

## THE CONCEPT OF *JIHAD* IN ISLAMIC INTERNATIONAL LAW

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### ABSTRACT

*In the post 11 September 2001 legal and political environment, Islam appears to have become one of the most misunderstood religions. Islam has been equated with fanaticism, intolerance, violence and wars of aggression – the classical Jihad ideology is often deployed to cast doubts on the compatibility of Islam with modern norms of international law as enunciated in the United Nations Charter. Much confusion stems from the fact that Islamic international law and Islamic laws of armed conflict have not received due attention in western legal scholarship. The concept of Jihad has arguably been central to many modern conflicts including that of resistance to US occupation of Iraq (2003–2005), the struggle for self-determination in Kashmir (1947–2005) and the Palestinian struggle for reclaiming their land from Israel (1948–2005).*

*This article seeks to provide a jurisprudential analysis of the concept of Jihad. Amidst controversies surrounding Jihad, the authors attempt to contextualise the concept and relate the discussion to contemporary norms of International law as established by the United Nations Charter. The authors identify the conditions under which Jihad is permissible in Islamic law in the light of its various sources. The distinction between dar-al-harb (abode of war) and dar-al-Islam (abode of Islam) is presented as this issue impacts on laws of war in Islam. The significance of humanitarian principles within Islamic international law as well as in Islamic humanitarian law is highlighted.*

Self-exertion in peaceful and personal compliance with the dictates of Islam (constitutes) the major or superior *Jihad*

—*Hadith* of the Prophet Muhammad

## 1 INTRODUCTION

In the post 11 September 2001 legal and political environment, Islam appears to have become one of the most misunderstood religions. Critics of Islam argue that Islam *per se* is an aggressive religion, encouraging Muslims to have recourse to violence, terrorism and destruction.<sup>1</sup> Muslim civilisation has been castigated

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<sup>1</sup> 'Many horrific acts have been, and continue to be carried out in the name of Islam, just as they have been in the name of Christianity. But unlike Islam, Christianity does not justify

as being backward, insular, stagnant and unable to deal with demands of the twenty-first century.<sup>2</sup> Islam has been equated with fanaticism, intolerance, violence and wars of aggression – the classical *Jihad* ideology is often deployed to cast doubts on the compatibility of Islam with modern norms of international law as enunciated in the United Nations Charter.<sup>3</sup> Much confusion stems from the fact that Islamic international law and Islamic laws of armed conflict has not received due attention in western legal scholarship.<sup>4</sup> The concept of *Jihad* has arguably been central to many modern conflicts including that of resistance to US occupation of Iraq (2003–2005),<sup>5</sup> the struggle for self-determination in Kashmir (1947–2005)<sup>6</sup> and the Palestinian struggle for reclaiming their land from Israel (1948–2005).<sup>7</sup>

This article seeks to provide a jurisprudential analysis of the concept of *Jihad* and locate it in the wider framework of Islamic international law known as *as-siyar*. Amidst controversies surrounding *Jihad*, the authors attempt to contextualise the concept, identify conditions under which *Jihad* is permissible in Islamic law and relate the discussion to contemporary norms of international law as established by the United Nations Charter. The distinction between *dar-al-harb* (abode of war) and *dar-al-Islam* (abode of Islam) is presented as this issue impacts on laws

the use of all forms of violence. Islam does'. P Sookhdeo, 'A Religion that sanctions violence', *Daily Telegraph*, 17 September 2001, 22. For a detailed analysis, see J. Rehman, *Islamic State Practices, International Law and the Threat from Terrorism: A Critique of the 'Clash of Civilizations' in the New World Order* (2005).

<sup>2</sup> 'We must be aware of the superiority of our civilization, a system that has guaranteed well-being, respect for human rights – and in contrast with Islamic countries – respect for religious and political rights. Islamic civilization is stuck where it was fourteen hundred years ago'. Italian Prime Minister, Silvio Berlusconi, comments made in Berlin, 26 September 2001. These comments have been cited extensively: see A. Palmer, 'Is the West Really Best', *Sunday Telegraph*, 30 September 2001, 14; A. Osburn, 'On the Brink of War: Reaction–Scorn Poured on Berlusconi Views–European and Muslim Leaders Express Disgust', *The Guardian*, 28 September 2001, 4; and 'EU deplores "Dangerous" Islam Jibe', *BBC News*, 9 October 2004, available at <[http://news.bbc.co.uk/1/hi/world/middle\\_east/1565664.stm](http://news.bbc.co.uk/1/hi/world/middle_east/1565664.stm)>.

<sup>3</sup> J.L. Esposito, *The Islamic Threat: Myth or Reality?* (1992) 5; and A. Cassese, *Terrorism, Politics and Law: The Achille Lauro Affair* (1989) 1.

<sup>4</sup> See M.A. Boisard, 'On the Probable Influence of Islam on Western Public and International Law', (1980) 11 *International Journal of Middle East Studies* 429; T. Landscheidt, *Der Einfluß des Islam auf die Entwicklung der Temperamenta Belli im europäischen Völkerrecht* (1955), unpublished dissertation, Göttingen; M.C. Bassiouni, 'Protection of Diplomats Under Islamic Law', (1980) 74 *AJIL* 609; and for a rare, though useful contemporary European perspective on Islam, see S. Ferrari and A. Bradney (eds.), *Islam and European Legal Systems* (2000).

<sup>5</sup> See D. McGoldrick, *From '9-11' to the 'Iraq War 2003': International Law in an Age of Complexity* (2004).

<sup>6</sup> A. Lamb, *Kashmir: A Disputed Legacy, 1846-1990* (1991); A. Azmi, *Kashmir: An Unparalleled Curfew* (1990); and T. Ataöv, *Kashmir and Neighbours: Tale, Terror, Truce* (2001).

<sup>7</sup> See I. Abu-Lughod (ed.), *The Arab-Israeli Confrontation of June 1967: An Arab Perspective* (1996); W. Laqueur, *The Road to War, 1967: The Origins of the Arab-Israeli Conflict* (1968); A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1995); N. Guyatt, *The Absence of Peace: Understanding the Israeli-Palestinian Conflict* (1998); and C. Bell, *Peace Agreements and Human Rights* (2000).

of war in Islam. The significance of humanitarian principles within Islamic international law as well as in Islamic humanitarian law is also highlighted.

The article is divided into five sections. After these introductory comments, section II analyses the nature of Islamic international law (*as-siyar*). Section III examines the meaning of *Jihad* and evaluates its application within modern international law. The discussion establishes the existence of two divergent views on the nature of *Jihad*. While reviewing these divergent views, the authors adopt a third and arguably, more contextualised and realistic approach towards the subject. Section IV examines principles of Islamic humanitarian law, and section V provides some concluding observations.

## 2 THE NATURE OF ISLAMIC INTERNATIONAL LAW (AS-SIYAR)

Within western legal literature, there continues to remain a substantial debate over the acceptance of international law as a distinct field of law and its relationship with domestic laws.<sup>8</sup> Islamic international law, known as *as-siyar*, is in this sense substantially different from its western counterpart. First, *as-siyar* has been recognised as an integral part of Islamic law and Islamic jurisprudence.<sup>9</sup> Second, *as-siyar* grew into a fully functional body of the *Sharia*<sup>10</sup> several centuries in advance of any similar developments in the western world.<sup>11</sup> Majid Khadduri explains it thus:

<sup>8</sup> See M.N. Shaw, *International Law* (2004) 120–174; and D. Feldman, ‘Monism, Dualism and Constitutional Legitimacy’, (1999) 20 *Australian YIL* 105.

<sup>9</sup> See K. Bennoune, ‘As-Salamu Alaykum? Humanitarian Law in Islamic Jurisprudence’, (1994) 15 *Michigan Journal of International Law* 605, 611. For sources of *as-siyar*, see H. Kruse, *The Foundations of Islamic International Law* (1956) 4 n.42; S.G. Vasey-Fitzgerald, ‘Nature and Sources of the Sharia’, in M. Khadduri and H.J. Liebesny (ed.), *Law in the Middle East* (1955) 72; A. Rahim, *Muhammadan Jurisprudence* (1995); J. Schacht, *Origins of Muhammadan Jurisprudence* (1959); J. Schacht, *An Introduction to Islamic Law* (1964); N.J. Coulson, *A History of Islamic Law* (1964); and A.A.A. Fyzee, *Outlines of Muhammadan Law* (4th edn., 1974).

<sup>10</sup> Principles of Islamic law. We like to make the point here that we believe *Sharia* to be based on sources of Islamic law, including the Quran and Hadith, but a human endeavour, guided and inspired by the religious text in Islam. Most writers on Islamic law equate *Sharia* with the Divine Will, a position from which we consciously distance ourselves.

<sup>11</sup> One of the reasons for early development of *as-siyar* since the eighth century AD may well have been the conviction in Muslim theology that the Islamic nation was one entity, the *Ummah*, and so laws to cover various nationalities in this *communitas islamica*, were necessary. The various schools of Islamic juristic thought thus set about to deduce rules of international law from the sources of Islamic law. The Hanafi school of juristic thought was particularly active, and two of Abu Hanifa’s (founder of the Hanafi school of thought) followers came to be known as ‘fathers’ of the Islamic law of nations. Abu Yusuf authored the *Kitab al-Kharaj* and *al-Radd Ala Siyar al-Awai*, and al-Shaybani wrote his famous *al-Siyar al-Kabir* translated by Majid Khadduri as *The Islamic Law of Nations* (1966). These works date back to the second and third century of *hijra*, the Islamic calendar (eighth and ninth century of the Christian calendar). For a discussion

[T]he *siyar*, if taken to mean the Islamic law of nations, is but a chapter in the Islamic *corpus juris*, binding upon all who believed in Islam as well as upon those who sought to protect their interests in accordance with Islamic justice.<sup>12</sup>

Hamidullah defines it as ‘[t]hat 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’.<sup>13</sup>

The sources of *as-siyar* are the same as those of Islamic law. There is a general consensus among writers on the subject that Islamic law is derived from four main sources and a number of subsidiary sources: the *Quran*, the *Sunna*, *Ijma* and *Qiyas* and *ijtihad*. Hamidullah, however, has a more extended list of sources. These include

1. The *Quran*;
2. The *Sunna* or traditions of the Prophet Muhammad;
3. The Practices of the early Caliphs;
4. The Practice of other Muslim rulers not repudiated by the jurisconsults;
5. Opinions of celebrated Muslim jurists:
  - (a) consensus of opinion (*ijma*)
  - (b) individual opinions (*Qiyas*)
6. Arbitral Awards;
7. Treaties, Pacts and other Conventions;
8. Official instructions to commanders, admirals, ambassadors and other State officials;
9. Internal legislation for conduct regarding foreigners and foreign relations;
10. Customs and usage.

The *Quran* is the primary source of Islamic law since it is, in the view of Muslims, the very word of God. The *Quran* consists of revelations made by God to the Prophet Muhammad over a period of approximately 23 years. The *Quran* consists of 114

of the history of the codification of Islamic international law, see M. Hamidullah, *Muslim Conduct of State: Being a Treatise on Siyar, that is Islamic Notion of Public International Law, Consisting of the Laws of Peace, War and Neutrality, Together with precedents from Orthodox Practices and Precedent by a Historical and General Introduction* (1977) 61–72.

<sup>12</sup> M. Khadduri, *The Islamic Law of Nations: Shaybanis Siyar* (1966) 6.

<sup>13</sup> Hamidullah, *op. cit.*, fn. 11, p. 3.

chapters or *sura* (plural *suras*), of greatly varying length and diverse subject matter. The chapters are further divided into verses or *ayat* (plural *ayaat*). Of the 6666 verses, about 70 are addressed to the conduct of hostilities.<sup>14</sup>

The second source of Islamic law is the *Sunna* or traditions of the Prophet Muhammad. The *Sunna* consists of compilation of the Prophet Muhammad's actions, sayings and opinions during his lifetime. The general belief of Muslims is that the *Quran* and *Sunna* form the two primary sources of Islamic law. *Sunna*, however, does not rank as high as the *Quran* but is considered an important source in the interpretation of *Quranic* verses. The memorisation and transmission of the *Sunna* in a literary form is characterised as *hadith*. The term *hadith* with a meaning 'occurring, taking place' represents the 'report' of Prophet Muhammad's *Sunna*.<sup>15</sup> The *Sunna* is preserved and communicated to succeeding generations through the means of *hadiths*.<sup>16</sup>

The third source of Islamic law is *ijma*, or agreement of jurists among the followers of the Prophet Muhammad in a particular age on a question of law.<sup>17</sup> Farooq Hassan contends that although third in the hierarchy of sources of law, *ijma* forms the major portion of Islamic jurisprudence.<sup>18</sup> *Ijma*, as a source of law, is supported by the *Quran* and *Sunna*.<sup>19</sup> The fourth source of Islamic law is *qiyas*, translated as analogical deduction. Analogy can only be employed, if no guidance is available on the point under discussion in any of the other three sources of law.<sup>20</sup> Another source of law is *ijtihad*, which literally means striving, exerting. Abdur Rahim defines it thus:

As a term of jurisprudence it means the application by a lawyer of all his faculties to the consideration of the authorities of the law (that is, the

<sup>14</sup> See appendix in J. Busuttill, 'Humanitarian Law in Islam', (1991) 30 *The Military Law and Law of War Review* 113.

<sup>15</sup> C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (1988) 34.

<sup>16</sup> A *Hadith* consists of two parts, *Isnad* and *Matin*. *Isnad* refers to the link, the source or the chain of narrators of the *Hadith*. Hence a *Hadith* in its *Isnad* would report the person who acted as transmitters. The *Matin* contains the substance of the Prophets' sayings, deeds or actions. See, F.M. Denny, *An Introduction to Islam* (1994) 160–161; and S.H. Al-Mūsawi, *Manhajul-Fiqhil-Islami, A Course in the Islamic Jurisprudence* (1997) 21–22.

<sup>17</sup> Rahim, *op. cit.*, fn. 9, p. 97.

<sup>18</sup> F. Hassan, 'The Sources of Islamic Law', (1982) 76 *Proceedings of the American Society of International Law* 67.

<sup>19</sup> See Rehman, *op. cit.*, fn. 1, p. 14.

<sup>20</sup> According to a well-quoted *Hadith*, the role *Qiyas* was confirmed at the time when Prophet Muhammad (while sending Mu 'adh b. J' alal to Yemen to take the position of a *qadi*) asked him the following question: 'How will you decide when a question arises?' He replied, 'According to the Book of Allah' – 'And if you do not find the answer in the Book of Allah?' – 'Then according to the *Sunna* of the Messenger of Allah' – 'And if you do not find the answer either in the *Sunna* or in the Book?' – 'Then I shall come to a decision according to my own opinion without hesitation', then the Messenger of Allah slapped Mu 'adh on the chest with his hand saying: 'Praise be to Allah who has led the Messenger of Allah to an answer that pleases him'. 'Kiyas', in H.A.R. Gibb and J.H. Kramers (eds.), *Shorter Encyclopaedia of Islam* (1953) 267.

*Quran*, the *Hadith* and *ijma*) with a view to find out what in all probability the law is (that is, in a matter which is not covered by the express words of such texts and has not been determined by *ijma*).<sup>21</sup>

The more conservative body of Islamic scholars deny this as an independent source and believe that the ‘doors of *ijtihad* are closed’, meaning therefore that the age of independent legal reasoning in Islamic jurisprudence is over.<sup>22</sup> But many modern day scholars of Islamic law argue that the doors of *ijtihad* are always open.<sup>23</sup>

## 2.1 Understanding the Scope and Content of Islamic International Law

There are a range of misconceptions regarding the meaning, content and scope of *as-Siyar*. The first of these relate to a belief that the totality of Islamic law, as expressed in the two primary sources (*Quran* and *Sunna*) represent the ultimate expression of the Divine Will<sup>24</sup> and that no further refinement is permissible or indeed possible in the two established sources. Other Islamic jurists however disagree and emphasise the need for continual review and development of Islamic law. According to one leading scholar Gamal Badr, a definition of *as-siyar* should not lose sight of the historical framework of Islam. Studies based on a single source in the classical literature or on sources pertaining to a single period are bound to be descriptive of Islam as it was at a certain point in time, not of the living and developing Islamic view of international law and relations.<sup>25</sup> Badr believes that the Islamic law of nations is not part of the dogma of Islam but

[I]s the product of a continuing process of juridical speculation by authoritative jurists over the ages. The Islamic law of nations is part of the corpus of Islamic law just as the original *jus gentium* was a branch of municipal Roman law. Islamic law is a religious law only in the sense that its basic ethical grounds and some of its general principles are to be found in the *Quran* and the pronouncements of the Prophet Muhammad. Beyond that, the corpus of Islamic law as it developed over the ages is ‘manmade’ in the sense that it resulted from the efforts of the jurists of the various schools of law. If civil law can be described as a legislator’s law

<sup>21</sup> Rahim, *op. cit.*, fn. 9, p. 143 and accompanying footnotes for Arabic sources.

<sup>22</sup> *Ibid.*, p. 147 and discussion therein.

<sup>23</sup> *Ibid.* Mohammad Iqbal, the famous Muslim philosopher–poet actively advocated *ijtihad*. See his famous exposition on the subject, M. Iqbal, *Reconstruction of Religious Thought in Islam* (1971). Also see, Hassan, *op. cit.*, fn. 18, p. 68.

<sup>24</sup> A.A. An-Na’im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (1990) 145; and ‘[T]here is often a traditional misconception about Islamic law being wholly divine and immutable’ is present in M.A. Baderin, *International Human Rights and Islamic Law* (2003) 33.

<sup>25</sup> G.M. Badr, ‘A Survey of Islamic International Law’, (1982) 76 *Proceedings of the American Society of International Law* 56.

as to its source and common law as a judge's law, then Islamic law is a jurist's law. There is very little that is rigid and immutable in Islamic law.<sup>26</sup>

This view is reinforced by Farooq Hassan's discussion on Islamic international law. He argues that

[T]hough the basis of every norm of Islamic law is by theory derived directly or indirectly from God's wishes for His peoples, in arriving at what a particular norm is for a given society, the mind of the jurist is patently visible. Therefore, the mechanics of Islamic jurisprudence, functionally speaking, are similar to the contemporary working of the law of a country possessing a common law system or a civil system of law. The character of the rules of Islamic law is therefore not spiritual but clearly secular, in the sense that such rules are made for the utilitarian purposes of a society by jurists through the use of the same techniques as employed in other legal systems; however, there is a priori, a fundamental assumption that the rules so made are ultimately based on the *Quran* or the *sunna*. The human element in Islamic law is, therefore, as pronounced as it is in any other major legal system of the world.<sup>27</sup>

For purposes of our present discussion, it is important to note that apart from the *Quran* and *Sunna* compiled as *Hadith* (which were inspired by God but compiled by human beings after the death of the Prophet Muhammad), all the other sources of Islamic law are clearly devised by human knowledge and endeavour. This inference however does not appear to be as obvious as it should have been – leading most Muslim scholars to argue that Islamic law is divine law and hence unchangeable. Implications of this conservative view in Islamic jurisprudence for doctrines such as *Jihad* are far reaching indeed. The predominance of this school of thought fossilises the confrontational and conflictual element of *Jihad*, thus precluding alternative legal reasoning, compatible with present day requirements of coexistence in a world espousing diverse ideologies. It is with these concerns in mind that it is proposed to undertake a conceptual analysis of the doctrine of *Jihad* in Islamic tradition.

### **3 JIHAD: ITS MEANING, SCOPE AND PURPOSE IN THE ISLAMIC TRADITION**

The doctrine of *Jihad* is central to the Islamic world view of international law. The *Jihad* ideology remains prominent in modern day conflicts and is frequently equated as the Islamic notion of 'Just war'.<sup>28</sup> Notwithstanding the significance

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> See H.M. Zawati, *Is Jihād a Just War? War, Peace, and Human Rights Under Islamic and Public International Law* (2001) 55–58.

and value of *Jihad* doctrine, there remains a continuing debate over the meaning, scope and purpose of the term. This section examines the two divergent theories advanced by scholars and jurists.

### **3.1 *As-siyar* and *Jihad* Ideology: A Permanent State of Belligerence with all Non-Believers?**

According to this significantly popular interpretation, the totality of *Jihad* ideology represents a religiously sanctioned aggressive war to propagate or defend the faith.<sup>29</sup> In fact, so strong is the ordinance to use aggressive war, that *as-siyar* values are regarded as synonymous to those of the *Jihad*. One proponent of this theory is Professor Rhoda Mushkat, who makes the point that

Islamic law enjoins Moslems to maintain a State of permanent belligerence with all non-believers, collectively encompassed in the *dar al-harb*, the domain of war. The Muslims are, therefore, under a legal obligation to reduce non-Muslim communities to Islamic rule in order to achieve Islam's ultimate objective, namely the enforcement of God's law (the Sharia) over the entire world. The instrument by which the Islamic state is to carry out that objective is called the *jihad* (popularly known as the 'holy war') and is always just, if waged against the infidels and the enemies of the faith.<sup>30</sup>

Since the state of belligerence and conflict is permanent, this view also regards *as-siyar* as exclusive to the Islamic laws of war. James Busuttil in advocating this position in his expose 'Humanitarian Law in Islam',<sup>31</sup> makes the point that

[A] primary concern of Islam, given its impetus to conversion by the sword, is the conduct of war. Indeed, the study of the law of war, the *siyar*, so encompasses the attitude of Islam to the non-Muslim world that it has taken on the connotation of Islamic international law in general.<sup>32</sup>

Busuttil's views appear to coincide with many Islamic scholars who perceive *Jihad* exclusively as an instrument of aggressive war. Majid Khadduri, a prominent

<sup>29</sup> Professor Abdullahi Ahmed An-Na'im makes the observation that 'the term can also refer to religiously sanctioned aggressive war to propagate or "defend" the faith. What is problematic about this latter sense of *jihad* is that it involves direct and unregulated violent action in pursuit of political objectives, or self-help in redressing perceived injustice, at the risk of harm to innocent bystanders...'. A.A. An-Na'im 'Upholding International Legality Against Islamic and American Jihad', in K. Booth and T. Dunne (eds.), *Worlds in Collision: Terror and the Future of Global Order* (2002) 162-172.

<sup>30</sup> R. Mushkat, 'Is War Ever Justifiable? A Comparative Survey', (1987) 9 *Loyola of Los Angeles International and Comparative Law Journal* 227.

<sup>31</sup> Busuttil, *op. cit.*, fn. 14, p. 113.

<sup>32</sup> *Ibid.*

Islamic jurist believes that Islam emerged in the seventh century as a conquering power with world domination as its goal.<sup>33</sup> Its notion of international law, he argues was bound to be in keeping with its mission of proselytisation of the whole of humankind.<sup>34</sup> Islamic law for the conduct of state was, therefore, the law of an imperial state which would recognise no equal status for the party (or parties) with whom it happened to negotiate or fight.<sup>35</sup>

It is contended that Khadduri and Busuttill's views are too narrowly contrasted; they fail to take on board the numerous aspects of conduct of inter-state relations not covering laws of armed conflict. Those arguing for an aggressive position equate *Jihad* as being synonymous with the use of force<sup>36</sup> and sometimes defined as 'holy war'.<sup>37</sup> As noted above, Islamic international law perceives the world as being essentially divided into *dar-al-Islam* and *dar-al-harb*<sup>38</sup>, and in theory, *dar-al-Islam* was permanently at war with *dar-al-harb*. Muslims were under a legal obligation to reduce *dar-al-harb* to Muslim rule and ultimately enforce God's law over the entire world.<sup>39</sup>

There is evidence that this version of *Jihad* ideology was deployed in the expansionist phase of Islam. In the chronicles of Islamic history, there are instances where the lines between violence pure and simple and *Jihad* are blurred; certainly wars and other societal conflicts of early Islamic experience by their very nature were destructive and bloody. This image of *Jihad* as an instrument of aggressive war is relished by those who claim fundamentally divergent

<sup>33</sup> M. Khadduri, *War and Peace in the Law of Islam* (1955) 51–54.

<sup>34</sup> M. Khadduri, 'Islam and the Modern Law of Nations', (1956) 50 *AJIL* 358–359.

<sup>35</sup> *Ibid.*

<sup>36</sup> A.A. An-Na'im reports on the basis of the *Quran* and *Sunna* that the term *qital* (fighting) and its derivatives were used to denote the use of force in international relations as opposed to the term *jihad* which has can be manifested in more than one forms (use of force against the enemy being only one such aspect of *jihad*). See An-Na'im, *loc. cit.*, fn. 24.

<sup>37</sup> Bennoune, *op. cit.*, fn. 9, p. 615. The accompanying n.52 is particularly pertinent to our present discussion. Quoting from Y. Haddad, 'Operation Desert Shield/Desert Storm: The Islamic Perspective', in P. Bennis and M. Moushabeck (eds.), *Beyond the Storm: A Gulf Crisis Reader* (1991) 248, 256, where the author describes how misunderstanding of what *jihad* really means comes out in insensitive statements. She states 'The association of Islam with holy war, and of Muslims with the propagation of violence, seems to be endemic to Western awareness of Muslim faith.... When a member of the American military was interviewed on television (during the Gulf War of 1991) and said that if they want to get to Allah he didnt mind speeding up the process, he was...expressing an overt lack of reverence for Muslim life and Muslim faith'.

<sup>38</sup> Virtually every writer on Islamic law has considered these divisions. *Dar-al-Islam* corresponds to territory under Islamic sovereignty. Its inhabitants were Muslims by birth or conversion and the people of the tolerated religions (Jews, Christians and Zoroastrians) who preferred to remain non-Muslims at the cost of paying a special tax. The *dar-al-harb* consisted of all the states and communities outside the territory of Islam. Its inhabitants were called *harbis* or people of the territory of war (Khadduri, *op. cit.*, p. 359). Also see, S. Mahmassani, 'International Law in the Light of Islamic doctrine', (1966) 117 *RdC* 201, 250–252. Hamidullah, *op. cit.*, fn. 11, Part II.

<sup>39</sup> Khadduri, *op. cit.*, fn. 12, p. 359.

positions between the Islamic legal order and the non-Muslim world. Such a hypothesis forms the basis of apprehension, tensions and ultimately the so-called ‘clash of civilizations’. In engineering the now well-publicised ‘Clash’, Samuel Huntington has viewed Islam as ‘a religion of the sword...glorify[ing] military virtues’.<sup>40</sup> In his perception, ‘[t]he Koran and other statements of Muslim beliefs contain few prohibitions on violence, and a concept of non-violence is absent from Muslim doctrine and practice’.<sup>41</sup>

Thomas Payne contrasts what he perceives as the ‘western view of what religion is and ought to be, namely, a voluntary sphere where coercion has no place’<sup>42</sup> with that of Islam. In his comparison, the

[E]mphasis on non-violence is not the pattern in the Muslim culture. To the contrary, violence has been a central, accepted element, both in Muslim teaching and in the historical conduct of the religion. For over a thousand years, the religious bias in the Middle Eastern Culture has not been to discourage the use of force, but to encourage it.<sup>43</sup>

### 3.2 *Jihad* and Just War: A State of Self-Exertion and Passivity

In contradistinction to the earlier position, a second view is frequently advanced by many jurists. According to this interpretation, the *Jihad* ideology is exclusively one of self-exertion and peaceful co-existence. Proponents of this viewpoint place reliance upon the literal interpretation of the meaning of *Jihad* as well as the primary sources of the *as-siyar* – the *Quran* and *Hadith* of Prophet Mohammed. The term *Jihad* comes from the Arab verb *jahada*, meaning to struggle or exert.<sup>44</sup> The Prophet Muhammad is believed to have stated that exertion of force in battle is a minor *Jihad*, whereas ‘self-exertion in peaceful and personal compliance with the dictates of Islam (constitutes) the major or superior *Jihad*’.<sup>45</sup> The Prophet Muhammad is also reported to have said that the ‘best form of *Jihad* is to speak the truth in the face of an oppressive ruler’.<sup>46</sup> In Islamic jurisprudence, *Jihad* has been defined as ‘exertion of one’s power to the utmost of one’s capacity’.<sup>47</sup>

It is contended that the advent of Islam (especially if compared with its historical epoch) brought forth a peaceful revolution. Islam set peace as the perfect

<sup>40</sup> S.P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (1996) 263.

<sup>41</sup> *Ibid.*

<sup>42</sup> J.L. Payne, *Why Nations Arm* (1989) 121.

<sup>43</sup> *Ibid.*, p. 122.

<sup>44</sup> Bennoune, *op. cit.*, fn. 9, p. 615.

<sup>45</sup> *Ibid.*, An-Na’im, *op. cit.*, fn. 24, p. 145 (citing Al-Kaya Al-Harasiy, Akhan Al-Quran 1:89 1983).

<sup>46</sup> *Ibid.*

<sup>47</sup> Bennoune, *op. cit.*, fn. 9, p. 615.

social and legal ideal. War was strictly regulated and limited by compulsory legal rules based on sacred texts and equitable principles. Many Muslim scholars cite *Quran* and *Hadith* texts to put forward the argument that in the Islamic tradition (unlike popularly held belief), war is an aberration and a condition which may be resorted to only under unavoidable circumstances.<sup>48</sup> The view advanced is that Islam's relations with other nations – as originally expounded by the Prophet Muhammad – was based on the principle of peaceful and non-hostile relations among nations.<sup>49</sup> The *Quran* states that

And if they incline to peace, incline thou also to it, and trust in God.<sup>50</sup>

So do not falter, and invite to peace when ye are the uppermost. And God is with you, and He will not grudge (the reward of) your actions.<sup>51</sup>

The fact that peace is the preferred state of affairs is borne out by the following *Quranic* verse:

And make ready for them all ye can of armed force and of horses tethered, that ye may dismay the enemy of God and your enemy and others besides them whom ye know not: God knoweth them. And whatsoever ye spend in the path of God, it will be repaid to you in full, and ye will not be wronged. And if they incline to peace, incline thou also to it and trust in God. Lo! He is the Hearer, the Knower.<sup>52</sup>

There is also authority in the *Quran* regarding avoidance of the use of force in international relations and settlement of disputes through arbitration and negotiation. A *Quranic* injunction states 'If two parties among the believers fall into a quarrel, make ye peace between them'.<sup>53</sup>

The expansion and propagation of Islam started initially by means of peaceful preaching and persuasion. Freedom of religion was applied in theory and practice.<sup>54</sup> A decade after the advent of Islam, persecution of the Prophet Muhammad and his early companions and followers gained momentum. To avoid further persecution, they fled from Makkah to Madina in 622 AD – an event known as *Hijra* (emigration) which also marks the beginning of the Islamic calendar. At Madina, although the first Muslim State was established, interference of the Makkans continued and Muslims lived under

<sup>48</sup> See Abd al-Wahhab Khallaf, *Al-Siyasa al-Shariyya* (1350 A.H.) 61–100; Sayyid Qutb, *al-Adala al-Ijtima'iyya* (1945) 92, 94–95; Hamidullah, *loc. cit.*, fn. 11. All these sources are cited in Khadduri, *op. cit.*, fn. 12, p. 293 n.40.

<sup>49</sup> For a discussion on this point, see Khadduri, *op. cit.*, fn. 33, p. 293.

<sup>50</sup> The *Quran*, verse VIII:61.

<sup>51</sup> The *Quran*, verse XLVII:35.

<sup>52</sup> The *Quran*, verse VIII:60–61.

<sup>53</sup> Although it may be argued here that this verse is confined in its application to disputes between believers.

<sup>54</sup> Mahmassani, *op. cit.*, fn. 38, p. 279.

persistent fear of invasion from the non-Muslim forces surrounding them. It was at that time, that the doctrine of *Jihad* in the sense of armed conflict gained currency, with the express purpose to defend the religious belief of the Muslims and to avoid extermination at the hands of the then dominant group. Thus *Jihad* in the sense of 'holy war' was established essentially as a means of self-defence.

The expansion of Islam, according to this viewpoint is substantiated not through the use of force but a variety of factors – use of force or aggression forming only an ancillary element. Muslims perceived themselves as liberators and providers of justice, and the rationale for Islam's expansion and Muslim dominance was that

[Islam] was the best social and political order the times could offer. It prevailed because everywhere it found politically apathetic people robbed, oppressed, bullied, uneducated, and unorganised and it found selfish and unsound governments out of touch with people. It was the broadest, freshest and cleanest political idea that had yet come into actual activity in the world.<sup>55</sup>

Even where force was used it was strictly regulated by a body of Islamic humanitarian laws. Thus according to Eaton:

[T]he rapidity with which Islam spread across the known world of the seventh centuries was strange enough, but stranger still is the fact that no rivers flowed with blood, no fields were enriched with the corpses of the vanquished. As warriors the Arabs might have been no better than other of their kind who had ravaged and slaughtered across the peopled lands but, unlike these others, they were on a leash. There were no massacres, no rapes, no cities burned. These men feared God to a degree scarcely imaginable in our time and were in awe of His all-seeking presence, aware of it in the wind and the trees, behind every rock and in every valley. Even in these strange lands there was no place in which they could hide from this presence, and while vast distances beckoned them ever onwards they trod softly on the earth, as they had been commanded to do. There had never been a conquest like this.<sup>56</sup>

Although there is a vast array of *Quranic* verses and *Hadith* literature rendering *Jihad* obligatory on every Muslim male, yet it is not considered a personal duty but only a general duty<sup>57</sup> which, if accomplished by a sufficient number, the

<sup>55</sup> H.G. Wells, *The Outline of History: Being a Plain History of Life and Mankind* (1925) 613–614.

<sup>56</sup> G. Eaton, *Islam and the Destiny of Man* (1994) 29–30.

<sup>57</sup> M. Khadduri, 'International Law', in M. Khadduri and H. J. Liebesny (eds.), *Law in the Middle East* (1955) 353, where it is stated that *Jihad* was a required duty of the whole Muslim community, binding the Muslims en masse rather than individually.

rest will not be condemned for the neglect of that duty – this fact renders administration of *Jihad* entirely in the hands of the government.<sup>58</sup> Those sections of the population who are exempted from participating in *Jihad* include children and the blind, lame, old, sick or the very poor.<sup>59</sup> Women and slaves are also exempted from military service,<sup>60</sup> but in case of need, even these are liable to active military service.<sup>61</sup>

### 3.3 Contextualising and Rationalising *Jihad* Ideology – *Dar-al-sulh*, the third way

As indicated earlier, there are disagreements among jurists regarding the nature of *Jihad* in Islam. Some argue that it is essentially defensive in nature, whereas others are inclined to consider it as including an offensive or aggressive element.<sup>62</sup> It is submitted that the truth probably lies somewhere in the middle, and on a historical plane one might argue that Islamic doctrine of war changed course in keeping with imperatives of time and circumstances: A critical feature in this regard is the contextualising of *Jihad*. Originating from the premise of peaceful propagation of the Islamic faith and resort to war only as a measure of self-defence, the doctrine went through a change when persecution of Muslims by the Makkans led to their emigration to Madina. *Jihad* (in the sense of use of force) was established and permitted to protect Muslims and to ensure their right to practice their religion.<sup>63</sup>

With the developments in *as-siyar*, the expansion of Islamic jurisdictions and increasing interaction of Muslims with other equally powerful societies, the *Jihad* ideology underwent a change. Although the instrument by which the Islamic state was meant to sustain itself and expand territorially was through waging of *Jihad*, this did not always mean going to war. Muslim States had to acknowledge the *de jure* existence and legitimacy of other communities and States. *Jihad* could take the form of intensive religious propaganda which may be construed as a continuous process of psychological and political warfare without resort to use of force in the military sense.<sup>64</sup> In their assessment of this phase of *as-siyar*, some Islamic scholars such as Khadduri, prefer to compare the conflict between *dar-al-Islam* and *dar-al-harb* to non-recognition in inter-state relations without precluding negotiations between the parties.<sup>65</sup> Khadduri's

<sup>58</sup> Hamidullah, *op. cit.*, fn. 11, p. 163, and accompanying footnotes.

<sup>59</sup> Kasani, VII, 97 cited in Mahmassani, *op. cit.*, fn. 38, p. 280.

<sup>60</sup> In support of this view, Ayni XIV states at 164 that the Prophet Muhammad said 'Your jihad is pilgrimage'.

<sup>61</sup> Hamidullah, *op. cit.*, fn. 11, p. 164.

<sup>62</sup> Mahmassani, Hamidullah, Agha Shahi are among writers subscribing to the view that Islam only permits war in self-defence, while Khadduri and Abdullahi Ahmed An-Naim argues that Islam permits use of force for propagation of faith which means that it is inherently aggressive in nature.

<sup>63</sup> Mahmassani, *op. cit.*, fn. 38, pp. 277–279.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

argument provides an avenue for peaceful coexistence between *dar-al-Islam* and *dar-al-harb* which he also reinforces by referring to permissible periods of peace when *Jihad* (in terms of use of force) stood suspended.<sup>66</sup>

With reference to the above argument, the generally accepted view of Muslim scholars on permissible periods of peace was restricted to ten years relying on the Treaty of Hubybia made during the lifetime of the Prophet Muhammad.<sup>67</sup> Later practice of Muslim states reflects extension of the ten-year rule to treaties of unlimited duration.<sup>68</sup>

Some Muslim jurists have argued that the division of the world into *dar-al-Islam* and *dar-al-harb* was necessitated by prevailing conditions and sense of insecurity among the fledgling Muslim community. Present-day conditions evolving from historical experiences of conduct of Muslim states with their non-Muslim counterparts dictate different subdivisions.<sup>69</sup> These writers stress the various peaceful options available in Islam, making room for a third category beyond *dar-al-Islam* and *dar-al-harb* called *dar-al-sulh* (the abode or territory of peace). The *dar-al-sulh* concept itself is based on security offered to people of *dar-al-harb*, i.e. promise of *aman* or security which must be met unconditionally, *dhimmi* status which made Christians, Jewish and members of other religions included as *ahl-al-Kitab* (people of the Book) protected semi-citizens,<sup>70</sup> and the *muwada'ah*, or *pacta sunt servanda*, the recognition of the binding nature of treaties which could not be revoked without notice. It may be argued that introduction of the *dar-al-sulh* as a third category of states in Islamic international opens up the possibility of building upon options of peaceful settlement of disputes in the Islamic tradition. Dr. Gamal Badr attempts to place this tripartite notion of the world, i.e. the *dar-al-Islam*, *dar-al-sulh* and *dar-al-harb* in the historical perspective of Islam, stating that it has passed through three stages of unequal duration, the age of expansion, the age of interaction and the age of coexistence.

The 'age of expansion' where Islam embarked on its mission of winning the whole world. The theory elaborated by jurists of the day was to term collectively the rest of the world which was outside the domain of Islam as *dar-al-harb* (the abode or territory of war). The 'normal' relationship between it and the Muslim state was considered to be war. Truce was permitted but its duration could not extend ten years.<sup>71</sup> (cf. the Treaty of Hudybia). The age of expansion lasted over a century after which it became clear that the objective of carrying Islam to the four corners of the world was unattainable. The realities of interaction with non-Muslim powers imposed new juridical formulations, although some jurists carried over to the age of interaction the norms and thinking of the previous age.

<sup>66</sup> *Ibid.*

<sup>67</sup> See Badr, *op. cit.*, fn. 25, pp. 56–57; Hamidullah, *op. cit.*, fn. 11, pp. 552–553.

<sup>68</sup> *Ibid.*

<sup>69</sup> This view is shared by H. Kruse, *The Foundation of Islamic International Law* (1956) and S.M. Banajah, *Al-Mabadi' Al-Siyasiyah* (1985), cited in Bennoune, *op. cit.*, fn. 9, pp. 619–620 n.42 and 68, respectively.

<sup>70</sup> This status was to be continued legally even during time of war.

<sup>71</sup> Badr, *op. cit.*, fn. 25, pp. 56–57.

The 'age of interaction' saw the main change in legal thought in the rationale for waging war against non-Muslims. While in the earlier period of war, against disbelievers was justified by the mere fact of their disbelief, later jurists placed more emphasis on their hostility to and aggression against Islam as a rationale for *Jihad*. Badr argues that it was in this age of interaction that the dichotomy of *dar-al-Islam/dar-al-harb* was replaced by a tripartite division of the world into *dar-al-Islam*, *dar-al-harb* and *dar-al-sulh*, i.e. the 'abode or territory of peace'. The *dar-al-sulh* is comprised of those states which, while not recognising the authority of the Muslim state over them, are not hostile and entertain friendly relations with it.<sup>72</sup>

The 'age of coexistence' or the third age in Islamic international law coincides roughly with the formative stage of international law as we know it today. In the age of coexistence, which continues to this day, peace has come to be more widely recognised as the 'normal' relationship between the Islamic and non-Islamic states, and treaties of amity no longer need to be of fixed duration.<sup>73</sup>

The above discussion, if established as the accepted view of Muslims will have far-reaching implications for the doctrine of *Jihad* in Islam where one of the reasons for going to war is to bring the *dar-al-harb* into the fold of *dar-al-Islam*.

Many serious issues arise regarding the philosophy of *Jihad* in the Islamic legal tradition. From a survey of the writings of some of scholars on the subject, it is evident that applicability of the doctrine is not confined to self-defence.<sup>74</sup> It is permissible as an instrument of reprisal against a rebellious population, including apostates, in support of allies in foreign jurisdictions, whether Muslim or non-Muslim. Finally, one may also argue that *Jihad* may be used as a tool for expansion of the Muslim faith, lending strength to the argument that Islam spread by the sword.<sup>75</sup>

### 3.4 Observations Regarding Applicability of *Jihad*

In the light of the *Quran* and *Sunna*, as well as writings of jurists, there appears to be little consensus as to what the conclusive rules for *Jihad* are. The safest line of analysis might lie in arguing that a particular injunction came about in keeping with the dictates of time. It will also be relevant to mention here that in line with *Quranic* hermeneutics, every rule has many alternatives. Thus on a continuum, one will witness options ranging from strict punishment to complete forgiveness.

<sup>72</sup> *Ibid.*, p. 57.

<sup>73</sup> These views are also propounded, Khadduri, *loc. cit.*, fn. 12.

<sup>74</sup> For a detailed discussion on the doctrine of *Jihad*, also *ibid.*, pp. 55–82.

<sup>75</sup> Khadduri argues that although it was not a consciously formulated policy, Muhammad's early successors, after Islam became supreme in Arabia, were determined to embark on a ceaseless war of conquest in the name of Islam. The *jihad* was therefore employed as an instrument for both universalisation of religion and the establishment of an imperial world order, *ibid.*, p. 55.

The question one must ask here is: why have the strictest and most extreme measures been adopted as law without leaving room for the less harsh alternatives? An example of this ambiguity and alternatives may be demonstrated in *Jihad* against apostates. Mahmassani defines apostasy as abjuration of Islam, committed voluntarily by a Muslim, either by words or by acts.<sup>76</sup> He believes that there are two courses open to an apostate from Islam. He/she is first invited to return to Islam. If he/she fails to comply, he/she is then liable to capital punishment according to the prevalent Hanafi School,<sup>77</sup> on the basis of a *Hadith* of the Prophet which says 'He who changes his religion must be killed'.<sup>78</sup> But there is a *Quranic* verse that appears to establish a different rule by proclaiming that 'There is no compulsion in religion'.<sup>79</sup> If however apostasy is collective and is accompanied by secession or desertion to the enemy, then it justifies declaration of war. In such a case, it is equivalent to rebellion and discord (*fitnah*), which, in terms of the *Quran*, is worse and more serious than murder.<sup>80</sup> Badr also states that, according to the true interpretation of the *Quran*, not mere renunciation of Islam but becoming an enemy of Muslim society and state was punishable.<sup>81</sup> He refers to a *hadith* where an individual was brought to the Prophet Muhammad, so that the penalty of apostasy would be applied to him. He had thrown his spear out in the desert wanting to kill God because he had lost a beloved woman whom he had wanted to marry. When brought to the Prophet Muhammad to stand trial, the response of the Prophet was 'Isn't it enough for you to believe in God?' The man was not brought to trial, and the penalty was not applied. As Badr describes it, apostacy was more a political question than anything else, comparable in modern laws with treason. It was withdrawal from Islam, taking action against the Islamic nation in a treasonous sense, as opposed to the individual's choice of adopting a different type of belief. Another school of thought argued that denial of Islam, the surrender in peace to God, was the essence of apostasy.<sup>82</sup>

A further question arising out of our discussion of permissible *Jihad* lies in using it as a means of converting non-Muslims to the Islamic faith. Here too, there appears an element of conflict between freedom of religion and the goal of converting people to Islam. Hamidullah is of the view that although no one may be forced to embrace the Islamic faith, yet Islamic rule is to be established by all

<sup>76</sup> Mahmassani, *op. cit.*, fn. 38, p. 287.

<sup>77</sup> Women apostates are not liable to capital punishment.

<sup>78</sup> Ayni XXIV, 79; and Suyuti, Jami, No. 8559, cited in Mahmassani, *op. cit.*, fn. 38, p. 201 n.39.

<sup>79</sup> The *Quran*, verse II:256.

<sup>80</sup> The *Quran*, verse II:191, 217.

<sup>81</sup> Badr, *op. cit.*, fn. 25, p. 76, believes that the concerns of those Muslim delegates at the United Nations who, during the discussions leading to the adoption of the Universal Declaration of Human Rights in 1948 wanted to avoid the term 'to adopt', in that instrument was because they did not want to encourage change of religion from Islam to another. These Muslim representatives were concerned on the basis of lessons of the last century where Muslims were converted by missionaries of imperial powers. Badr believes this to be a political question.

<sup>82</sup> *Ibid.* Dr. Hassan, participating in the discussion is of the view that the issue of apostasy was not political but legal; to say that it was political was not to answer the question.

means. It is not clear what this statement implies, but one might pose the question that if non-Muslims refuse to embrace Islam, would it be legitimate to wage war against them? Verse II:256 of the *Quran* appears to enjoin the opposite stating: 'There is no compulsion in religion. The right direction has become distinct from error'. Similarly, Verse CIX:6 says 'Unto you your religion and me my religion'.

Some Muslim scholars on *Jihad* argue that when a Muslim state is free from internal commotion and strife and has sufficient power to hope for victory in case of resistance, then it is its duty to invite the neighbouring non-Muslim sovereigns to accept the unity of God as an article of faith and believe in Muhammad as the Messenger of God. If they do, they will retain their power and will secure themselves against hostility on the part of the Muslim state. If the invitation is rejected, the non-Muslim chief within the Arabian peninsula has no other choice but to face the sword. If, however, his territory is outside Arabia, the alternative is to pay a yearly *jizyah* or the protection tax, which will secure his territory against Muslim attack. If both these alternatives are rejected and all peaceful persuasion and reasoning fail, then it is the duty of the Muslim State to declare war in the name of God until it conquers and receives the *jizyah* or has the gratification of knowing that the other party has at last embraced Islam.<sup>83</sup>

With regard to the above justifications for *Jihad*, it is submitted that it would be difficult to uphold this opinion on some counts. First and foremost is the inherent contradiction between conversion to Islam by the use of force and freedom of religion verses mentioned above. Second, how valid would these alternatives be in a multi-national world where there is no single Muslim state entity as envisaged in the arguments of Muslim jurists?

Moreover, the distinctive features of *dar-al-Islam* and *dar-al-harb* itself have undergone a change over the centuries. States that would have come within the purview of *dar-al-harb* now no longer answer to that description. A broad definition of *dar-al-Islam* is 'any territory whose inhabitants observe Muslim law'. To further narrow this down, one would have to pose the question: Must Islamic law be observed by the majority of the people, by a considerable number of them, or are there any other conditions required for a territory to be termed *dar-al-Islam*? It is stated that in order that a Muslim territory be regarded as *dar-al-Islam*, the believer should be able to freely fulfil his/her religious obligations. One of the tests was whether prayers on Fridays and Eid (feast days) could be held in the territory.<sup>84</sup> On this definition, British India was considered by Muslim scholars as a *dar-al-Islam*.<sup>85</sup> On the same analogy, one may argue that western states, such as Britain, today also qualifies as *dar-al-Islam*,<sup>86</sup> thus in turn leading to a re-evaluation of the divisions of *dar-al-harb* and *dar-al-Islam*. On the definition given above, very few, if any, countries of the world would qualify as other than *dar-al-Islam*.

<sup>83</sup> Hamidullah, *op. cit.*, fn. 11, pp. 171–172.

<sup>84</sup> Khadduri, *op. cit.*, fn. 12, p. 155.

<sup>85</sup> Rahim, *op. cit.*, fn. 9, pp. 396–397.

<sup>86</sup> Almost every city in Britain has at least one mosque, where Friday and Eid prayers are held. The Muslims also have facility of halal meat slaughter houses and so on.

#### 4 ISLAMIC LAW, *JUS AD BELLUM* AND *JUS IN BELLO*

In common with general international law in prescribing, the laws relating to the use of force (*jus ad bellum*), Islamic law and *as-siyar* also regulate the conduct of hostilities (*jus in bello*). Although, Islamic law attempted to inject strong humanitarian precepts in warfare, the *jus in bello* principles are often heavily intertwined with *jus ad bellum*. In the Islamic tradition, substantial limitations are placed in conducting warfare.<sup>87</sup> As examined in the earlier sections, war is permissible and is regarded as an integral part of human existence. *As-siyar* has, however, from the outset, endeavoured to develop regulatory norms for the conduct of wars and conflicts. Although not entirely synonymous, the Islamic humanitarian laws are in line with rules of modern international humanitarian law.<sup>88</sup> Within *as-siyar*, there exist clear rules relating *inter alia* to, notice of commencement of hostilities, unless it is a defensive war, effects of war, methods of warfare, organisation of the army and navy, modes of fighting, time of fighting, preparation, discipline and regulation of the army. The *Jihad* manifested in war is to be conducted under certain rules, which though originating in the seventh and eighth century, are still relevant today. Rules for the conduct of warfare created a category of protected persons. A distinction is made between combatants and enemy non-combatants. Those non-combatants who are unable to participate in hostilities are classed as protected persons and cannot be attacked, killed or otherwise molested.<sup>89</sup> Jurists differ on many details concerning protected persons, but there is general agreement that they include children, women,<sup>90</sup> the very old, blind, crippled, disabled (mentally and physically disabled) and sick.<sup>91</sup> In addition to these, ‘monks and hermits who retire to a life of solitude in monasteries or cloisters, and other priests who do not associate with other people’ are also to be categorised as protected persons.<sup>92</sup> Mahmassani cites an incident where the Caliph Abu Bakr forbade his commander from harming any religious person.<sup>93</sup> These instructions are in line with rules regarding inviolability of places of worship stated in the *Quran* in the following terms:

<sup>87</sup> Bennoune, *op. cit.*, fn. 9, pp. 620–621.

<sup>88</sup> An-Naim, who considers *Jihad* as an inherently aggressive concept declares that ‘Historically, *jihad* was a positive phenomenon because it humanised the practice of warfare in the Middle Ages. First, *Sharia* prohibited the prevalent practice of using war for material gain or revenge. Second, the Prophet and his companions, acting in accordance with the *Quran* and *Sunna*, laid down very specific and strict rules for honourable combat’. A.A. An-Naim, ‘Islamic Law, International Relations, and Human Rights: Challenge and Response’, (1987) 20 *Cornell International Law Journal* 317, 326.

<sup>89</sup> Mahmassani, *op. cit.*, fn. 38, p. 301.

<sup>90</sup> A woman leader, however, forfeits this right.

<sup>91</sup> Mahmassani, *op. cit.*, fn. 38, pp. 302–303, where states that Shafei and Ibn Hazm limited the exemption of protected persons to women and children.

<sup>92</sup> *Ibid.*, p. 301.

<sup>93</sup> Shaibani I, 39–55, *ibid.*

And had it not been for God's repelling some men by means of others, cloisters, churches, oratories and mosques, wherein God's Name is oft mentioned, would have been demolished.<sup>94</sup>

This verse of the *Quran* is also cited in support of freedom of religion in Islam and against forced conversion to Islam.

In addition to rules regarding protected persons during armed conflict, rules exist in the Islamic tradition aiming at humane conduct of warfare. Treachery and mutilation are prohibited, except in case of reprisals.<sup>95</sup> A saying of the Prophet Muhammad is cited: 'Do not steal from the spoils, do not commit treachery, and do not mutilate'.<sup>96</sup> Another *Hadiith* declares that 'if anyone of you fights, let him avert the face'. It is also forbidden to burn enemy warriors alive.<sup>97</sup> On the basis of the various sources regarding the conduct of armed conflict, Kasani laid down a general rule regarding protected persons in Islam. He is of the opinion that any person capable of fighting may be killed, whether he actually fights or not, and any person unable to fight may not be killed unless he actually participates in the fighting physically or mentally by way of tendering advice and provocation'.<sup>98</sup>

There is difference of opinion among Muslim jurists regarding treatment of prisoners of war which they considered under the heading of 'spoils of war'. This difference is based on two sets of *Quranic* verses, each enjoining a different course of action in the treatment of prisoners of war. The first verse declares that there are only two options available for prisoners who do not embrace Islam or enter into a pledge of safeguard or pact of *dhimmah*. Otherwise, they are to be killed or enslaved.<sup>99</sup> The majority of jurists however prefer to base their rules on a later *Quranic* verse that provides for redemption or release of prisoners of war. According to this interpretation of *as-siyar*, prisoners or hostages are never to be killed or enslaved. Muhammad Hamidullah in a detailed examination has listed nineteen practices expressly prohibited by Islamic law – these include a ban on the abuse and maltreatment of prisoners and hostages.<sup>100</sup>

Amidst this controversy, a few general rules may be identified that leave the Head of State with one of the following five courses:

1. Adult male captives are to be enslaved if this is necessary for weakening the enemy. Women and children cannot be killed;

<sup>94</sup> The *Quran*, verse XXII:40.

<sup>95</sup> Hidayah II, 117, cited in Mahmassani, *op. cit.*, fn. 38, p. 303.

<sup>96</sup> Ayni XIII, 115, cited in *ibid.*

<sup>97</sup> *Ibid.*, citing Mughni X, 502; Hidayah II, 117 and Nawawi Xii, p. 43.

<sup>98</sup> Kasani VII, 101, cited in Mahmassani, *op. cit.*, fn. 38, p. 304.

<sup>99</sup> The *Quran*, Verse XXXVII:4 states thus: 'So when you meet those who disbelieve, it is smiting of the necks until you have routed them, then tighten the fetters (bond), and afterwards either benevolent release or ransom till the war lay down its burden'.

<sup>100</sup> Hamidullah, *op. cit.*, fn. 11, pp. 205–208.

2. Enslavement of captives and their treatment as spoils of war;<sup>101</sup>
3. Redemption by exchange for Muslim prisoner;<sup>102</sup>
4. Redemption by payment of ransom (in money or property);<sup>103</sup>
5. Benevolent release (*mann*) of prisoners of war.

In addition to the abovementioned general rules, some mention must be made of captives who have embraced Islam, either before or after being captured. Such persons cannot be treated as prisoners of war because they enjoy immunity for their life, property and young children.<sup>104</sup> Special immunity is also granted as a result of a pledge of safeguard (*aman*) or a *dhimma* pact.<sup>105</sup>

Another important set of rules in Islamic laws of war relates to destruction likely to be caused in the course of battle. Since in Islam, the objective of war is neither the achievement of victory nor the acquisition of the enemy's property, participants of *Jihad* are meant to refrain from unnecessary bloodshed and destruction of property when waging war. There are, however, three differing views on this issue.<sup>106</sup> The first, held by several jurists (including the Hanafis) proceeds from the premise that inviolability of property is a corollary of the inviolability of its owner. Hence, where life of the owner is not immune, his property cannot possess this quality. This view therefore permits the destruction of enemy property including all fortresses, houses, water supplies, palms and other fruit trees and all other plants and crops. Jurists subscribing to this view cite a *Quranic* verse in support of their contention which states that

Whatever palm you cut down or left standing on its roots, it was by God's leave...<sup>107</sup>

It also allows slaughter of any animals belonging to the enemy, including horses, cows, sheep and cattle, poultry of any kind, bees and beehives. Transferring animals and weapons from the enemy back to Islamic territory is also allowed, but if this course of action is not feasible, animals may be slaughtered and burnt, whereas weapons may be destroyed to prevent the enemy from using them.<sup>108</sup>

<sup>101</sup> An Order of the Caliph Omar is stated to have forbidden the enslavement of an Arab or at least that their manumission is preferable. Mahmassani cites a number of authorities in support of this including Razi VII, 508 and Ayni XIII, 105.

<sup>102</sup> Abu Yusuf, a disciple of Abu Hanifa states that such a redemption is only permissible if this is carried out before the division of the booty.

<sup>103</sup> The Prophet Muhammad is said to have recommended this course by saying: 'Release the captive, feed the hungry and visit the sick' (narrated in Bukhari). Authorities cited in Mahmassani, *op. cit.*, fn. 38, p. 307 n.26.

<sup>104</sup> *Ibid.*, p. 306. But there is no consensus among Muslim jurists on this point.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*, p. 309, has identified some sources including Kasani VII, 100–102; Mawardi, 49–50; Hidayah II, 116; Shaibani I, 39–55; Muhalla X, No. 924; and Mughni X, 506–509.

<sup>107</sup> The *Quran*, verse XXXXXIX:5.

<sup>108</sup> Mahmassani, *op. cit.*, fn. 38, p. 310.

The second view on the subject is held by a growing number of jurists<sup>109</sup> who agree partly with the first view but disagree with killing animals, except those required for food or slaughtered by necessity, as in killing the horse of an enemy in battle. A third view in this regard which is the most respected was held by the first Caliph, Abu Bakr, which he explained in a celebrated address to the first Syrian expedition stating thus:

Stop, O people, that I may give you ten rules to keep by heart! Do not commit treachery, nor depart from the right path. You must not mutilate, neither kill a child or aged man or woman. Do not destroy a palm-tree, nor burn it with fire and do not cut any fruitful tree. You must not slay any of the flock or the herds or the camels, save for your subsistence. You are likely to pass by people who have devoted their lives to monastic services; leave them to that to which they have devoted their lives. You are likely, likewise, to find people who will present to you meals of many kinds. You may eat; but do not forget to mention the name of Allah.<sup>110</sup>

One last element in the laws of war in Islam needs mentioning here, i.e. rules relating to spoils of war (*ghanimah*), defined as any property seized by force from non-Believers in the course of war.<sup>111</sup> It includes, not only property (movable and immovable), but also persons, whether in the form of *asra* (prisoners of war) or *sabi* (women and children). The spoils belong to those who participated in war and must be divided after, not before, winning the war. Although there is difference of opinion among jurists regarding details of distribution of the *ghanimah*, the general rule on the subject is that one fifth is reserved for the state to be used in certain public works, and the remainder is to be distributed among the participants (soldiers).

The one fifth laid aside as the public share is further divided according to a verse of the *Quran* which states thus:

And know that whenever you have taken as booty, a fifth thereof is for God and for the Messenger, and for the kinsmen and orphans and the needy and the wayfarer.<sup>112</sup>

On the basis of the *Quranic* verse, this one-fifth share must be further divided as follows:<sup>113</sup>

1. The share of God and the Prophet Muhammad;

<sup>109</sup> Including the extinct Zahiri school of thought.

<sup>110</sup> Tabari, *Tarikh* I, 1850, cited in Khadduri, *op. cit.*, fn. 12, p. 102.

<sup>111</sup> For detailed rules on division of spoils of war, see Mahmassani, *op. cit.*, fn. 38, pp. 310–318; Khadduri, *op. cit.*, fn. 33, pp. 118–132; Hamidullah, *op. cit.*, fn. 11, pp. 245–251.

<sup>112</sup> The *Quran*, verse VIII:41.

<sup>113</sup> There is controversy among the jurists as to details.

2. The share of the Prophet Muhammad's kinsmen;
3. The share of orphans;
4. The share of the needy;
5. The share of the wayfarer.

## 5 CONCLUSION

Up until this time, the international law scene has witnessed hegemony of Western legal doctrine with little attempt to take on board concepts of *as-siyar* in discussions on the modern law of nations, including humanitarian law and laws of armed conflict.<sup>114</sup> Our study has established that it is not possible to ignore rules developed in the Islamic legal system as regards conduct of inter-state relations including laws of war, which even today form a coherent body of rules comparable with any legal system of the world. The problem however has been, that rather than compare Islamic laws of war of the seventh and eighth century with comparable laws in other legal systems of that period, the tendency has been to draw comparisons with twentieth century regulations in the field of international law and argue that Islamic law falls short of current standards.

It is submitted that in many areas of international law, such as human rights and the laws of war, rules of Islamic international law could be applied to build a better and more effective international legal order. Classical Islamic legal thought dictates that States can never be sovereign and are always subordinate to God's will and that individuals are subjects of international law.<sup>115</sup> Furthermore, Islamic law of nations is monistic thus according to greater juridical validity to international law in domestic legal structures.<sup>116</sup> In this respect, there is no distinction between the ordinary laws of the land and laws of inter-state conduct.<sup>117</sup> It is argued that a narrow understanding of *as-siyar* by confining it to laws of war in Islam would amount to ignoring the rich contribution of centuries of Islamic legal scholarship on international law. It also fails to take on board rules emerging from the application of alternative interpretations competing with views deduced from a literal and non-contextual reading of the *Quran* and *Hadith* text.<sup>118</sup>

<sup>114</sup> A few exceptions include the drafting process of the UN Convention on Rights of the Child and some comparative academic discourse on water policy. See, T. Naff and J. Dellapenna, 'Can there be confluence? A comparative consideration of Western and Islamic fresh water law', (2002) 4 *Water Policy* 465–489.

<sup>115</sup> J. Schacht, 'Islamic Law in Contemporary States', (1959) 8 *American Journal of Comparative Law* 133, 144.

<sup>116</sup> Hassan, *op. cit.*, fn. 18, pp. 71–72.

<sup>117</sup> Hamidullah, *op. cit.*, fn. 11, pp. 4–5.

<sup>118</sup> It is pertinent to mention here the fact that verses of the *Quran* give out conflicting views regarding laws of war, rules for conduct of war, treatment of prisoners of war, cessation of hostilities and so on. This ambiguity, it is argued provides room for developing rules of war in Islam that incline towards exigencies of the present.

Establishment of the United Nations has rendered use of force impermissible save in the limited instances of self-defence or through sanctioning of the Security Council. As noted earlier, modern Islamic States accept the position advanced by the United Nations Charter on the prohibition of the use of force – a position which is regarded as consistent with *as-siyar* and the *Jihad* ideology. Islamic States, while maintaining their Islamic credentials have, alongside other member States of the UN, renounced violence, aggression and terrorism. The insistence on prohibition on use of force in international relations by Islamic States therefore points towards a compatibility of the fundamental principle of international law with Islamic law and *as-siyar*. Last but not the least, the Charter of the Organisation of Islamic Conference (OIC) reaffirms commitment of its member (Islamic) States, to ‘the United Nations Charter and fundamental Human Rights, the purposes and principles of which provide the basis for fruitful cooperation among all people’.<sup>119</sup> Objectives of the OIC do not allude to the international community of States as being divided along the *dar-ul-harb/dar-ul-Islam* categorisation and include ‘taking all necessary measures to support international peace and security founded on justice’.<sup>120</sup> Likewise, in the field of humanitarian laws, Islamic States seek inspiration from *as-siyar* as well endorsing international legal principles of humanitarian laws. To achieve an effective conceptual confluence of ‘Western’ and ‘Islamic’ international law, contemporary state practice of Islamic jurisdictions must be taken as the ‘living’ or ‘operative Islamic law’,<sup>121</sup> thus comparing practice of legal norms rather than abstract ideological or rhetorical precepts.

<sup>119</sup> The Charter of the Organization of Islamic Conference, *The Preamble* (1972). Available at <<http://www.oic-oci.org/>>.

<sup>120</sup> *Ibid.*, article II(A).

<sup>121</sup> Shaheen Sardar Ali developed this concept in her book, *Gender and Human Rights in Islam and International Law. Equal Before Allah, Unequal Before Man?* (2000). She argues that Islamic law, as applied in Muslim jurisdictions today is informed and influenced by many factors extraneous to religion and include social, economic and political circumstances as well as international instruments.