

# A SOCIO-LEGAL ANALYSIS OF THE CONCEPT OF *JIHAD*

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**Abstract** Since many offensive and defensive wars or acts of terrorism, such as the atrocities of 11 September in the United States and the July 2005 bombings in London, are committed under the banner of Islam and the duty of *jihad*, it is important to shed some light upon the Islamic laws of war in general, and the controversial concept of *jihad* in particular. This article traces the origins of, and rationale for, the use of force within the Islamic tradition, and assesses the meaning and evolution of the contentious concept of *jihad* within its historical context. Following an analysis of the opposing doctrinal views on the potential implications of *jihad*, the study argues that the concept of *jihad* should not be interpreted literally, but be adjusted in accordance with new historical and international conditions, and conducted by peaceful means, rather than by the sword.

## I. INTRODUCTION

When it was established that Osama Bin Laden and his organization Al Qaeda were behind the 11 September attacks in the US, the age-old images of Islam, the fanatical, backward and stagnant religion threatening Western civilization, were revitalized within the Orientalist<sup>1</sup> discourse. The ‘9/11’ attacks also provoked apprehension about *jihad* and its potential implications, including massive terrorist attacks on Western nations, the re-establishment of the caliphate,<sup>2</sup> the subjugation and murder of non-Muslims and Islamic world conquest through the use of brutal force.<sup>3</sup> This oversimplified representation of Islam is further supported by Huntington’s ‘clash of civilizations’ model, in which Islam is simply deemed ‘a religion of the sword . . . [which] glorifies

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<sup>1</sup> For an analysis of Western representations of ‘the Orient’ see EW Said, *Orientalism* (Penguin Books, London, 2003).

<sup>2</sup> The institution of the caliphate was abolished in 1924 by the People’s Republican Party in Turkey, which, by departing from the theocratic Ottoman legacy, aimed to reshape Turkey and its institutions according to a secular system inspired by the West. See KH Karpat, ‘Modern Turkey,’ in PM Holt et al, *Cambridge History of Islam* (Cambridge University Press, Cambridge, 1992) 527, 533.

<sup>3</sup> J Strawson, ‘Holy War in the Media: Images of *Jihad*’ in S Chermak et al (eds), *Media Representations of September 11* (Praeger, Westport, 2003) 17–18.

military virtues.<sup>4</sup> The fact that there is no plain or uncontested definition of *jihad* in Islam is largely obscured by this portrayal, which crudely considers hostility to be an inherent feature of Islam.<sup>5</sup> Nevertheless, because many Islamic wars or acts of terrorism were ostensibly committed in the name of Islam and under the duty of *jihad*,<sup>6</sup> it is important to examine the Islamic laws of war—in particular the concept of *jihad*.

After briefly introducing the basic concepts of Islamic ‘just war’ principles, the article will show how the fighting verses of the Qur’an have evolved over time in accordance with the practical difficulties faced during the course of Islamic history. Following an assessment of the opposing doctrinal views on the potential implications of *jihad*, the study will argue that the concept of *jihad* should no longer be interpreted in its literal and narrow sense, but be adjusted to accord with the new historical conditions, particularly the United Nations’ principles, and that *jihad* should be conducted through peaceful means. In order to support such a conclusion, this article will undertake a historical and contextual examination of the sources of Islamic law with a view to illustrating their continuing relevance to the debate on the doctrine of *jihad*, and its compatibility with Islamic State obligations under modern international law.

## II. SOURCES OF ISLAMIC JURISPRUDENCE

The question of how the *sharia* (Islamic law) regulates the notions of just recourse to, and just conduct in war, requires a brief examination of the origins, development and hierarchy of Islamic law. By providing this brief overview, this section aims to lay the groundwork for the forthcoming analysis of Islamic humanitarian principles and the doctrine of *jihad*.

Islamic belief took its roots from the divine revelations given to Muhammad, whose chief mission was to establish an orderly world in accordance with the sacred messages he received from God. The Qur’an, the sole sacred scripture of the Muslims, consists of these revelations, and as such it constitutes the primary source of Islamic law. Since the Qur’an is believed to contain the very word of God, it is considered the most authoritative and

<sup>4</sup> SP Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simon & Schuster, New York, 1996) 263; also see SP Huntington, ‘The Clash of Civilizations?’ (1993) 72 *Foreign Affairs* 3 22, 49; also see 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) 1–2.

<sup>5</sup> J Rehman, ‘Islam, “War on Terror” and the Future of Muslim Minorities in the United Kingdom: Dilemmas of Multiculturalism in the Aftermath of the London Bombings’ (2007) 29 *Human Rights Quarterly* 4, 831, 832 ff; also see F Halliday, *Islam and the Myth of Confrontation* (IB Tauris & Co Ltd, London, 2003) 107.

<sup>6</sup> *Jihad* is commonly mistranslated as holy war; yet neither the Qur’an nor the *hadith* contains the concept of holy war, which was coined by Europeans in the 11th century, referring to the Crusades. See G Marranci, *Jihad: Beyond Islam* (Berg, New York, 2006) 18; L Napoleoni, ‘Modern *Jihad*: the Islamist Crusade’ (2003) 23 *Sais Review* 2, 53, 65.

authentic record of Islamic law.<sup>7</sup> The second principal source of the *sharia* incorporates the short anecdotal accounts of the Prophet Muhammad's deeds, sayings and views, known as the *sunna*; the written account of this prophetic tradition is termed *hadith*.<sup>8</sup> For Muslims the significance of the *hadith* lies in the fact that Muhammad was the messenger of God's revelations and, by so being, his deeds, sayings and opinions can and should be taken into account in order to gain a better understanding of the Qur'anic injunctions.<sup>9</sup>

*Sharia*, which literally means the highway to good life, has three additional 'non-revealed' sources (ie were not among God's direct revelations to Muhammad which formed the content of the Qur'an); (1) *ijma*: the general consensus of commentators on a point of law; (2) *qiyas*: the method of analogical reasoning; and (3) *ijtihad*: the application of independent personal reasoning in the interpretation of Islamic jurisprudence.<sup>10</sup> Historically, these sources proved to be crucial in providing answers to a question of law when the primary sources were silent on the matter involved. Particularly following the death of Muhammad, the Prophet's contemporary followers (*sahaba*) employed the method of general consensus (*ijma*) with a view to enriching Islamic jurisprudence. However, after the time of *sahaba*, mainly due to political divisions in the growing Muslim community, this consensus-based source of law effectively came to an end.<sup>11</sup> This difficulty, however, was largely compensated for by frequent recourse to the method of independent reasoning (*ijtihad*), which played a crucial role in preventing the *sharia* from becoming stagnant in the face of novel problems and challenges.<sup>12</sup> *Ijtihad*, in this sense, enabled Islamic jurisprudence to evolve in line with changing socio-political and economic conditions.

<sup>7</sup> FA Hassan, 'The Sources of Islamic Law' (1982) 76 American Society of International Law Proceedings 65, 66.

<sup>8</sup> M Mir, 'The Sura as a Unity: A Twentieth Century Development in Qur'an Exegesis' in GR Hawting and AA Shareef (eds), *Approaches to the Qur'an* (Routledge, New York, 1993) 218; Y H Aboul-Enein and S Zuhur, *Islamic Rulings on Warfare* (Strategic Studies Institute, Carlisle Barracks, 2004) 1–3.

<sup>9</sup> Hassan (n 7) 66.  
<sup>10</sup> N Mohammed, 'Principles of Islamic Contract Law' (1988) 6 Journal of Law and Religion 1, 115, 130; MH Kamali, 'Methodological Issues in Islamic Jurisprudence' (1996) 11 Arab Law Quarterly 1, 3, 4.

<sup>11</sup> I Abdal-Haqq, 'Islamic Law: An Overview of Its Origin and Elements' in HM Ramadan, *Understanding Islamic Law: From Classical to Contemporary* (Rowman & Littlefield Publishers, Oxford, 2006) 1, 17.

<sup>12</sup> The permissibility of exercising discretion through creative thinking (in the absence of guidance in the primary sources) was encouraged by the Prophet himself. According to a well-known *hadith*, when Muhammad appointed Muadh ibn Jabal as a judge in Yemen, he posed a question about the dynamics of decision-making in accordance with Islamic principles: 'Through which will you judge?'—'Through the book of God,' answered Muadh. 'And if you find nothing in the Book of God?'—'I shall judge according to the tradition [sunna] of God's messenger'—'And if you find nothing in the Messenger's tradition?' 'I shall not fail to make an effort [ajtahidu] to reach an opinion.' It is reported that this response pleased the Prophet. See *ibid* 1–5; T Ramadan, *The Messenger: The Meanings of the Life of Muhammad* (Penguin Books, London, 2007) 199.

By the end of the 9<sup>th</sup> century, through general consensus and independent reasoning, a significant body of legal rulings and precedents accumulated. In the 10<sup>th</sup> century, nevertheless, many jurists, who represented the *Sunni* majority, had come to believe that all the basic questions of law had been resolved and that personal interpretation of the law was no longer necessary;<sup>13</sup> henceforth, the task of jurists was merely to emulate or follow the existent precedent (*taqlid*).<sup>14</sup> This policy was finally followed by the official declaration of the Iraqi jurists to close the door for *ijtihad*,<sup>15</sup> a decision which was meant to keep the guiding principles of Islam intact and standardize the tradition.<sup>16</sup> While this development did not stop all Muslim jurists from employing independent reasoning to resolve new problems, the leaders of many Islamic schools (except for *Shias*) complied with this restrictive policy, causing Islamic law to ‘hibernate’ for nearly a millennium and delivering a significant blow to the progress of the *sharia*.<sup>17</sup> Today, many ‘reformist’ Muslim scholars rightly advocate the revival of individual reasoning, consistent with the basic tenets of primary sources, with the aim of enabling Islamic law to respond to the necessities of the modern socio-political context.<sup>18</sup> As will be discussed below, the rejection of blind adherence to tradition and out-dated legal concepts that are not responsive to contemporary challenges, and the demand for revival in analytical thinking with a view to generating just or satisfying outcomes, are crucial in contextualizing the current debate on the practical implications of *jihad* in the United Nations era.

### III. ISLAMIC TRADITION ON WARFARE

Islam was established in 7<sup>th</sup> century Arabia, and in less than a century it rapidly grew into an empire, the borders of which stretched from Spain across to North Africa, and from the Middle East to China.<sup>19</sup> Islam is based on highly detailed rules that govern broad aspects of human behaviour, including all private and public matters, moral issues, ritualistic and formal observances, modes of worship, good manners and hygiene. Through a casuistic methodology, an approach to religious and moral matters can be inferred from the

<sup>13</sup> JL Esposito, *Islam: The Straight Path* (Oxford University Press, Oxford, 1994) 195.

<sup>14</sup> See B Lewis and BE Churchill, *Islam: The Religion and the People* (Wharton School Publishing, New Jersey, 2008) 29; K Bennoune, ‘As-Salamu Alaykum? Humanitarian Law in Islamic Jurisprudence’ (1994) 15 Michigan Journal of International Law 605, 613.

<sup>15</sup> Abdal-Haqq (n 11) 21.

<sup>16</sup> HA Haleem et al (eds), *The Crescent and the Cross* (Macmillan Press Ltd, London, 1998) 62; Esposito (n 13) 196.

<sup>17</sup> See I Abdal-Haqq (n 11) 1, 21.

<sup>18</sup> See MA Fakh, *The Future of Islam in the Middle East: Fundamentalism in Egypt, Algeria, and Saudi Arabia* (Praeger Publishers, Westport, 1997) 42; SS Ali, *Gender and Human Rights in Islam and International Law* (Kluwer Law International, London, 2000) 23.

<sup>19</sup> See N Mohammad, ‘The Doctrine of *Jihad*: An Introduction’ (1985) 3 Journal of Law and Religion 2, 381, 382.

*sharia* and relevant instructions may be obtained as to what is right and wrong under Islam.<sup>20</sup>

Islam also regulates and constrains the exercise of force. In the Qur'an, the divine entity is extensively associated with efforts to discourage the employment of illicit force by the promise of eternal punishment.<sup>21</sup> Although the primary sources of Islam do not command Muslims to turn the other cheek,<sup>22</sup> as will be discussed below, during the early period of Islam fighting was, in principle, deemed inappropriate and lethal force was employed only when peaceful alternatives failed to prevent persecution and oppression, or to secure Muslims' right to freely exercise their religion.<sup>23</sup> During the formative years of Islam, Muhammad had preferred peaceful alternatives to secure and consolidate the well-being of the Muslim community and to spread the word of Islam. To that end, he at times engaged in trade and made alliances with non-Muslims,<sup>24</sup> and, when necessary, sought protection from those who rejected Islam.<sup>25</sup> It was only later, after the establishment of a stronger political entity in Medina, that the aim of warfare came to include the spread of Islamic influence; yet even then such wars had to be fought in accordance with certain rules and restrictions. Contrary to popular misconceptions,<sup>26</sup> therefore, Islamic tradition does not impose an unqualified duty to resort to warfare against all those who reject the Islamic faith. To be sure, Islam recognized warfare as a legitimate tool to defend the Muslim community and, under certain conditions, to expand the sphere of its public order. It is also fair to note that, over the centuries, in particular following the rule of the so-called 'first four-rightly guided caliphs,'<sup>27</sup> many Islamic States, under the pretext of

<sup>20</sup> S Bar, *The Fatwas of Radical Islam and the Duty to Jihad* (Rowman & Littlefield Publishers, Oxford, 2006) 1–2.

<sup>21</sup> D Little, "'Holy War" Appeals and Western Christianity: A Reconsideration of Bainton's Approach' in J Kelsay and JT Johnson (eds), *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions* (Greenwood Press, New York, 1991) 121.

<sup>22</sup> Islam clearly differs from the early Christian attitude on the question of pacifism. For early Christians, participation in war had to be avoided, because military service was deemed contrary to the peaceful spirit of the Gospel that condemned killing and commanded non-resistance to the evildoer. See Lewis (n 14) 2; DS Bachrach, *Religion and the Conduct of War* (The Boydell Press, Woodbridge, 2003) 24.

<sup>23</sup> As Hashmi notes, Muhammad regarded warfare as a necessary evil, which was only to be fought when other peaceful alternatives failed. SH Hashmi, 'Interpreting the Islamic Ethics of War and Peace' in T Nardin (ed), *The Ethics of War and Peace: Religious and Secular Perspectives* (Princeton University Press, New Jersey, 1996) 146–152.

<sup>24</sup> Muhammad not only concluded agreements with some neighbouring Jewish and pagan tribes, but also with the polytheistic clan of *Quraysh*. See T Ramadan, *Western Muslims and the Future of Islam* (Oxford University Press, Oxford, 2004) 92.

<sup>25</sup> For instance, while in Mecca, Muhammad was granted protection by his uncle Abu Talib, who never pronounced the profession of Islamic faith. See Ramadan (n 12) 68.

<sup>26</sup> For examples, see H Zawati, *Is Jihad a Just War: War, Peace, and Human Rights under Islamic and Public International Law* (The Edwin Mellen Press, New York, 2001) 1–5.

<sup>27</sup> Most Muslims believe that the pure form of Islam had been experienced during the rule of Muhammad and the four righteous caliphs (elected from the Prophet's closest companions: Abu Bakr, Umar, Uthman and Ali). Later caliphs are believed to be driven by self-interest by making

Islam, engaged in numerous wars principally for military and political purposes.<sup>28</sup> However, according to Islamic laws of war, for warfare to be recognized as legitimate, it must be fought in accordance with certain principles which regulate the manner in which wars should be engaged and conducted.<sup>29</sup>

Whilst it is not the main focus of this article to compare Islamic just war doctrine with its Catholic counterpart, it is useful to highlight that in their classical forms, both Islamic and Catholic just war thinking share some common traits with respect to the concepts of just recourse to, and just conduct in, warfare.<sup>30</sup> Reminiscent of the Catholic tradition, Islamic just war principles not only regulate the justificatory bases of warfare (*jus ad bellum*), but also the ways in which hostilities ought to be conducted (*jus in bello*). Indeed, Islamic *jus ad bellum* norms, comparable to those of Catholic teaching, require wars to be a matter of last resort, waged as a response to unjust aggression, persecution or corruption, openly declared by a legitimate authority, with the right intention and limited (but achievable) objectives. At the same time, the requirements that the means employed in warfare must be proportionate to the end sought and that combatants must be distinguished from non-combatants show parallels to 'Western' *jus in bello* norms.<sup>31</sup> While the substance or content of these procedures undoubtedly varied at the practical level,<sup>32</sup> one of the most crucial differences between Catholic and Islamic teaching on war evolved at a later stage: while the 'Western' tradition, starting from the early modern era, accommodated itself to the secularization of international politics, Islamic just war thinking was largely governed by religious principles until the post-World War II era, which inaugurated the decolonization process and enabled almost every Islamic state to adopt the rules and processes of modern international law.<sup>33</sup> As will be discussed below, for the purposes of this article, Islamic States' adoption of the modern and secular international legal framework governing the use of force discourse has

caliphate a hereditary office and introducing governments directed towards worldly objectives. See further A Hourani, *A History of the Arab Peoples* (Faber and Faber Limited, London, 2005) 22–37.

<sup>28</sup> See AA Engineer, 'Islam and Secularism' in JJ Donohue and JL Esposito, *Islam in Transition: Muslim Perspectives* (2<sup>nd</sup> edn, Oxford University Press, Oxford, 2007) 136, 137–138. On the rapidity of Islamic expansion see Hourani (n 27) 22 ff; VJ Parry, 'Warfare' in Holt (n 2) 834 ff.

<sup>29</sup> See AZ Yamanai, 'Humanitarian International Law in Islam: A General Outlook' in Ramadan (n 11) 65, 71 ff; Bennoune (n 14) 614 ff.

<sup>30</sup> See JT Johnson, 'Introduction' in JT Johnson and J Kelsay (eds), *Cross, Crescent, and Sword* (Greenwood Press, London, 1990) xvi.

<sup>31</sup> See further J Kelsay, 'Religion, Morality, and the Governance of War: The Case of Classical Islam' (1990) 18 *Journal of Religious Ethics* 123, 123 ff; JB Elshstain, 'Just War and Humanitarian Intervention' (2001) 17 *American University International Law Review* 1, 5–6; Bennoune (n 14) 605–623; S Augustine, *The City of God*, MDD Dods (trans) (Random House Inc, New York, 1950) 693–694; T Aquinas, *Summa Theologiae*, Vol 35, TR Heath (trans), (Blackfriars, London, 1972) 81–85; FH Russell, *The Just War in the Middle Ages* (Cambridge University Press, Cambridge, 1975) 16 ff.

<sup>32</sup> See Kelsay (n 31) 124.

<sup>33</sup> See Halcem (n 16) 113; Johnson (n 30) xvi.

significant ramifications for our endeavour to reinterpret the parameters of *jihad*. It is to the examination of Islamic humanitarian principles that we will now briefly turn.

### *A. Islamic Jus in Bello Rules*

Islamic just war tradition contains some important guidelines for the manner in which Muslims have to conduct themselves during armed conflict. As noted above, such ethical and practical guidelines concerning the methods, means, and limits of justified force correspond to some degree to the Catholic *jus in bello* principles, in that they are similarly based on the pillars of ‘proportionality’ and ‘discrimination.’<sup>34</sup> These principles require combatants to strike the right balance between the dictates of military necessity and humanitarian concerns, and, as such, demand belligerent parties to use proportionate means to achieve a military objective and to distinguish between military and civilian targets in order to minimize loss of civilian life or damage to civilian property.<sup>35</sup> The following Qur’anic verse, for instance, is pertinent to the notion of proportionality in armed hostilities: ‘And if one has retaliated to no greater extent than the injury he received, and is again set upon inordinately, God will help him: for God is One that blots out (sins) and forgives (again and again)’ (Q. 22: 60).<sup>36</sup> Likewise, the notion that one should not engage in violence any longer than is necessary under the circumstances is firmly embedded in the following verse: ‘And fight them on until there is no more tumult or oppression, and there prevail justice and faith in God altogether and everywhere; but if they cease, verily God doth see all that they do’ (Q. 8: 39).

It is important to note that these humanitarian principles did not emerge in a vacuum; rather they transpired within the practice of warfare with a view to achieving measure and moderation in the employment of lethal force. Some of these rules were revealed to Muhammad in response to specific circumstances and needs. For instance, the necessity of exercising restraint in avenging injuries was laid down following the defeat at Uhud (625) in which Muhammad, in his anger, vowed revenge as he saw the mutilated body of his uncle Hamza: ‘If God gives me power over the Quraysh,’ he exclaimed, ‘I will mutilate seventy of their men [in the next confrontation].’<sup>37</sup> Yet, soon after, the Prophet reportedly received a revelation which unequivocally prohibited the use of

<sup>34</sup> See Yamanai (n 29) 74.

<sup>35</sup> See MR Amstutz, *International Ethics: Concepts, Theories, and Cases in Global Politics* (Rowman & Littlefield Publishers, Oxford, 2005) 111.

<sup>36</sup> This study relies upon the authoritative scholar Yusuf Ali’s translation of the Qur’an. For a comparison of different translations of the Qur’an see the following website: <http://www.uah.edu/msa/quran.html>.

<sup>37</sup> M Ayoub, *The Qur’an and Its Interpreters* (State University of New York Press, Albany, 1992) 369. Some sources indicate that the Prophet vowed to mutilate thirty enemy corpses, not seventy. See Ramadan (n 12) 125.

disproportionate measures in the delivery of punishment and recommended the exercise of forbearance and patience towards the enemy:<sup>38</sup> ‘And if ye do catch them out, catch them out no worse than they catch you out: But if ye show patience, that is indeed the best (course) for those who are patient’ (Q. 16: 126). Some other *jus in bello* norms emerged from ‘non-revealed’ sources, that is, they were either formulated by the Prophet himself or by his legitimate successors (caliphs). According to the tradition, Muhammad had repeatedly underlined the necessity of proportionality in the use of legitimate force by asking his companions to respect the bodies of the living and the dead (including animals), avoid torture or other ill-treatment of prisoners, respect the dignity and integrity of all combatants, and refrain from using poisoned weapons against the enemies as well as damaging nature.<sup>39</sup>

The Islamic law of nations also contains the principle of distinction, which requires belligerents to distinguish between combatants and civilians, and prohibits the killing of women, children and the old, as well as the blind, the helpless, and the crippled.<sup>40</sup> Tradition shows that this principle of distinction can be traced to an incident in which the Prophet Muhammad encounters a slain woman while riding in battlefield and expresses his disapproval of the practice of killing women and children, which later prompted a distinct code of conduct that includes the prohibition of killing non-combatants and of wanton destruction of livestock, trees, orchards and wells.<sup>41</sup> Shirazi notes that before the commencement of armed aggression the Prophet would instruct his soldiers in the following manner:

Do not handcuff or tie up the prisoners. Do not mutilate. Do not kill the wounded. Do not pursue one retreating or one who throws down his weapon. Do not use treacherous means with the enemy. Do not kill the old, the young or the women. Do not cut down trees, unless you are forced to do so. Do not deploy poison in the lands. Do not cut off water supply. No house should be entered without permission and the people have safety. If any of the Muslims, whether high ranking or otherwise, give temporary refuge to any of the infidels to hear the message of God then let him do so. If he follows you then he is your brother in religion; but if he refuses, secure his safety and seek help from God.<sup>42</sup>

Similar humanitarian principles which require Muslim combatants to distinguish military targets from innocent civilians and to protect the environment during hostilities had also been emphasised by the first and the

<sup>38</sup> See Ayoub (n 37) 369; Ramadan (n 12) 125; AY Ali, *The Meaning of the Holy Qur’an* (11<sup>th</sup> edn, Amana Publications, Maryland, 2008) 670.

<sup>39</sup> *ibid*; also see Lewis (n 14) 151; Zawati (n 26) 109.

<sup>40</sup> LC Green, ‘Cicero and Clausewitz or Quincy Wright: The Interplay of Law and War’ (1999) 9 *Journal of Legal Studies* 59, 69.

<sup>41</sup> YH Aboul-Enein and S Zuhur *Islamic Rulings on Warfare* (Strategic Studies Institute, Carlisle Barracks, 2004) 21; Haleem (n 16) 131.

<sup>42</sup> IM Shirazi, *War, Peace and Non-Violence: An Islamic Perspective* (Fountain Books, London, 2001) 109.



fourth caliph.<sup>43</sup> While it would be implausible to assume that Muslim combatants (even in the early period) had invariably adhered to the basic precepts of Islamic humanitarian principles, the application of such humanitarian rules were at times enforced through punitive or disciplinary measures taken against those who exceeded the reasonable limits of warfare.<sup>44</sup> There are some recorded examples which show that the Prophet or his caliphs took some serious measures against those who had engaged in pre-Islamic methods of warfare, ie, going beyond the limits of proportionality and necessity.<sup>45</sup> Arguably, however, it was mainly the notions of faith and/or fear of the ultimate punishment of God that effectively prevented many Muslim warriors from violating the basic rules of Islamic humanitarian laws. As Khadduri rightly emphasizes, Islamic just war principles, being part and parcel of the *sharia*, were meant to apply irrespective of practical concerns (eg reciprocity); the adherents of Islam were required to impose restrictions on their warlike conduct because such was *commanded* by God.<sup>46</sup> Eaton also addresses this point:

The rapidity with which Islam spread across the known world of the seventh to eighth centuries was strange enough, but stranger still is the fact that no rivers flowed with blood, no fields were enriched with the corpses of the vanquished. As warriors the Arabs might have been no better than others of their kind who had ravaged and slaughtered across the peopled lands but, unlike these others, they were on a leash. There were no massacres, no rapes, no cities burned. These men feared God to a degree scarcely imaginable in our time and were in awe of His all-seeing presence. . . . [T]here was no place in which they could hide from this presence, and while vast distances beckoned them ever onwards they trod softly on the earth, as they had been *commanded* to do.<sup>47</sup>

### B. Islamic Jus Ad Bellum Rules

In close connection with *jus in bello* rules, Islam also contains rules on *jus ad bellum*, according to which wars must not only be conducted in accordance with religious values, but also be fought with the right intent: not for the spoils of war,<sup>48</sup> nor for personal glory, but for the cause and in the name of God.<sup>49</sup> At

<sup>43</sup> Aboul-Enein (n 41) 26; Zawati (n 26) 31–32.

<sup>44</sup> See Bennoune (n 14) 623.

<sup>45</sup> See Ramadan (n 12) 179; Yamanai (n 29) 74.

<sup>46</sup> See M Khadduri, *The Islamic Law of Nations: Shaybani's Siyar* (The John Hopkins Press, Baltimore, 1966) 5; also see Bennoune (n 14) 624.

<sup>47</sup> G Eaton, *Islam and the Destiny of Man* (State University of New York Press, Albany, 1985) 17 (emphasis added); also see SS Ali and J Rehman, 'The Concept of *Jihad* in Islamic International Law' (2005) 10 *Journal of Conflict & Security Law* 3, 321, 332.

<sup>48</sup> Although Islamic tradition accepts booty as a legitimate reward, it forbids Muslims to be motivated by it. See Lewis (n 14) 151.

<sup>49</sup> According to a *hadith*, when '[a] man came to the Prophet and asked, "A man fights for war booty; another fights for fame and a third fights for showing off; which of them fights in Allah's Cause?" The Prophet said, "He who fights that Allah's Word, Islam, should be superior, fights in Allah's Cause.'" Hadith Reported by al-Bukhari, *Hadith of Bukhari* (Hadith 4: 65).

the same time, the purpose of each war must be the promotion of Islamic values and the achievement of ultimate peace under the Islamic public order.<sup>50</sup> Again, as underlined earlier, similar to the 'Western' just war tradition, the concepts of just cause (defence against the enemy or fight in the name of God), right intent (pursuit of the Islamic ideals of promoting the good and condemning the evil), competent authority (the Prophet or his legitimate successor),<sup>51</sup> a reasonable chance of success,<sup>52</sup> and the objective of peace<sup>53</sup> constitute the backbone of Islamic *jus ad bellum* rules.<sup>54</sup>

Islam declared all forms of secular wars (*harb*) evil, and said they were to be avoided at all costs. To this end, the Prophet Muhammad sought to end the inter-tribal wars, which had been prevalent among the pagan Arabs. He unified the fragmented clans in the cause of Islam and introduced the concept of *jihad* as the only legitimate form of military force under the banner of Islam.<sup>55</sup> Yet, while the Islamic tradition discusses many war-related issues in extensive legal and theological texts, it is extremely difficult to identify a clear canon of Islamic attitude towards warfare. Certainly, the problem of identifying explicit rules or unequivocal interpretation is not particular to Islam, but is shared by almost any religious and ethical system based on sacred texts attributed to divine revelation, and esoteric in content. Such texts often support theses and moral positions which seem to offer conflicting alternatives.<sup>56</sup> Within the context of the Qur'an, the matter assumes a more complicated character due to the poetic style and complex structure of the

<sup>50</sup> See Khadduri (n 46) 10.

<sup>51</sup> In contrast to *Sunni* scholars, *Shi'i* jurists explicitly distinguish between defensive *jihad* and *jihad* that is undertaken against unbelievers for the cause of God. According to this school of thought, the latter type of *jihad* entails the presence of a divinely appointed leader (the *Imam*), as opposed to an ordinary Muslim authority, to ensure that *jihad* against unbelievers is undertaken strictly for the cause of God. See further AA Sachedina, 'The Development of *Jihad* in Islamic Revelation and History' in Johnson (n 30) 36, 41 ff.

<sup>52</sup> This element is considered to be based on the following Qur'anic verse: 'And spend of your substance in the cause of God, and make not your own hands contribute to (your) destruction; but do good; for God loveth those who do good' (Q. 2: 195). See Ali (n 38) 78.

<sup>53</sup> While the Qur'an advises Muslims to be ready for war (when necessary), it also notes that '... if the enemy incline towards peace, do thou (also) incline towards peace and trust in God: for He is One that heareth and knoweth (all things)' (Q. 8: 60–61).

<sup>54</sup> J Kelsay, *Islam and War: A Study in Comparative Ethics* (Westminster/John Knox Press, Louisville, 1993) 36; S Mahmoudi, 'The Islamic Perception of the Use of Force in the Contemporary World' (2005) 7 *Journal of the History of International Law* 1, 55, 59.

<sup>55</sup> See GF Nafziger and MW Walton, *Islam at War: A History* (Greenwood Publishing Group, Westport, 2003) 207–208; Mohammad (n 19) 384.

<sup>56</sup> See Bar (n 20) 4. Max Weber, with respect to internal ambiguities within religious rulings, argues that '[n]either religion nor men are open books. They have been historical rather than logical or even psychological constructions without contradiction. Often they have borne within themselves a series of motives, each of which, if separately and consistently followed through, would have stood in the way of the others or run against them head-on. In religious matters "consistency" has been the exception and not the rule.' HH Gerth and CW Mills (eds), *From Max Weber: Essays in Sociology* (Routledge, London, 2001) 291; Kelsay (n 54) 43.

text, in which later verses appear to contradict earlier ones. It would thus be incorrect to presume that Islamic sources provide a catalogue of clear-cut standards governing the doctrine of *jihad*.<sup>57</sup>

The main problem with interpretation lies in the controversy over whether *jihad* is justified only in defence against oppression or also further encompasses expansionist wars against non-Muslims. As most scholars indicate, the Qur'an is not always linear in format or unambiguous in its message regarding warfare.<sup>58</sup> Not surprisingly, therefore, Muslim thinkers are divided upon the factual implications of *jihad*: while some scholars underline that there is 'no compulsion in Islam' (Q. 2: 256) and that the very purpose of Islamic warfare is to deter aggression or oppression against Muslims,<sup>59</sup> others rely upon a rigid interpretation that envisages a universal struggle to eradicate the forces of immorality and unbelief, a global Muslim rule, conversions, and the re-establishment of the caliphate through, if necessary, the use of military force.<sup>60</sup> In order to have a better understanding of these positions, we must first explore the meaning of *jihad* more closely, and then proceed to look at the evolution of the concept under a military doctrine (*dar-ul-Islam* and *dar-ul-harb*) developed during Islam's imperial period.

### 1. The concept of *jihad*

The use of force is treated under distinct headings in Islam. The Qur'an makes occasional reference to the concept of 'war' (*harb*), yet it also makes frequent reference to 'fighting' (*qital*), and even more frequent reference to the notions of 'struggle' or 'striving' (*jihad* and other derivations).<sup>61</sup> Technically speaking, *jihad* means 'struggle' and refers to warfare engaged against non-Muslims.<sup>62</sup> However, *jihad* in its broad sense may also refer to non-violent means of struggle in the cause of God; that is, use of military force represents only one dimension of *jihad*, since the concept of *jihad* not only implies sheer force, but also debate and persuasion through dialogue.<sup>63</sup> Majid Khadduri, one of

<sup>57</sup> See G Kepel, *Jihad: The Trail of Political Islam* (IB Tauris & Co Ltd, London, 2006) 23–43; DW Simon, 'US Foreign Policy and the World of Islam' (1995) 3 *Willamette Bulletin of International Law & Policy* 1, 69, 70.

<sup>58</sup> See RL Euben, 'Killing (for) Politics: *Jihad*, Martyrdom, and Political Action' (2002) 30 *Political Theory* 1, 4, 12.

<sup>59</sup> See I S M Al-Qazwini, 'Just War: An Islamic Perspective' (2004) 9 *Nexus* 79, 83; NA Shah, *Self-Defense in Islamic and International Law: Assessing Al-Qaeda and the Invasion of Iraq* (Palgrave Macmillan, New York, 2008) 17 ff.

<sup>60</sup> See S Jackson, 'Jihad and the Modern World' in Donohue (n 28) 408; Z Baran, 'Fighting the War of Ideas' (2005) 84 *Foreign Affairs* 6, 68, 73.

<sup>61</sup> FM Donner, 'The Sources of Islamic Conceptions of War' in Kelsay (n 21) 46.

<sup>62</sup> See SK Mirza, 'An Exegesis on *Jihad* In Islam', in KE Shienbaum and J Hasan (eds), *Beyond Jihad: Critical Voices from Inside Islam* (Academica Press, Bethesda, 2006) 77.

<sup>63</sup> See Rehman (5) 839.

Islam's most respected theologians, in his seminal work, *War and Peace in the Law of Islam*, defines the concept of *jihad* as follows:

The term *jihad* . . . means 'exerted.' Its juridical-theological meaning is exertion of one's power in Allah's path, that is, the spread of the belief in Allah and in making His word supreme over this world . . . *The jihad, in the broad sense of exertion, does not necessarily mean war or fight, since exertion in Allah's path may be achieved by peaceful means as well as violent means.* The *jihad* may be regarded as a form of religious propaganda that can be carried on by persuasion or by sword.<sup>64</sup>

The notion of 'exerting one's power for God,' therefore, opens up doors for various alternatives as to what may constitute *jihad*. Islamic scholars usually distinguish between four distinct ways of *jihad*: (1) *jihad* by the sword: fighting in the cause of Allah against oppressors and unbelievers; (2) *jihad* by the heart: purification of oneself and the resistance of sin; (3) *jihad* by the tongue: peaceful propagation of the Islamic messages; and (4) *jihad* by the hands: fighting against evil through pious acts.<sup>65</sup> *Jihad* thus not merely refers to an external struggle against the enemies of Islam and idolaters, but also to an internal struggle against temptation and evil (*nafs*) in order to become a better Muslim. In this context, it is noted that when the Prophet Muhammad returned from a battle he reportedly told his companions: 'We return from the lesser *jihad* to the greater *jihad* [*al-jihad al-akbar*].'<sup>66</sup> This *hadith* clearly underlines that inner strife for spiritual growth or cleansing is not only more demanding, but also more significant than the external battles fought against the enemy.

Nevertheless, as noted earlier, the Qur'anic text appears to have an ambivalent attitude toward warfare: whilst some passages clearly condemn the oppression of the weak and declare that believers should fight only in self-defence, other passages seem to provide unequivocal justification for war or fighting for the purpose of subduing unbelievers. Hence, any conclusion as to whether the Qur'an does indeed condone offensive war carried out for the faith appears to be left to the interpretation of the analyst.<sup>67</sup>

In order to grasp this ostensibly ambiguous attitude of the Qur'an toward *jihad*, one needs to look at the genesis of Islam and the broader socio-political

<sup>64</sup> M Khadduri, *War and Peace in the Law of Islam* (John Hopkins Press, Baltimore, 1955) 55–56 (emphasis added); also see Rehman (4) 52.

<sup>65</sup> See J F Whalen, 'In Search of *Jihad*: Toward a Policy of Constructive Islamic Engagement' (1998) 5 *Brown Journal of World Affairs* 1, 279, 282; M Parvin and M Sommer, 'Dar al-Islam: The Evolution of Muslim Territoriality and Its Implications for Conflict Resolution in the Middle East' (1980) 11 *International Journal of Middle East Studies* 1, 1, 4.

<sup>66</sup> See Z Sardar, *The Future of Muslim Civilisation* (Croom Helm, London, 1979) 193; JL Esposito, *Unholy War: Terror in the Name of Islam* (Oxford University Press, New York, 2003) 28.

<sup>67</sup> Donner (n 61) 47. Firestone notes that because the Qur'an's message on warfare is spread out throughout the text, "it is difficult to know whether a verse is supposed to be read in relation to the verses among which it is currently situated or whether it should be read independently." R Firestone, *Jihad: The Origin of Holy War in Islam* (Oxford University Press, New York, 1999) 47.

context in which the military form of *jihad* gradually evolved. Islam emerged in seventh century Arabia, where warfare was regarded as a matter-of-fact;<sup>68</sup> the use or threat of military force was the most prevalent method of conducting relations among political entities, which included the dominant Arab tribes as well as the powerful Sasanian and Byzantine empires.<sup>69</sup> The Prophet Muhammad lived and received his early revelations in the city of Mecca, which was beset by tribal raids, cycles of vengeance and incessant blood feud. At this time, however, Arabia was subject not only to rivalry among the fragmented Arab tribes, but also to the competition and interventions of its powerful neighbours, since it was located at the centre of one of the most lucrative international trade routes.<sup>70</sup>

The socio-political setting within which the Prophet Muhammad lived, and to which he was opposed, was marked by corruption and immorality, a period known as *jahiliyyah* ('age of ignorance'). The salient features of *jahiliyyah* included polytheism and idolatry, sexual and other forms of decadence, female infanticide and incessant bloodshed.<sup>71</sup> It was against this backdrop that Muhammad's reformist message posed a significant threat to the religious, economic and political *status quo*. Radically, Muhammad challenged the establishment, called for social justice and equality for the vulnerable segments of society, and denounced polytheism and idolatry. He further summoned the people to strive (*jihad*) to eradicate *jahiliyyah*, and lead a virtuous life based on Islamic principles.<sup>72</sup>

However, during this Mecca period (610–622 AD), while the Prophet Muhammad did not have many supporters and thus had weak political power, *jihad* had a mild tone, which essentially meant the propagation of Islamic faith in a non-violent manner.<sup>73</sup> At this stage, fighting was not allowed, because enemies were evidently stronger than the small community of persecuted Muslims, who were commanded to employ peaceful alternatives when dealing with the pagans or the so-called 'People of the Book' (Jews, Christians, Sabaeans and Zoroastrians).<sup>74</sup>

Having threatened the political and economic interests of the dominant tribes (particularly the *Quraish*) of Mecca, the Prophet and his followers were met with strong resistance and remained under constant pressure applied by the pagan and polytheistic groups. This compelled Muhammad and his

<sup>68</sup> Some scholars maintain that Islam would probably not have survived if military *jihad* had not been employed in defending and spreading the faith 'at a time when violent force was the law.' See AA An-Na'im, *Toward and Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse University Press, New York, 1996) 158.

<sup>69</sup> *ibid* AA An-Na'im 142.

<sup>70</sup> Esposito (n 66) 29.

<sup>71</sup> GR Hawting, *The Idea of Idolatry and the Emergence of Islam: From Polemic to History* (Cambridge University Press, Cambridge, 1999) 1–2.

<sup>72</sup> See Esposito (n 66) 30.

<sup>73</sup> See Mohammad (n 19) 385; Mirza (n 62) 78.

<sup>74</sup> Among others, the injunctions to nonviolence in Q. 2: 109, Q. 2: 256, Q. 22: 78, Q. 25: 52, Q. 109: 1–6 belong to this period.

small community to move (*hijra*) from Mecca to Medina (622 AD) where he established the first Islamic community-State.<sup>75</sup> This migration ushered in a new stage in the development of Islam, which gradually took on a political form with the emergence of a new community (*ummah*) that was constantly growing in number and firmly bound together by their faith.<sup>76</sup> The establishment of such a theologico-political unit in Medina, in other words, marked a radical transition from a position of weakness to strength, whereby Islam could, if necessary, be spread by the sword, and acquire a universal character. Muslims accordingly no longer had to act passively, for they were now able to counteract the enemy with force. The following verses were revealed at this stage, when violence was deemed not only necessary for the survival of the Islamic community, but also inevitable:<sup>77</sup>

Those who believe, and suffer exile and strive with might and main in God's cause, with their goods and their people, have the highest rank in the sight of God. They are the people who will achieve salvation. (Q. 9: 20); To those against whom war is made, permission is given (to fight), because they are wronged;—and verily, God is most powerful for their aid (Q. 22: 39).<sup>78</sup>

In light of these verses, it seems evident that *jihad* may be waged in self-defence and in an attempt to redress injustice. However, as touched upon earlier, the application of force under *jihad* is limited by the principles of necessity and proportionality. Indeed, some important verses belonging to this period clearly require that *jihad* should be invoked as a measure of last resort and be fought within the strict confines of proportionality and necessity.<sup>79</sup>

In the Medina period (622–632 AD), it was thus made clear that as long as there was murder and the persecution of people because of their Islamic belief, the religion allowed the use of the sword to stop this oppression.<sup>80</sup> Significantly, this period witnessed Islam's first decisive victory in the war of Badr (624 AD) where, through the inspiring leadership of the Prophet Muhammad, a mere 300 Muslims defeated over a thousand Meccans. This unexpected triumph was regarded as divine approval of the new religion. It also laid the foundation of Muhammad's secular power: he was no longer

<sup>75</sup> Esposito (n 66) 31.

<sup>76</sup> See Esposito (n 13) 8–9; WM Watt, *Muhammad: Prophet and Statesman* (Oxford University Press, Oxford, 1964) 94 ff.

<sup>77</sup> AL Silverman, 'Just War, *Jihad*, and Terrorism: A Comparison of Western and Islamic Norms for the Use of Political Violence' (2002) 44 *Journal of Church & State* 1, 73, 78.

<sup>78</sup> Also see (Q. 22: 40).

<sup>79</sup> Examples of these verses, containing such injunctions as fight them only 'until there is no more tumult or oppression,' 'do not transgress limits,' or 'fear God, and know that God is with those who restrain themselves,' can be found at Q. 2: 190, Q. 2: 191, Q. 2: 192, Q. 2: 193, Q. 2: 194.

<sup>80</sup> J Said, 'Law, Religion and the Prophetic Method of Social Change' (2001) 15 *Journal of Law and Religion* 2, 83, 140; Mohammad (n 19) 387.

solely considered to be the Prophet of the Muslim community, but also their military commander and political leader.<sup>81</sup>

Later on, as the strength of the Islamic State grew further and the opposition of the pagans continued, Islam gradually went beyond a defensive posture and acquired a more militant character. The fight against the pagans was no longer merely imposed as a duty to deter aggression. It was aimed at invading the enemy's homes with a view to stopping their 'ungodly mischief'<sup>82</sup> or preventing their anticipated attacks against the Islamic community.<sup>83</sup> Nonetheless, before directly engaging in hostilities with the pagans, the Prophet Muhammad would, as a matter of custom, first send an official letter to polytheistic tribes inviting them to accept Islam.<sup>84</sup> *Jihad* was launched against those who did not acknowledge Islam as their faith.<sup>85</sup>

From this perspective, it may be argued that the use of defensive force is allowed against aggressors and pagans, and that Muslims are obliged to use force to repel persecution and vindicate their rights. Yet the question still stands unanswered: does vindication of rights encompass the pursuit of Islamic supremacy over other beliefs, or further justify military force to spread the word of God? As noted earlier, this question has a controversial character. We may, in this respect, identify two major schools of thought; the first one vehemently argues that *jihad* in the cause of Allah is approved by the Qur'an only for defensive purposes. Accordingly, Muslims are entitled to wage warfare only against those who fight against Muslims; they may not initiate hostilities or commit aggression. Defensive force, on the other hand, is by no means unlimited; it may only be continued until the oppression ceases or the persecutor desists.<sup>86</sup> It is also suggested that wars of aggression in general, and terrorism in particular, are diametrically opposed to the very idea of the Qur'an, which says 'if any one slew a person—unless it be for murder or for spreading mischief in the land—it would be as if he slew the whole people; and if any one saved a life, it would be as if he saved the life of the whole

<sup>81</sup> As Hitti notes, 'hitherto . . . [Islam] had been a religion within a state; in al Madinah (Medina), after Badr, it passed into something more than a state religion—it itself became the state.' PK Hitti, *History of the Arabs: From the Earliest Times to the Present* (Macmillan, London, 1956) 116–117.

<sup>82</sup> See M Abo-Kazleh, 'Rethinking International Relations Theory in Islam: Toward a More Adequate Approach' (2006) 5 *Turkish Journal of International Relations* 4, 41, 44.

<sup>83</sup> Haleem (n 16) 113.

<sup>84</sup> Drawing on an analogy between the ancient Roman and Islamic customs of warfare, Khadduri notes that '[l]ike the *jus fetiale* of ancient Rome, which required that a set of rules must be followed so that war would be lawful, the *jihad* was regarded as lawful only if it were preceded by an invitation to adopt Islam. If the enemy refused (or if they were People of the Book and refused to pay the poll tax), fighting would become lawful for the Muslims.' Khadduri (n 46) 95.

<sup>85</sup> Mirza (n 62) 77. The duty of waging war against the pagans was, among others, stipulated in the following verses: Q. 9: 36, Q. 47: 4, Q. 9: 5.

<sup>86</sup> Rehman (n 4) 57–58.

people' (Q. 5: 32).<sup>87</sup> Furthermore, proponents of this school of thinking seek to illustrate that at the very core of Islam lies the notion of peace, which forms the basis of Islamic legal framework. *Jihad*, in this vein, constitutes a just, defensive and exceptional form of belligerence which aims to achieve an ideal Islamic public order with a view to providing justice and equality for all people.<sup>88</sup> In an attempt to explain the implications of the belligerent ('sword') verses of the Qur'an, such scholars essentially maintain that verses which command fighting against the pagans are not referring to the use of military *jihad* against unbelievers as a whole, but rather against those who had attacked the Muslim community.<sup>89</sup> According to Sachedina, for instance, 'it is not unbelievers as such who are the object of force, but unbelievers who demonstrate their hostility to Islam by, for example, persecution of the Muslims.'<sup>90</sup>

However, on the other side of the debate there are those who reject any rigid distinction between offensive and defensive forms of *jihad*. Such commentators generally believe that Islam has a sacred and mandatory duty to spread the message of Islam, if necessary by force, to all human beings. The ultimate purpose of Islam, according to this view, is to universalize Islam, the final truth and the only true religion of God.<sup>91</sup> Mawdudi, a representative of this thinking and one of the most widely read authors among Muslims, posits that unity among Muslims is not based upon the mundane ties of race, history, geography, language, mutual interests, economics or culture, but upon Islam and their commitment to follow the divine path of God in their lives.<sup>92</sup> Mawdudi denies the possibility of any social change without changing the theoretical views of leaders and upper classes who are seduced by the evil agents of *jahiliyyah* (ignorance, barbarism, immorality and ungodliness).<sup>93</sup> The purpose of *jihad*, in this context, is to eliminate the dominance of un-Islamic systems and replace them with religious order based upon Islamic principles.<sup>94</sup> According to this view, Islam must never accept the bondage of corrupt regimes, but must be employed as a revolutionary ideology to transform the *status quo* and propel humanity toward greater freedom and morality:

Islam is a revolutionary ideology which seeks to alter the social order of the entire world and rebuild it in conformity with its own tenets and ideals. 'Muslims' is the title of that 'International Revolutionary Party' organized by Islam to carry out its revolutionary programme. '*Jihad*' refers to that

<sup>87</sup> Y El-Ayouty, 'International Terrorism under the Law' (1999) 5 ILSA Journal of International & Comparative Law 2, 485, 490.

<sup>88</sup> See Zawati (n 26) 4; Rehman (n 86) 70.

<sup>90</sup> Sachedina (n 51) 43.

<sup>92</sup> CJ Adams, 'Mawdudi and the Islamic State' in JL Esposito, *Voices of Resurgent Islam* (Oxford University Press, New York, 1983) 103.

<sup>93</sup> *ibid* 102.

<sup>94</sup> Translation from Mawdudi *Al-Jihad fi'l-Islam*, cited in SVR Nasr, *Mawdudi and the Making of Islamic Revivalism* (Oxford University Press, New York, 1996) 83.

<sup>89</sup> See Esposito (n 66) 68.

<sup>91</sup> Mirza (n 62) 85, 86.



revolutionary struggle and utmost exertion which the Islamic Nation/Party brings into play in order to achieve this objective. . . .<sup>95</sup>

Syed Qutb, whose views continue to inspire Taliban, Al-Qaeda and other militant groups, represents a more radical interpretation of Islam.<sup>96</sup> Strongly influenced by Mawdudi and the influential 13<sup>th</sup> century Sunni scholar Ibn Taymiyya, Qutb argues that modern world is plagued by ignorance (*jahiliyyah*), which is ‘based on rebellion against God’s sovereignty on earth.’<sup>97</sup> the establishment of God’s sovereignty on earth through the abolishment of man’s dominion, ie, ‘the taking away of sovereignty from the usurper to revert it to God,’ and the enforcement of the divine law (*sharia*) instead of man-made laws cannot be achieved merely by peaceful means. Those who usurp the supremacy of God, according to Qutb, will not give up their domination solely through preaching; if this had been the case, the task of establishing the supremacy of God would have been easy for the Prophets of all times.<sup>98</sup> Therefore, in order to free man from servitude to anyone other than God and secure the supremacy of God’s will in a universal manner, both preaching and military *jihad* must be used.<sup>99</sup>

According to Qutb, Islam is not a ‘defensive movement;’ on the contrary, it has been ‘a movement to wipe out tyranny and to introduce true freedom to mankind.’ He therefore strongly criticized those scholars who were apologetic and defensive while discussing the implications of *jihad*.<sup>100</sup> Any divinely-ordained Islamic system, Qutb argues, has in fact ‘a God-given right to step forward and take control of the political authority so that it may establish the Divine system on earth.’<sup>101</sup> To Qutb, therefore, the doctrine of *jihad* may legitimately go beyond the contours of peaceful propagation of the faith by encompassing the employment of the sword as a means of fighting worldly corruption and liberating mankind.

<sup>95</sup> AA Mawdudi, 1997b. ‘*Jihad fi Sabilillah*’ 3–9, cited in D Zeidan, *The Resurgence of Religion: A Comparative Study of Selected Themes in Christian and Islamic Fundamentalist Discourses* (Brill, Boston, 2003) 237. It must be noted that over the years the radical position of Mawdudi softened. In 1939, he declared that military form of *jihad* should be a weapon of last resort to achieve victory for Islam. See Nasr (n 94) 74.

<sup>96</sup> JL Esposito, *The Islamic Threat: Myth or Reality?* (Oxford University Press, New York, 1992) 143.

<sup>97</sup> S Qutb, *Milestone* (SIME E-Publishing, USA, 2005) 5; cf IM Abu-Rabi, *Intellectual Origins of Islamic Resurgence in the Modern Arab World* (State University of New York Press, Albany, 1996) 195.

<sup>98</sup> *ibid* Qutb 52; cf YY Haddad, ‘Sayyid Qutb: Ideologue of Islamic Revival’ in Esposito (n 92) 84–87.

<sup>99</sup> *ibid* Qutb 52–53.  
<sup>100</sup> He scornfully viewed such scholars as spiritually and mentally defeated ‘by the wily attacks of the Orientalists, who distort the concept of Islamic *Jihad*.’ *ibid* 55; Abu-Rabi (n 97) 193–194.

<sup>101</sup> Qutb (n 97) 68–69; D Bukay, *From Muhammad to Bin Laden: Religious and Ideological Sources of the Homicide Bombers Phenomenon* (Transaction Publishers, New Jersey, 2008) 223–224.

While such radical views provide the major reference points for contemporary fundamentalist movements, some other representatives of the second school base their conceptions on different grounds. Among these commentators, there are those who maintain that the peaceful Meccan verses had been abrogated by the so-called 'sword verses' revealed later in Medina. Muslim exegetical tradition initially employed the method of abrogation (*naskh*) to explain or contextualize the seemingly contradictory passages of the Qur'an by linking the disputed verses to traditions relating to specific historical conditions.<sup>102</sup> According to the traditional Muslim view, divine revelations were given in response to different and inconstant predicaments faced by the Prophet Muhammad and the Muslim community. In other words, God personally guided Muhammad through His revelations in difficult and uncertain times. In cases of apparent contradiction, therefore, the earlier verses must be considered to be revealed in accordance with the contingency of the moment, while the later revelations must be deemed normative and binding.<sup>103</sup> Some traditionalists on this account argue that within the context of *jihad*, the Medina verses take precedence over the earlier revealed Meccan verses:<sup>104</sup> for instance, Qur'an 2: 256, which states that 'let there be no compulsion in religion,'<sup>105</sup> had been abrogated by Qur'an 9: 73<sup>106</sup> with regard to polytheists and by Qur'an 9: 29 with respect to the 'People of the Book.'<sup>107</sup> Put differently, although the 'no compulsion' rule was revealed as universally valid and banned the notion of religious coercion, following the revelation of the two subsequent verses it was abrogated and thus its ruling had never been enforced ever since. Friedmann convincingly posits that this view may easily be supported by the deeds of Prophet Muhammad, who forced the Arab pagans to embrace Islamic faith and did not accept anything from them except conversion; it appears inconceivable that the Prophet would have acted as such had he been obliged to follow the 'no compulsion' rule.<sup>108</sup>

## 2. *Dar-ul-Islam and Dar-ul-Harb*

What is clear with respect to the concept of *jihad* is that, despite all the ambivalence as to its precise implications, many Qur'anic passages which

<sup>102</sup> See O Leaman (ed), *The Qur'an: An Encyclopaedia* (Routledge, New York, 2006) 5.

<sup>103</sup> See Firestone (n 67) 49–50. <sup>104</sup> Abo-Kazleh (n 82) 43.

<sup>105</sup> 'Let there be no compulsion in religion: Truth stands out clear from Error: whoever rejects evil and believes in God hath grasped the most trustworthy hand-hold, that never breaks. And God heareth and knoweth all things' (Q. 2: 256).

<sup>106</sup> 'O Prophet! strive hard against the unbelievers and the hypocrites, and be firm against them. Their abode is hell,—an evil refuge indeed.' (Q. 9: 73).

<sup>107</sup> 'Fight those who believe not in Allah nor the last day, nor hold that forbidden which hath been forbidden by Allah and His Messenger, nor acknowledge the religion of truth, even if they are of the People of the Book, until they pay the *jizya* (poll tax) with willing submission, and feel themselves subdued' (Q. 9: 29).

<sup>108</sup> Y Friedmann, *Tolerance and Coercion in Islam: Interfaith Relations in the Muslim Tradition* (Cambridge University Press, New York, 2003) 102.

deal with warfare seem to regard the military form of *jihad* as a valid or rather necessary means of dealing with unbelievers, particularly in cases where Muslims are attacked by them. Furthermore, under a military doctrine, developed during the era of *Abbasid* and *Umayyad* dynasties, which divided the world into two domains: *dar-ul-harb* and *dar-ul-Islam*, *jihad* may be waged for the purpose of spreading the Islamic faith.<sup>109</sup> The term *dar-ul-Islam* (house of Islam) includes countries wherein Islamic legal order and faith prevails, whilst the rest of the world is referred to as the ‘house of unbelief’ or the ‘house of war’ (*dar-ul-harb*). According to this doctrine, a legitimate Muslim country was in principle justified in waging *jihad* against *dar-ul-harb* states in order to bring the latter under the sway of Islamic order.<sup>110</sup> In fact, waging *jihad* in order to subdue the *dar-ul-harb* and bring it into the realm of *dar-ul-Islam* was deemed a religious duty of the caliph.<sup>111</sup> However, as the historical practice of concluding peace treaties or suspending hostilities with non-Muslim polities indicates, a permanent state of war between Muslim and non-Muslim communities did not necessarily call for the military form of *jihad*.<sup>112</sup> Khadduri, in this context, notes that:

In theory the *dar-ul-Islam* was always at war with *dar-ul-harb*. The Muslims were under a legal obligation to reduce the latter to Muslim rule in order to achieve Islam’s ultimate objective, namely, the enforcement of God’s law (the *sharia*) over the entire world. The instrument by which the Islamic states were to carry out that objective was *jihad* . . . , which was always justifiably waged against the infidels and the enemies of the faith. . . . But the *jihad* did not always mean war, since Islam’s objective might be achieved by peaceful as well as violent means.<sup>113</sup>

Here it is important to reiterate that the primary purpose of *jihad* is to strive against *non-believers* in the name of Islam. According to the Islamic worldview, the ‘People of the Book’ have a special status, ie, they are allowed to pursue their religions in line with their rituals and authoritative scriptures. However, they were not to proselytise or encroach upon the Muslims, and had to pay a poll tax known as the *jizya*.<sup>114</sup> Indeed, while the spread of Islam was

<sup>109</sup> A Ali, *The Spirit of Islam: A History of the Evolution and Ideals of Islam with a Life of the Prophet* (Christophers, London, 1922) 214–215.

<sup>110</sup> Some scholars assert that in the contemporary world many Muslim states have undermined Islamic principles and usurped the legal order; these states have not only failed in implementing the *sharia* properly, but they also responsible for creating social injustice, economic inequality, political and moral corruption. In order to eliminate such state of modern ignorance (*jahiliyyah*), *jihad* is argued to be launched first at home, thereafter expand abroad against infidelity. See Qutb (n 97) 78; also see JL Esposito, *Islam and Politics* (Syracuse University Press, Syracuse, 1987) 202; R L Euben, *Enemy in the Mirror: Islamic Fundamentalism and the Limits of Modern Rationalism* (Princeton University Press, Princeton, 1999) 60.

<sup>111</sup> See Khadduri (n 46) 10; Donner (n 61) 47–51.

<sup>112</sup> See An-Na’im (n 68) 150.

<sup>113</sup> M Khadduri, ‘Islam and the Modern Law of Nations’ (1956) 50 AJIL 2, 359.

<sup>114</sup> See (n 107); RC Martin, ‘The Religious Foundations of War, Peace and Statecraft in Islam’ in Kelsay (n 21) 98; B Lewis, *The Arabs in History* (Hutchinson’s University Library, London, 1950) 93–94.

mainly achieved through conquests and colonization, the chief concern of the conquerors was not to impose Islam by means of force upon those who professed a monotheist religion, and revered holy scriptures recognized by Muslims. These people were allowed to practise their religions under certain conditions imposed by the Islamic legal order. In contrast, as Lewis notes, 'for those who were not monotheists and possessed no recognized scriptures, the alternatives were harsher,'<sup>115</sup> since one of the main objectives of *jihad* was to proselytise unbelievers either through violent or non-violent means.<sup>116</sup>

Admittedly, the difference between Islam and other monotheistic traditions lies in its relatively belligerent character. Some scholars assert that Muhammad believed the day of final judgement was at hand and this gave him a sense of urgency; he wished to create a community of true believers who could lead a righteous life and be saved from the dreadful punishment of the last day. Muhammad's method for achieving this goal was not characterized by pacifism; in contrast, he preached a militant piety to fight against infidelity and ungodly immorality.<sup>117</sup> However, the characteristics of military means to achieve the objectives of Islam had never been straightforward, for the contours of the Islamic use of force discourse had been subject to various changes in accordance with the exegesis of a given difficulty and in line with the capabilities of the Islamic community to confront such a challenge. Not surprisingly, therefore, after the death of Muhammad and the so-called 'four rightly-guided caliphates,' the legitimacy of waging war, *jus ad bellum*, became more complicated in the Muslim tradition, because, starting from a relatively early stage, the Islamic world was no longer a politically unified polity. By the middle of the 8<sup>th</sup> century, there had been two independent and mutually hostile Muslim States: the *Abbasids* and *Umayyads*. From the 10<sup>th</sup> century onward, the number of independent Muslim States increased dramatically.<sup>118</sup> This politically fragmented structure of the Islamic world obviously affected the contours of Islamic *jus ad bellum* principles, for the interpretation and application of the *sharia* varied significantly from one Islamic country to another depending on the relevant socio-political context. The Islamic just war tradition became even more problematic when Muslim

<sup>115</sup> B Lewis, *The Middle East* (Weidenfeld & Nicolson, London, 1995) 57.

<sup>116</sup> See M Khadduri, 'International Law' in M Khadduri and HJ Lienbesny (eds), *Law in the Middle East*, (Vol 1, Middle East Institute, Washington, 1955) 355.

<sup>117</sup> See Donner (n 61) 47–48. In this context, Lewis, in his controversial article, 'The Roots of Muslim Rage,' argued that '[i]n Islam the struggle of good and evil very soon acquired political and even military dimensions. Muhammad . . . was not only a prophet and a teacher, like the founders of other religions; he was also the head of a polity and of a community, a ruler and a soldier. Hence his struggle involved a state and its armed forces. If the fighters in the war for Islam . . . are fighting for God, it follows that their opponents are fighting against God. And since God is in principle the sovereign . . . then God as sovereign commands the army. The army is God's army and the enemy is God's enemy. The duty of God's soldiers is to dispatch God's enemies as quickly as possible to the place where God will chastise them—that is to say, the afterlife.' B Lewis, 'The Roots of Muslim Rage' (1990) 266 *The Atlantic Monthly* 3, 49, 49.

<sup>118</sup> Aboul-Enein (n 41) 3.

rulers largely abandoned the practice of consulting the jurists to determine whether or not they were justified in waging *jihad*.<sup>119</sup> This delivered an additional blow to the development of the *sharia*—including Islamic laws of war—which had already been rendered dormant by the above-mentioned policy of closing the doors for innovative and independent thinking (*ijtihad*).

#### IV. THE NEED FOR A CONTEXTUAL READING OF *JIHAD* IN THE UNITED NATIONS ERA

To date, an authoritative line of demarcation between defensive and offensive *jihad* has not been clearly drawn. What is clear, however, is that during the Prophet's lifetime the notion of *jihad* acquired various meanings in line with the historical predicaments faced by the Muslim community. Accordingly, *jihad* moved from a pacifist character, to defensive and thereafter to a somewhat belligerent form to eliminate idolatry and immoral practices, as well as to universalize the influence of Islamic faith. The meaning of *jihad* has thus been subjected to various changes in accordance with the dictates of socio-political conditions. Therefore, an eclectic reading or rigid application of *jihad*, irrespective of the overall spirit of Islam and surrounding practical circumstances, is likely to be counterproductive.

Muslim jurists, in particular during the classical period of Islam (from the 7<sup>th</sup> to 13<sup>th</sup> centuries), had constantly sought to answer the pressing needs of international relations. The formulation of the categorical division of the world between *dar-ul-harb* and *dar-ul-Islam* in this context constitutes an excellent example of how jurists answered the practical impossibility of universalizing Islam across the globe.<sup>120</sup> The result of this division was in reality not a state of actual hostilities; instead it was rather a state of non-recognition of the enemy.<sup>121</sup> This did not, however, prevent Muslims from concluding treaties of peace with their enemies on numerous occasions. This state of affairs further induced some jurists, particularly *Shāfi'īs*, to coin another controversial category of *dar-ul-sulh* (bode of peace) or *dar-ul-ahd* (bode of covenant),<sup>122</sup> which refers to countries with which Islamic States have armistice, diplomatic ties, or peace agreements.<sup>123</sup> These covenants enabled both Muslims and non-Muslims to negotiate directly with one another and to maintain peaceful relations for long years.<sup>124</sup> The division of *dar-ul-sulh*,

<sup>119</sup> Donner (n 61) 51.

<sup>120</sup> It is to be noted that the practical abandonment of the Islamic military expansion occurred mainly from the seventeenth century onward, as the military and economic power of Islamic countries began to decline sharply before the European powers, which, during the age of imperialism, largely subjugated the Muslim world. See further A E Mayer, 'War and Peace in the Islamic Tradition and International Law', in Kelsay (n 21) 195–196.

<sup>121</sup> Khadduri (n 46) 14.

<sup>122</sup> Khadduri (n 115) 359–360.

<sup>123</sup> Abo-Kazleh (n 82) 46.

<sup>124</sup> See LB Ware, 'A Radical Islamist Concept of Conflict' in SC Pelletiere (ed), *Terrorism: National Security Policy and the Home Front* (Diane Publishing, US Army War College, 1995) 31–32.

despite its controversial and impermanent status,<sup>125</sup> was adopted in accordance with the Muslim realization once again that the obligation of military *jihad* could not be maintained actively against all external enemies who were much stronger than those faced during the rise of the Islamic faith.<sup>126</sup>

In the contemporary world, all Islamic States, with their diverse political, economic and social structures, are parties to international treaties of various kinds. Most importantly they are members of the United Nations (UN), and are thus bound by its Charter, which puts explicit emphasis on peace as its fundamental end, and expresses a determination ‘to save succeeding generations from the scourge of war.’<sup>127</sup> Modern international law, as it emerged following the Second World War, aims to maintain global peace and security by promoting amicable solutions of international disputes and establishing ‘conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.’<sup>128</sup> The UN Charter expressly stipulates that ‘armed force shall not be used, save in the common interest,’<sup>129</sup> and in the case of self-defence under article 51. With its explicit prohibition on the use of aggressive force, the UN Charter is clearly distinguished from the League of Nations, for Member States, following the unprecedented devastation of the Second World War, clearly renounced their sovereign prerogative to use or threaten to use force.<sup>130</sup> Today, article 2(4) of the UN Charter, which explicitly outlaws ‘the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the United Nations,’ is considered to belong to the customary norms of international law, and, as such, is binding upon all states.<sup>131</sup>

The prohibition against unilateral use of aggressive force constitutes today’s secular *jus ad bellum* principle and the primary norm of modern international law. Self defence, absent Security Council authorization, is

<sup>125</sup> Some jurists, in particular the *Hanafi* school, did not acknowledge this third division, arguing that if non-Muslim communities entered into treaty relations with Muslims, they would *ipso facto* become part of the *dar-ul-Islam*, and thus be entitled to the protection of Islam. See Khadduri, (n 46) 12–13.

<sup>126</sup> See M Parvin and M Sommer, ‘Dar-al-Islam: The Evolution of Muslim Territoriality and Its Implications for Conflict Resolution in the Middle East’ (1980) 11 *International Journal of Middle East Studies* 1, 1, 21.

<sup>127</sup> Charter of the United Nations, 24 October 1945, preamble.

<sup>128</sup> *ibid.*

<sup>129</sup> *ibid.*

<sup>130</sup> See MA Weightman, ‘Self-Defense in International Law’ (1951) 37 *Virginia Law Review* 1095, 1102–1108; D Kennedy, *Of War and Law* (Princeton University Press, Oxford, 2006) 75–76; C Hsiung, *Anarchy & Order: The Interplay of Politics and Law in International Relations* (Lynne Rienner Publishers, London, 1997) 51.

<sup>131</sup> MN Shaw, *International Law* (6<sup>th</sup> edn, Cambridge University Press, Cambridge, 2008) 1123. In *Nicaragua v United States*, the International Court of Justice (ICJ) described art 2(4) as a peremptory norm of international law from which Members cannot derogate. See *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Judgment of 27 June 1986, ICJ 14, ¶ 190.

accordingly the sole legitimate basis for the use of force (*casus belli*).<sup>132</sup> The modern law of nations, in this regard, not only abolished sovereign States' unqualified right to war as an instrument of State policy,<sup>133</sup> but also reduced the traditional just war reasons (including the recovery of property, securing redress for wrongdoings or avenging injuries) to only self defence.<sup>134</sup> The religious or moral justness of a given conflict is thus no longer relevant to an assessment of whether or not the use of force is compatible with the UN Charter. Indeed, as Kunz rightly observes, under the UN collective security system, the concept of *bellum justum* has been replaced by that of *bellum legale*, ie, the moral or religious notion of intrinsic justice no longer plays a role in determining the *legality* of warfare.<sup>135</sup> It follows that all member States of the UN, regardless of their political or religious affiliations, are debarred from resorting to the use of force, unless it is authorized by the Security Council or is undertaken for defensive purposes under article 51.

Being part and parcel of this secularized international legal system, Islamic States, as their recent practice demonstrates, usually justify their use of international force by reference to the UN Charter, rather than to the doctrine of *jihad*.<sup>136</sup> While governments of Muslim States sometimes invoke the rhetoric of *jihad* to rally popular support,<sup>137</sup> at the international level they often attempt to legitimize their position through legal means. Furthermore, almost all modern Islamic States formally denounce sectarian violence and terrorist attacks allegedly undertaken in the name of Islam.<sup>138</sup> Notably, the

<sup>132</sup> See Y Dinstein, *War, Aggression and Self-Defence* (4<sup>th</sup> edn, Cambridge University Press, Cambridge, 2005) 85; L Henkin, *How Nations Behave* (2<sup>nd</sup> edn, Columbia University Press, New York, 1979) 204–205; C Gray, *International Law and the Use of Force* (3<sup>rd</sup> edn, Oxford University Press, Oxford, 2008) 144–166.

<sup>133</sup> For more on the positivist legal position, which accorded the 'sovereign' the unqualified right to make war see K Nabulsi, *Traditions of War: Occupation, Resistance, and the Law* (Oxford University Press, Oxford, 2005) 241; SC Neff, 'A Short History of International Law' in MD Evans, *International Law* (2<sup>nd</sup> edn, Oxford University Press, New York, 2006) 29–38; A Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 *Harvard International Law Journal* 1.

<sup>134</sup> While some commentators maintain that humanitarian intervention, an unauthorized coercive action undertaken on humanitarian grounds, may be a legitimate cause for the use of force, compatible with art 2(4) of the UN Charter, this reading of the UN Charter is generally considered controversial. See Dinstein (n 132) 90; cf E Schroeder, 'Kosovo Crisis: Humanitarian Imperative versus International Law' (2004) 28 *Fletcher Forum of World Affairs* 181; J Mertus, 'Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo' (2000) 41 *William and Mary Law Review* 1751.

<sup>135</sup> See JL Kunz, 'Bellum Justum and Bellum Legale' (1951) 45 *AJIL* 528, 532.

<sup>136</sup> For a detailed analysis see Mahmoudi (n 54) 68 ff.

<sup>137</sup> For examples, see Kepel (n 57) 205 ff; J Rex, 'Islam in the United Kingdom' in ST Hunter (ed), *Islam, Europe's Second Religion: The New Social, Cultural, and Political Landscape* (Praeger, Westport, CT, 2002) 70.

<sup>138</sup> See Rehman (n 86) 60. For instance, Saudi Arabia, which is known for its strict application of the *sharia* principles, in its report to the Security Council on counter-terrorism expressed its 'resolute stance on rejecting terrorism in all its forms and manifestations,' and its desire for 'active cooperation and participation in and contribution to international and bilateral efforts to combat terrorism and the financing thereof.' Report Submitted by the Government of the

Organisation of the Islamic Conference (OIC),<sup>139</sup> which is currently composed of 57 Islamic countries, clearly expresses its determination to comply with the modern norms of international law. In its preamble, the Charter of the OIC affirms Member States' commitment 'to adhere . . . to the principles of the United Nations Charter . . . and international law.'<sup>140</sup> Likewise, the OIC Convention on Combating International Terrorism reaffirms the resolve of Islamic States to adhere 'to the principles of International Law and the United Nations Charter as well as all relevant UN resolutions on procedures aimed at eliminating international terrorism.'<sup>141</sup>

At the practical level, Islamic States have also frequently resorted to diplomacy or other methods of peaceful settlement of international disputes. Examples of such efforts include the conclusion of a peace treaty between Israel and Egypt,<sup>142</sup> the settlement of territorial questions between Qatar and Bahrain,<sup>143</sup> Egypt and Israel,<sup>144</sup> Emirates of Dubai and Sharjah,<sup>145</sup> Libya and Tunisia,<sup>146</sup> recourse to settlement of legal disputes between Algeria, Mauretania and Morocco,<sup>147</sup> Libya and the United Kingdom and the United States.<sup>148</sup> As these examples suggest, mechanisms of modern international law are being employed by Muslim States as a medium of peaceful settlement of international disputes.

It must be noted that the prohibition on the use of aggressive force in interstate relations and the necessity of resorting to alternative channels of dispute resolution may also be supported by reference to the Qur'an, which has abundant verses to bolster the idea that Islam takes peace as its

Kingdom of Saudi Arabia pursuant to para 6 of Security Council Resolution 1455 (2003), S/AC.37/2003/(1455)/42.

<sup>139</sup> The OIC is an international organization, founded in September 1969, which aims to promote close co-operation among Islamic countries in economic, political, cultural and spiritual matters. See further Ali (n 18) 195–196; Ali (n 47) 343; Rehman (4) 27 ff.

<sup>140</sup> Charter of the Organisation of the Islamic Conference (1972). Available at: <http://www.oic-oci.org/is11/english/Charter-en.pdf>.

<sup>141</sup> Convention of the Organisation of the Islamic Conference on Combating International Terrorism (1990). Available at: [http://www.oic-oci.org/english/convention/terrorism\\_convention.htm](http://www.oic-oci.org/english/convention/terrorism_convention.htm).

<sup>142</sup> Peace Treaty Between the State of Israel and the Arab Republic of Egypt (26 March 1979). Available at: <http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/Israel-Egypt%20Peace%20Treaty>.

<sup>143</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* I.C.J. Reports 2001, 40.

<sup>144</sup> *Boundary Dispute concerning the Taba Area (Egypt v Israel)* 27 ILM (1988) 1421.

<sup>145</sup> *Boundary Dispute between Dubai and Sharjah (Emirate of Dubai v Emirate of Sharjah)* (Arbitral Award of 19 October 1981) ILR Vol 91, 543 ff.

<sup>146</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* ICJ Rep 1982, 18.

<sup>147</sup> *Western Sahara Case*, Advisory Opinion, ICJ Rep 1975 12.

<sup>148</sup> *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v UK and Libya v United States of America)* ICJ Rep 1998, 115. For more on peaceful settlement of disputes in the Middle East see J Allain, *International Law in the Middle East* (Ashgate Publishing Limited, Aldershot, 2004) 229–262.



fundamental objective.<sup>149</sup> Observed from this perspective, it is arguable that the obligation of Islamic States to adhere to the principles of modern international law is compatible with the basic tenets of the *sharia*, which allows Islamic States to enter peace treaties with Muslims and non-Muslims alike, and recognizes the binding nature of such treaties in line with the maxim *pacta sunt servanda*.<sup>150</sup> The following Qur'anic verses support this point:

How can there be a league, before God and His Apostle, with the Pagans, except those with whom ye made a treaty near the sacred Mosque? As long as these stand true to you, stand ye true to them: for God doth love the righteous (Q. 9: 7); But if they violate their oaths after their covenant, and taunt you for your Faith,—fight ye the chiefs of Unfaith: for their oaths are nothing to them: that thus they may be restrained (Q. 9: 12); And fulfil (every) engagement, for (every) engagement will be enquired into (on the Day of Reckoning) (Q. 17: 34).

As noted earlier, tradition shows that Muhammad had engaged in various agreements with non-Muslim tribes and abided by the terms of such covenants.<sup>151</sup> In fact, entering into binding agreements or making alliances with non-Muslim communities with an intention to honour the terms and conditions provided therein has been a settled Muslim tradition, compliance to which is commanded by the primary sources of Islam, that is, by the Qur'an and the *sunna*.<sup>152</sup> It is well-known that both at the early, formative period and at the period of strength, the Prophet concluded strategic treaties with neighbouring Christian and Jewish tribes without insisting that they adopt Islam, but principally imposing a payment of contributions (*jizya*) to the Islamic state in return for protection.<sup>153</sup>

Arguably, therefore, lawfully concluded treaties (such as the UN Charter) are binding on Islamic States not only due to secular reasons, but also due to the fundamental principles of Islamic jurisprudence, which manifestly require fastidious observance of the obligations stemming from such agreements. As Hassan rightly observes, 'in Islam a contract or treaty is not merely a secular affair, but in fact a religious one; it is, therefore, safeguarded by divine as well as human sanctions.'<sup>154</sup> In the light of the above, one may safely conclude that Islamic *jus ad bellum* principles must be read contextually by subjecting the doctrine of *jihad* to the demands of modern international law, which has been developed with a view to preventing humankind from employing armed

<sup>149</sup> For references to the desirability of peaceful resolution of conflicts see, among others, Q. 49: 9, Q. 49: 10, Q. 8: 60–61, Q. 4: 90.

<sup>150</sup> See MC Bassiouni, 'Protection of Diplomats under Islamic Law' (1980) 74 AJIL 609, 614.

<sup>151</sup> For instance, in 625 he entered into a treaty with the Jewish tribes of Yatrib (Medina) and in 628 with the polytheistic Quraysh tribe, which had initially challenged Muhammad's prophethood and eventually forced the early Muslim community to emigrate to Medina. See Ramadan (n 24) 92.

<sup>152</sup> According to a *hadith*, the prophet had said that 'the Muslims are bound by their obligations, except an obligation that renders the lawful unlawful, and the unlawful lawful.' See Bassiouni (n 150) 615.

<sup>153</sup> See Watt (n 76) 214–220

<sup>154</sup> Hassan (n 7) 73.

aggression as an instrument for advancing political, economic or religious objectives.

#### V. CONCLUSION

The lack of a consensus over the conflicting verses of the Qur'an renders the task of clarifying the bounds of military *jihad* quite complex. What is more, Muslims no longer possess a central religious authority (caliph), like the Roman Catholic Pope, to interpret the divergent or equivocal passages. They are, therefore, dependent on the guidance of religious scholars and clerics of diverse schools of thought. To date, many texts of Islamic jurisprudence from all periods unfortunately remain unstudied or unpublished; or those that are published have not been unequivocally interpreted. The proliferation of independent Muslim States with their own distinct pre-Islamic cultural backgrounds has also contributed to the emergence of diverse juridical theories concerning warfare.<sup>155</sup>

There is no doubt that Islam spread its universal message both through persuasion as well as through force. It is also true that many battles during the expansionist phase of Islam were offensive in order to eliminate idolatry and spread the word of God. However, as noted above, military force represents only one dimension of *jihad*, which also contains peaceful and pious forms of struggle in the name of God. In fact, the latter form of *jihad*, which includes the purification of the soul and the inner struggle of each individual to become a righteous person, had been considered by Muhammad to be the greater *jihad* in Islam. Those who seek to reduce the application of *jihad* merely to the use of the sword generally adopt a literal interpretation of *jihad* by detaching it from its broader historical context. This reading of military *jihad* tends not only to ignore large numbers of peaceful Qur'anic verses or *hadith*,<sup>156</sup> but also to overlook the fact that Islam has constantly striven to meet the political and military exigencies of a given period by envisaging responsive strategies. The Islamic law of war was thus not developed in a vacuum; rather cultural, political, military and religious factors have played a significant role in shaping its legal contours. Rules on *jihad* have not remained stable but rather have been subject to change in line with the demands of practical realities. The same holds true for the most significant corpus of the Islamic law of nations, which has largely been developed during the so-called 'golden ages of Islam' where collective reasoning (*ijma*) and independent individual thinking (*ijtihad*) were strongly encouraged with the aim of preventing the *sharia*

<sup>155</sup> Donner (n 61) 31–32.

<sup>156</sup> As the influential philosopher Jawdat Said rightly stresses, those who advocate the military use of *jihad* generally fail to distinguish the contexts in which war under Islam is allowed or forbidden, and to take into consideration 'the abundance of *hadith* that prohibit the use of arms to the point where the Prophet orders the destruction of one's arms, even if unilaterally, and to rid one's self of one's sword.' Said (n 80) 141.

from becoming rigid or unresponsive in the face of changing socio-political contexts.<sup>157</sup> The categorical division of the world between *dar-ul-harb* and *dar-ul-Islam* and the invention of *dar-ul-sulh* or *dar-ul-ahd* are all examples of how the Muslim world attempted to remain dynamic by formulating flexible principles to interact with non-Muslim communities in the international arena.

Today, Islamic regimes, with their diverse composition and socio-political structures, are active subjects of the modern law of nations, which, with its universal character, has the potential to promote peaceful coexistence for the international community. The UN Charter, the centrepiece of modern international law, strictly prohibits recourse to warfare for the solution of international disputes, and renounces the use of aggression in national policy. By becoming parties to the UN Charter, Islamic States, just like other member States, have made a commitment not to resort to unilateral force beyond self defence and collective enforcement measures ordered by the Security Council, and strive to settle their international disputes through peaceful means. As noted earlier, for Muslims States, a breach of contractual obligations has both material (eg enforcement measures taken by the Security Council) and religious ramifications, for they are bound by the terms of lawful treaties not only because of secular reasons, but also because of the basic principles of the *sharia* that clearly command adherence to the legally concluded agreements: 'O ye who believe! Fulfil (all) obligations' (Q: 5:1). As Yusuf Ali, in his commentary on the Qur'an, explains, Muslims are to comply with their obligations, be it human or divine; hence if a State enters into a treaty it is the obligation of every individual living in that State 'to see that as far as lies in his power, such obligations are faithfully discharged . . . [because] truth and fidelity are parts of religion in all relations of life.'<sup>158</sup>

Islamic teaching, therefore, can be said to require Muslims to be faithful to the principles of the UN Charter, which aims to further the notions of international peace and security.

The modern political and military context of international relations also calls for a contextual analysis of the Qur'anic verses and the *hadith* on the doctrine of *jihad*. This may be achieved through identifying the specific conditions in which the response was revealed, and understanding the Qur'an and prophetic tradition in their unity. While the primary sources of Islam are deemed immutable, it is also clear that, in the face of ambiguity or apparent conflict in the Qur'anic injunctions or the *hadith*, the sources must be subjected to an independent and analytical scrutiny (*ijtihad*), which, particularly

<sup>157</sup> It is important to note that the most significant corpus of Islamic law of nations is not found in the primary sources of the *sharia*; it was developed within the process of juridical speculation (conducted in line with the core Islamic principles) during the height of Islamic power. In other words, Islamic jurisprudence, has been developed over the ages and as such it is man-made. See GM Badr, 'A Survey of Islamic International Law' (1982) 12 ASIL 56, 56.

<sup>158</sup> Ali (n 38) 242–243.

during the classical period of Islam, had significantly contributed to the development of Islamic law and theology. Any interpretation that does not duly take into account the relevant historical context along with abundant Qur'anic verses and *hadith* devoted to peace and tolerance will fall short of addressing the requirements of the modern world wherein wars, whatever motivation they carry behind them, possess the potential for humanity's ultimate destruction. Today, State aggression is no longer legitimate (or viable) in solving international disputes, nor does the Islamic community, which literally lives in the four corners of the world, require the use of the sword to spread the message of Islam. *Jihad*, as a result, should be conducted in accordance with the exigencies of present circumstances; that is, not by the sword, but by the heart and tongue.