

# Topical Issues In The Nigerian Law:

A Book of Readings



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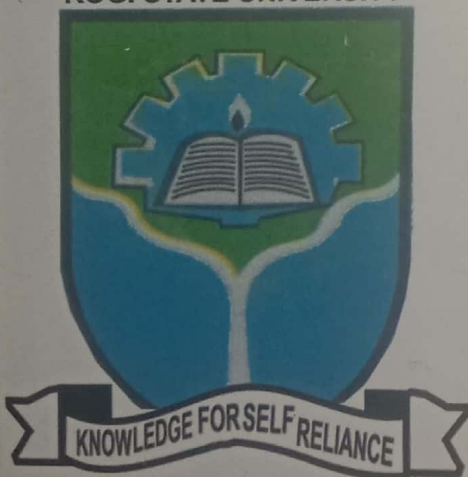
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## CHAPTER FORTY-SEVEN

### IS JIHAD A "HOLY WAR"? AN EXPOSITORY ARGUMENT VIA ISLAMIC INTERNATIONAL LAW

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*&*

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#### **Summary of the Paper**

*Despite of the explanations put forward by Muslim scholars that jihad does not necessarily need to do with warfare, but denotes struggle against one's own sinful inclinations, the perception of Islam on Jihad has been misconstrued by non-Muslims such that whenever the word Jihad is mentioned they understand it to be a holy war against non-Muslims. To this end, this chapter focuses on the concept of jihad under Islamic International Law. In doing this, the paper examines the various classes of jihad, while the distinction between Jihad and 'holy war' is also clarified. The paper in a jiffy aims at putting the concept of jihad in proper perspective.*

## Introduction

The doctrine of jihad is central to the Islamic world view of international law. The jihad ideology remains prominent in modern day conflicts and is frequently equated as the Islamic notion of 'Just war'. However, in much of the Western world, ever since September 11, 2001, nightly news segments, popular media, and political discussions have focused in on the idea of jihad. The 9/11 attack was by far the largest and most significant in a string of escalating attacks- which include attacks on American embassies in Kenya and Tanzania in 1998 and on the USS Cole in 2000- by militant groups claiming responsibility for these events, and others, identify themselves as a Muslims fighting a jihad - a holy war - against America and the West. Their claims have sparked many interesting debates about the nature of jihad.<sup>1</sup>

From here, it is observed that, the word, Jihad, has fallen into the two extremes of exaggeration and laxity. The latter is promoted by a group that wants to abolish jihad from the life of the Ummah, spreading the spirit of submission and surrender, under the guise of various calls such as tolerance and peace, described as agent of colonialism whose hostility to jihad is such that it has gone as far as creating groups which fabricated an Islam without jihad, and devoted themselves to promoting it. At the other extreme, there is another group that makes of the concept of Jihad a raging war it wages against the whole world, taking the natural state of things in relation to non-Muslims to be that of war, and regarding all people as enemies of Muslims, as long as they are not Muslim. This later group may agree with those Orientalists who

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<sup>1</sup> Nico R S., 'Jihad and Just War - Comparative Analysis', p. 2, available online at [www.soundideas-pugetsound.edu](http://www.soundideas-pugetsound.edu), accessed on 28/01/2016

define jihad, as in the encyclopedia of Islam as "spreading Islam by the sword, an individual duty upon all Muslims, such that it is almost a sixth pillar of Islam".<sup>2</sup>

One must be clear that not for a moment are we suggesting that Jihad is totally non-violent and never involves confronting a visible enemy. Rather what we are showing is that it is totally wrong to pinpoint the term for fighting alone.

### The Meaning and Scope of Jihad

The semantic meaning of the Arabic term, jihad has no relation to holy war or even war in general. In reality, the term jihad is derived from *ja-ha-da*. It means to struggle or strive, exert oneself, or take extraordinary pains.<sup>3</sup> Jihad is a verbal noun of the third Arabic form of the root *ja-ha-da*, which is defined classically as "exerting one's utmost power, efforts, endeavors, or ability in contending with an object of disapprobation. Such an object is often categorized in the literature as deriving from one of three sources: a visible enemy, the devil, and aspects of one's own self. There are, therefore, many kinds of jihad, and most have nothing to do with warfare. "Jihad of the heart," for example, denotes struggle against one's own sinful inclinations, while "Jihad of the tongue" requires speaking on behalf of the good and forbidding evil.<sup>4</sup> In Islam, any act done for the sake of Allah that requires hardship, struggle and persistence can be called Jihad. This can be in physical capacity, intellectual ability, gift of speech or worldly riches.<sup>5</sup> The *raison d'être* is that one who practices Jihad will gain tremendously in the hereafter, more so for one who dies in a military jihad.<sup>6</sup>

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<sup>2</sup> Yusuf Q., 'Fiqh al jihad', available online at [www.zulkuhlilhasem.files.wordpress.com](http://www.zulkuhlilhasem.files.wordpress.com), accessed on 28/01/2016

<sup>3</sup> Khadduri M., *War and Peace in the Law of Islam*, (The Lawbook Exchange Ltd, New Jersey, 2006), p. 55

<sup>4</sup> Reuven F., *Jihad: The Origin of Holy War in Islam*, (Oxford University Press, New York, Oxford, 1999), pp. 16-17

<sup>5</sup> 'The misconceptions of Jihad', Islamic Centre, Leicester, p. 1, available online at [www.islamiccentre.org](http://www.islamiccentre.org), accessed on 28/01/2016

<sup>6</sup> Muhammad T. and Muhammad M.K., *Translation of the meanings of The Noble Qur'an in the English Language*, (King Fahd Glorious Qur'an Printing Complex, Madianah, Saudi Arabia, 1983), Qur'an 93 (Ad-Duhah) vs. 4

Jihad is primarily an emphasis on the individual. Jihad also includes the striving and establishing of justice. Before one can strive for justice in his or her community, justice must be one of his or her main religious and moral principles. Jihad may also reflect the war aspects in Islam. The fighting of a war in the name of justice or Islam, to deter an aggressor, for self-defence, and or to establish justice and freedom to practice religion, would also be considered a Jihad.<sup>7</sup> Various activities subsumed under jihad are said by Prophet Muhammad to distinguish true believers who are loyal to God's Prophet:

*Every prophet sent by God to a nation (umma) before me has had the disciples and followers who followed his ways (sunna) and obeyed his commands. But after them came successors who preached what they did not practice and practiced what they were not commanded. Whoever strives (jahada) against them with one's hand is a believer; whoever strives against them with one's tongue is a believer; whoever strives against them with one's heart is a believer. There is nothing greater than (the size of) a mustard seed beyond that in the way of faith.<sup>8</sup>*

The Prophet is also reported to have said: "The best jihad is speaking a word of justice to a tyrannical ruler"<sup>9</sup>

The qualifying phrase "in the path of God" (*fi sabil Allah*) specifically distinguishes the activity of jihad as furthering or promoting God's kingdom on earth. It can be done, for example, by simply striving to behave ethically and by speaking without causing harm to others or by actively defending Islam and propagating the faith.

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<sup>7</sup> Hyder G., Islam, Law and War, available online at <https://hyderg.files.wordpress.com>, accessed on 28/01/2016

<sup>8</sup> Muslim b. al-Hajjaj, *Sahih Muslim*, (Dar al-Kitab al Misr, Cairo, n.d.), p. 536

<sup>9</sup> Abu Dawud, *Sunan Abu Dawud* (Muassasat al kitab al-Thaqafiyyah, Beirut, 1408/1988, vol. 1), p. 712, hadith 2332

Jihad as religiously grounded warfare, sometimes referred to as "jihad of the sword" (*jihad al-sayf*), is subsumed under the last two categories of defending Islam and propagating the faith, though these need not be accomplished only through war. When the term is used without qualifiers such as "of the heart" or "of the tongue," however, it is universally understood as war on behalf of Islam (equivalent to "jihad of the sword"), and the merits of engaging in such jihad are described plentifully in the most-respected religious works.<sup>10</sup>

### **Jihad in Islam**

Many Muslims scholars cite Quran and Hadith texts to put forward the argument that in the Islamic tradition (unlike popularly held belief), war is an aberration and a condition which may be resorted to only under unavoidable circumstances. The view advanced is that Islam's relations with other nations - as originally expounded by Prophet Muhammad - was based on the principle of peaceful and non-hostile relations among nations.<sup>11</sup> The Quran states that:

*And if they incline to peace, incline you also to it, and trust in God. So do not falter; and invite to peace when you are the uppermost.<sup>12</sup> And God is with you, and He will not grudge (the reward of) your actions.<sup>13</sup>*

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

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<sup>10</sup> Reuven F., *Jihad: The Origin of Holy War in Islam*, p. 17

<sup>11</sup> Shaheen S.A. and Javaid R., 'The Concept of Jihad in Islamic International Law', (Oxford University Press, Vol. 10, No 3, 2050), p. 331

<sup>12</sup> Qur'an 8 (Al-Anfal) vs. 61

<sup>13</sup> Qur'an 47 (Muhammad) vs. 35

*And make ready for them all you can of armed force and of horses tethered, that you may dismay the enemy of God and your enemy and others besides them whom you know not: God knows them. And whatsoever you spend in the path of God, it will be repaid to you in full, and you will not be wronged. And if they incline to peace, you also incline to it and trust in God. Verily He is the Hearer; the knower.*<sup>14</sup>

There is also authority in the Qur'an regarding avoidance of the use of force in international relations and settlement of disputes through arbitration and negotiation. A Qur'anic injunction states:

*If two parties among the believers fall into a quarrel, make peace between them.*<sup>15</sup>

It must also be noted that there is a clear distinction between Jihad and *qital* (fighting), as the command to engage in jihad was revealed in Makkah where there was no fighting, but rather jihad of *da'wah* (preaching) through the Quran. Allah says: "And strive against them with the utmost endeavour with it (the Quran)"<sup>16</sup>

The revelations that constitute the Quran coincide with military activity, and many address issues related to the conduct of jihad.

This is necessitated by the persecution of the Muslims by the unbelievers, thereby necessitating Allah granting permission to the Muslims to fight in self-defence. One of the earliest of these defines just causes for waging jihad, emphasizing the essential component of justice:

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<sup>14</sup>Qur'an 8 (Al-Anfal) vs. 60 & 61

<sup>15</sup>Qur'an 49 (Al-Hujurat) vs. 9

<sup>16</sup>Qur'an 25 (Al-Furqan) vs. 52

*Permission is given to those who fight because they are wronged. Surely Allah is capable of giving them victory. Those who were driven out of their homes unjustly, merely for their saying: "our Lord is Allah." Had Allah not repelled some people by others, surely Monasteries, churches, synagogues and mosques, wherein the name of Allah is mentioned frequently, would have been demolished. Indeed, Allah will support whoever supports Him. Allah is surely strong and Mighty.<sup>17</sup>*

Having said this, one can quickly establish that the expansion of Islam is substantiated not through the use of force but a variety of factors- use of force or aggression forming only an ancillary element. Muslims perceived themselves as liberators and providers of justice.

Although there is a vast array of Qur'anic verses and *Hadith* literature rendering jihad obligatory on every Muslim male, yet it is not considered a personal duty but only a general duty which, if accomplished by a sufficient number, the rest will not be condemned for the neglect of that duty- this fact renders administration of jihad entirely in the hands of the government.

Those sections of the population who are exempted from participating in jihad include children and the blind, lame, old, sick or the very poor. Women and slaves are also exempted from military service, but in case of need, even these are liable to active military service.<sup>18</sup>

### **Categorisation of Jihad**

Jihad is multi-dimensional, referring to struggles of varying levels and circumstances.

Though Western convention tends to refer solely to jihad as holy war, most Islamic jurists have continued to rely on the Prophet Muhammad's distinction to classify Jihad into two; *al-jihad al-akbar*, or greater jihad, and *al-jihad al-asghar*, or lesser jihad.<sup>19</sup> However, recent studies have shown the possibility of further including *jihad al kabeer* (the great jihad) in the classification of jihad.

With this classification, the triple nature of jihad is espoused. It initially means the struggle pertaining to the difficulty and complexity of living a good life: struggling against the evil in oneself in order to be virtuous and moral; enjoining that which is good and condemning that which is evil and; jihad can also mean fighting injustice and oppression, spreading and defending Islam, and creating a just society through preaching, teaching and, if necessary, armed struggle.<sup>20</sup>

Jihad in the sense of personal moral struggle is called *al-jihad al-akbar* (the greater jihad). It is divided into what is called "jihad against the self" and "jihad against the devil". This greater sense of jihad continues to be widely regarded as an inner struggle to overcome personal temptations and the carnal self as a necessary part in the process of gaining spiritual insight. In this respect, any number of personal challenges can be regarded as justification for peacefully struggling to be a better Muslim. This 'greater' and often less discussed aspect of jihad best represents the morally rich and peaceful nature of Islam.<sup>21</sup>

Yusuf Qardawi in his book, 'Jihad in Islam',<sup>22</sup> in order to clarify the vast scope of jihad, which makes every muslim a *mujahid* (he who struggles) – but not a *muqatil* (fighter) by necessity, seeks support from a fourteenth century scholar, the eminent Ibn al-Qayyim, student of Ibn Taymiyyah,

<sup>19</sup> It is narrated that when the prophet (peace be upon him) was returning from Tabuk to Madinah he said, "We have just returned from a lesser jihad to the greatest jihad". He was asked, "What is the greatest jihad O Messenger?" He (peace be upon him) replied, "Disciplining oneself".

<sup>20</sup> Brek B A. The justifications for Jihad, War and Revolution in Islam. (Strategic and Defence Studies Centre, Australian National University, Canberra, June, 2003), p. 2

<sup>21</sup> Ibid

<sup>22</sup> Yusuf Q. 'Figh al-jihad', available online at [www.zulkadilhasem.files.wordpress.com](http://www.zulkadilhasem.files.wordpress.com), accessed on 28/01/2016

who concluded from his study of the process of Islamic *da'wah* that there are 13 levels of jihad: first, *jihad al-nafs* (jihad of the self) which comprises 4 levels, exerting oneself to learn the guidance, to act upon it, to call to it, and to persevere on those actions; second, jihad against Shaytan, which includes 2 levels, struggling against the doubts in one's faith which Shaytan instigates, and resisting the desires and corruption to which he calls; third, jihad against the non-believers and hypocrites including 4 levels: with one's heart, tongue, wealth, and self; and fourth, jihad against the oppressors and the corrupt, comprising 3 levels: with one's hand if possible, if not then with one's tongue, if not then with one's heart. The author differs in regarding jihad against oppression and corruption as preceding jihad against disbelief and external transgression, while stressing that peaceful confrontation is to be adopted against oppressors profiting from the reasonable forms which others have developed in confronting unjust rulers, such as elected parliaments, parties, and the separation of powers.<sup>23</sup>

#### *Jihad Al-Kabeer (The Great Jihad)*

Away from *jihad al-akbar* is *jihad al-kabeer*. *Jihad al-kabeer* simply means inviting people to righteousness. In other words, it entails preaching, teaching and spreading the message of Islam so as to make positive Impact on the people. A significant difference between *jihad al-akbar* and *jihad al-kabeer* is that, as the latter focuses on the moral uprightness and spiritual upliftment of oneself, the latter focuses on extending the same good gesture to other people. One of the objectives of the Islamic social system is to make the society of human beings a righteous one.

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<sup>23</sup> *Ibid*

It is a form of jihad in Islam not only to work towards personal righteousness, but also to preach righteousness to others. This is one of the goals *da'wah* (call to the path of Allah) is set to achieve. *Jihad al-kabeer* (the great jihad) is well established in the Qur'an where Allah says: Don't pay heed to the unbelievers and strive against them using this (Quran) with *jihadan kabeera* (a great struggle)<sup>24</sup> The importance of inviting the people to Islam is further established in the Qur'an. It is instructive that Allah enjoins the Muslims to use rational arguments to convince non-believers of the truth of Islam. Allah says: Invite (the unbelievers) to the path of your Lord with wisdom and good admonition. And argue with them in a beautiful manner.<sup>25</sup>

*Jihad al-kabeer* was practiced by Prophet Muhammad while in Makkah. The prophet was persistent in inviting the people of Makkah to Islam for good thirteen years until he was instructed by Allah to migrate from Makkah to Medina when the torture and persecution of the Makkans became enormous on him.<sup>26</sup>

It is interesting to note that the prophet refrained from preaching the call for three years out of fear of reaction of the Meccans, until he received<sup>27</sup>

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<sup>24</sup> Qur'an 25 (Al-Furqan) vs. 52

<sup>25</sup> Qur'an 16 (An-Nahl) vs. 125

<sup>26</sup> Sirah literature describes the kinds of torture to which the oppressed, socially weak Muslims were subjected. Bilal, a slave who performed the call to prayer, is described as having been severely tortured by his master to force him to abandon the new religion and worship the famous Quraysh idols al-Lat and al-'Uzza. Bilal is reported as saying during his torture "One, One", meaning that there is only one God. The whole family of Yasir, including Ammar ibn Yasir, his father and his mother Sumayyah the daughter of al-Khayyat, are also reported to have been brutally tortured. The Prophet passed by them as they were being tortured and, being unable to save them, he said, "patience, O family of Yasir! Your meeting -place will be paradise." The mother, Sumayyah, known as the first female martyr in Islam, and her husband, Yasir, were killed under torture because of their adamant refusal to abandon the religion of Islam. Facing all these tortures and persecution and with no hope of stopping this aggression, the Prophet asked some Muslims to flee to Abyssinia because its king, the Negus, was a righteous man who would not allow anyone to be oppressed in his territory

<sup>27</sup> See Qur'an 15 (Al-Hijri) vs. 94 and Qur'an 26 (Shua'rah) vs. 214-215.

the Qur'anic revelations that commanded him to declare the message he received. In one incident, Abu Bakr is reported to have saved the Prophet from a group of men who encircled him; when he saw that one of them had seized the Prophet's robe, he "interposed himself weeping and saying, 'would you kill a man for saying Allah is my Lord?'<sup>28</sup> This form of jihad did not involve fighting. But, on getting to Medina, the form of jihad turned from the great one to *jihad al-asghar* (the lesser jihad), as the Prophet was given the permission to fight against the oppression of the enemies of Islam so as to defend the Muslim community.

*Al-Jihad Al-Asghar, (The Lesser Jihad)*

Jihad in the sense of an armed, state struggle is called *al-jihad al-asghar* (the lesser jihad) and falls into two main kinds: international and domestic jihad. International jihad, the most commonly referred to, is what the jurists sometimes called jihad against *al-kuffar* (unbelievers) or *jihad fi sabili Allah* (jihad in the path of God), i.e., war with the non-Muslim states. In fact, by the very nature of the structure of the Islamic state, any armed jihad against *al-kuffar* is an international war. This is because, until the abolition of the caliphate on 3 March 1924, Muslims had been, at least theoretically united under one state. Thus, historically and/or theoretically, any jihad which occurred between the Islamic state and its enemies was a war between Muslims and their enemies, misleadingly labelled *kuffar*. But this does not mean that such was necessarily motivated by the enemies' *kufir* (unbelief) because, historically and/or theoretically, *kuffar* were part of the Islamic state, which had legalized and practiced the conclusion of peace treaties and non-aggression pacts with these *kuffar*, i.e., non-Muslim states and other forms of political or religious entities.<sup>29</sup>

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<sup>28</sup> Ahmed M.A., 'War in Islamic Law: Justifications and Regulations', (PhD Thesis, University of Birmingham, 2009), p.26

<sup>29</sup> *Ibid*, p. 133

Domestic jihad, divided into four types: (1) fighting against *bughah* (rebels, secessionists); (2) fighting against *muharibun/qutta' al tariq* (bandits, highway robbers, pirates); (3) fighting against *ahl al-riddah* (apostates) and; (4) fighting against *khawarij* (roughly translated as violent religious fanatics).

The concern of this work is with the Islamic justifications for international war, i.e., jihad against non-Muslim states. Two factors explain much of the controversy over the justifications for war in Islam between the insider and outsider. First, as several scholars have pointed out, classical Muslim jurists paid little attention to the Islamic *jus ad bellum* (justifications for resorting to war). Second, there has been much misunderstanding of the role of the religion of Islam in the justifications for war, let alone the terms used in the definitions of jihad above.

As indicated above, all the various practical aspects of life were discussed by Muslim jurists within Islamic jurisprudence. The five types of the armed jihad, whether within Islamic state or against other states, are based on religious, political or criminal grounds. Even when a war in these cases is waged on religious grounds, an investigation is still to be made to determine whether it is just or not. Despite the invoking of religious authority of war, the causes of the wars in question were essentially temporal; despite being termed jihad, they were wars of the state not wars of religion.<sup>30</sup>

### **Jihad and Holy War: A Clarification**

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

<sup>30</sup> Ibid.

because of the great variety of interest and approach between them, even the definition of war itself finds no universal acceptance. In most general terms, however, war may be defined as an organized, purposeful activity directed by one established group against a rival group that involves actual or potential application of lethal force. War does not always mean combat. It may be a state of condition between human groups even when warfare is not actually being conducted. The cold war, for example, represented a state of affairs in which actual and direct combat between the principal parties never took place, and the doctrine of jihad in Islamic legal literature likewise defines a state of relationship between the Islamic world and the non-Islamic world.

In the West, Jihad is one of the few Arabic words which most people believe they understand. Jihad is often equated with the use of force and is often inaccurately defined as 'holy war'.<sup>31</sup> However, given the fact that no universally accepted interpretation of jihad is offered by the three main sources of Islamic guidance; the Qur'an, the prophetic traditions, and Islamic jurisprudence, this noble concept of struggling in the path of God is open to dangerous interpretations.<sup>32</sup>

One of those interpretations is its mischievous association with holy war.

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

<sup>31</sup> Hilmi M.Z., 'Is Jihad a just war? War, Peace and Human Rights under Islamic and Public International Law', (Studies in Religion and Society, Ewin Mellen Press, Vol.3), p. 13

<sup>32</sup> Brek B.A., The Justifications for Jihad, War and Revolution in Islam, p.1

for the sake of protecting a territory or righting a wrong, and usually under the authority of some secular and political figure in the name of a state.<sup>33</sup> The idea of just war in these ancient cultures came largely out of the idea that war should be fought for the restoration of peace and justice. Since peace was held in such high esteem it was necessary that order methods of dispute resolution be attempted turning to the last resort of war. These pre-Christian societies laid down the ideas that later Christian writers would adopt as the foundation of what became just war theory.<sup>34</sup>

Since Christianity had its roots in Judaism, t of Christian just war theory was heavily influenced by Jewish texts and traditions. The multiple wars fought by Israel, both righteously with the approval of God (and unrighteously without God's approval) served as examples for later Christian writers.<sup>35</sup> Augustine would eventually find this divine authorisation, or even command, for war extremely important as justification, and argued that Moses showed no cruelty in going to war on God's command. Furthermore,<sup>36</sup> he law of the Torah provided Christian writers with the earliest elements of what could be considered an anti-scorched earth

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<sup>33</sup> Throughout human history violent conflict has played a role in shaping cultures and in giving rise to nation-states. In the midst of this violence, many different cultures have attempted to restrict the violence, hoping to limit its destruction of people, land, goods, economic resources, and culture. Of particular importance to the formation of the Christian just war tradition were the efforts of the ancient Jewish, Greek, and Roman cultures to develop a code for warfare that would somehow establish rules and limits.

<sup>34</sup> *Ibid*

<sup>35</sup> Nico R. S., 'Jihad and Just War: Comparative Analysis', p 5.

<sup>36</sup> Saint Augustine, 'Answer to Faustus a Manichean (Contra Faustum Manichaeum)' in The works of Saint Augustine: A translation for the 21st Century, translated by Roland T., (Part 1, Vol. 20), See also Hyde P., (New City Press, New York, 2007), p. 351

policy for warfare.<sup>37</sup>

It was with the rise of the Papal States and ultimately with the declaration of the crusades that the concept of "holy war" came to be an important term. It is noteworthy that the earliest "holy wars" were often wars by Christians against other Christians in the sense that the protagonists saw themselves as carrying out the will of God. However, it was with the "taking of the cross" by the Christian warriors sent by pope Urban in the eleventh century that "just war" became "holy war" in its fullest sense. It was only with the authorisation of the pope that a Knight could adopt the symbol of the cross. Holy war as a term, thus has its origins in Christianity, not Islam.<sup>38</sup>

The expansion and propagation of Islam started initially by means of peaceful preaching and persuasion. Freedom of religion was applied in theory and practice. A decade after the advent of Islam, persecution of Prophet Muhammad and his early companions and followers gained momentum. To avoid further persecution, they fled from Makkah to Madina in 622 AD – an event known as *Hijrah* (emigration) which also marks the beginning of the Islamic calendar. At Madina, although the first Muslim state was established, interference of Makkans continued and Muslims lived under persistent fear of invasion from the non-Muslim forces surrounding them. It was at that time, that the doctrine of jihad in the sense of armed conflict gained currency.

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<sup>37</sup>The Jewish code for war is clearly spelled in Deuteronomy 20 (although Joshua 11 also contains information that would later be used by Christian writers on just war). Deuteronomy 20 dictates that enemy cities near to Israel could be subjected to extermination (20: 16-18). However, if the cities were beyond Israel's borders and agreed to submit peacefully, they would be offered peace, and if accepted become laborers for the Israelites (20:10-11). If the cities refused to submit and instead made war, the Israelites were commanded to "put all its males to the sword [They could], however, take as [their] booty the women, the children, livestock, and everything else in the town, all its spoil" (20: 13-14). And in one of the more interesting passages, even if the city were within the confines of Israel, and its people were to be put to death: the trees that produced food must be spared (20: 19-20).

<sup>38</sup>'Jihad and the Islamic Law of War', (The Royal Aal al-bayt Institute for Islamic Thought, Jordan, 2009), p. 2, available online at [www.rissc.io](http://www.rissc.io), accessed on 28/01/2016

with the express purpose to defend the religious of the Muslims and to avoid extermination at the hands of the then dominant group. Thus jihad in the sense of 'holy war' was established as a means of self-defence.<sup>39</sup>

### The Legal Development of Jihad

After the success the early conquests and in converting people to Islam and in expanding the realm of Islam, early Muslim scholars split the world into two distinct spheres: the sphere of war (*dar al-harb*) and the sphere of Islam (*dar al-Islam*). This distinction was based on the implicit division in the Quran of the world into spheres of belief and disbelief.<sup>40</sup> For the sake of Jihad there was a distinction between how the Jihad could be waged under what circumstances. Fighting within the sphere of Islam is reserved for the restoration of peace and justice, and if it occurs against protected peoples (people who have paid the poll-tax), once the conflict has ended they are to be restored to their protected status. Jihad against the *dar al-harb* is considered obligatory for all followers of Muhammad, who was "commanded to fight people until they testify that there is no god but Allah and that Muhammad is the Messenger of Allah." The obligation to fight came down to "every able-bodied man who has reached puberty and is sane." There are several recourses believers were instructed to take before a violent jihad could be allowed. In the case of unbelievers it was required that they be invited to Islam first, and the Prophet himself is credited in a *hadith* with saying "the best jihad is speaking a word of justice to a tyrannical leader." When other means had failed,

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<sup>39</sup>Shaheen S. A. and Javaid R., 'The Concept of Jihad in Islamic International Law', p. 332

<sup>40</sup>Nico R.S., 'Jihad and Just War: Comparative Analysis', p. 33

<sup>41</sup>John K., *Arguing the Just War in Islam*, (Harvard University Press, Cambridge, 2007), p. 103

jihad was permitted, so long as it was justly declared by an Islamic sovereign (or caliph in the early literature), and waged by a legitimate Islamic state. When jihad is legitimately declared, there are specific and strict rules for how they ought to be conducted.

On the subject who may be killed, it has been established that women and children are not to be killed unless they take up arms against the Muslims. Furthermore, Muslims may not be killed, including those who have recently converted, and those to whom a Muslim has given protection may also not be harmed "provided the number is limited, and the Muslim protecting them does not harm the Muslims." Other stringent rules also apply, such as what to do with the spoils of war, how to treat livestock (they are generally not to be killed), how to treat prisoners, and the treatment of property of the enemies (trees, houses, etc.) it should be noted here that there is disagreement among Sunni and Shi'i Muslims over the authority to declare a jihad, and this disagreement is significant since correct authority is a crucial to declare a jihad, and this disagreement is significant since correct authority is a crucial consideration. With the decline of the early Islamic empire, and its defeats at the hands of the crusaders and the Mongols, both traditions at least to some extent had come to believe that jihad had entered into a dormant state. The Shi'i tradition holds that jihad "can only be waged under the leadership of the rightful Imam", and that it has been dormant since the occultation of the last Imam in 873. Therefore, according to the Shi'i tradition no lawful jihad can be fought until the Imam's return. The Sunni tradition, by contrast, simply requires the return of a powerful Muslim state, with a leader (such as a caliph) to declare that jihad has resumed.<sup>42</sup>

### **Applicability of Jihad**

Many serious issues arise regarding the philosophy of jihad in the Islamic legal tradition. From a survey of the writings of some scholars on the subject, it is evident that applicability of the doctrine is not confined to self-defence. It is permissible as an instrument of reprisal against a rebellious population, including apostates, in support of allies in foreign jurisdictions, whether Muslim or non-Muslim. Finally, one may also argue that jihad may be used as a tool for expansion of the Muslim faith, lending strength to the argument that Islam spread by the sword.<sup>43</sup>

<sup>42</sup>Nico R.S., 'Jihad and Just War: Comparative Analysis', p. 35

<sup>43</sup>Shaheen S.A. and Javaid R., 'The Concept of Jihad in Islamic International Law', p. 335

In the light of the Qur'an and *Sunna*, as well as writings of jurists, there appears to be little consensus as to what the conclusive rules for jihad are. The safest line of analysis might lie in arguing that a particular injunction came about in keeping with the dictates of time. It will also be relevant to mention here that in line with Qur'anic hermeneutics, every rule has many alternatives. Thus on a continuum, one will witness options ranging from strict punishment to complete forgiveness.<sup>41</sup>

An example of this ambiguity and alternatives may be demonstrated in jihad against apostates. Apostasy is defined as abjuration of Islam, committed voluntarily by a Muslim, either by words or by acts. Mahmassani believe that there are two courses open to an apostate from Islam. He/she is first invited to return Islam. If he/she fails to comply, he/she is then liable to capital punishment according to the prevalent Hanafī School, on the basis of a *Hadith* of the Prophet which says 'He who changes his religion must be killed'.<sup>45</sup> But there is a Qur'anic verse that appears to establish a different rule by proclaiming that 'There is no compulsion in religion'.<sup>46</sup> If however apostasy is collective and is accompanied by secession or desertion to the enemy, then it justifies declaration of war. In such a case, it is equivalent to rebellion and discord (*finah*), which, in terms of the Quran, is worse and more serious than murder.<sup>47</sup> There is also the argument that, according to the true interpretation of the Qur'an, not mere renunciation of Islam but becoming an enemy of Muslim society and state was punishable. Reference is made to a *hadith* where an individual was brought to Prophet Muhammad, so that the penalty of apostasy would be applied to him. He had thrown his spear out in the desert wanting to kill God because he had lost a beloved woman whom he had wanted to marry. When brought to Prophet Muhammad to stand trial, the response of the Prophet was 'Isn't it enough for you to believe in God?' the man was not brought to trial, and the penalty was not applied.

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<sup>41</sup> *Ibid*

<sup>42</sup> *Ibid*

<sup>43</sup> Qur'an 2 (Al-Baqarah) vs. 256

<sup>44</sup> Qur'an 2 (Al-Baqarah) vs. 191 & 217

As described, apostasy was more a political question than anything else, comparable in modern laws with treason. It was withdrawal from Islam, taking action against the Islamic nation in a treasonous sense, as opposed to the individual's choice of adopting a different type of belief. Another school of thought argued that denial of Islam, the surrender in peace to God, was the essence of apostasy.<sup>48</sup>

A further question arising out of our discussion of permissible jihad lies in using it as a means of converting non-Muslims to the Islamic faith. Here too, there appears an element of conflict between freedom of religion and the goal of converting people to Islam. Some scholars are of the view that although no one may be forced to embrace the Islamic faith, yet Islamic rule is to be established by all means. It is not clear what this statement implies, but one might pose the question that if non-Muslims refuse to embrace Islam, would it be legitimate to wage war against them?<sup>49</sup> With regard to the above discussion on jihad, it is submitted that it would be difficult to uphold the opinion of establishing Islam by all means on some counts. First and foremost is the inherent contradiction between conversion to Islam by the use of force and freedom of religion verses in the Qur'an.<sup>50</sup> Second, how valid would these alternatives be in a multi-national world where there is no single Muslim state entity as envisaged in the arguments of Muslim jurists?

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<sup>48</sup>The position of this school is to the effect that the issue of apostasy was not political but legal; to say that it was political was not to answer the question

<sup>49</sup>It must be noted that in the history of Islam, call to the path of Allah is not known to be through coercion. Even, during the early times of Islam, in the battles between the Muslims and the Pagan Quraysh, when the Makkans were determined to stamp out the young Muslim state, the approach of Islam was defensive. Wherever possible, the Prophet also made peace treaties, such as that of Hudaibiyyah. This treaty was made despite repeated provocations by the Quraysh when the Muslims were on their way to Makkah to perform Umrah (the lesser pilgrimage). See *Jihad and the Spread of Islam*, (Dawah Institute of Nigeria Islamic Education Trust, Minna, Nigeria, 2009), pp. 30-33

<sup>50</sup>Qur'an 2 (Al-Baqarah) vs. 191 and 217

### **Conclusion**

The perceived responsibilities to 'defend' Islam will remain highly subjective. Whilst Muslims may widely agree on the need to defend their faith and prevent oppression, injustice and corruption, the specific circumstances which justify armed action and revolt have evaded agreement for over a millennium. Based on the unresolved contradictions found within the three main sources of Islamic guidance and the current social, political and economic environment of the Middle East, Islam will be subject to continued variance in interpretation and manipulation. Indeed, the Islam of the twenty-first century will continue to offer moderates, traditionalists and radicals alike the opportunity to manipulate concepts such as jihad, war and revolution. The continued ambiguity of these concepts will allow Muslim individuals and groups to mold a religion that best fits their own particular circumstances and interpretation. In this context, Islam remains truly at the mercy of its own followers

### **Recommendations**

- There should be more enlightenment by the Islamic jurist to the public on the true meaning of Jihad. Jihad entails striving towards righteousness, peaceful preaching and persuasion and not terrorism.
- A term like 'holy war' has never been used in Islam. The term is a reflection of the Christian use of this term 'holy war' to refer to the crusades of the Middle Ages. It is typical of the enemies of Islam that they suggest Islam has suffered the same problems they have. Because the Jews and Christians failed to preserve their sacred texts, they are working endlessly and fruitlessly to try to prove Islam has had the same problem with their texts. And because they are somewhat embarrassed by their bloody past in the form of the Crusades, they are keen to suggest Islam has the same problems. All these misconceptions are recommended for clarification through a practical Dawah