

**REGIONAL INTEGRATION
GLOBALISATION
&
DEVELOPMENT IN AFRICA**
(ECOSOC/SADC/ECOWAS EDITION)

VOL. 1



Editors:
N O Nwaodu | E O C Ijeoma | B P Wanda

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DEDICATION

This book is dedicated to ECOSOC, the African Union, ECOWAS, SADC, NEPAD, PAP, and all other agencies that are working towards achieving regional integration and development in Africa

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Chapter Twenty-One

The Anathemaic View of Islamic Law in Relation to Violation of Rights of Non-Combatants Immunity and Collateral Damage

By
Dr. A A Owoade

وَقَاتِلُوا فِي سَبِيلِ اللَّهِ الَّذِينَ يُقَاتِلُونَكُمْ وَلَا تَعْتَدُوا إِنَّ اللَّهَ لَا يُحِبُّ الْمُعْتَدِينَ

And fight in the way of Allah those who fight you, but transgress not the limits. Truly, Allah likes not the transgressors.

Introduction

Islamic teachings emphasizes peace but also sanctions Holy War. In fact, armed struggle forms an integral part of Islam's formative period of the seventh century. This historical reality has created a unique ideal in which war appears as an extension of religion by another means.³⁷³ Thus, the increase in violent attacks against civilians and non-combatants and the claims made by groups waging such attacks that their acts are legitimate under Islamic law had been generating wide interest in Islamic laws of war.³⁷⁴ Islamic law does not sanction warfare as the primary means of engaging with one another in any indifference.³⁷⁵ But where the

inevitability occurs 'mercy and peace' are the *fons et origo* of everything in Islam. Hence, Islamic rules on warfare are complex, appear to be contradictory and require careful analysis.³⁷⁶

Islamic rules on warfare actually focus on the concepts of just war, typologies of conflicts, treatment of the vanquished, division of spoils, and the upholding of Islamic law, given the travel and exchange between Muslim and non-Muslim territories.³⁷⁷ Most Western readers and some feeble Muslims will probably find the Islamic rulings on war to be contradictory. It may not be clear whether they promote war or peace. However, Muslims believe the Quran to be divinely revealed, and Quran experts hold that the text must be understood in the spirit of its entirety, and not simply reduced to selected verses or phrases. The Holy Qur'an provides thus;

وَالرَّاسِخُونَ فِي الْعِلْمِ يَقُولُونَ آمَنَّا بِهِ كُلٌّ مِّنْ عِندِ رَبِّنَا... وَمَا يَذَّكَّرُ إِلَّا أُولُو الْأَلْبَابِ

...And those who are firmly grounded in knowledge say: "We believe in the Book; the whole of it is from our Lord:" and none will grasp the

³⁷³ See Gawrych G. W., 'Jihad, War, and Terrorism' (n.d.), P.2, available at <https://www.hsdl.org> accessed 05/04/2018

³⁷⁴ Nesrine Badawi, 'Islamic Jurisprudence and the Regulation of Armed conflict', program on humanitarian policy and conflict research Harvard University, February 2009, p. 1

³⁷⁵ As would be shown much later, between 622 and his death in 632, Prophet Muhammad participated in twenty-seven military expeditions;

he actually fought in nine engagements and suffered a minor wound in one battle. Muslims regard these battles as necessary, for they allowed Muslims to worship freely, secure from attack and persecution.

³⁷⁶ Youssef H. S., *Islamic Rulings On Warfare*, (The Strategic Studies Institute, 2004), p.1 available at <http://www.carlisle.army.mil/ssi/> accessed 28/03/2018

³⁷⁷ *Ibid*

Message except men of understanding.³⁷⁸

Having said this, another misconstrue concept in relation to warfare in Islam is the concept of Jihad. In simple term, it means *to struggle or strive*. Still, in the sense of personal moral struggle, it (Jihad) is called *al-jihad al-Akbar* (the greater jihad). This is divided into *jihad against the self* and *jihad against the devil*.³⁷⁹ 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* (non-believers) or *jihad fi sabil Allah* (jihad in the Cause of God), i.e., war with the non-Muslim states.³⁸⁰

Furthermore, the defensive nature of fighting in Islam can be seen in the wars fought by the Prophet of Islam. Thus, of the 27 battles in which Prophet Muhammad played a direct or indirect role, the first 18 defended the Muslims against the *Makkans* and

the other 9 he initiated against the *Makkans* and other tribes in Arabia. Therefore, Muslims were allowed to defend themselves militarily from the forces or armies which were attacking them wherever that happened.³⁸¹ Hence, tremendous care was to be taken not to shed the blood of non-combatants³⁸², but if Muslims found themselves attacked by those non-combatants, they may kill their attackers while defending themselves without committing a sin.³⁸³

Conversely, the concept of collateral damage, also known as the proportionality rule, is basically to offer protection to civilians and non-combatants alike in wartime.³⁸⁴ As such, it is said as the unintentional or incidental injury or damage to persons or objects that are not lawful military targets.³⁸⁵ Consequently, the harm done to persons, animals or things by combatants in the conduct of a war which is a side effect of attacks on persons, animals, or things that they are morally permitted to

³⁷⁸ The Holy Quran, English translation by Dr. Muhammad Taqi-ud-Din al-Hilali and Dr. Muhammad Muhsin Khan, *Translation of the meanings of The Noble Qur'an in the English language*, (King Fahd Glorious Qur'an printing complex, Madinah), Qur'an chapter 3 (Suratul Al-Imran), verse 7

³⁷⁹ For a more extensive discussion on this, See Yusuf al-Qaradawi, *Fiqh al-Jihad*, (vol. 1, Wahba Bookshop, 2009), pp. 52, 143-168. Available at <https://www.zulkiflihasan.files.wordpress.com> accessed 16/04/2018

³⁸⁰ Al-Dawoody, A. M., *War in Islamic law: Justifications and regulations*, (A thesis submitted to The University of Birmingham for the degree of Doctor Of Philosophy, August 2009), p. 54

³⁸¹ But an examination of Qur'an 2 (Suratul Baqarah), verses 191, 193-4 will further give more details about the extent of fighting in Islam.

³⁸² Noncombatants are those who may accompany combatants but do not perform in that capacity. Or, those who take no active part in a war.

³⁸³ Dr. Joel Hayward, *Warfare in the Quran*, (The Royal Aal Al-Bayt Institute for Islamic Thought, Jordan, 2012), pp. 30-31

³⁸⁴ Valerie Epps, 'Civilian casualties in modern warfare: The death of the collateral damage rule', *Georgia Journal of International and Comparative Law*, vol 41, 2013, p.309

³⁸⁵ Bruce Cronin, 'Reckless endangerment warfare: Civilian casualties and the collateral damage exception in international humanitarian law', *Journal of Peace Research*, 2013, pp1-13 available at sagepub.co.uk/journalsPermissions.nav

target³⁸⁶ under the law³⁸⁷ invariably amounts to collateral damage.

Conceptual Analysis

When we talk of warfare in Islam, various types of terminologies has been adopted depending on the type and nature of that particular combat. Some of these terms are necessary here in order to grasp the real nature or essence of fighting Islam.

The general term for war is *Harb*.³⁸⁸ In the same vein, *Qital* (fighting, or killing) is used in the Quran. But unlike *jihad*, it is not followed by the phrase, "*fi sabil Allah*" (in the path of God). Three types of military action were introduced during Prophet Muhammad's time (590-632 A.D.). The terms carry a particular legitimacy due to their derivation in this early period, and their relationship to the Prophet's practice. Moreso, *Ghazw* is a raid that has evolved into the term for battle, *ghazah*, or *ghazwa*. These were battles in which Prophet Muhammad personally participated. The term *Ghazi* came to mean "warrior for the faith," as these battles came to be associated with the expansion of Muslim territory.

Conversely, *Siriya* means a battle Prophet Muhammad commissioned but did not lead.³⁸⁹ This is also the

name for raiding parties and reconnaissance groups, usually on horseback, which he authorized.³⁹⁰ Also, *Ba'athat* were expeditions or missions primarily diplomatic in nature (e.g., a courier or political exchange), but which some consider combative. It differed from *saraya* in size.

These terms, derived from the early Islamic texts on warfare, are part of a particular discourse on conflict that differs in some ways from Western traditions.

A Synopsis on the Concept of Jihad

The concept of jihad in Islam is one of the concepts that cause the most confusion and is surrounded by a discordance aiming at equating jihad with mass murder and random shooting sprees. This crucial thought underlies all discussion of jihad, perhaps the most misrepresented of ideas in the West's understanding of Islam.³⁹¹ It is therefore useful, and even imperative, to explain what jihad is (albeit in a concise approach) what it means to Muslims, and how it relates to the concrete issues of war and peace which include the immunity of non-combatants and collateral damage.

The University of Birmingham for the degree of Doctor Of Philosophy, August 2009), p. 54

³⁹⁰The word *sariyah* refers to expeditions allegedly sent by the Prophet for several objectives, such as to preach Islam, get news of what the *Quraysh* were planning, return stolen property, fight against those who were preparing to attack Medina, kill an individual for the same reason, fight those who killed one of the Prophet's messengers and, in five instances, to destroy *Quraysh* idols after the victory of Mecca.

³⁹¹*Ibid*

³⁸⁶Lefkowitz David, 'Collateral Damage in War' *Essays in Political Philosophy*, Cambridge University Press, New York, 2008, p.145

³⁸⁷That is the provision of Islamic laws of war.

³⁸⁸For instance, in the provision of Qur'an chapter 2 (Suratul Baqarah), verse 279, the word *Harb* therein is interpreted to mean war.

³⁸⁹Al-Dawoody A. M., War in Islamic law: Justifications and regulations, (A thesis submitted to

Before delving deeper into the concept of jihad, it is essential to trace the term itself from its root in the Arabic language. The word jihad comes from the root *ja ha da*³⁹², which in Arabic means to exert the most effort. This definition is general: as one can exert effort in various ways like studying or fulfilling goals and ambitions.³⁹³ Furthermore, Jihad,³⁹⁴ both linguistically and as a technical term means 'struggle' or 'strive', and is etymologically related to the words *mujahadah*, which also means struggle or contention, and *ijtihad*, which is the effort exerted by jurists to arrive at correct judgments in Islamic law.³⁹⁵

Types of Jihad

Islamic jurists considered different types of *jihad*³⁹⁶. Certain categories might be waged against Muslims as well as non-Muslims. Thus, in the

وَالَّذِينَ جَاهَدُوا فِينَا لَنَهْدِيَنَّهُمْ سُبُلَنَا

As for those who strive hard in Us (Our Cause), We will surely, guide them to Our Paths (i.e. Allah's religion-Islamic Monotheism)...

³⁹³ *Ibid*, see also Mohammad H.K., *Principles of Islamic Jurisprudence* (Islamic Texts Society, 2005): One of the most complete and accessible introductions to Islamic law. Also valuable for it discussion of the "sword verse" (pp. 223-225)

³⁹⁴ For more details about the concept of jihad as it relates to war, see; *Jihad and the Islamic Law of war*, (The Royal Aal Al-Bayt Institute for Islamic Thought, Jordan, 2009), see also, Muhammad Sa'id R. Al-Buti, *Al-Jihad fi'l-Islam*, (Dar al-Fikr, Damascus, 2005): An excellent overall discussion of the issues pertaining to *jihad*, from an eminent scholar and recognized authority, including the laws of war, protected peoples, political rebellion, preaching Islam

(*da'wah*), treaties, and forced conversion.

³⁹⁵ Muhammad et al, *War and Peace in Islam: the Uses and Abuses of Jihad*, (first edition, MABDA: the Royal Islamic Strategic Studies Centre, 2013). P.58

³⁹⁶ If the word is limited to struggling or striving in the cause of Allah

sense of personal moral struggle, it (Jihad) is called *al-jihad al-Akbar* (the greater jihad). It is divided into what is called a *jihad against the self* and *jihad against the devil*. 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 a jihad against *al-kuffār* (non-believers) or *jihad fi sabil Allah* (jihad in the Cause 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 the disbelievers is an international war.³⁹⁷

The Defensive Theory of Jihad

After Prophet Muhammad migrated from Mecca to Medina in 622 AD, permission to take up armed combat against those who had persecuted them for years at Mecca in self-defense was given by Allah.

أَئِذْ لِلَّذِينَ يُقَاتِلُونَ فِي سَبِيلِ اللَّهِ وَإِنْ كَانُوا عَلَىٰ خَلْعٍ لَّيُسْرَىٰ

Permission to fight (against disbelievers) is given to those (believers) who are fought against because they have been wronged; and surely, Allah is able to give them (believers) victory.³⁹⁸

Thus, the provision is written in the passive tense, 'who are fought against', and therefore indicates that permission is given when Muslims are 'wronged', i.e., attacked. As such,

³⁹⁷ *Ibid*

³⁹⁸ Qur'an chapter 22 (Suratul hajj) verse 39

unjustified killing is not sanctioned by this permission thereby protecting the rights of non-combatants. Similarly, the subsequent verse³⁹⁹ sheds some light on what the Qur'an means by wronging: thus, Allah says;

Those who have been expelled from their homes unjustly only because they said: "Our Lord is Allah" ...⁴⁰⁰

Permission to use force is therefore predicated on 'wronging' Muslims.⁴⁰¹ Similarly, the above position of is further substantiated by the provision of Quran chapter 2 verse 190:

وَقَاتِلُوا فِي سَبِيلِ اللَّهِ الَّذِينَ يُقَاتِلُونَكُمْ وَلَا تَعْتَدُوا إِنَّ اللَّهَ لَا يُحِبُّ الْمُعْتَدِينَ

And fight in the way of Allah those who fight you, but transgress not the limits. Truly, Allah likes not the transgressors.⁴⁰²

This verse was revealed one year after the Prophet Muhammad migrated from Mecca to Medina. The first part of the verse may be said to have two meanings. First, it allows Muslims to fight those who fight them, a reflection of the permission given in Quran 22 verse 39. The phrase 'who fight you' shows that Muslims cannot be aggressors because it is basically against the intention of Islam *ab initio*. This verse prohibits aggression but

allows the use of force in self-defense as an exception. Secondly, it refers only to fighting combatants during actual combat (*qital*). 'And do not transgress' means that the limits set by Allah must not be violated: fight those who fight you or use force in self-defense. Thus, Verses 22:39 and 2:190 are the two verses that speak of individual self-defense in the Qur'an, but verse 22:39 is a primary verse on this point.⁴⁰³

The Essential Condition for the Cause of God

The Jihad of Islam is not merely a struggle; it has a definitive purpose which is a struggle for the Cause of God. Therefore, *for the Cause of God* is an essential condition for Jihad in Islam. This expression is also part of the special terminology of Islam to which I have alluded to above. Its literal meaning is 'In the way of God'. It is this translation which misled the people into believing that 'Jihad in the way of God' enjoined forcible conversion of other people to the faith of Islam, for the limited intellects of the people could take the expression 'in the way of God' to mean nothing else than that. But in the terminology of Islam, this expression bears wider meaning.⁴⁰⁴

³⁹⁹ See footnote 30 below

⁴⁰⁰ Qur'an chapter 22 (Suratul hajj) verse 40

⁴⁰¹ In his commentary, Imam al-Taher Ibn 'Ashur reported through Ibn 'Abbas and 'Umar Ibn 'Abdul 'Aziz and Mujahid that this verse is definite and has not been abrogated. He went on to say: 'the purport is to fight those who are set to fight you, i.e. do not attack the old, women or children.'

⁴⁰² Ibid

⁴⁰³ Some scholars also argue for the offensive theory of jihad which is based on two main arguments: the progression of rules on the use of force and the universality of the Islamic religion. The progression argument states that the Qur'an did not allow the use of force and, instead, favored patience in the early years of Islam, i.e., the Meccan period (610- 622 AD).

⁴⁰⁴ Ibid

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allows the use of force in self-defense as an exception. Secondly, it refers only to fighting combatants during actual combat (*qital*). 'And do not transgress' means that the limits set by Allah must not be violated: fight those who fight you or use force in self-defense. Thus, Verses 22:39 and 2:190 are the two verses that speak of individual self-defense in the Qur'an, but verse 22:39 is a primary verse on this point.⁴⁰³

The Essential Condition for the Cause of God

The Jihad of Islam is not merely a struggle; it has a definitive purpose which is a struggle for the Cause of God. Therefore, *for the Cause of God* is an essential condition for Jihad in Islam. This expression is also part of the special terminology of Islam to which I have alluded to above. Its literal meaning is 'In the way of God'. It is this translation which misled the people into believing that 'Jihad in the way of God' enjoined forcible conversion of other people to the faith of Islam, for the limited intellects of the people could take the expression 'in the way of God' to mean nothing else than that. But in the terminology of Islam, this expression bears wider meaning.⁴⁰⁴

³⁹⁹ See footnote 30 below

⁴⁰⁰ Qur'an chapter 22 (Suratul hajj) verse 40

⁴⁰¹ In his commentary, *Imam al-Taher Ibn 'Ashur* reported through *Ibn 'Abbas* and *'Umar Ibn 'Abdul 'Aziz* and *Mujahid* that this verse is definite and has not been abrogated. He went on to say: 'the purport is to fight those who are set to fight you, i.e. do not attack the old, women or children.'

⁴⁰² *Ibid*

⁴⁰³ Some scholars also argue for the offensive theory of jihad which is based on two main arguments: the progression of rules on the use of force and the universality of the Islamic religion.

The progression argument states that the Qur'an did not allow the use of force and, instead, favored patience in the early years of Islam, i.e., the Meccan period (610– 622 AD).

⁴⁰⁴ *Ibid*

unjustified killing is not sanctioned by this permission thereby protecting the rights of non-combatants. Similarly, the subsequent verse³⁹⁹ sheds some light on what the Qur'an means by wronging: thus, Allah says;

Those who have been expelled from their homes unjustly only because they said: "Our Lord is Allah" ...⁴⁰⁰

Permission to use force is therefore predicated on 'wronging' Muslims.⁴⁰¹ Similarly, the above position of is further substantiated by the provision of Quran chapter 2 verse 190:

وَقَاتِلُوا فِي سَبِيلِ اللَّهِ الَّذِينَ يُقَاتِلُونَكُمْ وَلَا تَعْتَدُوا إِنَّ اللَّهَ لَا يُحِبُّ الْمُعْتَدِينَ

And fight in the way of Allah those who fight you, but transgress not the limits. Truly, Allah likes not the transgressors.⁴⁰²

This verse was revealed one year after the Prophet Muhammad migrated from Mecca to Medina. The first part of the verse may be said to have two meanings. First, it allows Muslims to fight those who fight them, a reflection of the permission given in Quran 22 verse 39. The phrase 'who fight you' shows that Muslims cannot be aggressors because it is basically against the intention of Islam *ab initio*. This verse prohibits aggression but

allows the use of force in self-defense as an exception. Secondly, it refers only to fighting combatants during actual combat (*qital*). 'And do not transgress' means that the limits set by Allah must not be violated: fight those who fight you or use force in self-defense. Thus, Verses 22:39 and 2:190 are the two verses that speak of individual self-defense in the Qur'an, but verse 22:39 is a primary verse on this point.⁴⁰³

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⁴⁰² *Ibid*

⁴⁰³ Some scholars also argue for the offensive theory of jihad which is based on two main arguments: the progression of rules on the use of force and the universality of the Islamic religion.

The progression argument states that the Qur'an did not allow the use of force and, instead, favored patience in the early years of Islam, i.e., the Meccan period (610- 622 AD).

⁴⁰⁴ *Ibid*

To start with, every action in Islam shall be judged by its preconceived intention⁴⁰⁵. As such, all such work as is undertaken for the collective well-being of mankind and in which the functionary has no vested interest in the present world, his sole interest being to win the favor of God, is regarded in Islam as an 'act in the way of God'.⁴⁰⁶ To take an instance, if you give away something in charity in anticipation of receiving some material or moral dividend in this world, it would not be regarded as an 'act in the way of God'. But if it is your desire to win the pleasure of God by affording assistance to a poor man, this charitable act would be deemed to have been done 'in the way of God'. Hence the term 'in the way of God' is reserved for such deeds only as are undertaken with perfect sincerity, without any thought of gaining a selfish end, and executed on the understanding that to afford benefit to other human beings like the protection of the immunity of non-combatants is a means of winning the pleasure of God and the sole purpose of human life is to win the favor of the Creator of the universe.⁴⁰⁷

The condition *in the cause of God* has been attached to Jihad for the same reason. It strictly implies that when a person or a group arises to carry out a revolution in the system of life and to

establish a new system in conformity with the ideology of Islam, he or they should keep no selfish motives in mind while offering sacrifices and executing acts of devotion for the Cause. The aim should not be to knock out an Emperor and occupy the vacant throne i.e., to become a Caesar replacing another Caesar. The objectives of the struggle should be completely free from the taint of selfish motives like gaining wealth or goods, fame and applause, personal glory or elevation. All sacrifices and exertions should be directed to achieve the one and the only end i.e., the establishment of a just peaceful and equitable social order among human beings; and the only reward in view should be to gain the favor of God. Allah says:

الَّذِينَ آمَنُوا يُقَاتِلُونَ فِي سَبِيلِ اللَّهِ وَالَّذِينَ كَفَرُوا يُقَاتِلُونَ فِي سَبِيلِ الطَّاغُوتِ

Those who believe fight in the way of God and the unbelievers fight in the way of Taghut (Devil)...⁴⁰⁸.

Similarly, it is reported in a Tradition that an individual enquired from the Prophet of Islam (peace be upon him), What does 'war in the cause of Allah' imply? A man fights to obtain goods. Another engages in a battle to secure a reputation for valor. A third man fights to wreak vengeance upon the other or is impelled to fight for national honor.⁴⁰⁹

⁴⁰⁵ Paramole A. O., *Ethical Themes in the Forty Traditions of Imam Nawawi*, (2nd edition, Debo Prints, 2008), p.67

⁴⁰⁶ *Ibid*

⁴⁰⁷ Abul A'la Maududi, *Jihad In Islam*, (The Holy Koran Publishing House, Beirut, Lebanon, 2006), pp7-8

⁴⁰⁸ Qur'an chapter 4 (Suratul An'am), verse 76

⁴⁰⁹ *Ibid*. similarly, the Prophet of Islam also said when a man ask him about fighting in the way of Allah;

Therefore, it is a cardinal principle in Islamic law that the purpose of warfare is nothing but for the Cause of God.

Who, among these men, is a fighter 'in the way of God' The Prophet of Islam (peace be upon him) answered: "None. Only he fights in the way of the Lord who holds no other purpose than the glorification of God".

Another tradition relates: "If a man engaged in battle entertains in his heart a desire to obtain out of the war only a rope to tie his camel with, his reward shall be forfeited"

An Aphorism about the Concept of State under Islamic Law

In order to adjudicate the propriety for peace and war, some Muslim jurists have divided the world into three territorial realms. The Abode of Islam (*dar al-Islam*) refers to those areas under Muslim rule. Ideally, Muslim governments should not fight each other, but for various reasons, they have, in instances too numerous to quantify. Such conflicts, however, should not be Jihad, but simply war or *harb*. The Abode of War (*dar al-harb*) are lands controlled by non-Muslim rulers who oppose Islam, persecute Muslims in their domain, or conduct hostile operations against Islamic states. Muslims must wage Holy War (*al-jihad al-muqaddas*) against such states. Before the nineteenth century, Muslims have tended to conceptualize the armed struggle as one waged against non-believer (*kufr*) and

infidels (*kuffar*). For Muslim scholars, *kufr* means more than a denial of truth; it also includes the notion of a direct threat to the *Ummah*.⁴¹⁰ Finally, there is the Abode of Peace or (*dar al-sulh*). Here, non-Muslim rulers allow Muslims freedom of worship and Muslims, therefore, can enter into treaties with such states. The Prophet Muhammad himself reached a truce with pagan Mecca in 628. The pact became known as the Treaty of *Hudaybiyah*.⁴¹¹

The Purpose and Objective of Warfare in Islam

Under Islamic law, its (war) *raison d'être* was primarily religious. Thus, the purpose or the aim of jihad or conducting wars for the sake of God should be on the following basis:

1) To fight in Self-defence and fighting back against aggression.⁴¹² Thus, when the Prophet dispatched his armies he would say, "Go in the name of God. Fight in the way of God [against] the ones who disbelieve in God. Do not act brutally. Do not exceed the proper bounds. Do not mutilate. Do not kill children or hermits.

2) Alleviating religious persecution and establishing freedom of religion so that people may have the opportunity to think freely and

⁴¹⁰ *Ibid*,

⁴¹¹ *Ibid*; for a more comprehensive insight on this, see also; George Sadek, *International Relations under Islamic law (Shar'iah): Dar Al -Harb (House of War) vs Dar Al-Islam (House of Islam)*, (Global Legal Research Center, March 2012), pp.1-5

⁴¹² See Qur'an 22 verses 39-40

practice their religious convictions.⁴¹³ Furthermore, fighting should be only against combatants, not defenseless civilians who are not on the battlefield and are not equipped or trained to be engaged in combat.

In furtherance, if the word *jihad* is used as a word for fighting, its purpose also includes others.⁴¹⁴ In addendum, the Islamic law of war and peace provides for the preservation of the environment, which includes a prohibition on killing animals or cutting trees or destroying harvests or polluting rivers or wells or demolishing houses, thus cutting the line or chain of collateral damage as a result of a war.

Is there Total War in Islam?

This simple question is of the highest importance in the law of war under Islamic law. But, the simple answer is No! Islam, as its name reads, means peace and the adherent of the faith are people who submit to it⁴¹⁵. Therefore, it is apt to say that there is no single provision of the law of war

under Islamic law which justifies the notion of total war. Thus, Proportionality is a key rule of the Islamic law of war.⁴¹⁶ The principle is clearly laid down in the Qur'an and the Hadith of the Prophet of Islam. Thus, Allah says:

وَإِنْ عَاقَبْتُمْ فَعَاقِبُوا بِمِثْلِ مَا عُوقِبْتُمْ بِهِ...

And if you punish (your enemy, O you believers in the oneness of Allah), then punish them with the like of that with which you were afflicted...⁴¹⁷

All these verses⁴¹⁸ show that proportionality is a key principle, but Qur'an chapter 16 (*Suratul an-Nahl*), verse is conflict specific⁴¹⁹ and very apt: punish them with the like of that with which you were afflicted.

It was revealed in order to prevent disproportionate harm in armed conflicts, which makes it the key verse on proportionality.⁴²⁰ It is now to

⁴¹⁶ Niaz A. Shah, 'The Use of Force under Islamic Law', *The European Journal of International Law* Vol. 24 no. 1, 2013, p. 361 Downloaded from <http://ejil.oxfordjournals.org/>

⁴¹⁷ Qur'an chapter 16 (*Suratul an-Nahl*), verse 126

⁴¹⁸ The provisions of Qur'an chapter 40 (*Suratul Ghafir*), verse 40 and Qur'an chapter 42 (*Suratul Ash-Shura*), verse 40 are very much apt.

⁴¹⁹ Like many other verses, the verse can be interpreted in two ways: one is to lay down the principle of proportionality, and the other is to prohibit mutilation. The occasion of its revelation makes it a classic example of both the principles of proportionality and prohibition of mutilation.

⁴²⁰ *Hamzah*, the paternal uncle of the Prophet Muhammad, was killed in the battle of *Uhud* (3 AH). *Abu Sufyan*, who was leading the *Quraysh* army against the Muslims, was accompanied by his wife, *Hind bin Utbah*. *Hind* cut open *Hamzah's* belly and chewed off his liver. Prophet Muhammad swore that he would kill 30, and some authors say 70, people in revenge. When the Muslim fighters heard the Prophet say this, they became angry and swore to cut their enemies into pieces. On this occasion, verse 16:126 was revealed to prevent Muslims from committing

⁴¹³ Therefore, a nobility of purpose, meaning that no personal interests or private gains should be the aim behind which *jihad* is being waged.

⁴¹⁴ a) The most permissible form of *jihad* was that pursued against unbelievers or polytheists.

b) *Jihad* against dissension or sedition. Since Muslims gave an oath of allegiance to their leader, none should revolt against him.

c) *Jihad* against brigands and deserters.

d) *Jihad* against the Peoples of the Book (*ahl al-Kitab*), Jews, Christians, and by some definitions, Magians and Sabeans.

e) Some jurists considered a defense of the frontiers (*ribat*) to be a requirement of Muslims comparable to *jihad*.

⁴¹⁵ When his Lord said to Him, "Submit (i.e. be a Muslim)!" He said, "I have submitted myself (as a Muslim) to the Lord of the 'Alamin (mankind, jinn and all that exists)."

expatiate more on the anathema view of Islamic law on these concepts.

The Anathemaic View of Islamic Law

There is no how one would discuss this sub-topic without alluding to the peaceful nature of Islam. Islam in totality stands for peace and a peaceful coexistence both among the believers and non-believers.⁴²¹

Firstly, Islam does not sanction a forceful or strident conversion of non-believers to the religion which may lead to chaos rather it advocates a peaceful and wisdom-like mode of propagating the religion. Thus, Allah says;

لَا إِكْرَاهَ فِي الدِّينِ
There is no compulsion in religion...⁴²²

Also:

ادْعُ إِلَى سَبِيلِ رَبِّكَ بِالْحُكْمِ وَالْمَوْعِظَةِ الْحَسَنَةِ
وَجَادِلْهُمْ بِالَّتِي هِيَ أَحْسَنُ ...

Invite (mankind, O Muhammad [SAW]) to the Way of your Lord (i.e. Islam) with wisdom (i.e. with the Divine Revelation and the Qur'an) and fair preaching, argue with in a way that is better...⁴²³

Furthermore, in order to re-emphasize the peaceful nature of Islam, the Qur'an provides that had the Almighty Allah so wished, He would have made everyone on the earth surface believers, but the reverse is the case. Therefore, it is not for the Prophet of Islam or any other

person to coerce anyone into becoming a believer. Allah says:

وَلَوْ شَاءَ رَبُّكَ لَأَمَنَّ مِنَ فِي الْأَرْضِ كُلَّهُمْ جَمِيعًا أَفَأَنْتَ تُكْرِهُ النَّاسَ حَتَّى يَكُونُوا مُؤْمِنِينَ

And had your Lord willed, those on earth would have believed, all of them together. So, will you (O Muhammad [SAW]) then compel mankind, until they become believers.⁴²⁴

Secondly, where the need for a combat⁴²⁵ with the non-believers arises, Islam set a standard for prosecuting such a combat. Thus, for instance, Allah says:

وَقَاتِلُوا فِي سَبِيلِ اللَّهِ الَّذِينَ يُقَاتِلُونَكُمْ وَلَا تَعْتَدُوا إِنَّ اللَّهَ لَا يُحِبُّ الْمُعْتَدِينَ

And fight in the way of Allah those who fight you, but transgress not the limits. Truly, Allah likes not the transgressors.⁴²⁶

Aggression in the above verse⁴²⁷ implies attacks on non-combatants and peaceful, unarmed civilians who pose no threat to Muslims or to their community as a whole. This includes

⁴²⁴ Qur'an chapter 10 (Suratul Yunus), verse 99

⁴²⁵ See footnotes 41 and 42 above

⁴²⁶ Qur'an chapter 2 (Suratul Baqarah), verse 190

⁴²⁷ An attempt is made at examining the verse prohibiting aggression against the enemy which include the killing of non-combatants and the commission of collateral damage. Thus, this verse was revealed in Madinah. It was the verse which permits the killing of the enemy in Medina when the believers had been persecuted for a long period of times. But, such a killing should only be in the cause of God. In addition to a contextual analysis, a linguistic analysis indicates that the type of 'la' in the verse indicates proscription or prohibition which denotes a command.

such excesses. On the day Mecca was conquered, Hind was given amnesty together with others.

⁴²¹ See Qur'an 22 (Suratul Hajj), verse 78

⁴²² Qur'an chapter 2 (Suratul Baqarah), verse 256

⁴²³ Qur'an chapter 16 (Suratul An Nahl), verse 125

women⁴²⁸, children, the elderly, and those devoted to the religious activity, such as priests and monks, of all religious and ideological persuasions.⁴²⁹

Having defined the purpose and objective of warfare under Islamic law, the verses also define the limits of war that, but transgress not the limits. Truly, Allah likes not the transgressors.

Conversely, in order to substantiate the above Qur'anic provision, *Abu Bakr*, the first Caliph, formulated a detailed set of rules⁴³⁰ for Islamic conduct during war. He gave the following instructions to a Muslim army setting out for Syria, which was then governed by the Byzantine Empire:

يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ لِلَّهِ شُهَدَاءَ بِالْقِسْطِ وَلَا يَجْرِمَنَّكُمْ شَنَاَنُ قَوْمٍ عَلَىٰ أَلَّا تَعْدِلُوا اعْدِلُوا هُوَ أَقْرَبُ لِلتَّقْوَىٰ وَاتَّقُوا اللَّهَ إِنَّ اللَّهَ خَبِيرٌ بِمَا تَعْمَلُونَ

I instruct you in ten matters: Do not commit treachery or deviate from the right path. You must not mutilate dead bodies; Do not kill women, children, the old, or the infirm; do not cut down fruit-bearing trees; do not destroy any town; do not kill sheep or camels except for the purposes of eating; do not burn date-trees or submerge them; do not steal from the booty and do not be cowardly.⁴³¹

⁴²⁸ *Abdullah ibn `Umar* reports that when, in one of the battles, the Prophet was told that a woman was found among those killed, he immediately ordered that women and children should not be killed during combat.

⁴²⁹ See footnote 56 above.

⁴³⁰ These rules are coin from the various provisions of the sayings of the Prophet of Islam I relation to warfare.

⁴³¹ *Malik's Muwatta', the book of Jihad*, Hadith 10 (in English)

Aggression also entails exceeding the moral and ethical limits⁴³² set by Islam for fighting a just war.⁴³³ These limits outlaw the atrocities perpetrated in wars outside Islam, past and present.⁴³⁴ Such atrocities are totally repugnant to Muslims and can never be sanctioned or committed by people who honor and fear God as has been shown above and would continue below. Allah says:

⁴³² Similarly, the provision of Qur'an chapter 5 (Suratul Maidah), verse 8, is to the effect that despite the enmity between the believers and non-believers, the believers still need to be upright and just in dealing with them.

O you who believe! Stand out firmly for Allah as just witnesses; and let not the enmity and hatred of others make you avoid justice. Be just: that is nearer to piety; and fear Allah. Verily, Allah is Well-Acquainted with what you do

⁴³³ Conversely, Allah the Law Giver forbids the unjust killing of non-combatants. Thus, under the provisions of Qur'an chapter 60 (Suratul Mumtahanah), verses 8-9:

"Allah does not forbid you to deal justly and kindly with those who fought not against you on account of religion nor drove you out of your homes. Verily, Allah loves those who deal with equity.

It is only as regards those who fought against you on account of religion, and have driven you out of your homes, and helped to drive you out, that Allah forbids you to befriend them. And whosoever will befriend them, then such are the *Zalimuni* (wrong-doers—those who disobey Allah)

وَأِنْ عَاقَبْتُمْ فَعَاقِبُوا بِمِثْلِ مَا عُوقِبْتُمْ بِهِ وَلَئِنْ صَبَرْتُمْ لَهُوَ خَيْرٌ لِلصَّابِرِينَ

⁴³³ Grant P. B., 'Islamic law, International law, and Non-international Armed Conflict in Syria', *Boston University International law journal*, vol. 35:1. P.4; Syria can now be characterized as the quintessential *fitnah* that Islamic jurists fear. Contrary to Islamic and International Law, the Syrian government is using weapons of mass destruction to fight rebels, without regard for the lives of innocent civilians.

Both government and anti-government forces have resorted to siege warfare and committed murder, rape, and torture without fear of accountability.

And if you punish (your enemy, o you believers in the oneness of Allah), then punish them with the like of that with which you were afflicted. But if you endure patiently, verily, it is better for *As-Sabirun* (the patient).⁴³⁵

The principles in the above provisions⁴³⁶ are clear. The Islamic law of war prohibits naked aggression, the harming of non-combatants, excessive cruelty even in the case of combatants, and even addresses the rights of animals and the natural environment.

Thus, Islamic law of war theoretically and practically frowns at the extra-judicial killings in the course of warfare. Therefore, it prescribes patience as a precaution for mass killing. But if you endure patiently, verily, it is better for *As-Sabirun* (the patient)⁴³⁷.

Still, the following traditions of the Prophet of Islam will further give us the insight on the anathema view of Islamic law on the protection of non-combatants as well as collateral damage in warfare. Thus, *'Abdullāh ibn Mas'ūd* quotes the Prophet as saying: "True believers are those who strictly observe their moral code when they kill."⁴³⁸

'Abdullāh ibn Yazīd al-Anṣari reports that the Prophet has strictly forbidden

looting and the mutilation of dead bodies.⁴³⁹

Ibn Ya'la reports that on one expedition, the leader, *'Abd al-Rahman ibn Khalid ibn al-Walid*, was brought four enemy fighters. He ordered that they be tied and put to death slowly. When *Abu Ayyub al-Ansari*, a close Companion of the Prophet, heard of this, he said: "I heard the Prophet forbid slow killing. I swear by God that I would not inflict slow death even on a chicken." When *'Abd al-Rahman* heard this he immediately sought to free four slaves in compensation.⁴⁴⁰

The first cases to be adjudicated against on the Day of Judgment will be those of bloodshed', and his strikingly stark threat that: 'Whoever kills one (non-Muslim) under contract (of Muslim protection) will never smell the scent of paradise' (*Ibn Majah*).

Abu Hurayrah reports that the Prophet sent him with an expedition instructing them to burn two men from the *Quraysh* he had named, but as they were about to depart the Prophet said: "I have ordered you to burn these two people, but only God may punish with fire. If you capture them, just kill them."⁴⁴¹

In fact, Islamic law of war provides that wherein warfare with the enemies and such enemy surrenders his arms or call for armistices; it beckons on the Muslim army to

⁴³⁵ Qur'an chapter 16 (Suratul an-Nahl), verse 126

⁴³⁶ That is the provision of the Holy Qur'an and the Hadith of the Prophet of Islam relating to warfare

⁴³⁷ *Ibid*

⁴³⁸ Related by Abu Dawud

⁴³⁹ Related by al-Bukhari

⁴⁴⁰ Related by Abu Dawud

⁴⁴¹ Related by al-Bukhari, Abu Dawud and al-Tirmidhi

incline to same with immediate effect. Thus, Allah says:

وَإِنْ جَنَحُوا لِلسَّلَامِ فَاجْنَحْ لَهَا وَتَوَكَّلْ عَلَى اللَّهِ إِنَّهُ هُوَ السَّمِيعُ الْعَلِيمُ

But if they incline to peace, you (also) incline to it and (put your) trust in Allah. Verily, He is the All-Hearer, the All-Knower.⁴⁴²

Such is the code that governs war in Islam, and such are its objectives, which derive directly from the Qur'anic statement contained in Qur'an chapter 2 (Suratul Baqarah), verse 190.

The Muslims were well aware that they would not prevail as a result of their numerical strength or superior armament; they were hopelessly deficient on both counts. The main secret of their victory lay in their faith in, and obedience to, God, and the support they received from Him. To ignore God's commands and the Prophet's instructions would have deprived them of the only force that could ensure their victory. These principles had to be strictly observed, even with those enemies who had persecuted them and inflicted unspeakable atrocities on them. Even though at one point the Prophet, overcome by rage, had ordered that two *Qurayshi* men be a, put to death by burning, he immediately retracted that order, because only God punishes with fire.⁴⁴³

⁴⁴² Qur'an chapter 8 (Suratul Anfal), verse 61, see also, Qur'an chapter 2 (Suratul Baqarah), verse 192

⁴⁴³ See; Sayyid Qutb, *In the shade of the Qur'an*, vol I. p.229, available at www.uislam.org/pdf/fi-zilal-Al-Quran-volume-1-Surah-1-2.pdf. Accessed on 11/03/2018, however,

Conversely, as has been mentioned above, the conduct of a war should be aimed at achieving peace under Islamic law. Hence, Islamic law makes provisions against the commission of collateral damage in any form. This assertion can be deduced from the development of the concept of collateral damage under Islamic law which stems from the various provisions of the holy Quran. For instance, Allah says in *Suratul al maidah* verse 32,

مِنْ أَجْلِ ذَلِكَ كَتَبْنَا عَلَى بَنِي إِسْرَائِيلَ أَنَّهُ مَنْ قَتَلَ نَفْسًا بِغَيْرِ نَفْسٍ أَوْ فَسَادٍ فِي الْأَرْضِ فَكَأَنَّمَا قَتَلَ النَّاسَ جَمِيعًا وَمَنْ أَحْيَاهَا فَكَأَنَّمَا أَحْيَا النَّاسَ جَمِيعًا...

Because of that, We ordained for the children of Israel that if anyone killed a person not in retaliation of murder, or to spread mischief in the land- it would be as if he killed all mankind, and if anyone saved a life, it would be as if he saved the life of all mankind...

Although the above provision is basically on the protection of lives, however, by analogy it could be said that the applicability of the concept of collateral damage in this verse is to the effect that lives should not be taken without just cause.⁴⁴⁴

Conclusion

War is not a coffee cake situation in reality. Hence, there will always be those who would suffer as a result of the effect of same. On the contrary,

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⁴⁴⁴There are other verses which provide for the concept like Qur'an chapter 17 (Suratul al Isra), verse 33 and a host of others.

Islamic law treats war as a sometimes necessary evil, whose conduct is constrained by concrete goals of justice and fairness in this world. If warfare has any worth (and indeed, those martyred while fighting justly in the way of God are promised paradise), it comes from what is fought for, not from the fighting itself. Jurists of Islamic law never ask whether war is 'holy'. Rather, they determine, based on Islamic teaching, if it is right and just. As such, non-combatants under Islamic law enjoy absolute protection.

Like, *Abu Hurayrah* quoting the Prophet as saying: "When you fight, avoid striking your opponent in the face."⁴⁴⁵

In resume, God asks neither that Muslims be belligerent nor that they be a pacifist. Rather, they must love peace but resort to force when the cause is just. Therefore, non-combatants should not be harmed on account of the mere possibility or the fear that they might cause harm, but only if they actually do so. In the end, there is an instruction that, if the attackers ceased their attacks, Muslims were not to continue to fight them because Allah is Oft-forgiving, Most Merciful. Thus, whatever is anti-peace is anti-Islam.

⁴⁴⁵ Related by al-Bukhari and Muslim