, which includes two (2) levels; struggling against the doubts in one's faith which *shaytān* instigates and resisting the desires and corruption to which he calls; third, *jihād* against the non-believers and hypocrites including four (4) levels; with one's heart, tongue, wealth, and self; and fourth, *jihād* against the

³²It is narrated that when the Prophet (PBUH) was returning from Tabūk to Maīnah he said, "We have just returned from a lesser *jihād* to the greatest *jihād*". He was asked, "What is the greatest *jihād* O Messenger? He (PBUH) replied, "Disciplining oneself". Although, the Hadīth, it must be noted, was reported by Al-Bayhaqi with a weak chain of transmission. The version with an authentic narration as reported by Imam Ahmad in his Musnad is: "The Mujāhid is one who strives against his own soul". Graded as authentic by Imam Tirmidhī in his *Jāmi'* at-Tirmidhī, Hadīth No. 1621 and Imam Ahmad in his Musnad Hadīth No. 23965

³³ BA Brek *The Justifications for Jihad, War and Revolution in Islam* (Strategic and Defence Studies Centre, Australian National University, Canberra, 2003) 2

³⁴ B. A Brek, op. cit., 2

³⁵Y Qardawi *Fiqh al-Jihād*, Available online at www.zulkiflihasem.files.wordpress.com, accessed on 05/11/2023

oppressors and the corrupt, comprising three (3) levels: with one's hand if possible, if not then with one's tongue, if not then with one's heart – making a total of thirteen in all.³⁶

3.2 Al-Jihād Al-Kabīr (The Great Jihād)

Jihād al-kabīr simply means inviting people to righteousness. In other words, it entails preaching, teaching and spreading the message of Islam so as to make positive impact on the people. A significant difference between *jihād al-Akbar* and *jihād al-Kabīr* is that, as the latter focuses on the moral uprightness and spiritual upliftment of oneself, the latter focuses on extending the same good gesture to other people. One of the objectives of the Islamic social system is to make the society of human beings a righteous one.³⁷ It is a form of *jihād* in Islam not only to work towards personal righteousness, but also to preach righteousness to others. This is one of the goals of Islamic propagation (*Da'wah*). *Jihād al-Kabīr* (the great *jihād*) is well established in the Qur'ān: 'So do not obey the disbelievers and strive against them using the (Qur'ān) a great struggle (*Jihād al-Kabīr*)'.³⁸

The importance of inviting the people to Islam is further established in the Qur'ān. It is instructive that Allāh enjoins the Muslims to use rational arguments to convince non-believers of the truth of Islam: 'Invite (the unbelievers) to the path of your Lord with wisdom and good admonition. And argue with them in a beautiful manner.'³⁹ *Jihād al-Kabīr* was practiced by the Prophet (PBUH) while in *Makkah*. The prophet was persistent in inviting the people of *Makkah* to Islam for good thirteen years until he was instructed by Allāh to migrate from *Makkah* to *Madīnah* when the torture and persecution of the *Makkans* became enormous on him and his followers.⁴⁰ It is interesting to note that the Prophet refrained from preaching the call for three years out of fear of reaction of the *Makkans*, until he received the Qur'ānic revelations that commanded him to declare openly the message he received.⁴¹ In one incident, Abū Bakr is reported to have saved the Prophet from a group of men who

³⁶ Y Qardawī, op. cit.

³⁷ MS Tufail *The Significance of Righteousness in Islam* (The Shah Jehan Mosque, England, 1961) 6

³⁸ Al-Furqān: 52

³⁹ An-Nahl: 125

⁴⁰ *Sīrah* literature describes the kinds of torture to which the oppressed, socially weak Muslims were subjected. Bilal, a slave who performed the call to prayer, is described as having been severely tortured by his master to force him to abandon the new religion and worship the famous Quraysh idols al-Lāt and al-'Uzza. Bilāl is reported as saying during his torture "One, One", meaning that there is only one God. The whole family of Yāsir, including Ammār ibn Yāsir, his father and his mother Sumayyah the daughter of al-Khayyat, were also reported to have been brutally tortured. The Prophet (PBUH) passed by them as they were being tortured and, being unable to save them, he said, "patience, O family of Yasir! Your meeting place will be paradise." The mother, Sumayyah, known as the first female martyr in Islam, and her husband, Yāsir, were killed under torture because of their refusal to abandon the religion of Islam. Facing all these tortures and persecution and with no hope of stopping this aggression, the Prophet asked some Muslims to flee to Abyssinia because its king, the Negus, was a righteous man who would not allow anyone to be oppressed in his territory.

⁴¹ See Al-Hijri: 94 and Shu'arā: 214-215.

accosted him; when he saw that one of them had seized the Prophet's robe, he 'interposed himself weeping and saying, 'would you kill a man for saying Allāh is my Lord?''⁴²

This form of *jihād* did not involve fighting. In *Madīnah*, the form of *jihād* turned from the great one to the lesser one (*jihād al-Asghar*), as the Prophet was given the permission to fight against the oppression of the enemies of Islam so as to defend the Muslim community.

3.3 Al-Jihād Al-Asghar (The Lesser Jihād)

Jihād in the sense of an armed, state struggle is called the lesser *jihād* (*al-jihād al-asghar*) and can be categorized into two: international and domestic *jihād*. International *jihād*, the most commonly referred to, is what the jurists sometimes called *jihād* against *al-kuffār* (unbelievers) or *jihād fi sabīli Llāh* (*jihād* in the way of Allāh) i.e. war with the non-Muslim states. In fact, by the very nature of the structure of the Islamic state, armed *jihād* against *al-kuffār* is an international war.⁴³ This is because; the territory of the *kuffār* is *dār al-Harb*. Domestic *jihād*s divided into four (4) types: fighting against *Bughāh* (rebels, secessionists);⁴⁴ fighting against *muhāribun* or *quttā 'at-Tarīq* (bandits, highway robbers, pirates);⁴⁵ fighting against *ahl ar-Riddah* (apostates);⁴⁶ and fighting against *khawārij* (roughly translated as violent religious fanatics)⁴⁷.

The above five types of armed or military form of *jihād* (whether within an Islamic state or against other states) are based on religious, political or criminal grounds. Even when a war in these cases is waged on religious grounds, an investigation is still to be made to determine whether it is just or not. Despite being termed *jihād*, they were wars of the state not wars of religion.⁴⁸

4.0 JIHĀD AND HOLY WAR: CLARIFYING SOME MISCONCEPTIONS

The study of war is a vast field comprising historical, phenomenological, legal, tactical and psychological approaches, along with those in the field of economics, political science, international relations, ethics, religious studies, anthropology, history, and so on. In these various disciplines, definitions must

⁴² MA Ahmed, *War in Islamic Law: Justifications and Regulations* (PhD Thesis, University of Birmingham, 2009) 26

⁴³ Tina R., op. cit., 527

⁴⁴ T Sadia *Combatants, not Bandits: the Status of Rebels in Islamic law* (2011) International Review of the Red Cross, 93;881: 3

⁴⁵ P Rudolph *Crime and Punishment in Islamic Law Theory and Practice from the Sixteenth to the Twenty-first century*, (Cambridge University Press, Cambridge, New York, 2005) 57

⁴⁶ S Abdul Jalil *Islam Against Religious Extremism and Fanaticism* (International NGO Rights and Humanity) Available online at http://archive.mcb.org.uk/wp-content/uploads/2015/12/Dr-Abdul-Sajid-Islam-against-Religious-Extremism-and-Fanaticism_2001.pdf, accessed on 05/04/2023

⁴⁷ *Islamic facts Refuting the Allegations against Islam*, 44. Available online at <http://www.masjidiman.com>, accessed on 05/04/2023

⁴⁸ Ahmed M.A., op. cit., 26

be established in order to limit and quantify the topic of study, because of the great variety of interests and approaches between them.⁴⁹ Generally speaking, war may be defined as an organized, purposeful activity directed by one established group against a rival group that involves actual or potential application of lethal force. War does not always mean combat. It may be a state of condition between human groups even when warfare is not actually being conducted. The cold war, for example, represented a state of affairs in which actual and direct combat between the principal parties never took place, and the doctrine of *jihād* in Islamic legal literature likewise defines a state of relationship between the Islamic world and the non-Islamic world.⁵⁰

In the West, *jihād* is one of the few Arabic words which most people believe they understand as it is often equated with the use of force and is often inaccurately defined as ‘holy war’.⁵¹ Examples of things described as holy in Islam include the three holy sites, represented by the Grand Mosque (*al-Masjid al-Haram*) in Makkah, the Prophet’s Mosque (*al-Masjid an-Nabawī*) in *Madīnah* and *Aqsa* Mosque (*al-Masjid al-Aqsa*) in Palestine; the four sacred months in Islam,⁵² the sacred day of sacrifice (also known as *yawm an-Nahr* or *yawm al-Hajj al-Akbar*).⁵³ The description of *jihād* as holy war, *hajj* as holy pilgrimage, and Qur’ān as holy book, as bandied about in the West and elsewhere, is a misnomer and can only be traced to Christendom.⁵⁴ Islam did not qualify them as holy.⁵⁵ More importantly, such attitude is like replicating the Christianity experience in Islam. When not rooted in *ijtihad* (juristic exertion), *Sharī‘ah* concepts and terminologies along with their qualifications are based on revelation and must be accorded their unchangeable (*tawqifī*) status.⁵⁶

The two distinct yet similar formations of a permissible war: the holy war and just war are traceable to Christian tradition. Holy wars have traditionally been fought for the sake of the faith, for ideals, and have been waged on the authority of God or a religious leader acting in the name of God (for example, a pope). The just war has generally been fought on more mundane grounds, for the sake of protecting a territory or righting a wrong, and usually under the authority of

⁴⁹*The Philosophy of War*, Available online at <http://www.iep.utm.edu/war>, accessed on 05/04/2023

⁵⁰Mohammad N. I. J., ‘The Use of Armed Force in International Relations: The ‘Sharī‘ah’ Perspective, Centre for Promoting Ideas, p. 44.

⁵¹Hilmi M.Z., ‘Is Jihad a just war? War, Peace and Human Rights under Islamic and Public International Law’, (Studies in Religion and Society, Ewin Mellen Press, Vol.3), p. 13

⁵²They are Rajab, Dhul Qa’dah, Dhul al-Hijjah and Muharram. See At-Tawbah: 36

⁵³Abu Bakra narrated: In his sermon on the Day of Sacrifice at Mina, the Prophet (PBUH) said: ‘Your blood and your property and your honor are forbidden for you to violate, like the sacredness of this day of yours, in this month of yours, in this city of yours.’ (Bukhari, Hadith No. 67 and Muslim, Hadith No. 1679). See also, At-Tawbah: 2

⁵⁴F Huwaidi, op. cit., 219

⁵⁵The Qur’ān is described with many attributes such as Qur’ān Karīmun, Qur’ān Majīd, Qur’ān Mubīn etc.

⁵⁶For instance, name of *Sūrah*s (translated as chapters in English) and their orderly arrangement are considered *tawqifī*. Same is true for many Sharī‘ah concepts and terms.

some secular and political figure in the name of a state.⁵⁷ The idea of just war in these ancient cultures came largely out of the idea that war should be fought for the restoration of peace and justice. Since peace was held in such high esteem it was necessary that order methods of dispute resolution be attempted turning to the last resort of war. These pre-Christian societies laid down the ideas that later Christian writers would adopt as the foundation of what became just war theory.⁵⁸

Since Christianity had its roots in Judaism, Christianity just war theory was heavily influenced by Jewish texts and traditions. The multiple wars fought by Israel, both righteously with the approval of God (and unrighteously without God's approval) served as examples for later Christian writers.⁵⁹ It was with the rise of the papal states and ultimately with the declaration of the crusades that the concept of 'holy war' came to be an important term.⁶⁰ Also, with the 'taking of the cross' by the Christian warriors sent by Pope Urban II in the eleventh century the 'just war' term became 'holy war' in its fullest sense. It was only with the authorisation of the Pope that a Knight could adopt the symbol of the cross. Holy war, as a term, thus has its origins in Christianity, not Islam.⁶¹

The expansion and propagation of Islam started initially by means of peaceful preaching and persuasion. Freedom of religion was applied in theory and practice. A decade after the advent of Islam, persecution of the Prophet and his early companions and followers gained momentum. To avoid further persecution, they fled from *Makkah* to *Madīnah* – an event known as *Hijrah* (emigration) in Islam. At *Madīnah*, although the first Muslim state was established, interference of Makkans continued and Muslims lived under persistent fear of invasion from the non-Muslim forces surrounding them. It was at that time the doctrine of *jihād* in its military form or in the sense of armed conflict gained currency, with the express purpose to defend the faith of Muslims and to avoid extermination at the hands of the then dominant group. Thus, *jihād* was established as a means of self-defence.⁶²

5.0 THE USE OF FORCE IN JIHĀD

⁵⁷Throughout human history violent conflict has played a role in shaping cultures and in giving rise to nation-states. In the midst of this violence, many different cultures have attempted to restrict the violence, hoping to limit its destruction of people, land, goods, economic resources, and culture. Of particular importance to the formation of the Christian just war tradition were the efforts of the ancient Jewish, Greek, and Roman cultures to develop a code for warfare that would somehow establish rules and limits.

⁵⁸Brek B.A., op. cit., 1

⁵⁹Nico R.S., op. cit., 5

⁶⁰F Huwaidi, op. cit., 219

⁶¹*Jihad and the Islamic Law of War*, op. cit., 2

⁶²SA Shaheen and R Javaid, op. cit., 332

Jihād in the sense of ‘taking up arms’, involves the use of force in exceptional circumstances. However, the use of force is one of the most controversial areas of Islamic law and international law. There are several references in the Qur’ān which can be interpreted as requiring Muslims to strive in the cause of Islam, and in some verses to specifically fight (engage *inqitāl* or armed resistance) in the cause of Allāh i.e. to use force in self-defence.

It is worthy of note that at the beginning of Muhammad’s prophet-hood in *Makkah*, *jihād* did not involve the use of force. Then, after strong resistance and persecution in *Makkah*, the Prophet migrated to *Madīnah* to avoid further persecution. At *Madīnah*, he established the first Islamic state. Muslims who had been forced to leave their home due to their religious beliefs were attacked by non-Muslims from *Makkah*. Islam’s survival as a religion and as a nation (*ummah*) was threatened and its defence at the time became necessary. It was at this critical stage in the development of Islam that Allāh, the Lawgiver, first permitted fighting in self-defence against aggression⁶³ thus: ‘Permission to fight has been given to those who are being fought, because they were wronged’.⁶⁴ The Qur’ān sheds some light on the description of those who were wronged: ‘They are those who have been evicted from their homes unjustly – only because they say, “Our Lord is Allāh”’.⁶⁵

The use of force in defensive *jihād* is resorted to if an attack occurs on the religion, honor, property, or territories of Muslims. This form of *jihād* is required under the condition of repelling aggression. It is aimed at resisting the enemy that enters a Muslim territory, and occupies part of it, regardless of how small this area is, or the enemy that launches an assault against Muslim lives, property or sanctities, even without entering or actually occupying their territory. Defensive *jihād* is regarded as necessary against those who persecute Muslims because of their faith, or those who plot to dissuade Muslims away from their faith or deprive them of their right to choose their own religion, or force them to renounce it through harm and torture.⁶⁶ The Qur’ān allows the use of force for defending other Muslims who are oppressed and are unable to defend themselves. Allāh queries:

And what is the matter with you that you fight not in the cause of Allāh and for the oppressed among men, women, and children who say, “Our Lord, take us out of this city of oppressive people and appoint for us from Yourself a protector and appoint for us from Yourself a helper.”⁶⁷

⁶³ S Manisuli S., *Jihad Re-Examined: Islamic Law and International Law* (2012) Santa Clara Journal of International Law, 10; 1: 16

⁶⁴ Al-Hajj: 39

⁶⁵ Al-Hajj: 40

⁶⁶ Manisuli S., *op. cit.*, 18

⁶⁷ An-Nisāi: 75

Thus, the concept of *jihād* embraced the use of force to resist aggression i.e. it was used in self-defence for the survival of Muslims. Therefore, the Prophet started fighting those who fought him and the Muslims (in self-defence) and refrained from fighting those who left him alone and did not fight him and his followers (avoiding aggression). This was on the instruction of his Lord as provided in the Qur'ān where Allāh says:

Fight in the cause of Allāh those who fight you, but do not transgress limits; for indeed, Allāh does not like transgressors. And slay them wherever you catch them, and expel them from wherever they have expelled you; for tumult and oppression are worse than killing . . . And fight them on until there is no more tumult or oppression, and there prevail justice and faith in Allāh; but if they cease, then there is no aggression except against the oppressors.⁶⁸

From the above analysis, it becomes clear that Islamic law allows the use of force in self-defence, defending those who are oppressed and are unable to defend themselves. It also allows a Muslim ruler to use force against rebels. The offensive theory of *jihād* has no strong basis. The anticipatory use of force is however allowed when an attack on Muslim land is imminent. Muslims may resort to the use of force in anticipation only if and when the other party is openly hostile to them. The fear of treachery must not, of course, be based on mere surmise but on clear, objective evidence.⁶⁹ In such circumstances, Allāh gives conditional permission: 'And if you fear treachery on the part of a people, then throw back to them on terms of equality. Verily, Allāh does not love the treacherous'.⁷⁰ It is obligatory on the part of the Muslim head of government and/or their representative to apprise the enemy beforehand of the non-existence of pacts and treaties. Fighting without this previous notice is unlawful. Once treachery is established, the Qur'ān says: 'And prepare against them what force you can and horses tied at the frontier, to frighten thereby the enemy of Allāh and your enemy'.⁷¹

6.0 LIMITATIONS TO THE USE OF FORCE IN JIHĀD

The use of force by Muslim fighters is not perpetual. Islamic law imposes limits on the means and methods used during *qitāl*. The basic principles guiding the conduct of war in Islam include military necessity, humanity, distinction, and proportionality. The *Shari'ah* allows that only the extent and degree of force necessary to achieve military objectives be used. Once the military objectives are secured, Muslim forces have to cease their attack. The Qur'ān provides to

⁶⁸ Al-Baqarah: 190-193

⁶⁹ AS Niaz *The Use of Force under Islamic Law* (2013) *The European Journal of International Law*, 24; 1: 357

⁷⁰ Al-Anfāl : 58

⁷¹ Al-Anfāl : 60

the effect that Muslims should fight the attackers until they are defeated, restrained from mischief (*fitnah*), or choose peace instead of war. Allāh says: ‘And kill them wherever you find them, and turn them out from where they have turned you out. And *fitnah* (oppression) is worse than killing.’⁷² Furthermore, Allāh instructs: ‘And fight them until there is no more *fitnah* (disbelief and worshipping of others along with Allāh) and worship remains for Allāh only. But, if they desist, then aggression is not allowed except against the transgressors’.⁷³

In some instances, the limitations are either of place or time. On the limitation of place, Allāh commands: ‘And fight not with them at *al-Masjid al-Haram* (the Grand Mosque in Makkah), unless they first fight you there. But if they attack you, then kill them. Such is the recompense of the disbelievers.’⁷⁴ The limitation of time relates to the sacred month as captured in the verse: ‘The sacred month is for the sacred month, and for the prohibited things, there is the law of equality (*qisas*). Then whoever transgresses the prohibition against you, you transgress likewise against him. And fear Allāh, and know that Allāh is with the pious.’⁷⁵

Distinction is one of the fundamental principles of the Islamic law of armed conflict: ‘And fight in the way of Allāh those who fight you, but transgress not the limits. Truly, Allāh likes not the transgressors’.⁷⁶ This terse verse contains three important rules. First, Muslims are given permission to fight. Secondly, fighting is permitted only against those who are fighting Muslims, i.e. combatants. Thirdly, Muslims are warned not to transgress the limits set by Allāh and the Prophet (PBUH). The practice of the Prophet was to make a clear distinction between combatants and non-combatants.⁷⁷ Indiscriminate attacks on non-combatants are contrary to several principles derived from the Qu’rān including just and kind treatment, proportionality, humanity, fraternity and justice. Targeting non-combatants is contrary to the standard of ‘just and kind’ treatment of non-combatants as stated in the verse: ‘Allāh does not forbid you to deal justly and kindly with those who fought not against you on account of religion nor drove you out of your homes, that you show them kindness and deal with them justly. Verily, Allāh loves those who are just’.⁷⁸

Killing or causing bodily harm to non-combatants or civilian objects cannot meet the test of ‘just and kind’ treatment. In any case, such indiscriminate attacks were prohibited by the Prophet. In particular, violence against non-combatants such as members of the following groups was prohibited: women, children, the elderly, the sick and wounded, clerics, and places of worship of

⁷² Al-Baqarah: 191

⁷³ Al-Baqarah: 193

⁷⁴ Al-Baqarah: 191

⁷⁵ Al-Baqarah: 194

⁷⁶ Al-Baqarah: 190

⁷⁷ AS Niaz, op. cit., 360

⁷⁸ Mumtahanah: 8

Christianity and Judaism.⁷⁹It was narrated that the Prophet said to the Muslim army: ‘Go out in the name of Allāh and by the help of Allāh, following the way of the Messenger of Allāh. Do not kill any old man, infant, child or woman . . . spread goodness and do good, for Allāh loves those who do good’.⁸⁰

In another narration, the Prophet stated: “Do not mutilate the dead bodies; do not kill children.”⁸¹ He also instructed the Muslim fighters dispatched against the Byzantine army in the following way:

Spare the female gender; injure not the infants or those who are ill in bed. Refrain from demolishing the houses of the unresisting inhabitants; destroy neither the means of subsistence, nor their fruit-trees and touch not the palm, and do not mutilate bodies and do not kill children.⁸²

This example was followed by the successors of the Prophet after his death. For example, AbūBakr al-Siddīq, the Prophet’s first successor, instructed the commander of his army: ‘I advise you of ten things: do not kill a woman, or a child, or any old person, or cut down any fruit trees.’⁸³Similarly, Umar Ibn al-Khataab, the second successor, warned commanders of the Muslim army as follows:

Do not mutilate when you have the power to do so. Do not commit excess when you triumph. Do not kill an old man or a woman or a minor, but try to avoid them during the encounter of the two armies, and at the time of the heat of victory, and at the time of expected attacks.⁸⁴

In addition to the prohibition of fighting civilians, other rules regulating the conduct of hostilities in Islam include the prohibition of collective punishments, protection from retroactive penalty, the prohibition of mutilation, the prohibition of cutting down trees and demolishing of buildings, the prohibition of plundering and pillaging, as well as respecting agreements concluded on the cessation of hostilities.⁸⁵Muslims are required to treat prisoners of war humanely.⁸⁶ The wounded are to be nursed and cared for. Respect is always to be paid to the dead. For instance, after the battle of

⁷⁹S Manisuli, op. cit., 28

⁸⁰I Muslim *Sahīh Muslim* (The Book of *Jihād*, Vol. 4, Hadith No 2, Dāru Sh-sha’ab, Cairo, 1381H) 331

⁸¹I Muslim, op. cit., 342

⁸²I Malik, *Al-Muwatta* (No. 10, Markaz al-Buhūth, Kuwait, 1997) 280

⁸³MIA Al-Shawkani *Nayl al-Awar Sharh Muntaqa al-Akhbar min Ahadith Sayyid al-Akhyar* (Maba’at Muafa al-Babi al-Adabi, Cairo 1952) 8: Hadith 263

⁸⁴AIQ Al-Dinawari *Kitab ‘Uyun Al-Akhbar* (Dar al-Kitab al-‘Arabi, Cairo, 1957) 107

⁸⁵S Manisuli, op. cit., 29

⁸⁶Humane treatment of prisoners of war forms an essential part of Islamic humanitarian law. All forms of abuse of prisoners, whether physical or sexual, are prohibited. In Sūrah Muhammad:4 two alternatives for the treatment of prisoners of war provided are: either the Muslim commander should free those prisoners of war who cannot offer ransom, either in the form of money or an equivalent number of Muslim captives, or the commander should ransom prisoners of war for money or for a similar number of Muslim captives. This is what is now known as an exchange of prisoners.

Khandaq, the Prophet handed over the dead bodies of the enemy and refused to take money for them.⁸⁷ Islamic law forbids mutilation and urges respect for the dead. All these principles indicate a concern for humanity, which is in line with the Qur'ānic concept that all mankind is one community.⁸⁸

Proportionality is a key principle of the Islamic law of *jihād*. Several Qur'ānic verses on the principle of proportionality include: 'And if you take your turn, then retaliate with the like of that which you were afflicted; but if you are patient, it will certainly be best for those who are patient';⁸⁹ 'The one who does something evil will not be punished but in its equal proportion';⁹⁰ and 'The recompense of evil is evil like it. Then the one who forgives and opts for compromise has his reward undertaken by Allāh. Indeed, He does not like the unjust.'⁹¹

On the basis of the limitations above, it is submitted that Islam does not permit the use of Weapons of Mass Destruction (WMD) (e.g., chemical, biological, and nuclear weapons) because they kill large numbers of people without discrimination between combatants and non-combatants. This leads to loss of lives without a just cause, contradicting the Qur'ānic instruction thus: 'And do not kill anyone whom Allāh has forbidden, except for a just cause, and whoever is slain unjustly, We have indeed given to his heir authority, so let him not exceed the just limits in slaying; Indeed, he has been supported by the law.'⁹² However, in case WMD are used against Muslims, it is permissible for Muslims to use the same weapons in self-defence as needed to repel aggression.⁹³

7.0 CONCLUSION

This paper examined the conduct and regulation of *jihād* under Islamic International Law. It posited that *jihād* primarily denotes struggle against one's own sinful inclinations. It may also imply the war aspects in Islam. The use of force or fighting of a war in the name of justice or Islam, to deter an aggressor, for self-defence, and or to establish justice and freedom to practice religion, is considered part of *jihād*. A conceptual clarification between *jihād*, *siyar* and *qitāl* was provided. This work also classified *jihād* into *al-jihād al-akbar* or greater *jihād*, *al-jihād al-kabīr* or great *jihād* and *al-jihād al-asghar* or lesser *jihād*. The term 'holy war' is a reflection of the Christian usage to refer to the crusades of the Middle Ages. It is typical of enemies of Islam to suggest that Islam has suffered the same problems they have. Islam did not describe *jihād* as 'holy war'; hence, the paper found that use of force is not without limitation

⁸⁷M Hamidullah, op. cit., 3; M Noor *The Doctrine of Jihad: An Introduction* (1985) Journal of Law and Religion, 3: 381

⁸⁸ Al-Baqarah : 213

⁸⁹ An-Nahl: 126

⁹⁰ Al-Ghāfir: 40

⁹¹ Ash-Shūra: 40

⁹² Al-Isrā: 33

⁹³ An-Nahl: 126

under Islamic law. Having regard or consideration for military necessity, humanity, distinction, and proportionality are basic principles limiting the use of force in the conduct of *jihād*.