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The Use of Force under Islamic Law

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Abstract

This article focuses on the use of force under Islamic law, i.e., jus ad bellum. *Islamic law allows the use of force in self-defence and in defence of those who are oppressed and unable to defend themselves. In contrast, the offensive theory of jihad is untenable. Muslim states follow the defensive theory of jihad. Islamic law also allows, under certain conditions, anticipatory self-defence. Only the head of a Muslim state (a ruler or caliph) is allowed to declare jihad. Most of the current so-called declarations of jihad have been issued by non-state actors, e.g. Al-Qaeda, who have no authority to declare jihad. These declarations thus have no validity under Islamic law and, indeed, Muslim states are fighting these armed groups. Islamic law imposes certain restrictions on the use of force in self-defence, i.e., military necessity, distinction, and proportionality. Accepting an offer of peace and humanity are also relevant conditions.*

This article investigates the use of force under Islamic law. It specifically examines the question of when it is justified to resort to the use of force, namely the *jus ad bellum* of Islamic law. Two other questions, naturally related to this central question, are: what are the limitations on the use of force and when should the use of force end? We argue that Islamic law allows the use of force in self-defence only, and that the offensive theory of jihad (the offensive use of force) is untenable. This article is divided into four sections. Section 1 explores the basis for the use of force in the two primary sources of Islamic law: the Qur'an and the Sunnah (the model behaviour of the Prophet Muhammad).[1] For the sake of clarity, section 1 is sub-divided into three parts: part A discusses the defensive and offensive theories on the use of force; part B examines the use of force in anticipatory self-defence; and part C discusses the question of who can authorize the use of force or declare jihad. Section 2 focuses on the

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[1] We do not intend to engage in a historical survey of the use of force under Islamic law, as that would require a larger space than is available here. See, generally, Bassiouni, 'Evolving Approaches to Jihad: From Self-defence to Revolutionary and Regime-Change Political Violence', 8 *Chicago J Int'l L* (2007) 1.

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limitations on the use of force and section 3 looks at the Islamic rules for ending the use of force. Section 4 concludes the article.

1. *Jus ad bellum*

In Islamic tradition *jus ad bellum* is part of jihad. Therefore, it is essential to understand the meaning of jihad, which derives from the Arabic word '*juhd*' and literally means to 'exert', 'strive', and 'struggle'.[2] In Islamic tradition, there are two main kinds of jihad: greater or major jihad and lesser or minor jihad. Greater/major jihad is a process of self-purification, whilst lesser/minor jihad signifies a struggle for self-defence – a struggle which can be carried out by tongue, pen or sword. In our view, jihad is a search. On a personal level, it is a search for self-satisfaction by winning the pleasure and blessing of God. This internal search may be regarded as major jihad. At the external level, jihad is a search for self-protection in several ways, including self-defence, self-determination, and the search for ways to overcome hurdles preventing self-protection. The search or struggle for self-protection should not be by violent means. The resolution of an international issue by intense diplomatic negotiations is a perfect example of jihad: a struggle to find a solution to a problem. For instance, the intense diplomatic efforts of Muslim states to resolve the Israeli – Palestinian conflict may be considered a perfect example of jihad. Jihad by sword, i.e., the use of force in self-defence, which is the focus of our discussion, is a last resort. In this article, the term jihad is used in the sense of using force in self-defence.

A *Theories of Jihad*

There are two theories of jihad on the use of force: the defensive and offensive theories.

1. Defensive Theory

The Qur'an (22:39) allows the use of force in self-defence: 'Permission [to fight] is given to those against whom fighting is launched, because they have been wronged.'[3] This was the first time, immediately after the Prophet Muhammad migrated from Mecca to Medina[4] in 622 AD, that the Qur'an gave permission to use force in self-defence.[5] Verse 22:39 is written in the passive tense, 'against whom fighting is launched',[6] and therefore indicates that permission is given when Muslims are 'wronged', i.e., attacked. Verse 22:40 sheds some light on what the Qur'an means by wronging: '[they are] the ones who were expelled from their homes without any just reason, except that they say "Our Lord is Allah"'. Permission to use force is therefore predicated on 'wronging' Muslims. This position is reinforced by verse 2:190: '[f]ight in the way of Allah against

[2] Qur'an, 6:108; 22:27.

[3] The translation of the Qur'an by Muhammad Taqi Usmani, *The Meaning of the Noble Quran* (2006), A. Ali, *infra* note 4, is used in this article.

[4] A.Y. Ali, *The Meaning of the Noble Quran* (1989), at 832.

[5] A.M. Daryabadi, *The Glorious Quran: Text, Translation and Commentary* (2002), at 603.

[6] See Ali, *supra* note 4, at 832.

those who fight you, and do not transgress. Verily, Allah does not like the transgressors.' This verse was revealed one year after the Prophet Muhammad migrated from Mecca to Medina.[7] 'Fight in the way of Allah against those who fight you' has two meanings. First, it allows Muslims to fight those who fight them, a reflection of the permission given in verse 22:39. The phrase 'who fight you' shows that Muslims cannot be aggressors.[8] This verse prohibits aggression but allows the use of force in self-defence as an exception. Secondly, it refers only to fighting combatants during actual combat (*qital*). '[A]nd do not transgress' means that the limits set by Allah must not be violated: fight those who fight you or use force in self-defence. Verses 22:39 and 2:190 are the two verses that speak of individual self-defence in the Qur'an, but verse 22:39 is a primary verse on this point.

The Qur'an (4:75) allows the use of force for defending other Muslims who are oppressed and are unable to defend themselves: 'what has happened to you that you do not fight in the way of Allah and for the oppressed among men, women and children'. Here we find a different meaning. Whilst verse 22:39 allows the use of force in self-defence, verse 4:75 permits the use of force in the defence of those who are persecuted for believing in Islam and are unable to defend themselves. The threshold for using force in the defence of oppressed and weak Muslims is that the oppression suffered must be so severe as to compel Muslims to leave their homes, for instance, genocide or torture.

The Qur'an provides clear evidence for the use of force in self-defence and for defending other Muslims who are oppressed but unable to defend themselves. Permission to use force to defend oppressed and weak Muslims is specified for Muslims, but verse 4:75 does not prohibit extending that rule to the protection of all others on humanitarian grounds. There is evidence in the Qur'an on the basis of which a rule can be developed to protect any oppressed people who are unable to defend themselves. For instance, the Qur'an (5:32) states: 'whoever saves the life of a person is as if he has saved the life of the whole of humankind'. The development of such a rule would be in line with the higher value/message of the Qur'an (2:213), i.e., that humankind is one family and the Qur'an (21:170) is mercy for mankind.

The Qur'an (49:9) also allows the use of force against other Muslims in certain circumstances: '[i]f two groups of the believers fight each other, seek reconciliation between them. And if one of them commits aggression against the other, fight the one that commits aggression until it comes back to Allah's command. So if it comes back, seek reconciliation between them with fairness, and maintain justice.' Here again permission is given to fight aggressors. The circumstances in which verse 49:9 was revealed do not indicate that it addresses the situation of an armed conflict among Muslims or that it allows a ruler to use force against rebellion. There are different views about the circumstances in which it was revealed, but it seems that the verse addressed situations like a street brawl or a dispute between families during the

[7] M. Asad, *The Message of the Quran* (1997), at 512.

[8] See Daryabadi, *supra* note 5, at 68; see also M. Hamidullah, *The Muslim Conduct of State* (1956) and Noor Muhammad, 'The Doctrine of Jihad: An Introduction', 3 *J L &Religion* (1985) 381.

lifetime of the Prophet Muhammad.[9] It was the immediate successors of the Prophet Muhammad and later jurists who interpreted verse 49:9 as allowing a ruler to use force against rebellion. They cite the example of Fourth Caliph Ali and his fight against rebels to justify their interpretation.[10] Thus, this verse became a basis for using force against rebellion.

The defensive theory of jihad has a clear basis in the Qur'an. On this theory, the use of force is allowed in self-defence; defending Muslims who are oppressed but unable to defend themselves; using force to prevent a humanitarian catastrophe, and allowing a Muslim ruler to use force against rebellion.[11]

2. Offensive Theory

The offensive theory of jihad is based on two main arguments: the progression of rules on the use of force and the universality of the Islamic religion.

The progression argument states that the Qur'an did not allow the use of force and, instead, favoured patience in the early years of Islam, i.e., the Meccan period (610–622 AD).[12] However, following Prophet Muhammad's migration to Medina, when he founded a Muslim community, jihad was allowed in self-defence, i.e., in the Medinan period (622–632 AD). In the last year of the Medinan period (9 AH) the argument goes, all the verses relating to self-defence were repealed by verses 9:5 and 9:29, making jihad a continuous obligation for Muslims of all ages.

Let us elaborate each stage of the progression argument. In Mecca jihad was not allowed. The following verses are cited to support this argument:

> The one who defends himself after having been wronged; there is no blame on such people (42:41).
>
> Blame, in fact, is upon those who wrong people and make mischief on earth unjustly (42:42).
>
> And if one observes patience and forgives, it is, of course, one of the courageous conducts (42:43).
>
> (O Muslims), many among the people of the Book desire to turn you, after your accepting the faith, back into disbelievers – all out of envy on their part, even after the truth has become clear to them. *So, forgive and overlook till Allah brings out His command* (2:109) [emphasis added].

There is scholarly consensus on this point: jihad was not allowed in Mecca.

In Medina, a new command (verses 22:39 and 2:190) was revealed and force was thus allowed in self-defence, a command alluded to in verse 2:109. The following two verses are cited in support of this argument:

[9] I. Ibn Kathir, *Tafseer Ibn Kathir* (trans. Junaqghari, 2005), v, at 67; A. Elahi, *Anwarul Bayan* (2008), v, at 178.

[10] See N.A. Shah, *Islamic Law and the Law of Armed Conflict: The Armed Conflict in Pakistan* (2011), at 66–67.

[11] The defensive theory of Jihad is compatible with the 1945 UN Charter. Art. 2(4) prohibits the use of force, but Art. 42 allows the Security Council to authorize the use of force for maintaining or restoring peace and security. Art. 51 allows the use of force in self-defence as an exception.

[12] Afsaruddin, 'War and Violence', in O. Leaman (ed.), *The Quran: An Encyclopaedia* (2008), at 687; M. Bin Ismail Al-Bukhari, *Kashful Bari: Kitab Al-Maghazi (Book of Ghazqat)* (trans. S. Khan, 2008), at 17.

> Permission (to fight) is given to those against whom fighting is launched, because they have been wronged' (22:39),
>
> Fight in the way of Allah against those who fight you, and do not transgress. Verily, Allah does not like the transgressors (2:190).

There is scholarly consensus on this point as well.

The argument goes that this rule of jihad in self-defence remained in force for eight years of the Medinan period. The Muslim community consolidated itself during this period, and in 9 AH, two separate commands were revealed regarding polytheists and People of the Book (Jews, Christians, and Sabians). The Qur'an, it is argued, said to fight and kill polytheists, but to spare them if they embraced Islam. Verse 9:5 is cited to support the argument:

> So, when the sacred months expire, kill the [polytheists] wherever you find them, and catch them and besiege them and sit in ambush for them everywhere. Then, if they repent and establish [prayer] and pay [poor due], leave their way. Surely, Allah is most Forgiving, Very-Merciful.

The People of the Book were to be fought and killed, but they could be spared if they agreed to pay *jizya* (protection tax) after being subdued. Verse 9:29 is cited to support this argument:

> Fight those People of the Book who do not believe in Allah, nor in the Last Day, and do not take as unlawful what Allah and His Messenger have declared as unlawful, and do not profess the Faith of Truth; [fight them] until they pay *jizya* with their own hands while they are subdued.

The proponents of the progression argument maintain that verses 9:5 and 9:29 abrogated verses 22:39 and 2:190, permitting the use of force in self-defence. Offensive jihad thus became an obligation for every Muslim: the rules of jihad progressed from a state of patience to the use of force in self-defence followed by an obligatory jihad against the polytheists and People of the Book. If this interpretation is accepted, it would simply mean that verse 9:5 obliges Muslims to forcefully convert polytheists to Islam or kill them, which would amount to a rule for genocide. It would also mean that verse 9:29 obliges Muslims to subjugate the People of the Book.

However, the study of verses 9:5 and 9:29 in their historical and Qur'anic contexts suggests that the progression argument is untenable. We argue that verses 9:5 and 9:29 do not repeal verses 22:39 and 2:190. To establish our point, we need to examine verses 9:5 and 9:29 in their Qur'anic and historical contexts. We would also need to find out whether the Qur'an had used the 'kill them [polytheists]' language in other verses and contexts as well. Finally, we need to examine the practices of Prophet Muhammad and his immediate successors to find out how they dealt with the polytheists and the People of the Book after verses 9:5 and 9:29 were revealed.

(a) Verses 9:5 and 9:29

Chapters 8 and 9 of the Qur'an were revealed at Medina and their subject matter is similar, i.e. war. Chapter 8 was revealed shortly after the battle of Badr (2 AH) and dealt with the lessons of Badr: the question of war booty; the virtues necessary for good fighting; victory against the odds; and clemency and consideration for one's own people and for others in the hour of victory.[13] It aimed to address the large questions

[13] See Ali, *supra* note 4, at 413.

arising at the start of a newly organized community. Chapter 9 logically follows the argument of chapter 8 so closely[14] that a *Bismillah* ('in the name of Allah') is not written at the beginning. This is the only chapter of the Qur'an to begin without a *Bismillah* because the compilers of the Qur'an were not sure if they were separate chapters.[15] Chapter 9 is the last of the Qur'anic chapters to be revealed.[16]

Verses 1–29 of Chapter 9 were revealed before the battle of Tabuk in October, 9 AH.[17] The subject matter of the chapter is 'what is to be done if the enemy breaks faith and is guilty of treachery'.[18] It does not lay down new rules for the use of force. Chapter 9 discusses three kinds of people: the polytheists (or pagans), the People of the Book, and the hypocrites (those who pretended to be Muslims but never wholeheartedly embraced Islam). There were four kinds of polytheists in Medina in 630 AD. A first group were those with whom the Prophet Muhammad had concluded a peace treaty at Hudaybiyya in 628 AD, i.e., the Quraysh. One of the conditions of the treaty was that no party would attack another party or its allies. The treaty allowed other tribes to join any of the main parties to the treaty. Banu Bakr joined the Quraysh whereas Banu Khazagh joined the Muslims. Banu Bakr breached the terms of Hudaybiyya by attacking Banu Khazagh, and so did the Quraysh by aiding its ally. As the treaty was violated, the Prophet Muhammad marched towards Mecca in 629 AD but was conquered without actual combat. The second group of polytheists were those with whom the Prophet Muhammad had concluded peace treaties for a fixed period, during which time the terms of their treaties were not broken, e.g., Bani Zamrah and Bani Madlej. The third group comprised those with whom the Prophet Muhammad had open-ended peace treaties: their terms were not fixed. The fourth group was made up of those with whom the Prophet Muhammad had no treaty at all.[19] The first three verses address the first and second groups, who were given a four-month guarantee of safe passage (*aman*):

> Here is a disavowal (proclaimed) by Allah and His Messenger against the [polytheists] with whom you have a treaty (9:1).
>
> So, move in the land freely for four months, and be aware that you can never frustrate Allah, and that Allah is going to disgrace the disbelievers (9:2).
>
> And here is an announcement, from Allah and His Messenger, to the people on the day of the greater Hajj, that Allah is free from (any commitment to) the [polytheists], and so is His Messenger. Now, if you repent, it is good for you. And if you turn away, then be aware that you can never frustrate Allah. And give those who disbelieve the 'good' news of a painful punishment (9:3).

Verse 9:4 was addressed to Banu Zamrah and Banu Madlej: '[e]xcept those of the [polytheists] with whom you have a treaty, and they were not deficient (in fulfilling the treaty) with you, and did not back up any one against you. So fulfil the treaty with

[14] *Ibid.*
[15] Kathir, *supra* note 9, at 478; M. Shafi, *Ma'ariful Quran* (1974), at 305–306.
[16] *Ibid.*
[17] Ali, *supra* note 4, at 435.
[18] *Ibid.*
[19] Elahi, *supra* note 9, at 553; Al-Bukhari, *supra* note 12, at 179.

them up to their term.' Verse 9:7 was addressed to Banu Hamzah and Banu Kinana who remained faithful to their treaties and were given time until the end of their treaties: '[h]ow can the [polytheists] have a treaty with Allah and His Messenger? Except those with whom you made a treaty near Al-Masjid-ul-Haram. Then, as long as they remain straight with you, you too remain straight with them' (9:7). Verse 9:5 was addressed to Quraysh[20] who broke the terms of Hudaybiyya: '[s]o, when the sacred months expire, kill the [polytheists] wherever you find them, and catch them and besiege them and sit in ambush for them everywhere. Then, if they repent and establish Salah (prayer) and pay Zakah (poor due) leave their way.'

Verse 9:29 was revealed to address the People of the Book: '[f]ight those People of the Book who do not believe in Allah, nor in the Last Day, and do not take as unlawful what Allah and His Messenger have declared as unlawful, and do not profess the Faith of Truth; [fight them] until they pay *Jizya* with their own hands while they are subdued.' The immediate context for the revelation of verse 9:29 was the rumour that the Byzantines (Romans) – who were People of the Book – were preparing to attack Arabia.[21] After the revelation of verse 9:29, the Prophet Muhammad gathered an army of 30,000 and marched towards Syria, and stayed at Tabuk, a town bordering Byzantine territory, in order to repel the imminent Byzantine attack. The Byzantine invasion did not come off, but the Prophet Muhammad made treaties with some Christian and Jewish tribes near the Gulf of Aqabah.[22] Verses 30–129 were revealed after the Tabuk expedition, and dealt with the hypocrites who did not join the Tabuk expedition and other issues, such as who must participate in actual combat (*qital*).[23]

A careful contextual analysis of verses 9:1–9:29 indicates that they were revealed to address particular groups of people and their relationship with the Muslims at that time. The subject-matter and intention of these verses is not to create new rules for the use of force by superseding the previous verses,[24] but whether to dissolve or not to dissolve treaties with particular tribes. The dissolution of a treaty means that a treaty relationship is eliminated and thus a non-treaty relationship is entered. It does not mean that new rules for the use of force are created or that the previous ones are repealed. Elahi argues that verse 2:29 is not about spreading Islam – through obligatory jihad – and eliminating the People of the Book if they do not embrace Islam. It is about *jizya*, a symbol of political dominance and sovereignty. Verse 2:29 is addressed to the Muslims of 7th-century Arab society. It is not addressed to the Muslims of the 21st century, asking them to go to the People of the Book with the Qur'an in one hand and a sword in the other, and to kill them if they do not accept the Qur'an (i.e., embrace Islam) or pay *jizya*.[25] Verse 9:5 is about fighting those polytheists – Quraysh – who broke their covenants with the Muslims. It is not directly addressed to Muslims today.

[20] Shafi, *supra* note 15, at 309–312.
[21] Ali, *supra* note 4, at 435.
[22] *Ibid.*
[23] *Ibid.*
[24] See N.A. Shah, *Self-defence in Islamic and International Law: Assessing Al-Qaeda and the Invasion of Iraq* (2008).
[25] Elahi, *supra* note 9, at 576.

(b) The 'kill them' language

In addition to a contextual analysis, a linguistic analysis indicates that the Qur'an did not use the 'kill them' language for the first time in verses 9:5 and 9:29. The same language had been used in verses revealed before verses 9:5 and 9:29.[26]

> *Kill them wherever you find them*, and drive them out from where they drove you out, as Fitnah (to create disorder) is more severe than killing (2:191).
>
> They wish that you should disbelieve, as they have disbelieved, and thus you become all alike. So, do not take friends from among them unless they migrate in the way of Allah. Then, if they turn away, *seize them, and kill them* wherever you find them, and do not take from among them a friend or helper (4:89).
>
> You will find others who want to be secure from you, and secure from their own people. (But) whenever they are called back to the mischief, they are plunged into it. So, if they do not stay away from you, and do not offer peace to you, and do not restrain their hands, then *seize them, and kill them* wherever you find them, and, we have given you an open authority against them (4:91) [emphasis added].

Whenever the Qur'an requires the killing of non-Muslims, it is contingent upon them doing or not doing something. For instance, verse 2:191 is about expelling non-Muslims from where they had expelled Muslims. In verse 4:89, the killing is contingent on 'if they turn away', whereas in verse 4:91 it is conditional upon 'if they do not stay away from you'. The 'kill them' language has been used on specific occasions for specific groups of people. This is also the case with verses 9:5 and 9:29. They do not repeal or purport to repeal verses related to jihad in self-defence. The only normative value of verses 9:5 and 9:29 is that in similar contexts and conditions Muslims may follow the course suggested by these verses. The rule of killing for specific reasons is not confined to non-Muslims only. Islamic law allows the killing of Muslims in certain cases, such as in rebellion. The contextual and linguistic analysis suggests that the Qur'an does not permit the killing of polytheists.

In general, the Qur'an prohibits the crime of genocide. Several verses of the Qur'an and practices of the Prophet Muhammad can be cited to support this point, but verse 5:32 is the most relevant:

> Whoever kills a person not in retaliation for a person killed, nor (as a punishment) for spreading disorder on the earth, is as if he has killed the whole of humankind, and whoever saves the life of a person is as if he has saved the life of the whole of humankind.

The verse can be divided into parts: 'the killing of innocent persons' and 'the saving of life'. The killing part of the verse can be relied on for the prevention or punishment of the crime of genocide, whereas the saving part can be referred to for humanitarian intervention. The use of the word 'person' means that any person, irrespective of religion or race or colour, cannot be killed without reasons set out in verse 5:32. It also means that a person of any background can be saved from destruction and death. The principle of humanitarian intervention can be extended to nations and races of any description. It is important to note that humanitarian intervention to protect Muslims from persecution is mentioned in the Qur'an (4:75) separately. It reinforces the point that the ultimate aim of the Qur'an is to prevent the killing of all innocent people.

[26] See Ali, *supra* note 4.

(c) The Practices of Prophet Muhammad and Caliph Abu Bakr

As stated above, verses 9:1–9:29 were revealed before the Tabuk expedition in 9 AH. In fact the Tabuk expedition began after permission was given by verse 9:29 to fight the People of the Book[27] and verse 9:29 is therefore regarded as a preface to the battle of Tabuk.[28] When the Prophet Muhammad reached Tabuk, the governor of Aylah, Rubah, made a peace treaty with the Prophet Muhammad by agreeing to pay *jizya* to him. The people of Jarba and Adhruh also agreed to pay *jizya* to the Prophet Muhammad and the Prophet Muhammad wrote agreements for each of them.[29] They were all non-Muslims. After the death of the Prophet Muhammad (632 AD), most of the former polytheist tribes who had embraced Islam during the Prophet's lifetime renounced Islam and attempted to secede from the Muslim polity. Some even tried to invade Medina,[30] the capital of the Islamic state. Abu Bakr, the first Caliph, sent forces to suppress the secessionist tribes and restore the writ of Islamic government. He gave the following instructions to commander Muhajir before sending him as a reinforcement to the expedition of Kindah: '[i]f this letter of mine reaches you before you have achieved victory, then – if you conquer the enemy – kill the fighting men and take the offspring captive if you took them by force'.[31] If verse 9:5 meant killing all polytheists, Abu Bakr would have given different instructions: kill them all when you capture them. The practices of the Prophet Muhammad and Caliph Abu Bakr suggest that verses 9:5 and 9:29 did not repeal verses 22:39 and 2:190 or allow the genocide of polytheists.

Muslim history and the current practices of Muslim states do not support the progression argument. Throughout the history of Islam, People of the Book and other non-Muslims have lived in Muslim states. During the Muslim rule in Spain, the Jews enjoyed their golden era. Millions of Hindus and Sikhs, including the liberal Baber the Lion and the conservative Aurangzeb Alamgir, lived under the rule of the Mughal emperors in the Indian sub-continent for centuries.[32] In addition, current Muslim states are all members of the United Nations and the 1945 Charter of the United Nations prohibits the threat or use of force except in self-defence. This rule has acquired the status of customary law. Muslim states would not have agreed to this rule if Islamic law required them to engage in offensive jihad.

The second argument for the offensive use of force is the universality of Islam: Islam is intended for the whole of mankind and Muslims have an obligation to propagate Islam to the rest of mankind. If their way of propagation is obstructed, those obstructions are to be removed peacefully or by sword if necessary and if Muslims are capable of doing so. Therefore, it is called the offensive theory of jihad. The two architects of the offensive theory of jihad, who have immensely influenced the debate on jihad in the 20th century, are Sayyid Abul A'la Mawdudi and Sayyid Qutb.

[27] *Ibid.*, at 35; Shafi, *supra* note 15, at 362.

[28] *Ibid.*, at 385.

[29] A.J. Ibn JarirTabari, *History of Al-Tabari (Tarikh al-Rusul wa'l muluk)* (trans. M. Ibrahim, 2003), at 58.

[30] *Ibid.*, at 476.

[31] *Ibid.*, at 185.

[32] I. Prasad, *A Short of History of Muslim Rule in India* (1930).

Mawdudi argues that Muslims are supposed to serve the whole of humanity and the best way to do that is to invite people to embrace goodness and prevent them from doing evil: good and evil are based on his understanding of true Islamic teachings.[33] Mawdudi does believe in defensive jihad in order to preserve Muslims and their power from elimination.[34] However, he argues that once Muslims have gained sufficient power then they should strive to remove mischief from the earth and establish the rule of God. This may be done peacefully or by sword if necessary: hence his justification for offensive jihad.[35] In his view, the Qur'an allows Muslims to use the sword for two purposes: (a) to preserve Muslims and their power from being eliminated, and (b) to use their accumulated power to remove mischief from the entire world, establishing the rule of Allah.

Qutb, influenced by Mawdudi, argues that to say that jihad is merely defensive war is to 'underrate the Islamic way of life, places its importance below that of the homeland'.[36] He believes that 'justification for Jihad is inherent in the nature of this faith … defending the homeland of Islam is the means to establish God's authority within it, and to use it as the base from which to address all mankind. Islam is a message to all humanity, and the whole earth is its sphere of action.'[37] According to Qutb, jihad includes 'efforts to change people through verbal advocacy. It also includes the possible armed struggle to end an oppressive system and establish [Islamic] justice.'[38] 'Islam is not a party of preachers and missionaries but rather of divine enforcers. Its mission is to blot out, by force if necessary, oppression, moral anarchy, social disorder and exploitation … and replace evil with good.'[39] Any effort to spread Islam may face obstacles which Islam aims to remove so that it can address people freely and appeal to their minds and consciences in order to have genuine freedom of choice.[40] The ultimate aim of jihad is 'universal revolution' to 'replace the dominance of non-Islamic systems'.[41] Jurists such as Ibn Taymiyyah took a more activist position, claiming that a ruler who fails to enforce Shari'a rigorously in all its aspects, including jihad, forfeits his right to rule.[42] Similarly, Muhammad Mutahhari deems jihad defensive, but that includes defence against oppression. He considers attacks on polytheist countries legitimate, not to impose the religion of Islam but to eliminate the evils of polytheism.[43] Both Mawdudi and Qutb rely on the following verses to support their theory of offensive jihad:

[33] S.A. A'la Mawdudi, *Al-Jihad Fil-Islam (Jihad in Islam)* (1996), at 86.
[34] *Ibid.*, at 53–82.
[35] *Ibid.*, at 85–149.
[36] S. Qutb, *In the Shade of the Quran* (trans. M.A. Salahi, 2003), at 18–20.
[37] *Ibid.*, at 20–21.
[38] *Ibid.*, at 20.
[39] *Ibid.*, at 34.
[40] *Ibid.*, at 21.
[41] *Ibid.*, at 36.
[42] Ibn Taymiyya cited in Streusand, 'What does Jihad Means?', IV *Middle Eastern Q* (1997), available at: www.meforum.org/357/what-does-jihad-mean.
[43] Mutahhari, 'Jihad in the Quran', in M. Abedi and G. Legenhausen (eds), *Jihad and Shahadat: Struggle and Martyrdom in Islam: Essays and Addresses by Ayatollah Mahmud Taleqani, Ayatullah Murtada Muttahari and Dr. Ali Shari'ati*. (1986), at 89.

> You are the best of peoples, evolved for mankind, enjoining what is right, forbidding what is wrong, and believing in Allah (3:110).
>
> Let there arise out of you a band of people inviting to all that is good, enjoining what is right, and forbidding what is wrong (3:104).
>
> (They are) those who [Muslims], if We establish them in the land, establish regular prayer and give regular charity, enjoin the right and forbid wrong (22:41).

There is no doubt that the Qur'an declares Islam to be a religion for all humankind. There is also no doubt that the Qur'an enjoins its adherents to spread the message of Islam to the rest of the world. Nevertheless, the theory of offensive jihad – as espoused by Mawdudi and Qutb – does not stand up to Qur'anic scrutiny for the following three reasons. First, a contextual interpretation of the verses they rely on brings a different meaning to them. The verses do not support the offensive theory of jihad. Secondly, the Qur'an provides elaborate rules for propagating Islam which do not include the use of force. Thirdly, their interpretation is against the Qur'anic code of armed conflict based on the principle of neutrality.

Let us start with the contextual interpretation of the verses used in support of offensive jihad. Verses 3:104 and 3:110 were revealed in the context of comparing Muslims with those People of the Book who had given up their faiths and were engaged in strife and dissention. These verses in fact allude to an ideal Muslim community: happy, untroubled by conflicts or doubts, sure of itself, united, and prosperous because it invites people to goodness and forbids wrong.[44] To make the context clear, verse 3:110 is reproduced in full:

> You are the best Ummah ever raised for mankind. You bid the Fair and forbid the Unfair, and you believe in Allah. If the people of the Book had believed, it would have been better for them. Among them, there are believers, while most of them are sinners.

The following two verses throw further light on the real meaning and context of verse 3:110, particularly the concept of 'enjoining good and forbidding evil'.

> The believers, male and female, are friends to each other. They bid virtue and forbid vice and establish [prayer] and pay [poor due] and obey Allah and His Messenger. Those are the ones whom Allah will bless with mercy (9:71).
>
> (They are) those who repent, those who worship, those who praise (Allah), those who journey (in Allah's way) … those who bid the Fair and forbid the Unfair and those who preserve the limits prescribed by Allah (9:112).

Verse 3:110 concerns how a Muslim community should be and how it may achieve happiness and felicity. It should establish prayer, pay *zakat* (poor due), promote good, and forbid evil.[45] It should practise charity and participate in jihad. Only those who have sufficient knowledge of Islam may invite people to good and forbid evil because only the knowledgeable may know the difference.[46] Jihad is one of the features of an ideal Muslim community. It is not a means of forbidding evil in the way that Mawdudi and Qutb describe. In addition, one of the requirements of 'enjoining good

[44] Ali, *supra* note 4, at 154.
[45] *Ibid.*, at 310.
[46] Usmani, *supra* note 3, at 81.

and forbidding evil' is to possess sufficient knowledge of Islam, whereas jihad becomes compulsory for every ordinary Muslim if a Muslim land is under attack. In some cases, jihad is optional for able-bodied men. The order of 'enjoining good and forbidding evil' is intended for Muslims in relation to other Muslims in a Muslim community in order to avoid the situation of the People of the Book mentioned in verse 3:110. For instance, regarding the People of the Book, the Qur'an (5:79) says that they failed to invite good and forbid evil; hence there is dissention and strife among them. To argue, as Mawdudi and Qutb do, that this rule applies to non-Muslims as well means subjecting non-Muslims to the Islamic code of good and evil. Yet, it is a germane norm of Islamic law that Islamic law applies only to Muslims. For instance, the 1979 (Enforcement of Hadd) Ordinance of Pakistan prohibits the drinking of alcohol for Muslims but does not prohibit it for non-Muslims. This brings us to the second point: the offensive theory of jihad contradicts the Qur'anic concept of the freedom of religion.

The Qur'an espouses the right to freedom of religion and explains the rules for propagating Islam and the different stages involved in the process. The Qur'an (2:256) sets out a general rule on the absence of compulsion in religion: 'let there be no compulsion in religion'. Verse 2:256 makes it clear that no one is compelled to adopt Islam as his or her religion. The Qur'an (16:125) goes one step further and lays down guidelines for preaching Islam: 'invite all to the way of God with wisdom and beautiful preaching; and argue with them in ways that are best and most gracious'. After imparting the message of Allah in 'ways that are best and most gracious', the Qur'an (18:29) states, 'let him who will believe, and let him who will reject (it)'. The Qur'an thus elaborates the stages for preaching religion: (a) there is no compulsion in religion, (b) invite all to the way of God graciously and, after invitation, (c) people should be left free to choose whether to believe or not to believe.[47]

It is interesting to note that Mawdudi has a similar view on the freedom of religion. Relying on verse 2:256, Mawdudi argues that the best way for Muslims is to present their religion and its teaching to the world together with their reasoning for it. It should be left to the people to accept or reject it.[48] To get to the contextual meanings of this verse, he goes further and explains the occasion/context of its revelation. It was the tradition among the Arabs in Medina, before the migration of Prophet Muhammad from Mecca to Medina, for a woman whose children had died in infancy to say that she would raise a particular child as a Jew if he or she were to live. This was in fact to please the gods so that her child might live longer. In this way many children became Jews. With the arrival of Prophet Muhammad in Medina, the local people tried to convert their Jewish children to Islam. The reason was that they believed Islam to be a better religion, hence they desired conversion. On this occasion verse 2:256 was revealed, prohibiting the forceful conversion of Jewish children to Islam.

Mawdudi also says that 'enjoining good' can be done by persuasion and peaceful means.[49] Regarding 'forbidding evil', he argues that if there is 'mischief and evil' on

[47] Shah, 'Freedom of Religion: Koranic and Human Rights Perspective', 6 *Asia-Pacific J Human Rts and the Law* (2005) 69.

[48] Mawdudi, *supra* note 33, at 17.

[49] *Ibid.*, at 164–165.

the earth and Muslims have sufficient powers (military capability) to remove it by force, they should do so. He fails to cite any Qur'anic evidence to back up his argument. Moreover, we have never come across any evidence in the Qur'an or the Sunnah which predicates the use of force for 'forbidding evil' on the sufficiency of power (or military capabilities of Muslims). Both Mawdudi and Qutb cite verse 2:251: '[a]nd did not Allah check one set of people by means of another, the earth would indeed be full of mischief'. However, verse 2:251 is not relevant to the point Mawdudi and Qutb are making. First, it shows how one group was checked by another group, but does not provide a ground for the use of force. Secondly, the word 'check' does not necessarily or usually include the use of force. If Mawdudi and Qutb's concept of 'evil and mischief' means attacking and persecuting Muslims, then force may be used. But this is not what they mean by 'evil and mischief'. For Mawdudi it means immorality[50] and an un-Islamic way of life.[51] For Qutb, it means the removal of 'un-Islamic systems'.[52] This amounts to an imposition of Islam by force, which the Qur'an clearly prohibits.

Thirdly, the offensive theory of jihad is against the Qur'anic code of armed conflict with non-Muslims and the inherent principles of neutrality, i.e., fight those who fight you. The Qur'an provides express rules on living in peace with non-Muslims, making peace treaties with them if they are inclined towards peace, and it obligates Muslims to honour their covenants with non-Muslims. If a covenant with the pagans has not been dissolved and they are not engaged in aiding others against Muslims, then Muslims are required to respect their pledge with them. The Qur'an (9:4) states, 'Except those of the [polytheists] with whom you have a treaty, and they were not deficient (in fulfilling the treaty) with you, and did not back up any one against you. So fulfil the treaty with them up to their term'. When treaties come to an end, the general Qur'anic rule applies: necessary and proportionate force may be used in self-defence only. This does not mean a declaration of war. The Qur'an (60:8) encourages just and kind dealing with everyone: 'Allah does not forbid you as regards those who did not fight you on account of faith, and did not expel you from your homes, that you do good to them, and deal justly with them.'

The views of Mawdudi and Qutb on jihad as self-defence and on freedom of religion conform to the Qur'an. Their views on the universality of the Islamic faith are understandable. However, their concept of 'evil and mischief' and their argument for its removal by force are problematic. It seems that they consider all moral, political and social systems which are not Islamic as 'evil and mischief'. For them the panacea for all 'evil and mischief' is its replacement with 'good': the rule of Allah. The Qur'an (2:191; 2:217) mentions that 'tumult and oppression are worse than slaughter', which Mawdudi[53] and Qutb[54] cite to build their arguments. However, these two verses give the opposite meanings when read in full, i.e., Muslims shall not be oppressed

[50] *Ibid.*, at 105–109.
[51] *Ibid.*, at 170–175.
[52] Qutb, *supra* note 36, at 36.
[53] Mawdudi, *supra* note 33, at 104.
[54] Qutb, *supra* note 36, at 18.

and prevented from believing in Islam rather than requiring Muslims to use force to impose Islam on non-Muslims.

> Kill them wherever you find them, and drive them out from where they drove you out, as Fitnah (to create disorder) is more severe than killing. However, do not fight them near Al-Masjid-ul-Haram (the Sacred Mosque in Makkah) unless they fight you there. However, if they fight you (there) you may kill them (2:191).

> They ask you about the Sacred Month, that is, about fighting in it. Say, 'Fighting in it is something grave, but it is much more grave, in the sight of Allah, to prevent (people) from the path of Allah, to disbelieve in Him, and in Al-Masjid-ul-Haram, and to expel its people from there, and Fitnah (to create disorder) is more grave than killing.' They will go on fighting you until they turn you away from your faith if they could ... (2:217).

In these verses 'tumult and oppression' has two meanings: (a) turning Muslims out of their homes, and (b) preventing them from having access to the path of Allah. The Qur'an allows the use of force in these cases. This take us back to the grounds for defensive jihad: when Muslims are attacked (or turned out of their homes) and persecuted for believing in Islam (prevented from the path of Allah). This is a reiteration of the grounds for self-defence rather than the introduction of new grounds for the use of force. The repetition strengthens the theory of defensive jihad and the fact that self-defence is the *only* Qur'anic ground for the use of force.

The offensive theory of jihad seems to be in conflict with the major themes of the Qur'an: (a) peace, (b) freedom of religion, and (c) Qur'anic justice for all God's creatures. The contextual interpretation of the verses cited in support of the offensive theory supports these Qur'anic themes rather than the offensive theory of jihad. However, it might be helpful to understand Mawdudi and Qutb's arguments in the political context and landscape in which they lived. Mawdudi wrote *Al-Jihad Fil-Islam* (in Urdu) in 1926 when the Indian sub-continent was under British rule and political heat was gathering fast to overthrow the colonizers. He founded his own religious political party called Jamat Islami in 1936. 'Jihad for [Mawdudi] was akin to war of liberation.'[55] Based on Mawdudi's and Hassan Al-Bana's view, the Egyptian Islamic Brotherhood came into existence in 1928. Qutb, himself an Egyptian, was its key member. The Brotherhood focused on the removal of the then government as it considered it un-Islamic. 'For them, as for Ibn Taymiya, jihad includes the overthrow of governments that fail to enforce Shari'a.'[56] To obtain popular support, both Mawdudi and Qutb tried to anchor their arguments firmly in the Qur'an. The political climate of the time may partly explain their offensive view of jihad: the overthrow of foreign and un-Islamic political regimes. Similarly, Ibn Taymiyyah's war against the Tatars furnishes a clue as to why he adopted an extreme view of jihad. The Tatars threatened the borders of Islam by attempting to cut a swathe across Central Asia and Asia Minor. 'Ibn Taymiyyah's call for *jihad* was, at its root, a call for defence against invasion.'[57]

[55] See Streusand, *supra* note 42.

[56] *Ibid.*

[57] Silverman, 'Just War, Jihad, and Terrorism: A Comparison of Western and Islamic Norms for the Use of Political Violence', 44 *J Church & State* (2002) 73; Muhammad, *supra* note 3, at 393.

From the above analysis it becomes clear that Islamic law allows the use of force in self-defence, defending those who are oppressed and are unable to defend themselves. It also allows a Muslim ruler to use force against rebels. The offensive theory of jihad has no foundation in the primary sources of Islamic law.

B *Anticipatory Use of Force*

The Qur'an also allows for necessary preparation and the use of force when an attack on Muslim land is imminent. It was a practice among the warring Arab tribes to conclude peace treaties, but in many instances the terms of those treaties were never honoured. The Qur'an (8:56) reflects this tendency: '[t]hey are those with whom thou didst make a covenant, but they break their covenant every time, and they have not the fear (of Allah)'. The breaking of covenants has two implications. First, entering into covenants with non-Muslims is not only permissible but, in fact, desirable. Secondly, Muslims may resort to the use of force in anticipation only if and when the other party is openly hostile to them.[58] In such circumstances, the Qur'an (8:58) gives conditional permission: '[i]f thou fearest treachery from any group, throw back (their covenant) to them, (so as to be) on equal terms': 'The "reason to fear treachery" must not, of course, be based on mere surmise but on clear, objective evidence.'[59] 'For Allah loveth not the treacherous' is a clear warning to Muslims that before they break the covenant and declare war, there should be clear evidence of treachery by the other side.[60] 'It is obligatory on the part of the Muslim head of government and/or their representative to apprise the enemy beforehand of the non-existence of pacts and treaties. Fighting without this previous notice is unlawful.'[61] Once treachery is established, the Qur'an, in the same chapter (8:60), says, '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.'

The prime example of anticipatory self-defence is the battle of Badr (624 CE), which is the subject of Chapter 8: Al-Anfal (spoils of war) of the Qur'an. After 13 years of persecution, the Prophet Muhammad migrated from Mecca to Medina where he consolidated the Muslim community in a short time. He had concluded alliances and peace treaties with neighbouring tribes and his influence was growing. This alarmed the powerful tribes of Mecca, particularly the Quraysh, because the Muslims could get control of the main trade route between Mecca and Syria which passed near Medina. The Quraysh apprehended that the growing power of Muslims in Medina might jeopardize their trade with Syria. They sent an expedition towards Medina to crush the Muslim power. When the Prophet Muhammad received this news, he led a small force out of Medina to thwart an imminent attack on it.[62]

[58] Asad, *supra* note 7, at 248–249.

[59] *Ibid.*

[60] *Ibid.*

[61] Daryabadi, *supra* note 5, at 346.

[62] Mawdudi, *supra* note 33, at 119–134. In general, Mawdudi's interpretations of the Qur'an and his historical accounts of different events are considered authoritative. However, we respectfully disagree with some of his views such as the offensive theory of Jihad.

C *Who Can Declare Jihad?*

According to the Qur'an, the Prophet Muhammad, and after his death a Caliph (Muslim ruler), have the authority to declare defensive jihad. 'In its classical interpretation it was left to the Imam or Caliph who was the head of Muslim polity to declare Jihad.'[63] The Qur'an (8:65) says, 'O Messenger, rouse the Believers to the fight' and 'consult them in affairs (of moment). Then, when thou hast taken a decision put thy trust in Allah' (3:159). After a decision is taken by 'mutual consultation' the citizens of a Muslim state are required to follow the decision of those in authority because the Qur'an (4:59) states, 'O ye who believe! Obey Allah, and obey the Messenger, and those charged with authority among you.' The Qur'an (4:59) provides a procedure for the resolution of differences among Muslims, e.g., the ruler and the ruled: '[i]f ye differ in anything among yourselves, refer it to Allah and His Messenger that is best and most suitable for final determination'. This means that if Muslims 'differ in anything' among themselves, the matter shall be decided according to the Qur'an (the words of God) and the Sunnah. Verse 4:59 gives priority to the words of God, both in obedience and for dispute resolution; hence it is imperative to turn to the Qur'an for guidance on particular issues.

After the death of the Prophet Muhammad, the only option was to refer such matters to those 'charged with authority', e.g., caliph/ruler. Individuals or a group of individuals may differ with a given government on the issue of declaring jihad. Certain Muslim armed groups may rebel against the rulers of a Muslim state. In such a situation, the test is the public support (which can be derived from the above three verses). If the public trusts and believes that the government is Islamic, then it is for the government to decide on the declaration of jihad. In this case, any opposing individuals or groups have no authority. However, if the given government loses public support and trust because it is considered un-Islamic, then those who have the support and trust of the public can, after being put in a position of authority according to Islamic law, take decisions on declaring jihad.[64]

This signifies that there could be a situation where individuals (or leaders not in government), by consensus, may be able to declare jihad. Individuals or a group of individuals may declare jihad, e.g., when (a) a Muslim land is attacked, (b) the ruler is on the side of the invader, and (c) a well-founded fear exists that the ruler will not protect the lives and properties of Muslims. In such a case, if there is consensus among Muslim leaders, they may declare jihad in defence of Muslims. The classic case is the Russian invasion of Afghanistan in 1979. The Afghan leaders declared jihad against the invaders as well as the pro-communist ruler of Afghanistan. Muslims around the world joined the Afghan jihad. This kind of jihad would be considered as a war in self-defence or defensive jihad, although it was not declared by a Muslim ruler.

[63] Muhammad, *supra* note 3, at 390.

[64] The government and its officials hold political power as public trust; see *Nusrat Baig Mirza*, All Pakistan Legal Decisions 1992 Federal Shariat Court 412. A *hadith* of the Prophet Muhammad the purport of which is that Muslim Ummah will never agree on something which is against Islam is also relevant.

Within the scheme of the Qur'an, the status of armed groups – non-state actors – is as follows. First, non-state actors or Muslim armed groups within a Muslim state cannot declare jihad on behalf of a Muslim state with another state, e.g., Al-Qaeda or armed groups in Pakistan cannot declare jihad on behalf of Pakistan against International Security Assistance Force (ISAF) forces in Afghanistan. Their declaration of jihad will not be considered as valid. If these armed groups have grievances against Pakistani rulers, they can rebel against the Pakistani government and their relationship with the Pakistani government is governed by verses 49:9–10.

> If two groups of the believers fight each other, seek reconciliation between them. And if one of them commits aggression against the other, fight the one that commits aggression until it comes back to Allah's command. So if it comes back, seek reconciliation between them with fairness, and maintain justice. Surely Allah loves those who maintain justice (49:9)
>
> All believers are but brothers; therefore seek reconciliation between your two brothers (49:10)

When rebellion grows and becomes equal to or larger than the government, they acquire new status and they cannot be regarded as a non-state actor. Second, armed groups outside Muslim states, e.g., Hezbollah, have a different status: they are not under the authority of a caliph/ruler within a Muslim state. The leadership of groups like these may make their own decisions. Whatever decision they may make will not be considered against the authority of a Muslim caliph/ruler because they are not within the writ of a Muslim state. The relationship between these groups and Muslim states is governed by verse 4.75: 'And why should you not fight 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 thee one who will protect; and raise for us from thee one who will help!"'

2 Limitations on the Use of Force

Once *qital* (actual combat/armed conflict) begins, it does not mean that Muslim fighters are free to use force without restrictions. The primary sources of Islamic law do impose limits on the means and methods used during *qital*. The Islamic law of *qital* has four basic principles: military necessity, humanity, distinction, and proportionality. We argue that accepting an offer of peace during *qital* is the fifth principle, but in this article it is discussed separately.

A Military Necessity

The Qur'an allows that only the extent and degree of force necessary to achieve military objectives be used. Once the military objectives are secured, Muslim forces have to cease their attack. On several occasions, the Qur'an says that one should fight the attackers until they are defeated, restrained from mischief (*fitna*), or choose peace instead of war. The following verses illustrate the point:

> Fight them until there is no Fitnah anymore, and obedience remains for Allah. But, if they desist, then aggression is not allowed except against the transgressors (2:193).

> Kill them wherever you find them, and drive them out from where they drove you out, as Fitnah … is more severe than killing. However, do not fight them near Al-Masjid-ul-Haram (the Sacred Mosque in Makkah) unless they fight you there. However, if they fight you (there) you may kill them … (2:191).
>
> But if they desist, then indeed, Allah is Most-Forgiving, Very-Merciful (2:192).
>
> The holy month for the holy month, and the sanctities are subject to retribution. So when anyone commits aggression against you, be aggressive against him in the like manner as he did against you … (2:194).

These verses impose different kinds of restrictions on the use of force. In verse 2:193, the objective is to end *fitna*, but if the other party desists from *fitna*, aggression is not allowed. *Fitna* is used in many places in the Qur'an, mainly in the sense of rebellion and mischief. In verse 2:191, the objective is to expel others from where Muslims were expelled. Here, expelling Muslims from their homes is regarded as *fitna*. Both verses 2:192 and 2:193 say that if 'they desist', military necessity ends and fighting is not allowed. Verse 2:191 imposes limitations of place – the sacred mosque – whereas verse 2:194 imposes limitations of time– excluding the sacred months. The practice of the Prophet Muhammad suggests that the degree and kind of force required are only those which can achieve military objectives. For instance, he once sent a military expedition after the tribe of Banu Qazagh camped outside Medina in order to attack Medina.[65] They fled as they saw the Muslim army approaching. They were not chased, as the military objective was to prevent the impending attack on Medina. Another example is when, on the occasion of the battle of Zeeqard,[66] the enemy fled from the scene. The Muslim army knew that the enemy had run out of water. It wanted to pursue the enemy, but the Prophet Muhammad did not allow it and told them to show mercy once the enemy was subdued. This last instance is also an example of the principle of humanity.[67]

B *Distinction*

Distinction is one of the fundamental principles of the Islamic law of armed conflict. The Qur'an (2:190) says, 'fight in the way of Allah against those who fight you, and do not transgress'. This terse verse contains three important rules. First, Muslims are given permission to fight. Secondly, fighting is permitted only against those who are fighting Muslims, i.e., combatants. Thirdly, Muslims are warned not to transgress the limits set by Allah and the Prophet Muhammad. The practice of the Prophet Muhammad was to make a clear distinction between combatants and non-combatants. Many tribes used to build forts for their protection in times of war. They would use children as human shields by holding them over the walls of the fort so that the enemy would stop shooting them with arrows.[68] Muslim fighters asked the Prophet Muhammad about this, and he advised them to aim at the combatants only.[69] If it is

[65] Al-Bukhari, *supra* note 12, at 579.
[66] *Ibid.*, at 409.
[67] Al-Hajjaj bin Muslim, *Sahih Muslim* (trans. A. Rehman, 2008), at 627.
[68] Hamidullah, *supra* note 8, at 202; M. Al-Shaybani, *The Islamic Law of Nations: Shaybani's Siyar* (trans. M. Khadduri, 1966), at 103.
[69] A.H. Al-Mawardi, *The Islamic Law of Governance* (trans. A, Yate, 2005), at 65.

absolutely necessary to hit a particular target and it is impossible to distinguish military from non-military targets or if every effort is made to distinguish between them, then any resulting collateral damage is acceptable.[70] Collateral damage is allowed, but distinction remains one of the basic principles of the Islamic law of *qital.*

C *Proportionality*

Proportionality is the third key rule of the Islamic law of *qital*. The principle is clearly laid down in the Qur'an and several verses may be cited to support it:

> And if you were to harm (them) in retaliation, harm them to the measure you were harmed. And if you opt for patience, it is definitely much better for those who are patient (16:126).
>
> The one who does something evil will not be punished but in its equal proportion (40:40).
>
> The recompense of evil is evil like it. Then the one who forgives and opts for compromise has his reward undertaken by Allah. Surely, He does not like the unjust (42:40).

All these verses show that proportionality is a key principle, but verse 16:126 is conflict-specific and very apt: 'harm them to the measure you were harmed'. It was revealed in order to prevent disproportionate harm in armed conflicts, which makes it the key verse on proportionality. Hamzah, the paternal uncle of the Prophet Muhammad, was killed in the battle of Uhud (3 AH). Abu Sufyan, who was leading the Quraysh army against the Muslims, was accompanied by his wife, Hind bin Utbah. Hind cut open Hamzah's belly and chewed off his liver. The Prophet Muhammad swore that he would kill 30, and some authors say 70, people in revenge. When the Muslim fighters heard the Prophet say this, they became angry and swore to cut their enemies into pieces. On this occasion, verse 16:126 was revealed to prevent Muslims from committing such excesses.[71] On the day Mecca was conquered, Hind was given amnesty together with others.[72] Like many other verses, verse 16:126 can be interpreted in two ways: one is to lay down the principle of proportionality, and the other is to prohibit mutilation. The occasion of its revelation makes it a classic example of both the principles of proportionality and prohibition of mutilation.

D *Humanity*

Humanity as a principle is related to the Islamic law of *qital* (armed conflict), but it is relevant to discuss it briefly here. The most relevant verse is 16:126 which prohibits the doing of more harm than is necessary, including mutilation. In some instances, the Muslim army set enemy forts on fire while enemy fighters were hiding in them.[73] But later the Prophet Muhammad prohibited the practice, saying that Allah alone could punish by fire.[74] 'Fairness is prescribed by God in every matter, so if you kill, kill in a fair way.'[75] Muslims are required to treat prisoners of war humanely.[76] The

[70] B.A. Al-Hasan Ali Marghinani, *The Hidaya* (trans. C. Hamilton, 2005), at 446–447.
[71] Kathir, *supra* note 9, at 218–219; Al-Bukhari, *supra* note 12, at 345.
[72] Tabari, *supra* note 29, at 345.
[73] Al-Bukhari, *supra* note 12, at 576.
[74] Marghinani, *supra* note 70, at 457.
[75] Hamidullah, *supra* note 8, at 204.
[76] Tabari, *supra* note 29, at 182.

wounded shall be nursed and cared for. When Mecca was conquered in 8 AH, the Prophet Muhammad declared a general amnesty for Meccans, despite the fact that they had persecuted and forced him to migrate from Mecca to Medina.[77] The concern for humanity runs through other Islamic principles as well. 'It does not [behove] Muslims to slay women or children, or men aged, bed-ridden, or blind, because opposition and fighting are the only occasions which make slaughter allowable … and such persons are incapable of these.'[78] This indicates that non-combatants must not be harmed. Women and the elderly, however, forfeit their protection if they give advice or help in planning war. Humanity in war should be shown to both parties; thus it is not obligatory for children, the aged and the infirm to take part in the conflict.[79] Preference is given to unmarried men over married men in drafting soldiers.[80]

Respect is always to be paid to the dead. For instance, around 40 fighters of the Quraysh who were killed during the battle of Badr (2 AH) were buried in a well.[81] Some of those who could not be moved because of damage to their bodies were buried on the spot.[82] After the battle of Khandaq, the Prophet Muhammad handed over the dead bodies of the enemy and refused to take money for them.[83] Islamic law allows only able-bodied men to fight and be killed during *qital*. It forbids mutilation and urges respect for the dead. All these principles indicate a concern for humanity, which is in line with the Qur'anic concept that all mankind is one community (2:213).

3 Terminating the Use of Force

In addition to the four basic principles, the Qur'an lays greater emphasis on accepting an offer of peace during conflict. The Qur'an (8:61) says, 'if they tilt towards peace, you too should tilt towards it'. The implication of this verse is that even if they offer peace only with a view to deceiving, this offer of peace must be accepted, as all judgement of their intentions is based on outward evidence.[84] In other words, mere suspicion is not an excuse for rejecting an offer of peace.[85] 'While we must always be ready for a good fight lest it be forced on us, even in the midst of the fight we must always be ready for peace if there is any inclination towards peace on the other side. There is no merit merely in fighting by itself.'[86] Ali contends that peace cannot be withheld when the enemy comes to an agreement.[87] We agree with Ali on the point that Muslims cannot refuse the offer of peace because the Qur'an (2:192) states, 'but if they cease,

77 Shafi, *supra* note 15, at 312.
78 Marghinani, *supra* note 70, at 448.
79 *Ibid.*, at 444.
80 Shaybani, *supra* note 68, at 85.
81 Al-Bukhari, *supra* note 12, at 67.
82 *Ibid.*, at 86.
83 Hamidullah, *supra* note 8, at 256.
84 Asad, *supra* note 7, at 249.
85 *Ibid.*
86 Ali, *supra* note 4, at 429.
87 *Ibid.*, at 76.

Allah is oft-forgiving, most Merciful'.[88] As the war is in the cause of Allah – defending Muslims and their land – and Allah is merciful and forgiving, so shall be the Muslim army. The verses on accepting peace are more relevant for the discussion on the use of force in Islamic law, but they can also be relied on for interpreting issues of truce and armistice, e.g., collecting the wounded and burying the dead.

4 Conclusion

To conclude I would like to address two specific points: first, a brief summary of the above discussion and, second, I would like to express my view as to why we study Islamic law, especially in comparison with international law.

This article has established that Islamic law allows the use of force in self-defence and that the offensive theory of jihad is untenable. The practice of Muslim states supports this interpretation as all Muslim states have accepted the UN Charter and are members of the UN. The Charter does not allow the use or threat of force against another state unless it is in self-defence. I have argued that the offensive theory of jihad is untenable, although we might assume that it is a plausible interpretation of Islamic law of an earlier era. Even so, I would argue that the fact that Muslim states are members of the UN today means that an interpretation which is in line with the UN Charter should be adopted, as Muslim states are bound to implement international law in good faith. Non-state actors within a Muslim state cannot declare jihad on behalf of a Muslim state against another state unless their status is changed by becoming equal to or larger than the government. Non-state actors in a non-Muslim state are not under the writ of a Muslim state and their relationship with a Muslim state is governed by verse 49:9 of the Qur'an.

Why do we study Islamic law? My research looks at the compatibility between Islamic law and international law for the following reasons.

First, international law does not prescribe a particular mechanism for the implementation of international law at national level, but generally two constitutional doctrines/mechanisms are envisaged for the domestic implementation of international law: the monist and dualist doctrines.[89] Most states, including Muslim states, Pakistan and Afghanistan to mention only two, tend to follow the dualist doctrine. There are 46 Muslim majority states in the world, but only 23 of these have declared Islam as a state religion such that Islam (i.e., the Qur'an and the Sunnah) is the, or at least a, source of law. The constitutions in these countries stipulate that any existing law that conflicts with Islam is considered void and no new law that conflicts with Islam can be enacted.[90] Usually, superior courts are given the power to examine and determine the Islamic standing of a given law. Thus, for instance, in Pakistan the Constitution

[88] See also Qur'an, 4:128.

[89] See M. N. Shaw, *International Law* (2008) 129–194; I. Brownlie, *Principles of Public International Law* (2008) 31–54.

[90] United States Commission on International Religious Freedom, 'The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Majority

(Article 203D) empowers the Federal Shariat Court, whilst in Afghanistan, the Constitution (Article 121) gives this power to the Supreme Court. Muslim states which follow the dualist doctrine have to enact enabling legislation to implement international law at domestic level. Pakistan enacted the following acts in order to implement various international laws: the United Nations (Privileges of Immunities) Act 1947; Diplomatic Immunities (Commonwealth Countries Representatives) Act 1957 and Diplomatic and Consular Privileges Act 1972. These enabling acts are part of municipal law and its Islamic credential can be challenged in the Federal Shariat Court of Pakistan. This is exactly what happened in *In re: Islamisation of Laws Public Notice No. 3 of 1983*,[91] where the above acts, among others, were challenged, but the Federal Shariat Court declared them to be compatible with Islamic law.[92]

Second, in most cases, international law imposes obligations on state parties to enact laws and take other measures to fulfil their treaty obligations. Examples include human rights law, the law of armed conflict and international criminal law. Muslim states have to think twice before ratifying or acceding to an international treaty because any enabling legislation can be challenged in domestic courts; after ratification or accession they would not be able to invoke municipal law for failing to implement international law.[93] Muslim states tend to ratify or accede to those instruments of international law which, in their view, are compatible with Islamic law, e.g., the four 1949 Geneva Conventions and diplomatic conventions. In cases of partial compatibility, they tend to enter reservations, e.g., international human rights instruments. Muslim states are members of the UN and have accepted the Charter rules on the use of force as they presumably see no conflict between the use of force under Islamic law and the Charter. Muslim states do not need a Jihad Act but rather a United Nations Act. For instance, Pakistan has enacted the United Nations Security Council Act 1948 in order to give effect to Article 41 of the UN Charter.[94]

Scholarly studies that investigate the compatibility of Islamic law and international law can play a vital role in maximizing the application of international law in Muslim states. Scholars can identify areas where compatibility exists and where conflicts occur, and can reflect on ways in which greater compatibility can be achieved. The key is to provide a sound knowledge base indicating compatibility or otherwise as states may, due to various reasons and pressures, ratify or accede to an international treaty which may not be compatible with Islamic law. For example, in March 2003 Afghanistan ratified the 1979 Convention on the Elimination of All Forms of Discrimination against Women without reservation. Does this mean that Islamic law as practised in Afghanistan is compatible with that Convention? We may wish it were so, but the reality is that it is not.[95] The incompatibility will be exposed when it is challenged in the

Muslim Countries and other OIC Members', 12 August 2012, at 8, available at www.uscirf.gov/reports-and-briefs/special-reports/3787.html, accessed 27 September 2012.

91 *All Pakistan Legal Decisions* 1985 Federal Shariat Court 344.

92 The court cited a book by Dr Hamidullah, *The Conduct of Muslim State* (1968).

93 See Article 27 of the 1969 Vienna Convention on the Law of Treaties.

94 The United Kingdom has enacted a similar act called the United Nations Act 1946.

95 Several articles in the 2004 Constitution are discriminatory on the basis of gender, see Shah, 'The Constitution of Afghanistan and Women's Rights' 13(2) *FLS* (2005) 239–258.

Supreme Court.[96] At the moment this ratification seems to be an empty commitment. These are hard legal realities in Muslim states, which most scholars of Islamic law in distant lands – far away from the actual theatre of Islamic law, i.e., where it is applied on a daily basis and where it matters to people – overlook sometimes.

Scholarly studies of Islamic law on the use of force and the Islamic law of *qital* (armed conflict) can also serve to enhance public understanding and compliance with international law in Muslim states. In today's world, where many armed groups offer new interpretations or give new meanings to evidence in the primary sources of Islamic law on the use of force, scholars need to respond. The idea is not to have 'the Islamic analogue to the Geneva conventions', but to find commonality between Islamic law and international law so that the latter can be, as much as possible, smoothly implemented in Muslim states.

Many legal rules allow multiple but plausible interpretations. Of course, some are more plausible than others. The rule of plausible multiple interpretations applies to all jurisdictions. As I have endeavoured to explain in this article, it is my view that Islamic law allows the use of force in self-defence and can be utilized for humanitarian interventions, whereas the offensive theory is untenable.

[96] Article 3 of the Constitution states that 'no law can be contrary to the sacred religion of Islam'.