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# Law, Religion & Violence: The Importance of Islamic Law as a Tool for Refuting the Ideology of Violent Extremists

Ben Clarke<sup>1</sup>

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## *Abstract*

Violent attacks by radical Islamists against civilians represents a serious and continuing threat to human security in a number of States, including India and to a lesser extent Australia. Causes of such violence have been extensively debated in the literature of a variety of disciplines including law, psychology and political science.<sup>2</sup> This paper examines one aspect of this debate: the use by extremists of concepts derived from Islamic law to justify violence against civilians. It does so by identifying religious norms that underpin the ideology of radical Islamists who engage in terrorism. The thesis advanced here is that an effective response to such violence requires, among other things, that the ideology propagated by radical Islamists be challenged. To do so, their approach to interpretation and application of Islamic law must be refuted. It is argued that Muslim States and the schools of Islamic jurisprudence must energetically engage in this task if the ideology that motivates such attacks is to be thoroughly discredited. Until this occurs, it will be difficult to counter the process of radicalisation of young Muslims who, through exposure to the ideology of radical Islamist organisations such as *al-Qaeda* and Jamaa Islamia ('JI'), often regard violence against civilians as permitted by their religion.

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2 For a discussion of the importance of inter-disciplinary analysis of the causes and cures of terrorism see: SPECIFIC HUMAN RIGHTS ISSUES: NEW PRIORITIES, IN PARTICULAR TERRORISM AND COUNTER-TERRORISM Terrorism and human rights Final report of the Special Rapporteur, Kalliopi K. Koufa E/CN.4/Sub.2/2004/40 25 June 2004, page 2.

## 1. Introduction

According to a range of radical Islamist groups who have deliberately engage in violence against civilians, their actions are justified under Islamic law.<sup>3</sup> Such groups have often argued, by reference to the Koran and other sources of Islamic law, that extra-judicial violence against civilians is a permissible response to actual or perceived injustices against Muslims.<sup>4</sup> Much of the literature on religious justifications for violence by Islamists centres around the notion of violent *jihad*.<sup>5</sup> However other norms are referred to by radical Islamists to justify attacks on civilian and other targets. This paper highlights one of them: the notion that Islamic law requires apostasy to be punished by death. The nature of these beliefs is examined, together with the debate among Muslim scholars as to the scope of Islamic law on punishment of apostasy. The importance of this debate for States that face ongoing threats of violence by radical Islamists is highlighted. Proposals are then offered as to how the ideology of violent extremists may be refuted by reference to Islamic law and the role that States, international organisations and Islamic schools of jurisprudence may play in refuting the ideology of radical Islamists. Before exploring these matters, the nature of the threat from violent Islamists to Australia and India is briefly noted. Law and policy responses of States to such extremism are briefly noted. It is argued that while these responses may be necessary, they may not be sufficient to counter the ideology that motivates radical Islamists to engage in violence. A further matter raised here is whether the *The United Nations Global Counter-Terrorism Strategy* ('*Global Counter-Terrorism Strategy*')<sup>6</sup> needs to be revised to deal with this issue.

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3 See Section 4 below.

4 Ibid.

5 See for example: Shaheen S. Ali, and Javaid Rehman, 'The Concept of Jihad in Islamic International Law' (2005) 10(3) *Journal of Conflict and Security Law*, 321-343; Hilm Zaw t , *Is Jih d a Just War?: War, Peace, and Human Rights Under Islamic and Public* (2001); Abdallah Saeed, 'Jihad and Violence: Changing Understandings of Jihad Among Muslims' [72], in Tony Coady & Michael O'Keefe, *Terrorism and Justice: Moral Argument in a Threatened World* (2002).

6 The *United Nations Global Counter-Terrorism Strategy* is annexed Plan of action ([A/RES/60/288](#)). See <http://www.un.org/terrorism/strategy-counter-terrorism.shtml> Accessed 19 September 2009.

## 2. A Common Experience

### 2.1 India

Over the last decade, hundreds of Indian and Australian citizens have been killed and injured in various attacks carried out by radical Islamists. India has suffered numerous attacks of this kind over a number of years. Only two are mentioned here. They include the 2008 Mumbai terrorist attacks which claimed 166 lives. This violence was carried out by Pakistani nationals who were trained, equipped and financed by the radical Islamist group Lashkar-e-Taiba.<sup>7</sup> On 20 July 2009, Mohammad Ajmal Kasab, the lone surviving gunman from the group of 10 attackers, expressed his wish to plead guilty to the charges against him.<sup>8</sup> They included murder and waging war against India.<sup>9</sup> The attacks were launched at luxury hotels, Mumbai's main railway station, a restaurant and a Jewish center.<sup>10</sup> The same organisation carried out the 2003 Mumbai bombings, which claimed 52 lives. Three members of Lashkar-e-Taiba were sentenced to death in August 2009 for their involvement in these attacks, following their conviction on charges of murder, criminal conspiracy and terrorism.<sup>11</sup> They have appealed their death sentences.<sup>12</sup>

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- 7 See Zahid Hussain, "Islamabad Tells of Plot by Lashkar" *The Wall Street Journal*, 28 July 2009. Available at: [http://online.wsj.com/article/SB124872197786784603.html?mod=googlenews\\_wsj](http://online.wsj.com/article/SB124872197786784603.html?mod=googlenews_wsj). Accessed 28 July 2009. 'Lashkar-e-Taiba responsible for Mumbai terroristic act' 28 November 2009 <http://www.hindu.com/2008/11/28/stories/2008112862080100.htm>.; Mark Mazetti, (28 November 2008), "US Intelligence focuses on Pakistani Group", *The New York Times*, <http://www.nytimes.com/2008/11/29/world/asia/29intel.html?partner=permalink&exprod=permalink> Accessed 20 September 2009.
- 8 Sukanya Shetty , Mustafa Plumber, 'I confess... please end my trial, deliver your judgment' *Indian Express* 20 July 2009. Available at <http://www.indianexpress.com/news/kasab-confesses-to-role-in-26-11-terror-attacks/491739>. Accessed 19 September 2009.
- 9 For details of the charges see: Hari Kumar, 'Pakistani charged in Mumbai assault' *The New York Times* (26 February 2009). [http://www.nytimes.com/2009/02/26/world/asia/26mumbai.html?\\_r=1](http://www.nytimes.com/2009/02/26/world/asia/26mumbai.html?_r=1) Accessed 19 September 2009.
- 10 'Pakistani charged in Mumbai assault' *The New York Times* (26 February 2009) <http://www.nytimes.com/2009/02/26/world/asia/26mumbai.html> Accessed 19 September 2009; 'Kasab seeks translated copy of charges sheet' [http://timesofindia.indiatimes.com/India/2611\\_trial\\_Kasab\\_seeks\\_translated\\_copy\\_of\\_chargesheet/articleshow/4246845.cms](http://timesofindia.indiatimes.com/India/2611_trial_Kasab_seeks_translated_copy_of_chargesheet/articleshow/4246845.cms) Accessed 19 September 2009.
- 11 "Death for three in 2003 Mumbai bomb blasts case". *The Hindu*. 7 August 2009. <http://www.hindu.com/2009/08/07/stories/2009080757860100.htm> at 13 October 2009.
- 12 Phil Hazelwood, 'Death penalty for 2003 Mumbai bombers' 6 August 2009, Available at <http://news.smh.com.au/breaking-news-world/death-penalty-for-2003-mumbai-bombers-20090806-ebex.html>, Accessed 13 September 2009.

## 2.2 Australia

Over a hundred Australians have lost their lives in violence committed by racial Islamists during the last decade. All such attacks have occurred outside of Australia. The most lethal attacks in terms of the loss of Australian lives occurred on 12 October 2002 at the Sari Club and Paddy's Pub in Kuta Bali. These attacks were organized and conducted by members of JI.<sup>13</sup> 88 Australians were killed in these attacks which left a total of 202 people dead with a further 240 injured.<sup>14</sup> On 9 November 2008, after exhausting all avenues of appeal, three persons convicted of carrying out the bombings (Imam Samudra, Amrozi Nurhasyim, and Ali Ghufron) were executed by firing squad.<sup>15</sup>

A number of radical Islamist networks operating inside Australia have been disrupted in recent years before planned attacks were carried out. In 2009, various members of Islamist cells were convicted and sentenced for planning violent attacks in Sydney and Melbourne.<sup>16</sup>

## 3. A Common Response

India and Australia have responded to violence against their citizens through rule of law based measures. These include investigation of the crimes, prosecution of alleged perpetrators, expansion of criminal laws to ensure that peripheral actors involved in attacks of this kind may be brought to justice and the provision of extra-territorial jurisdiction to courts to grant them authority to deal with offshore crimes of this nature where necessary.<sup>17</sup> At a policing level, there has been enhanced cooperation between the investigative branches in various States. In the case of the Bali bombings, Australia provided forensic and other assistance to Indonesian authorities, who prosecuted a number of members of JI who were subsequently convicted of a number of crimes arising from their involvement in the

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13 Gerard Chaliand, Arnaud Blin, *The history of terrorism: from antiquity to al Qaeda* (2007) 46-347.

14 Subsequent attacks include the 9 September 2004 bombing of the Australian Embassy in Jakarta, and the 1 October 2005 Bali bombings.

15 Irwan Firdaus, "[Indonesia executes Bali bombers](http://www.thejakartapost.com/news/2008/11/09/indonesia-executes-bali-bombers.html)" *The Jakarta Post* (9 November 2008).  
<http://www.thejakartapost.com/news/2008/11/09/indonesia-executes-bali-bombers.html>. Accessed 9 September 2009.

16 Meraiah Foley, 'Australian terrorist sentenced to 15 years' *New York Times*, 3 February 2009, Available at: <http://www.nytimes.com/2009/02/03/world/asia/03iht-03terror.19886637.html> Accessed 19 September 2009; 'Terrorism cell member jailed for 5 years' *ABC News (Australia)* 2 September 2009, Available at: <http://www.abc.net.au/news/stories/2009/09/02/2674854.htm> Accessed 19 September 2009.

17 For Australian terrorism offences passed after 11 September 2001, see: [Criminal Code 1995 \(Cth\), Schedule 1, Part 5.3 \(Terrorism\)](#) divisions 100-103.

attacks.<sup>18</sup> This cooperation has been reinforced by bilateral agreements,<sup>19</sup> other forms of cooperation,<sup>20</sup> and implementation of certain measures outlined in Chapter VII resolutions of the UN Security Council<sup>21</sup> as well as the UN General Assembly's *Global Counter-Terrorism Strategy*.<sup>22</sup> What is absent from these resolutions is any obligation upon States and international organisations to cooperate in refuting the ideology of radical Islam through interpretation of Islamic Law.

#### *4. Reliance on Religious Norms to Justify Violence against Civilians: The practise of al-Qaeda and affiliated organisations*

The issue of religious justifications offered for violence against civilians has gained international attention following the terrorist attacks of 11 September 2001.<sup>23</sup> The architects of these attacks, *al-Qaeda*, have sought to justify acts leading to the loss of civilian lives on the basis of religious norms.<sup>24</sup> Such consequences are often excused by the organisation as necessary measures aimed at the expulsion of non-Muslim armies from Muslim lands or the overthrow of 'apostate governments.'<sup>25</sup> Such

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18 See Note 14 below.

19 See the bilateral Counter-Terrorism Memorandum of Understanding (2002) between Australia and Indonesia, extended for 3 years in 2008. See Indonesia Country Brief (DFAT) [http://www.dfat.gov.au/GEO/indonesia/indonesia\\_brief.html](http://www.dfat.gov.au/GEO/indonesia/indonesia_brief.html) Accessed 19 September 2009.

20 See The Agreement between Australia and the Republic of Indonesia on the Framework for Security Cooperation (Lombok Treaty), signed by Foreign Ministers in Lombok, 13 November 2006.

21 See for example: UN Security Council Resolution 1373, U.N. SCOR, 56th Sess., 4385th mtg. at 1, U.N. Doc. S/Res/1373. A comprehensive list of UN Security Council resolutions on terrorism is available at: <http://www.un.org/terrorism/securitycouncil.shtml> Accessed 8 July 2009.

22 See above n 6 (*Global Counter-Terrorism Strategy*). See Indonesia Country Brief (Australian Department of Foreign Affairs and Trade). Available at [http://www.dfat.gov.au/GEO/indonesia/indonesia\\_brief.html](http://www.dfat.gov.au/GEO/indonesia/indonesia_brief.html) Accessed 19 September 2009.

23 See: Mark Juergensmeyer, 'From Bhindranwale to Bin Laden: The Rise of Religious Violence' (October 14, 2004). Orfalea Center for Global & International Studies. Paper 20. <http://repositories.cdlib.org/gis/20> ; Mark Juergensmeyer, *Terror in the Mind of God: The Global Rise of Religious Violence* (2004). But see Robert A Pape, *Dying to Win: The Strategic Logic of Suicide Terrorism* (2005). See also: Shmuel Bar, 'The Religious Sources of Islamic Terrorism', Policy Review No. 125, June & July 2004 Available at <http://www.hoover.org/publications/policyreview/3438276.html> See also: Ayaan Hirsi Ali, *Infidel: My Life* (2007, Free Press), 169–92 .

24 See: 'Al Qaeda Fatwa: World Islamic Front against Jews and Crusaders', published in *al-Quds al-Arabi* (London UK), 23 February 1998, 3. But see letter from Ayman al-Zawahiri to Abu Musab al-Zarqawi dated 9 July 2005. (al-Zawahiri deals with the issue of fighting Shi'ite ('apostates') in some detail and encourages al-Zarqawi not to be distracted from the main target: US forces.) Available at [http://www.globalsecurity.org/security/library/report/2005/zawahiri-zarqawi-letter\\_9jul2005.htm](http://www.globalsecurity.org/security/library/report/2005/zawahiri-zarqawi-letter_9jul2005.htm) accessed 13 October 2009.

25 See for example: 'Purported bin Laden tape urges Somalis to overthrow new president' 19 March 2009 CBC New <http://www.cbc.ca/world/story/2009/03/19/somalia-alqaeda-binladen.html> Accessed 19 September 2009. See also letter from Ayman al-Zawahiri to Abu Musab al-Zarqawi dated 9 July 2005. Available at [http://www.globalsecurity.org/security/library/report/2005/zawahiri-zarqawi-letter\\_9jul2005.htm](http://www.globalsecurity.org/security/library/report/2005/zawahiri-zarqawi-letter_9jul2005.htm) accessed 13 October 2009.

justifications are outlined in: speeches by prominent figures including Osama bin Laden, Ayman al-Zawahiri and Abu Musab Al-Zarqawi; video messages left by suicide bombers prior to terrorist attacks in countries including the UK, Iraq, Saudi Arabia and Israel; and video recordings made during the beheading of unarmed hostages (eg in Afghanistan, Pakistan and Iraq). During these various presentations, Islamic law (including verses of the *Qur'an* and *Hadith*) is often recited. A classic example is an *al-Qaeda* videocassette, broadcast on *al Jazeera* TV satellite network in December 2004, in which Osama bin Laden reads a letter to "To the Muslims in Iraq in Particular and The [Islamic] Nation in General." The speech directly invokes the doctrine of apostasy. It states:

"Aiding America, or the Allawi government [in Iraq] which is apostate [*Murtada*], or the Karzai government [in Afghanistan], or the Mahmoud Abbas government [in the Palestinian Authority] which is apostate, or the other apostate governments in their war against the Muslims, is the greatest apostasy of all, and amounts to abandonment of the Muslim community.

#### Participation in the Iraqi or Palestinian Elections Is Apostasy

"Muslims must beware of these kinds of elections. They must unite around the *Jihad* warriors and those who resist the occupiers." He continued, "Anyone who participates in these elections ... has committed apostasy against Allah."<sup>26</sup>

In similar fashion, Al-Zarqawi brands the Shi'ite apostates for their heretical beliefs in a letter purportedly written to senior *al-Qaeda* leaders. The letter was seized by Coalition forces in a raid on a safe house in January 2004.<sup>27</sup> The author is committed to 'fighting the sects of apostasy.' In exploiting the notion of apostasy to justify an ideology of hatred and violence,<sup>28</sup> criminal organisations such as AQI follow a long tradition of invoking Islamic jurisprudence on the punishment of *kafir* (heretical belief) to justify the killing of those with different political or religious views. In modern times, this tradition can be traced back to Egyptian dissident Sayyid Qutb, who argued (from his gaol cell) that it was necessary to rid not only the Islamic world but also the entire planet, of the "structure" of Jahiliyya (godless

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26 Relevant extracts from the letter are available at;

<http://www.memri.org/bin/articles.cgi?Area=sd&ID=SP83704&Page=archives> Accessed 13 October 2009.

27 The letter is available at [http://www.cpa-iraq.org/transcripts/20040212\\_zarqawi\\_full.html](http://www.cpa-iraq.org/transcripts/20040212_zarqawi_full.html) Accessed 13 October 2009.

28 This phenomenon has been critiqued in a number of programme on Arab satellite channels. *Al Arabiya* highlights the problem in *Sinaat al-Mawt* (Death Industry). It is argued below that abolishing laws that required the punishment of apostasy is one way of undermining the death industry and the international harm it causes to respect for the Islamic principles invoked by extremists.

ignorance).<sup>29</sup> Qubt's writings inspired Ayman al-Zawahiri, a senior *al-Qaeda* figure and apologist for its ideology.<sup>30</sup> Al-Zawahiri continues to promote an ideology that actively encourages criminal attacks on civilians, including Muslims, who are deemed 'apostates.' This far-reaching doctrine has been invoked to justify attacks upon non-Muslim States and also Muslim governments that are deemed apostate.<sup>31</sup> Osama bin Laden's theological direction was heavily influenced by both Zawahiri and Abdullah Azzam (a Palestinian academic who masterminded a new ultra-extreme form of wahhabism).<sup>32</sup> Azzam, who was killed by a massive explosion in Peshawar in 1989, was admired by bin Laden for both his scholarship and his mujahedeen credentials (gained from his involvement in the *jihad* against Soviet occupation of Afghanistan). Azzam's legacy is a popular ideology, keenly exploited by bin Laden, which justifies mass-killing in an attempt to overthrow 'apostate' regimes and eliminate those who support them.<sup>33</sup>

At this juncture it is important to emphasize the contrast between the beliefs of violent extremists and those of the vast majority of Muslims. Opinion polls suggest that most Muslims - while sympathetic to some of the goals of *al-Qaeda* - regard the killing of civilians as contrary to Islam.<sup>34</sup> Nonetheless, reliance by violent extremists upon Islamic norms to justify their actions raises sensitive issues regarding the nature and scope of such norms and who has the authority to enforce them.<sup>35</sup> The enforcement of penalties against apostates in a number of Muslim countries also leads to questions about the example these States are setting for Non-State Actors (such as *al-Qaeda*) who invoke the same doctrine (often together with the concept of *jihad*) to justify their criminal campaign of sectarian

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29 See Abel Bari Atwan, *The Secret History of al Qaeda* (2006), 72-73.

30 Gene W. Heck, *When Worlds Collide: Exploring the Ideological and Political Foundations of the Clash of Civilisations* (2007) 79.

31 See Atwan, above n 29, 176-178.

32 See Atwan, above n 29, 70. See also: Monte Palmer & Princes Palmer, *Islamic Extremism: Causes, Diversity & Challenges* (2008) 147.

33 See Atwan, above n 29, 43, 193; Palmer & Palmer, above n 32, 146-7. On the ideological and para-military training of the Mumbai bomber, see Aryn Baker and Jyoti Thottam, 'The Making of a Mumbai Terrorist' *Time Magazine* 8 March 2009 <http://www.time.com/time/world/article/0,8599,1883334-3,00.html> Accessed 20 September 2009. See also "Mumbai Terrorist Wanted to Kill and Die and Become Famous, ABC News, 03-Dec-2008". <http://abcnews.go.com/Blotter/Story?id=6385015&page=2>. Accessed 20 September 2009. ("When we asked whether he knew any verses from the Quran that described jihad, Ajmal Amir said he did not," police said. "In fact he did not know much about Islam or its tenets," according to a police source.)

34 Steven Kull, Clay Ramsay, Stephen Weber, Evan Lewis, Ebrahim Mohseni, 'Public Opinion in the Islamic World on Terrorism, al Qaeda, and US Policies', 25 February 2009, p23, Available at : <http://www.worldpublicopinion.org/pipa/articles/brmiddleeastnafricara/591.php> Accessed 20 September 2009.

35 See Ben Clarke, 'Law, Religion and Violence: A Human Rights-Based Response to the Punishment of Apostasy by State and Non-State Actors' (2009) 30(1) *Adelaide Law Review* (forthcoming).

violence. Moreover, this State practice is at odds with the obligations of States that are party to the *Covenant of Civil and Political Rights* (1966)<sup>36</sup> ('ICCPR') to guarantee and protect the right to freedom of religion and belief. Violence against apostates (whether judicial or extra-judicial in character) cannot be reconciled with these ICCPR norms.<sup>37</sup> Attention now turns to the debate among Muslim scholars regarding whether apostasy should be punished.

### 5. *Islam & Punishment of Apostasy: Two Very Different Schools of Thought*

The punishment of apostasy has been described as 'one of the most contentious issues in Islam.'<sup>38</sup> Whether 'earthly punishment' of apostasy is justified (or required) under Islam has been debate for centuries. As noted in the preceding paragraph, the issue of penalty is of fundamental importance, in various countries, to the fate of those deemed 'apostates'. The debate about whether apostasy should be punished arises because while apostasy is condemned in a number of verses of the *Qur'an*, no earthly penalty for this sin is prescribed.<sup>39</sup> As with all questions pertaining to Islamic law, analysis of whether the killing of apostates is permitted requires an examination of the various sources of Islamic law (*fiqh*). Islamic law is discovered by referring to a hierarchal body of sources or foundations (*usul*). At the top of this hierarchy is the Koran, followed by *sahih Hadith* (authentic verses of the words of Muhammed).<sup>40</sup> The selective use of analogical reasoning (*qiyas*) is another source, although it not universally accepted. Consensus (*ijmā'*) of the recognised body of religious experts is a further source.<sup>41</sup> In order to ascertain whether such a consensus exists, reference may be had to interpretations

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36 *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), UN GAOR, 21st sess, supp no 16, UN Doc A/6316 (1966).

37 See Section 6.1 below.

38 See Shaikh Abdur Rahman, *Punishment of Apostasy in Islam*, (2007, Revised Edition) vii.

39 See *Qur'an* 4: 90; *Qur'an* 5: 59; *Qur'an* 16: 108.

40 Authoritative *Hadith* are those which are *Sahih*. *Sahih* means 'of sound health'. *Hadith* of this character are of the highest grade: their *isnad* (attestation) reflect the highest grades of transmission. *Sahih Hadith* yields certainty of knowledge whereas *Hadith* that are weak (da'if) or even spurious (maudu) do not. See John Burton, *An Introduction to the Hadith* (1994) 200. Farooq notes that: 'The vast and comprehensive body of Islamic laws (*fiqh*) critically rests on the *Hadith* literature. Islamic scholars, including the experts in *Hadith*, have gone to a great extent to defend the sanctity of *Hadith* literature and utilize it not just to expound Islamic knowledge, but also to formulate Islamic codes and laws pertaining to the entire gamut of life.' Mohammad Omar Farooq, 'Islamic Law and the Use and Abuse of Hadith' (2006) [www.globalwebpost.com/farooqm/writings/islamic/law\\_Hadith.doc](http://www.globalwebpost.com/farooqm/writings/islamic/law_Hadith.doc) Accessed 3 July 2009. Nonetheless, some *Hadith* identified as *Sahih* by eminent Muslim jurists are of doubtful accuracy. See Muhammad Zubayr Siddiqi, *Hadith Literature: Its Origin, Development & Special Features* (1993) 57-58; M. M. Azami, *Studies in Hadith Methodology and Literature* (1977) 92. *Sahih* (authentic) *Hadith* are usually *mutawatir* (derived from "continuously recurrent" or "a report by an indefinite number of people related in such a way to preclude the possibility of their agreement to perpetuate a lie." See Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (2003) 93.

41 Jonathon Porter Berkey, *The formation of Islam* (2003) 145.

of the *Qur'an* and *Hadith* reached by jurists over the ages (including modernists). An exhaustive review of all sources of Islamic law of relevance to the issue of punishment of apostasy is beyond the word constraints of this article. However, attention is paid to key verses of the *Qur'an* (the primary source of Islamic law) that deal with apostasy and those that emphasize freedom of religion and belief. Regard is also had to *Hadith* that form the cornerstone of the traditional approach to punishment of apostasy. The opinions of a range of classical and modernist Muslim jurists and other commentators are also considered. Conclusions are then drawn with respect to whether the killing of apostates is justified under Islamic law.

### 5.1 The Traditional View

Islam's schools of jurisprudence (the *Madh'hab*)<sup>42</sup> hold that sane adult male converts from Islam must be executed – even in cases that do not involve treason or rebellion.<sup>43</sup> This approach reflects Islamic legal tradition dating back to Caliph Abu Bakr, who succeeded Mohammed as leader of the nascent Muslim community. Pakistani writer on Islam and Islamic law, Muhammad Iqbal Siddiqi, offers an explanation for the tradition approach:

. . . the sayings and doings of the Holy Prophet (peace and blessings of Allah be upon him), the decision and practice of the Caliph Abu Bakr (Allah be pleased with him), the consensus of the opinion of the Companions of the Holy Prophet (peace and blessings of Allah be upon him) and all the later Muslim jurists, and even certain verses of the Holy *Qur'an* all prescribe capital punishment for an apostate.<sup>44</sup>

Siddiqi's remarks echo the views of many classical and contemporary Muslim jurists. In his article 'Apostasy and Human Rights', Ibn Warraq notes early Muslim jurists who cited verses of the *Qur'an* as

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42 Four of these schools are Sunni (Hanafi, Maliki, Shafi'i, and Hanbali) and one is Shi'ite (Ja'fari). See Mohammed Hameedullah Khan, *The Schools of Islamic Jurisprudence: A Comparative Study* (1997).

43 See Rahman Doi, *Shar 'ah: The Islamic Law* (2007) 265; Patrick Sookhdeo, 'Islamic Teaching on the Consequences of Apostasy from Islam' (2006), 1 Available at <http://barnabasfund.org/UK/News/Archives/Islamic-Teaching-on-the-Consequences-of-Apostasy-from-Islam.html?p=5&m=7%238&a=773&l=UK> Accessed 9 July 2009; Yohanan Friedman, *Tolerance and Coercion in Islam: Interfaith Relationships* (2003); Michael Nazir-Ali, *Islam, a Christian perspective* (1984) 128. But see: Mashood Baderin, *International Human Rights Law and Islamic Law* (2003) 123-124, 128.

44 Muhammad Iqbal Siddiqi, *The Penal Law of Islam* (1979) 97.

authority for the rule that apostates must receive the death penalty.<sup>45</sup> An example is al-Shafi (died 820 C.E.), founder of one of the four orthodox schools of law of Sunni Islam. According to Shafi, *Qur'an* 2:217 meant that the death penalty should be prescribed for apostates.<sup>46</sup> *Qur'an* 2:217 reads: '... But whoever of you recants and dies an unbeliever, his works shall come to nothing in this world and the next, and they are the companions of the fire for ever.' Al-Razi adopted the same approach in his commentary on 2:217.<sup>47</sup> Ibn Warraq also quotes commentaries by Baydawi (died c. 1315-1316) on *Qur'an* 4:89. Baydawi interprets this passage of the *Qur'an* to mean 'Whosoever turns back from his belief (*irtada*), openly or secretly, take him and kill him wheresoever ye find him, like any other infidel.'<sup>48</sup>

As for modernists who follow the traditional approach to punishment of apostasy, they include the popular 20th century Pakistani Muslim scholar Abul A'la Mawdudi, whose *Qur'anic* commentary is found in millions of Muslim homes.<sup>49</sup> Mawdudi's views echo those of Majid Khadduri, who in the 1950s, stated that 'theologians agree that apostasy a violation of the law punishable in this world and the next. Not only is the person denies salvation in the next world but is liable to capital punishment by the state.'<sup>50</sup>

However, close examination of the *Qur'an* and *Hadith* reveals that Islamic law on the punishment of apostasy is not as clear-cut as its exponents of the traditional approach suggests. While the *Qur'an* condemns apostasy as a sin,<sup>51</sup> it does not *mandate* an earthly penalty.<sup>52</sup> Instead, verses of the *Qur'an*

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45 Ibn Warraq, 'Apostasy, Human Rights, Religion and Belief', paper delivered at "Victims of Jihad" Conference held parallel to the UN's 61st commission of Human Rights on 18th April 2005, Geneva, Switzerland (7 April 2004) (extensive citations omitted).

46 Ibid.

47 Ibid. See S. Zwemer, *The Law of Apostasy in Islam* (1924) 34-35 (Note: Rahman highlights the inadequacy of Zwemer's uncritically endorsement of the approach of Al-Razi, see Rahman, above n 38, 24.). See also Fakhr al-din al-Razi, *al-Tafsir al-Kabir* (Cairo, 1308 A.H.), Vol.2, lines 17-20.

48 Zwemer, Ibid, 33-34.

49 Sookhdeo, above n 43, 1. See Abul A'la Mawdudi, *The Punishment of the Apostate According to Islamic Law* (1963). English translation by Syed Silas Husain & Ernest Hahn (1994) 17.

50 Majid Khadduri, *War And Peace in the Law of Islam* (1955) , 149-150.

51 See *Qur'an* 4: 90; *Qur'an* 5: 59; *Qur'an* 16: 108.

52 See Abdullah Saeed and Hassan Saeed, *Freedom of Religion, Apostasy and Islam* (2004), 79. See also Mahmoud Ayoub, 'Religious Freedom and the Law of Apostasy in Islam' (1994) 20 *Islamochristiana* 75-91, 79.

dealing with apostasy are silent on this point.<sup>53</sup> Muslim jurists who advocate the death penalty for apostasy therefore rely upon 'indirect verses of the *Qur'an* which they claim endorse their approach<sup>54</sup> and various *Hadith* (a collection of the purported words and deeds of the Prophet Muhammad).<sup>55</sup> With respect to the *Qur'an*, Khadduri points to *Qur'an* 4:89, a verse dealing with hypocrisy.<sup>56</sup> 4:89 states:

They wish that you disbelieve as they have disbelieved, then you become equal. Do not consider them friends, unless they mobilize along with you in the cause of God. If they turn against you, you shall fight them, and you may kill them when you encounter them in war. You shall not accept them as friends, or allies.

Other Muslim jurists, including former Chief Justice of Pakistan, Shaikh Abdur Rahman, have rejected Khadduri's interpretation of 4:89. Rahman considers the claim that execution is justified under this verse as being impossible in the whole context of the hypocrisy verses.<sup>57</sup>

Khadduri relies on a number of other verses of the *Qur'an* as justification for this position: *Qur'an* 2:214,<sup>58</sup> *Qur'an* 4: 90-91;<sup>59</sup> *Qur'an* 5:59;<sup>60</sup> and *Qur'an* 16:108.<sup>61</sup> Interestingly, none of these verses

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53 See *Qur'an* 4: 90; *Qur'an* 5: 59; *Qur'an* 16: 108.

54 See Saeed & Saeed , above n 52, 57.

55 For in-depth examination of *Hadith* cited to justifying the execution of apostates, see Saeed & Saeed , above n 52, 58-65; M.E. Asad Subhani, *Apostasy in Islam* (2004); Rahman, above n 38. See also Dr. Ahmad Shafaat, 'The Punishment of Apostasy in Islam (Part II): An Examination of the AHadith on the Subject' (2006) <http://www.islamicperspectives.com/Apostasy1.htm> Accessed 3 July 2009.

56 Khadduri, above n 50, 149-152.

57 Rahman, above n 38, 41. The hypocrisy verses are found at *Qur'an* 4:88-91. They are recited below:  
*How to Deal With the Hypocrites*

[4:88] Why should you divide yourselves into two groups regarding hypocrites (among you)? GOD is the one who condemned them because of their own behaviour. Do you want to guide those who are sent astray by GOD? Whomever GOD sends astray, you can never find a way to guide them.

[4:89] They wish that you disbelieve as they have disbelieved, then you become equal. Do not consider them friends, unless they mobilize along with you in the cause of GOD. If they turn against you, you shall fight them, and you may kill them when you encounter them in war. You shall not accept them as friends, or allies.

[4:90] Exempted are those who join people with whom you have signed a peace treaty, and those who come to you wishing not to fight you, nor fight their relatives. Had GOD willed, He could have permitted them to fight against you. Therefore, if they leave you alone, refrain from fighting you, and offer you peace, then GOD gives you no excuse to fight them.

[4:91] You will find others who wish to make peace with you, and also with their people. However, as soon as war erupts, they fight against you. Unless these people leave you alone, offer you peace, and stop fighting you, you may fight them when you encounter them. Against these, we give you a clear authorization.

58 *Qur'an* 2.214:

'Or do you think that you would enter the garden while yet the state of those who have passed away before you has not come upon you; distress and affliction befell them and they were shaken violently, so that the Apostle and those who believed with him said: When will the help of Allah come? Now surely the help of Allah is

states that the death penalty must be imposed by an earthly authority. In interpreting these verses, Khadduri states: ‘Although only the second of these four verses specifically states that [the] death penalty should be imposed on those who apostasize or turn back from their religion, all commentators agree that a believer who turns back from his religion (irtadda), openly or secretly, must be killed if he persists in disbelief.’<sup>62</sup> However the same writer concedes that ‘the law of apostasy did not prevent a few believers, during Mohammed’s career, from reverting to polytheism.’<sup>63</sup>

As for the *Hadith*, one verse in particular is raised by Muslim jurists who hold the view that the death penalty must be imposed for apostasy. It states: 'Kill the one who changes his religion'.<sup>64</sup> Khadduri, for example, offers up this *Hadith* as proof that apostates be put to death - without acknowledging its weak foundation.<sup>65</sup> This *Hadith* was transmitted from Muhammad by only one person (I.e. it was not confirmed by others.) It is therefore *ahad*, or solitary *Hadith*. Kamali notes that the majority of scholars “are in agreement that the prescribed penalties (*hudud*) cannot be established by solitary *Hadith* (*ahad*), and that unbelief by itself does not call for the death penalty.”<sup>66</sup> Such *Hadith* can be contrasted with *Mutawatir*, a category of *Hadith* that means 'continuously recurrent' or 'a report by an

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nigh!

59 *Qur'an* 4:90-91:

Except those who reach a people between whom and you there is an alliance, or who come to you, their hearts shrinking from fighting you or fighting their own people; and if Allah had pleased, He would have given them power over you, so that they should have certainly fought you; therefore if they withdraw from you and do not fight you and offer you peace, then Allah has not given you a way against them.

You will find others who desire that they should be safe from you and secure from their own people; as often as they are sent back to the mischief they get thrown into it headlong; therefore if they do not withdraw from you, and (do not) offer you peace and restrain their hands, then seize them and kill them wherever you find them; and against these We have given you a clear authority.

60 *Qur'an* 5:59:

'Say: O followers of the Book! do you find fault with us (for aught) except that we believe in Allah and in what has been revealed to us and what was revealed before, and that most of you are transgressors?'

61 *Qur'an* 16:108:

These are they on whose hearts and their hearing and their eyes Allah has set a seal, and these are the heedless ones.

62 Khadduri, above n 50, 150.

63 Khadduri, above n 50, 151.

64 *Sahih al-Bukhari*, 9: 57. (*Hadith*)

65 Khadduri, above n 50, 150.

66 Mohammad Hashim Kamali, *Freedom of Expression in Islam* (1997) referring to Mahmud Shaltut, *al-Islam Aqidah wa-Shari'ah* (1966) 292-93. See also Saeed & Saeed, above n 52, 64.

indefinite number of people related in such a way to preclude the possibility of their agreement to perpetuate a lie.<sup>67</sup>

Another justification offered for this approach to apostasy is legal tradition that developed around the practice of the early Caliphs during and after the ridda wars. Khuddari notes that the rule was strictly enforced after Mohammed's death during the ridda wars and endorsed by the practice of the early caliphs who executed apostates.<sup>68</sup> Moreover, this practice was sanctioned by Imjā (i.e. unanimity of opinion) and 'there is no disagreement as to its validity.'<sup>69</sup> Yet, according to some Muslim jurists, the dire situation that the nascent Muslim community found itself in during the riddah wars delimits the boundaries of the rule on punishment of apostasy by execution. The Hanafi school of Sunni jurisprudence, for example, only recognises that apostasy may be punished by death where the apostasy is couple with acts of war against Islam.<sup>70</sup>

Even so, arguments raised by traditionalists in support of the death sentence in apostasy cases tend to downplay an obvious difficulty: the requirement that a rule sanctioning the death penalty be founded upon clear, reliable and unambiguous authority derived from the *Qur'an* and/or *sahih Hadith*. Ayoub highlights this point in the following way:

Had the Qur'an considered apostasy a public offence deserving maximum punishment (hadd) like theft, adultery or murder, these verses would have been the proper place for such a ruling. In fact, traditions concerning the occasions of the revelation of the verses do not mention that the persons who had turned away from the faith and later returned penitent were required to make a public confession of their repentance. Nor was apostasy an issue of major concern for classical commentators on these verses.<sup>71</sup>

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67 Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (2003) 93.

68 See Saeed & Saeed, above n 52, 65; Sookhdeo, above n 43, 7; Mohammed Adeb al-Jabri, *Democracy, Human Rights and Law in Islamic Thought* (2009), 199- 200; and Mohamed Charfi, *Islam and Liberty: The Historical Misunderstanding* (2005) 51.

69 Khadduri, above n 50, 151.

70 See David A. Jordan, 'The Dark Ages of Islam: Ijtihad, Apostasy, and Human Rights in Contemporary Islamic Jurisprudence' (2003) 9 *Wash. & Lee Race & Ethnic Anc. L.J.* 55, 62 (citations omitted).

71 Ayoub, above n 52, 75-91.

It is of interest that the Organisation of the Islamic Conference ('OIC'), which represents at least 57 Muslim countries, while recognising that apostasy is a sin, has avoided the issue of punishment of apostates.<sup>72</sup>

## 5.2 The Minority View

A growing number of Muslims jurists and other commentators argue that Islamic law does not sanction the earthly punishment of apostasy.<sup>73</sup> Kamali notes that a minority of medieval Islamic jurists held this view. They include the Hanafi jurist Sarakhsi (d. 1090), Maliki jurist Ibn al-Walid al-Baji (d. 494 AH) and Hanbali jurist Ibn Taymiyyah (1263-1328).<sup>74</sup> In recent years, a number of senior Islamic clerics have issued *fatwas* that reflect this view. They include the Grand Mufti of Egypt Ali Gomaa<sup>75</sup> (a Sunni Muslim) and Grand Ayatollah Hossein-Ali Montazeri<sup>76</sup> (a Shi'ite Muslim).

Baderin highlights the main thrust of the 'no earthly punishment approach'. He notes that: 'apostasy simpliciter, in the sense of an individual denouncing Islam without more, whenever mentioned in the *Qur'an* does not stipulate any worldly punishment, but is only describes apostasy as attracting 'severe punishment in the hereafter.'<sup>77</sup> Thus, 'it is not the changing of ones religion simpliciter that is

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72 According to Article 10 of the OIC *Declaration of the Rights of Man in Islam* (1992), it is forbidden to change religion because Islam is the "natural" religion. See also ANNEX I TO OIC RES.NO.16/22-C DECLARATION ON THE RIGHTS AND CARE OF THE CHILD IN ISLAM, Article 8. Interestingly, the International Islamic Fiqh Academy, an organ of the Organization of the Islamic Conference (OIC), recently decided to review the issue of whether apostates should face the death penalty, see: Patrick Goodenough, 'Islamic Scholars Wrestle With Death-For-Apostasy Issue', 30 April 2009 Available at [www.cnsnews.com/Public/content/article.aspx?RsrcID=47401](http://www.cnsnews.com/Public/content/article.aspx?RsrcID=47401). Accessed 27 July 2009.

73 The expanding body of authors favouring 'no earthly punishment of apostates' and the rethinking of the sharia rule on punishment of apostasy include: Rahman, above n 38, 133; Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (1991), 169-170; Charfi, above n 68, 48-51; Farooq, above n 40; Abdullahi Ahmed An-Na'im, *Islam and the Secular State: Negotiating the Future of Sharia* (2008) 118-123; Abdulaziz Abdulhussein Sachedina, *The Islamic roots of democratic pluralism* (2001), 100; and Saeed & Saeed, above n 52. See also: al-Jabri, above n 68, 224, and Leonard M Hammer, *The International Human Right to Freedom of Conscience* (2001), 135.

74 See Mohammad Hashim Kamali, "Punishment in Islamic Law: A Critique of the Hudud Bill of Kelantan, Malaysia", (1998) 13(2) *Arab Law Quarterly*, 203-234 (citations omitted).

75 Grand Mufti Ali Gomaa, Gomaa's Statement on Apostasy, *The Washington Post*, 25 July 2007. <http://newsweek.washingtonpost.com/onfaith/> Accessed 6 July 2009; Nashwa Abdel-Tawab, 'Whosoever will, let him disbelieve', *Al-Ahram Weekly*, Issue No. 857, 9-15 August 2007. <http://weekly.ahram.org.eg/2007/857/eg9.htm> Accessed 6 July 2009.

76 Grand Ayatollah Hossein-Ali Montazeri, 'Not Every Conversion is Apostasy', by Mahdi Jami, In Persian, BBC Persian, February 2, 2005, retrieved April 25, 2006 [http://www.bbc.co.uk/persian/iran/story/2005/02/050202\\_mj-montzari-renegade.shtml](http://www.bbc.co.uk/persian/iran/story/2005/02/050202_mj-montzari-renegade.shtml) Accessed 3 July 2009.

77 As to differences among Muslim jurists on this issue, see Baderin, above n 43, 123-4. For religious sources, see

prohibited under Islamic law but its manifestation in a manner that threatens public safety, morals and freedom of others, or even the existence of the Islamic State itself.’<sup>78</sup>

Saeed and Saeed summarise the central arguments against the 'earthly' punishment of apostasy:

1. The *Qur'an* offers no justification for temporal ('earthly') punishment of apostasy;<sup>79</sup>
2. Apostasy laws have been misused to eliminate opponents and sure up authoritarian regimes;<sup>80</sup> and
3. These laws developed from isolated *Hadith* (*ahad*) and interpretations of these *Hadith* on the basis of analogy (*qiyas*) and *ijtihad*.<sup>81</sup> As these sources and their interpretation do not guarantee certainty of knowledge (*ilm qati*) as understood in Islamic jurisprudence, Muslims in the modern period have the opportunity to re-think these laws.<sup>82</sup>

Similar arguments have been presented by a range of other jurists. Many note that *sahih* Al-Bukhari (9:57) ['He who changes religion kill him!'] is of doubtful authenticity and providence, having been reported by one person only.<sup>83</sup> Jordan notes that this verse is about treason rather than apostasy (i.e. to face the death penalty, the apostate in question must wage war on Islam rather than merely renounce

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notes 395-403.

78 Baderin, above n 43, 125.

79 Saeed & Saeed, above n 52. Of the fourteen passages in the *Qur'an* that refer to apostasy, seven refer to punishment (mostly referring to punishment in the next life).

80 Saeed & Saeed, above n 52, 40, 43, 100 & 103. Charfi argues that the death penalty for apostasy is a political rule not a religious rule. This rule was used to justify the wars of apostasy waged in the aftermath of Mohammed's death, and has been deployed in the service of authoritarian politics subsequently. Charfi, above n 68, 51. See also Hamadi Redissi & Jan-Erik Lane, 'Does Islam Provide a Theory of Violence?' in *The Enigma of Islamist Violence* (2007) 38. For him, lack of freedom of religion in Muslim countries is the product of underdevelopment. Charfi, above n 68, 48-9. This reflects the view of UN Rapporteur Mr. Abdelfattah Amor ('action to promote freedom of religion or belief is inextricably linked to action to promote democracy and development.') E/CN.4/1999/58, para 123.

81 Ibid, 167. See also: Charfi, above n 68, 51. On *ijtihad* in classical Sunni jurisprudence see: Éric Chaumont, 'Ijtihad et histoire en islam sunnite classique selon quelques juristes et quelques théologiens', in Robert Glkove (ed), *Islamic Law: Theory and Practice* (1997), 7-23. An interesting development that may strengthen the minority position is the current review by the Turkish Ministry of Religious Affairs of *Hadith* of dubious authenticity (with a view to removing ideas and practices that have no sound basis in Islam). See Brian Whitaker, 'Islamic Newspeak' *The Guardian* (Online) 26 February 2008 at [www.guardian.co.uk](http://www.guardian.co.uk) Accessed 3 July 2009.

82 Saeed & Saeed, above n 52, 168.

83 Charfi, above n 68, 49; Redissi & Lane, above n 80, 27-46; Samuel Hosain Lamarti, *The Development of Apostasy and Punishment Law in Islam* (PhD Thesis, Glasgow University, 2002) 1, xii.

the faith).<sup>84</sup> Forte notes that the verse reflects challenges faced by the nauseant Muslim community that was fighting for its very existence in the aftermath of Mohammed's death. Its unity was threatened at various times by defection, treachery, and insurrection by tribes that had returned to their pre-Islamic beliefs.<sup>85</sup> This distinction between treason (which is a threat to the government) and individual acts of apostasy involving religious belief (which poses no such threat) is the reason why some Muslim States do not prosecute individuals for simply leaving Islam for another religion.<sup>86</sup>

Various verses of the *Qur'an* may be invoked to argue against the earthly punishment of apostasy. Grand Mufti Sheikh Ali Gomaa (Egypt) listed a number of these verses in a recent article that appeared in *The Washington Post*. According to Gomaa, punishment of apostates 'is left until the Day of Judgement, and it is not to be dealt with in the life of this world. It is an issue of conscience, and it is between the individual and Allah.'<sup>87</sup> Gomaa states that 'the essential question before us is can a person who is Muslim choose a religion other than Islam? The answer is yes, they can because the Qur'an says, 'Unto you your religion, and unto me my religion,' [Qur'an, 109:6], and, 'Whosoever will, let him believe, and whosoever will, let him disbelieve,' [Qur'an, 18:29], and, 'There is no compulsion in religion. The right direction is distinct from error,' [Qur'an, 2:256].'<sup>88</sup>

Other verses from the *Qur'an* that may be invoked to support this view, including this one: 'exhort them; your task is only to exhort. You cannot compel them [to believe].' (*Qur'an* 88:21-22)

As for *Hadith*, Farooq points to a concreate example of 'how the Prophet handled a case of simple apostasy, not related to any treason or rebellion.'<sup>89</sup> Significantly, the death penalty was not imposed on the apostate.<sup>90</sup>

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84 See Jordan, above n 70, 61-21.

85 David F. Forte, 'Apostasy and Blasphemy in Pakistan' (1994) 10 *Conn J Int'L Law* 27, 44.

86 According to the Hanafi school of Sunni jurisprudence, only apostasy couples with acts of war against Islam merits death. See Jordan, above n 70, 62 (citations omitted).

87 Ali Gomaa, 'The Meaning of Jihad in Islam' 21 July 2007 Published in *The Washington Post*, Available at [http://www.aligomaa.net/news\\_files/4.html](http://www.aligomaa.net/news_files/4.html) Accessed 27 June 2009.

88 Ibid.

89 Farooq, above n 40.

90 *Sahih al-Bukhari*, 9: 318 states that: 'A bedouin gave the Pledge of allegiance to Allah's Apostle for Islam. Then the bedouin got fever at Medina, came to Allah's Apostle and said, "O Allah's Apostle! Cancel my Pledge," But Allah's

In concluding this discussion, it is clear that an increasing number of Muslim jurists do not agree with the approach of the schools of Islamic jurisprudence on the issue of punishment of apostasy. There are compelling arguments, derived from the text of the *Qur'an*, that whilst apostasy is a sin, Islam guarantees religious freedom and does not compel Muslims to remain in the religion. Nor does it mandate earthly punishment of those who chose to depart from the faith. Growing support for this position reflects, *inter alia*, the influence of the human rights movement. Attention now turns to whether the punishment of apostasy can be reconciled with international human rights law.<sup>91</sup>

### 6. *The Punishment of Apostasy and Human Rights Standards*

The relationship between Islamic law (as practiced in various States) and international human rights standards has been examined by various international actors (including the UN Commission on Human Rights) for decades.<sup>92</sup> Apostasy is regarded as a crime under Islamic law and carries the death penalty in various Muslim-majority States.<sup>93</sup> Judicial punishment of apostasy has drawn international criticism of the States involved.<sup>94</sup> Unsurprisingly, a growing body of literature on human rights and the punishment of apostasy has emerged, which forms part of a wider body of scholarship on the

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Apostle refused. Then he came to him (again) and said, "O Allah's Apostle! Cancel my Pledge." But the Prophet refused. Then he came to him (again) and said, "O Allah's Apostle! Cancel my Pledge." But the Prophet refused. The bedouin finally went out (of Medina) whereupon Allah's Apostle said, "Medina is like a pair of bellows (furnace): It expels its impurities and brightens and clears its good."

91 According to An-Na'im, '...there should be no penal or other negative legal consequences for apostasy and all the related concepts from an Islamic perspective, because belief in Islam presupposes and requires freedom of choice which can never be valid under coercion or intimidation.' An-Na'im, above n 73, 122. See his survey of scholarly debates on punishment of apostasy in Islam, see 117-122. See also: Abdullahi Ahmed An-Na'im, 'Islamic Foundations of Religious Human Rights' in John Witte, jnr and Johan D van der Vyver (eds), *Religious Human Rights in Global Perspectives: Religious Perspectives* (1996) 337-359. See generally: Mohammad Omar Farooq (weblog) 'On Apostasy and Islam: 100+ Notable Islamic Voices affirming the Freedom of Faith' 2 April 2007 <http://apostasyandislam.blogspot.com/> accessed 29 June 2009.

92 See official website of the Special Rapporteur for Freedom of Religion or Belief <<http://www2.ohchr.org/ENGLISH/ISSUES/RELIGION/index.htm>> Accessed 28 May 2009.

93 In all Muslim States where the approach of the established schools of Islamic jurisprudence is followed, apostasy is, in theory at least, punishable by death - unless legislation provides otherwise. There are some 46 States where Muslims form the majority of the population. Of these, 15 have declared Islam the religion of the State and 5 are designated Islamic Republics. See Mashood Baderin, 'A Macroscopic Analysis of the Practice of Muslim States Parties to International Human Rights Treaties: Conflict or Congruence?' (2001) 1 *Human Rights Law Review* 265, 265. Apostasy is punishable by death in Saudi Arabia, Somalia, Qatar, Yemen, Iran, Sudan, Afghanistan, the Comoros Islands and Mauritania. In various other Muslim countries, apostasy is theoretically a capital crime but the death penalty is not actually imposed. In some instances the death penalty has been commuted on appeal. Lesser penalties are sometimes imposed. For relevant state practice see Clarke, above n 35.

94 See Mohamed S. El-Awa, *Punishment in Islamic Law: A Contemporary Study* (2000) 49-50, 53.

relationship between Islam and human rights.<sup>95</sup>

As is evident from the preceding discussion, the right to freedom of religion and belief provides the foundation for a human rights-based analysis of punishment of apostasy. This right is recognised under a range of international instruments and resolutions, including United Nations General Assembly resolutions, international human rights law treaties, and general comments of the ICCPR Human Rights Committee. The key provisions on freedom of religion and belief include the following:

1. 1948 *Universal Declaration of Human Rights* ('UDHR') '[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief';<sup>96</sup>
2. ICCPR: '[e]veryone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice';<sup>97</sup>
3. *Declaration on the Elimination of All Forms of Intolerance Based on Religion or Belief*:<sup>98</sup>  
'[e]veryone shall have the right to freedom of thought, conscience and religion. This shall include freedom to have a religion or whatever belief of his choice';  
'[n]o one shall be subject to discrimination by any state, institution, group of persons, or person on the grounds of religion or other belief';<sup>99</sup>  
and  
'[a]ll States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life'<sup>100</sup>

One of the purposes of the 1981 Declaration was to clarify the nature and scope of Article 18 of the ICCPR. Like the UDHR, the 1981 Declaration is not legally binding upon States. Nonetheless, one can infer a certain level of consensus regarding the right to conscience among state delegates who

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<sup>95</sup> See for example: Baderin, above n 43; al-Jabri, above n 68; Charfi, above n 68; Jordan, above n 70; Mayer, above n 73; Zaw t , above n 5.

<sup>96</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), 2nd sess, 177th plen mtg, UN Doc A/810, art 18.

<sup>97</sup> *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), UN GAOR, 21st sess, supp no 16, UN Doc A/6316 (1966), art 18(1).

<sup>98</sup> *Declaration on the Elimination of All Forms of Intolerance Based on Religion or Belief*, GA Res 36/55, UN GAOR, 36th sess, supp no 51, UN Doc A/36/684 (1981), art 1(1), ('The 1981 Declaration')

<sup>99</sup> *Ibid*, art 2(1).

<sup>100</sup> *Ibid*, art 4(1).

participated in drafting it.<sup>101</sup>

While the right to freedom of religion is a fundamental and well established human right, Baderin notes that, as expressed in Article 18(3) of the ICCPR, this right is not absolute.<sup>102</sup> In the case of the freedom to manifest ones religion or beliefs, these rights may only be subject to such limitations as are prescribed by law and necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. Such limitations, however, do not include a right to take measures to punish those who exercise the right to freedom of religion by changing or abandoning their religion. In its second periodic ICCPR report, Sudan stated that conversion from Islam is not an offence in Sudan *per se*, but only the manifestation of such conversion in a manner that adversely affects public safety. Put differently, Sudan has purported to define apostasy in such a manner that places it within the realms of the exception in Article 18(3) of the ICCPR.<sup>103</sup>

General Comment 22 issued by the Human Rights Committee reinforces the notion that the punishment of apostasy is a violation of the ICCPR. Para. 3 states: "Article 18 does not permit any limitations whatsoever on the freedom of thought and conscience or the freedom to have or adopt a religion or belief of one's choice." Para. 5 states : "The Committee observes that the freedom to 'have or to adopt' a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief."

### *6.1 Punishment of Apostasy as a violation of International Human Rights Law*

The approach adopted by the schools of Islamic jurisprudence with respect to the punishment of apostasy is at odds with the human rights standards noted above. They raise two important legal questions. Can the crime of apostasy (and punishment of the same) be reconciled with international human rights law? Are States that are party to the ICCPR that retain the crime of apostasy and/or fail

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101 Hammer, above n 73, 60-61.

102 Baderin, above n 43, 124.

103 Section 126 of the *Sudan Criminal Act* 1991, recognises the crime of apostasy which is punishable by death. Sudan has explained this law by stating that those who commit apostasy are a danger to the fabric of society and are akin to traitors. See UN Doc/A/46/40 (1991), p127. See Baderin, above n 93; Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (2005) 51.

to protect persons from punishment for leaving Islam acting in accordance with their obligations under international law?

According to most legal commentators *who address these questions from a human rights law perspective*, the answer to both questions is in the negative. Those who take the opposite position generally interpret human rights standards in accordance with a traditional view of Islamic law. Their approach invariably assigns priority to their view on Islamic law.

UN human rights bodies have adopted the view that the punishment of persons who depart from Islam cannot be reconciled with fundamental human rights standards.<sup>104</sup> The Human Rights Committee's General Comments on the ICCPR states that all human beings, regardless of who they are and where they live, have the right to:

... choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views ... Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert.<sup>105</sup>

The Human Rights Committee has also made clear that the ICCPR:

does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference from the State.<sup>106</sup>

Moreover the Human Rights Committee confirmed that 'in accordance with Articles 18 .2 and 17, no

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104 For a list of commentators that have highlighted the fundamental character of the right to change religion under Article 18 of the ICCPR, see Hammer, above n 73, 135.

105 Human Rights Committee, General Comment No. 22, para. 5. See also: E/CN.4/2005/61, para 47.

106 Human Rights Committee, General Comment 22, para . 3.

one can be compelled to reveal his thoughts or adherence to a religion or belief.’<sup>107</sup> For these reasons, States Parties to the ICCPR (who include almost all Muslim States) have a responsibility to protect persons who choose to change their religion. Laws which permit the punishment of those who leave Islam or any other religion or ideology for that matter, are in clear violation of the ICCPR. This is evident from the following comment by the Committee:

*the freedom to ‘have or to adopt’ a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one’s current religion or belief with another or to adopt atheistic views, as well as the right to retain one’s religion or belief.*<sup>108</sup> (Italics added)

A further layer of protection under international law to those who change or abandon their religion arises from the status of the right to freedoms of religion and belief as a peremptory norm of international law.<sup>109</sup> In General Comment 24, the Human Rights Committee stated that ‘The fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4.2 of the ICCPR.’<sup>110</sup> It also notes that:

Reservations that offend peremptory norms would not be compatible with the object and purpose of the ICCPR. Although treaties that are mere exchanges of obligations between States allow them to reserve inter se application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the ICCPR that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to ... deny freedom of thought, conscience and religion ....<sup>111</sup>

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107 Ibid.

108 Ibid, para 5. See also: E/CN.4/2006/5/Add.3, paras. 73 (country visit to Sri Lanka); and Warraq, above n 45..

109 See Human Right Committee, General Comment No. 22, para 5.

110 Human Rights Committee, General Comment No. 24: (‘Issues relating to reservations made upon ratification or accession to the ICCPR or the Optional Protocols thereto, or in relation to declarations under article 41 of the ICCPR’) , para 1.

111 Human Rights Committee, General Comment No. 24, para 8.

Thus, a State may not reserve the right to deny freedom of thought, conscience and religion. This approach reflects the prevailing view among legal scholars, namely that in the case of peremptory norms of international, there can be no derogation by States.<sup>112</sup> In any case, as a number of commentators have observed, no Muslim State has ever entered a reservation to the ICCPR with regard to imposition of the death penalty for apostasy.<sup>113</sup> Such States are therefore bound, under treaty law at least, to guarantee the right to freedom of religion to their citizens. However, not all Muslim-majority States are parties to the ICCPR. Prominent non-parties include Saudi Arabia and Malaysia. The extent to which non-parties are bound, under customary international law, by norms contained in the ICCPR is the subject of doctrinal debate. The existence of a customary norm is dependent upon both state practice and *opinio juris* pointing towards the existence of the norm.<sup>114</sup> According to Goldsmith and Posner, while there is said to be a large body of customary international human rights law, it does not reflect a general and consistent body of State practice.<sup>115</sup> Instead, customary international law on human rights is based more on human rights consensus found in General Assembly resolutions, multilateral treaties and the writings of scholars and less on State practice. As this body of 'law' has very little influence on State behaviour, this raises doubts as to whether it is indeed binding under custom.<sup>116</sup> Nonetheless, there are a number of human rights that have been recognised as peremptory norms of international law. Significantly, the Human Rights Committee has recognised freedom of religion as a norm that is not capable of derogation. Moreover, General Comment 24 suggests that this right forms part of customary international law.<sup>117</sup> If so, Saudi Arabia cannot ignore

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112 Ibid. See also: B. G. Ramcharan, *The Right to Life in International Law* (1985) 133.

113 Rosalyn Higgins, *Problems & Processes: International and How We Use It* (1994) 98. On reservations to human rights treaties by Muslim countries see Nisrine Abiad, *Sharia, Muslim States and International human rights treaty obligations: A comparative study* (2008) 67-82. For withdrawal of Islamic reservations, see 90-92. Mayer notes that the right to change religion was added to the UDHR with direct reference to Islam and apostasy. The right was added at the behest of a Lebanon's delegate who objected to the ban on conversions from Islam. (In 1948, Lebanon was a pluralistic society comprised for the most part of Christians, Muslims and Druze.) A number of Muslim countries opposed this move, although Pakistan's representative spoke forcefully in defence of the provision as being in full accord with Islam. All Muslim countries eventually voted for the UDHR, except Saudi Arabia. See Mayer, above n 73, 164.

114 See *North Sea Continental Shelf*, (1969) ICJ Reports, para. 74 and 77.

115 Jack L Goldsmith & Eric A. Posner, *The Limits of International Law* (2005) 132.

116 Ibid, 132. For State practice with respect to punishment of apostasy see, Clarke, above n 35.

117 UN Human Rights Committee, General Comment No. 24 (52), UN Doc. CCPR/C/21/ Rev. 1/Add. 6, 1994, para 8. See also Vojin Dimitrijevic, 'Customary Law as an instrument for the protection of Human Rights' (Working Paper, 2006) 12. Available at <[www.ispionline.it/it/documents/wp\\_7\\_2006.pdf](http://www.ispionline.it/it/documents/wp_7_2006.pdf)>at 14 October 2009.

it and must recognise and protect the customary law right of its citizens to exercise freedom of religion and belief.



## 7. The Importance of Reform in the Context of Violence by Radical Islamists

One practical step that Muslim States could take to undermine the ideology of *al-Qaeda* and its ilk (and at the same time bring their law and practice into closer conformity with the ICCPR) is to amend their domestic law so that the punishment of apostasy is prohibited. In those States where the views of schools of Islamic law prevail, the legal changes advocated here would require a re-interpretation of *Sharia* with respect to punishment of apostasy. A transition in such States towards a legal system that recognises and fully protects international human rights (such as the right to change religion) would be expedited if supported by these schools. Robust application of the doctrine of *ijtihad* (reinterpretation of Islamic law) may be needed for this new approach to apostasy to be adopted by the Islamic schools of jurisprudence and embraced by the *umma*. In applying this doctrine, Islamic law schools could take account of obligations under international human rights law and perhaps wider factors which shape the modern world (e.g. globalization, pluralism and democracy). At a political level, reform of law and practice with regard to apostasy may require an ideological shift in some States. However, given the history of abuse of apostasy laws, those Muslim States seeking to build stronger and more stable democracies may benefit from the abolition of these laws.<sup>118</sup> Such reform would also undermine a central plank of *al-Qaeda*'s ideology: the notion that the killing of apostates is justified under Islamic law. Muslim States could go further and abolish all crimes against religion (Islam) that operate in a discriminatory manner.<sup>119</sup> The introduction and enforcement of non-discriminatory laws that protect all members of society from religious hatred and violence could be accompanied by public awareness campaigns to promote the necessary cultural changes.<sup>120</sup>

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118 Ayoub has noted that 'Muslims have themselves politicized apostasy by using it as an ideological weapon against one another.' See Ayoub, above n 52, 75-91.

119 Ideally, all crimes would be defined in a non-discriminatory manner in accordance with fundamental principles of international human rights law. Under this approach, one measure of a good law is that it does not discriminate against minorities (whether religious or otherwise) but instead treats all persons as equal before the law. The right to change religion or belief is underpinned by the principle of non-discrimination. This principle protects members of all religions (and none) from adverse treatment on the basis of their religion or beliefs. Thus, under international human rights law, departing from a religion is not a punishable act. It is instead a fundamental human right.

120 The UN General Assembly have often emphasised the importance of education, economic development, friendly cooperation between States and peaceful resolution of the Middle East conflict as ways to bring an end to politico-religious violence and extremism in the Arab world. See for example: 'Measures to address the conditions conducive to the spread of terrorism', *Global Counter-Terrorism Strategy* above n 6.

## 8. Conclusion

Australia, India and indeed all States whose citizens have been directly exposed to the danger of violence by radical Islamists should consider all possible causes of the same. One such cause is the abuse of norms of Islamic law by radical Islamists to justify their actions. In an era of globalisation, all States, whether Muslim-majority or otherwise, have an interest in addressing this problem. Given the sensitivity of the issue of apostasy for many Muslims, it is perhaps unsurprising that apostasy laws and their interpretation has received little attention by Muslim States and organisations in their response to violence by radical Islamists. However, this does not mean that the issue should be ignored. Non-Muslim States, such as Australia and India, have an interest in encouraging various Muslim-majority States (eg Pakistan and Indonesia) and organisations (including the Organisation of the Islamic Conference) to tackle the issue. If these States and organisations are willing and able to refute interpretations of Islamic law that permit violence against civilians, they will make a significant contribution to the struggle to isolate violent extremists and their radical ideologies.

It is important to acknowledge that the invocation of religious norms to justify attacks against civilians is only one aspect of the problem of violence by extremists who profess to be Muslims. Analysis of other causes of violence by radicalised Islamists is beyond the scope of this article. However it must be acknowledged that strong arguments have been advanced pointing to political rather than religious considerations as the primary cause of violence by these actors.<sup>121</sup> Perhaps the two causes cannot be separated, particularly in the context of the recent sectarian violence in Iraq. Nevertheless, it is clear that extremists *are* citing religious norms in their bid to justify acts of violence against civilians (and recruit others to engage in such conduct). This phenomena cannot be ignored if the causes and potential cures of violent extremism are to be examined in a comprehensive fashion.

The ideology and actions of violent extremists is having a destabilising effect upon - and undermining

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121 According to Robert Pape (*Dying to Win: The Strategic Logic of Suicide Terrorism* [2005]), nationalism rather than religion is 'the taproot of suicide terrorism' (79). His theory suggests that religion is a subsidiary cause of such violence. Defence of the homeland (84-87) and the desire to end alien occupation (83-84) are considered more significant causes. Pape states that 'the presence of American military forces for combat operations on the homeland territory of the suicide terrorists is stronger than Islamic fundamentalism in predicting whether individuals from that country will become al-Qaeda suicide terrorists.' (103). Moreover, *Al-Qaeda* propaganda emphasizes the 'Crusader' theme, which relates to occupation (117-24). See also: Bruce Michael Bongar, Lisa M. Brown, Larry E. Beutler, Philip G. Zimbardo, *Psychology of terrorism* (2007) 106. (Religious fanaticism is neither a necessary nor sufficient factor in suicide terrorism). But see: Mohammed M. Hafez, *Suicide bombers in Iraq: the strategy and ideology of martyrdom* (2007) 214-215; Bruce Hoffman, *Inside Terrorism* (2006) 325. (Many religious fanatics who have engaged in terrorism in Iraq sought to justify their conduct by reference to religious norms, including apostasy).

security within - various Muslim States and societies. Measures that would undermine the ideology of *al-Qaeda* and other such organisations should therefore be given serious consideration. Yet the proposals advanced in this article would be difficult to implement: the notion of law reform to prohibit the punishment of apostasy would be likely to encounter strong opposition in conservative Muslim States. Moreover, such reform would not guarantee an end to violence by non-State actors against those they regard as apostates. Nonetheless, it could play an important role - as part of a broader counter-terrorism strategy - in addressing the causes of violence against civilians by those who claim that their conduct is justified under Islamic law.<sup>122</sup>

It is hoped that this conference paper will help promote further discussion of this issue. It could be addressed at bilateral and multilateral diplomatic meetings where counter-terrorism law and policy is addressed. Such international forums include the UN General Assembly (which devised the UN counter-terrorism plan) and the OIC (a representative body for Muslim States and societies) could address the issue. Ideally, the *Global Counter-Terrorism Strategy* should be revised to comprehensively tackle the problem of abuse of religious norms of violent extremists. The OIC could support this process by calling up all Muslim States to reform their law and policy as suggested above.

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122 The current international strategy to address terrorism (including terrorism by groups that seek to justify their actions by reference to Islam) is set out in the *Global Counter-Terrorism Strategy*, above n 6.