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Jihad Re-examined: Islamic Law and International Law

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* Senior Lecturer in Law, Brunel University, London. Qur'an verses cited in this article were based on the following translations: Abdullah Yusuf Ali, *The Meaning of the Holy Qur'an* (Birmingham, Islamic Dawah Centre International, 2007); Abdullah Yusuf Ali (revised and edited by the Presidency of Islamic Researches, IFTA, Call and Guidance), *The Holy Qur'an: English Translation of the Meanings and Commentary* (Al-Madinah Al-Munawarah, King Fahd Complex, 1413 AH); and Muhammad Muhsin Khan and Muhammad Taqi-ud-Din Al-Hilali, *Interpretation of the Meanings of the Noble Qur'an* (Riyadh, Darussalam, 1999).

Abstract

The Arabic term jihad, which means striving, endeavouring, and struggling, has widely been conceptualised to include ‘armed struggle’ as one of the forms of jihad. Jihad has been used by political leaders in some Islamic States or increasingly by non-State actors either to justify the use of force (e.g. Al-Qaeda’s 1996 ‘Declaration of War against the Americans Occupying the Land of the Two Holy Places’, and the 1998 World Islamic Front pronouncement signed by Osama bin Laden and Ayman al-Zawahiri, among others, declared ‘jihad against Jews and Crusaders’) or to condemn the use of force as unlawful. Jihad has inspired many recent armed conflicts including that of the resistance to the US war against Afghanistan in 2001, the US-UK invasion and occupation of Iraq in 2003, the struggle for self-determination in Kashmir since 1947, the Palestinian struggle for reclaiming land from Israel since 1948 and the on-going armed conflict in Somalia. In recent times, the application of jihad to justify the use of force or its condemnation has raised questions regarding the compatibility of the jihad concept as conceptualised in Islamic law or by leaders of some Muslim groups with modern norms of international law as enunciated in the United Nations Charter. This article seeks to examine the evolving concept of jihad in Islamic law, its contemporary application and its compatibility with international law, in particular the relationship between jihad, freedom of religion/belief, and the prohibition on the use of force.

I. Introduction

The concept and nature of jihad has evolved since the early developments of Islam in the seventh century, often reflecting the prevailing socio-political and economic realities. It has been a subject of discussion among several publicists, particularly after the September 11, 2001 attacks.¹ Historically, jihad has been used in several contexts, ranging from self-defence against aggression, pre-emptive self-defence, conquest, revolutionary and regime-change political violence to terrorism. This article examines the concept of jihad in Islamic law and its compatibility with (and impact on) International law.

This article is divided into five sections. Following this introduction, section 2 reviews the concept of jihad and the objectives of armed jihad from an Islamic perspective. Section 3 identifies and examines three different contemporary approaches to jihad — namely the ‘modernist,’ ‘fundamentalist,’ and ‘moderate’ approaches. Section 4 examines the application of jihad in the form of the use of force in self-defence in the early stages of

1. See, e.g., JIHAD IN ISLAMIC HISTORY (Michael Bonner ed., 2006); RICHARD BONNEY, JIHAD: FROM QUR’AN TO BIN LADEN (new ed. 2004); ANDREW G. BOSTOM, LEGACY OF JIHAD: ISLAMIC HOLY WAR AND THE FATE OF NON-MUSLIMS (2005); DAVID COOK, UNDERSTANDING JIHAD (2005); Fawaz Gerges, THE FAR ENEMY: WHY JIHAD WENT GLOBAL (2005); MARY HABECK, KNOWING THE ENEMY: JIHADIST IDEOLOGY AND THE WAR ON TERROR (2006); FARHAD KHOSROKHAVAR, SUICIDE BOMBERS: ALLAH’S NEW MARTYRS (David Macey trans., Pluto Press 2005); ADNAN MUSALLAM, FROM SECULARISM TO JIHAD: SAYYID QUTB AND THE FOUNDATIONS OF RADICAL ISLAMISM (Praeger 2005); WALID PHARES, FUTURE JIHAD: TERRORIST STRATEGIES AGAINST AMERICA (Palgrave Macmillan 2006).

Islam. Section 5 considers defensive jihad (*jihad ad-daf*) and pre-emptive jihad (*jihad at-talab*). Section 6 examines whether the use of force (armed/military jihad) is compatible with contemporary international law, focusing mainly on the prohibition on the use of force, except in self-defence, in the UN Charter. In doing so, this section reviews the evolving nature of jihad, noting that jihad has been used in several contexts, ranging from self-defence against aggression through conquest and more recently to indiscriminate attacks on civilians. In section 7, it is concluded that the contemporary politicisation and manipulation of jihad as a legitimising basis for political violence and terrorism is a threat to freedom of religion or belief, peace and security which is contrary to the object and purpose of Islamic law and modern international law. It is suggested that a contemporary doctrinal approach to Jihad involving the use of force is necessary to restrict Jihad to self-defence. This would be equivalent to the contemporary international law of self-defence subject to the limitations on the methods and means of warfare in accordance with contemporary international humanitarian law.

II. Conceptualising Jihad: Islamic Perspectives

The meaning, nature and scope of jihad are traced back to the primary and secondary sources of *Sharia* (Islamic law). The primary sources are the Qur'an (believed to be the very word of God)² and the Hadith/Sunnah (narrations concerning words and actions of Prophet Muhammad).³ The secondary sources, which represent the human understanding and articulation of the primary sources, are Ijma (consensus among Muslim jurists in a particular age on a question of law) and Qiyas (analogy, the process of reasoning rendering possible the extraction of the legal norm/rule — *hukm* — from previously cited sources). These secondary sources derive from the interpretation of the primary sources. This section considers briefly the meaning of jihad and its objectives on the basis of the above sources.

A. What is Jihad?

In recent times, the Arabic term jihad has been misused due to misunderstanding, manipulation or distortion of its true meaning. Linguistically, the term *jihad* is derived from the Arabic word '*Jahd*', which means fatigue, or from the Arabic word '*Juhd*', which

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2. The Qur'an is believed by Muslims to be the word of God (Allah) that was repeatedly revealed from Allah to Prophet Muhammad verbally through the angel Jibril (Gabriel) over a period of approximately twenty-two years, two months, and twenty-two days, beginning in 610 CE when he was forty, and concluding in 632 CE, the year of his death. The Qur'an is divided into 114 chapters (Surah), 30 sections (Juzu) and 666 verses.
 3. See *al-Jaami' al-Sahih al-Musnad al-Mukhtasar min Umur Rasool Allah wa sunanihi wa Ayyamihi* (There are six canonical sets of hadith collections, Sahih Bukhari, Sahih Muslim, Tirmidhi, Abu Dawud, Nasa'i, and Ibn Majah, which were evaluated and gathered during the 8th and 9th centuries. The two most authoritative of these are considered by Muslims to be those of Sahih Bukhari, the cited source, and Sahih Muslim. There is considerable overlap amongst the six books so that Ibn al-Athir al-Mubarak ibn Muhammad, *Jami' al-Usul fi ahadith al-Rasul*, 15 volumes (Bayrut: Dar al-Kutub al-'Ilmiyah, 1998), which gathers together the hadith texts of all six books, deleting repeated texts, has about 9500 hadith). See also Al-Shahid al-Thani, *Dirayat al-hadith*, in ABD AL-HADI AL FADLI, INTRODUCTION TO HADITH (Nazmina Virjee trans., ICAS Press 2002).

means effort. Thus, the term jihad literally means to strive, or to exert one's efforts, or to earnestly work towards a desired goal or to prevent an undesired one. In other words, it is an effort (which makes one feel fatigued) that aims at bringing about benefit or preventing harm. This meaning of jihad is stated in the Holy Qur'an, Chapter 61 (As-Saff) verses 10-12 as follows:

10. O you who believe! Shall I lead you to a bargain that will save you from a grievous penalty?

11. That you believe in Allah and His Messenger, and that you strive (your utmost) [do 'jihad'] in the cause of Allah, with your property and your persons: that will be best for you, if you but knew!

12. He will forgive you your sins, and admit you to gardens beneath which rivers flow, and to beautiful mansions in gardens of eternity: that is indeed the supreme achievement.⁴

Thus, in the above context, any striving, any effort, or any work or thing one does in the cause of Allah or to further the cause of Islam, seeking nothing but the pleasure and good will of Allah, is considered to be *jihad-fi-Sabeelillah* (i.e. striving in the cause of Allah).⁵ Jihad in the sense of striving to achieve a desired goal or to prevent an undesired outcome applies to all aspects of life — civil, political, economic, social, educational, religious and cultural. For example, the term may be used to describe the struggle against colonialism, neo-colonialism, poverty, illiteracy, disease, discrimination, aggression and other forms of human rights violations.

Given the broad nature of the term jihad, it can be used to mean several aspects depending on the context in which it is used. According to Ibn al-Qayyim, jihad is of four stages: *jihad al-nafs* (striving against the self), *jihad al-shayateen* (striving against the accursed Satan or devils), *jihad al-kuffaar* (striving against the disbelievers) and *jihad al-munaafiqeen* (striving against the hypocrites [those who undermine Islam from within]).⁶

In addition to the above classification, there could be other forms of jihad, for example, jihad against leaders of oppression and innovation in Islam.⁷ The first two types of jihad, *jihad al-nafs* (jihad against one's self) and *jihad al-Shaytaan* (jihad against the accursed Satan), are considered to be obligatory upon every adult individual Muslim who is capable (*fard 'ayn*), while the last two kinds of jihad, jihad against non-Muslims and jihad against the hypocrites, and jihad against leaders of oppression and innovation, are considered to be obligatory to the community as a whole (*fardkafaayah*).⁸ The doctrines of *fard 'ayn*

4. QUR'AN, *As-Saff* 61:10-12.

5. See QUR'AN, *Al-Hajj* 22:78 ("And strive in Allah's cause as you ought to strive, (with sincerity and under discipline)").

6. Sheikh Muhammed & Salih Al-Munajjid, *Fatwa 20214: Ruling on Jihad and Kinds of Jihad*, ISLAMQA.COM, <http://www.islam-qa.com/en/ref/20214/jihad> (last visited Aug. 13, 2011).

7. HADITH No. 867 (Sahih Muslim) (The Prophet said: "Every invented matter [in Islamic religion] is an innovation (bid'ah), and every innovation is an act of going astray, and every act of going astray will be in Hellfire"); Hadith Bukhari, Fath al-Baari, No. 2697, narrated by Aishah (the Prophet said: "Whoever innovates something in this matter of ours [Islamic religion] that is not a part of it will have it rejected").

8. Muhammed & Al-Munajjid, *supra* note 6.

(individual duty) and *fardkafaayah* (communal duty) are not stated in the Qur'an, but were developed by jurists to regulate several Qur'anic injunctions including jihad. As a result, there are some variations among Muslims as to whether a particular form of jihad at a particular time and circumstance is to be characterised as *fard 'ayn* and *fardkafaayah*.⁹ One view is that jihad becomes an individual obligation upon all Muslims if the enemy occupies a Muslim land. The major problem with the classification of armed jihad as an individual obligation is that in the absence of centralised authority, it is open to global misuse by individuals.

Jihaad al-nafs (striving against one's self) is a personal, spiritual, and moral struggle. It takes several kinds, including the following five aspects: striving to learn the teachings of Islam, personally striving to act in accordance with what one has learned, striving to call others to Islam, teaching those who do not know about it, and striving to bear patiently the difficulties involved in calling people to Islam. In this context, jihad does not involve the use of non-peaceful means. It is claimed by some commentators that *jihaad al-nafs* is the 'greater' form of jihad. This view is based on the following statement attributed to Prophet Muhammad (hadith), who reportedly said to his companions when they returned from a military campaign (battle of Badr), "We have come back from the lesser jihaad to the greater jihad." They said, "Is there any greater jihaad than jihaad against the kuffaar?" He said, "Yes, *jihaad al-nafs* [jihaad against the self]."¹⁰

If this statement is correct, striving against oneself for goodness and piety would be more recommended than striving against others in a military campaign. It is true that striving against the others (e.g. non-believers and hypocrites) cannot take place (or be sustained) until one strives and forces oneself to do it, or until one's self submits and accepts to strive against others. However, the above hadith is classified by many Islamic scholars as 'weak' (*da'eef*) and 'not *saheeh*' (unauthentic)¹¹ because of its questionable chain of transmission to the Prophet. In addition, the hadith contradicts the *saheeh* (authentic) hadith of the Prophet, indicating that fighting in the cause of Allah is the highest degree of jihad.¹² It is not mentioned in any of the authentic books of hadith. In any case, jihad, meaning fighting in the cause of Allah, is not devoid of the jihad of the self. It is well known that the self always prefers safety, loves life, and hates death. Therefore, the Muslim who chooses the path of jihad has to resist the urges of his or her self, the discouragements of

9. See e.g., HASAN AL-BANNA, *On Jihad*, in FIVE TRACTS OF HASAN AL-BANNA 150 (Charles Wendell trans., Berkeley, University of California Press, ed., 1978) (1906-1949) (describing armed jihad as an individual obligation); HASAN AL-HUDAYBI, DU'AT LA QUDAT 136 (Dar al-Tiba'awa-al-Nashr 1977) (stating that armed jihad could only be carried out as a communal duty because it requires "management, organisation and guidance"); ABD AL-RAHIM, HILF AL-IRHAB: TANZIM AL QAIDA 110-117 (Markaz al-Mahrusa 2004) (stating that armed jihad today is an individual duty).

10. See Sheikh Muhammed & Salih Al-Munajjid, *Fatwa 10455: Greater and Lesser Jihad*, ISLAMQA.COM, <http://www.islam-qa.com/en/ref/10455> (last visited July 30, 2011).

11. See, e.g., SHAYKH IBN 'UTHAYMEEN, *Fataawa Manaar al-Islam*, 2:421; see also 1 ENCYCLOPEDIA OF JIHAD 62-63 (Raj K. Pruthi ed., New Delhi, Anmol 2002); Sheikh Muhammed & Salih Al-Munajjid, *Greater and Lesser Jihaad*, ISLAMQA.COM, <http://www.islamqa.com/en/ref/2407/doc> (last visited July 30, 2011); ABI ZAKARYYA AL DIMASHQI AL DUMYATI, THE BOOK OF JIHAD (814, Hijri).

12. See *infra* Part 4.

those surrounding him or her, and the spread of *wahan* (love of life and hatred of death) in the *Ummah* (community or nation).

Even if this hadith were to be authentic, the Prophet reportedly said it after returning from the battlefield of Badr. This indicates that it was not intended to undermine the armed jihad for purposes of self-defence. According to the logic of the hadith itself, Muslims should start with the 'lesser jihad', and then gradually progress to the 'greater jihad' as is the norm of Islam in all aspects: to start with the lesser and then go to the greater. If seen in this context, the hadith does not undermine the significance of military jihad required to deal with aggression.

Jihad al-Shaytaan requires warding off the doubts that Shaytaan stirs up to undermine faith and striving against Shaytaan to ward off the corrupt desires that he provokes. This form of jihad is primarily spiritual and does not involve the use of force.

Jihad against non-Muslims and hypocrites is of four kinds: with the heart, the tongue (using words and ideas), one's wealth, and oneself physically. The hypocrites are characterised as 'enemies' of Islam in the Qur'an.¹³ Thus, jihad against the hypocrites involves more striving against them along the lines of using words and ideas. The same applies to the jihad against the non-Muslims.¹⁴ However, as shown below, once the non-Muslims fight Muslims, jihad against them entails *qital* (physical fighting) in self-defence.¹⁵

Jihad against the leaders of oppression seeks to protect against injustice and corruption, paying particular focus on the weak, more vulnerable, and oppressed. The Qur'an addresses jihad against oppression in the following passage:

And why should you not fight not in the cause of Allah, and of those who, being weak, are ill-treated (and oppressed)? — Men, women, and children, whose cry is: 'Our Lord! Rescue us from this town, whose people are oppressors; and raise for us from You one who will protect; and raise for us from You one who will help!'¹⁶

It is important to note that the Qur'an requires Muslims not to be unjust; and not to support an unjust person.¹⁷ In some hadith, jihad against injustice is referred to as the best type of jihad. Tariq ibn Shihab Al-Bajali narrated that a man asked the Prophet while they were about to go into the battlefield, "Which is the best jihad?" The Prophet said, "Telling the truth to a despotic ruler".¹⁸ On the basis of this hadith, jihad against domestic injustice and corruption has priority over external jihad against non-Muslims and aggression. This form of jihad is of three kinds. First, jihad with one's hand (i.e., physical jihad, fighting) if one is able. If that is not possible then it should be with one's

13. See QUR'AN, *Al-Munafiqun* 63:4.

14. See QUR'AN, *An-Nahl* 16:125 ("Invite all to the way of your Lord with wisdom and beautiful preaching; and argue with them in ways that are best and most gracious.").

15. See QUR'AN, *Al-Baqarah* 2:190, 193; *Al-Anfal* 8:39; *At-Tawbah* 9:5, 12, & 29.

16. See QUR'AN, *An-Nisa'* 4:75. At the material time, Muhammad's life and the lives of his followers were threatened: they were mocked, assaulted, insulted and beaten. Some of Muhammad's followers were imprisoned; others were shut out of trade, business and social relations.

17. See QUR'AN, *Hud* 11:113 ("And incline not to those who do wrong, or the Fire will seize you; and you have no protectors other than Allah, nor shall you be helped.").

18. See YUSUF AL-QARADAWI, *FIQH AL-JIHAD (THE JURISPRUDENCE OF JIHAD)* 173 (Wahba Bookshop, Cairo 2009).

tongue (i.e., by speaking out). If that is not possible then it should be with one's heart (i.e., by hating the violations and feeling that these are wrong).¹⁹ It is incumbent on Muslims in all Arab and Muslim States to strive hard through peaceful means to restore their political freedom since denial of political freedoms aggravate resort to armed jihad. In this regard, authorities in these States must allow multi-party systems, as well as free and fair elections that are meant to represent all sectors of the society.

In short, jihad is a comprehensive term which is composed of several elements, only one of which involves the use of force or military means. Indeed, references to jihad in the Qur'an are found in twenty-four verses, most of which provide for a spiritual and peaceful non-violent understanding of jihad, such as being steadfast in the faith, being patient,²⁰ the peaceful propagation of Islam, and personal and financial sacrifice.²¹ Jihad is more general and more comprehensive than fighting or war. This is supported by the fact that several Qur'anic Makkan verses made references to jihad at a time when there was no military jihad, which took place in Madinah. Some of these verses, which prove that jihad does not always mean fighting, are stated below:

But verily thy Lord,— [t]o those who leave their homes [a]fter trials and persecutions,— [a]nd who thereafter strive [a]nd fight for the Faith [a]nd patiently persevere,— [t]hy Lord, after all this [i]s Oft-Forgiving, Most Merciful.²²

O Prophet! [S]trive hard against [t]he [u]nbelievers and the [h]ypocrites, [a]nd be firm against them. Their abode is Hell,—[a]n evil refuge indeed.²³

O Prophet! Strive hard [a]gainst the [u]nbelievers[a]nd the [h]ypocrites, [a]nd be harsh with them. Their abode is Hell,—[a]n evil refuge (indeed).²⁴

This is consistent with the fact that Islam calls for peace, cooperation, and maintaining justice, and provides for the happiness and welfare of humanity as a whole, regardless of religion. This fact is declared in the Qur'an when it states "Allah commands justice, the doing [o]f good, and giving to kith [a]nd kin, and He forbids [a]ll indecent deeds, and evil and rebellion: He instructs you, [t]hat ye may receive admonition."²⁵

The absolute minimum level of jihad is to strive against one's own soul and temptations and control one's unlawful desires. The highest level or epitome of jihad in Islam is to be

19. See *Sahih Muslim*, in HADITH 1:79 (narrated by Abu Sa'id al-Khudri:

I heard the Messenger of Allah (PBUH) as saying: "He who amongst you sees something abominable should modify it with the help of his hand; and if he has not strength enough to do that, then he should do it with his tongue; and if he has not strength enough to do even that, then he should (at least abhor it) from his heart; and that is the least of faith.")

20. See, e.g., QUR'AN, *An-Nahl* 16:41–42:

To those who leave [t]heir homes in the cause [o]f Allah, after suffering oppression, We will assuredly give [a] goodly home in this world;[b]ut truly the reward [o]f the [h]ereafter will be greater. If they only realised (this)! (They are) those who persevere [i]n patience, and put [t]heir trust on their Lord.

21. For a discussion of these verses, see M. Cherif Bassiouni, *Evolving Approaches to Jihad: From Self-Defense to Revolutionary and Regime-Change Political Violence*, 8 CHI. J. INT'L L. 119 (2007).

22. QUR'AN, *An-Nahl* 16:110.

23. QUR'AN, *At-Tawbah* 9:73.

24. QUR'AN, *At-Tahrim* 66:9.

25. QUR'AN, *An-Nahl* 16:90.

ever ready to willingly engage in military jihad (if need be) which may lead to the loss of one's life and property to further the cause of Allah. Military jihad is one of the most questionable and controversial aspects of jihad because of its implications on national and international peace and security as well as its compatibility with international law. What, then, are the objectives of military jihad?

B. Objectives of Military Jihad

The major objectives of military jihad are repelling aggression, preventing persecution against Muslims, fighting those who do not respect treaties on the cessation of hostilities and restoration of peace.²⁶ The intent is not to examine these objectives in detail, but to outline these objectives in order to provide the context for the following discussion.

The first objective of military jihad in Islam is to repel aggression²⁷ — any armed attack, whether this attack or aggression is against the Islamic religion, or Muslim country or any part of Muslim territories. An attack against religion includes any temptation that aims to turn Muslims back from Islam, any persecution against Muslims due to their religious beliefs, any hindrance or prevention of Islamic *da'wah* (inviting people to Islam), and any act of aggression or harm against *du'ah* (Islamic preachers). In addition, it includes any attack against the lands of Islam or the Muslim countries, and any violation of the people's blood, property, sanctified rights, and sacred places. Similarly, any aggression against an individual's life, wealth, property, family, and progeny should be resisted.

The second objective is to prevent persecution against Muslims that is aimed at turning Muslims back from Islam and at securing the freedom of teaching Islam.²⁸

The third objective is to save weak members of society from the injustice of tyrants and their domination.²⁹

The fourth objective is to fight those who do not respect treaties (on the cessation of hostilities) and who do not keep covenants concluded voluntarily with Muslim States.³⁰

26. See AL QARADAWI, *supra* note 18, pt. 4.

27. QUR'AN, *Al-Baqarah* 2:190-192 (Prophet Muhammad is reported to have stated in an authentic narration, "Whoever amongst you is killed while protecting himself, his family, his property, his honor, his land, his country is a '*shaheed*' (martyr)").

28. *Id.* at 2:193 ("And fight them on [u]ntil there is no more [p]ersecution [a]nd the religion becomes Allah's."); QUR'AN, *Al-Anfal* 8:39 ("And fight them on [u]ntil there is no more [p]ersecution, [a]nd religion becomes Allah's in its entirety [b]ut if they cease, verily Allah [d]oth see all that they do").

29. QUR'AN, *An-Nisa* 4:74-75:

Therefore let those fight in the way of Allah, who sell this world's life for the hereafter; and whoever fights in the way of Allah, then be he slain or be he victorious, We shall grant him a mighty reward. And what reason have you that you should not fight in the way of Allah and of the weak among the men and the women and the children, (of) those who say: Our Lord! cause us to go forth from this town, whose people are oppressors, and give us from You a guardian and give us from You a helper.

30. QUR'AN, *Al-Anfal* 8:55-57:

Surely the vilest of animals in Allah's sight are those who disbelieve, then they would not believe. Those with whom you make an agreement, then they break their agreement every time and they do not guard (against punishment). Therefore if you overtake them in fighting, then scatter by (making an example of) them those who are in their rear, that they may be mindful.

The final objective is to impose internal peace by force between the conflicting parties. This kind of fighting is directed to Muslims, not non-Muslims, in order to cease armed conflict between Muslim parties. It is regarded as a collective duty of the Muslim nation. The first individuals who should fulfill this duty are the rulers and the highly qualified Muslims.³¹

In sum, the objectives of jihad are closely linked to the crime of aggression and violations of human rights, particularly freedom of religion. In the absence of aggression and with the guarantee of human rights, including religious freedom, the resort to military jihad would be difficult to justify. This is especially the case where there exists effective means for the peaceful resolution of issues likely to lead to a resort to the use of force.

III. Islamic Approaches to Jihad

The Qur'an and hadith deal with several aspects of jihad. These have been subject to varying interpretations since they lend themselves to multiple readings and extrapolations. As a result there are at least three dominant approaches to jihad among contemporary Muslims. In this article, these approaches are referred to as 'modernist,' 'fundamentalist,' and 'moderate'.

The first category ('modernist') seeks to promote spiritual jihad and to cast a veil on armed jihad. This category, developed mainly by the Sufis, claims that jihad primarily refers to the inner struggle of being a person of virtue and submission to God in all aspects of life. It is asserted that Jihad's major concern is to raise spiritual values and behavioural virtues, considering this to be the greater/major jihad: ongoing struggle against Satan and one's vain desires. This approach to jihad is criticised on the basis that it contradicts the clear injunctions in the Qur'an and hadith which refer to jihad as involving warfare. Indeed the 199 references to jihad in the Bukhari collection of hadith are to warfare. Thus, the exclusive limitation of jihad to spiritual aspects is problematic. One view is that this approach to jihad seeks to keep the Muslim Ummah unarmed with military power thereby leaving its religion, its home, and its sanctuaries with no guards to protect and defend them in case of an armed attack.

The second category ('fundamentalist'/extremist) advocates the legitimacy of fighting all nonbelievers in Islam in order to defend or allegedly to propagate Islam. This is done without distinction between those who fight Muslims and those who are at peace with Muslims. This category claims that its approach is supported by much evidence from the Qur'an, hadith, Seerah (biography of the Prophet), history, sayings of the jurists, and ideology of Islam. The evidence advanced for this view is summarised below:

31. QUR'AN, *Al-Hujurat* 49:9-10:

And if two parties of the believers quarrel, make peace between them; but if one of them acts wrongfully towards the other, fight that which acts wrongfully until it returns to Allah's command; then if it returns, make peace between them with justice and act equitably; surely Allah loves those who act equitably. The believers are but brethren, therefore make peace between your brethren and be careful of (your duty to) Allah that mercy may be had on you.

1. The Qur'an states: "And fight them on until there is no more Fitnah — tumult or oppression, and there prevail justice and faith in Allah."³² The Qur'an further states, "And fight them until there is no more Fitnah — tumult or oppression, and there prevail justice and faith in Allah altogether and everywhere; but if they cease, verily Allah does see all that they do."³³ It is believed that the word Fitnah, which is mentioned in these two verses, means 'disbelief and worshipping of others along with Allah [polytheism]', according to some *tafseer* (exegetes of the Qur'an).³⁴ However, Fitnah in this verse has been understood by some jurists as referring to fighting the disbelievers to end any temptation that aims at turning Muslims, especially the weak among them, back from Islam, and returning them to disbelief after they have believed in Islam.

2. The verse of the sword (Ayat al-Sayf),³⁵ which allegedly abrogated about 114 verses or 140 verses. This verse, according to the proponents of abrogation (naskh),³⁶ obligates fighting all disbelievers. This is stated to be the verse that reads, "Then, when the sacred months have passed,³⁷ then kill the Mushrikun [the idolaters] wherever you find them, and capture them and besiege them, and lie in wait for them in every ambush."³⁸ While the doctrine of abrogation is supported by several Islamic scholars,³⁹ it is a subject of disagreement among scholars. In the context of jihad, it is argued that it is an error to consider all the commands of the Qur'an, which call upon Muslims not to fight or harm the disbelievers, as being abrogated by the 'verse of the sword'. This is because the verses said to be abrogated form a part of the ethical guidance mentioned in the Qur'an, which forms the ethical side in the Islamic personality.

3. The hadith that reads: "I was sent with the sword just before the Hour so that Allah be worshipped alone without partners. My provision was placed under the shadow of my spear, and those who defy my order were disgraced and humiliated, and he who imitates a people is one of them."⁴⁰ It is argued that this hadith indicates the permissibility of using force against all disbelievers since Muslims' relations with non-Muslims are originally based on war. However, the Qur'an does not mention in any of its verses that Prophet Muhammad

32. QUR'AN, *Al-Baqarah* 2:193.

33. QUR'AN, *Al-Anfal* 8:39.

34. See e.g., INTERPRETATION OF THE MEANINGS OF THE NOBLE QUR'AN 51 (Muhammad Muhsin Khan & Muhammad Taqi-ud-Din Al-Hilali trans., Darussalam 1999) at 2:193.

35. See MAJMOO' FATAAWA WA MAQAALAAAT LI'L-SHAYKH IBN BAAZ 6:219.

36. Abrogation generally means revocation and replacement of a legal ruling with another legal ruling. It does not mean cancellation or amendment in the English sense. Since the Qur'an was revealed to the Prophet in a gradual manner, so as to enable people to have a better understanding of its meanings and teachings, some later verses are considered to have revoked earlier ones. See QUR'AN, *Al-Baqarah* 2:106 ("None of our revelations [verses] do We abrogate or cause to be forgotten, but We substitute better or similar: know you not that Allah has power over all things?").

37. See generally QUR'AN 9:36. (The sacred months are the 1st, 7th, 11th, and 12th months of the Islamic calendar.)

38. QUR'AN, *At-Tawbah* 9:5, in INTERPRETATION OF THE MEANINGS OF THE NOBLE QUR'AN, *supra* note 34.

39. See e.g., Ibn Baaz, *There is no Compulsion to Accept Islam*, ISLAMQA.COM <http://www.islamqa.com/en/ref/34770/sayf> (last visited Aug. 14, 2011).

40. This hadith was narrated by Imam Ahmad, 4869; Saheeh al-Jaami, 2831. It has been accepted by some scholars. See *Was Islam Spread by Sword?*, ISLAMQA.COM, <http://islamqa.info/en/ref/43087/1%20was%20sent%20with%20the%20sword> (last visited Aug. 14, 2011). Others have ranked it among the weaker hadiths because of one of its narrators.

was sent with the sword. Rather, the Qur'an (in both Madinah and Makkah verses) asserts many times that the Prophet was sent with guidance, the religion of truth, mercy, warnings, cure, and good admonition.⁴¹

4. The hadith that reads:

I have been ordered to fight people until they say: There is no god but Allah and I am the Messenger of Allah. If they did so, then they would save their lives and property from me except for Islamic laws, and then their reckoning [accounts] will be done by Allah.⁴²

It is claimed that the meaning of this hadith is very clear. It gives no other reason for fighting, except to make others say, "there is no god but Allah," that is, embrace Islam. It should be noted, however, that this hadith is just a mention of the objective of fighting in exceptional circumstances during which an armed jihad is permissible. Indeed, the Prophet used to make peace with those who wanted to make peace with him.

5. It is claimed that in most of the Prophet's battles, the Prophet initiated attacks against the disbelievers, as happened in the Conquest of Makkah, the Battle of Tabuk, and others. This is over-exaggerated because the Prophet's biography indicates that he did not fight against the disbelievers who concluded truces with him.⁴³ He never compelled anyone to convert to Islam. Rather, he used to fight against those who fought against him.⁴⁴ When the Prophet reached Madinah, he made peace with the Jews and left them on their creed and tenets. When the Jews broke their covenant and started fighting him, he fought back against their aggression. Indeed, compelling anyone to believe in Islam would be contrary to the Qur'an.⁴⁵

6. The conquests of the rightly guided Caliphs and the Companions of the Prophet — whom Muslims should follow to attain guidance — were offensive wars. These conquests were not merely for expansionism but for other aims such as removing obstacles from the way of Islam, launching pre-emptive wars for protecting the Islamic state, and launching wars for liberating those people deemed to be oppressed and weak.⁴⁶

7. The alleged consensus of the jurists that pre-emptive Jihad (*jihad at-talab*) is a collective duty on the Ummah and that it is an obligation upon all Muslims to take part in it at least once a year. This is taken to mean the obligation of fighting and invading the lands of the disbelievers at least once a year. However, there is disagreement among Muslim jurists on this matter. As Al-Qaradawi notes:

There is no consensus among the jurists on this issue. Some of them are of the view that jihad is an obligation only on the Prophet's Companions. This is related by Imam Al-Hafizh in his book entitled *Fath Al-Bari*. Imam

41. See e.g., QUR'AN, *At-Tawbah* 9:33; *As-Saff* 61:9; *Al-Fath* 48:28; *Al-Anbiya'* 21:107; *Yunus* 10:57; *An-Nahl* 16:89; *Al-Israa'* 17:105; & *Al-Baqarah* 2:119.

42. See Sahih Al-Bukhari, Hadith No. 6924, 6925.

43. This is in accordance with QUR'AN, *At-Tawbah* 9:7 which reads: "So long as they carry out their obligations there under, you must carry out your obligations."

44. See IBN AL-QAYYIM AL JAWZIYYA, Hidayat Al-Hayara (al-Qāhirah: Maktabatal-Qurān, 1990).

45. QUR'AN, *Al-Baqarah* 2:257: "Let there be no compulsion in religion: Truth stands out clear from error."; QUR'AN, *Yunus* 10:99: "If thy Lord had enforced His will, surely all those on the earth would have believed, without exception."

46. AL-QARADAWI, *supra* note 18, at 339-364.

Muslim narrated on the authority of Ibn Al-Mubarak that the Prophet's hadith that reads "One who died but did not fight in the way of Allah nor did he express any desire (or determination) for Jihad died in one of the states of hypocrisy" relates to the Prophet's Companions only. An-Nawawi said, "This view is probable." . . . Also, some of the Prophet's Companions, their followers, and the great Imams stated that pre-emptive jihad is voluntary, and not an obligation. This view was narrated by Imam Abu Bakr Ar-Razi (Al-Jassas), Ibn Abi Shaybah, and others on the authority of Ibn 'Umar (may Allah be pleased with them both). It was also narrated on the authority of 'Ataa' and 'Amr ibn Dinar, from among the followers of the Companions, and on the authority of Ibn Shubrumah and SufyanAth-Thawri, from among the great Imams of Islam.⁴⁷

8. Disbelief is enough reason for fighting if there are no other reasons, such as aggression against Islam and Muslims. This is the view of one of the recognised schools of *fiqh* (Islamic legal doctrines) — the Shafiite school based on teachings of Muhammed Ibn Idris Shafi'i. Imam Shafi'i held the view that non-Muslims should be fought for their disbelief, even if they committed no harm against Muslims. Shafi'i's view is contrary to the view of other recognised schools of *fiqh*⁴⁸ and the majority of Islamic scholars, who held the view that the disbelievers should be fought for their aggression towards Muslims, and not for their disbelief.

9. The ideology of subjecting tyrant authorities and unjust systems to the system and rule of Islam, so that people are able to see and recognize Islam and its teachings. Hence, they will be affected by Islam, and consequently, will embrace it.⁴⁹ In the era of globalisation, it is possible for Muslims to reach all over the world, through many forms of media such as radio networks, satellite channels, Internet, and messages written in different languages, without the need to use military jihad against authorities opposed to Islam.

The second category, thus, perceives jihad as a fight against non-Muslims in the whole world regardless of whether or not they have directly or indirectly attacked Muslims, or otherwise have rejected the propagation of Islam, or forced Muslims to abandon their religion, and whether they have extended the bridges of peace to the Muslims and offered reconciliation with them. This understanding of jihad is problematic as it places Muslims constantly at war with non-Muslims. Such interpretation is contrary to the Qur'an and Sunnah as summed up below:

1. The Qur'an states: "Fight in the cause of Allah those who fight you, but do not transgress limits; for Allah loves not transgressors [those who exceed the limits]."⁵⁰ This verse denotes that fighting the disbelievers is contingent on their fighting against Muslims. Hence, their transgression, and not their disbelief, is the reason behind fighting

47. *Id.* at 385.

48. The Malakite school, founded by Malik ibn Anas; the Hanafi school, founded by Abu Hanifah; and the Hanbalite school, founded by Ahmad ibn Hanbal. See ABD AL-RAHMÂN AL-JAZÎRÎ, ISLAMIC JURISPRUDENCE ACCORDING TO THE FOUR SUNNI SCHOOLS: AL-FIQH 'ALA AL-MADHAHIB AL-ARBA 'AH (Nancy Roberts trans., 2009).

49. AL-QARADAWI, *supra* note 18, at 257.

50. QUR'AN, *Al-Baqarah* 2:190.

against them. This is clearer from another Qur'anic verse which states, "Therefore, if they withdraw from you but fight you not and [instead] send you [guarantees of] peace, then Allah has opened no way for you [to war against them]."⁵¹

2. It has been authentically reported from the Prophetic Sunnah that the Prophet passed by a dead woman and said, "This woman was not supposed to be fought."⁵² The reason for prohibiting the killing of such a woman was her not fighting against Muslims, and not her being booty for Muslims (according to Shafi'i).

3. The Qur'an prohibits compulsion in religion by stating, "Let there be no compulsion in religion: Truth stands out clear from error."⁵³ This is a general text that denotes that Muslims must not compel anyone to embrace Islam. As Imam Ibn Kathir, a major scholar of *Tafsir* (Qur'an interpretation) explained, this means:

Do not force anyone to become Muslim, for Islam is plain and clear, and its proofs and evidence are plain and clear. Therefore, there is no need to force anyone to embrace Islam. Rather, whoever Allah directs to Islam, opens his heart for it and enlightens his mind, will embrace Islam with certainty. Whoever Allah blinds his heart and seals his hearing and sight, then he will not benefit from being forced to embrace Islam.⁵⁴

If it was permissible to fight against non-Muslims until they embrace Islam, then that would be the highest level of compulsion in religion. Indeed, rather than compelling non-Muslims to convert to Islam, the Qur'an states: "To you be your religion, and to me my religion [Islamic Monotheism]."⁵⁵ In other verses, the Qur'an states, "So remind them [O Muhammad], you are only one who reminds. You are not a dictator over them."⁵⁶ Furthermore, the Qur'an asserts: "If it had been thy Lord's will, they would all have believed,—all who are on earth! . . . [W]ill you [O Muhammad] then compel mankind, [against their will] . . . [to] believe[!]"⁵⁷ This clearly indicates that even the Prophet was simply a reminder, but could not compel others to believe.

4. The Prophet's biography points out that he had never fought against the disbelievers who made a truce with him. The Prophet was never the first to start fighting against people. If the Qur'an commanded the Prophet to kill all the disbelievers, then the Prophet would have initiated fighting against them.

5. The Qur'an permits an Islamic state to levy a tax called *Jizyah* upon non-Muslims (Jews, Christians) who are under the protection of a Muslim government:

Fight against those who (1) believe not in Allah, (2) nor in the Last Day, (3) nor forbid that which has been forbidden by Allah and His Messenger [Muhammad], (4) and those who acknowledge not the religion of truth (i.e. Islam) among the

51. QUR'AN, *An-nisa* 4:90.

52. ABU DAWUD SULAYMAN IBN AL-ASH'ATH, SUNAN ABI DAWUD 2:739 (2 vols. Beirut, Dar al-Janan, 1988).

53. QUR'AN, *Al-Baqarah* 2:256.

54. See 2 TAFSIR IBN KATHIR 30 (abr. ed., Darussalam Publ'ns 2000).

55. QUR'AN, *Al-Kafirun* 109:6 (Khan & Al-Hilali trans.).

56. QUR'AN, *Al-Ghashiyah* 88:21-22 (Khan & Al-Hilali trans.).

57. QUR'AN, *Yunus* 10:99 (Yusuf Ali, 1413).

people of the Scripture (Jews and Christians), until they pay the *Jizyah* with willing submission, and feel themselves subdued.⁵⁸

If disbelief obligated the killing of non-Muslims, then Muslims would not accept *jizyah* (protection tax from non-Muslims) and subjugation (to the system of the Islamic state) from the non-Muslims, since this will not change their state of disbelief in Islam. Indeed, apart from the most serious crimes under Islamic law, the killing of any human being is generally prohibited, regardless of religion.⁵⁹

The third category ('moderates') limits the application of jihad to self-defence against aggression by unfriendly States. This view holds that pacifist non-Muslims who do not fight against Muslims on account of religion, and offer Muslims peace should not be fought, as they do not do anything that necessitates fighting them. Moreover, many Qur'anic verses explicitly forbid fighting against those who do not fight Muslims and indicate that disbelief in Islam per se is not a reason for fighting. Some examples are cited below for purposes of illustration:

Fight in the [cause] . . . of Allah those who fight you, but [do not] transgress . . . limits; [for] . . . Allah [loves] . . . not . . . transgressors [those who exceed the limits].⁶⁰

[Let there be] no compulsion in religion [: Truth stands out clear from error].⁶¹

Say . . . O People of the . . . [Book!] . . . Come to [common terms an agreement] . . . [as] between us and you: that we [shall] worship none but Allah; . . . that we associate no partners with Him; . . . that we [erect not, from among ourselves] . . . , lords [and patrons] . . . [other than] Allah." If then they turn . . . [back], say [you]: 'Bear witness that we [at least] are Muslims [bowing to Allah's will].⁶²

[Therefore] . . . if they withdraw from you [but], . . . fight . . . you not, and [instead send] . . . you [guarantees of] peace, then Allah has opened no way for you [to war] against them.⁶³

But if the enemy incline[s] towards peace, then do you (also) incline towards peace, and trust in Allah: for He is the One that hears and knows (all things). Should they intend to deceive you, verily Allah is sufficient for you.⁶⁴

Allah forbids you not, with regard to those who fight you not for (your) faith nor drive you out of your homes, from dealing kindly and justly with them: for Allah loves those who are just. Allah only forbids you, with regard to those who fight you for (your) faith, and drive you out, of your homes, and support (others) in driving you out, from turning to them (for friendship and protection).⁶⁵

58. QUR'AN, *Tawbah* 9:29.

59. QUR'AN, *Al-Maidah* 5:32 (referring to the prohibition and consequences of murder); see QUR'AN *Al-An'am* 6:151 (discussing Allah forbidding or prohibiting the killing of another person); see also YUSUF AL-QARADAWI, *THE LAWFUL AND THE PROHIBITED IN ISLAM* 323-327 (Al-Halal Wal-Haram Fil Islam, 2003) (explaining the prohibition of murder); see generally YUSUF AL-QARADAWI, *supra* note 18, at 373-384 (discussing the prohibition of murder).

60. QUR'AN, *Al-Baqarah* 2:190.

61. *Id.* at 2:256.

62. QUR'AN, *Al'Imran* 3:64.

63. QUR'AN, *An-Nisa'* 4:90.

64. QUR'AN, *Al-Anfal* 8:61-62.

65. QUR'AN, *Al-Mumtahanah* 60:8-9.

But if they turn away, say: “Allah is sufficient for me: There is no god but He: On Him is my trust — He is the Lord of mighty power!”⁶⁶

It can be deduced from the foregoing verses that the Qur’an does not provide a religious basis for fighting against non-Muslims who do not fight against Muslims. It follows that armed jihad should be resorted to only in self-defence. This also means that Muslims must avoid aggression. In addition, the Qur’an explicitly prohibits transgression and fighting against those who have made peace with Muslims.

A. Jihad and the Use of Force in Self-defence

Does the concept of jihad encourage the use of force? There are several references in the Qur’an (Madina-revealed verses) which can be interpreted as requiring Muslims to strive in the cause of Islam, and in some verses to specifically fight (engage in *Qital*, or armed resistance) in the cause of Allah, i.e., to use force in self-defence.⁶⁷ While the concept of jihad is well-established in the Qur’an as noted above, there are different views regarding the status of jihad in Islam. In particular, is jihad obligatory, simply permitted or merely recommended? Is it an individual or a collective duty? One view is that generally Muslims are required to participate in (defensive) jihad once a leader calls for jihad.⁶⁸ Defensive jihad is regarded as an obligation according to the unanimous agreement of Islamic jurists. This collective obligation can be discharged by armed forces capable of defending a State’s borders and independence against any attack.

It is vital to note that generally *Qital*, or armed jihad, can only be declared when there is an Islamic State, and the leader, or *Ameer*, of this Islamic State is the only one who can declare this armed resistance.⁶⁹ However, in a State or place where Muslims are specifically oppressed for their religious beliefs and denied freedom of religion and its manifestation in public, the Muslim leadership of that State or place may, if it is practical to do so, declare a jihad to defend themselves, using all the power and means at their disposal in accordance with the law.

In *Shari’ah* (Islamic Law) one of the meanings of jihad in the cause of Allah, as noted by Sheikh ‘Atiyyah Saqr, former Head of Al-Azhar Fatwa Committee, is the “fighting in order to make the word of Allah most high, and the means for doing so is taking up arms in addition to preparation, financing and planning strategies.”⁷⁰ Obviously, jihad in the sense of “taking up arms” involves the use of force in exceptional circumstances. However,

66. QUR’AN, *At-Tawbah* 9:129; see also *Sahih Al-Bukhari*, in HADITH 6:4563-64.

67. See e.g., QUR’AN, *Al-Baqarah* 2:218, *An-Nisa* 4:95, *Al-Maidah* 5:35, *Al-Anfal* 8:72, *At-Tabah* 9:19, 20, 24, 44 & 93, *Al-Hajj* 22:78, *Al-Hujarat* 49:15, *Al-Mumtahanah* 60:1.

68. See QUR’AN, *At-Tawbah* 9:38 (“O you who believe! What is the matter with you, that, when you are asked to march forth in the cause of Allah (i.e. Jihad), you cling heavily on the earth?”); see also HADITH narrated by *Al-Bukhari* and *Muslim*, (“When you are called to Jihad, then go forth.”).

69. See HADITH, *Sahih al-Bukhari* 2957 (“A Muslim ruler is a shield [of his people]. A war can only be waged under him and people should seek his shelter [in war].”).

70. See *What is Jihad in Islam?*, http://www.islamonline.net/servlet/Satellite?cid=1119503543554&pagename=IslamOnline-English-Ask_Scholar%2FFatwaE%2FFatwaEAskTheScholar.

the use of force is one of the most limited and controversial areas of Islamic law and international law.

Historically, jihad has evolved through several stages. At the beginning of Muhammad's⁷¹ *Prophethood in Makkah*, and the Qur'an's revelation between 610-622 AD, jihad did not involve the use of force. It was striving by peaceful means, exclusively against pressures and persecutions at the time, to uphold the newly acquired faith by new converts. First, prophet Muhammad concentrated on reading,⁷² followed by warning his closest kinsmen, then warning his people, then warning the Arabs around them, then warning all the Arabs, then warning all of humankind. He continued to call them for over ten years from the beginning of his Prophethood, without fighting; he was commanded to refrain, to be patient and to be forbearing.⁷³ Thus, Makkah-revealed verses simply called on Muslims to "strive" in the cause of Allah without reference to fighting in self-defence or otherwise.⁷⁴ Striving was applied by using peaceful means. This is in accordance with the fact that most of the Qur'an and Hadith deal with how to attain higher spiritual endeavours through *iman* (faith), *aqida* (belief) and *taqwa* (piety), rather than engagement in military actions.

Then, after strong resistance and persecution in Makkah, Prophet Muhammad migrated to Madina in 622 AD, the 23rd year of Muhammad's prophethood, to avoid further persecution.⁷⁵ The revelation of the Qur'an continued until Prophet Muhammad's death in 632 AD. While at Madinah, Muhammad established the first Islamic state. Muslims who had been forced to leave their home due to their religious beliefs were attacked by non-Muslims from Makkah. Islam's survival as a religion and as a nation (*ummah*) was threatened and its defence at the time appeared necessary. It was at this critical stage in the development of Islam that the Qur'an first permitted fighting in self-defence against aggression by providing that, "To those against whom war is made, permission is given [to fight], because they are wronged."⁷⁶ Thus the concept of jihad embraced the use of force to resist aggression, i.e., it was used in self-defence for the survival of Muslims. Therefore Prophet Muhammad started fighting those who fought him and the Muslims (in self-defence), and refrained from fighting those who left him alone and did not fight him and his followers (avoiding aggression). This is in accordance with the Qur'an Chapter 2 (Surah Baqarah) verses 190-193 providing that:

Fight in the cause of Allah those who fight you, but do not transgress limits [do not commit aggression]; for Allah loves not transgressors [aggressors]. And slay them wherever you catch them, and turn them out from where they have turned you out; for tumult and oppression are worse than killing . . . And fight them on until there is no more tumult or oppression, and there prevail justice and faith in Allah; but if they

71. Peace and blessings of Allah be upon him (also abbreviated as PBUH or SAWS) is a commonly used expression after the name of Prophet Muhammad.

72. See QUR'AN, *Al-Alaq* 96:1-5.

73. See QUR'AN, *Al-Muddathir* 74:1-7.

74. See, e.g., QUR'AN, *Al-Furqan* 25:52; *Al-Ankabut* 29:6; *Al-Ankabut* 29:69; *As-Saff* 61:11.

75. See GHULAM SARWAR, ISLAM: BELIEFS AND TEACHINGS 89-99 (The Muslim Educational Trust, 8th ed. 2006).

76. QUR'AN, *Al-Hajj* 22:39.

cease, let there be no hostility except to those who practice oppression (emphasis added).

It follows, therefore, that in the Qur'an context, jihad involving the use of force arose in the context of self-defence against aggression. "Fight in the cause of Allah those who fight you" means that armed action renders self-defence necessary because there is no other alternative left. The purpose of self-defence is limited to counteracting the attack and to re-establish peace. This is why the Qur'an states that "if they cease, let there be no hostility."

The Qur'an promised heavenly rewards for those killed in jihad⁷⁷ and threatened those who neglected jihad with severe punishments in the hereafter.⁷⁸ There are also several Hadith (pronouncements of Prophet Muhammad) encouraging participation in jihad and containing promises of heavenly rewards to those who die in jihad (martyrs) in the sense of using force in self-defence. Some examples are cited below:

Sahih Muslim Hadith 4696, narrated by Abu Hurayrah: "The Messenger of Allah (saws) said: One who died, but did not fight in the way of Allah, nor did he express any desire (or determination) for Jihad, died the death of a hypocrite."

The Prophet (saws) said, "A single endeavor (of fighting) in Allah's cause in the afternoon or in the forenoon is better than all the world and whatever is in it."

Al-Tirmidhi, Hadith 3834, narrated by Al-Miqdamibn Ma'dikarib: Allah's Messenger (saws) said, "The martyr receives six good things from Allah: he is forgiven at the first shedding of his blood; he is shown his abode in Paradise; he is preserved from the punishment in the grave; he is kept safe from the greatest terror; he has placed on his head the crown of honour, a ruby of which is better than the world and what it contains; he is married to seventy-two wives of the maidens with large dark eyes; and is made intercessor for seventy of his relatives."

Sahih Bukhari, Vol. 4 No. 54 The Prophet (saws) said, "The person who participates in (Holy battles) in Allah's cause and nothing compels him to do so except belief in Allah and His Apostles, will be recompensed by Allah either with a reward, or booty (if he survives) or will be admitted to Paradise (if he is killed in the battle as a martyr). Had I not found it difficult for my followers, then I would not remain behind any sariya [army unit] going for Jihad and I would have loved to be martyred in Allah's cause and then made alive, and then martyred and then made alive, and then again martyred in His cause."

The Prophet (saws) said: "A martyr does not suffer when he is slain any more than one of you suffers from being bitten by an ant."

The Messenger of Allah (saws) said: "All the sins of a Shahid (martyr) are forgiven except debt."

The above pronouncements motivate some Muslims to participate in armed jihad. A question arises here whether jihad involving the use of force concerns both "anticipatory" and "pre-emptive" self-defence; that is, does jihad involving the use of force in self-defence

77. QUR'AN, *Al Imran* 3:157 ("And if you are slain, or die, in the way of Allah, forgiveness and mercy from Allah are far better than all they could amass [of the worldly wealth]."); *id.* at 3:158 ("And if you die, or are slain, it is to Allah that you are brought together."); *see also id.* at 3:169-172.

78. *See* QUR'AN, *At-Tawbah* 9:81-82, *Al-Fath* 48:16.

arise only after an armed attack has started, or can Muslims engage in jihad in anticipation of the attack and thus take pre-emptive measures?

B. Armed Jihad: Defensive or Pre-emptive?

Jihad may be defensive (*jihad ad-daf*) or pre-emptive (*jihad at-talab*), as it is not realistic to expect Muslim States in all cases to wait for an armed attack before responding.

Defensive jihad is resorted to if an attack occurs on the religion, honor, property, or territories of Muslims. This form of jihad is required under the condition of repelling aggression. It is aimed at resisting the enemy that enters a Muslim territory, and occupies part of it, regardless of how small this area is, or the enemy that launches an assault against Muslim lives, property or sanctities, even without entering or actually occupying their territory.⁷⁹ Defensive jihad is regarded as necessary against those who persecute Muslims because of their faith, or those who plot to dissuade Muslims away from their faith or deprive them of their right to choose their own religion, or force them to renounce it through harm and torture.

Pre-emptive jihad is launched only when there is evidence that the Muslim *Ummah* seriously expects an imminent attack against its territories from an enemy. In this case, Muslims attack the enemy before the enemy attacks them. The apparently pre-emptive jihad stated in Qur'an 2:190, as quoted above, is not an open-ended call for fighting all those who do not accept Islam. Rather, it is conditioned by fighting only "those who fight against you [Muslims]." Fighting at the Prophet's time was therefore restricted to self-defence. Muslims had only to fight those who fought them. The phrase "[a]nd slay them wherever you find them . . ." in the 2:191 passage is conditioned by "but if they attack you." In this respect, it applies only in self-defence. The general rule that must be noted is that the Qur'an is explicitly against aggression when it states that "Allah loves not the aggressors" and "but if they cease, let there be no hostility except to those who practice oppression." Accordingly the use of jihad to justify aggression is incompatible with the Qur'an.

Jihad in the form of the use of force during Muhammad's prophethood had clear objectives. First, the main goal of jihad was to protect the freedom of Muslims to observe their religion, i.e., to worship Allah alone. Thus, the Qur'an, as noted above, states, "And fight them on until there is no more tumult or oppression, and there prevail justice and faith in Allah,"⁸⁰ and "And fight them until there is no more tumult or oppression, and there prevail justice and faith in Allah . . ."⁸¹ The second goal was to repel the aggression of those who attacked the Muslims. This was aimed at protecting the freedom of Muslims to manifest their religion, and also to protect against the killing of Muslims (as a religious group) in whole or in part who were targeted by non-Muslim forces at the time. In this

79. YUSUF AL-QARADAWI, *supra* note 18.

80. QUR'AN, *Al-Baqarah* 2:193.

81. QUR'AN, *Al-Anfal* 8:39.

context of self-defence against aggression, the Qur'an encouraged Muslims to defend themselves by stating:

March forth, whether equipped lightly (being healthy, young and wealthy) or heavily (being ill, old and poor) and strive with your wealth and your lives in the cause of Allah.⁸²

Fight in the way of Allah with those who fight against you, but do not commit aggression; because Allah does not like the aggressors.⁸³

Will you not fight people who violated their oaths [pagans of Makkah], plotted to expel the Messenger, and attacked you first? Do you fear them? Nay, it is Allah whom you should more justly fear, if you believe!⁸⁴

The battles of Badr (624 AD), Uhud (625 AD), Al-Khandaq (627 AD) and many others⁸⁵ were clear examples of the use of jihad by Muslims against actual aggression. In all these battles Muslims were attacked by superior forces and responded by defending themselves as a last resort. In fact, fighting against the aggressors who invade Muslim countries with the best weapons is considered a Qur'anic obligation, and whoever gets killed in the course of such fighting is considered a martyr, or *shahid*, in the cause of Allah.⁸⁶

After waging jihad, the non-Muslims then fell into three categories: those who lived in territories with whom there was a truce or peace treaty (*dar-al-ahd*),⁸⁷ those in territories with whom Muslims were at war (*dar-al-harb/dar-al-kufr*), and those who lived under the rule and protection of the Islamic state (*dar-al-Islam*).⁸⁸ The distinction between *dar-al-Islam* (the land of peace — the territory controlled by Muslims or where Muslims could freely practice and proselytize Islam) and *dar-al-harb* (the land of war — the territory controlled by non-Muslims, who, in the absence of a treaty with Muslims, or if they prohibited the peaceful propagation of Islam, were presumed to be enemies of Islam) was developed by Islamic scholars, particularly in the Hanafi school. In this conceptualisation of the world, armed jihad was seen as a tool to bring *dar-al-harb* into *dar-al-Islam*. However, the concept of categorizing countries as *dar-al-harb* (or *kufr*) and *dar-al-Islam* is a matter of *ijtihad* (independent judgment) made by some Islamic scholars. There is no mention of this concept in either the Qur'an or the Sunnah. It follows, therefore, that the labeling of a country or place as being an Islamic (*dar-al-Islam*) or a non-Islamic one (*dar-al-harb*) revolves around the question of religious freedom. This means that any country, regardless of whether it is secular or un-Islamic, which protects freedom of religion and its

82. QUR'AN, *At-Tawbah* 9:41.

83. QUR'AN, *Al-Baqarah* 2:190.

84. QUR'AN, *At-Tawbah* 9:13.

85. Other battles include Al-Ahzab (626 AD), Khaibar (628 AD), Tabuk (630 AD), Mu'tha (629 AD), Hunain (630 AD), Quraizah (627 AD), and al-Mutaliq (627 AD).

86. See QUR'AN, *Al-Anfal* 8:60 ("Against them make ready your strength to the utmost of your power, including steeds of war, to strike terror into (the hearts of) the enemies, of Allah and your enemies. . .").

87. *Id.* at 8:61 ("But if the enemy inclines towards peace, do you also incline towards peace and trust in Allah.").

88. See Majid Khadduri, *Islam and the Modern Law of Nations*, 50 AM. J. INT'L L. 358 (1956); THE ISLAMIC MODERN LAW OF NATIONS: SHAYBANI'S SIYAR 15 (Majid Khadduritrans, The Johns Hopkins Press 1966).

teaching and manifestation in private or public (without discrimination against Muslims), is considered to be *dar-al-Islam*. This means that resort to armed jihad becomes unnecessary since there is no question of freedom of religion, propagation of religion, or self-defence. It is noteworthy that the *dar-al-harb/dar-al-Islam* division was influenced by historical circumstances and has no significance in almost any states today where freedom of religion, its teaching and its manifestation is a guaranteed human right.

C. International Law and Armed Jihad: Are they Compatible?

The question one must ask here is whether the threat or use of armed jihad in self-defence is consistent with contemporary international law as reflected in the Charter of the United Nations (UN Charter)?⁸⁹ In answering this question, it should be noted that all Islamic States are members of the United Nations, and, accordingly, are bound by the UN Charter. The Charter of the Organisation of Islamic States (OIC Charter), which attempts to be the collective voice of the Muslim World (*Ummah*), reaffirms the commitment of OIC Member States⁹⁰ to the principles of the UN Charter and International Law,⁹¹ and “to uphold the objectives and principles of the present [OIC] Charter, the Charter of the United Nations and international law as well as international humanitarian law.”⁹² Similarly, the Arab Charter on Human Rights, adopted by Muslim Member States of the Arab League in 1994 (and revised in 2004) reaffirms commitment to the principles of the UN Charter.⁹³ It follows, therefore, that OIC and the Arab League Member States must respect principles of international law enunciated in the UN Charter. The most important ones relevant to jihad are rules relating to the prohibition on the use of force except in self-defence or use/authorisation by the UN Security Council, the protection and promotion of human rights, including freedom of religion, rules regulating armed conflicts, and the crime of terrorism.

1) Use of Force in International Law

The first purpose of the UN Charter, as set out in Article 1, is to “maintain international peace and security,” and to that end “to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.” Accordingly, the UN Charter prohibits the use of force by States in Article 2(4) as follows: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or

89. U.N. Charter art. 1.

90. *Member States*, ORGANISATION OF ISLAMIC COOPERATION, http://www.oic-oci.org/member_states.asp.

91. Charter of the Organisation of the Islamic Conference, pmb. ¶ 4, Mar. 14, 2008, *available at* <http://www.oic-oci.org/is11/english/Charter-en.pdf>.

92. *Id.* at ¶ 21.

93. *See* League of Arab States, *Arab Charter on Human Rights, opened for signature* May 22, 2004, pmb. ¶ 6 (entered into force Mar. 15, 2008), *reprinted in* 12 INT'L HUM. RTS. REP. 893 (2005). The first ratifications of the Charter were: Algeria, Bahrain, Jordan, Palestine, Syria, Libya and the United Arab Emirates.

political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”⁹⁴

This provision is directed at the “inter-State use of force” because it applies only in international relations.⁹⁵ As such, it does not apply to civil (internal) conflicts involving the use of force. Similarly, it does not apply to the use of armed force by non-State actors. Even among States, the prohibition of the use of force “has not prevented the occurrence of over 100 major conflicts since 1945 and the death of over 20 million people.”⁹⁶ Nonetheless, Article 2(4) of the UN Charter remains important because it aims at prohibiting the unilateral use of force by States. The prohibition of the use of force in Article 2(4) represents customary international law and *jus cogens*.⁹⁷ Aggression is thus widely regarded as a crime under customary international law. It is also a crime under the Rome Statute of the International Criminal Court (ICC Statute). However, the definition of aggression has been a subject of disagreement among States. When the ICC Statute was adopted in 1998, no definition of aggression was reached. It was not until July 2010 that the following definition of aggression was agreed. The definition, which is reflected in Article 8*bis* of the ICC Statute, states that:

For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

The contentious part of this definition was the qualifier, i.e., the requirement that the act of aggression be a “manifest” violation of the UN Charter. What does that mean? Does it mean an obviously illegal violation, a violation with serious consequences, or a violation which is both obviously illegal and serious? This question was not resolved in the text of the amendments but addressed in the Understandings attached to the text. Two of those understandings read as follows:

6. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.

7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a “manifest” determination. No one component can be significant enough to satisfy the manifest standard by itself.

94. U.N. Charter art. 2(4). *See generally* CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* (2d ed. 2004).

95. Christine Gray, *The Use of Force and the International Legal Order*, in *INTERNATIONAL LAW* 589, 617 (Malcom D. Evans ed., 2d ed. 2006).

96. *Id.* at 589.

97. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 190 (June 27).

While the above definition and understanding of aggression remains to be clarified in the future, it is clear that aggression arises out of the illegal use of force. Thus, a State will be acting contrary to the UN Charter if it unilaterally declares a jihad (in the sense of use of force) against another State or if it supports an armed jihadist group fighting another State through “recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding and directing military and paramilitary actions.”⁹⁸

The Friendly Relations Declaration clarifies that every State has the duty to refrain from organising, instigating, assisting, or participating in acts of civil strife in another State and the duty not to foment, incite, or tolerate subversive, terrorist, or armed activities directed towards the violent overthrow of the regime of another State.⁹⁹ Under the UN Charter, control over the use of force is centralised in the Security Council, acting under Chapter VII. It is of course unlikely that the five permanent members of the Security Council — the USA, Russia, China, France and the UK — can permit the use of force on the basis of the Islamic jihad concept. In any case, hardly any Islamic State has used jihad before the UN as a justification for the inter-State use of force. Jihad has only been invoked on limited occasions by leaders of Islamic States to mobilise people internally against apparent external aggression. For example, Mullah Muhammad Omar of Afghanistan invoked jihad to mobilise people in Afghanistan against the U.S. attack in 2001; Saddam Hussein of Iraq referred to jihad against the U.S. attack in 2003; Ayatollah Khomeini of Iran used the concept of jihad to mobilise support against Iraq invasion in 1980; and Muammar Gaddafi of Libya called for a jihad against Switzerland in 2010 in opposition to the proposal banning the building of minarets based on the claim that minarets are a sign of Islamisation.¹⁰⁰

There are two main exceptions to the prohibition on the use of force in Article 2(4) of the UN Charter: first, where force is used or authorised by the Security Council as provided for in Articles 42-9 and 53 of the UN Charter; second, if force is used in self-defence under Article 51. Article 51 of the UN Charter recognises the right to self-defence against an armed attack by providing that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this

98. *Id.* at ¶ 228.

99. See Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., U.N. Doc. A/8082 (Oct. 24, 1970).

100. Gaddafi stated: "Let us fight against Switzerland, Zionism and foreign aggression," adding that "this is not terrorism," in contrast with the work of al-Qaida, which he called a "kind of crime and a psychological disease." Mark Tran, *Gaddafi Calls for Jihad Against Switzerland*, THE GUARDIAN (Feb. 26, 2010), <http://www.guardian.co.uk/world/2010/feb/25/muammar-gaddafi-libya>. He asserted that "[t]here is a big difference between terrorism and jihad, which is a right to armed struggle." *Id.* He further stated that "The masses of Muslims must go to all airports in the Islamic world and prevent any Swiss plane landing, to all harbours and prevent any Swiss ships docking, inspect all shops and markets to stop any Swiss goods being sold." *Id.*

right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

While the ban on use of military force was stated clearly in the UN Charter, the permitted exception relating to self-defence was in some respects fuzzy and left States with much leeway in the application of the rules on self-defence. For example, what is an armed attack? Does self-defence extend to “an armed attack” by non-State actors or terrorist organisations? Is anticipatory self-defence allowed?

Self-defence in international law is limited to action which is necessary to deal with an “armed attack” (i.e., self-defence should be exercised by States if no other means are available) and proportionate to this end (it should not be used indiscriminately).¹⁰¹ According to the International Court of Justice (ICJ), an armed attack includes “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to an actual armed attack, or its substantial involvement therein.”¹⁰² It follows that if non-State actors carry out an armed attack on behalf of a State, this would amount to an “armed attack” which could justify resort to self-defence.

On anticipatory self-defence, the better interpretation of Article 51 seems to be that self-defence is lawful when an armed attack by another State is imminent (pre-emptive self-defence, as in the case of Israel in 1967, when the international community did not object to Israel’s attack to forestall the impending invasion by some Arab countries).¹⁰³ Anticipatory self-defence is unlawful when the attack is launched to prevent a possible future aggression (preventive self-defence, as in the case of the 1981 Israel attack on Iraq to destroy the Osirak nuclear reactor, an attack the Security Council condemned by resolution 487/1981).¹⁰⁴ In sum, Article 2(4) of the UN Charter on the prohibition of force, except in self-defence under Article 51, is capable of addressing the question of aggression. In this respect, the concept of jihad and self-defence under the UN Charter can be used to serve the same purpose. Military jihad against aggression can be applied in a manner consistent with the UN Charter.

2) Jihad and Freedom of Religion

It is clear that the UN Charter promotes friendly relations among States. Thus, under the UN Charter, there is no threat to Muslim or Islamic States per se. Indeed one of the purposes of the UN, as stated in Article 1(3) of the UN Charter, is to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and

101. *Nicaragua v. United States*, 1986 I.C.J. 14, ¶ 194 (June 27); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 141 (July 8); *Oil Platforms (Iran v U.S.)*, Judgment, 2003 I.C.J. 161 (Nov. 6).

102. *Nicaragua v. United States*, 1986 I.C.J. 14, ¶ 195 (June 27).

103. See ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 154-55 (Oxford Univ. Press, 2d ed. 2008).

104. *Id.*

for fundamental freedoms for all without distinction as to race, sex, language, or religion. Clearly, respect for human rights is at the core of the UN Charter. These rights include freedom of religion or belief and the manifestation of one's religion or belief in teaching, practice, worship and observance as guaranteed in international and regional human rights instruments.¹⁰⁵ Significantly, Muslim States, through the Arab Charter on Human Rights (2004),¹⁰⁶ have reaffirmed commitment to "the Universal Declaration of Human Rights (UDHR) and the provisions of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)."¹⁰⁷ All Member States of the Arab League are party to more than one of the UN human rights treaties, including the ICCPR and the ICESCR. Article 18 of the ICCPR provides:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.¹⁰⁸

The Human Rights Committee (HRC) has interpreted Article 18 as protecting "theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief."¹⁰⁹ Further,

[t]he Committee observe[d] that the freedom to 'have or to adopt' a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief. Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert.¹¹⁰

105. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc.A/810, art. 18 (1948); International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, at 52, 21 U.N. GAOR Supp. No. 16, U.N. Doc. A/6316, art.18 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); African [Banjul] Charter on Human and Peoples' Rights, art. 8, *adopted* June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986); American Convention on Human Rights, art. 12, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978); [European] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9, 213 U.N.T.S. 222.

106. See Mervat Rishmawi, *The Arab Charter on Human Rights and the League of Arab States: An Update*, 10 Hum. Rts. L. Rev. 169, 169-78 (2010).

107. Arab Charter on Human Rights, 22 May 2004, (note 93) preamble, para. 6.

108. International Covenant on Civil and Political Rights art. 18, *adopted* 16 Dec. 1966, 999 U.N.T.S. 171 (entered into force Mar. 23 1976).

109. U.N. Human Rights Committee, *General Comment 22: The Right to Freedom of Thought, Conscience and Religion*, ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (July 30, 1993).

110. *Id.* at ¶ 5.

In the contemporary human rights era in which freedom of religion or belief, including freedom to propagate and manifest it either individually or in community with others and in public or private, is guaranteed, the resort to armed jihad based on the seventh-century jihad (in self-defence) would be difficult to justify in the absence of a threat to Islamic nations or Muslims. The peaceful Islamic jihad, which involves peacefully striving in the teaching, practice, worship and observance, would be consistent with the Qur'an's prohibition of 'compulsion in religion'¹¹¹ and respect for other religions.¹¹² It is also supported by the Prophet Muhammad's example as reflected in the fact that the Treaty of Madina in the first year of Hijra (migration from Makkah to Madina) between Muhammad and his followers who migrated from Makkah with the different tribes in Madinah belonging to various beliefs (Christians and Jews), guaranteed freedom of religion for Muslims, Christians and Jews. Recent human rights instruments among Muslim States protect freedom of religion.¹¹³ Indeed compulsion is incompatible with religion because religion depends upon voluntary faith and will, and these would be meaningless if induced by the use of force.

3) Jihad and Indiscriminate Attack on Civilians and Civilian Objects: From Self-defence to Terrorism?

Does the concept of jihad provide a religious basis for indiscriminate attacks on civilian populations not taking a direct part in hostilities, or attacks on civilian objects in violation of international humanitarian law and the criminalisation of terrorism? Two principles of international humanitarian law (IHL) should be noted here.¹¹⁴ First, the principle of distinction requires that attacks be directed against combatants, civilians taking direct part in hostilities, and military objectives.¹¹⁵ Second, the principle of proportionality

111. QUR'AN, *Al-Baqarah* 2:256 ("Let there be no compulsion (footnote omitted) [i]n religion: Truth stands out [c]lear from [e]rror. . . ."); *See also* QUR'AN, *Al-Kafirun* 109:6 ("To you be your [w]ay [religion], [a]nd to me mine (footnote omitted).").

112. QUR'AN, *Al-Baqarah* 2:62 ("Those who believe [in the Qur'an], and those who follow the Jewish (scriptures), and the Christians and the Sabians (footnote omitted) — any who believe in Allah and the last day, and work righteousness, shall have their reward with their Lord; on them shall be no fear, nor shall they grieve (footnote omitted).").

113. *See* League of Arab States, *Arab Charter on Human Rights*, art. 30, *opened for signature* May 22, 2004 (entered into force March 15, 2008):

1. Everyone has the right to freedom of thought, conscience and religion, and no restrictions may be imposed on the exercise of such freedoms except as provided for by law. 2. The freedom to manifest one's religion or beliefs or to perform religious observances, either alone or in community with others, shall be subject only to such limitations as are prescribed by law and are necessary in a tolerant community with others, shall be subject only to such limitations as are prescribed by law and are necessary in a tolerant society that respects human rights and freedoms for the protection of public safety, public order, public health or morals or the fundamental rights and freedoms of others. 3. Parents or guardians have the freedom to provide for the religious and moral education of their children.

114. On IHL, *see generally* LESLIE CLAUDE GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* (Manchester Univ. Press, 3d ed. 2008) (1993); *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* (Dieter Fleck ed., Oxford Univ. Press, 2d ed. 2008).

115. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, art. 48 (entered into force Dec. 7, 1979) ("In order to ensure respect for and protection of the civilian population and civilian

prohibits otherwise lawful attacks if the anticipated civilian loss is disproportionate to the anticipated direct military advantage.¹¹⁶ From the above principles, two customary rules flow from the choice of weapons to be used in armed conflicts. It is prohibited to employ methods or means of warfare that may be expected to cause superfluous injury or unnecessary suffering;¹¹⁷ and it is prohibited to employ methods and means of warfare that are indiscriminate, i.e., cannot be directed against a specific military objective.¹¹⁸

As noted above, the concept of jihad in the sense of using force was used in the Prophet's era in self-defence. Later, jihad was used as a tool for conquest. Significantly, in 630 AD when Muslims under Prophet Muhammad attacked Makkah, it was not for self-defence but rather to take control of the Kaaba.¹¹⁹ In the post-Prophet era until the end of the Ottoman Empire after World War I, jihad continued to be used predominantly in support of conquests (starting in the Arabian Peninsula, moving throughout the Middle East and Persia, on to North Africa and Spain, the rise of the Ottoman Empire and the Mughal Empire in the India, the expansion into Sub Saharan Africa) and internal power struggles within the Muslim States (e.g., the struggle against the Soviet invasion in Afghanistan and the present conflict in Palestine).

In recent times, jihad has increasingly been used by (transnational) non-State actors, (e.g., Al-Qaeda and Al-Shabab) to justify attacks on civilians and civilian objects, and to justify the use of force with a view to fighting the perceived 'far' enemy (*al-'aduw al-ba'id*) and 'near' enemy (*al-'aduw al-qarib*).¹²⁰ The 'far enemies' of Islam, in the view of jihadist non-State actors, are particularly the United States and its Western allies, while the 'near enemies' are governments in the Arab world who in the view of jihadists, are lackeys of the United States. Armed jihad is seen as a means of fighting American presence in Muslim lands. This is clear from statements (presented as 'fatwas' or advisory religious opinions) made by Osama Bin Laden, in particular his "Declaration of War against the

objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”)

116. *Id.* art. 57(2).

117. Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, art. 23(e) (Oct. 18, 1907), *available at* <http://www.unhcr.org/refworld/docid/4374cae64.html>; Protocol I, *supra* note 116 art. 35(2).

118. Protocol I, *supra* note 115 art. 51(4):

Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) Those which are not directed at a specific military objective; (b) Those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

119. The Kaaba is a cube-shaped building in Makkah, Saudi Arabia, and is the most sacred site in Islam. It was first built by Ibrahim and his son Ismael. *See* QUR'AN, *Al-Baqarah* 2:125-129; *Al-Hajj* 22:26-27. The building now has a mosque built around it, the Masjid al-Haram. All Muslims around the world face the Kaaba during prayers, no matter where they are.

120. *See* MUHAMMAD 'ABD AL-SALAM FARAJ, AL-FARIDA AL-GHA'IBA [Jihad: The Neglected Duty] (Maktabah Al Ansaar Publications 2000), *available at* <http://www.almaqdese.net>, *translated in* JOHANNES J. G. JANSEN, *THE NEGLECTED DUTY: THE CREED OF SADAT'S ASSASSINS AND ISLAMIC RESURGENCE IN THE MIDDLE EAST* (MacMillan 1986); *see also* FAWAZ GERGES, *THE FAR ENEMY: WHY JIHAD WENT GLOBAL* (Cambridge University Press 2005).

Americans Occupying the Land of the Two Holy Places”¹²¹ in 1996 and the “Declaration of the World Islamic Front for Jihad against the Jews and the Crusaders” in 1998, which urged a jihad against Americans and their allies without distinguishing between civilians and combatants. The 1998 Declaration stated that:

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.”¹²²

Following this Declaration, U.S. facilities in Nairobi, Kenya, and Dar es Salaam, Tanzania, were bombed, allegedly by Al Qaeda. The view that killing Americans is a duty has been accepted by some actors, e.g., in Afghanistan.¹²³ Thus there has been some support for military jihad by some groups in order to realize political objectives, even in some cases where targets are civilian populations or civilian objects. Prominent jihadist groups/organizations include Al Qaeda, the now defunct Algerian Armed Islamic Group (replaced by the Salafist Group for Dawa and Combat), and prior to 2009, the Kashmir-based Lashkar-e-Taiba. Some of these groups have used jihad to legitimise and justify indiscriminate attacks against non-combatants (innocent civilians) and civilian objects, particularly against the United States and some Western States declared to be enemies of Islam. Several methods have been used including suicide bombings and assassinations. Is such violence compatible with *Sharia*?

Indiscriminate attacks on non-combatants are contrary to several principles derived from the Qu’ran including just and kind treatment,¹²⁴ proportionality,¹²⁵ humanity,¹²⁶ fraternity¹²⁷ and justice.¹²⁸ Targeting non-combatants is contrary to the standard of ‘just and kind’ treatment of non-combatants as stated in the following Qu’ran passage: “Allah does not forbid you to deal justly and kindly with those who fought not against you on account of religion nor drove you out of your homes. Verily, Allah loves those who are just.”¹²⁹

121. See Osama Bin Laden, *Fatwa: Background and Declaration of War Against the Americans Occupying the Two Holy Places*, MIDEASTWEB, <http://www.mideastweb.org/osamabinladen1.htm>.

122. Osama Bin Laden, *Declaration of the World Islamic Front for Jihad against the Jews and the Crusaders*, in AL QUDS AL-ARABI 3 (London), Feb. 23, 1998, available at <http://www.mideastweb.org/osamabinladen2.htm>.

123. See, e.g., Miles Amore, *I’m Proud to be a Boy Bomber: Killing is Good*, THE SUNDAY TIMES (London), Feb. 13, 2011, at 30 (“The Americans are the enemy of Islam. They kill people and they want to destroy our religion. It’s our duty to kill them.” (quoting Abdullah, a 14-Year-old boy from the Jagatu district in Afghanistan)).

124. QUR’AN, *Al-Mumtahanah* 60:8.

125. QUR’AN, *An-Nahl* 16:126-128.

126. QUR’AN, *Al-Maidah* 5:32.

127. QUR’AN, *An-Nisa* 4:1.

128. QUR’AN, *An-Nahl* 16:90.

129. QUR’AN, *Al-Mumtahanah* 60:8.

Killing or causing bodily harm to non-combatants or civilian objects cannot meet the test of ‘just and kind’ treatment. In any case such indiscriminate attacks were prohibited by Prophet Muhammad. During Prophet Muhammad’s era, the use of force (*jus ad bellum*) was, as noted above, primarily used in self-defence and indeed subject to several humanitarian rules regulating the conduct of hostilities (*jus in bello*). In particular violence against non-combatants such as members of the following groups was prohibited: women, children, the elderly, the sick and wounded, clerics, and places of worship of Christianity and Judaism.

It was narrated that the Prophet said to the Muslim army, “Go out in the name of Allah and by the help of Allah, following the way of the Messenger of Allah. Do not kill any old man, infant, child or woman . . . spread goodness and do good, for Allah loves those who do good.”¹³⁰ In another narration, the Prophet stated “do not mutilate [the dead] bodies; do not kill children.”¹³¹ Prophet Muhammad also instructed the Muslim fighters dispatched against the Byzantine army to specifically spare

the female sex; injure not the infants or those who are ill in bed. Refrain from demolishing the houses of the unresisting inhabitants; destroy not the means of subsistence, nor their fruit-trees and touch not the palm, and do not mutilate bodies and do not kill children.¹³²

This example was followed by the successors of the Prophet after his death. For example, Abu Bakr al-Siddeeq, Prophet Muhammad’s first successor, instructed the commander of his army: “I advise you of ten things: do not kill a woman, or a child, or any old person, or cut down any fruit trees . . .”¹³³ Similarly, Umar Ibn al-Khataab, the second successor, warned commanders of the Muslim army as follows:

Do not mutilate when you have the power to do so. Do not commit excess when you triumph. Do not kill an old man or a woman or a minor, but try to avoid them during the encounter of the two armies, and at the time of the heat of victory, and at the time of expected attacks.¹³⁴

In addition to the prohibition of fighting civilians, other rules regulating the conduct of hostilities in Islam¹³⁵ include the prohibition of collective punishments,¹³⁶ protection from

130. Narrated by Abu Dawood, 2614; its isnaad (chain of narration) includes Khaalidibn al-Faraz, of whom Ibn Hajar said in al-Taqreeb, he is maqbool (acceptable) i.e., if there are corroborating reports. See also MUAHAMMAD IBN AL-ASAN AL-SHAYBANI, ABWAB AL-SIYAR FI ARD AL-HARB § 1, ¶ 47 [The Islamic Law of Nations], (Majid Khadduri ed., Beirut, al-Dar al-Muttaidalil Nashr, 1975).

131. *Sahih Muslim*, in HADITH, Book 19, No. 4294 and 3261. See also *id.* at No. 4320 (“It is narrated by Ibn Umar that a woman was found killed in one of these battles; so the messenger of Allah (may peace be upon him) forbade the killing of women and children”).

132. MALIK IBN ANAS, AL-MUWATTA’, No. 10 (Kuwait, Markaz al-Buhuth 1997).

133. MALIK IBN ANAS, AL-MUWATTA’, 982, Kitaab al-Jihaad. See also Muhammad Ibn ‘Ali al-Shawkani, Nayl al-Awar Sharh Muntaqa al-Akhbar min Ahadith Sayyid al-Akhyar, (8 vols. Cairo, Maba’at Muafa al-Babi al-alabi 1952) 7:263.

134. 1 ‘ABD ALLAH IBN QUTAYBA AL-DINAWARI, KITAB ‘UYUN AL-AKHBAR, 107-108 (Cairo, Dar al-Kitab al-‘Arabi, 1957).

135. See YUSUF AL-QARADAWI, *supra* note 18, ch. 5.

136. The concept of punishment in the Qur’an is based on the principle of individual responsibility. See QUR’AN, A-Muddathir 74:38; An-Nisa 4:123; Fatir 35:18.

retroactive penalty,¹³⁷ the prohibition of mutilation, the prohibition of cutting down trees and demolishing buildings, the prohibition of plundering and pillaging,¹³⁸ as well as respecting agreements concluded on the cessation of hostilities.

Humane treatment of prisoners of war forms an essential part of Islamic humanitarian law.¹³⁹ All forms of abuse of prisoners, whether physical or sexual, are prohibited. The Qur'an (47:4) provides two alternatives for the treatment of prisoners of war¹⁴⁰: either the Muslim commander should free those prisoners of war who cannot offer ransom, either in the form of money or an equivalent number of Muslim captives, or the commander should ransom prisoners of war for money or for a similar number of Muslim captives. This is what is now known as an exchange of prisoners. The Qur'anic text does not mention a third choice, namely the enslavement of prisoners of war. Indeed the Qur'anic text implicitly forbids it by limiting the choice to only two alternatives—free release (generosity) or ransoming—without referring to enslavement.¹⁴¹ Thus enslavement is not involved in the choice. The Prophet avoided the enslavement of any free person in the wars he engaged. For example, during the battle of Badr the Prophet accepted ransoms from the prisoners of war and let them go, and he let many of the prisoners go for free, releasing them with no ransom.¹⁴² Similarly, during the conquest of Makkah, it was said to the people of Makkah: “Go, for you are free.”¹⁴³ The prophet urged Muslims to show good treatment to war captives by saying to his companions: “Treat the prisoners of war kindly,” and further that:

War Prisoners are your brothers. Allah has put them in your hands; whosoever has his brother in his hands, let him give food to eat out of what he himself eats and let him give him clothes to wear out of what he himself wears, and do not impose on them a work they are not able to do themselves. If at all you give them such work, help them to carry it out.¹⁴⁴

Such limitations are consistent with international humanitarian law and the law of armed conflict, which have been developed through a series of treaties (the most important of which are the Hague Conventions of 1899 and their successors of 1907, the four Geneva Conventions of 1949 dealing with wounded and sick on land, wounded, sick and shipwrecked at sea, prisoners of war, and civilians, and the two 1977 Additional Protocols to those Conventions).

137. QUR'AN, *Bani Israel* 17:15.

138. See Karima Bennoune, *As-salamu 'Alaykum? Humanitarian Law in Islamic Jurisprudence* 15 MICH. J. INT'L L. 605 (1994).

139. See Hasan Abi'l-Ghuddah, 256 *al-Sijnwa'l-Sujana' wa Mu'aamalat al-Sujana' fi'l-Islam*, in *Treatment of Prisoners-of-War in Islam*, <http://www.islam-qa.com/en/ref/13241/prisoners%20of%20>.

140. QUR'AN, *Muhammad* 47:4 (“Therefore, when you meet the unbelievers (in fight [battle]), strike at their necks; at length, when you have thoroughly subdued them, bind a bond firmly (on them); thereafter (is the time for) either generosity or ransom; until the war terminates.”)

141. *Id.*

142. See *Islam and Slavery*, ISLAMQA.COM <http://islamqa.info/en/ref/94840/47:4> (last visited Apr. 9, 2012).

143. *Id.*

144. AL-BUKHARI, *supra* note 42, Hadith No. 2545.

On the basis of the limitations above, it is arguable that Islam does not permit the use of weapons of mass destruction (WMD) (e.g., chemical, biological, and nuclear weapons), because they kill large numbers of people without discrimination between combatants and non-combatants. This leads to loss of lives without a just cause, contradicting the Qur'an, al-Isra'el 17:33, providing "Nor take life — which Allah has made sacred — except for just cause." Using such weapons is considered a kind of "corruption in the land."¹⁴⁵ However, in case WMD are used against Muslims, it is permissible for Muslims to use the same weapons in self-defence as needed to repel aggression. This is based on the Qur'an, an-Nahl 16:126: "If you punish [your enemy], then punish them with the like of that which you were afflicted."

In addition, humane treatment of prisoners of war is emphasised in the Qur'an. Muslims are forbidden from humiliating, terrifying, or torturing prisoners of war. Instead, they are urged to sympathize with the prisoners of war and help them feel their captors' humanness by, for example, providing them with the essentials of life such as food.¹⁴⁶ This humane treatment of prisoners, particularly providing them with adequate food, is indivisibly linked to the inherent dignity of the human person. The Prophet Muhammad was specifically directed to give consolation to the prisoners of war who were taken during the Battle of Badr.¹⁴⁷ It follows, therefore, that inhuman treatment of prisoners of jihad is incompatible with the Qur'an and the Sunnah.

'Suicide bombing' is one of the main methods used by some jihadist groups and organizations (e.g., in the Israel-Palestine conflict, and increasingly in the aftermath of September 11, 2001, and the U.S. aggression in Afghanistan and Iraq) to fight those who fight Muslims. While suicide is strictly forbidden in the Qur'an,¹⁴⁸ some Islamic scholars distinguish between 'suicide bombing' and what is described as 'Martyr operations' which are considered to be one of the 'greatest' forms of jihad. In this regard, Sheikh Yusuf Al-Qaradawi has stated as follows:

The martyr operations is [sic] the greatest of all sorts of Jihad in the Cause of Allah. A martyr operation is carried out by a person who sacrifices himself, deeming his life less value than striving in the Cause of Allah, in the cause of restoring the land and preserving the dignity. To such a valorous attitude applies the following Qur'anic verse: "And of mankind is he who would sell himself, seeking the pleasure of Allah; and Allah hath compassion on (His) bondmen."

But a clear distinction has to be made here between martyrdom and suicide. Suicide is an act or instance of killing oneself intentionally out of despair, and finding no outlet except putting an end to one's life. On the other hand, martyrdom is a heroic

145. See AL-QARADAWI, *supra* note 18, ch 5.

146. See QUR'AN, *Al-Insan* 76:8 ("And they feed, for the love of Allah, the indigent, the orphan, and the captive"); & QUR'AN, *Al-Insan* 76:9 ("We feed you for the sake of Allah alone: we desire from you neither reward nor thanks. . .").

147. See QUR'AN, *Al-Anfal* 8:70 ("O Prophet! say to those who are captives in your hands: 'If Allah findeth any good in your hearts, He will give you something better than what has been taken from you, and He will forgive you: for Allah is Oft-Forgiving, Most Merciful.'").

148. See QUR'AN, *Nisa* 4:29-30 (prohibiting believers from killing or destroying themselves); see also QUR'AN, *Al-An'am* 6:151 ("take not life, which Allah hath made sacred, except by way of justice and law.").

act of choosing to suffer death in the Cause of Allah, and that's why it's considered by most Muslim scholars as one of the greatest forms of Jihad.¹⁴⁹

According to this view, when 'suicide bombings' targeted at those who are actually at war against the believers are carried out, not as a result of despair and discontent or for a material gain, but as sacrificing one's life for the cause of Allah,¹⁵⁰ they represent one of the greatest forms of jihad rather than being labeled 'suicide' or 'terrorism'. The resolution issued by The Islamic Fiqh Council affiliated to the Organization of the Islamic Conference (OIC) in its fourteenth session in 2003 confirmed this position in the following terms:¹⁵¹

2. Terrorism equals illegal aggression, terror, threatening both in material and abstract forms which is practiced by states, groups or individuals against man, his religion, soul, honor, intellect or his property via all means, among which is the spread of corruption on earth.

3. The Islamic Fiqh Council asserts that jihad and martyr operations done to defend the Islamic creed, dignity, freedom and the sovereignty of states is not considered terrorism but a basic form of necessary defense for legitimate rights. Thus the oppressed peoples who are subjected to occupation have the right to seek their freedom via all means possible.

4. The Islamic Fiqh Council stresses that martyr operations are a form of jihad, and carrying out those operations is a legitimate right that has nothing to do with terrorism or suicide. Those operations become obligatory when they become the only way to stop the aggression of the enemy, defeat it, and grievously damage its power.¹⁵²

However, this view is of questionable validity in Islam, particularly given the fact that 'suicide bombings' contradict two fundamental principles in Islam: the prohibition against suicide, and the deliberate killing on non-combatants causing indiscriminate and unnecessary suffering to civilians. Even when such operations are carried out, they are often far away from military objectives and cause direct civilian casualties or damage, which is excessive in relation to the intended military advantage which the attack is expected to produce. As Muhammad Munir has observed:

When a suicide bomber targets civilians, he might be committing at least five crimes according to Islamic law, namely killing civilians, mutilating them by blowing them up, violating the trust of the enemy's soldiers and civilians, committing suicide and, finally,

149. Yusuf Al-Qaradawi, *Palestinian Women Carrying Out Martyr Operations* (November 6, 2006) available at http://www.islamonline.net/servlet/Satellite?pagename=IslamOnline-English-Ask_Scholar/FatwaE/FatwaE&cid=1119503545134. See also *The Qaradawi Fatwas*, 11 Middle East Quarterly 78, 78-80 (2004), available at <http://www.meforum.org/646/the-qaradawi-fatwas>.

150. See also, e.g., Burhan, *Question No.539: Suicide Bombers*, available at http://www.islamhelpline.com/view_answers.asp?QAID=4287.

151. The Conference was held in Doha, Qatar 5–13 Dhul-Qi'dah 1423 A.H., 11–16 January 2003 C.E. The text of the resolution is available at http://www.islamonline.net/servlet/Satellite?cid=1119503546498&pagename=IslamOnline-English-Ask_Scholar%2FFatwaE%2FFatwaEAskTheScholar.

152. The Conference was held in Doha, Qatar. See The Islamic Fiqh Council, 14th Sess., January 11-16, 2003, 5–13 Dhul-Qi'dah 1423 A.H., available at http://www.islamonline.net/servlet/Satellite?cid=1119503546498&pagename=IslamOnline-English-Ask_Scholar%2FFatwaE%2FFatwaEAskTheScholar.

destroying civilian objects or property. . . A suicide mission is therefore contrary to the norms of Islamic jus in bello and has no place in Islamic legal thought.¹⁵³

Yet, jihad (and Islam in general) is never a tool of terrorism¹⁵⁴ or waging war against the civilian population and civilian objects. According to the 1999 OIC Convention on Combating International Terrorism:

“Terrorism” means any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing people or threatening to harm them or imperiling their lives, honor, freedoms, security or rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent States.¹⁵⁵

Terrorism violates the right to life of innocent individuals which is contrary to the clear text of Qur’an verses such as:

[T]ake not life, which Allah has made sacred, except by way of justice and law: thus does He command you, that you may learn wisdom.¹⁵⁶

. . . if anyone 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 people.¹⁵⁷

It can be noted from the foregoing that the Qur’an equates the taking of even one human life unjustly, with killing all of humanity. Therefore, the arbitrary killing of civilians is considered a crime against humanity in the Qur’an. How, then, can innocent attacks on civilians be justified in the name of jihad? Clearly, the Qur’an prohibits terrorism since its effect is not to save life but to deprive innocent persons of the right to life, contrary to several Qur’an concepts of morality, love, compassion, mercy, modesty, self-sacrifice, tolerance and peace. Even when one is wronged, the Qur’an calls for forgiveness.¹⁵⁸ The Qur’an declares that “Allah likes not the *Mufsidun* (those who commit great crimes and sins, oppressors, tyrants, mischief-makers, corrupters)”.¹⁵⁹ Terrorism is one of the most serious crimes and in the Qur’an context, those who commit terrorist acts would be among the *Mufsidun*. Even beating people or humiliating them was prohibited in the practice of Prophet Muhammad’s companions. For example, Prophet Muhammad’s second successor, Umar Ibn al-Khattab, gave the following instructions: “Don’t beat up people or humiliate them! Since when have you turned men into slaves, whereas they were born free?”¹⁶⁰

153. Muhammad Munir, *Suicide Attacks and Islamic Law*, 90 INT’L REV. OF THE RED CROSS 71, 89 (2008).

154. Terrorism is condemned by Islamic States. See, e.g., *Convention on Combating International Terrorism*, ORGANISATION OF ISLAMIC COOPERATION, (1999), available at <http://www.oicun.org/7/38>.

155. *Id.* art. I(2).

156. QUR’AN, *Al-An-am* 6:151; See also QUR’AN, *Bani Israel* 17:33; *An-Nisa* 4:29.

157. QUR’AN, *Al-Ma’idah* 5:32.

158. “Hold to forgiveness; command what is right; but turn away from the ignorant.” QUR’AN, *Al-A’raf* 7:199; see also ISLAM DENOUNCES TERRORISM, <http://www.islamdenoucesterrorism.com/> (last visited Aug. 21 2011).

159. QUR’AN, *Al-Qasas* 28:77 (Khan and Al-Hilali trans.).

160. See 14 IBN KATHIR, *AL-BIDAYA WAL-NIHAYA; MAKTABAT AL-MA’ARIF, BEIRUT*, vols. 8, 70, n.d.).

IV. Conclusion: Should Muslims Abandon Armed Jihad?

While there are several views on jihad, one interpretation is that it includes the use of military force in self-defence for the sake of Allah. In the early days of Islam, this was justified because there was no freedom to propagate Islam or for Muslims to manifest it freely in non-Muslim controlled areas. Generally, this is no longer the case today. The freedom to manifest religion or belief in worship, observance, and practice is an internationally-guaranteed human right. Restrictions on the freedom to manifest religion or belief are permissible only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. In this human rights framework, and given that jihad is currently used mainly by non-State actors (as opposed to States) to advocate armed struggle for regime change, should Muslims abandon such armed jihad?

As noted above, the use of force is prohibited under the UN Charter except in the case of self-defence under Article 51 or when used or sanctioned by the Security Council under Chapter VII. Clearly, unless the use of military force on the basis of Islamic jihad is brought in the context of Article 51 or sanctioned by the Security Council, it is a violation of the UN Charter. However, it is not realistic to expect Islamic States (i.e., either applying some aspects of Islamic law or where Muslims are the majority of the population) to abandon armed jihad because it is contrary to the UN Charter. Military jihad is still regarded as forming an essential aspect of religion.¹⁶¹

Therefore, the concept of jihad should be considered in light of those obligations of Islamic States under the UN Charter which were reaffirmed in the OIC Charter. This requires the application of military jihad under *Sharia* in a manner compatible with international law. This is possible because interpretations of *Sharia* are a product of human agency, in a specific time and place and can thus evolve through the same process over time.¹⁶² Military jihad in the Qur'an can thus be limited to self-defence against aggression in accordance with the UN Charter and subject to the methods and means of warfare consistent with international humanitarian law. As argued above, the use of armed jihad to compel non-Muslims to believe in Islam is not only contrary to the Qur'an, but also violates the right to freedom of religion as protected in international human rights instruments. It is also against the very concept of religion or belief because it necessarily entails the freedom to choose whether or not to believe. Indeed, without the existence of the right to disbelieve, there can be no genuine belief. Finally, the use of jihad to justify terrorism and indiscriminate attack on non-combatants is a gross abuse of the very concept of jihad.

161. See, e.g., Sheikh Abdullah bin Muhammad bin Humaid, *The Call to Jihad (Fighting in Allah's Cause) in the Qur'an*, in SUMMARISED SAHIN AL-BUKHARI, 1079-1096 (Muhammad Muhsin Khan trans., 1996).

162. See Abdullahi Ahmed An-Na'im, *Why Should Muslims Abandon Jihad? Human Rights and the Future of International Law*, 27 *THIRD WORLD Q.* 785, 792 (2006).