

Islamic *Jus ad Bellum* and the Modern Trend in the Use of Force*

By

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Abstract

jus ad bellum is a principle of international law that deals with rules governing the right of parties to engage in war. This body of rules is meant to determine the legitimacy, justification or otherwise of a war. However, this principle has been misconceived and misconceptualised from Islamic international law perspective. Western writers in particular often portray Islamic *jus ad bellum* in a bad image by asserting that some verses of the Quran instigate Muslims to engage in violent activities that threatens world peace. As such, this paper analysis Islamic *jus ad bellum* and relates it with the realities of the modern international law in relation to the use of force in carrying out international relations. The paper posits that Islamic *jus ad bellum* has justification for the use of force just as the United Nations Charter provides a widow for defensive war. The paper recommended that both western writers and dogmatic scholars of Islamic law should appreciate that Islamic *jus ad bellum* could be explained in the light of the modern international law on the use of force since.

Keywords: War, *Jus ad bellum*, Use of Force, International Law, Jihad

1. Introduction

The concept of *jus ad bellum* simply refers to embodiment of rules governing the right of parties to engage in war. This body of rules is meant to determine the legitimacy, justification or otherwise of a war. In line with this meaning, there has been misconceptions and ill-will concerning Islamic perspective of *jus ad bellum*. Western writers in particular often portray Islamic position in a bad image by asserting that some verses of the Quran instigate Muslims to engage in other jihad related activities that threatens world peace. It is acknowledged that

* The early version of this paper was presented at the Maiden Seminar Series of the Department of Sharia Law, Faculty of Law University of Maiduguri held on 13th March 2018 at the Faculty Conference Room.

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antecedent of Islam as a religion shows that many wars were fought but at that time war was a means of carrying out international relations and Arabia was hostile and intolerant. It was obvious that Islam fought the wars during that time in line with the realities of the then Arabian Peninsula.

In view of this background, the paper discusses Islamic *jus ad bellum* and the modern international law relating to the use of force in international relations. In doing so, the paper provides a background by discussing jihad and the concepts that are associated with violent jihad such as *dar al-Islam* and *dar al-harb* and whether Islam *jus ad bellum* allows for both defensive and aggressive wars. The paper further discusses the position of modern international law in the use of force and tries to relate the discussion with the Islamic position in the light of today's reality.

2.1 Concept of Jihad

The word 'war' has been used synonymously with the word 'Jihād' in Islamic law which is an Arabic term.¹ The etymology of the word Jihād is derived from Arabic verb *jāhada* which simply means to exert an effort or strive hard to achieve a particular objective.² This can be done by either act of commission or omission which can be a moral or spiritual duty, rather than a mere commitment to military violence.³ The Prophet (PBUH) has stated in several *ahadith* different acts that constitute Jihad. Speaking the truth before an unjust ruler is described as one of the greatest Jihad. It was reported that the Prophet (PBUH) said the "best form of Jihad is to speak the truth in the face of an oppressive ruler."⁴ In another tradition, the Prophet (PBUH) stated that a Muslim can perform Jihad by faith in his heart, by "preaching and proselytising with his tongue", by "good deeds with his hands" and by "confronting unbelievers or enemies with the sword" and the latter is considered the inferior Jihad.⁵ Thus, self-exertion in peaceful time against evil deeds and personal compliance with the injunctions of Islam also constitute the major or superior form of Jihad.⁶ In the words of Zawati, Jihad "is essentially an

¹ Mohammed Ahmad, "Jihad in Islam" (2004), *The Light*, at 13; Bernard K. Freamon, "Martyrdom, Suicide, and the Islamic Law of War: A Short Legal History" vol. 27 (2003) *Fordham International Law Journal*, at 301

² *Ibid*

³ R. Paul Churchill, "Interpreting the Islam Jihad: Militarism Versus Muslim Pacifism" (1991) *The Acorn*, at 20; Magdalena Martinez Almira, "Women in Jihad: A Question of Honour, Pride and Self-Defence" vol. 1, No. 1 (2011) *World Journal of Islamic History and Civilisation*, at 27

⁴ Shaheen Sardar Ali and Javaid Rehman, "The Concept of Jihad in Islamic International Law" (2005) *Journal of Conflict & Security Law*, at 10; See Imam Khomeini, *Governance of the Jurist (Velayat-e Faqeeh)* translated by Hamid Algar, Tehran: The Institute for Compilation and Publication of Imam Khomeini's Works, n.d., at 66

⁵ *Sahih Bukhari*, Book 2, vol. 52, Hadith 248

⁶ Abu Dawud, (Kitab al-Jihad) Book 14, Hadith 2498

expression of endeavor and struggle in the cause of Allah.”⁷ In the context of Islamic Jurisprudence, Jihad is defined as “exertion of one’s power to the utmost of one’s capacity.”⁸

However, most western writers do not really appreciate and share the view that Jihad could connote a non-violent means by which a Muslim can attain his religious goals.⁹ They often prefer to ascribe violence to Islam and recognised Jihad as a holy war to be fought against the non-Muslims.¹⁰ Some went to the extent of justifying terrorism and suicide attacks as having a religious connotation and support from the Islamic teachings.¹¹ According to some of the westerners “the overwhelming majority of classical theologians, jurists and traditionalists ... understood the obligation of jihad in a military sense.”¹² By and large, the scholars are tilted toward the violent aspect of Jihad and try to associate its prosecution to Islamic dogma.¹³ It is clear that Prophetic traditions show that Jihad is not necessarily violent and the non-violent is even the superior form of Jihad.

Importantly, the concept of Jihad is an aspect of Islamic law which centers on *fiqh*.¹⁴ It has been developed through *Ijtihad* by Muslim scholars since *fiqh* deals mainly with juristic exertion of effort to arrive at a just ruling on Islamic issues.¹⁵ Some Muslim scholars could not precisely voice out the fact that Jihad is part of *fiqh* and has developed as a result of *Ijma*,¹⁶

⁷ Hilmi M. Zawati, *Is Jihād a Just War? War, Peace, and Human Rights Under Islamic and Public International Law*, Lewiston: Edwin Mellen Press, 2001, at 13

⁸ Karima Bennouna, “*As-Salamu Alaykum?* Humanitarian Law in Islamic Jurisprudence” 15 (1994) Mich. J. Int’l L. at 615

⁹ It is import to note that Islam hates war and the Prophet was reported to have said worst names is war and it is bitter. *Sahih Muslim*, (Kitab al-Jihad Wa’l Siyar) Book19, Hadith 4323

¹⁰ Churchill, Op cit, at 20

¹¹ Joel Hayward, “The Qur’an and War: Observations on Islamic Just War” vol. 13, No. 3 (Winter 2010) Air Power Review, at 56; Maribel Fierro, “A Review of ‘Between Jihad and Salaam: Profiles in Islam, by Joyce M. Davis, New York: St. Martin’s Press, Inc., 1999” vol 19, No.1, The American Journal of Islamic Social Sciences, at 123; Ali Raza Tahir, “Islam’s Concept of Jihad (A Philosophical Analysis)” vol. 2, No. 5 (September 2012) Interdisciplinary Journal of Contemporary Research in Business, at 124

¹² David Burkay, “The Religious Foundations of Suicide Bombings Islamist Ideology” vol. xiii, No. 4 (Fall 2006) Middle East Quarterly, at 27

¹³ Churchill, n. 2 at 20

¹⁴ *Fiqh* refers to “knowledge of the practical rules of *Shari’ah* acquired from the detailed evidence in the sources” and it “is concerned with the knowledge of the detailed rules of Islamic law in its various branches.” See Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, Malaysia: IIUM, 2001, at 12

¹⁵ “Understanding Sharia’s Role in the War” at 2 <www.wired.com/images_blogs/.../05/guandolo_jihad_islamic_law.pdf> viewed 23 October 2013

¹⁶ *Ijma* simply refers to consensus of opinion of Muslim jurists on a particular legal issue. Ahmed Souaiaia, “On the Sources of Islamic Law and Practices” vol. XX (2006) Journal of Law and Religion, at 102; Kamali, Op cit, at 155

*Qiyas*¹⁷ and *Ijtihad*.¹⁸ The misconception about the categorisation of Jihad as part of *fiqh* has been one of the rationales behind the western misrepresentation and pervasion of the Islamic concept of Jihad.¹⁹ Moreover, even among the Muslim scholars, there are divergent views concerning the meaning and application of the term, particularly in trying to relate the classical Islamic position that was developed in the orthodox Islamic heritage with the modern day global practice.²⁰ In addition, a careful look at the jurisprudential definition of Jihad coupled with the varying definitions given by Islamic schools of thought and their approaches have further contributed to the misrepresentation of Jihad by the western scholars as a 'Holy War'.²¹

In considering Jihad from a violent perspective, Islam recognises Jihad as central to the Muslim perception of the dissection of the world into *dar Islam* (abode of Islam) and *dar al harb* (abode of war).²² *Dar al Islam* is a nation where there is prevalence of Islamic norms and practice, and is being governed based on Islamic law and teachings.²³ *Dar al harb* on the other hand, is a nation that is not practicing Islam and is not governed by Islamic law.²⁴ Accordingly, the *dar al harb* is a nation that is in a state of permanent belligerency with Muslims, as such Muslims should endeavor to conquer and make it part and parcel of *dar al Islam*.²⁵ According to Heck, it has to be done to the extent of "privileging Islam over other religions and the interests of Muslims over non-Muslims within the socio-political order".²⁶ This is superficial

¹⁷ *Qiyas* refers to analogical deduction of a legal ruling derived from the primary sources of Islamic law. Kamali, Op cit, at 180; Ahmed, On the Sources of Islamic Law and Practices, at 102

¹⁸ Majid Khadduri, "Islam and the Modern Law of Nations" vol. 50 (1956) The American Journal of International Law, at 359

¹⁹ Ahmed Mohsen Al-Dawoody, *War in Islamic law; Justifications and Regulations*, Ph.D. Thesis: University of Birmingham, 2009, at 128-129. The author considers the instance of the various definitions given by the four Islamic schools of thought. Hanafi jurists define Jihād as 'exerting one's utmost effort in fighting in the path of God either by taking part in battle or by supporting the army financially or by the tongue'. The Mālikīs define Jihād to mean 'exerting one's utmost effort in fighting against a non-Muslim enemy with whom Muslims have no peace agreement in order to raise the word of God, i.e., to convey or spread the message of Islam' while the Shāfi'īs define it "as fighting in the path of God", and the Hanbalīs define it as "fighting against unbelievers".

²⁰ Muhammad-Basheer Adisa Ismail, *Islamic Diplomatic Law and International Diplomatic Law: A Quest for Compatibility*, Ph.D. Thesis: University of Hull, 2011, at 296. According to Maududi, there are two causes of misconception about Jihad which is attributed to the failure of both non-Muslims and Muslims alike to "understand the real nature of Jihad fi Sabilillah ("Holy War for the Cause of Allah")...they assume Islam to be a "Religion" in the accepted (western) sense." The second cause "is that they take Muslims to be a 'Nation' in the technical sense." See Abul A'la Maududi, *Jihad Fi Sabilillah (Jihad in Islam)* Translated by Khurshid Ahmad, Birmingham: UKIM Dawah Center, 1938 at 4

²¹ Ibid

²² M. Cherif Bassiouni, "A Reviewed of Is Jihād a Just War? War, Peace and Human Rights under Islamic and Public International Law by Hilmi M. Zawati" vol. 96, No. 4 (2002) The American Journal of International Law, at 1001

²³ Ibid

²⁴ Muhammad-Basheer Adisa Ismail, *Islamic Diplomatic Law and International Diplomatic Law: A Quest for Compatibility*, Ph.D. Thesis: University of Hull, 2012, at 325-328

²⁵ Ibid

²⁶ Paul L. Heck, "Jihad Revisited" vol. 32, No. 1 (2004) Journal of Religious Ethics, at 96

of the Western thought. It is significant to point out that the dichotomisation was not unconnected with the earlier day's international practice in Arabia where war was the recognised means of carrying out international relations.²⁷ Both Arabia and its environs were deeply concerned with the 'state of war' that existed between the various clans and tribes which was the true reflection of the then realities of Arabian Peninsula.²⁸ This point was buttressed by several provisions of the Quran. Allah says "[a]nd remember when you were a small, marginalised group in the land, living in fear that the people would snatch you away ..." ²⁹ and the other verse says "[i]f we follow the guidance with you we shall be snatched from our land."³⁰ Likewise, in another verse Allah says "[d]o they not see that We established a safe haven while people all around them were being snatched away?"³¹ Therefore, it is glaring from the aforementioned verses that clans and nations were threatened with high insecurity of invasion as a result of the 'state of war' that existed at that period which might have influenced the scholars' position.

More importantly, many scholars are of the view that the dichotomization is part of *fiqh* and there is no single verse or tradition of the Prophet (PBUH) that mentioned the separation of the world into two dichotomies (*dar al-Islam* and *dar al-harb*). The whole idea about the two opposing realms was breed and nurtured by scholars who have considered the antecedent

²⁷ Abdullahi Ahmad An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law*, Syracuse: Syracuse University Press, 1996, at 142; Manuel E. F. Supervielle, "Islam, the Law of War, and the U.S. Soldier" vol. 21 (2005) AM. U. INT'L L. REV, at 205

²⁸ Sherman A. Jackson, "Jihad and the Modern World" vol. 7, No. 1 (2002) Journal of Islamic Law and Culture, at 12. It is important to point out that Islam is a religion of peace and has accorded high respect for sanctity of human life. No life should be taken except with just cause, Allah says: "[...]And do not kill the soul which Allah has forbidden [to be killed] except by [legal] right [...]" Quran *al-An'am* 6: 151. Any person who intentionally kills a human being without justification is as good as he killed the whole *ummah*. In Surah *al-Ma'ida* Allah says: "[...] whoever kills a soul unless for a soul or for corruption [done] in the land – it is as if he had slain mankind entirely. And whoever saves one – it is as if he had saved mankind entirely. And Our messengers had certainly come to them with clear proofs. Then indeed many of them, [even] after that, throughout the land, were transgressors." Quran *al-Ma'ida* 5:32

²⁹ Quran *al-Anfal* 8:26

³⁰ Quran *al-Qasas* 28:57. Other verses of the Quran further refer to the insecurity, threat and the danger involved in staying in Arabian Peninsula in those days. The Quran says: "Let them, then, worship the Lord of this House, Who banished their hunger with food and their fear with security", Quran *al-Quraysh* 106:2-4. In yet another verse, the Quran says: "Surely all the people have lined up against you so fear them." Quran *al 'Imran* 3:173

³¹ Quran *al- 'Ankabut* 29:67. In Quran 9 verses 7-10 Allah says: "How can there be for the polytheists a treaty in the sight of Allah and with His Messenger, except for those with whom you made a treaty at al-Masjid al-haram? So as long as they are upright toward you, be upright toward them. Indeed, Allah loves the righteous [who fear Him]. How [can there be a treaty] while, if they gain dominance over you, they do not observe concerning you any pact of kinship or covenant of protection? They satisfy you with their mouths, but their hearts refuse [compliance], and most of them are defiantly disobedient. They have exchanged the signs of Allah for a small price and averted [people] from His way. Indeed, it was evil that they were doing. They do not observe toward a believer any pact of kinship or covenant of protection. And it is they who are the transgressors." These verses show lack of tolerance that Muslims faced when they were few and weak from the polytheist.

of the earlier international relations of Islam.³² However, the designation *dar al-harb* in the modern context means that a nation which does not have international treaty relation with Muslim countries.³³ It does not mean that hostilities may break out at any time between the two nations, as there is possibility of initiating and negotiating treaty with such a country.³⁴ However, for countries that have a treaty with Muslim nations and they are not actually *dar al-Islam*, such countries are regarded as abode of treaty (*dar al-ahd*) or abode of reconciliation (*dar al-sulh*).³⁵ This means that notwithstanding the fact that a country is not governed by Islamic law, it can still be in friendly relationship with a Muslim nation provided that the relationship is bounded by a treaty.³⁶ Whereas, a country that is neither abode of Islam nor abode of treaty, no absolute refrain from hostilities can be guaranteed as any justifiable ground for embarking on war can be entertained since there is no mechanism for amicable resolution of dispute.³⁷ This position will later be considered in the light of contemporary international law on the use of force. It is significant to note that under Islamic *jus ad bellum*, war can only be declared by a legitimate authority upon determination of a legitimate cause which can be either defensive or offensive.

2.2.1 Defensive Jihad

There are divergent views as to whether Jihad can only be waged in defence of an Islamic state territory or it can equally be waged for the purpose of propagating the religion of Islam (war of aggression).³⁸ Scholars such as Maliki, Hanafi and Hambali are of the opinion that Jihad can only be waged in the defence of a state against invasion or against persecution of Muslims based on their religious faith.³⁹ They supported their position with the Quranic verse where Allah says “[f]ight in the way of Allah those who fight you but do not transgress.

³² The Royal Aal al-Bayt Institute for Islamic Thought, *Jihad and the Islamic Law of War*, Jordan: The Royal Aal al-Bayt Institute for Islamic Thought, 2007, at 26 (hereinafter ‘Institute for Islamic Thought’)

³³ Khadduri, Op cit, at 360; Brek Batley, “The Justifications for *Jihad*, War and Revolution in Islam” (2003) Working Paper No. 375, Canberra, at 3-4

³⁴ Ibid; Ibrahim Abdullah Al-Marzouqi, *Human Rights in Islamic Law*, n.p. (2005), at 107-108

³⁵ Institute for Islamic Thought, Op cit, at 26

³⁶ Maurits Berger, “Islamic Views on International Law” in *Culture and International Law*, edited by P. Meerts, Hague: Hague Academic Coalition, 2008, at 107-108

³⁷ Khadduri, Op cit, at 361

³⁸ Michael Bonner, *Jihad in Islamic History Doctrines and Practice*, Princeton: Princeton University Press, 2006, at 12

³⁹ Al-Dawoody, *War in Islamic law; Justifications and Regulations*, at 133. Sufyan al-Thawri equally shares the view that Jihad can only be fought in a defensive manner. See Roy Parviz Mottahedeh and Ridwan al-Sayyid, “The Idea of the *Jihad* in Islam before the Crusades” in *The Crusades from the Perspective of Byzantium and the Muslim World*, edited by Angeliki E. Laiou and Roy Parviz Mottahedeh, Washington: Dumbarton Oaks, 2001, at 26

Indeed, Allah does not like transgressors.”⁴⁰ They further cited the verses which say “[a]nd what is [the matter] with you that you fight not in the cause of Allah and [for] the oppressed among men, women, and children....”⁴¹ and “[p]ermission [to fight] has been given to those who are being fought, because they were wronged.”⁴²

From the aforementioned verses, Jihad is to be fought when Muslims are under attack which could be direct attack or attack by way of oppression. It can be further deduced that Muslims are only allowed to fight back those who fight them, persecute or oppress them, but aggression is not allowed.⁴³ Based on these authorities, it is an obligation on the part of Muslims to defend the *ummah* against oppressors such as in the case of Palestine who have been deprived of their wealth, exiled from their homes and denied their land.⁴⁴

Thus, defensive jihad is “arguably the only kind of war permitted by Islamic *jus ad bellum* and is described in the classical sources as an important variety of the religious obligation of jihad.”⁴⁵ Furthermore, as a counter to those who opined that aggressive war is also permitted for the sake of propagating Islam, Islam has prohibited compulsion in religion. The Almighty Allah says “[t]here shall be no compulsion in [acceptance of] the religion.”⁴⁶ Therefore, waging war with the sole aim of propagating Islam would not be in consonance with

⁴⁰ Quran *al-Baqarah* 2:190

⁴¹ Quran *an-Nisa* 4:75

⁴² Quran *al-Hajj* 22:39. The subsequent verse also provides that: “[They are] those who have been evicted from their homes without right – only because they say, ‘Our Lord is Allah.’” Quran *al-Hajj* 22:40

⁴³ Michael G. Knapp, “The Concept and Practice of Jihad in Islam” vol. 33, No.1 (2003) Parameters US Army War College, at 85

⁴⁴ Sohail H. Hashim, “Is there an Islamic Ethic of Humanitarian Intervention” in *Just Intervention* edited by Anthony F. Lang, Washington: Georgetown University Press, 2003, at 69-70; Bernard, *Martyrdom, Suicide, and the Islamic Law of War: A Short Legal History*, at 300-301. See Irwin J. Mansdorf and Mordechai Kedar, “The Psychological Asymmetry of Islamist Warfare” vol. XV, No. 2 (2008) Middle East Quarterly; Michael, *The Concept and Practice of Jihad in Islam*, at 86; Douglas Roche, *The Human Right to Peace*, Mumbai: Better Yourself Books, 2006, at 155-156

⁴⁵ Bernard, *Martyrdom, Suicide, and the Islamic Law of War: A Short Legal History*, at 300-301

⁴⁶ Quran *al-Baqarah* 2:256. Additionally, the Quran in Surah *al-Kafirun* 109: 1-6 has made it clear that there is no compulsion in joining the religion of Islam. Abdullah ibn Abbas narrated that “when the children of a woman (in pre-Islamic days) did not survive, she took a vow on herself that if her child survives, she would convert it a Jew. When Banu an-Nadir were expelled (from Arabia), there were some children of the Ansar (Helpers) among them. They said: We shall not leave our children. So Allah the Exalted revealed; ‘Let there be no compulsion in religion. Truth stands out clear from error.’” Abu Dawud, (*Kitab al-Jihad*) Book 14, Hadith 2676. Another hadith narrated by Abu Huraira stipulates that the Prophet (PBUH) states that “I have been ordered to fight against the people until they say: There is no God but God.” The interpretation given to the people referred to by the Prophet in the hadith was said to mean only Arab idolaters while Maliki said refers to only Quraysh. *Sahih Bukhari*, Book 4, vol. 52, Hadith No. 196. Additionally, Quran *al-Kafirun* 109: 1-6 clearly shows that there is no compulsion in joining a religion. Another verse used to refute aggressive Jihad is where Allah says: “[Fighting in] the sacred month is for [aggression committed in] the sacred month, and for [all] violation is legal retribution. So whoever has assaulted you, then assault him in the same way that he has assaulted you. And fear Allah and know that Allah is with those who fear Him.” Quran *al-Bakara* 2:194

the Islamic dictates. As such, “Islam neither justifies an aggressive war nor does it make destruction of crops, animals, home etc., an objective of war.”⁴⁷ Thus violent jihad can only be used in defence or for the purpose of establishing peace and justice in case of oppression.⁴⁸ Accordingly, a defensive Jihad is a serious war that constitutes *fard ayn* on Muslims which refers to personal obligation of every capable individual. Thus a Jihad becomes *fard ayn* in the event of enemy invasion of the Muslims territory as such other rules governing going to war such as parental permission are discarded.⁴⁹

However, it is significant to point out that the aforementioned scholars though did not canvas for aggressive jihad but it can be asserted that they have mentioned aggressive jihad by implication since they recognized jihad as *fard kifayah* (individual obligation). Arguably, recognition of individual obligation in times of violent jihad shows that it is not defensive because defensive jihad is *fard ayn* (obligatory on everybody).

2.2.2 Aggressive Jihad

There are some jurists particularly the Shafi’i and some Hambali and Zahiri jurists who opined that aggressive Jihad is to be waged against the non-Muslims with a view to submitting them to Islam. Shafi’i buttresses his position by citing a verse where Allah says:

“And when the sacred months have passed, then kill the polytheists wherever you find them and capture them and besiege them and sit in wait for them at every place of ambush. But if they should repent, establish prayer, and give zakkah, let them [go] on their way. Indeed, Allah is Forgiving and Merciful.”⁵⁰

According to Shafi’i, this verse has abrogated the Quranic verses relied upon by the proponents of defensive Jihad. It is apposite to point out that the subsequent verse following the authority of Shafi’i says “[a]nd if any one of the polytheists seeks your protection, then grant him protection so that he may hear the words of Allah [i.e. the Quran]...”⁵¹ The subsequent verse has clearly shown that polytheists can securely leave in a Muslim territory and enjoy protection from the state. Perhaps, this prompted Shafi’i to distinguish between non-Muslims and

⁴⁷ Hammudah Abdalati, *Islam in Focus*, Egypt: Dar Al-Manarah, 2007, at 174

⁴⁸ Zakir Naik, “Islam and Terrorism” at 3 <www.admireislam.com/Islam/IslamTerrorism.pdf> viewed on 12 December 2013

⁴⁹ Churchill, Op cit, at 114

⁵⁰ Quran *al-Tawba* 9:5

⁵¹ Quran *al-Tawba* 9:6

categorised them into Arab and non-Arab disbelievers.⁵² In view of this categorisation, the Arab disbelievers are to be fought until they abandon polytheism and embrace Islam.⁵³ For the non-Arab disbelievers and people of the book, they are to be called to accept Islam or pay *Jizya* (poll tax) in the alternative.⁵⁴ If they accept neither of the two options, they are to be fought.⁵⁵ Some scholars such as *Qutb* were cited to have insisted that “waging jihad against the people of the Book (Jews and Christians) is a permanent, communal obligation upon the Muslims.”⁵⁶ This view cannot be dissociated from the earlier established ‘state of war’ that existed between Muslims and non-Muslims which was characterised by permanent belligerency.⁵⁷ This mode of Jihad is *fard kifaya* which means a communal responsibility to be discharged so that it is fulfilled once there is sufficient number of individuals participating to achieve the goal. Jihad becomes *fard kifaya* when it is waged particularly outside the Islamic state territory.⁵⁸

3. The International Law *Jus ad Bellum*

Jus ad bellum,⁵⁹ which literally means “law to war” or justice to war, refers to set of rules that regulate the initiation of the use of armed force.⁶⁰ It is not regulated by International Humanitarian Law (IHL) but by the United Nations (UN) Charter⁶¹ which is a multilateral

⁵² Al-Dawoody, *War in Islamic law; Justifications and Regulations*, at 143

⁵³ Ibid; Abu Dawud, (Kitab al-Jihad) Book 14, Hadith 2635

⁵⁴ Ibid; *Sahih Muslim*, (Kitab al-Jihad Wa'l Siyar) Book 19, Hadith 4294. Jizya is a tax levied on non-Muslims living in an Islamic state, as such they are recognised as *dhimmi*. It is collected as a tax “so that all the capable non-Muslim citizens of the State can contribute, each from his own money, to the general welfare of the State, and that in return for this, they can enjoy their rights as nationals of this State, including compensation from the Muslim Exchequer when they are in need.” In other words, the Islamic state guarantees the protection of their lives and property. See Mohammad Naqib Ishan Jan, “The Use of Armed Force in International Relations: The ‘Shari’ah’ Perspective” vol. 1, No. 2 (2011) International Journal of Humanities and Social Science, at 71.

⁵⁵ Sohail H. Hashimi “Saving and Taking Life in War: Three Modern Muslim Views” vol. LXXXIX, No. 2 (1999) *The Muslim World*, at 162

⁵⁶ Jackson, *Jihad and the Modern World*, at 21

⁵⁷ S.K. Malik, *The Quranic Concept of War*, New Delhi: Adam Publishers and Distributors, 1992, at 72-74; Kent Bob Huzen, *Politics of Islamic Jihad*, Master Thesis: University of Canterbury, 2008, at 56

⁵⁸ Churchill, *Op cit*, at 114

⁵⁹ ‘*Jus ad bellum* from international law is the title given to the branch of international law that defines the legitimate reasons a state may engage in an armed conflict and focuses on certain criteria that render the conflict just.’ See Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 2nd Edition. (New York: Basic Books, 1997), 44; L.C. Green, *The Contemporary Law of Armed Conflict*, Manchester, Canada: Manchester University Press, 1993.

⁶⁰ ‘*Jus ad bellum* refers to set of rules that are consulted before engaging in an armed conflict, in order to determine whether entering into armed conflict is justifiable.’ See generally James Turner Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry*. (New Jersey: Princeton University Press, 1981), 4; Moseley, “Just War Theory,” in *The Internet Encyclopedia of Philosophy* (accessed February 2, 2003); available at: <http://www.utm.edu/research/iep/j/justwar.htm>; Internet.

⁶¹ Charter of the United Nations, June 26, 1945, 59 Stat. 1031, UNTS No.993 (hereinafter: ‘UN Charter’). The Charter expresses, in its preamble, a determination ‘to save succeeding generations from the scourge of war’, ‘to practice tolerance and live together in peace with one another as good neighbours’, ‘to unite our strength to maintain international peace and security’, and to ensure ‘that armed force shall not be used, save in the common interest.’

treaty⁶² that has 194 States parties. The Charter of the UN was adopted at the San Francisco Conference in 1945. It created the UN, defines its functions and limitations, and outlines the rights and obligations of its member States. It is an unbending legal instrument as per Article 108 and it considers all its members, whether big or small, powerful or weak, rich or poor, as equal and sovereign.⁶³ The Charter advocates for peaceful coexistence and cooperation among its member States and encourages peaceful settlement of inter-States disputes.⁶⁴ The UN Charter further forbids the UN from intervening in matters which are essentially within the domestic jurisdiction of Sovereign States and prohibits the use of military force in international relations.⁶⁵ Generally, the Charter prohibits the use of armed force in international relations, as contained in Article 2 (4) but allows it if used in self-defense as contained in Article 51⁶⁶ or its use is authorised by the UN Security Council, as contained in Chapter VII of the UN Charter.⁶⁷

Use of military force to intervene in an independent state generally violates the established customary principle of non-involvement and the enshrined prohibition of the use of force under the United Nations Charter (UN Charter). Article 2(4) of the UN Charter provides that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or any other manner inconsistent with the purposes of the United Nations.” This provision of the Charter specifically prohibits the use of military force against the sovereignty of a state which does not preclude the exertion of economic or political pressure on a state. The prohibition of the use of force in this context does not also cover cases of indirect intervention as it has been established by the International Court of Justice (ICJ) in the case of *Nicaragua v. United States*.⁶⁸ It is important to mention

⁶²J.E. Alvarez, ‘Constitutional Interpretation in International Organizations’ in J-M. Coicaud and V. Heiskanen (eds.), *The Legitimacy of International Organizations*, UN University, 2001. See also G Arangio Ruiz, ‘The Federal Analogy and UN Charter Interpretation: A Crucial Issue’, (1997) 8 *European Journal of International Law*.

⁶³ UN Charter, Article 13

⁶⁴ Ibid, Articles 1 (2) & (3) and 2 (3) & 33

⁶⁵ Ibid, Article 2 (7)

⁶⁶ Article 51 of the UN Charter provides: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

⁶⁷ Chapter VII of the UN, as per Arts 39, 42 and 25, allows the use of force in response to an act of aggression or any other act that threatens or breaches international peace and security. In addition to the right of self-defence, the use of force under the collective security system is another exception to the general prohibition of the use of force

⁶⁸ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*; Merits, International Court of Justice, 27 June 1986

that the provision of Article 2(4) of the UN Charter covers not only the actual use of armed force but the threat of use of force as well. Accordingly, the 'threat of use of force' covers a situation where an ultimatum announcing recourse to use of military measures if certain demands are not accepted. Thus, both threat and actual use of armed force against the territorial integrity of a sovereign state is prohibited in international law.

However, the prohibition of the use of armed force contained in the UN Charter is not absolute as the Charter appreciates that certain situations may warrant the use of force in international relations. In other words, the Charter has provided for certain exceptional circumstances where the use of force is allowed. For instance, it permits the use of force in two broad situations, namely military force may be used in self-defence under Article 51 of the Charter and military force may also be used if it is authorized by the UN Security Council under Chapter VII of the UN Charter.

In case of use of force in self-defence, the UN Charter has allowed a member state to use its armed forces against another state in individual self-defence or collective self-defence. The Article provides that:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”⁶⁹

It is obvious from the wordings of the Charter that self-defence may be individual or collective. Self-defence envisaged under the Charter is a lawful use of force by a state in line with the conditions prescribed under international law. In essence, a state is allowed to resort to use of armed forces in response to an unlawful use of force against its territorial integrity or sovereignty. According to the provisions of Article 51 of the UN Charter, it is an inherent right of every sovereign State to deter aggression against its territory in order to protect its territorial sovereignty. The principle of self-defence by states in protection of their territorial sovereignty

⁶⁹ UN Charter, Article 51

is well established customary norm which is to be exercised in a defensive not retributive manner.

It is significant to mention that the right of states to resort to use of force in self-defence has its limitations. Therefore, for a state to exercise the right of self-defence in this respect, there must be "a necessity of self-defence", that is, the action taken in self-defence must be in response to an armed attack. It has been emphasized that the phrase 'if an armed attack occurs' contained in the provision of Article 51 of the UN Charter must be given its ordinary meaning. The ICJ in *Nicaragua's case* said the ordinary meaning of the phrase is that the exercise of the right of self-defence is subject to the State concerned having been the victim of an armed attack and that reliance on collective self-defence does not remove the need of this requirement. Perhaps, this position excludes other extraneous meaning to be given to the phrase 'if an armed attack occurs' thereby preventing the imputation of 'pre-emptive self-defence' within the scope of the principle of self-defence. In line with this argument, Philip C. Jessup asserts that "Article 51 of the Charter suggests a further limitation on the right of self-defence: it may be exercised only 'if an armed attack occurs'. This restriction in Article 51 very definitely narrows the freedom of action States had under traditional international law."

4. Jihad in the Light of International Law

A question arises now as to the position of Jihad in the modern day society and international relations. It is pertinent to state that both defensive and aggressive reasons are in principle legitimate grounds for waging a Jihad. According to Maududi, the classification of Jihad into defensive and aggressive is not relevant as it can only be applied to wars in context of nations and countries, while Islam is universal.⁷⁰ As such Islamic Jihad constitutes aggressive as well as defensive Jihad at the same time.⁷¹ He further buttresses that Jihad is offensive simply "because the Muslim Party assaults the rule of an opposing ideology and it is defensive because the Muslim Party is constrained to capture state power in order to arrest the principles of Islam in space-time forces."⁷²

⁷⁰ Abul A'la Maududi, *Jihad in Islam*, Beirut: The Holy Quran Publishing House, 2006, at 25

⁷¹ Ibid

⁷² Ibid, at 26. Maududi further observes that "when an international party rises with a universal faith and ideology and invites all peoples as human beings to embrace this faith and ideology and admits into its fold as equal members men of all nationalities and strives only to dismantle the rule of an opposing ideology and set up in its place a system of government based on its own ideology, then in this case the use of the technical terms like 'offence' and 'defence' is not germane."

However, with respect to Jihad in modern days, it is practicable to prefer the position that Jihad is a defensive war to be waged only in defence of Islamic territory.⁷³ That will be in line with the realities of the contemporary world order where the territorial integrity and sovereignty of states are made sacrosanct and inviolable.⁷⁴ More importantly, the United Nations Charter has explicitly prohibited interference with the sovereignty of independent states⁷⁵ and forbidden the use of force in international relation.⁷⁶ It should be recalled that Muslim states are equally parties to the Charter and have consented to its ideals and objectives.⁷⁷ Thus, this can be said to have established a permanent state of peace in the New World Order (NWO). In the words of Jackson “‘state of war’ has given way in modern times to a global ‘state of peace’ that rejects the unwarranted violation of the territorial sovereignty of all nations.”⁷⁸ Therefore, whether a state is *dar al-harb* or not today’s reality shows that Muslim states cannot engage the state in war nor would they treat such a state with permanent belligerency. This further means the supposed permanent state of war that existed between *dar al-Islam* and *dar al-harb* could not be feasible today. In the light of this argument, Muslims are presumably in a state of peace with all nations and consequently, Jihad can only be waged in defence of Islamic territory or defence of the oppressed Muslims.⁷⁹ In other words, aggressive Jihad will certainly be difficult or impossible to prosecute as Muslim nations cannot exist in isolation.⁸⁰

In addition, the Muslim world on its own part is expected to avoid the assumption “that the realities of yesterday pass automatically into today or that the factual or historical assessments of the Muslims of the past constitute authoritative doctrines that are binding on the Muslims of the present.”⁸¹ The concept of Jihad was developed by juristic opinions based on the classical era of Islam in Arabian Peninsula that was characterised by permanent ‘state

⁷³ UN Charter, Article 51(2)

⁷⁴ Mohammad Naqib Ishan Jan, *Principles of International Law A Modern Approach*, Malaysia: IIUM Press, 2011 at 403-405

⁷⁵ UN Charter, Article 2(1). The Charter does not expressly provide for non-intervention as it has become a customary international law principle reiterated in the Nicaragua’s case where the International Court of Justice (ICJ) states that “it was never intended that the Charter should embody written confirmation of every essential principle of international law.” See generally on the use of force in international, Mohammad Naqib Ishan Jan, *The Use of Force in International Law*, Malaysia: MCLJ, 2011

⁷⁶ UN Charter, Article 2(4)

⁷⁷ Sohail, *Saving and Taking Life in War: Three Modern Muslim Views*, at 158

⁷⁸ Jackson, *Jihad and the Modern World*, at 20

⁷⁹ Yusuf Al-Qaradawy, *Introduction to Know Islam*, Lagos: Al-Waseelat Publishers, 1995, at 281

⁸⁰ UN Charter, Article 2(6). This Article provides that the whole United Nations States should ensure that even states who are not members comply with the provisions of the Charter in order to maintain international peace and security.

⁸¹ Jackson, *Jihad and the Modern World* at 24

of war'.⁸² Thus, Jihad in particular is a phenomenon that has to be interpreted in the light of the current realities in order to avoid the wreck of havoc and misplacement of Muslims' priority.⁸³ A typical example is the ongoing conflict in North-Eastern Nigeria, where a religious sect declared a Jihad of aggression against Nigeria, and accordingly creates a communal obligation on Muslims to participate.⁸⁴ The sect's acclaimed goal is to establish an Islamic state in Nigeria based on classical Islamic doctrines.⁸⁵ As a result of the erroneous declaration of the aggressive war, thousands of Muslims were part of the victims leaving many people dead, dozens injured and displaced, and property worth billions of Nigerian naira destroyed.⁸⁶ Probably, this is a clear indication that Jihad of aggression against the non-Muslims or Muslims of different sect with a view to subjugating them to embrace Islam or a particular sect certainly negates the realities of the current reality.

However, gleaning the other side of the coin may expose a different understanding and argument, particularly a critical evaluation of the so called super powers' treatment of the Muslim countries, as well as the exercise of veto power by the Security Council members.⁸⁷ A good example can be taken from events such as the arbitrary invasion of Iraq and Afghanistan, the 1999 bombing of Sudan, the perpetual threat on Iran nuclear program and the acquiescence of the super powers on the Israel continues expansion of the Occupied Palestinian Territory.⁸⁸

⁸² Abdullahi Ahmed An-Na'im, "Islamic Ambivalence to Political Violence: Islamic Law and International Terrorism" vol. 31 (1988) German Yearbook of International Law, at 323; Churchill, n. 2 at 96

⁸³ See Abdullahi, Islamic Ambivalence to Political Violence: Islamic Law and International Terrorism, at 322; Khadduri, n. 17 at 361

⁸⁴ See Abimbola, Adesoji, "The Boko Haram Uprising and Islamic Revivalism in Nigeria" 45, 2, (2010), Africa Spectrum, at 98; Hazrat Mirza Tahir Ahmad, *Murder in the Name of Allah*, translated by Syed Barakat Ahmad, London: The London Mosque, 1990, at 23

⁸⁵ A.F. Ahokeyh, "Boko Haram: A 21st Century Challenge in Nigeria" vol. 8, No.21 (September Edition) European Scientific Journal, at 52; Hashim, A.S., et al., "'Western Ways Are Evil': The Emergence and Evolution of Boko Haram" vol. 4, Iss.7 (2012) International Center for Political Violence and Terrorism Research (Counter Terrorist Trends and Analysis), at 1

⁸⁶ Adagba Okpaga, et al., "Activities of Boko Haram and Insecurity Question in Nigeria" vol. 1, No.9 (April 2012) Arabian Journal of Business and Management Review (OMAN Chapter), at 77; Samuel Asuquo Ekanem, et al., "Boko Haram: A Philo-Legal Appraisal" vol. 2, No. 4 (2012) [Special Issue – February] International Journal of Humanities and Social Science, at 20

⁸⁷ Sahar Okhovat, "The United Nations Security Council: Its Veto Power and Its Reform" (December 2011) CPACS Working Paper No. 15/1, University of Sydney, at 31. Generally on how Muslims were treated by other empires and powers, see Kemal H. Karpat, *The Politicisation of Islam: Reconstructing Identity, State, Faith, and Community in the Late Ottoman State*, Oxford: Oxford University Press, 2001

⁸⁸ Jackson, Jihad and the Modern World, at 24. See generally on these international politics affecting Muslims nations: Michael Griffin, "Picturing America's 'War on Terrorism' in Afghanistan and Iraq: Photographic Motifs as News Frames" vol. 5, No. 4 (2004) Journalism; Amy Belasco, "Troop Levels in the Afghan and Iraq Wars, FY2001-FY2012: Cost and Other Potential Issues" (2009) Congressional Research Service, <www.crs.gov> viewed on 25 December 2013; Raymond Hinnebusch, "The American Invasion of Iraq: Causes and Consequences" (2007) Perceptions; Human Rights Watch, *Sudan, Oil, and Human Rights*, Human Rights Watch: Brussels London New York Washington, D.C., 2003; Jim Zanotti, "Israel: Possible Military Strike Against Iran's Nuclear Facilities" (September 2012) Congressional Research Service, <www.crs.gov> viewed 20 December

Another instance is the recent 2011 use of force in Libya that resulted in ousting the Gaddafi's regime which was neither in self-defence nor authorized under chapter VII of the UN Charter. It is logical to conclude that despite the existence of the United Nations Charter, certain nations have been aggressive to the Muslim world with impunity. This casts doubt in the minds of Muslims on the presumed state of peace envisaged or established by the United Nations Charter, which rather resuscitates the olden day permanent 'state of war'.⁸⁹ It is worthy of note that the United Nations (UN) Charter has given exceptional situations where resort to use of force may be lawful as contained in Article 51 (2) and Chapter VII of the UN charter. However, the aforementioned cases of aggression against Muslim states could not be situated within the legal framework of the exceptions envisaged in the Charter. This obviously raises doubt as to the certainty associated with the supposed state of peace established by the Charter.

5. Conclusion

In the Pre-Islamic era in Arabia, war was used as a means of carrying out international relations, which was characterised by a permanent state of war among the nations. Islamic law allows in principle both defensive wars against invasion of Muslim territory or oppression, as well as war against aggressors. These legitimate grounds are based on the historical antecedent of the religion which was nurtured under a tensed brutal Arabian Peninsula. However, in the context of the modern trend in international relations, it presupposes that a permanent state of peace has been established by the UN Charter and state of war has vanished. Thus, the only practicable ground for a legitimate war which is in line with Islamic principles and present realities is the defence of Muslim territory. It is suggested that both western writers and dogmatic scholars of Islamic law should appreciate that *Islamic jus ad bellum* could be explained in the light of the modern international law on the use of force since Muslim states are parties to the UN Charter and that *Islamic jus ad bellum* is compatible with the prohibition on the use of force in modern international law.

2013; Christopher Hemmer, "Responding to a Nuclear Iran" (Autumn 2007) Parameter US Army War College; Anthony H. Cordesman and Abdullah Toukan, "Analysing the Impact of Preventive Strikes Against Iran's Nuclear Facilities" (2012) Center for Strategic and International Studies< www.csis.org/burke/reports> viewed 20 December 2013; Jan Wouters and Tom Ruys, "Security Council Reform: A New Veto for a New Century?" (August 2005) Royal Institute for International Relations (IRRI-KIIB) Brussels, at 3

⁸⁹Ibid