

WAR AND ITS TOPOLOGY UNDER ISLAMIC HUMANITARIAN LAW

By

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Abstract

Prior to the advent of Islam in Arabian Peninsula, war was perceived as a significant means of carrying out international relations. The word 'war' is synonymous to 'jihad' in Arabic language, though jihad could be both violent and non-violent. As such war entails the violent aspect of jihad. Thus this paper examines the concept of war (jihad) and the dichotomization of the world into *dār al-Islam* (abode of Islam) and *dār al-harb* (abode of war). It also examines the typology of war and the humanitarian norms expected to be observed by Muslims in their conduct of hostilities under each classification. The paper posits that war is a concept that was developed by jurists through *fiqh* and it has been associated with the issue of *dār al-Islam* (abode of Islam) and *dār al-harb* (abode of war). It further argues that the permanent state of war that existed at the early stage of Islam may not be equated with the realities of the present international relations. It is suggested that the Muslim World and the non-Muslims should appreciate the fact that the concept of war (jihad) was largely developed through *fiqh* and as such the aspects of the concept developed by scholars do not prevail over or equate with the provisions of the Quran and traditions of the Prophet.

Keywords: International Relations, Islam, Jihad, Rebellion, Apostasy

1. INTRODUCTION

Islam is a religion of peace and it has provided a comprehensive framework that regulates the legality or otherwise of the right of parties to engage in war. Prior to the advent of Islam in Arabian Peninsula, concept of war was an important tool in carrying out international relations. It was Islam that brought about the need for the justness of carrying out war and the obligation to respect humanitarian ideals in the conduct of hostilities.¹ However, that does not mean that Islam glorifies war rather it has considered waging war as a means through which peace and justice could be attained. The conception of the word 'war' is synonymous to jihad in Arabic language, though jihad could be both violent and non-violent. As such war entails the violent aspect of jihad and its surrounding jurisprudence. War has been classified under Islamic humanitarian law based on the people that the war is being waged against them. For instance, there is war against rebels who have defied constituted

¹ 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

authority, war against highway robbers and war against apostates who change their religion from Islam to other religion.

It is against this background that this paper discusses the concept of war under Islamic humanitarian law. It argues that war is an old aged concept that was developed through *fiqh*, which has been associated with the issue of *dār al-Islam* (abode of Islam) and *dār al-harb* (abode of war). It further buttresses that the permanent state of war that existed at the earlier stage of Islam in Arabia may not be the same with current realities of international relations. The paper also considers the various typology of war and the humanitarian norms expected to be observed by Muslims in their conduct of hostilities under each classification. It is important to mention that it is not the intention of the paper to discuss and address the issues relating to whether defensive and/or aggressive war is permitted under Islamic *jus ad bellum* (law regulating the legality or otherwise of going to war).

2. WAR AND ITS SURROUNDING JURISPRUDENCE

The word ‘war’ has been used synonymously with the word ‘Jihad’ in Islamic law which originates from Arabic. The etymology of the word Jihad 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 may be a moral or spiritual duty, rather than a mere commitment to military violence.³ The Prophet (PBUH) stated in several *ahadīth* the different acts that constitute Jihad. For instance, 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 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 From the foregoing meanings of jihad, jihad can generally be seen from two different phases. The first phase entails a general struggle and exertion of one’s effort towards attaining

² 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. See ÂbdulAzeez Ibn. Abdulsalam al-Sulamiyu, *Ahkamu al-Jihādi Wa fada’iluhu*, vol.1, Jidda: Maktabatul Daru al-Wafa’i, 1986, at 53

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 *Sahīh Bukhari*, Book 2, vol. 52, Hadīth 248

⁶ Abū Dawud, (Kitab al-Jihad) Book 14, Hadīth 2498

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

Allah's pleasure while the second phase refers to actual engagement in conduct of war as prescribed by Islamic humanitarian law. Our discussions in this paper centre on the second phase which is the violent aspect of jihad i.e. war.

However, most western writers do not really appreciate and share the view that Jihad connotes a non-violent means by which a Muslim can attain his religious goals.⁹ They often prefer to ascribe violence to Islam and recognise 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 writers "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

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 *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

⁹ It is important to note that Islam hates war and the Prophet was reported to have said worst names is war and it is bitter. See *Sahih Muslim*, (Kitab al-Jihad Wa'l Siyar) Book 19, 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, Op. cit, 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. See Ahmed Souaiaia, "On the Sources of Islamic Law and Practices" vol. XX (2006) *Journal of Law and Religion*, at 102; Kamali, n. 14 at 155

¹⁷ *Qiyas* refers to analogical deduction of a legal ruling derived from the primary sources of Islamic law. See Kamali, n. 13 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. Al-Dawoody examines the instances 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". See Al-Dawoody, *War in Islamic Law: Justifications and Regulations*, at 128-130

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 *dār al-Islam* (abode of Islam) and *dār al-harb* (abode of war).²² *Dār 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 *Dār al-harb* on the other hand, is a nation that is not practising Islam and is not governed by Islamic law.²⁴ Accordingly, the *dār al-harb* is a nation that is in a state of permanent belligerency with Muslims, and arguably Muslims should endeavor to conquer and make it part and parcel of *dār al-Islam*.²⁵ According to Heck, conquest 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 however, superficial of the Western thought. It is significant to note 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 brutal Arabian Peninsula.²⁸ This point was buttressed by several provisions of the Quran. Allah says: "And 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

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 are 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, n. 19 at 325-328. See generally on the Position of Muslims in *dār al-harb*, Yahya Ibn Muhammad Al-Shaybani, *Ikhtilaf al-A'ima al-Ulama*, vol.2, Beirut: Darul Kutub Ilmiya, 2002, at 307-310

²⁵ Ibid

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

²⁷ An-Na'im, Op. cit, at 142; Supervielle, Op. cit, 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 significant to clarify 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-Mā'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-Mā'ida* 5:32

²⁹ Quran, *al-Anfal* 8:26

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.

More importantly, Jihad 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 (*dār al-Islam* and *dār al-harb*). The whole idea about the two opposing realms was breed and nurtured by scholars who have considered the antecedents of the early international relations of Islam.³² However, the designation *dār al-harb* in the modern context could mean 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 *dār al-Islam*, such countries are regarded as abode of treaty (*dār al-ahd*) or abode of reconciliation (*dār 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

However, it is important to realize that in contemporary practice, the United Nations Charter has explicitly prohibited interference with the sovereignty of independent states³⁸ and forbidden the use of force in international relation.³⁹ It should be recalled that Muslim states are also parties to the Charter and have consented to its ideals and objectives.⁴⁰ Thus, this can be said to have established a permanent state of peace in the new World Order. In the words of Sherman “state of

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.

³¹ Quran, *al-Ankabut* 29:67

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, n. 17 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.d, 2005, at 107-108

³⁵ Institute for Islamic Thought, at 26. For a detailed discussion on Muslims residing in *dār al-sulh*, see Muhammad Ibn. Âbd al-Wahab, *Al-Duraru al-Saniyyatu Fī al-Ajiwabati Al-Najdiyyati*, vol.10, KSA: n.p., 1996, at 170-173

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, at 361.

³⁸ Article 2(1) United Nations Charter. 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

³⁹ United Nations Charter, Article 2(4)

⁴⁰ Sohail, Op. cit, at 158

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."⁴¹ 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.⁴² Moreover, the Muslim world 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."⁴³ Especially the concept of Jihad was developed by juristic opinions based on the classical era of Islam in Arabian Peninsula that was characterized by permanent 'state of war'.⁴⁴ 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.⁴⁵

It is important to mention that war can only be declared by a legitimate authority upon determination of a legitimate cause, which can be either defensive or offensive. Whether the war is defensive or offensive, Muslims are obliged to respect the obligation imposed by principle of distinction i.e. to distinguish between combatants and non-combatants in their conduct of hostilities

3. TYPOLOGY OF WAR IN ISLAMIC LAW

War is usually a general nomenclature given to a state of discord between people or groups. In the context of Islamic law, jurists have classified conflicts into war against unbelievers and war against Muslims. War has been further classified into war that aims at suppression of rebellion, apostasy and high way robbery.

3.1 War against Rebellion and the Status of Rebels

The term rebellion is simply used in referring to transgression against a just leader which is called *baghy* in Arabic.⁴⁶ There is also a synonymous term *khuruj* in Arabic which literally means 'going out' and was used to tag those who revolted against Caliph Ali ibn Abi Tālib (600-661 CE).⁴⁷ The term has subsequently been used to

⁴¹ Sherman, Op. cit, at 20. 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. It is logical to assert 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 presume state of peace envisaged or established by the United Nations Charter, which rather resuscitates the olden day permanent 'state of war'. See 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; Kemal H. Karpat, *The Politicization of Islam: Reconstructing Identity, State, Faith, and Community in the Late Ottoman State*, Oxford: Oxford University Press, 2001.

⁴² Yusuf Al-Qaradawy, *Introduction to Know Islam*, Lagos: Al-Waseelat Publishers, 1995, at 281

⁴³ Sherman, Op. cit, at 24

⁴⁴ 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

⁴⁵ Ibid

⁴⁶ Khaled Abou El Fadl, "The Rules of Killing at War: An Inquiry into Classical Sources" vol. LXXXIX, No. (1999) *the Muslim World*, at 144

⁴⁷ Nesrine Badawi, "Islamic Jurisprudence and the Regulation of Armed Conflict" Policy Brief, October 2009, Harvard University Program on Humanitarian Policy and Conflict Research, at 8. Badawi further states that those who rebelled against Caliph Ali were specifically named as *khawarij*, which means 'those who went out.' "The *Khawārij* started with a group of fighters who rejected Ali's acceptance of arbitration in the first *fitna* and are generally perceived to have committed a major sin for doing so."

refer to rebellion of other Muslim leaders from the household of the Prophet (PBUH).⁴⁸ The two words *baghy* and *khuruj* are now synonymous and used to describe any rebellion whether just or unjust, provided that it is in line with the code of conduct developed by the jurists.⁴⁹

Thus, rebellion is defined as “the act of resisting or defying the authority of those in power.”⁵⁰ It is described as waging war against Allah and His Messenger, and spreading of mischief and corruption on the earth. Allah says: “[i]ndeed, the penalty for those who wage war against Allah and His Messenger and strive upon earth [to cause] corruption is [...]”⁵¹ The phrase ‘waging war’ used in the verse has been further elaborated to cover “acts of violence and terrorism against individuals or treason and aggression against the Islamic state.”⁵² As such, Islam has out of wisdom emphasised that the best jihad is to tell an unjust ruler the truth which is simply a means to avoid unnecessary rebellion.⁵³

Generally, Islam allows the killing of fellow human beings in the course of prosecuting a legitimate armed conflict. However, in case of rebellion, an Islamic state is preferably required to avoid the extreme position of killing, particularly if there are other options of rehabilitation for the rebels since both parties are Muslims.⁵⁴ Rebellion may arise in certain situations where a group of Muslims contradicts the usual understanding of Islamic issues and introduces a different school of thought.⁵⁵ In such a case, if the group does not propagate the novel interpretation in defiance of the established Islamic authority and has not moved into seclusion, they are not to be fought since they remain under the leadership of the state.⁵⁶ It is expected that they will continue to enjoy all rights and privileges available to individuals. In this

⁴⁸ Ibid

⁴⁹ Ali ibn. Suleiman al-Murdawi, *Al-Insafu Fi- Ma'arifati al-Rajihu Min Khilafi ala Mazhab al-Imamu Ahmad ibn. Hambal*, vol.3, Beirut: Darul Ihya'u Al-Turasu al-Arabi, 1998, at 137

⁵⁰ Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law*, Cambridge: Cambridge University Press, 2001, at 8

⁵¹ Quran *al-Mā'ida* 5: 33

⁵² *Translation of the Meaning of the Qur'an* Translated by Saheeh International, Jeddah: Saheeh International, 2004, at 100. Allah says regarding disagreement among Muslims as follows: “And if two factions among the believers should fight, then make settlement between the two. But if one of them oppresses the other, then fight against the one that oppresses until it returns to the ordinance of Allah. And if it returns, then make settlement between them in justice and act justly. Indeed, Allah loves those who act justly.” Quran *al-Hujura* 49:9. According to Ibn Qudama, this verse has five issues i.e: first the rebels are Muslims; it is compulsory to fight them; you stop fighting them when they return; you do not fight them when they fulfil their part of obligation; and it makes lawful fighting anybody that refuses to fulfill an obligation. See Abdulrahman ibn. Qudama, *Al-Sharhu al-Kabir*, vol.10, KSA: Darul Kitab al-Arabiya, n.d., at 48

⁵³ Muhammad Hisham Kabbani and Seraj Hendricks, “Jihad: A Misunderstood Concept from Islam - Rebellion Against Rulers” (12 December 2013) The Islamic Supreme Council of America, at 9. Allah says in *Surah an-Nisa*: “O you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and best in result.” Quran *an-Nisa* 4:59

⁵⁴ Sadia Tabassum, “Combatants, not Bandits: The Status of Rebels in Islamic Law” vol. 93, No. 881 (2011) *International Review of the Red Cross*, at 121

⁵⁵ M.S. Abubakar, “The Role of the Sharia in Solving Armed Conflicts Between Muslims or Between Muslims and Non-Muslims” in *Alternative Dispute Resolution and Some Contemporary Issues*, edited by Ibrahim Ahmad Aliyu, et al, Kaduna: M.O. Press & Publishers Ltd, 2010, at 176

⁵⁶ Muhammad Munir, “The *Layha* for the *Mujahideen*: An Analysis of the Code of Conduct for the Taliban Fighters Under Islamic Law” vol. 93, No. 881 (2011) *International Review of the Red Cross*, at 84

circumstance, the uproar is still within a fragile stage which can be tackled through the use of security enforcement institutions and dialogue.⁵⁷

However, a rebellion may also take the form of armed violence of apprehensive intensity targeting social and political institutions as well as Muslim scholars.⁵⁸ In this context, the rebels have gone extra-mile to establish a leadership distinct from the constituted authority and shun away from their responsibilities as members of the *ummah*.⁵⁹ If in addition, the group opts to overthrow a 'just' government and establish a new one, the rebellion may be considered as mutiny.⁶⁰ Therefore, the Islamic state is duty bound in this regard to fight the rebels and compel them to abide by the law and order. In fighting the rebels, the state is expected to inform the group about the consequences of their actions and rebellion before engaging them in confrontation.⁶¹

In the event that the struggle has reached a dimension that the rebels have captured certain part of the state, the whole equation will change. There are basically two essential factors to determine the effectiveness of rebellion against a state. They are: the ability of the rebels to establish authority over a particular land in defiance of the central constituted authority (*mana'ah*); and the rebels' challenge of the central government legitimacy (*ta'wil*).⁶² If these two factors are present, thus the land under the territory of the rebels becomes *dār al-baghy* (territory of rebels).⁶³ The implication is that the territory of rebels is considered as a *de facto* state with the right to collect tax and enter into a treaty with another state.⁶⁴ Another consequence and most importantly is any decision of the court of the *de facto* state cannot be revised, as well as crimes committed cannot be tried by the central government when it recaptured back the territory.⁶⁵

Furthermore, when rebellion has reached the level of *mana'ah* and *ta'wil*, the basic punishment recognised in Islamic criminal law such as *hadd*, *Qisas* and *ta'zir* cease to apply.⁶⁶ Its implication is that the government cannot afterward prosecute those who participated in the rebellion for simply taking up arms against the law of the state or causing damage to property.⁶⁷ The position has similitude with that of non-Muslims who fought against Muslims, but subsequently embrace Islam, they cannot be asked to pay compensation for damage done during hostilities.⁶⁸ Worthy of mention is the fact that the suspension of punishment against the rebels has no

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ El Fadl, Op. cit, at 8

⁶⁰ Elizabeth Peiffer, "The Death Penalty in Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria" vol.11, iss3/9 (2005) *Wm. & Mary J. Women & L.* at 515. Where the ruler is unjust, it is expected that the ruler should be made to face the wrath of the law. See Peiffer, Op. cit, at 155

⁶¹ Abubakar, Op. cit, at 177

⁶² Kabbani and Hendricks, Op. cit, at 9. Kabbani and Hendricks state that Shafi'i is of the view that the number of the rebels will also be taken into account in ascertaining the legitimacy of their struggle.

⁶³ Ibid

⁶⁴ Tabassum, Op. cit, at 123

⁶⁵ Ibid

⁶⁶ Ibid

⁶⁷ Ibid. However, the rebels may be asked to pay compensation for damage done prior to attaining the stage of *mana'ah* and *ta'wil*. Accordingly, the law will be enforced against the rebels for prior damage notwithstanding any agreement to the contrary during peace agreement. This is premised on the fact that the property damaged is individuals' rights, which the government cannot waive as it touches the fundamental norms envisaged in Islamic law. See Kabbani and Hendricks, Op. cit, at 9

⁶⁸ El Fadl, Op. cit, at 145

connotation with respect to the lawfulness or otherwise of their *ta'wil*, nor does it legitimise their rebellion.⁶⁹

It is significant to reiterate that rebels are not treated as criminals or bandits when their rebellion has attained the legal threshold, but rather, they are combatants based on the law of war.⁷⁰ As such, all the corresponding rights available for combatant status should also be extended to rebels and that serves as an incentive for them to comply with the law of war.⁷¹

In terms of *jus in bello* during hostilities with rebels, all the prohibited acts in time of armed conflict is applicable to war against rebellion with additional restrictions. They are to be attacked only when advancing forward and not while retreating, except if they are retreating to reorganise themselves.⁷² The wounded, sick, women, children and the old should not be attacked, which is a general prohibition in times of armed conflict.⁷³ Their houses, property and animals must remain secured and should not be burnt.⁷⁴ The use of sophisticated, poisonous or incendiary weapons against the rebels is prohibited.⁷⁵ A further peculiar restriction on the side of the government is that their property must not be taken away as booty nor their women and children be enslaved.⁷⁶

3.2 War against Apostates

Apostate means *murtadd* in Arabic which refers to a person “who himself announces that he is relinquishing the faith [Islam].”⁷⁷ A person who apostatises is called *man artadad* ‘*an dinihi* meaning a “person who turns his back on religion”.⁷⁸ Apostasy in Islamic law covers both a situation of change of religion from Islam to unbelief such as idolatry and heresy (*irtidad*) as well as change of religion from Islam to other religions such as Christianity and Judaism (*ridda*).⁷⁹ In the Glorious Quran, Almighty Allah says: “... But if they turn away [i.e., refuse], then seize them and kill them wherever you find them...”⁸⁰ And He also says: “Indeed those who reverted back [to disbelief] after guidance had become clear to them – Satan enticed them and prolonged hope for them.”⁸¹ In another chapter, Allah says:

⁶⁹ Ibid

⁷⁰ Kabbani and Hendricks, Op. cit, at 9

⁷¹ Tabassum, Op. cit, at 124

⁷² El Fadl, Op. cit, at 144

⁷³ Ibid. On the general Islamic humanitarian principles applicable during armed conflict, see Mohammad Naqib Ishan Jan and Abdulrashid Lawan Haruna, *International Humanitarian Law*, IJUM Press, Kuala Lumpur, 2014)

⁷⁴ Badawi, Op. cit, at 8

⁷⁵ Abubakar, Op. cit, at 177-178

⁷⁶ Musa ibn. Muhammad ibn. Musa al-Hijawi, *Al-Ikna'u Fi Fiqhi al-Imamu Ahmad ibn. Hambal*, vol.2, Beirut: Darul al-Ma'arifatu, n.d., at 51

⁷⁷ Hadrat Mirza Tahir Ahmad, *The Truth About the Alleged Punishment for Apostasy in Islam*, Translated into English from Urdu by Saleem-ur-Rahman and Mubasher Ahmad, Islamabad: Islam International Publications Ltd, 2005, at 26

⁷⁸ See Muhammad ibn. Yusuf Abi al-Qasin, *Al-Taju Wal al-Iklil Limuktasar Khalil*, vol.6, Beirut: Darul al-Fikru, 1977, at 279. See also Samuel M. Zwemer, *The Law of Apostasy in Islam*, London: Marshal Brothers Ltd, 2004, at 33

⁷⁹ Samuel Hosain Lamarti, *The Development of Apostasy and Punishment Law in Islam 11 AH/ 632 AD - 157AH/ 774 AD*, Ph.D. Thesis: Glasgow University, 2002, at 69

⁸⁰ Quran, *al-Nisa* 4:90. See Abdullahi Ahmad An-Na'im, “The Islamic Law of Apostasy and its Modern Applicability: A Case from the Sudan” vol. 16 (1986) *Religion*, at 197

⁸¹ Quran, *Muhammad* 47:25. Furthermore, Allah says: “O you who have believed, whoever of you should revert from his religion – Allah will bring forth [in place of them] a people He will love and who will love Him [who are] humble toward the believers...” Quran *al-Māida* 5:55

“Whoever disbelieves in [i.e., denies] Allah after his belief except for one who is forced [to renounce his religion] while his heart is secure in faith. But those who [willingly] open their breasts to disbelief, upon them is wrath from Allah, and for them is a great punishment; That is because they preferred the worldly life over the Hereafter and that Allah does not guide the disbelieving people.”⁸²

The above verses have tried to distinguish between those who are forced to apostatise and those who out of free volition decide to turn back on religion whose punishment is severe. For those who renounced their faith but their hearts are still with faith, they are regarded as believers.

In case of war against apostates, it is a war that targets individuals who have been Muslims at a time and later converted to a belief other than Islam.⁸³ Though there is no Quranic provision categorically stating the punishment for apostasy,⁸⁴ but several traditions of the Prophet (PBUH) have disclosed that death is the designated punishment for apostate.⁸⁵ The Prophet (PBUH) was reported to have said “whoever changes his religion [Islam] kill him.”⁸⁶ In another hadith, the Prophet said:

“During the last days there will appear some young foolish people who will say the best words but their faith will not go beyond their throats (i.e. they will have no faith) and will go out from (leave) their religion as an arrow goes out of the game. So, where-ever you find them, kill them, for who-ever kills them shall have reward on the Day of Resurrection.”⁸⁷

These Prophetic traditions show that death is the prescribed punishment for an apostate. With respect to waging war against collective apostates, the wars fought by Caliph Abu Bakr (573-634 CE) in the seventh century against Arab tribes were the beginning of a collective war against apostates.⁸⁸

In a collective approach, there are two different scenarios. Firstly, in a situation where the apostates decide to remain within the territory and control of the Muslim community, they are not to be fought.⁸⁹ Muslims are expected to make effort towards discovering the reason for their change of religion, and if the problems center

⁸² Quran *an-Nahl* 16: 106-107

⁸³ Lamarti, Op. cit, at 69

⁸⁴ The following verses of the Quran have all discussed apostasy and the gravity of the offence, but they mentioned the punishment to be hereafter without mentioning the worldly punishment. See Quran *al-Imran* 3: 86-90, 177, *al-Nisa'* 4: 137, *al-Nahl* 16: 106- 110, *Muhammad* 47: 22-28, except Quran *al-Mā'ida* 5:36. In another verse, Allah says that “...And whoever of you reverts from his religion [to disbelief] and dies while he is a disbeliever – for those, their deeds have become worthless in this world and the Hereafter, and those are the companions of the Fire; they will abide therein eternally.” Quran, *al-Baqarah* 2:217. For a detailed argument against capital punishment for apostate, see Hadrat Mirza Tahir Ahmad, (1986 July) “The Truth About the Alleged Punishment for Apostasy in Islam” An address by Khalifatul Masih IV on the Occasion of Jalsa Salana—the Annual Conference, U.K., held at Islamabad

⁸⁵ Zabih Motahari-Khah, “Is Apostasy a Crime?” vol. 6, No. 3 (2013) *Intl. Res. J. Appl. Basic. Sci.*, at 338

⁸⁶ *Sahih Bukhari*, Book 9, vol. 84, Hadith No.57

⁸⁷ *Sahih Bukhari*, Book 9, vol. 84, Hadith No.64

⁸⁸ Ahmad Atif Ahmad, “Al-Ghazālī’s Contribution to the Sunnī Juristic Discourses on Apostasy” vol. 7 (2007) *Journal of Arabic and Islamic Studies*, at 52. Though according to Ahmad, some writers have pointed out that the people fought by the Caliph were not apostates since they were never Muslims not even during the period of the Prophet (PBUH).

⁸⁹ Abubakar, Op. cit, at 175

on confusion, it can be addressed. In such circumstances, they can repent and return to Islam thereby joining their Muslim community.⁹⁰ However, if the apostates refused to repent and return to Islam, their blood has become lawful and they are to be killed.⁹¹ Though juristic views vary concerning the period within which to execute the apostates. Some jurists on one hand, opine that the apostates should be killed immediately if they refuse to repent as their punishment constitutes right of the public which must not be delayed.⁹² On the other hand, some jurists including Hanafi and Shafi'i opine that the apostates should be given a grace of three days to repent, afterward they can be executed if they refused to return to Islam.⁹³ Secondly, where apostates have left the Muslim community and join ranks with the disbelievers, they are to be fought after the grace given to them lapses. In fighting the apostates, they can be attacked while either advancing or retreating.⁹⁴ When they are defeated, their property is not booty for the combatants, but will be shared among the destitute, and their women should not be enslaved.⁹⁵

3.3 War against Highway Robbers

Highway robbery (*al-hirabah*) is one of the heinous crimes Islam has frowned against. It is one of the *hudud* offences recognised under Islamic law and is described as waging war against Allah and His Messenger. The saying of Allah in Surah *al-Mā'ida* that "[i]ndeed, the penalty for those who wage war against Allah and His Messenger and strive upon earth [to cause] corruption..." is simply referring to committing "acts of violence and terrorism against individuals."⁹⁶ In a legal parlance, highway robbery refers to "waiting by the way (or highway) to steal travelers' property by force and by this means obstructing traveling on this road."⁹⁷ Accordingly, the offence is deemed constituted once there is use of force against people with a view to depriving them their property or wealth whether or not there was killing or injury, provided that the scene has left the victims with no means of getting rescue.⁹⁸ It has been aptly stated that:

"Anyone who disturbs free passage in the street and renders them unsafe to travel, striving to spread corruption in the land by taking money, killing people or violating what God has made it unlawful to violate is guilty of *hirabah*...be he a Muslim or a non-Muslim, free or slave, and whether he actually realises his goal of taking money or killing or not."⁹⁹

Therefrom, Jurists have pointed out that the main constituents of the offence of *hirabah* are intimidation of the victims, rendering them helpless and lack of

⁹⁰ Ibid

⁹¹ Ahmad, Op. cit, at 71

⁹² Zwemer, Op. cit, at 40

⁹³ Ibid

⁹⁴ Ahmad, Op. cit, at 54

⁹⁵ Ibid

⁹⁶ Quran, *al-Mā'ida* 5: 33

⁹⁷ Oloso K. K. and Ibrahim O. Uthman, "The Application of Al-Uqubat (Islamic Criminal Law) in Contemporary Nigerian Society: Current Issues and the Way Out" vol. 2, No.1 (2011) *International Journal of Advanced Legal Studies and Governance*, at 60

⁹⁸ Ibid

⁹⁹ Sherman M. Jackson, "Domestic Terrorism in the Islamic Legal Tradition" vol. 91(2001) *The Muslim World*, at 295

possibility of taking effective security measures against the criminals.¹⁰⁰ As a result of these elements, some jurist held the view that the offence cannot be committed in a place where there are people who can conceivably assist the victims such as in urban areas.¹⁰¹ The reason has been that victims can scream, which may possibly call the attention of their neighbours to render assistance or the criminals may feel unsecured, thereby vitiating the requirement of helplessness and lack of possibility of taking effective security measures.¹⁰² It is significant to mention that taking away property, injuring or killing a victim has not been considered as an essential factor in trying to analyse whether a particular case has constituted a crime of *hirabah*. However, there is no gain saying the fact that they are important factors which some jurists used as indicators for determining the appropriate punishment to be meted out on the felons.

The punishment for armed robbery being a *hudud* has been categorically stated in the text of the Quran in Surah *al-Mā'ida*. Allah says:

“Indeed, the penalty for those who wage war against Allah and His Messenger and strive upon earth [to cause] corruption is none but that they be killed or crucified or that their hands and feet be cut off from opposite sides or that they be exiled from the land. That is for them a disgrace in this world; and for them in the Hereafter is a great punishment.”¹⁰³

¹⁰⁰ Ibid. For instance, the scenario of the conflict in Northern Nigeria where a religious sect *Jamā'atu Ahlus-Sunnah Lidda'wati wal Jihād*, popularly known as Boko Haram- meaning western education is forbidden has unleashed its rebellion against the government of Nigeria. See Abimbola Adesoji, *The Boko Haram Uprising and Islamic Revivalism in Nigeria*, at 96. The group opts to establish an Islamic state through the use of violence against the state agents and institutions to an extent that at a time they have control over certain areas. They group has its leadership and a good number of followers. In essence, using a classical Islamic indicator, the group has established *mana'ah* and *ta'wil* for a clear case of rebellion. The method of resistance and rebellion adopted by the group in addition to fighting government agents and institutions is characterised by conducts such as: terrorising the civilian population as well as killing them in order to deter them from supporting the government; confiscating property in the name of putting to use for Allah's sake; and leaving people in a state of helplessness of support from either neighbors or security agents. See Lauren Ploch, “Nigeria: Current Issues and U.S. Policy” (April 24, 2013) Congressional Research Service, at 12-13 <www.crs.gov> viewed on 10 October 2013. Andrew Walker, “What is Boko Haram” Special Report 308 (June 2012) United States Institute of Peace, 1<www.usip.org> viewed on 20 March 2013. The features of the group's method of rebellion tally exactly with the requirements set out for *hirabah*. Though admittedly Nigeria is not an Islamic state, but the contention is whether the act of the members of such group constitutes armed robbery besides being a rebellion, since it has satisfied the requirement for armed robbery under Islamic penal law.

¹⁰¹ Ibid. The author further states that Ibn Qudama shares this opinion, though Hambali jurists are generally of the view that committing robbery in cities is more deadly and severe than outside the town. When it occurs in the city, it shows that the robbers are not mindful of the security of the entire population and victims are likely to lose the whole of their property unlike when they are travelling. See Jackson, *Domestic Terrorism in the Islamic Legal Tradition*, at 295

¹⁰² Ibid

¹⁰³ Quran, *al-Mā'ida* 5: 33. In addition, there is a hadīth which was narrated as follows: “A group of eight men from the tribe of 'Ukil came to the Prophet and then they found the climate of Medina unsuitable for them. So, they said, "O Allah's Apostle! Provide us with some milk." Allah's Apostle said, "I recommend that you should join the herd of camels." So they went and drank the urine and the milk of the camels (as a medicine) till they became healthy and fat. Then they killed the shepherd and drove away the camels, and they became unbelievers after they were Muslims. When the Prophet was informed by a shouter for help, he sent some men in their pursuit, and before the sun rose high, they were brought, and he had their hands and feet cut off. Then he ordered for nails which were heated and passed over their eyes, and they were left in the Harra (i.e. rocky land in Medina). They asked for water, and nobody provided them with water till they died (Abu Qilaba, a sub-narrator said, "They

Looking at the provision of this verse, *hirabah* is one of the offences that carry the most severe punishment in Islam as it touches on the livelihood and sustenance of the society by terrorising highway and rendering it unsafe for trade and commerce.¹⁰⁴ Consequently, the Almighty Allah has imposed the severest punishment as a means of humiliating and discouraging the criminals in order to open the doors of business and commerce.¹⁰⁵

Basically, the aforementioned verse has laid down the punishment for *hirabah*, however jurists differ on the exact punishment to be meted out on a specific occasion taking into cognisance the gravity of the harm caused in individual cases.¹⁰⁶ Jurists have categorised the punishment in such a manner as follows: he who terrorises the highway by killing his victim and appropriating the property of the victim should be killed and crucified;¹⁰⁷ if he causes death of the victim without seizing property, he should be executed;¹⁰⁸ he who terrorises by taking away property of the victim without causing death, his hand and leg should be amputated from opposite side;¹⁰⁹ and if he terrorises without causing death or confiscating property, he should be given discretionary punishment such as banishment, imprisonment, etc.¹¹⁰ However, according to Maliki, even in situation where the felons did not kill or seize property, the mere fact that they terrorised people is enough to constitute *hirabah*. Thus, the punishment is left at the mercy and discretion of the Kādi who may impose crucifixion or execution.¹¹¹

4. CONCLUSION

In the pre-Islamic era in Arabia, war was used as a means of carrying out international relations in the Arabian Peninsula, which was characterised by a permanent state of war among the nations. War under the classical position reflects the dichotomisation of the world into *dār al-Islam* (abode of Islam) and *dār al-harb* (abode of war), which was developed through *fiqh*. The permanent state of war envisaged under the dichotomization may however not reflect the realities of the present day international relations. Based on the typology of war under Islamic humanitarian law, war can be waged against people who rebel against the central constituted authority, against apostates and highway robbers. War against rebellion is governed by more restricted rules provided that the rebellion has reached the threshold set by the law. In addition, the rebels are not treated as criminals, but rather they are considered as combatants who cannot be tried for simply taking up arms against the state or causing destructions

committed murder and theft and fought against Allah and His Apostle, and spread evil in the land.”
Sahih Bukhari, Book 4, vol. 52, Hadith 261

¹⁰⁴ Oloso and Uthman, Op. cit, at 61

¹⁰⁵ Jackson, Op. cit, at 299-300

¹⁰⁶ Peiffer, Op. cit, at 513

¹⁰⁷ According to Hanafi, whosoever terrorises by killing and seizing the victim's property, his punishment should be left at the discretion of the leader who may order for the killing of the culprits and have them crucified or may order their hands and legs to be amputated from opposite sides and afterward, have them killed. See Abubakar, n. 54 at 180

¹⁰⁸ Oloso and Uthman, Op. cit, at 61

¹⁰⁹ *Sahih Bukhari*, Book 4, vol. 52, Hadith 261

¹¹⁰ Abubakar, Op. cit, at 180. It was further added that “the *Hanafi* and *Shi'ah Imamiyyah* schools punish troubling the roads without killing the victim or taking property with banishment; the *Shafi'i* and *Shi'ah Zahdiyyah* punish it with banishment, imprisonment, or a *ta'zir* punishment; the *Maliki* and *Zahiris* allow the *qadi* or sovereign to choose between amputation, execution, or crucifixion.” Peiffer, Op. cit, at 513

¹¹¹ Jackson, Op. cit, at 300

of property. In case of war against apostates, *jus in bello* rules of Islamic law are applicable, except that their property as well as women and children are not taken as booty. For highway robbers, their punishment varies depending on the gravity of individual cases which will be used to determine the suitable punishment for each case. It is suggested that the Muslim World as well as the non-Muslims particularly the Western World should appreciate the fact that the concept of war (jihad) has been largely developed through *fiqh*. As such some aspects of the concept developed by scholars do not prevail over or equate with the provisions of the Quran and traditions of the Prophet.