

Terror on Diplomats and Diplomatic Missions in The Name of Jihād: Islamic Law Perspective

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ABSTRACT

Terrorist attacks on diplomats and diplomatic facilities have been on the increase in recent years. It has often been argued that most of the terrorist attacks have been perpetrated by Muslims in the name of Islam. These attacks on diplomatic personnel and facilities have generally provoked some questions among international and Islamic law experts from which emanate the subject of discussion in this paper. This article intends to critically examine the following questions: what is the relationship between the concept of *jihād* and terrorism?; what is the legality or otherwise of non-State actors declaring *jihād*?; can diplomatic envoys and missions be subject of attack even during a lawfully declared *jihād*?; can the maiming or killing of unarmed civilians be justified based upon the principles of *jihād*?; does the dichotomisation of the world into *dār al-harb* (the abode of war) and *dār al-Islām* (the abode of Islam) have any relevance to the concept of *jihād*?; and what are the responses of Muslim States to these terrorist attacks and how do they treat such violation of the principles of international diplomatic law based on the criminal justice system of Islamic law? This article argues that even in a war situation, Islamic law dictates that diplomatic envoys and facilities must be safely protected. This article further argues that since the principles of *jihād* are fundamentally diametrical to the act of terrorism, it will, therefore, be erroneous to equate the *jihād* ideology with terror-violence.

I. INTRODUCTION

Terrorist attacks on diplomatic missions have been on the increase in recent years.¹ Diplomats and diplomatic facilities have been soft targets for terrorist attacks in the so-called ‘world-wide war’ often perpetrated by non-state actors against various States.² These attacks are usually perpetrated in the form of murder, arson, kidnap and even

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¹ B. Zagaris and D. Simonetti, “Judicial Assistance under U.S. Bilateral Treaties,” in M. C. Bassiouni (ed.), *Legal Responses to International Terrorism: U.S. Procedural Aspects*, Kluwer Academic Publishers, Netherlands 1988, p. 219.

² B. M. Jenkins, “Diplomats on the Front Line,” *Rand Corporation, Santa Monica, California*, 1982, p. 1.

detention often committed against diplomatic agents of foreign countries. In fact, since the attack on the World Trade Centre on 11 September, 2001,³ terrorism has gradually, but sophisticatedly, become a global catastrophe requiring a global challenge.⁴ A recent statistical survey, for instance, indicates that in 2012 various diplomatic institutions were attacked ninety-five times, out of which more than one-third of such attacks targeted United Nation personnel or facilities, with the remaining two-thirds spread across African Union, European Union, the World Bank, the World Health Organisation, including consulates, embassies, and diplomatic personnel representing Bulgaria, Canada, China, Egypt, Germany, Great Britain, India, Indonesia, Iran, Israel, Italy, Japan, Saudi Arabia, Syria, Tunisia, Turkey, and the United States.⁵

With the recent spate of terrorist activities within the Muslim States, and mostly perpetrated by Muslims, one may want to agree with the submission of Esposito that “the most widespread examples of religious terrorism have occurred in the Muslim world.”⁶ However, this must not be construed as if terrorism originated from amongst the Muslims.⁷ The truth is that terrorism can be said to be as old as human history.⁸ Surprisingly, the perpetrators of these attacks often claim inspiration from the Islamic *jihād*.⁹ This article argues that even in a war situation between a Muslim State¹⁰ and a non-Muslim State, there are some laid down principles according to Islamic law of war which must necessarily be complied with. For instance, Islamic law requires that during peace and war situation, diplomatic envoys must not be molested, imprisoned or killed; rather, they and their missions should be safely protected throughout their stay within a particular Muslim State. However, these incessant attacks on diplomatic personnel and facilities have generally provoked some questions which form the subject of discussion in this article. This article will, therefore, critically examine the following questions: (a) what is the relationship between the concept of *jihād* and terrorism? (b) is it legal for non-State actors to declare *jihād*? (c) can diplomatic envoys and diplomatic missions be targeted for attacks even during a lawfully declared *jihād*? (d) can the maiming or killing of unarmed civilians be justified according to the principles of *jihād*? (e) what is the relevance of *dār al-harb* (the abode of war) and *dār al-Islām* (the abode of Islam)

³ J. Rehman, *Islamic State Practices, International Law and the Threat from Terrorism: A Critique of the ‘Clash of Civilisations’ in the New World Order*, Hart Publishing, Oxford, 2005, p. 71.

⁴ D. A. Schwartz, “International Terrorism and Islamic Law,” *Colum. J. Transnat’l L.* 1991, Vol. 29, p. 630.

⁵ *Annex of Statistical Information 2012*, National Consortium for the Study of Terrorism and Responses to Terrorism, A Department of Homeland Security Science and Technology Centre of Excellence Based at the University of Maryland, May 2013, p. 9.

⁶ J. L. Esposito, *Unholy War: Terror in the Name of Islam*, Oxford University Press, New York, 2002, p. 151. See also D. A. Schwartz, *op cit.* p. 630.

⁷ E. Kedourie, “Political Terrorism in the Muslim World,” in B. Netanyahu (ed.), *Terrorism: How the West Can Win*, The Jonathan Institute, New York, 1986, p. 70.

⁸ See R. D. Law, *Terrorism: A History*, Polity Press, Cambridge, 2009, Pp. 1 and 5.

⁹ N. A. Shah, *Self-Defense in Islamic and International Law: Assessing Al-Qaeda and the Invasion of Iraq*, Palgrave Macmillan, New York, 2008, p. 47.

¹⁰ Muslim States are States that are predominantly Muslim majority, which also include States that specifically declare themselves as ‘Islamic Republics’ and those States that declare Islam, in their Constitutions, as the States religion. See M. A. Baderin, *International Human Rights and Islamic Law*, OUP, Oxford, 2003, p. 8.

to the concept of *jihād*? (f) what are the responses of Muslim States to these terrorist attacks, and how do they treat such violation of the principles of international diplomatic law based on the criminal justice system of Islamic law? These issues will be analysed by relying on directives from the Qur'an, the prophetic instructions and advices from the Caliphs to their military commanders as expounded in the Islamic *siyar*.

II. TERRORISM AND ITS DEFINITIONAL PROBLEM

The ability to comprehend and explain the concept of terrorism is often impeded by a single and accepted universal definition. As such, there are divergent definitions of terrorism amongst policy-makers, international lawyers, academics, national legislators, regional organisations and even by the United Nations.¹¹ Perhaps, this definitional ambiguity may not be unconnected with the general aphorism that “one man’s terrorist is another man’s freedom fighter.”¹² This may be one of the reasons why the international community has not been able to fashion out a binding and an acceptable definition of terrorism. Thus, Bassiouni’s view that “the pervasive and indiscriminate use of the often politically convenient label of ‘terrorism’ continues to mislead this field of inquiry” appears to be correct.¹³ Yet, it is very important that a clear-cut definition of terrorism be given as noted by the former President of Lebanon, Emile Lahoud, that “[i]t is not enough to declare war on what one deems terrorism without giving a precise and exact definition.”¹⁴ One begins to wonder whether it is sufficient, particularly in this era of political sensitivity, to generalise the definition of terrorism to cover “[w]hat looks, smells and kills like terrorism is terrorism.”¹⁵ Definitely not, for such generalisation will be too far-reaching. The fact remains that once an act is not terrorism, it can never be terrorism.

Multiple attempts have been made towards having a universal definition of terrorism since 1937¹⁶ with the adoption of the Geneva Convention for the Prevention

¹¹ See B. Golder and G. Williams, “What is ‘Terrorism’? Problem of Legal Definition,” *UNSW Law Journal*, 2004, Vol. 27(2), p/ 270 See also J. Weinberger, “Defining Terror,” *Seton Hall J. Dipl. & Int’l Rel.* 2003, Vol. 4, p. 63.

¹² E. Rosand, “Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism,” *AJIL*, 2003, Vol. 97, p. 334.

¹³ M. C. Bassiouni, “A Policy-Oriented Inquiry into the Different Forms and Manifestations of ‘International Terrorism’,” in M. C. Bassiouni (ed.), *Legal Responses to International Terrorism: U.S. Procedural Aspects*, Kluwer Academic Publishers, Netherlands, 1988, p. xvi.

¹⁴ *Beruit Wants Terrorism Defined*, ALJAZEERA, Jan. 13, 2004, available at <http://english.aljazeera.net/NR/exeres/854F5DE3-FC2D-4059-8907-7954937F4B6C.htm>. [accessed 10 February, 2012].

¹⁵ This was in a speech delivered by the former British Ambassador to the United Nations, Sir Jeremy Greenstock, following the pathetic incidence of September 11, 2001. See J. Collins, ‘Terrorism’ in J. Collins and R. Glover (eds.), *Collateral Language: A User’s Guide to America’s New War*, New York University Press, New York, 2002, Pp. 167 – 168.

¹⁶ In 1937 the then League of Nations which later became known as the United Nations made an attempt to define the word terrorism following the assassination of King Alexander I of Yugoslavia in 1934. See B. Saul, ‘The Legal Response of the League of Nations to Terrorism’, *J Int’l Criminal Justice*, 2006, Vol. 4, p. 79; G. Guillaume, ‘Terrorism and International Law’, *JCLQ*, 2004, Vol. 53, p.538.

and Punishment of Terrorism¹⁷ up to 2002¹⁸ following the infamous attack on the World Trade Centre in September 11, 2001 which still appears to be elusive. A working group set up by the United Nations (U.N.) General Assembly, for instance, came to define terrorism as an act

intended to cause death or serious bodily injury to any person; or serious damage to a State or government facility, a public transportation system, communication system or infrastructure facility . . . when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing an act.¹⁹

This definition, though, tends to proscribe a wide range of criminal acts. Nevertheless, it is said to be inconclusive²⁰ as Malaysia, on behalf of the Organisation of Islamic Cooperation (OIC), proposed an exemption that “[p]eople’s struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime.”²¹ The aim of the proposal was to exclude the activities of national liberation forces from the reach of the convention by relying on Article 2 (a) of the 1999 Convention of the OIC on Combating International Terrorism.²² The proposal by the 57 members of the OIC was rejected by a majority of the Western nations including Israel²³ on the ground that “a terrorist activity remained a terrorist activity whether or not it was carried out in the exercise of the right of self-determination.”²⁴

Any attempt to jettison the idea of proffering a universally accepted definition and purpose for this enigmatic concept called terrorism before engaging in ways of combating it, may only amount to an exercise in futility. The U.N. General Assembly

¹⁷ The Convention for the Prevention and Punishment of Terrorism was signed on 16 November, 1937 with twenty-four States as signatories, while India was the only country that ratified it. See 19 League of Nations Official Journal (1938), p. 23. See also J. Borricand, ‘France’s Responses to Terrorism’ in R. Higgins and M. Flory (eds.), *op cit.*, p. 145.

¹⁸ That was when a working group was formed by the United Nations General Assembly following the incident of September 11, 2001 charged with the task of developing a comprehensive convention on international terrorism.

¹⁹ Measure to Eliminate International Terrorism: Report of the Working Group, U.N. GAOR 6th Comm., 55th Sess., Agenda Item 164 at 39, U.N. Doc. A/C.6/55/L.2 (2002).

²⁰ G. Guillaume, ‘Terrorism and International Law’, *JCLQ*, 2004, Vol. 53, p. 539.

²¹ S. P Subedi, “The UN Response to International Terrorism in the Aftermath of the Terrorist Attacks in America and the Problem of the Definition of Terrorism in International Law,” *International Law Forum du droit International*, 2002, Vol. 4, p. 163.

²² Article 2 (a) of the Convention of the OIC on Combating International Terrorism provides that: “Peoples struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime.”

²³ See J. Friedrichs, “Defining the International Public Enemy: The Political Struggle Behind the Legal Debate on International Terrorism”, *Leiden Journal of International Law*, 2006, Vol. 19, p. 75. See also N. Rastow, “Before and After: The Changed UN Response to Terrorism Since September 11th”, *Cornell Int’l L.J.*, 2002, Vol. 35, p. 488.

²⁴ SP Subedi, *op cit.*, p. 163.

Resolution 42/159 of December 7, 1987 confirms this argument when it says that “the effectiveness of the struggle against terrorism could be enhanced by the establishment of a generally agreed definition of international terrorism.” It is quite important to note that for a definition of terrorism to be generally accepted as such, it should encapsulate all forms of act regardless of the actor, perpetrator, target, place or time.²⁵ In other words, the definition should be devoid of double standards; irrespective of whether the terrorist activities are perpetrated by the State or non-State actors.

In international law, terrorism may be perceived as a crime which precipitates serious violations of individual and collective rights.²⁶ Such activities as armed assault on civilians, indiscriminate bombings, kidnapping, focused assassination, hostage-taking and hijacking have been generally considered by the international community to be illegal and criminal in nature.²⁷ It is beyond doubt that defining terrorism in international law remains problematic and very much complicated. This complication does occur usually when it comes to the question of differentiating a terrorist from a freedom fighter.²⁸ Labelling someone or a particular group as a terrorist or terrorist organisation appears to depend on “political persuasion and nationalistic sentiments.”²⁹ No wonder, Nobel Peace Prize laureates Menachem Begin (d. 1992), Yasser Arafat (d. 2004) and Nelson Mandela (d. 2013) were, at different stages of their lives, famously labelled as terrorists.³⁰

Most African States, including Muslim States, strongly viewed that the meaning of terrorism does not include those struggling against armed occupation and foreign aggression.³¹ The majority of the Western States including the United States and Israel, on the other hand, contend that “state terrorism” cannot be included in the definition of terrorism.³² Many scholars have, in their quest for a universal definition of terrorism, come to the conclusion that since States and regional organisations cannot be unanimous on the definition of terrorism, it would then be difficult to have or invoke a universal criminal jurisdiction on it.³³ In a recent article written in 1997, Higgins concludes that

Terrorism is a term without legal significance. It is merely a convenient way of alluding to activities, whether of States or of individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both.³⁴

²⁵ S. Zeidan, “Desperately Seeking Definition: The International Community’s Quest for Identifying the Specter of Terrorism,” *Cornell Int’l L. J.* 2004, Vol. 36, p. 492.

²⁶ J. Rehman, *op cit.* (2005), p. 71.

²⁷ A. P. Schmid, “Frameworks for Conceptualising Terrorism,” *Terrorism and Political Violence*, 2004, Vol. 16:2, p. 197

²⁸ J. Rehman, *op cit.* (2005), p. 73

²⁹ *Ibid.*, 74

³⁰ See H. Gardener, *American Global Strategy and the ‘War on Terror’*, Ashgate Publishing Limited, England, 2005), p. 74. See also O. Elagab, *International Documents Relating to Terrorism*, Cavendish Publishing Limited, London, 1995, p. iii

³¹ G. Levitt, *op cit.* p. 109

³² R. Higgins, “The General International Law of Terrorism,” in Rosalyn Higgins and Maurice Flory (eds.), *Terrorism and International Law*, Routledge, London, 1997, p. 16

³³ R. Baxter, “A Skeptical Look at the Concept of Terrorism,” *Akron Law Review*, 1974, Vol. 7, p. 380

³⁴ R Higgins, “The General International Law of Terrorism,” in R. Higgins and M. Flory (eds.), *Terrorism and International Law*, Routledge, New York, 1997, p. 28.

If Higgins' statement is anything to go by, it therefore means that different countries will have to adopt different definitions of terrorism depending on how terrorism is perceived by them. Invariably, there may be no universal definition of terrorism due to lack of unanimous acceptance from the international community.

However, for the purpose of this discussion which focuses on whether the principles of *jihād* sanction the acts of terrorism particularly against internationally protected persons, we may not have to belabour the issue concerning the universal definition of terrorism. Rather, we may want to agree with the argument canvassed by the United States Government that "convening a conference to consider this question (i.e., the universal definition of terrorism) once again would likely result in a non-productive debate and would divert the United Nations attention and resources from efforts to develop effective, concrete measures against terrorism."³⁶ It suffices, at least, that categories of acts that are identified and condemned by the international community as forming the acts of terrorism are domestically criminalised with the intent to prosecute or extradite the perpetrators in cooperation and with the understanding of other States.

III. MEANING AND LEGAL IMPLICATION OF JIHĀD IN ISLAMIC LAW

The statement that says that "to equate Islam and Islamic fundamentalism uncritically with extremism is to judge Islam only by those who wreak havoc"³⁷ may not be far from the truth. This observation becomes relevant in view of the amount of misunderstanding of the word *jihād* which is often considered as a synonym of terrorism³⁸ because it is a powerful religious concept which is frequently used by some "self acclaimed jihadists" as a justification for their nefarious acts.³⁹ The compatibility of Islamic law with the modern norm of international law has been a subject of deep controversy, partly due to the scepticism surrounding the acceptance of the concept of *jihad*, owing to the pejorative connotations it has acquired particularly in the minds of most Westerners.

It is thus, important to mention that the term "*jihād*" is not in any way identical with the phrase "holy war" or analogous to the concept of crusade as understood in Western Christendom.⁴⁰ Moreover, "*Harb al-Muqaddasah*" which is the Arabic equivalent of the

³⁵ J. M. Lutz and B. J. Lutz, *Global Terrorism*, 2nd edn, Routledge, New York, 2008, p. 14.

³⁶ United Nations General Assembly, *Measures to Eliminate International Terrorism*, The Secretary-General's Report, A/48/267/Add.I, 21 September, 1993, p. 2.

³⁷ John L. Esposito, "Political Islam: Beyond the Green Menace" (originally published in the journal *Current History* January, 1994), accessed 11 March, 2012, <http://islam.uga.edu/espo.html>.

³⁸ N. A. Shah, op cit. p. 13.

³⁹ See Micheal Cappi, *A Never Ending War*, Trafford Publishing, Victoria, 2007, p. 138. See also D. Bukay, "The Religious Foundations of Suicide Bombing: Islamist Ideology," *Middle East Quarterly* XIII, 2006, p. 27 article online at <http://www.meforum.org/1003/the-religious-foundations-of-suicide-bombings> [accessed 14 March, 2012].

⁴⁰ See H. M. Zawati, *Is Jihad A Just War? War, Peace and Human Rights Under Islamic and Public International Law*, The Edwin Mellen Press, Wales, 2001, 13 See also R. Peters, *Jihad in Mediaeval and Modern Islam*, E. J. Brill, Leiden, The Netherlands, 1977, p. 4.

English phrase “*Holy War*” is not mentioned anywhere in the Qur’an or the authentic traditions of Prophet Muhammad (pbuh).⁴¹ The word *Jihād* is an Arabic expression derived from the verb *jahada*, which means to strive or exert oneself in doing things to the best of one’s ability.⁴² Basically, the concept of *jihād* signifies self-exertion and peaceful persuasion for the sake of God in contradistinction to violence or aggression.⁴³ *Jihād*, at the time of Prophet Muhammad, was a challenge that required one to place everything at the disposal of Islam, which included the resort to force in self-defense, if need be.⁴⁴ According to al-Kāsāni, “jihad is used in expending ability and power in struggling in the path of *Allāh* by means of life, property, words and more”⁴⁵ just as it has been expressly stated in the Qur’an that:

O you who have believed, shall I guide you to a transaction that will save you from a painful punishment? It is that you believe in Allah and His Messenger and strive in the cause of Allah with your wealth and your lives. That is best for you, if you only knew.⁴⁶

In a more general context, *jihād* has been further defined by Esposito as the obligation incumbent on all Muslims, individuals, and the community to follow and realize God’s will: to lead a virtuous life and to spread Islam through preaching, education, example, and writing. It also includes the right, indeed the obligation, to defend Islam and the Muslim community from aggression.⁴⁷

Shah, in his explanation of the kinds of *jihād*, indicates that *jihād* could be viewed from two main perspectives: the internal *jihād* and the external *jihād*. He stresses that the internal *jihād*, which is a process of self-purification, “is a search for self-satisfaction by winning the pleasure and blessing of God.”⁴⁸ External *jihād*, according to him, involves the “search for self-protection in several ways, including self-defense, self-determination, and the search for how to remove obstructions hindering self-protection.”⁴⁹ In essence, *jihād* could be summed up as a search for self-satisfaction and self-protection.⁵⁰

⁴¹ J. Badawi, “Muslim/Non-Muslim Relations: An Integrative Approach,” *J. Islamic L. & Culture*, 2003, Vol. 8, p. 38.

⁴² See S. Mahmassani, “The Principles of International Law in The Light of Islamic Doctrine,” in *Hague Academy of International Law, Recueil Des Cours: Volume 117 1966/I*, Martinus Nijhoff Publishers, 1968, p. 280. See also N. Mohammad, “The Doctrine of Jihad: An Introduction,” *Journal of Law and Religion*, 1985, Vol. 3, p. 385.

⁴³ J. Rehman, “Islamic Criminal Justice and International Terrorism: A Comparative Perspective into Modern Islamic State Practices,” *J. Islamic St. Prac. Int’l L.*, 2006, Vol. 2, p. 19.

⁴⁴ M. C. Bassiouni, “Evolving Approaches to Jihad: From Self-Defense to Revolutionary and Regime-Change Political Violence,” *Chi. J. Int’l. L.*, 2007-2008, Vol. 8, p.120.

⁴⁵ Al-Kaasaani, *Kitaab Badaa’i al-Sanaa’i*, vol. 7, 97.

⁴⁶ Qur’an 61: 10-11.

⁴⁷ J. L. Esposito, “Terrorism and the Rise of Political Islam,” in Louise Richardson (ed.), *The Roots of Terrorism* Routledge, Oxon, 2006, p. 149.

⁴⁸ N. A. Shah, op cit. p. 14.

⁴⁹ Ibid.

⁵⁰ Ibid.

The use of what has been termed “physical force” only forms an aspect of *jihād*, which presupposes that it will be incorrect to assume that *jihād* as a whole stands for violence.⁵¹ But then, can one really say whether this aspect of *jihād*, in other words, the use of force, is purposely enjoined on Muslims in self-defense against persecution and aggression or for the purpose of launching offensive wars against the non-Muslims in the name of proselytisation? To answer this question, one has to consider whether *jihād* is indeed a defensive or an offensive war.

A. *Jihād as a Defensive War*

According to Islamic law, the use of force can be resorted to as self-defense to repel all forms of aggression and oppression against the Muslim community. This assertion is supported by an array of Qur’anic verses and historical facts. It may be argued that, in Islam, the general rule is to maintain and spread peace, while war, which is an aberration, will only be resorted to in exceptional conditions.⁵² This argument comports with the ideological rationale behind the concept of *jihād* which is, as stated by Ibn Taymiyyah (d. 728/1328), “to defend Muslims against real or anticipated attacks; to guarantee and extend freedom of belief; and to defend the mission of Islam.”⁵³ Therefore, according to the principle of *jihād*, war can only become permissible if the sole objective is to protect the Islamic faith and to preserve the lives of the Muslims.

There are some early Quranic verses that were revealed to Prophet Muhammad (pbuh) shortly after his emigration (*hijrah*) to Madinah emphasising the condition under which *jihād* could be fought.⁵⁵ At that time, Madinah was persistently under the fear of invasion from the non-Muslims.⁵⁶ These Qur’anic verses marked the genesis of armed struggle in Islam, “with the express purpose to defend the religious belief of the Muslims and to avoid extermination at the hands of the then dominant group [the idolatrous Arabs].”⁵⁷ It was revealed to Prophet Muhammad (pbuh) that:

Permission [to fight] has been given to those who are being fought, because they were wronged. And indeed, Allah is competent to give them victory. [They are] those who have been evicted from their homes without right - only because they say, “Our Lord is Allah. . .”⁵⁸

⁵¹ S. H Hashmi (ed.), *Just Wars, Holy Wars and Jihads: Christian, Jewish and Muslim Encounters and Exchanges*, OUP, Oxford, 2012, p. 9.

⁵² See S. S. Ali and J. Rehman, “The Concept of Jihad in Islamic International Law,” *Journal of Conflict & Security Law*, 2000, Vol. 10, p. 331.

⁵³ Shams al-Islam Ahmad Ibn Taymiyyah, “Qaa’ida fi Qitaal al-Kuffaar,” in Muhammad Haamid al-Faqi, *Majmu’at Rasaa’il Ibn Taymiyyah*, Matba’at al-Sunnah al-Muhammadiyah, Cairo, 1949, Pp. 116-117.

⁵⁴ That was on 09 September, 622 AD when Prophet Muhammad and his followers migrated from Makkah to Madinah in order to escape from the Makkans persecution.

⁵⁵ John L. Esposito, *What Everyone Needs to Know About Islam*, OUP, Oxford, 2002, p. 120.

⁵⁶ Ali and Rehman, op cit. (2000), Pp. 331-332.

⁵⁷ Ibid, p. 332.

⁵⁸ Qur’an 22:39-40.

These verses clearly indicate that for one to engage in *jihād* either individually or collectively, it must be for the purpose of redressing a wrong and in defense of the community.⁵⁹ Notable defensive *jihāds* in the more recent time may include the Afghan resistance against the Russian invasion in 1979 and the Palestinian struggle against Israel.⁶⁰

According to Ibn Katheer (d. 774/1373),⁶¹ Qur'an 22:39-40 and 2:190 are the first Qur'anic injunctions authorising the use of physical force against the unbelievers.⁶² It is worth mentioning that the instruction to "fight in the way of Allāh" is not based on the non-acceptance of Islam, as "there shall be no compulsion in [acceptance of] the religion."⁶³ Badawi asserts that there is

[n]o single verse in the Qur'an, when placed in its proper textual and historical context, which permits fighting others on the basis of their faith, ethnicity or nationality. To do so, contravenes several established values and principles.⁶⁴

Once the enemies desist from their hostile and aggressive pursuit, and opted for peace, the Muslims are expected to reciprocate in the like manner and embrace peace⁶⁵ in conformity with the Qur'anic injunction that says: "And if they incline to peace, then incline to it [also] and rely upon Allah. Indeed, it is He who is the Hearing, the Knowing."⁶⁶ This verse and other similar verses of the Qur'an confirm the peaceful relationship that could exist and does exist between Muslims and non-Muslims contrary to the view of some scholars who argue that "in theory *dar al-Islam* was in a state of war [permanently] with the *dar al-harb*."⁶⁷

B. *Can Jihād be Offensive?*

There are some Islamic scholars who contend that the Islamic faith should be spread peacefully, but, if there are any impediments against peaceful propagation, then the use of force could be resorted to.⁶⁸ In their argument, they often refer to some verses of the Qur'an that are known as the "sword verses" claiming that these verses have abrogated the earlier Qur'anic verses (Qur'an 22:39-40 and 2:190) known as the "peace verses" that

⁵⁹ A. L. Silverman, "Just War, Jihad, and Terrorism: A Comparison of Western and Islamic Norms for the Use of Political Violence," J. Church & St., 2002, Vol. 44, p. 78.

⁶⁰ S. C. Tucker (ed.), The Encyclopaedia of Middle East Wars: The United State in the Persian Gulf, Afghanistan, and Iraq Conflicts, Vol. 1, ABC-CLIO Ltd., 2010, p. 653.

⁶¹ His full name was Abu Al-Fidaa' Isma'il ibn Katheer. He was the author of the famous commentary on the Qur'an named 'Tafseer al-Qur'an al-'Azeem'.

⁶² Abu Fidaa' Isma'il ibn Katheer, Tafseer al-Qur'an al-'Azeem, Vols. 1 and 2, Dar al-Marefah, Beirut, 1995, Pp. 233 and 235.

⁶³ Qur'an 2:256.

⁶⁴ J. Badawi, op cit. p. 40.

⁶⁵ N. A. Shah, op cit. (2008), p. 17.

⁶⁶ Quran 8:61.

⁶⁷ M. Khadduri, op cit. p. 13.

⁶⁸ Shah, op cit. p. 15.

establish the defensive nature of the Islamic *jihād*.⁶⁹ As such, they allege that the “sword verses” legitimise absolute offensive war citing Quran 9:5 which says that:

And when the inviolable months have passed, then kill the polytheists wherever you find them and capture them and besiege them and sit in wait for them at every place of ambush.⁷⁰

This verse should not and cannot be read in isolation. It should be read together with the previous and subsequent verses, i.e. Quran 9:1-15, for one to fully comprehend the textual and historical context inherent in the verse. Those verses including Qur’an 9:5 were revealed as a result of the Makkans’ breach of the *Treaty of Hudaibiyyah* (628 AD)⁷¹ when the Banu Bakr, a tribe that was an ally to the Makkans, attacked the Banu Khuza’ah, a tribe in alliance with the Muslims.⁷² Surprisingly, the Makkans had to surrender to the Muslims without fighting, thereby rendering the application of these verses unnecessary. Moreover, if one thoroughly considers the “sword verse” and the “peace verses”, one would see that the “sword verse” appears to be absolute (*mutlaq*) while the “peace verses” are qualified (*muqayyad*).⁷³ The “peace verses” are qualified in that they provide specific reasons for declaring *jihād* against the polytheists, while the sword verse does not provide any reason for waging war. Since the “peace verses” and the “sword verse” convey the same ruling, which is the declaration of war, and the same subjects, according to the Muslim jurists, the conditions in the “peace verses” will automatically apply to the “sword verse”.⁷⁴ This takes away the question of the “sword verse” abrogating the “peace verses”.

Moreover, the contention that Qur’an 9:5 has abrogated the peace verses was considered ‘not plausible’ by Ibn Katheer⁷⁵ because Allah has specifically instructed the Muslims to “fight against the disbelievers collectively as they fight against you collectively.”⁷⁶ According to Ibn Katheer, this means that

[y]our [the Muslims] energy should be spent on fighting them [the polytheists], just as their energy is spent on fighting you, and on expelling them from the areas from which they have expelled you, as a law of equality in punishment.⁷⁷

Esposito made a similar remark that

⁶⁹ J. L. Esposito, op cit. (2002), p. 121.

⁷⁰ Qur’an 9:5.

⁷¹ It is also known as ‘Sulh al-Hudaibiyyah’. It was signed between the Muslims of Madinah as represented by Prophet Muhammad on the one hand, and the Quraysh tribe of Makkah as represented by Suhayl bin ‘Amr on the other hand. See, W. M. Watt, *Muhammad at Medina*, Oxford University Press, Karachi, 1981, Pp. 46-52.

⁷² M. Munir, “Public International Law and Islamic International Law: Identical Expression of World Order,” *Islamabad Law Review*, 2003, Vol. 1:3 and 4, p. 375.

⁷³ See Ibid. p. 378.

⁷⁴ M. H. Kamali, *Principles of Islamic Jurisprudence*, The Islamic Texts Society, Cambridge, 1991, p. 111.

⁷⁵ Abu Al-Fidaa’ Isma’il Ibn Katheer, *Tafseer Al-Qur’an Al-‘Azeem* Vol 1 Dar Al-Ma’rifah, Beirut, 1995, p. 233.

⁷⁶ Qur’an 9:36

[a]lthough this verse has been used to justify offensive jihad, it has traditionally been read as a call for peaceful relations unless there is interference with the freedom of Muslims.⁷⁸

Similarly, Sayyid Qutb (d. 1966),⁷⁹ an Egyptian scholar, strongly condemned those who erroneously interpret Qur'an 9:5 to mean an outright extermination of the unbelievers when he says that:

Some people may feel differently, taking the order to mean that when the truce was over, the Muslims were meant to kill all unbelievers. . . . But this view is wrong.⁸⁰

Obviously, the reasons for enmity between the Muslims and the polytheists were not as a result of their different religious beliefs. Rather, it was due to the Makkan's hostility, persecution and aggression towards the Muslims.⁸¹

Those who argue in support of the offensive *jihād* theory also refer to Qur'an 9:29 to buttress their argument thus:

Fight against those who do not believe in Allah or in the Last Day and who do not consider unlawful what Allah and His Messenger have made unlawful and who do not adopt the religion of truth [i.e., Islam] from those who were given the Scripture . . .⁸²

The understanding of some Muslim scholars about this verse is that it has abrogated all the peace verses in the Qur'an; as such, it marks the final stage of the Muslim-non-Muslim relations.⁸³ Apparently, the reasons for the revelation of Qur'an 9:29 were not obscure. In the summer of 630 AD there was information that the Byzantine Empire, which was predominantly Christian, was getting prepared to launch an offensive attack on the Muslims. As expected, Prophet Muhammad (pbuh) set out with about thirty thousand men with the intention of stopping the Roman soldiers from invading Madinah.⁸⁴ The Muslim forces eventually retreated back to Madinah when it was discovered that the Christian army had withdrawn their plan to invade Madinah.⁸⁵ The Muslim forces might

⁷⁷ Abu Al-Fidaa' Isma'il Ibn Katheer, *Tafseer Al-Qur'an*, p. 233.

⁷⁸ J. L. Esposito, *Unholy War*, p. 35.

⁷⁹ Sayyid Qutb was an Egyptian author, Islamic theorist and a leading member of the Egyptian Muslim Brotherhood. He was executed by hanging in August 29, 1966 by the Egyptian President, Gamal Abdel Nasser.

⁸⁰ S. Qutb, *In the Shade of the Qur'an* Vol. VIII Surah 9 available at <http://archive.org/details/InTheShadeOfTheQuranSayyidQutb> [accessed 05 April, 2013].

⁸¹ A. Al-Dawoody, *The Islamic Law of War: Justifications and Regulations*, Palgrave Macmillan, New York 2011, p. 48.

⁸² Qur'an 9:29.

⁸³ See S. Qutb, *Fi Zilaal al-Qur'an*, vol. 3, Daar al-Shuruq, Cairo 1417/1996, Pp. 1619-1650.

⁸⁴ See Bakircioglu, op cit. p. 65 See also H. A. Adil, *Muhammad, the Messenger of Islam: His Life and Prophecy* Islamic Supreme Council of America, Washington 2002, Pp. 533-537.

⁸⁵ M. Munir, op cit. (2003), p. 378.

have retreated because war is only allowed for the purpose of self-defense. It may be wrong to take Qur'an 9:29 out of its specific historical context if it has general application under Islamic law.⁸⁶ It will thus be erroneous to interpret the "sword verses" to mean an indiscriminate military *jihād* against all non-Muslims. Rather, the "sword verses" are meant for non-Muslims who attack or threaten to attack the Muslim community since "wars of aggression in general, and terrorism in particular, are diametrically opposed to the very idea of the Qur'an."⁸⁷

Having discussed the position of Islamic law concerning the defensive or offensive nature of *jihād*, the next questions that need to be answered are: who declares *jihād*; is it the Muslims or the Muslim government? What are the pre-conditions that must be fulfilled before the Muslims could exercise their right to declare *jihād*? These are pressing questions that must be answered in view of the multiple attacks in the form of suicide missions; killings; injuries; arsons; and kidnapping, being perpetrated particularly against diplomats and diplomatic facilities of non-Muslim countries and their allies in the Muslim States. It is worth mentioning that these attacks are often organised by non-state actors. These are the issues to be considered in the next section.

C. *Who Declares the Call for Jihād?*

When it becomes necessary to resort to physical *jihād* or the use of force in self-defense either due to an actual invasion or a threat of aggression on the Muslim territory, there has to be a declaration of *jihād*. Both the classical and modern jurists are unanimous that the decision to initiate war according to Islamic jurisprudence must be taken by a legitimate authority.⁸⁸ Basically, at the earliest time in Islam, the sole legitimate authority that must declare the commencement of *jihād* was Prophet Muhammad (pbuh) who, according to the Qur'an, was commanded to "urge the believers to battle."⁸⁹ The responsibility of initiating *jihād* was placed upon Prophet Muhammad (pbuh), perhaps, due to the fact that *jihād* was then, just as it is now "an issue of public safety."⁹⁰

With the demise of Prophet Muhammad (pbuh), the power to declare *jihād* devolved upon the Imam or Caliph,⁹¹ being the head of the Muslim polity.⁹² It is not for the individual

⁸⁶ N. A. Shah, op cit. (2008), p. 20.

⁸⁷ Bakircioglu, op cit. p. 427 See also Sachedina, "The Development of *Jihad* in Islamic Revelation and History," in J. T. Johnson and J. Kelsay (eds.), *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition*, Greenwood, New York 1990, p. 43.

⁸⁸ A. Al-Dawoody, op cit. (2011), p. 76.

⁸⁹ Qur'an 8:65.

⁹⁰ N. A. Shah, op cit. (2008), p. 22.

⁹¹ Qur'an 4:59 says 'O you who have believed, obey Allah and obey the Messenger and those in authority among you.'

⁹² See A. Mikaberidze, *Conflict and Conquest in the Islamic World: A Historical Encyclopedia*, ABC-CLO, LLC, California, 2011, p. 827; N. J. DeLong-Bas, *Wahhabi Islam: From Revival and Reform to Global Jihad*, I. B. Tauris & Co. Ltd., London, 2007, p. 203.

Muslims or an organisation(s), not even the *‘ulama* (Islamic jurists) to declare *jihād* without the definite directive of the Caliph or the Islamic head of State.⁹³ Abu Yusuf (d. 182/798) was very clear on this point when he observed that “no army marches without the permission of the Imam.”⁹⁴ Ibn Qudamah (d. 620/1223), a renowned Hanbali scholar, expresses the view that “[d]eclaring Jihad is the responsibility of the Ruler and consists of his independent legal judgment.”⁹⁵

There are, of course, exceptional situations that may necessitate the declaration of *jihād* by non-State actors (individuals or group of individuals) notwithstanding the existence of an Islamic head of State. One of such situations is when there is a physical attack on a Muslim territory and the Muslim leader or the Islamic head of State appears to be incapable or refuses to declare a defensive *jihād* to protect the lives and properties of the Muslims, then the Muslims in that country will be justified to initiate a defensive *jihād*.⁹⁶ The Afghanistan war against the Russian occupation of their land in 1979 serves as a typical example of a defensive *jihād* declared not by the Muslim ruler, but by the consensus of Afghan Muslim religious leaders.⁹⁷ The defensive *jihād* embarked upon by the Afghans, which was a kind of collective and self-defensive war against the Russian invasion, was said to be compatible with Article 51 of the Charter of the United Nations⁹⁸ which provides that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.⁹⁹

Can individual or an organisation declare *jihād* against other nation(s) relying on the exceptional situations given above, even though there was no actual physical attack from invader(s)? It is very much doubtful if such a declaration can ever be legitimate under Islamic law. This is because, as stated earlier, there must be an actual physical attack on the Muslim State from a non-Muslim State. Until then, the declaration of *jihād* will remain the prerogative of the Islamic head of State. Reference will, for instance, be made

⁹³ Shaykh MH Kabbani, “Jihad in Islam,” in Vincent J. Cornell (ed.), *Voices of Islam: Voices of the spirit* vol. 2 (Westport: Praeger Publishers, 2007), 219.

⁹⁴ Abu Yusuf Ya’qub Ibn Ibraahim, *Kitaab al-Kharaaj*, (Beirut: Daar al-Hadaatha, 1990), 349.

⁹⁵ See Ibn Qudamah, *Al-Mughni*, vol. 9, 184.

⁹⁶ See Sohail H. Hashmi, “9/11 and the Jihad Tradition,” in DJ Sherman and T Nardin (eds.), *Terror, Culture, Politics: Rethinking 9/11* (Bloomington: Indiana University Press, 2006).

⁹⁷ See M. Sageman, *Understanding Terror Network*, University of Pennsylvania, 2004, p. 2.

⁹⁸ N. A. Shah, *op cit.* (2008), p. 23.

⁹⁹ Charter of the United Nations and Statute of the International Court of Justice, (San Francisco, 1945), Pp. 10-11, , <http://treaties.un.org/doc/Publication/CTC/uncharter.pdf> [accessed 22 April, 2012].

to the two declarations of *jihād* made by Al-Qaeda¹⁰⁰ in 1996¹⁰¹ and 1998.¹⁰² Usama bin Laden, who was the leader of Al-Qaeda, issued *jihād* declarations both in 1996 and 1998 calling on all Muslims of the world “to kill the Americans and their allies, civilians and military.”¹⁰⁵ The 1998 declaration further stresses that

[it] is an individual duty of every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa Mosque [in Jerusalem] and the Holy Mosque [in Mecca] from their grip and in order for their armies to move out of all the lands of Islam, defeated and unable to threaten any Muslim.¹⁰⁵

Several verses of the Qur’an were cited in the 1996 and 1998 declarations wherein the Muslims were reminded of their duty to Allah and Islam concerning waging *jihād* against the infidels.

Most attacks that were launched against diplomats and diplomatic missions were, for instance, most likely, inspired by these two declarations of *jihād* by Al-Qaeda,¹⁰⁶ prominent among which were the two attacks on the United States embassies in Nairobi, Kenya and Dar es Salaam, Tanzania both of which occurred on 7 August, 1998. Not less than 200 people lost their lives in the two attacks, leaving more than 1,000 people with severe injury.¹⁰⁷ The 1996 and 1998 declarations of *jihād* made by Usama bin Laden in collaboration with some group leaders in Pakistan, Egypt and Bangladesh remain inconsistent with the classical traditions of Islamic law.¹⁰⁸ The recent terrorist attack on the

¹⁰⁰ Al-Qaeda is generally known as an international terrorist network led and established by Usama bin Laden in 1988. See <http://www.globalsecurity.org/military/world/para/al-qaida.htm> [accessed 22 April, 2012]

¹⁰¹ This is a fatwa released by Usama bin Laden entitled ‘Declaration of War against the American Occupying the Land of the Two Holy Places’ first published in Al-Quds Al-Arabi, a London-based newspaper, in August, 1996 which was substantially the same as the 1998 declaration. See PBS *Newshour*, August, 1996 http://www.pbs.org/newshour/terrorism/international/fatwa_1996.html [accessed 23 April, 2012]

¹⁰² This is the 1998 *jihad* declaration by Usama bin Laden and his associates entitled ‘Jihad against Jews and Crusaders World Islamic Front Statement’ [23 February 1998] available at <http://www.fas.org/irp/world/para/docs/980223-fatwa.htm> [accessed 23 April, 2012]. The Arabic language text of this document: *World Islamic Front for Jihad Against Jews and Crusaders: Initial “Fatwa” Statement* also available at <http://www.library.cornell.edu/colldev/mideast/fatw2.htm> [accessed 23 April, 2012]

¹⁰³ He was shot dead by the American forces on May 2, 2011 during a raid on his hitherto secret residence in Abbottabad, Pakistan. See *The Guardian*, Monday 2 May, 2011, available at: <http://www.guardian.co.uk/world/2011/may/02/osama-bin-laden-dead-obama> [accessed 23 April, 2012]

¹⁰⁴ The 1998 *jihad* declaration, op cit., (*supra fn.* 92)

¹⁰⁵ *Ibid.*

¹⁰⁶ A car bomb that was detonated outside the US Consulate in Karachi, Pakistan on 15 June, 2002 which killed 11 people was linked to Al-Qaeda terrorist network. See *The Telegraph*, 15 June, 2002 available at: <http://www.telegraph.co.uk/news/worldnews/asia/india/1397397/Karachi-car-bomb-kills-11-outside-US-consulate.html> [accessed 23 April, 2012]. The double bombing of the British Consulate in Istanbul along with the HSBC Bank on 15 November, 2003 which left at least 27 people dead including top UK diplomat, Consul-General Roger Short, was also linked to Al-Qaeda. See *BBC News*, Thursday, 20 November, 2003 available at: <http://news.bbc.co.uk/1/hi/world/europe/3222608.stm> [accessed 23 April, 2012].

¹⁰⁷ See *BBC News*, 7 August, 1998 available online: http://news.bbc.co.uk/onthisday/hi/dates/stories/august/7/newsid_3131000/3131709.stm [accessed 23 April, 2012].

¹⁰⁸ N. A. Shah, op cit. (2008), p. 58.

United Nations building in Abuja, the Nigerian capital, by a group popularly referred to as Boko Haram,¹⁰⁹ killing at least 21 and injuring 60 in the summer of 2011 is also worth mentioning.¹¹⁰ The Boko Haram is a group that is believed to have received training from al-Qaeda in the Lands of the Islamic Maghreb (AQIM).¹¹¹ *Jihād* has now become a word that is loosely and commonly used by war mongers among the Muslims who camouflage as ‘Muslim *Jihādists*’ employing the *jihād* as a justification for illegitimately spilling the blood of non-Muslims, and even Muslims who do not subscribe to their ideological manifestation, all in the name of Islam.

Jihād, according to Islamic jurisprudence, as a defensive mechanism is a last resort and should not be understood as an aggressive warfare method. Moreover, since *jihād*, according to Ibn Taymiyyah, is “a defensive war against unbelievers whenever they threatened Islam,”¹¹² it therefore means that peace, if desired by the non-Muslims, should ordinarily characterise interaction between the Muslims and the non-Muslims.

D. Protection of Diplomatic Envoys and Civilians during Jihād

Jihād is now being embarked upon by some individual Muslim groups and organisations under the pretence of Islam, to carry out some nefarious activities against diplomatic personnel, non-Muslim as well as Muslim civilians as if they were legitimate targets. We must not forget that these groups always make references to Islamic sources (the Qur’an and *Sunnah*) to justify their actions, but the truth is that their actions regarding the practice and conduct of *jihād* clearly contradict the rules and norms in Islamic jurisprudence.¹¹³ The killing of the US ambassador to Libya, Christopher Stevens, and three other Americans in the US Consulate, Benghazi in September 12, 2012, is one of the most recent examples of these terrorist activities perpetrated in the name of Islamic *jihād*.¹¹⁴ The attack on the US Consulate was sparked by a film produced in America entitled ‘Innocence of Muslims’ which was reported to have insulted the Islamic faith. The generality of Muslim States were unanimous in their condemnation of the attack on the diplomatic mission particularly the killing of its diplomatic personnel. The OIC has seriously condemned the killing of Chris Stevens, the US ambassador to Libya, and three US diplomats in the Benghazi consulate, stating that their death “is not a loss for the Americans only, but for the international diplomatic vitality.”¹¹⁵ Perhaps, this explains

¹⁰⁹ The organisation is known as Jama’atu Ahlis Sunna Lidda’awati wal-jihad (translation: People Committed to the Propagation of the Prophet’s Teachings and Jihad) but popularly referred to as ‘Boko Haram’ which means ‘Western education is forbidden.’

¹¹⁰ See J. J. F. Forest, *Confronting the Terrorism of Boko Haram in Nigeria* Joint Special Operation University, 2012, p. 67.

¹¹¹ See “*The National Strategy for Counter Terrorism*” The White House, 2011, p. 16 available at: http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf [accessed 10/09/2014].

¹¹² See MF Sharif, “Jihad in Ibn Taymiyyah’s Thought,” *The Islamic Quarterly* Vol. 49:3, 183-203

¹¹³ P. Ahmed, op cit. (2007-2008), Pp. 772.

¹¹⁴ See ‘*Chris Stevens, US Ambassador to Libya, Killed in Beghazi Attack*’ Wednesday 12 September, 2012 The Guardian, available online at <http://www.guardian.co.uk/world/2012/sep/12/chris-stevens-us-ambassador-libya-killed> [accessed 03 May, 2013].

¹¹⁵ See ‘*OIC: It was Deliberate Incitement*’ Tuesday 18 September, 2012, Arab News, also available online at <http://www.arabnews.com/oic-it-was-deliberate-incitement> [accessed 03 May, 2013].

why Al-Qaeda's and other similar organisations' violent activities have been found to be unacceptable to the classical norms of Islamic *jihād*.¹¹⁶

The diplomatic personnel have a special kind of protection in Islamic law bestowed on them by the provisions of the Qur'an, numerous traditions of Prophet Muhammad (pbuh) and the practice of the various Muslim States. Such protections as personal inviolability, immunity from court's jurisdiction, freedom of religion and exemption from taxation are all guaranteed under Islamic diplomatic law.¹¹⁷ It is well known both in the classical and modern periods of Islamic history that diplomatic envoy must not be imprisoned, maltreated, injured or killed while he or she is within the Muslim territory.¹¹⁸ If Prophet Muhammad (pbuh) did not sever the heads of the two diplomatic envoys of Musaylimah (the false prophet),¹¹⁹ despite the verbal confirmation of their belief in the acclaimed prophethood of Musaylimah,¹²⁰ which was considered a culpable offence according to Islamic law, what justification would Al-Qaeda and their likes have in targeting diplomats and diplomatic facilities in their attacks? Moreover, al-Shaybani who is often referred to by many scholars as one of the foremost contributors to the development of international law,¹²¹ discussed the principles that entrenched the safety and immunity of diplomatic envoys even during the course of *jihād*.¹²²

At least, it is obvious that out of the fifty-seven Muslim States in the world, none has been attacked by a non-Muslim State as at the time Usama bin Laden, Al-Qaeda and other similar organisations declared their global *jihād* particularly against the United States of America and their allies. Even if the declaration of *jihād* by Al-Qaeda were legitimate, without conceding, is it permissible or do they have the legal authority to injure or kill those that are under the protection of diplomatic immunity or civilian having valid entry visas which may be considered as having *aman* – safe conduct under Islamic law? Of course, the answer will be no. This is because the Muslim jurists have unanimously agreed that the diplomatic envoy including his wealth, family and aides will continue to enjoy the right of immunity for as long as they remain within the Islamic territory.¹²³ While

¹¹⁶ See P. Ahmed, op cit. (2007-2008), Pp. 772-773.

¹¹⁷ See M. B. A. Ismail, "Justifications and Principles of Diplomatic Immunity: A Comparison between Islamic International Law and International Law," *Journal of Islamic State Practice in International Law*, 2013, Vol. 9:1, Pp. 80-87. See also M. C. Bassiouni, "Protection of Diplomats Under Islamic Law," *American Journal of International Law*, 1980, Vol. 74:3, Pp. 609-610.

¹¹⁸ See H. M. Zawati, op cit. (2001), p. 79.

¹¹⁹ His full name was Musaylimah ibn Habib. He was one of those who laid false claim to prophethood almost around the same time with Prophet Muhammad. He was nicknamed by the Prophet as '*al-kadhhab*' (the liar).

¹²⁰ Abu Muhammad Abdul Maalik Ibn Hishaam, *As-Seeratu-n-Nabawiyah*, Vol. IV, Darul Gadd al-Jadeed, Al-Monsurah, Egypt, p.192.

¹²¹ K. R. Bashir, "Treatment of Foreigners in the Classical Islamic State with Special Focus Diplomatic Envoys: Al-Shaybani and Aman," in Marie-Luisa Frick and A. Th. Muller (eds.), *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives*, Martinus Nijhoff Publishers, Leiden, 2013, p. 146.

¹²² K. R. Bashir, op cit. p. 152.

¹²³ L. A. Bsoul, "Islamic Diplomacy: Views of the Classical Jurists," in Marie-Luisa Frick and A. Th. Muller (eds.), *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives*, Martinus Nijhoff Publishers, Leiden, 2013, p. 134.

explaining the essence of Qur'an 9:6, Sharbini stressed that Islam categorically forbids the killing of diplomatic envoys and urges that they must be accorded full diplomatic immunity during the duration of their stay within the Muslim territory until they return back to their destination.¹²⁴

The Islamic law of armed conflict is clear when it comes to determining those who are the combatants (*ahl al- qitāl*) and the non-combatants (*ghayr ahl al- qitāl*). The combatants are those who are actively engaged in war or preparing to engage in war either as military officers or volunteers.¹²⁵ The non-combatants, on the other hand, are those who do not fight and are indifferent to the effects of war. This will normally include children particularly those below the age of fifteen,¹²⁶ women (provided she is not a queen of the enemy),¹²⁷ the very old, the monks, the sick and the disabled persons,¹²⁸ diplomats, peasants and merchants.¹²⁹ These categories of persons are protected under the Islamic law from any kind of attack in times of war, unless they are found to have compromised their immunity by partaking in the fight or by providing assistance to the enemies.¹³⁰ In fact, Ibn Taymiyyah (d.728/1328), whose legal pronouncements on the issue of *jihād* have often been misinterpreted or quoted out of context by some radical Muslim groups, is of the opinion that non-combatants who do not participate in war should not be killed.¹³¹

The immunity given to non-combatants is based on the Islamic law principle that "everything is immune from attack unless it is explicitly permitted to be attacked."¹³² The immunity granted to those who are not directly engaged in active combat or providing any kind of assistance to the enemies is particularly authorised in various verses of the Qur'an and specific Prophetic instructions given to Muslim fighters. When the Qur'an, for instance, says "Fight in the way of Allah those who fight you but do not transgress,"¹³³ that could also mean that the Muslims are restrained from fighting those who do not fight them; otherwise it could amount to transgression.¹³⁴

¹²⁴ Sharbini Muhammad Khattib, *Mughni al-Muhtaj*, Vol. 4, Cairo, 1958, p. 236 cited in L. A. Bsoul, op.cit, p. 135-135.

¹²⁵ See W. al-Zuhayli, *Athar al-harb fi al-fiqh al-Islami: diraasa muqaarana* Dar al-Fikr, Beirut, 1981, p. 503 cited in S. H. Hashmi, "Saving and Taking Life in War: Three Modern Muslim Views," *The Muslim World*, 1999, Vol. LXXXIX:2,; p. 169.

¹²⁶ Mahmassani, *Al-Qanun wa al-'Alaqa al-Dawliyyah fi al-Islam* Dar al-Ilm lil Malayin, Beirut, 1972, p. 239

¹²⁷ A. Al-Dawoody, op cit. (2011), p. 113.

¹²⁸ S. Mahmassani, op cit. (1968)), p. 301.

¹²⁹ See H. M. Zawati, op cit. (2001), p. 44.

¹³⁰ S. Mahmassani, op cit (1968), Pp 302-303.

¹³¹ Ibn Taymiyyah, *Al-Siyasa al-Shari'yyah fi Islah Al-Ra'i wa Al-Ra'iyah* edited by Ali b. Muhammad al-Imaran Saudi Arabia: 2008, p. 158 .

¹³² N. A. Shah, *Islamic Law and the Law of Armed Conflict*, Routledge, Abingdon, 2011, p. 47.

¹³³ Qur'an 2:190.

¹³⁴ See M. Munir, "The Protection of Civilians in War: Non-Combatant Immunity in Islamic Law," pp. 6-7, available at: http://works.bepress.com/muhammad_munir/13 [accessed 28 April, 2012] .

IV. THE REALITY OF THE CONCEPTS OF *DĀR AL-ISLĀM* AND *DĀR AL-HARB*

The *dār al-Islām* and *dār al-harb* are concepts which distinguish territories that are strictly under the governance of Islamic law from those that are not so governed. Aside from the Muslim citizens, there were also non-Muslim residents of *dār al-Islām*. These were people who had acquired the status of *dhimmi*, (those given protection) on the condition that their poll taxes, commonly referred to as *jizyah*, had to be paid.¹³⁵ Diplomatic immunity and inviolability were granted to non-Muslim foreign envoys during their visitation to the Muslim territories. *Aman* (safe-conduct) was equally granted to non-Muslims from *dar al-harb* who were visiting *dār al-Islām* for peaceful purposes. In a nutshell, *dār al-harb* can be described as a territory which does not tolerate the freedom to practice Islam and where the lives and properties of the Muslims are not safe.

There are controversies among modern Islamic scholars regarding the meaning of *dār al-Islām* and *dār al-harb*, most especially with “[t]he growth of Muslim communities in non-Muslim countries during the last decades of the twentieth century [which] has accentuated old dilemmas and created new ones.”¹³⁶ There are those with the most radical view who contend that *dār al-Islām* is any country that is governed purely by the *sharī-ah*.¹³⁷ One wonders if such country exists today. There are some scholars who maintain a moderate position by defining *dār al-Islām* as any country where the Muslims have the liberty to freely practice the tenets of Islam regardless of whether the country is a secular or non-Muslim State. This view has been supported by Boisard who maintains that “a non-Muslim State which does not threaten the community of believers, respect justice, and guarantee freedom of worship, should not be considered *dār al-harb*.”¹³⁸

It must be understood that the creation of this universal dichotomy between *dār al-Islām* and *dār al-harb* was neither Qur’anic nor contained in any Prophetic traditions.¹³⁹ It was the creation of the medieval Islamic scholars based on their respective *ijtihād*. If one may ask: Can the *dār al-Islām* consider the rest of the world as *dār al-harb* with which *jihād* becomes inevitable in the present world order? The likes of Al-Qaeda may want to answer this question in the affirmative. The answer, in my opinion, will be in the negative. First of all, as earlier stated, the two concepts of *dār al-Islām* and *dār al-harb* never originated from the Qur’an or from the *Sunnah*. After all, the existence of other nations is recognised in the Qur’an when it says: “O mankind! We have created you from a male and a female, and made you into nations and tribes, that you may know one another.”¹⁴⁰ Secondly, this may also be impossible because of the absence of

¹³⁵ J. E. Campo, *Encyclopedia of Islam* Infobase Publishing, (New York, 2009, p. 182.

¹³⁶ S. Bar, *Warrant for Terror: Fatwās of Radical Islam and the Duty of Jihād*, Rowman & Littlefield Publishers, Maryland, 2006, p. 19.

¹³⁷ Ibid.

¹³⁸ M. A. Boisard, *Jihad: A Commitment to Universal Peace*, The American Trust Publication, Indianapolis, 1988, Pp. 8-9.

¹³⁹ See B. Tibi, op cit. (2008), p. 47.

¹⁴⁰ Qur’an 49:13.

the relevant conditions that are necessary before a territory could assume the status of either *dār al-Islām* or *dār al-harb*. The establishment of the United Nations has brought all countries of the world together with the agreement to live in peace with each other. That has invariably brought an end to “this whole theoretical, historical, circumstantial division” of the world into what is known as *dār al-Islām* and *dār al-harb*.¹⁴²

The division of the world into *dār al-Islām* and *dār al-harb* was, in fact, temporary and not permanent, quoting the words of Munir that presently “Muslims are safe everywhere and can carry out their religious practices anywhere they want.”¹⁴³ He says further that “Muslim states have signed almost every international convention, especially the UN Charter that gives equal status and sovereignty to every state.”¹⁴⁴ Hence, *jihād*, according to Islamic law, cannot be based on the theoretical dichotomy of the world into *dār al-Islām* and *dār al-harb*, which does not seem to exist anymore. Rather, *jihād* will continue to be used, whenever the need arises, as a means of protecting Muslims against oppression, and to defend the freedom of religion and social order, and to prevent aggression and injustice.¹⁴⁵

Moreover, it has also become clear that this theoretical division of the world into *dār al-Islām* and *dār al-harb* cannot be a basis for a permanent tension or state of war between the Muslim States and the non-Muslim States since Allah has enjoined the Muslims to remain “righteous towards them (the non-Muslims) and acting justly towards them (the non-Muslims)” once the non-Muslims are not at war with them. It therefore means that in the absence of war or war-like situation, peaceful diplomatic relations could and should be established between the Muslim States and the rest of the world.

V. HOW TERRORISM IS CONSIDERED UNDER MUSLIM STATES PRACTICES

Modern Muslim State practices have condemned the acts of terrorism in all its ramifications and forms. In fact, there was a concordant criticism by individual Muslim States as reflected in one of the conferences of the OIC which says that:

Such shameful terrorist acts are opposed to tolerant divine message of Islam which spurns aggression, calls for peace, coexistence, tolerance and respect among people, highly prizes the dignity of human life and prohibits the killing of the innocent. It further rejected any attempts to allege the existence of any connection or relation between the Islamic faith and the terrorist acts, as such attempts are not in the interest of multilateral efforts to combat terrorism and further damage relations among people of the world. It stressed as well the need to undertake a joint effort to promote dialogue and create between Islamic world and the West

¹⁴¹ M. H. Kamali, “Methodological Issues in Islamic Jurisprudence,” *Arab Law Quarterly* 1996, Vol. 11:1, p. 11.

¹⁴² Al-Dawoody, op cit. (2011), p. 95.

¹⁴³ M. Munir, op cit. (2003), p. 407.

¹⁴⁴ Ibid Pp. 407-408.

¹⁴⁵ S. Mahmassani, op cit. (1968), p. 279.

in order to reach mutual understanding and build bridges of confidence between the two civilizations.¹⁴⁶

Truly, terrorism has gone far beyond a domestic problem; it has, in fact, become a global crisis that could necessarily require a global solution. The current spate of terrorism, particularly in the Muslim States, has continuously served as a constant reminder of the efficacy of domestic counter-terrorism legislations which complement the various international conventions that were created to combat terrorism. Virtually all the Muslim States are parties to most of the international conventions on terrorism. Some of these international conventions are the 1973 Convention on the Prevention of Crimes against Internationally Protected Persons, including Diplomatic Agents; 1979 International Convention against the Taking of Hostages; 1997 International Convention for the Suppression of Terrorist Bombings; 1999 International Convention for the Suppression of the Financing of Terrorism; and 2005 International Convention for the Suppression of Acts of Nuclear Terrorism. In conformity with provisions in other treaties on terrorism,¹⁴⁷ the provisions of Article 2 of the 1973 Convention on the Prevention of Crimes against Internationally Protected Persons, including Diplomatic Agents adopt a similar approach which directly considers specific actions of the perpetrators without attaching any importance to their ulterior motives or intentions. It specifically spelt out such crimes which each State shall make punishable by appropriate penalties which take into account their grave nature as: intentional commission of murder, kidnapping or other attack upon the person or liberty of an internationally protected person; violent attack upon the official premises, the private accommodation or the means of transport of such person likely to endanger his person or liberty, a threat or an attempt to commit any such attack; an act constituting participation as an accomplice in any such attack. Article 3 further empowers each State party to establish its jurisdiction over those crimes stated in Article 2 above whether the crime is committed within the territory of the State or the alleged offender is within the territory of the State.

The Muslim States have unanimously echoed the tenets of Islamic law which rejects all forms of violence and terrorism in conformity with the principles and rules of international law by also ratifying the 1999 Convention of the Organisation of the Islamic Conference on Combating International Terrorism.¹⁴⁸ Aside from re-enforcing protection, security and safety of diplomatic and consular persons and missions and regional and international organisations within the territories of member States,¹⁴⁹ the Convention

¹⁴⁶ Final communique of the ninth extraordinary session of the Organization of the Islamic Conference of Foreign Ministers, held at Doha, Qatar on 10 October 2001 available at: <http://www.un.org/documents/ga/docs/56/a56462.pdf> [accessed 30 April, 2012].

¹⁴⁷ Examples of such provisions are: Article 2 of the 1979 International Convention against the Taking of Hostages; Article 4 of 1997 International Convention for the Suppression of Terrorist Bombings; Article 4 1999 International Convention for the Suppression of the Financing of Terrorism; and Article 5 of the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism.

¹⁴⁸ This Convention was adopted at the Organization of the Islamic Conference's twenty-sixth session of the Islamic conference of foreign ministers in Ouagadougou, Burkina Faso, in July 1999.

¹⁴⁹ Article 3(A)(6) of the 1999 Convention of the Organisation of the Islamic Conference on Combating International Terrorism.

also makes provision for the Muslim States to arrest perpetrators of terrorist crimes and prosecute them in accordance with the national law or extradite them pursuant to the provisions of this or other existing Conventions between the requesting and requested States.¹⁵⁰ Member States are thus conferred with the domestic jurisdiction to try offences that fall under the meaning of terrorism, that is States that are parties to these Conventions can have local laws with the enabling jurisdiction to convict any person found guilty of the offence of terrorism.

Modern scholars of Islamic jurisprudence are of the view that the traditional meaning of *hirābah*, which forms one of the *hudūd*¹⁵¹ offences, should be extended to incorporate the act of terrorism.¹⁵² This justified the argument canvassed by Crane that terrorists should be held to account under the Islamic crime of *hirābah* in the following words:

They [the extremists] are exhibiting the most serious crime condemned in the Qur'an, which is the root of almost all the other crimes, namely, arrogance. They are committing the crime of *hirabah*, which is the attack on the very roots of civilization, and justifying it in the name of Islam. There can be no greater evil and no greater sin. If there is to be a clash of civilizations, a major cause will be the muharibun, those who commit inter-civilizational *hirabah*.¹⁵³

Ibn Hazm (d. 456/1064), a Spanish Muslim jurist, has meticulously defined a *hirābah* offender as:

One who puts people in fear on the road, whether or not with a weapon, at night or day, in urban areas or in open spaces, in the palace of a caliph or a mosque, with or without accomplices, in the desert or in the village, in a large or small city, with one or more people . . . making people fear that they'll be killed . . . whether the attackers are one or many.¹⁵⁴

¹⁵⁰ Ibid., Article 3(B)(1).

¹⁵¹ Crimes are designated as *hudud* (sing. *hadd*) when they fall within the categories of 'prohibitions ordained by Divine Law [Shari'ah], from which we are restrained by God with punishment decreed by Him; they form an obligation to God.' These are offences with specific punishments contained in the Qur'an and Sunnah otherwise known as '*uquubat muqaddarah*. These crimes are theft (*sariqah*); drinking of alcohol (*shrub al-khamr*); unlawful sexual intercourse (*zinah*); false accusation of unlawful sexual intercourse (*qadhf*); banditry and highway robbery (*hiraabah*); and apostasy (*ridda*). See J. L. Esposito, *The Oxford Dictionary of Islam*, OUP, Oxford, 2003, p. 10.

¹⁵² See C. S. Waren, *Islamic Criminal Law*, OUP, Oxford 2010, p. 9.

¹⁵³ R. D. Crane, *Hirabah versus Jihad* available at: http://www.irfi.org/articles/articles_301_350/hirabah_versus_jihad.htm [accessed May 11, 2012].

¹⁵⁴ Quoted in A. Quraishi, "An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective," in G. Webb (ed.), *Windows of Faith: Muslim Women Scholar-Activists in North America*, Syracuse University Press, New York, 2000, p. 130.

Aside from the two countries, Saudi Arabia¹⁵⁵ and Iran,¹⁵⁶ that, most probably, embrace the classical Islamic law in their legal systems, there are some of the Muslim States such as Pakistan,¹⁵⁷ Sudan¹⁵⁸ and most of the northern States of Nigeria¹⁵⁹ that have recently re-introduced the Islamic criminal law into their respective legal systems.¹⁶⁰ According to the classical Islamic criminal law which forms part of the legal systems of these Muslim countries, *hirābah*, that is waging war against God and His Apostle and spreading corruption on the earth, being one of the *hudūd* offences, has been generally argued to include the offence of terrorism. The Kingdom of Saudi Arabia stresses in one of the counter-terrorism reports it submitted to the United Nations Security Council that:

The commission of terrorist acts and support for such acts are included among the crimes of *hirabah* in the Islamic Shariah as applied by the Kingdom. This is the category that includes the most serious crimes and those for which the severest penalties are prescribed in the *hirabah* verses of the Holy Koran [Koran 5:33]. In accordance with the statutes in force in the Kingdom, the courts have jurisdiction to decide all cases relating to terrorism and, in accordance with its Statute, the Commission for Investigation and Public Prosecution investigates such crimes and prosecutes them in the courts.¹⁶¹

The Islamic Republic of Iran also made a similar commitment to combating terrorism by saying that “based on the sublime teachings of Islam, which denounce and prohibit incitement to terrorist acts, Iran is determined to combat the culture of terrorism.”¹⁶²

The crime of and punishment for *hirābah* is specifically mentioned in the Qur’an thus:

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

¹⁵⁵ The Saudi Arabian legal system strictly applies the uncodified Hanbali School of law. See Sherifa Zuhur, March, 2005, *Saudi Arabia: Islamic Threat, Political Reform, and the Global War on Terror*, p. 15, available at: <http://www.carlisle.army.mil/ssi> [accessed May 10, 2012].

¹⁵⁶ The Islamic Republic of Iran operates a criminal justice system based on the *Twelver Shi’i* School of law. See F. E. Vogel, “The Trial of Terrorists Under Classical Islamic Law,” *Harvard Int’l L. J.*, 2002, Vol. 43:1, p. 54.

¹⁵⁷ It was during the regime of Zia-ul-Haq that introduced the *Hudood* laws ‘so as to bring it [the existing law] in conformity with the injunctions of Islam as set out in the Holy Quran and Sunnah.’ See N. A. Shah, *Women, The Koran and International Human Rights Law*, Martinus Nijhoff Publishers, Leiden/Boston, 2006, p. 127.

¹⁵⁸ K. B. Gravelle, “Islamic Law in Sudan: A Comparative Analysis,” *ILSA J. Int’l & Comp. L.*, 1999, Vol. 5, p. 1.

¹⁵⁹ See P. Ostien, *Sharia Implementation in Northern Nigeria 1999-2006: A Sourcebook*, Spectrum Books Limited, Ibadan, 2007.

¹⁶⁰ F. E. Vogel, *op cit.* (2002), p. 54.

¹⁶¹ A Counter-Terrorism report submitted by the Kingdom of Saudi Arabia to the UN Security Council pursuant to paragraph 6 of resolution 1373 (2001) of 28 September, 2001 also available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/722/76/PDF/N0172276.pdf?OpenElement> [accessed May 14, 2012].

a great punishment, except for those who return [repenting] before you apprehend them. And know that Allah is Forgiving and Merciful.¹⁶³

Alternative punishment for *hirābah* according to the Holy Qur'an includes death, crucifixion, amputation of the hand and foot as well as exile, depending on the circumstances of each case. For instance, terrorizing the public without killing and taking any property is punishable with banishment, which also implies life imprisonment according to the Hanafi jurists;¹⁶⁴ one that terrorizes the public by taking away their properties will have his right hand and left foot amputated; one that terrorizes by killing without taking any property will be sentenced to death by beheading; and the one that terrorizes the public by taking their properties and killing them will, of course, be beheaded and crucified thereafter.¹⁶⁵

Hirābah is considered, in Islamic criminal law, to have the severest punishment. It is also extremely detrimental, in the words of the Maliki jurist, Al-Qurtubi, who says that:

[B]ecause it prevents people from being able to earn a living. For indeed, commerce is the greatest and most common means of earning a living, and people must be able to move in order to engage in commerce. . . . But when the streets are terrorized (*ukhifa*), people stop travelling and are forced to stay at home. The doors to commerce are closed and people are unable to earn a living. Thus, God instituted the severest punishment for *hirabah* as a means of humiliating and discouraging the perpetrators thereof and in order to keep the doors of business open.¹⁶⁶

According to the Saudi legal system, terrorism is considered a serious crime which, of course, attracts strict penalties. It is thus, stated that:

[i]n as much as terrorist offences come under serious crimes included in the category of crimes against society (*hirabah*), the penalties imposed for them are severe, ranging up to execution. Saudi Arabia is known internationally for having the severest penalties for perpetrators of terrorist offences. The reason for this is its adherence to the provisions of the Islamic *Shariah*, which criminalizes all forms of terrorism.¹⁶⁷

¹⁶² A Report submitted by the Islamic Republic of Iran to the UN Security Council pursuant to paragraph 6 of resolution 1373 (2001) as well as the country's response to resolution 1624 (2005) dated 13 March, 2007, p. 17 also available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/269/28/PDF/N0726928.pdf?OpenElement> [accessed May 14, 2012].

¹⁶³ Qur'an 5:33-34.

¹⁶⁴ S. A. Jackson, "Domestic Terrorism in the Islamic Legal Tradition," *The Muslim World*, 2001, Vol. 91, p. 300.

¹⁶⁵ F. E. Vogel, op cit. p. 59.

¹⁶⁶ Al-Qurtubi, *Al-Jami' li ahkam al-Qur'an* vols. 11, K. Mays (ed.), Dar al-Fikr, Beirut, 1419/1999, p. 3:88.

¹⁶⁷ A third report submitted by the Kingdom of Saudi Arabia to the UN Security Council pursuant to paragraph 6 of resolution 1373 (2001) of 28 September, 2001 dated 29 May, 2003 also available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/384/65/PDF/N0338465.pdf?OpenElement> [accessed May 14, 2012].

Similarly, in Sudan, the severity of the punishment for committing any act of terrorism or participating in any terrorist activities is such that, upon conviction, the person might be executed or made to serve life imprisonment.¹⁶⁸ It is not a surprise that those who engage in the acts of terrorism by waging illegitimate war against their own State's governments and terrorising innocent people are usually considered as 'Muhaaribun' in Islam.¹⁶⁹ Therefore, if one considers the strictness in the punishments set down for the act of terrorism by the Islamic criminal jurisprudence, which cannot be compared with the conventional penalties,¹⁷⁰ it will, obviously, sound ridiculous to then equate Islam or the Islamic *jihād* with terrorism.

VI. CONCLUSION

The need to protect diplomats and diplomatic facilities from the onslaught and deadly attacks by terrorists cannot be over-emphasised. It has been established in this article that terrorist attacks that are unleashed on diplomatic establishments, particularly those perpetrated by Muslims within the Muslim and non-Muslim States cannot be justified as being a lawful *jihād* under Islamic law. The reasons have been summarised as follows: 1) *Jihād* is generally the prerogative of the Muslim head of State. It is hardly declared by individual or a group of individuals. In an exceptional situation where the lives and properties of Muslims are endangered by external aggression and the Muslim head of State appears to be too weak or refuses to call for *jihād* in defence of the Muslims, the responsibility of declaring *jihād* will then rest on individual Muslims or Muslim organisations; 2) it is a fundamental principle of Islamic *jihād* that diplomatic facilities and their personnel along with non-combatants should not be deliberately targeted for attack; 3) usually, *jihād* is resorted to as a defensive mechanism to fight all forms of aggression and oppression against the Muslim community. But terrorist attacks are, in most cases, offensively launched mainly for ideological goal; 4) the act of terrorism, being one of the offences of *hirābah* under Islamic penal law, is strictly punishable with death and or amputation. As such; it is unanimously condemned by all the Muslim States. The foregoing points further confirm the incongruity between the Islamic *jihād* and terrorism. They are two parallel lines that remain permanently far apart and can never meet.

¹⁶⁸ Articles 5 & 6 Terrorism (Combatting) Act, 2000 of Sudan See appendix VIII available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/210/61/IMG/N0221061.pdf?OpenElement> [accessed May 14, 2012].

¹⁶⁹ A. N. Kobeisy, *Counseling American Muslims: Understanding the Faith and Helping the People*, Praeger Publishers, Westport, 2004, p. 30.

¹⁷⁰ T. Winter, "Terrorism and Islamic Theologies of Religiously-Sanctioned War," in D. Fisher & B. Wicker (eds.), *Just War on Terror?: A Christian and Muslim Response*, Ashgate Publishing Limited, Surrey, 2010, p. 21.

Cultural Repercussion on Mediation: Exploring A Culturally Resonant Mediation Approach Germane to Asia

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Abstract

Cultures always have profound impacts on what people do, and more importantly how they do it. The practice of mediation is not an exception. Therefore, a dynamic mediator also endeavours to mitigate ‘cultural conflict’ in a dispute so that cultural departure does not exacerbate or create another conflict. Adapting Hofstede’s theory on ‘style of dispute resolution practices in Asian commercial organizations’ into mediation, this paper explains why a bit of an evaluative approach from mediators would be more appreciated and fruitful in Asian cultural context. Practices of mediation in indigenous Asian societies are also analyzed to deduce that historically Asian people are accustomed with practicing evaluative mediation to resolve their disputes. In brief, theories and practices of mediation synthesized in this paper would assist puzzled practitioners and policy makers in Asia to choose between evaluative and facilitative mediation. This paper, however, forms a strong argument why practice of evaluative mediation would be more productive and apposite in Asian context.

I. INTRODUCTION

Mediation is essentially an assisted conflict resolution process where parties need to negotiate with each other, with the assistance of a third party mediator, to attain a better outcome. A mediator, therefore, needs to be conscious about factors which may hinder effective negotiation between mediating parties.¹ Mediators need to understand conflict – how it arises and evolves in interpersonal relationship requiring mediation. Conflict is a state of antagonistic human relationship that may begin from a difference of opinion. As explained by Simpson² a conflict may arise because of opposing views on three different issues: material assets, psychological needs for control or recognition, and conflict divergence of value. Conflict may also be evident in different spheres. While intra-personal conflict is a person’s disharmony with his or her own morality, inter-personal conflict is between two people, intra-group conflict is between group members

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¹ J.A.Chowdhury, *Gender Power and Mediation: Evaluative Mediation to Challenge the Power of Social Discourses*, Cambridge Scholars Publishing, Newcastle upon Tyne, 2012, p. 13.

² C. Simpson, *Coping through Conflict Resolution and Peer Mediation*, The Rosen Publishing Group, New York, 1998, p. 2.