

Revisiting the Jihad Ideology in Islamic International Law and its Appropriation by Nonstate Actors

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ABSTRACT

Jihad is quintessentially a religious doctrine and notwithstanding difficulties of conceptualisation, constitutes a foundational principle of both the *shari'a* (religious law of Islam) and Islamic International law (*siyar*). Jihad, in all its variants, is designed to further the will and dictates of God Almighty and must be distinguished from worldly struggles such as tribal rivalries and national conflicts or international wars. With its focus on Jihad, this article has the four key objectives. First, since within the historiography of *siyar*, the Jihad ideology has retained primacy and centrality, this article critically examines the key facets of this ideology. Second, in its historical incarnation, Jihad obligations were placed upon the whole of the Muslim community as *fard kifaya* (collective obligation). However, in more recent times the doctrine has been appropriated almost exclusively by terrorist organisations, who have insisted that Jihad is in fact *fard 'ayn* (individual obligation) to be pursued aggressively by individuals and non-State actors. This appropriation is manifested in the practices of terrorists and radical organisations including Al-Qaeda and the ISIS, as well as by the resurgent Taliban in Afghanistan. In evaluating the adoption and implementation of the Jihad ideology by contemporary terrorist or radical organisations, this article assesses the future direction of this doctrine within contemporary Muslim societies. Third, Jihad, overtime, adopted the form of Islam's *bellum iustum* and enunciated rules justifying or legitimising the use of force as well as determining and regulating the conduct of hostilities. The Jihad ideology segments and distinguishes between what came to be subsequently termed as *jus ad bellum* (the rules justifying use of force) and *jus in bello* (rules regulating the conduct of hostilities). This study investigates the various substantial juristic dissensions that exist in the conceptualisation of the pre-modern Jihad principles relating to *jus in bello* and *jus ad bellum*. Finally, while, the Jihad ideology continues to eclipse the historiography of Islamic international law, this article investigates and establishes that *siyar* also became engaged with the important subjects of the legal status of recognised non-Muslim communities (known as *dhimmi*s) within *dar-al-Islam* (the abode of Islam) as well as with issues pertaining to jurisdiction, commercial relations and diplomacy.

I. INTRODUCTION

Islamic international law (*siyar*) is one of the earliest developed systems and as integral to the *shari'a* (religious law of Islam) predates its western counterpart by several centuries. *Siyar*, is the plural of *sira*, a term that originally referred to 'life' or 'biography'. The term was subsequently recognised as the conduct of the Prophet Mohammad in his wars and the dealings

of Muslim rulers in international affairs. The *Qur'an* deploys the terminology on a number of occasions referring to 'travel', 'to move' or 'form'.¹ It is not entirely certain as to when the concept of *siyar* was formally invoked or deployed, though historical accounts suggest that this term was in vogue during the period of the early Abbāsīd caliphate (750–1258). It is probably the case that Imam Abu Hanifa (699–767) may have formally introduced the term as an integral part of the *shari'a*. In the early jurisprudence, the almost exclusive focus of *siyar* was on the laws of war and upon the Jihad ideology alongside a more specific examination of subjects such as *maghazi* (campaigns), *ghanima* (spoils) and *ridda* (apostasy).²

Within the historiography of Islamic International law, the Jihad ideology has retained primacy and centrality and therefore it is vital to highlight its relationship with *siyar*. Indeed, such great emphasis has been placed on Jihad and the laws of war that for many jurists and publicists, *siyar* became almost synonymous with Jihad and the terms were used interchangeably.³ Jihad—as subsequent analysis reveals—is quintessentially a religious doctrine, and not withstanding difficulties of conceptualisation, constitutes a foundational principle of both the *shari'a* and *siyar*. Jihad, in all its variants, is designed to further the will and dictates of God Almighty and must be distinguished from worldly struggles such as tribal rivalries and national conflicts or international wars. Overtime, Jihad, adopted the form of Islam's *bellum iustum* and enunciated rules justifying or legitimising the use of force as well as determining and regulating the conduct of hostilities.⁴ The Jihad ideology segments and distinguishes between what came to be subsequently termed as *jus ad bellum* (the rules justifying use of force) and *jus in bello* (rules regulating the conduct of hostilities).

In its historical incarnation, Jihad obligations were placed upon the whole of the Muslim community as *fard kifaya* (collective obligation), while in more recent times the doctrine has

been appropriated almost exclusively by terrorist organisations, which have insisted that Jihad is in fact *fard 'ayn* (individual obligation) to be pursued aggressively by individuals and non-State actors.⁵ This appropriation is manifested in the practices of terrorists and radical organisations including Al-Qaeda and the ISIS, as well as by the resurgent Taliban in Afghanistan. Modern understanding of the Jihad ideology also represents substantial juristic dissensions. These dissensions and differences are evident in the conceptualisation of the pre-modern Jihad principles of *jus ad bellum*. At the same time, modern juristic opinion remains divided upon the normative framework and applicability of *jus in bello* principles.⁶ While, the Jihad ideology continues to eclipse the historiography of Islamic international law, this article confirms that *siyar* also became engaged with the important subjects of the legal status of recognised non-Muslim communities (known as *dhimmis*) within *dar-al-Islam* (the abode of Islam)⁷ as well as issues pertaining to jurisdiction, commercial relations and diplomacy.⁸

This article is divided into six sections. After an introductory overview, the next section, section II, highlights the relationship of the Jihad ideology with *siyar* and in so doing examines the various permutations of Jihad as have featured within modern legal literature. Section III analyses the validity of the arguments put forward by terrorist and radical organisations including ISIS,⁹ Al-Qaeda and the Taliban and the assessment of their arguments by commentators and jurists. With the Taliban reportedly to return to power within months if not weeks, the operative relationship of the Jihad ideology within a constitutional, governmental framework may not remain a purely academic and juristic exercise.¹⁰ Section IV examines the contemporary understanding of those foundational principles of Jihad that specifically focus on regulating the conduct of hostilities and are recognised in modern humanitarian law as *jus in bello*. Section V offers an examination of residual aspects of *siyar*, which although inter-

connected to the Jihad ideology have nevertheless attracted autonomous attention from contemporary jurists. Section VI offers a number of concluding reflections on the subject.

II. *SIYAR*, AND THE *JIHAD* IDEOLOGY IN THE HISTORIOGRAPHY OF ISLAMIC INTERNATIONAL LAW

The Jihad ideology retains a central, yet controversial position in the historiography of *siyar*. The controversy arises in establishing the parameters of Jihad and its application within *siyar* as an instrument of war and global dominance. Modern Muslim exegetes disagree over the meaning and scope of Jihad, as framed by the *Quran*, the *Sunnah* and its subsequent ideological synchronization within the *Uṣūl al-fiqh*. These jurists take widely divergent positions on the content and scope of Jihad. These range from Jihad as a religiously inspired doctrine aimed at intensive (but passive) propaganda machinery to an exclusively violence-based strategy deployed as a tool for conquest and global expansion. The following analysis presents an overview of the contemporary approaches and modern interpretations of Jihad.

A. Pacific and Context-Based vision of Jihad

The jurists advocating the pacific and context-based interpretation of Jihad includes those that point to the passive origins of the doctrine with the *Quranic* instructions to Prophet Mohammad as evidence of the pacific and peaceful nature of Jihad. These jurists argue that the message of peace was interrupted violently by the prevalent forces of aggression. This school of thought include such renowned figures as Mahmoud Cherif Bassiouni, Mohammad Hashim Kamali and Hilmi M Zawati. In championing his argument, Zawati points to the terminological nexus

between *Jahada* (exerting oneself in labour and toil for the will of Allah) and Jihad,¹¹ whereas Hashim Kamali is anxious to assert that the initial and principal path of Jihad is that of peace, only digressed as a consequence of the aggression and undue belligerence of the unbelievers of Mecca.¹²

According to another contemporary scholar, Professor Khaled Abou El Fadl, 'Far from being a concept constrained to the idea of violent struggle and warfare, jihad embodies the very idea of righteous and ethically upright struggle. By definition, jihad cannot be a struggle pursued for unrighteous or ungodly reasons, and a struggle that is immoral or unjust cannot be a jihad. This is precisely what led many contemporary Muslims thinkers to invoke the dogma of jihad in an earnest effort to energize contemporary Muslims into spearheading a civilizational rebirth per which Muslims would contribute to all fields of humanistic endeavors.'¹³

In order to justify the ostensibly competing messages from the *Quran*, the *Sunnah* and the studies of founding fathers of the Islamic schools of jurisprudence, contemporary scholars belonging to this school seek solace in the context in which Jihad was ordained upon Muslims. Bassiouni makes the point that '[t]he verses revealed in Madina were less conciliatory because that was critical time in the early days of Islam which could have easily been defeated by its enemies. During the Makkan period, Muslims were persecuted and needed to migrate from Makka to Madina, leaving behind tribal affiliation, family, work, house, and fortune. . . [a]s the Madina Muslims became more secure, the Quran's exhortation to jihad by means of violence increased'.¹⁴ These scholars inevitably focus upon the *Hadith* in which Prophet Mohammad upon returning from the battle of Tabuk is reported to have commented: '[W]e returned from a lesser jihad to a great Jihad'.¹⁵

The aim of such interpretations is to portray Jihad as an essentially peaceful, non-violent ideology, which has overtime been defiled and contaminated by political expediency, greed or selfish interests. The injection of global dominance through the sword, according to these exegetes, is the product of a mentality of Muslim dynasties that took charge of Islam subsequent to the death of the Prophet Muhammad and the four rightly-guided caliphs. Therefore, it is argued that these apparent inconsistencies in the contemporary understanding of the Jihad ideology are not derived from the reading of the divine sources. Instead, the distorted image is adopted from the jurisprudence that was built by the founding founders of the Islamic *fiqh* in the second and third century of the Muslim calendar and those who followed them. The vision of an imperial Islam constructed by the founders of Islamic legal schools, according to these jurists, was to have a profound impact in conceptualizing the content of Jihad. As noted by Mairaj Syed

[t]he scholars of the eighth century who articulated the basic legal and moral doctrines of jihad constructed norms of warfare based on precedents they perceived as stemming from the time of the Prophet and his companions through the prism of a historical memory of victorious conquests that they saw as proof of Divine providence and a validation of their religious mission. It would be no stretch to describe the attitude of entitlement to power and conquest produced by the rapid imperial expansion as a Muslim Manifest Destiny. Put simply, the context in which Sunni religious scholars undertook the systematic elaboration of jihad as a legal doctrine was substantially different from the context that produced the Divine texts on which they relied. The imperial success of the Muslims following Muhammad's death no doubt informed the direction and substance of the construction of a systematic approach to warfare.¹⁶

The context-driven, shifts in the Jihad ideology highlighted by these aforementioned modern jurists, nevertheless, portray a message of inconsistency and incoherence, allowing critics to lodge a credible challenge. Amna Guellali, a contemporary scholar, is critical of what she describes as 'modern interpretations' of Jihad and she asserts that '[t]hese new modernist interpretations range from perfunctory ruses and tricks, to reinterpretation of the sources in order

to promote a defensive and peaceful vision of Jihad, to the theoretical reconceptualization of the whole system of Islamic law'.¹⁷ In making such a claim she suggests that the 'modernist' have adopted this path through 'an aggregative interpretation of verses, which are read in conjunction with one another. This method presents the advantage of expelling the prominence of war like verses and gives more weight to some other verses that were previously considered abrogated'.¹⁸

B. Literalist Vision of Jihad

Associated with the context-based view, is the literalist exposition of Jihad and advanced by a number of leading modern jurists. Foremost amongst these scholars is Professor Abdullahi Ahmed An-Na'im, who takes cognizance of the endemic violence and aggression within the seventh century Arabia. While considering the developmental stages of the *shari'a*, Professor An-Na'im takes the pragmatic yet literalist version of Jihad noting that '[i]t was simply conceptually incoherent and practically impossible for *Sharia* regulations of intercommunal (international) relations to have been based on principles of peaceful co-existence and rule of law in the modern sense of the terms'.¹⁹ In his interpretation of the *Quranic* verses revealed during the Medina phase of Prophet Mohammad, Khadduri advances the view that '[i]n the Madinan revelations, the jihad is often expressed in terms of strife, and there is no doubt that in certain verses the conception of jihad is synonymous with the words wars and fighting'.²⁰ Similar points are made by Dr James Busuttil who visualizes Jihad as warfare and conquest and as the most potent tool of converting the *Dar-al-Harb* (territory of war) in to *Dar-al-Islam* (the territory of Islam). He notes that:

the departure point of Islamic international law is the division of the world into Dar al-Islam, the Abode of Islam, and Dar al-Harb, the Abode of War. Islam teaches that, as the Divinely revealed religion, it will ultimately prevail over other beliefs. . . Classical Islamic theorists viewed the world as sharply divided between Dar al-Islam, where Shari'a ruled and Muslims could live at peace, and the rest of the world, which was viewed as both at war with Islam and a suitable subject for conquest, Dar al-Harb. The transformation of Dar al-Harb into Dar al-Islam is worked through jihad, which means (exertion in Allah's path). Jihad does not mean exclusively combat. Scholars have been uniform in accepting a range of behavior as satisfying the Muslim's jihad obligation, including verbal persuasion. Nonetheless, in most verses of the Qur'an, especially the ones revealed to Muhammad later in his life, jihad is synonymous with war.²¹

Synonymy of Jihad with perpetual war and permanent belligerency with non-believers has been suggested by a number of contemporary jurists. In equating the Jihad ideology with 'holy war' concept, Roda Mushkat argues that Muslims remain under a legal obligation to work towards achieving Islam's ultimate objective of the enforcement of the *shari'a*.²² Jihad, as a violent expression, also troubles Payne as he proclaims that '[v]iolence has been central, accepted element, both in the Muslim teachings and in the historical conduct of the religion. For over a thousand years, the religious bias in the Middle Eastern culture has not been to discourage the use of force, but to encourage it'.²³

A serious criticism of the literalists, inflexible school is its inability to perceive Jihad as a context driven ideology. There are failings to envision a shift in the nature of Jihad from an offensive aggressive agenda to defensive wars of self-preservation and subsequent existence as a pacific expression. This image of Jihad as an instrument of aggression and violence feeds into the fundamental interpretations the ideology.

C. Fundamentalist Vision of Jihad:

The twentieth and twenty-first centuries have witnessed a remarkable resurgence in the

proponents of fundamentalist visions of the Jihad ideology. Proponents of fundamentalist version of Jihad have included not only jurists, statesmen, but (as shall be examined in due course) *Jihadism* is a term currently connoted to non-state actors who aim to bring about political change through extreme violence and terror. A return to the pristine form of Islam with a focus upon Jihad has been a theme propagated by many recent campaigners. Rashid Rida, one such ideologue, has been an inspirational figure behind Egypt's Muslim Brotherhood movement and Jamat-e-Islami in British India. He is widely regarded as the founding father and modern architect of political Islam. Rida was the leading exponent of, what he regarded as the cleansing of Islam from its impurities which were to be achieved through the *al-salafi* movement: a call for the return to the original teaching of Islam.²⁴ He took the puritanical view of the State's adherence to the rule of God; any deviance from the word of God and His messenger was unacceptable.²⁵ Rashid Rida was to influence many of his younger comrades including Hassan al-Banna, founder of the Egypt's Muslim Brotherhood (founded in 1928) and Maulana Maududi leader and founder of Jamat-e-Islami in British India in 1941. Maulana Maududi was an Islamic revivalist, who—drawing upon wahabism and the writings of Rida and influenced by the Indian anti-imperialist Deobandi School of South Asia—led the revivalist movement of Islam. Maududi treated Jihad as an absolutely fundamental element of faith and asserted that 'Jihad is as much a primary duty of the Muslims concerned as are the daily prayers or fasting. One who shirks it is a sinner. His very claim to being a Muslim is doubtful. He is a hypocrite whose 'Ibādah and prayers are sham, a worthless, hollow show of devotion.'²⁶ For Maududi, it was not helpful to categorize Jihad as offensive or defensive since the ultimate 'objective of Jihad in Islam is to liquidate the suzerainty of an unIslamic system of life and replace it with the rule of Islam'.²⁷ Without any constraints attached, in Maududi's view, it is incumbent upon Muslims to conduct

the Jihad to establish the *shari'a*, and the subordination to a government within the Islamic State is only conditional upon it establishing an Islamic form of government.²⁸ Therefore according to the fundamentalists '[j]ihad is conceived as the means to establish . . . a system to bring about the enforcement of the Divine law. This objective cannot be achieved through preaching alone, but also through Jihad, armed struggle'.²⁹

Amongst contemporary modern scholars, Sayyid Qutb is probably the most vociferous advocate of radicalised interpretations of Jihad.³⁰ Qutb, was a strong proponent of the enforcement of the *shari'a* and an Islamic form of government. Himself disillusioned from secularism as well as western societies—which he believed were anti-Islam—Qutb argued that the west is a legitimate target of attack. Qutb's exclusive agenda was to ensure God's rule in this world and in order to achieve this goal, he campaigned for Jihad to be deployed. In his most revolutionary work, the *Milestones*, Qutb elucidated upon the meaning and content of Jihad and noted that 'Islam wants to employ all forces and means that can be employed for bringing about a universal all-embracing revolution. It will spare no effort for the achievement of this supreme objective. This far-reaching struggle that continuously exhausts all forces and this employment of all possible means are called Jihad.'³¹ Qutb remained unrestrained in his views and was also critical of those modernists who confine Jihad to a defensive strategy. For Qutb, '[t]his group of thinkers who are a product of the sorry state of present Muslim generation, have nothing but the label of Islam and have laid down their spiritual and rational arms in defeat. They say "Islam has prescribed only a defensive war" and think that they have done some good for their religion by depriving it from its methods'.³² Therefore, in so far as Qutb was concerned, the real rationale for Jihad is not so much the defence of Muslim lands but to ensure God's rule and *Quranic* laws and there is thus no reason for Muslims to refrain from violence to achieve this goal.³³

From the above consideration, it is evident that within the fundamentalist perspectives Jihad is not about the propagation of the message of Islam through peaceful means. Nor does Jihad connote a strategy to defend Islam, but the aim is to establish the rule of God and enforce the *shari'a* through violent means, if that is needed. Fundamentalists draw heavily upon those of the *Quranic* verses and the *Hadith* that suggests the dominance of Islam through violence and aggression. The expansionist and imperialist phases of Muslim history provides the ammunition with which to build a narrative justifying global conquest under the banner of Islamic Jihad.

III. Radical Re-visitations of the Jihad Ideology: The Islamic State, Al-Qaeda and the Taliban

Just as there has been a growth in fundamentalist ideological rhetoric of Jihad, there has also a significant mushrooming of non-State actors exclusively reliant upon radical and violent Jihad. These non-State actors include prominent terrorist organizations and entities such as Al Qaeda and ISIS though there are several other lesser-known groups including Boko Haram, Al-Shabaab, Tehrik-e-Taliban Pakistan and Lashkar-i-Jhanghvi.³⁴ In addition some of these groups notably ISIS as well as the Taliban have had power and territorial control. Drawing inspiration from the advocates of *Salafi* Islam and violent Jihad, the leaders of Al Qaeda have aimed to put to practice the ideals expounded by Sayyid Qutb and Maulana Maududi. A trilogy of ideals provides the inspirational force for violent Jihad. These are: *hakmiyyah*, *Jahiliyyah* and global Jihad. *Hakmiyyah* enshrines Allah's sovereignty over all matters including political and social and economic affairs; *Jahiliyyah* means ignorance prevalent as a consequence of the absence of the word of Allah and Prophet Mohammad. In order to ensure Allah's sovereignty and to end the period of *Jahiliyyah*, violent global Jihad needs to be pursued. Notwithstanding this

commonality, there are significant ideological variances in ensuring the pursuit of *hakmiyyah* and ending *Jahiliyyah*. Osama Bin Laden, Al-Qaeda's late leader was a champion of defensive Jihad, legitimising the use of force as justifiable self-defence against the West and Israel. Bin Laden called for the killing of Americans (civilians as well as the military) suggesting that such executions would be justifiable for the purposes of self-defence and liberation of Muslim territories. As shall be examined shortly, while from the theological point of view, killing of unarmed and innocent civilians is generally deemed unlawful in *siyar*, a minority of jurists and preachers have expressed the permissibility in instances where the civilians and non-combatants are in fact aiders and abettors of the enemy by action, opinion and material support.³⁵ Following Ibn Taymiyyah's dictates, Bin Laden declared that in the prevailing circumstances, Jihad is an individual duty, if the enemy embarks upon the task of destroying the Muslim countries and their homelands. According to this view, Jihad is in fact *fard 'ayn* (individual obligation) as opposed to—and as noted already—the traditionally held perception of *fard kifaya* (collective obligation) and that fighting may be conducted, aimed at civilian and military targets on the basis of what Bin Laden regarded as 'reciprocity'.³⁶ In his *fatwa*, Bin Laden declared:

The ruling to kill the Americans and their allies—civilians and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa Mosque and the holy mosque [Mecca] from their grip, and in order for their armies to move out of all the lands of Islam, defeated and unable to threaten any Muslim. This is in accordance with the words of Almighty God, “and fight the pagans all together as they fight you all together,” and “fight them until there is no more tumult or oppression, and there prevail justice and faith in God.

This is in addition to the words of Almighty God: “And why should ye not fight in the cause of God and of those who, being weak, are ill-treated (and oppressed)?—women and children, whose cry is: “Our Lord, rescue us from this town, whose people are oppressors; and raise for us from thee one who will help!””³⁷

The ISIS went further than Al-Qaeda in pursuing global Jihad and the ensuring *hakmiyyah* and enforcement of the *shari'a*. However, unlike Al-Qaeda, this terrorist organisation focused on the establishment of an Islamic Caliphate, a de facto *Jihadi* State that not only invoked submission from other States, emirates or organisations but also required all Muslims across the globe to join the Caliphate to combat what it regarded as evil and *Jahliyah*. Therefore, in order to legitimise its existence, a deliberate calculated effort was made by this terrorist group to transform into a terrorist State and with a promise to attract adherent from all across the globe. Abu Baker al-Bagdadi became the self-styled leader of this new 'State'. It is acknowledged by commentators that the ISIS made good usage of the social media to reinforce conservative religious symbolism and parables and apocalyptic themes such as the end of days, *Malhama al-kubra* (the prophesised battle at the end of times shortly before the judgment day) to support the utopian ideal of pristine Islamic caliphate to ensure supremacy of word of Allah and ensure the *shari'a*.³⁸

The ISIS was also actively engaged in applying the *takfiri* doctrine which justifies fighting and killing of fellow Muslims.³⁹ Applying this doctrine, ISIS found it justifiable to declare all of the governments in Muslim majority States as apostates and *fasida* i.e. consisting of 'corrupt rule'. ISIS rhetoric was that governments must be overthrown through violent Jihad and joined forcibly as part of the existing Islamic Caliphate. According to this philosophy of Jihad, everything that is unIslamic must be rejected and the killing of unbelievers (including the *shia*'s) is permissible.

While most of the Muslim jurists condemned the whole existence of ISIS, their campaigns and ideology,⁴⁰ the rise and exponential growth of ISIS captured the attention and interest of individuals, groups and communities from within the Islamic world as Muslim youth from Europe, Americas and Australia confounded both policy makers and jurists alike.⁴¹ It probably is the case that the de facto existence of ISIS, as a group has come to an end, but the ideology

propagated by the terrorist organisation appears to have survived; the sporadic killings; attacks and a continuing propaganda warfare by its adherents provides a consistent reminder of the enduring nature of its ideological imprint.⁴²

With the gradual destruction of ISIS, it is arguable that ISIS no longer poses a viable organizational threat. Instead, it was claimed that the mantle of being the world's deadliest terror group had been passed on to the then resurgent Taliban within Afghanistan.⁴³ Taliban, a Pashto language word represents the plural of 'Talib' and is taken from the Arabic and Urdu languages that means a 'student' in particular a religious student. The leadership of the Taliban having primarily studied in the Pakistani religious seminaries during the 1980's was nurtured and nourished in a virulent Jihad ideology that professed violent conflict as a means of enforcing the sharia.⁴⁴ Whilst the foundational principles of the Pakistani madrassas emerged from the less rigid Deobandi schools, the Taliban were indoctrinated by the then prevalent Wahabi scholarship aided and promoted by many Saudi preachers, including Osama Bin Laden. The undoubted Anti-Soviet conflict, followed by the exigencies of governance during 1996–2001 was frequently legitimised with the invocation of an intolerant and repressive Jihad ideology as a means of enforcing the sharia in its most illiberal expression.

In July 2021, the US, NATO and Allies forces all but departed from Afghanistan, leaving behind them a significant void in the security and administration of the country. Amidst this vacuum, the Taliban forces are rapidly making advances and it appears certain that they would sooner rather than later take control of Kabul. It is difficult to predict how the Jihad ideology would be re-shaped. Equally, there is a lack of clarity on the future political structures as much would depend on the nature of the conflict that awaits the Taliban forces and their leaders.⁴⁵ Michael Semple presents three possible scenarios with the underlying quintessential ambition of

the Taliban to enforce the sharia:

For as long as they survive as a cohesive movement, the Taliban will dedicate themselves to *shariat* promotion. However there are radically difference vantage points from which the Taliban might be pursuing their *shariat*-based mission. The underlying issue is what will have happened to Afghanistan's contest for state power. From the Taliban's perspective there are three plausible scenarios for Afghanistan in 2024. In the optimal case they will have re-captured Kabul, seized state power again and restored their Islamic Emirate. Alternatively, if the war has proved inconclusive, the Taliban will be in control of a large swathe of territory, but Afghanistan will have a dualist system, divided between areas of government control and the Taliban zone. Finally, if the Taliban were to reach political agreement with the Kabul Government, they could find themselves peacefully promoting *shariat* while participating in some form of broad-based government.⁴⁶

IV. SIYAR, JUS AD BELLUM AND JUS IN BELLO

Modern jurists, notwithstanding retaining substantial disagreements, generally tend to agree that Islam was a harbinger for humanization in warfare. Islamic *jus in bello* injected the inherent humanitarian precepts of *shari'a* as foundational principles of conducting wars. Abdullahi An-Na'im, who otherwise considers Jihad as an inherently aggressive phenomenon, nonetheless acknowledges that '[h]istorically, jihad was a positive phenomenon because it humanized the practice of warfare in the Middle Ages. First, *Sharia* prohibited the prevalent practice of using war for material gain or revenge. Second, the Prophet and his companions, acting in accordance with the *Quran* and *Sunna*, laid down very specific and strict rules for honorable combat'.⁴⁷ The honorable combat referred to by An-Na'im is reflective in innumerable aspects of warfare including the treatment of non-combatants, prisoners of war, booty and property rights at the end of war. Within Islamic jurisprudence, a generalized view prevailed that non-combatants who were unable to participate in hostilities were to be classed as protected persons and could not be attacked, killed or otherwise molested. Protected persons included minors (under the age of 15),

women,⁴⁸ the very old, blind, crippled, (mentally and physically) disabled, and the sick.⁴⁹ In addition, Dr. Mahmassani points out that '[m]onks and hermits who retire to a life of solitude in monasteries or cloisters, and other priests who do not associate with other people' were also to be categorized as protected persons.⁵⁰

The humanization principles of honorable conduct during warfare, as outlined above, were nevertheless subjected to what Khaled Abou El Fadl treats as 'classical Muslim jurists negotiat[ing] between functional, and perhaps practical, rules, and absolute moral imperatives'.⁵¹ As Abou El Fadl elaborates, this intriguing balance was dependent not only on religious association of the warring parties but was also based upon practical benefits and military advantages of warfare. Thus, the jurists established critical distinctions between the *harb al-bugha* (war against Muslims) and *harb ul-kuffar* (war against unbelievers). Moralism and moral imperatives suggested that exemptions were generated when fighting Muslims as opposed to warfare against non-Muslims.⁵² The broad, generalized regulations of war established to humanize the *jus in bello* were similarly subjected to functionalism and dependent on practical benefits and military advantages.

A key characteristic of the Islamic *jus in bello* is the principle that a conflict can only commence after a declaration of hostilities has been effectively pronounced and this declaration must take place regardless of the conduct or behaviour of the enemy combatant.⁵³ Classical jurists have pointed to the Prophet's tradition, whereby he never initiated a conflict without an appropriate warning. According to one report, the Prophet instructed Mu'adh bin Jabal, the commanding officer in charge of Muslim forces in Yemen:

Do not fight them until you invite them (to Islam); and do not commence combat until they initiate it; and if they initiate, do not respond (violently) until they have killed one of our soldiers; and when this happens confront them and ask them, 'Is there not a better recourse than this?'⁵⁴

Modern jurists are in consensus that distinctions were drawn between enemy combatants and enemy non-combatants, but disagree on matters of specific detail.⁵⁵ Munir has raised the issue that the broad immunity for women and children was lost where, for example, either they were mixed with other combatants or retained the capability of combat or subsequent damage to Muslims forces.⁵⁶ James Busuttil draws a distinction between non-combatants and civilian men; this latter category was 'presumed to be capable of fighting and therefore may be killed, whether they fight or not'.⁵⁷

According to Conrad, disability could only constitute an immunity from harm where physical disability was of a very substantial nature.⁵⁸ Thus, dumbness or deafness was insufficient illnesses to constitute an impediment.⁵⁹ Slaves were also categorized as protected persons, not so much because of their inability to fight, but because of their limited legal personality.⁶⁰

If the historiography in relation to the treatment of combatants reflects a lack of specificity, the rulings on the treatment for prisoners of war generates even greater complexity. Classical as well as modern jurists have relied on apparently conflicting *Quranic* verses to lay competing claims of enslavement, execution, release in exchange of ransom, release in exchange for Muslim prisoners, conditional or unconditional, honorable release.⁶¹ There is no doubt that within this narrative, the interaction of the humanizing instinct vis-à-vis the needs and practical expediency makes frequent appearances. Fadhil's earlier point about balancing morality with practical benefits is clearly played out when specifically adjudicating upon the immunities from execution of prisoners of war.⁶² Fadhil makes the assertion that:

competing trends within Islam [] battled for acceptance. The first trend believed that the failure to adopt Islam is a sufficient cause for execution. Women, children and others are not killed only because they are of potential use for Muslims. The second trend considered unbelief to be a grave crime, but it is not

sufficient cause for execution. After the fourth/tenth century, it is clear that the second trend becomes the prevailing and predominant view. Among the important competing trends. . . was a school of thought which argued that under no circumstances could a prisoner be executed.⁶³

Modern jurists such as Mohamad Munir and Hamidullah follow the school that suggests that the prisoners of war could never be executed and yet acknowledge the absence of a consensus.⁶⁴ In these circumstances, a number of discretionary principles have been identified, the Head of State having the ultimate decision-making authority to follow anyone of the following five courses:

1. Adult male captives are to be enslaved if this is necessary for weakening the enemy. Women and children cannot be killed.
2. Enslavement of captives, and their treatment as spoils of war.
3. Redemption by exchange for Muslim prisoner.
4. Redemption by payment of ransom (in money or property)
5. Benevolent release (*mann*) of prisoners of war.

Furthermore, the position of those captives who converted to Islam (either before or after being captured) has also remained the subject of intense scrutiny by Muslim jurists. The consensus view has emerged that such persons cannot be treated as prisoners of war since they enjoyed immunity for their life, property and young children. Muhammad Hamidullah, has conducted an examination of the activities expressly prohibited by *siyar*. In his assessment, the proscribed actions include a complete ban on the abuse and maltreatment of prisoners as well as their vindictive and precautionary killing.⁶⁵ Similarly there is a ban on torture, treachery and mutilation except in cases of reprisals. A form of prohibited action is the burning of enemy warriors alive and punishing with fire.⁶⁶ Notwithstanding the lack of consensus regarding the ultimate fate of prisoners of war, there is complete unanimity amongst modern jurists on the

prohibition of torture or abuse of prisoners while in detention. James Busuttil restates that principle noting that '[w]hile that fate is being decided, even if it is death, prisoners must be treated fairly, following Muhammad's directive in that regard. They should be clothed, protected from the heat, and fed. Feeding prisoners has a special place in the Shari'a because the Qur'an describes it as an act of a person bound for Heaven'.⁶⁷

Siyar principles also engage with the regulation of property rights during and at the conclusion of wars. The participants of Jihad are prohibited from unnecessary bloodshed or the destruction of property since the objective of warfare in Islam is neither aggression, acquisition of property, or the achievement of victory in the material sense.⁶⁸ However, much like other areas of *jus in bello*, there remain juristic disagreements.⁶⁹ One view, propounded by a significant number of jurists, including by the Hanafi scholars is that immunity of chattels and property is contingent upon the immunity attached to the owner. Thus, in the absence of the inviolability of the owner, this characteristic could not be associated to the concerned property or to the chattels. The point has been interpreted by Conrad, when he notes that

'[t]he permission to seize in the course of hostilities any object situated in the dar al-harb, irrespective of its being public or private property, is regarded as a consequence of the principle of (unlimited nuisance) applicable against all unprotected unbelievers. The immunity of property corresponds thus directly with the owner's inviolability, he is considered (mubbh) in wartime, unless he is protected by law or contract, he and his belongings are at the disposal of the Muslim community'.⁷⁰

Based on this interpretive approach, enemy property can either be transferred to the territory of Islam or if this course of action is not practical, then destruction, annihilation or dissemination is permissible.⁷¹ Thus animal slaughter of cows, cattle, sheep and poultry is allowed if these could not be returned to the Islamic territory and could instead be beneficial and advantageous to the enemy. A similar annihilation is permissible of properties belonging to

enemy including the destruction of fortresses, houses, fruit trees, crops and other plants. Outside of these broad generalisations, there remain differences of opinions amongst jurists from the Sunni schools of thought. In highlighting these differences, Khadduri makes the observation that:

[m]alik . . . prohibited only the slaying of the flock and the destruction of beehives. Abū Hanifa laid down the rule that everything that the jihādists cannot bring under their control must be destroyed, including the houses, churches, trees, flocks and herds. Shafi contended that everything which is lifeless must be destroyed, including trees; but animals can be slain only if the jihādists believed they would strengthen their enemies.⁷²

While classical jurists have vacillated and expressed preferences based on utilitarian arguments, a trend amongst contemporary jurists is to point towards the humanitarian practices of the Prophet of Islam, Prophet Mohammad and his immediate comrades. In this regard, the exhortation of the first Caliph, Abu Bakr presents a remarkable example. Abu Bakr in his celebrated address to the first Syrian expedition had pointed to his military in the following terms:

Stop, O people, that I may give you ten rules to keep by heart! Do not commit treachery, nor depart from the right path. You must not mutilate, neither kill a child or aged man or woman. Do not destroy a palm-tree, nor burn it with fire and do not cut any fruitful tree. You must not slay any of the flock or the herds or the camels, save for your subsistence. You are likely to pass by people who have devoted their lives to monastic services; leave them to that to which they have devoted their lives. You are likely, likewise, to find people who will present to you meals of many kinds. You may eat; but do not forget to mention the name of Allah.⁷³

Places of worship are regarded as sacrosanct and must not be degraded, damaged or destroyed.

The *Quran* notes the inviolability of places of worship in the following terms: “And had it not been for God’s repelling some men by means of others, cloisters, churches, oratories and mosques, wherein God’s Name is oft mentioned, would have been demolished”.⁷⁴ This verse of

the *Quran* is also cited in support of freedom of religion in Islam and against forced conversion to Islam.

V. *SIYAR* BEYOND JIHAD

While the Jihad ideology has provided a foci for *siyar*, there are many areas of interest which although inter-related to the laws of war have nevertheless attracted the attention of jurists and exegetes. These areas include diplomacy, neutrality, the legal status of *dhimmis*, their permits of residence and safe conduct as well as issues pertaining to jurisdiction and commercial relations amongst States. Modern jurists have considered the role of *siyar* in developing diplomacy and diplomatic immunities. While within *siyar*, diplomats are perceived to enjoy immunities not dissimilar to those provided in general international law, there are crucial differences amongst modern exegetes as to the rationale and motivation behind developing the institution of diplomatic immunities within the *shari'a* and *siyar*. According to Khadduri, diplomacy supplanted the strategic war objectives of Muslim rulers representing an integral part of Jihad.⁷⁵ He takes the view that diplomats or emissaries served the crucial purpose of initial invitation of Islam prior to commencement of hostilities and were significant agents for treaty and peace negotiations.⁷⁶

Placing emphasis on the political context, Khadduri takes the position that while emissaries were generally well looked after, in certain instances where peaceful relations broke down and if emissaries were found within Muslim territories, they risked being ill-treated and in extreme circumstances, killed.⁷⁷ Contrary to Majid Khadduri's views, there are a number of noted jurists who advocate the inviolability of diplomats and emissaries as an absolute principle

drawn from the *Quran* and the *Sunnah* of Prophet Mohammad. These include Mahmassani, Bassiouni and Hamidullah.⁷⁸ Bassiouni claims that diplomatic immunities remain firmly rooted within the *Quran* and *Sunnah*. In highlighting the exceptional nature of the respect and recognition for diplomats and envoys, Bassiouni notes that these practices were implemented by Prophet Muhammed at '[a] time when inviolability of envoys was ill recognized in the Arabian Peninsula'.⁷⁹ Mahmassani also praises the innovative nature of Muslim practices, noting that '[within] Islamic practice, diplomatic agents were generally received with gorgeous ceremony. Similar ceremonies were observed on their departure. These ceremonies were often accompanied by great hospitality and the display of extravagant pomp and lavish processions, in order to give the emissaries, the impression of the grandeur and power of the State'.⁸⁰ To facilitate international relations, and to provide and ensure adequate securities to foreign diplomats and emissaries, the *shari'a* also devised and developed the concept of *amân*.⁸¹ *Amân* could also be extended indefinitely to religious minorities permanently residing within Muslim jurisdictions and known as *dhimmis*.⁸² Modern jurists have analysed the position of *dhimmis* within pre-modern legal literature. Perceptions have varied although in contemporary literature Anver Emon's views appear to be balanced and objective: whilst acknowledging limitations upon the rights of the *dhimmis*, he nevertheless points to juristic positions to accommodate their specific rights.⁸³

The *siyar* concept of *amân* has been the subject of some, albeit limited, attention not only by Muslim exegetes but also by judges within Muslim jurisdictions. In a case from Pakistan, the High Court had to place reliance on the doctrine of *amân* for the want of any alternative legal, statutory or common law principles to accord legal capacity to the successor of enemy aliens to challenge the confiscation of their property.⁸⁴ The Court expressly commented on the absence of

similar legal as it noted that ‘amân is a pledge of security by virtue of which an enemy alien would be entitled to protection, while he is in the dar-ul-Islam [and] no procedural technicality can take away [these] rights’.⁸⁵

A relatively less explored area has been that of *siyar*’s interaction with international trade and commerce. Limited exposition of this subject has been conducted by western historians and jurists. These commentators have attempted to draw a relationship between *siyar*’s ideals of commerce and the historical trade practices in Muslim lands. According to Macgoliouth ‘[a] dissertation has been written on the commercial language of the Koran, showing that the tradesman Prophet could not keep free of metaphors taken from his business. ‘God’ he repeatedly says, ‘is good at accounts’. The Believers are doing a good business, the unbelievers a losing trade. Those who buy error for guidance make a bad bargain. . . .[e]ven when he was sovereign at Medinah he did not disdain to buy goods wholesale and make a profit by selling them retail; while occasionally he consented to act as auctioneer’.⁸⁶

Similarly in the words of Udovitch, the ports of Basra and Baghdad emerged ‘[a]s the hub of a flourishing international trade with goods as prosaic as paper and ink and as exotic as panther skin and ostriches streaming into Mesopotamia from the four corners of the globe. Here they were either sold, or transhipped by caravan to the Mediterranean coast or by caravan or ship on to further East. Sustaining long distance trade . . . regardless of its absolute volume, implies a fairly advanced degree of commercial techniques available to those engaged in this trade. Conversely, a clear understanding of the framework within which commerce was, or could have been carried out would offer us a valuable indicator of the level of this aspect of economic life’.⁸⁷ Jurists such as Udovitch consider that pre-modern *siyar* principles left an imprint on subsequent developments within international commercial laws. GM Badar refers to the Islamic

law origins of the Bills of exchange and assignments of debts, also referred to as the *hawalah*.⁸⁸ Similarly Dr Mahmassani, in his treaties on *siyar*, points to partnership laws including the *mufawada* (unlimited, universal partnership) and *inân* (limited investment partnerships), which had considerable global and regional influence.⁸⁹

VI. CONCLUDING REFLECTIONS

There is no doubt that much contemporary interest has focused around the Jihad ideology of *siyar* with many modern jurists continuing to treat Islamic international law as synonymous to the laws of war. Although controversy surrounds its parameters, the Jihad ideology nonetheless has retained a central position in the historiography of *siyar*. As this study has established, Jihad is quintessentially a religiously inspired doctrine and within its specific contextual framework was aimed at humanizing both the laws of peace and war. Over centuries, the counters of Jihad have been shaped and reshaped by the vicissitudes and fluctuations of circumstances and human experiences. The advent of modernity and the new world order has not meant the decay of the Jihad ideology. Instead, modernity and the new order present a civilizational challenge to the Muslim world. The strain upon contemporary Muslim societies has reignited demands for constitutional and global reforms through Jihad or *ijtihad*. It is thus not surprising to notice that the rhetoric and politics founded upon violent Jihad is increasingly finding relevance for Muslim masses all across the globe. As this study has explored, fundamentalist and radical Jihad with ambitions of global domination is not only finding expression at an ideological, utopian level, but the mantle for spearheading such campaigns has been handed down to entities such as ISIS and Boko Haram. The growth in appeal for these entities makes it impossible for modern jurists

not to analyze the validity of claims based on the Jihad ideology.

More broadly, it must also be acknowledged that the historiography of Islamic international law is both enriching and fascinating. As one of the earliest developed systems (and one that is firmly entrenched within the *shari'a*) the *siyar* principles have historically generated considerable influence on the growth and development of Islamic civilizations. For over fourteen centuries, Islamic civilizations have contributed to the milieu of the social, economic, cultural and anthropological enterprise. Frequent disappointment has been expressed at the 'eurocentrism' and the negation of the contributions made by *siyar* in such areas as treaty law, international commercial law and trade law and the peaceful settlement of disputes.⁹⁰ Professor An-Na'im has rightly suggested that '*Islamic traditions, . . .* are part of the jurisprudential sources that may be tapped in the quest to identify "general principles of law recognized by civilized nations"'.⁹¹ There is some, albeit limited, evidence to suggest that Islamic jurisprudence is increasingly gaining the interest and attention of modern scholars, policy makers, jurists and judges of the International Court and Tribunals.⁹² It is anticipated that the historiography of Islamic international law, will over time, cover further ground with research into the aforementioned areas.

Endnotes

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¹ For an analysis see M Khadduri, **The Islamic law of Nations: Shaybānī's Siyar** (Baltimore: John Hopkins Press) 1966 at p. 39.

² See John Kelsay, 'Al-Shaybani and the Islamic Law of War' 2 *Journal of Military Ethics* (2003) 63–75, at p. 66.

³ R Murphy and MM EL Zeidy 'Prisoners of War: A Comparative Study of the Principles of International Humanitarian Law and the Islamic Law of War' 9 *International Criminal Law Review* (2009) 623 at p. 638; MK Masud, 'Clearing Ground: Commentary to "Sharia and the Modern State"' in AM Emon, MS Ellis and B Glahn (eds.) *Islamic Law and International Human Rights Law* (Oxford: Oxford University Press) 2012, 104–114, at p.111.

⁴ See SS Ali and J Rehman, 'The Concept of Jihad in Islamic International Law' 10 *Journal of Conflict and Security Law* (2005) 321.

⁵ M Khadduri, 'International Law', in M. Khadduri and H. J. Liebesny (eds.), *Law in the Middle East* (Washington, D.C.: Middle East Institute) 1955, at p. 353, according to which jihad was a required duty of the whole Muslim community, binding the Muslims en masse rather than individually. See also M. Hamidullah, *Muslim Conduct of State: Being a Treaties on Siyar, that is Islamic Notion of Public International Law, Consisting of the Laws of Peace, War and Neutrality, Together with precedents from Orthodox Practices and Precedent by a Historical and General Introduction* (Lahore: Sh Muhammad Ashraf) 1977 at p. 163, and accompanying footnotes.

⁶ K Abou El Fadl, 'The Rules of Killing at War: An Inquiry into Classical Sources' Vol. LXXXIX *The Muslim World* (1999) 144.

⁷ AM Emon 'Religious Minorities and Islamic Law: Accommodation and the Limits of Tolerance' in AM Emon, MS Ellis and B Glahn (eds.) above n.3, at pp. 323–343.

⁸ See for example, MC Bassiouni, 'Protection of *Diplomats* under Islamic Law' 74 *American Journal of International Law* (1980) 609.

⁹ ISIS (Islamic State of Syria and Iraq) also called as ISIL 'Islamic State of Iraq and the Levant'. It has taken name of 'the Islamic State'. This entity is also known in the Arabic language as *ad-Dawlah al-Islāmiyah fī 'l- 'Irāq wa-sh-Shām*, resulting in the acronym Da'ish, Da'eesh, or DAESH. On 29 June 2014, ISIS announced the establishment of a worldwide Caliphate and Aub Bakr al-Baghdadi appointed himself its Caliph. For further analysis see G Wood, 'What ISIS Really Wants' <http://www.theatlantic.com/features/archive/2015/02/what->

isis-really-wants/384980/ (March 2015) <last visited 3 August 2021>; For Background information See Report of the Independent International Commission of Inquiry on the Syrian Arab Republic: Rule of Terror: Living under ISIS in Syria, A/HRC/27/CRP.3 (19 November 2014); UNSC, 2016 Report of the Secretary General on ISIS UN Doc.S/2016/92 (29 June 2016).

¹⁰ See [The Taliban are making gains in Afghanistan - and showing off their progress to the world | World News | Sky News](#) (last accessed 4 July 2021).

¹¹ HM Zawati, *Is Jihād a Just War? War, Peace, and Human Rights Under Islamic and Public International Law* (Lewiston, NY, Edwin Mellen Press, 2001) at pp. 13–14

¹² HM Kamali, ‘Jihad and the Interpretation of the Quran: Contextualising Islamic Tradition’ in MC Bassiouni and A Guellali (eds.) *Jihad and its Challenges to International and Domestic Law* (Hague Academic Press) 39–58, at p. 41.

¹³ Khaled Abou El Fadl, ‘Islamic Law, Jihad and Violence’ (2017) 16 *UCLA J Islamic & Near E L* 1 at 10.

¹⁴ MC Bassiouni, ‘Evolving Approaches to Jihad: From Self-Defence to Revolutionary and Regime-Change Political Violence’ in MC Bassiouni and A Guellali (eds.) above n.12, 11–38, at p. 20.

¹⁵ HM Kamali, ‘Jihad and the Interpretation of the Quran: Contextualising Islamic Tradition’ in MC Bassiouni and A Guellali (eds.) above n.12, at p. 43.

¹⁶ M Syed, ‘Jihad in Classical Legal and Moral Thought’ in J Neusner, BD Chilton, RE Tully (eds.) *Just War in Religion and Politics* (Lanham, Maryland: University Press of America) 2013, 135–162, at p. 138. (footnotes omitted).

¹⁷ A Guellali, ‘Understanding the Discourses on Jihad in Islam Through Classical and Modern Narratives’ in MC Bassiouni and A Guellali (eds.) above n.12, 59–86, at p. 75.

¹⁸ *Ibid*, at p. 78.

¹⁹ AA An-Na’im ‘Upholding International Legality Against Islamic and American Jihad’ in K Booth and T Dunne (eds.), *Worlds in Collision: Terror and the Future of Global Order* (London, Palgrave, 2002) 162–172, at 166.

²⁰ M Khadduri, *War and Peace in the Law of Islam* (Baltimore: John Hopkins University) 1955 at p. 56.

²¹ See Further, J Busuttil, ‘Slay them where you find them—Humanitarian Law in Islam’ 30 *Military Law and Law Review* (1991) 111 at p. 116.

²² R Mushkat, ‘Is War Ever Justifiable? A Comparative Survey’ 9 *Loyola of Los Angeles International and Comparative Law Journal* (1987) 227, at p. 302.

²³ JL Payne, *Why Nations Arm* (Oxford: Basil Blackwell) 1989, at p. 121.

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- ²⁴ See M Fakhry, 'The Theocratic Idea of Islamic State in Recent Controversies' 30 *International Affairs* (1954) 450 at p. 454.
- ²⁵ A Afsaruddin, 'Obedience to Political Authority: An Evolutionary Concept' in MA Muqtedar Khan (ed.) *Islamic Democratic Discourses* (Lanham: Lexington Books) 2006, 37–62, at p. 43.
- ²⁶ S Abul A' la Maududi, *Towards Understanding Islam* (The Islamic Foundation: Markfield) 1981, at p. 100.
- ²⁷ S Abul A' la Maududi, *Jihad in Islam* (Lahore: Islamic Publications) at p.4. <http://www.scribd.com/doc/92165822/Abul-Ala-Maududi-Jihad-in-Islam#scribd> (last accessed 5 May 2021).
- ²⁸ Afsaruddin, 'Obedience to Political Authority: An Evolutionary Concept' in MA Muqtedar Khan (ed.) above n.25, 37–62, at p. 44.
- ²⁹ A Guellali, 'Understanding the Discourses on Jihad in Islam Through Classical and Modern Narratives' in MC Bassiouni and A Guellali (eds.) above n.12, 59–86, at p. 80.
- ³⁰ See WE Sheppard, 'Sayyid Qutb's Doctrine of Jahiliyya' 35 *International Journal of Middle Eastern Studies* (2003) 521–545.
- ³¹ S Qutb, *Milestones* (Delhi: Markazi Maktaba Islami) 1981 at p. 71.
- ³² Ibid. p. 63.
- ³³ DR Springer, JL Regens and DN Edger, *Islamic Radicalization and Global Jihad* (Washington: Georgetown University Press) 2009, pp. 33–36.
- ³⁴ For a list of designated terrorist organizations see U.S. Department of State 'Foreign Terrorist Organizations' [Foreign Terrorist Organizations - United States Department of State](#) <last visited 5 August 2021>.
- ³⁵ See Sheikh Waheb al-Zuhili, 'Islam and International law' 87 *International Review of the Red Cross* (2005) 269 at p. 282
- ³⁶ See Kelsay above n.2 at p. 74.
- ³⁷ World Islamic Front Statement, 'Jihad Against Jews and Crusaders' Posted 23 February 1998 [World Islamic Front Statement Urging Jihad Against Jews and Crusaders \(fas.org\)](#) <last accessed 28 July, 2021>.
- ³⁸ See J Stone 'ISIS Attacks Twitter Streams, Hacks Accounts to Make Jihadi Message Go Viral' 17 June 2014 <last accessed 28 July 2021>; C Winter, 'Media Jihad: The Islamic State's Doctrine for Information Warfare' (The International Centre for the Study of Radicalisation and Political Violence) <last accessed 2 August 2021>.

³⁹ See G Wood, above n.9.

⁴⁰ Professor Mona Siddique regarded ISIS as pursuing a contrived ideology justifying barbarism and sexual control. See M Siddique ‘A Contrived Ideology justifying Barbarism and Sexual Control’ *The Guardian* Sunday 24 August 2014. [Isis: a contrived ideology justifying barbarism and sexual control | Mona Siddiqui | The Guardian](#) <last accessed 3 August 2021>. Professor An-Na‘im labelled ISIS as Demons from Hell, See Abdullahi A An-Na‘im, ‘*Shari‘a* and Constitutionalism in Islamic Societies: Dialectics of Legality and Normativity’ Annual Socio-Legal Lecture, Centre for Socio-Legal Studies University of Oxford, 20 May 2015.

⁴¹ See e.g. *The Guardian*, ‘Police Considers forced deradicalisation as terror arrests soar’ (14 May, 2015).

⁴² See, O Roy, *Jihad and Death: The Global Appeal of Islamic State* (Hurst & Company, London) 2017; Hans Myhre Sunde, Jonathan Ilan and Sveinung Sandberg, ‘A cultural criminology of “new” jihad: Insights from propaganda magazines’ (2021) 17(2) *Crime, Media and Culture: An International Journal* at 271.

⁴³ ‘TERRORISM ISIL is no longer the world’s deadliest terrorist group’ [ISIL is no longer the world’s deadliest terrorist group - Vision of Humanity](#) (last accessed 6 July 2021)

⁴⁴ See Sayed Hassan Akhlaq ‘Taliban and Salafism: a historical and theological exploration’ 1 December 2013 openDemocracy [Taliban and Salafism: a historical and theological exploration | openDemocracy \(researchgate.net\)](#) (last accessed 6 July 2021); also see Michael Semple, ‘The Taliban in 2024’.

⁴⁵ See T Ruttig, ‘Have the Taliban Changed?’ CTC Sentinel (March 2021) at p. 1.

⁴⁶ Michael Semple, ‘The Taliban in 2024’.

⁴⁷ AA An-Na‘im, ‘Islamic Law, International Relations, and Human Rights: Challenge and Response’ 20 *Cornell International Law Journal* (1987) 317 at 326.

⁴⁸ See Hilmi M Zawati, ‘Jus ad Bellum and the Rules of Engagement in the Islamic Law of Nations – Shaybānī’s Siyar,’ Lecture delivered at a conference on: Islam, Politics and Law: Perspectives on International Humanitarian Law between Universalism and Cultural Legitimacy: The Hague, 27 November 2009; SRRN-id2193122 pdf (27 October 2013).

⁴⁹ S. Mahmassani, ‘The Principles of International Law in the Light of Islamic Doctrine’ 117 (1) *Recueil des Cours de l’Académie de Droit International* (1996) 205, at p 303.

⁵⁰ See *ibid* at p. 301.

⁵¹ Abou El Fadl, above n.6, at p. 144.

⁵² *Ibid.* at p. 144.

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- 53 Abou El Fadl, above n.13, at p. 21.
- 54 Quoted in al-Zuhayli, *Athar al-Harb*, 156.
- 55 Mahmassani, above n. 49, at p. 301.
- 56 See M Munir, ‘The Protection of Women and Children in Islamic Law and International Humanitarian Law: A Critique of John Kelsay’ XXV *Hamdard Islamicus* (July–September 2002) 69 at p. 74.
- 57 Busuttil above n. 21, at p.122.
- 58 See G Conrad ‘Combatant and Prisoner of War in Classical Islamic Law *Studies*’ 20 *Military Law and Law Review* (1981) 269, at p. 277.
- 59 Ibid. p. 279.
- 60 See Conrad, above n.58, at p. 282.
- 61 Busuttil above n.21, at p.123.
- 62 Busuttil, above n.21, at p. 122.
- 63 Fadl, above n.6, at pp. 152–153.
- 64 M Munir, ‘Debates on the Rights of Prisoners of War in Islamic Law’ 49 *Islamic Studies* (2010) 463–492, at p.466; Hamidullah, above n. 5, at pp. 205–208.
- 65 Ibid. 205–208.
- 66 See Conrad, above n.58, at p. 288.
- 67 Busuttil, above n.21, at p. 125.
- 68 See Ali and Rehman, above n. 4 at p. 340.
- 69 See Mahmassani, above n.49, at p.309.
- 70 See Conrad, above n.58, at p. 284.
- 71 See Mahmassani, above, n. 49, at p. 310.
- 72 Khadduri, above n.20, at p. 103.
- 73 For further analysis see Ali and Rehman, above n. 4, at p.341
- 74 The *Quran*, Verse XXII:40.
- 75 Khadduri, above n. 20, at p. 250.

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- 76 Ibid at p. 250–251.
- 77 Ibid at p. 244.
- 78 Hamidullah, above n. 5, at p. 139; Bassiouni, above n. 7; Mahmassani above n. 49.
- 79 See for example, *Bassiouni*, above n. 7 at p. 612.
- 80 Mahmassani, above n. 49, at pp. 265–266.
- 81 See J Rehman, *Islamic State Practices, International Law and the Threat from Terrorism: A Critique of the ‘Clash of Civilizations’ in the New World Order* (Oxford: Hart Publishing) 2005, at p 49.
- 82 N Yakoob and A Mir, ‘A Contextual Approach to Improving Asylum Law and Practice in the Middle East’ in YY Haddad and BF Stowasser (eds.), *Islamic Law and the Challenge of Modernity* (Rowman and Littlefield: Rowman and Littlefield Publisher) 99–132 at p. 109
- 83 AM Emon ‘Religious Minorities and Islamic Law: Accommodation and the Limits of Tolerance’ in AM Emon, MS Ellis and B Glahn (eds.) above n.3, 323–343, at p. 333
- 84 *State Bank of India v. The Custodian of Evacuee Property*, West Pakistan, (1969) PLD, Lahore, 1050.
- 85 Ibid. at p. 1062.
- 86 DS Macgoliouth, *Muhammad and the Rise of Islam* (London and New York, G.P Putnam Sons, 1905) 69.
- 87 AL Udovitch ‘Commercial Techniques in Early Medieval Islamic Trade’ in DS Richards (eds.), *Islam and the Trade of Asia: A Colloquium* (Oxford, Bruno Cassirer, 1970) 37–66 at 38.
- 88 GM Badr, ‘Islamic Law: Its Relations to Other Legal Systems’ 26 *American Journal of Comparative Law* (1978) 188, at 196.
- 89 Mahmassani, above, n.49, at pp. 271–272; D de Santillana ‘Law and Society’ in J Schacht and CE Bosworth (eds.), *The Legacy of Islam* (Oxford: Clarendon Press, 1974) 309–310.
- 90 Rehman, above n. 81, at p. 44; Khaliq, makes the point that ‘[i]n the 19th and early 20th century, international law was still seen by leading European and North American commentators as being European and distinctively Christian in nature. In their relations with non-Europeans from the 15th until the mid-20th century, the approach of European international lawyers reflected a strong belief in not only European religious but also racial, civilizational and cultural superiority’ U Khaliq, ‘The International Court of Justice and its Use of Islam: Between a Rock and a Hard Place’ 2 *Oxford Journal of Law and Religion* (2013) 98 at p. 107.
- 91 AA An-Na’im, ‘Islam and International Law: Toward a positive mutual engagement to

realize shared ideals' 98 *ASIL Proceedings* (2004) 159 at p. 166 (footnotes omitted).

⁹² See generally Khaliq, above n. 90.