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# Ambivalent Universalism? Jus ad Bellum in Modern Islamic Legal Discourse

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## Abstract

*In this paper, we discuss the trajectory of modern Islamic legal discourse on jus ad bellum questions, challenging the ideas that the choice is between either a defensive or an aggressive jihad doctrine, and that declaring and waging war is regarded in Islamic law as properly a matter to be monopolized by legitimate state authorities. The dominant modern doctrine of just war in Islamic legal thought is not quite as simple as a bare doctrine of mutual non-aggression. While it is understandable that many Muslims have been eager to conclude that the proper understanding of jihad in Islam is that it authorizes only defensive or humanitarian war, virtually indistinguishable from modern international norms, the reality of modern Islamic just war thinking is somewhat more interesting than this. In this paper, we introduce a third modern Islamic concept of just war that would permit war against a country that does not allow for peaceful proselytization of Islam within its borders, and discuss some of the ambiguities of this doctrine.*

What does it mean to ask about the Islamic law of war and peace? As with all areas of Islamic law, it is to inquire into a field of discourse about divinely ordained standards of legitimacy, morality, and justice. It is to inquire into what Muslim scholars, thinkers, or religious authorities argue the moral rules of going to war and harming in war to be. It is emphatically not to speak about a state-centric field of legal codes, conventions, treaties, and protocols.

This is not to say that in Islamic legal discourses on war the state and its secular authorities do not matter; for most aspects of war, the state, and even non-ideal rulers, are given wide-ranging, *almost* exclusive, authority over warfare. It is also not to say that in Islamic legal discourse codes, conventions, and treaties contracted and endorsed by secular state authorities may not enjoy a certain authority and

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bindingness. It is merely to say that, if one is interested in questions of justice, morality, and normativity, the state is an object of, rather than the source of, transcendent moral theorizing and authoritative law-giving.

To even speak about ‘Islamic law’ is already to speak in an alien idiom. What is ‘Islamic law’ a translation of? Everyone, of course, knows the term ‘*shari’a*’, but it is a presumption to speak about ‘the *shari’a*’s laws of war’. *Shari’a* is not a settled body of law or legal doctrine, but an aspiration, like Justice, or an ontological concept, like Plato’s Forms. If what we mean to inquire into is the field of reasoning and argument within which Muslim religious authorities attempt to justify various rules or doctrines as the most likely worldly simulacrum of divine *shari’a* (itself known infallibly only in God’s mind), we are speaking of ‘*fiqh*’, or Islamic jurisprudence. If what we mean to inquire into is the authoritative, settled code of conduct within warfare accepted by Muslims, the Islamic analogue to the Geneva conventions, then, well, we are simply out of luck.

Jihad is a subject category of all authoritative collections of *hadith* reports (the collected sayings and doings of the Prophet Muhammad) as well as of all compendia of legal doctrines of the various schools of Islamic jurisprudence (*fiqh*). All collections of *hadith* and all Islamic legal manuals (from short compendia to massive, multi-volume *summae*) contain a ‘Book of Jihad’. The discussions in the legal manuals and, in the modern period, treatises specifically dedicated to the rules of war do contain lists of rules (*ahkam*) for going to war and harming in war, but no single one of them is universally authoritative. There are wide areas of commonality or agreement, and in such cases we are on relatively firm ground in speaking about ‘what Islamic law says’. But no code-like listing of rules is authoritative or binding because of its formal, procedural, and public acceptance by the community of Muslims, and still less because of its adoption by a single Muslim state or a collection of them. In fact, to our knowledge, not only has no single such code been publicly accepted and adopted; none has even been *formulated*.

The preceding comments on the meaning of ‘Islamic law’ and its relationship to positive legal codes are more or less true about all areas of Islamic jurisprudence, but particularly so about warfare. If ‘Islamic law’ is a tradition of formulating jurisprudential doctrine (*fiqh*) on all possible areas of human conduct, courts and states have always been crucial agents of interpretation, application, adjudication, and codification in areas of civil law such as sales, contracts, marriage, divorce, and property. One certainly can study pre-modern and modern jurisprudence on these topics as formulated by religious scholars (and, in the modern period, by many intellectuals without traditional training), but one must also pay close attention to modern state codifications and the work of judges and advocates in courts. For example, there is a very compelling claim that in the all-important realm of family law, the real action for scholars lies in the nexus between various kinds of state law-givers, judges, and civil society activists (from Islamists to secular feminists).

Furthermore, not all areas of ‘*shari’a*’ carry the same symbolic weight and importance for pious Muslims. When Islamist activists talk about ‘applying the *shari’a*’ or object to the gap between the applied positive law and the ideal religious law, very

rarely are they thinking in the first place about the classical doctrines on sales, gifts, and manumitting slaves. Unlike highly symbolic areas such as public morality and the criminal law, the civil code of many Muslim states is often regarded as 'Islamic enough' by pious Muslims and Islamist activists and, in such cases, it is not exactly a category mistake to treat those codes and their application within courts as the working of 'Islamic law' in modernity.

Is the same true for the laws of war? Certainly, Muslim states have been active in warfare in the modern period, less than many non-Muslim states, more than some. Some Muslim states have also not only claimed to be waging 'jihad' but also the authority to speak in the name of Islamic law. The Ottoman Empire during World War I is the prime example; famously, the Ottoman Sultan, in his capacity as Caliph, attempted to issue binding moral commands even to Muslims living outside his sphere of political jurisdiction, including the Muslim citizens of the United Kingdom and France. But, by and large, modern Muslim states, including those most insistent on their Islamic legal character, namely the Kingdom of Saudi Arabia, the Islamic Republic of Iran, and Sudan, have remained disproportionately uninterested in the Islamic laws of war as a source of authority for regulating international relations. No such state has declared International Humanitarian Law (IHL) to be non-binding and proposed Islamic legal norms in its place. These states have neither applied Islamic law to their *ad bellum* claims, nor have they (to our knowledge) incorporated religious law into their approach to the conduct of hostilities. Indeed, even states that claim to utilize Islamic law as their *only* source of law (such as Saudi Arabia and Iran) engage closely with the United Nations system as regards the prevention of armed conflict and its strict legal regulation, and engage with the international community and the International Committee for the Red Cross as High Contracting Parties to the Geneva Conventions. Unlike the approach of both of these states (and many other Muslim majority states that apply Islamic law to some lesser aspects of their domestic legal systems) to international human rights law, where they have formally issued reservations to broad swathes of various treaties on the basis of incompatibility with *shari'a*,<sup>1</sup> no such reservation or even claim to an exception has been made regarding the Charter's restrictions on the use of force or IHL's framework for regulating hostilities.

This is not to say that such states have remained silent about or indifferent to the discourse of jihad. But their interest in it has been largely limited to defending their own legitimacy against internal opponents and to justifying and celebrating other Muslim populations' (Palestinians, Lebanese, Afghans, Chechens, Bosnians) defence of themselves against external aggressors.

On one view of law and why it matters, that should settle the question of 'IHL and Islamic law'. No Muslim state, even from the handful of so-called 'Islamic states', adopts Islamic laws of war as policy or declares any reservations to IHL (as even

<sup>1</sup> For a discussion of interpretive declarations and reservations issued by contracting parties to the UDHR, the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) on *shari'a* grounds, see Mashood Baderin, *International Human Rights and Islamic Law* (Oxford: Oxford University Press, 2003).

quasi-secular Muslim states frequently do to International Human Rights Law). The rest is just ideology, and we are not today debating ‘IHL and Marxism’ or ‘IHL and the Lord’s Resistance Army’. If we take an interest in historical or contemporary thinking about the Catholic just war tradition or Jewish law and war, is that not more about intellectual curiosity and interdisciplinary collegiality than about studying the circulation of *legal norms* in the world today?

We do not object to this legal realist view here. If the wider popular and scholarly interest in the Islamic laws of war is generated by anxiety about existing Muslim *states* or the legitimacy of IHL in Muslim countries, we are happy to downplay the significance of Islamic law ‘as law’ in the contemporary world. But we note that a reason for this is not, and cannot be, because Islamic law in general, and the Islamic law of war in particular, is somehow the exclusive monopoly of state actors. If Islamic law is irrelevant for contemporary international law, it is because Muslim state actors decline to participate in it, not because Islamic law *demand*s a monopoly on the part of state actors to decide when the right of self-defence must be acted upon. Indeed, as we will show, not only is Islamic law *qua* a tradition of reasoning about morality and justice in the realm of warfare not the monopoly of the worldly sovereign, neither is actual *fighting* the exclusive preserve of the state in Islamic jurisprudence.<sup>2</sup>

State actors do often pronounce on the morality of war in the form of Islamic legal arguments. Both of the Supreme Leaders of the Islamic Republic of Iran up to this point, Ayatollahs Khomeini and Khamene’i, have declared the use of nuclear weapons to be impermissible not only as IRI state policy, but also ‘within Islam’. But almost all of the dynamism and creativity in (re-)thinking the legitimate Islamic conduct of war is located outside the state. This has occurred not only in apologetic treatises written by religious scholars or lay PhDs in Islamic studies, but also in texts written by Islamist militants. Al-Qa’ida leaders and ideologues have both drawn on (in some cases abused) the authority of religious scholarly authorities from the past or those operating today in countries like Saudi Arabia and also produced much jurisprudence of their own. Indeed, it is not far-fetched to suggest that much of the urgency motivating non-radical scholars’ thinking on how to apply classical Islamic jihad doctrines to the modern period is due to the energy that radical jihadi thinkers have put into justifying (and in some cases reforming) their practices of war. Mainstream Islamic religious scholars have not only been motivated to *remind* Muslims what ‘*shari’a*’ says about war and killing in response to the jihadi challenge; they have re-opened old questions and addressed new ones that they might have ignored or handled superficially but for the intellectual challenge posed to their authority by jihadi discourse.

In this article, we discuss the trajectory of modern Islamic legal discourse on *jus ad bellum* questions, challenging the ideas that the choice is between either a defensive or an aggressive jihad doctrine, and that declaring and waging war is regarded in Islamic law as properly a matter to be monopolized by legitimate state authorities.

<sup>2</sup> Here we dissent from the view advanced in the article by Niaz Shah, ‘The Use of Force under Islamic law’, this issue, at 343.

## 1 The Classical Islamic *Jus ad bellum* Doctrine: Just War as the Expansion of Islam

What justifies the use of force in Islamic law? The question of Islamic doctrines of *jus ad bellum* is often posed, by both Muslims and non-Muslims, in terms of whether jihad is both expansionary (justified for the purpose of spreading Islam, eradicating barriers to its reception, and removing man-made systems of governance) and defensive, or whether war in Islam is justified merely to defend Muslim lands against external invasion or to protect minority communities (particularly Muslims) from oppression and tyranny. Alternatively, it is sometimes asked whether the legal rule or ‘basic principle’ (*al-asl*) of relations with non-Muslims is war or peace.<sup>3</sup>

Classical Islamic law gives support almost exclusively for the former position, namely that war for the purpose of expanding the territory ruled by Islam is not only permissible but obligatory within Islamic law.<sup>4</sup> One of the primary constructs of classical Muslim political geography was that of the non-Muslim world as *dar al-harb*, ‘the abode of war’. Consequently, non-Muslim residents of ‘the abode of war’ are usually referred to as ‘*harbis*’, the ascriptive adjective of the noun ‘war’. The theological-juridical basis for this ascription is clearly the view that, even if a constant state of actual warfare is not assumed, the basic status of relations between the abodes is one of war and permanent non-recognition.<sup>5</sup> In the classical period, all Sunni schools ‘thought of the *jihad* as a war for the expansion of Islamic territory – i.e., the sphere where the norms prescribed by the Shari’a would be paramount’.<sup>6</sup> The application of this doctrine varied depending on the identity of the non-Muslim community. Polytheists were to be given only a choice between conversion to Islam and war. People of the Book (Christians, Jews, and Zoroastrians) were given a third option of recognizing Muslim sovereignty by paying the poll tax (*jizya*) but preserving their religious identity.<sup>7</sup> While the ability of Muslim states to wage expansionary war into new territories

<sup>3</sup> Parts of this section are taken from A. March, *Islam and Liberal Citizenship: The Search for an Overlapping Consensus* (2009), at 125–127.

<sup>4</sup> For a work of Sunni jurisprudence compiled after the establishment of the settled doctrines of the legal schools that seeks to summarize the points of agreement and disagreement across the four Sunni legal schools see Abu al-Walid Ibn Rushd (Averroes, d. 595/1198), *Bidayat al-mujtahid wa nihayat al-muqtasid* (1997). Ibn Rushd writes that ‘the scholars have all agreed that *jihad* is an obligation on a sufficient number of the Muslim community on the basis of the Qur’anic verse “Fighting has been ordained for you, even if you hate it” [verse 2:216]’ (Vol. 1, p. 379). Ibn Rushd elaborates that the only condition for going to war against unbelievers is a prior invitation (*da’wa*) to accept Islam (*ibid.*, i, at 385).

<sup>5</sup> Contemporary Islamic legal scholar Khalid ‘Abd al-Qadir, in a comprehensive treatment of legal questions pertaining to relations with non-Muslims, notes that ‘the vast majority of the classical scholars hold that the means of bringing the Islamic message to the unbelievers is by building up strength, equipping the armies and then campaigning in the lands of the unbelievers. Before fighting, unbelievers are given the choice between converting to Islam, paying the *jizya* (if they are amongst the peoples eligible for it) and war. They all held that the basic principle (*al-asl*) of relations between Islam and unbelief is war, and that peace is an exception to this rule’: K. ‘Abd al-Qadir, *Fiqh al-aqalliyat al-muslima* (1998), at 38.

<sup>6</sup> Sachedina, ‘The Development of *Jihad* in Islamic Revelation and History’, in J.T. Johnson and J. Kelsay (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (1990), at 44.

<sup>7</sup> Ibn Rushd records that the primary disagreement amongst the classical jurists focused not on whether jihad could ever be merely defensive but on the conditions for ending an expansionary jihad. He reports universal

ebbed and flowed throughout history, and Islamic scholars debated myriad *jus in bello* issues, no mainstream Islamic scholar before the 20th century ever questioned the basic premise that it was the prerogative, indeed the *obligation* whenever capacity and strength permitted, of the Muslim community to expand its territory through war.

Modern Muslim scholars, and particularly lay Islamist ideologues, have struggled with the legacy of the classical *jus ad bellum* consensus. More radical contemporary Islamist ideologues, as well as more strictly traditional scholars, particularly those identifying with the *salafi* tradition, have felt no embarrassment in reaffirming the classical doctrine. These groups see jihad as war to eradicate political barriers to the implementation of Islamic law and the liberation of humanity from subjection to man-made laws.

The Pakistani Islamist thinker, Abu'l-A'la al-Mawdudi, rejected the demand to define jihad as either offensive (*hujumi*) or defensive (*difa'i*) as inapplicable to an Islamic context since those categories derive from thinking about wars between nations or states:

Whereas if a truly universal party is established, founded on a comprehensive revolutionary ideology that does not distinguish between nations or territories and calling all nations and peoples across racial and linguistic differences to its ideology and program, opening its doors to all who wish to participate in spreading this message, wishing only to hold up to judgment those oppressive governments that violate eternal principles of truth and to establish a sound government founded on the principles of truth and justice in which it believes and to which it calls, then in this case there is no room for the two categories of fighting 'offensive' and 'defensive.' ... The Islamic jihad, if truth be told, is both offensive and defensive. Offensive, because the Islamic party opposes and confronts the worldly powers founded on principles that violate Islam and wants to root them out entirely, and does not rule out using military force to do so.<sup>8</sup>

Others have endorsed the doctrine of religiously motivated expansion as a just war from a modern activist perspective,<sup>9</sup> as well as from within a traditionalist (*salafi*) method, within which the affirmation of jihad is not only a legal matter but also a

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agreement that 'People of the Book' (Jews, Christians, Zoroastrians) can sue for peace by converting to Islam or by offering to submit to Islamic authority and pay the *jizya* tributary tax. Disagreement focused on whether other groups – polytheists or others outside the Abrahamic family – could also pay the *jizya* in place of conversion or war. The dispute was a function of a fundamental disagreement about which sets of Qur'anic verses were general, and thus established the rule, and which were particular, and thus modified or qualified the rule. One group argued that the general rule was to fight unbelievers until conversion, a rule that had been modified in the case of Jews and Christians during the lifetime of the Prophet. The other group argued that verses exhorting general warfare were themselves of particular application to the Prophet's war with the Meccan polytheists, and that the general rule was that all unbelievers were to be given the choice between Islam, war, and the *jizya*: Ibn Rushd, *supra* note 4 i, at 387–388. This same dispute also informed *jus in bello* questions. Those who maintained that the *ratio legis* for killing in war was mere *unbelief* (on the basis of the verse 'fight the polytheists wherever you find them' [Q. 9:5, the so-called 'Verse of the Sword']) thus permitted the intentional killing of non-combatant non-Muslim peasants, women, and children. The other camp argued that the ratio for killing is the *ability to fight* and thus prohibited the intentional, avoidable killing of non-combatant women, children, old men, and unarmed peasants: *ibid.*, i, at 380–384.

<sup>8</sup> A. al-Mawdudi, *al-Jihad fi'l-Islam* (1983), at 42–43.

<sup>9</sup> E.g., al-Nabhani (the Palestinian founder of the global Islamist movement, Hizb al-Tahrir), 'Bahth fi'l-jihad', in M.'A. Hasan, *al-'Alaqt al-dawliyya fi'l-Qur'an wa'l-Sunna* (1982), at 121–132; A. al-Bazri, *al-Jihad fi'l-Islam* (1984), at 63, and 'A. Zaydan, *Majmu'a buhuth fiqhiiyya* (1975), at 54–57.

creedal one.<sup>10</sup> Even without an avowed *salafi* affiliation, those who treat the pre-modern juridical tradition as authoritative have affirmed that, as there was no disagreement amongst classical jurists that aggressive, expansionary warfare is at the very least permitted, modern Muslims should also adopt this view.<sup>11</sup>

This doctrine receives its most famous articulation from an activist perspective in the writings of Sayyid Qutb. In the following passage Qutb argues that verses in the Qur'an which speak of peace or co-existence with unbelievers (e.g., 8:61, 60:8, 2:190, 3:64) were temporary, provisional rulings abrogated by the final ruling revealed in chapter 9 of the Qur'an (*Surat al-Tawba*):<sup>12</sup>

If Muslims today, in their present situation, cannot implement these final rulings, then they are not, now and for the time being, required to do so. For God does not charge anyone with more than he or she can do. They may resort to the provisional rulings, approaching them gradually, until such a time when they are able to implement these final rulings. But they may not twist the final texts in order to show them as consistent with the provisional ones. They may not impose their own weakness on the divine faith, which remains firm and strong. Let them fear God and not attempt to weaken God's faith under the pretext of showing it to be a religion of peace. It is certainly the religion of peace, but this must be based on saving all mankind from submission to anyone other than God. [Islam's] advocates must not be ashamed of declaring that their ultimate goal is to destroy all forces that stand in its way of liberating mankind from any shackle that prevents the free choice of adopting Islam.

When people follow human codes and apply man-made laws to regulate their lives, every doctrine and code has the right to live in peace within its own area, as long as it does not entail aggression against others. In this case, coexistence of difference creeds, regimes and social orders should be the norm. But when there is a divine code requiring complete submission to God alone, and there are alongside it human systems and conditions that are man-made, advocating submission to human beings, the matter is fundamentally different. In this case, it is right that the divine system should move across barriers to liberate people from enslavement by others. They will then be free to choose their faith in a situation where people surrender themselves to God alone.<sup>13</sup>

Islamic legal scholar Muhammad Khayr Haykal also portrays expansionary, 'regime-change' jihad in humanitarian and (literally) paternalistic terms: '[d]o

<sup>10</sup> E.g., Muhammad Nasir al-Din al-Albani in his commentary on a 9th/10th century statement of creed, '*Jihad* as a collective duty is warfare in the path of God to bring the Islamic message to all lands until Islam rules over them. This form of *jihad* is valid until the Day of Judgment, and it is unfortunate that some writers today deny it': al-Albani, *al-'Aqida al-Tahawiyya: Sharh wa ta'liq* (1978), at 49.

<sup>11</sup> See M.K. Haykal, *al-Jihad wa'l-qital fi'l-siyasa al-shar'iyya* (1993), i, at 815–818.

<sup>12</sup> 9:5: 'When the forbidden months are past, then fight and slay the pagans wherever you find them. Seize them, beleaguer them, and lie in wait for them in every stratagem of war. But if they repent and establish regular prayers and practice regular charity, then open the way for them. For God is Oft-Forgiving, Most-Merciful.' 9:29: 'Fight those who believe not in God nor in the Last Day, nor hold forbidden that which God and His Messenger have forbidden, nor acknowledge the religion of truth, from among the People of the Book until they pay the *jizya* and feel themselves subdued.' 9:111: 'Behold, God has bought of the believers their lives and their possessions, promising them paradise in return. [and so] they fight in God's cause, and slay, and are slain: a promise which in truth He has willed upon Himself in [the words of] the Torah, and the Gospel, and the Qur'an. And who could be more faithful to his covenant than God? Rejoice, then, in the bargain which you have made with Him: for this, this is the triumph supreme!'

<sup>13</sup> S. Qutb, *Fi Zilal al-Qur'an* (1973–1974), v. 3, at 1582 (in English: A. Salahi and A. Shamis (trans.), *In the Shade of the Qur'an* (2002–2009), v. VIII, at 28.

Muslims interfere in the name of *jihad* in the affairs of others? The answer is an unambiguous “yes!”. But this is not an atavistic, exploitative interference, but rather ‘like in the intervention of fathers and mothers in the affairs of their children, for the purposes of establishing truth and justice amongst them and sowing love and mercy in their hearts’.<sup>14</sup>

Elsewhere, Qutb makes it clear that the classical doctrine of non-recognition of non-Muslim polities ought to be revived by Muslims as part of the renewal of their religion: ‘[n]o peace agreement may be made [with Christians and Jews] except on the basis of submission evident by the payment of a special tax which gives them the right to live in peace with the Muslims. ... Never will they be forced to accept the Islamic faith. But they are not given a peaceful status unless they are bound by covenant with the Muslim community on the basis of paying the submission tax.’<sup>15</sup>

On Verse 8:61, which reads, ‘If they incline towards peace, then incline to it as well and place your trust in God’ and is often the centrepiece of modern arguments in favour of a doctrine of *jihad*-as-self-defence, Qutb comments:

I have dwelt rather extensively on the provisional nature of the rule outlined in this verse, which requires the Prophet and the Muslims to reciprocate any inclination to peace by the unbelievers. My aim is to clarify a certain aspect of confusion that arises from the spiritual and intellectual defeatism reflected in the work of many of those who write about Islamic *jihad*. Such people feel the pressure of modern values that prevail in international relations. Lacking a clear understanding of Islam as they are, they find it too much for the divine faith to adopt a single and permanent approach towards all humanity, giving all people a choice between three alternatives: acceptance of Islam, payment of *jizya* or being at war with Islam. ... Such writers try to impose a different interpretation on Qur’anic statements and Prophetic *hadith* reports so that they can be seen to be in line with the situation in our present world with all its pressures on contemporary Muslims. They find the single approach of Islam and the three choices it offers too hard to swallow. Such writers often interpret statements that have a provisional nature or qualified application as final, permanent and having general and universal application. When they tackle the final statements they interpret these in the light of those provisional ones to which they have applied a final import. Thus, they come up with the idea that Islamic *jihad* is merely a defensive operation to protect Muslim people and their land when they are attacked, and that Islam will always accept any offer of peace. To them, peace is merely a state of non-belligerence which, in practical terms, means that the other camp will not attack the land of Islam. According to their understanding, Islam should shrink inside its borders at all times. It has no right to call on others to accept its message or to submit to God’s law, unless such a call takes the form of a speech, statement or bulletin. When it comes to material forces, Islam has no right to attack the ruling forces in *jahiliyyah* societies unless it first comes under attack, in which case Islam is right to defend itself.<sup>16</sup>

Affirming the ‘defeatist’, ‘defensive’ interpretation of the Islamic doctrine of *jihad*, according to which non-Muslim states have the right to equal recognition with Muslim states, is for Qutb and other like-minded thinkers permissible only as a temporary

<sup>14</sup> Haykal, *supra* note 11, at 820.

<sup>15</sup> Qutb, *supra* note 13, v. 3, at 1620 (in English, v. VIII, at 101–102).

<sup>16</sup> *Ibid.*, v. 3, at 1546–1547 (v. VII, at 190–191).

concession to reality or before the invitation to accept Islam.<sup>17</sup> Of course, the ‘defeatist’ doctrine of jihad as self-defence or humanitarian intervention compatible with modern international law and conventional just war doctrines is precisely what many modern Muslims have been attracted to.

## 2 Modernist Apologetics: Jihad as Self-Defence

While, in a sense, the doctrine of expansionary jihad is a continuation of the classical tradition, it is also asserted – as all of the above quotations indicate – as a response to a modern tendency to (re-)define jihad as purely defensive. Qutb’s caustic dismissal of ‘people [who] feel the pressure of modern values that prevail in international relations [and] try to impose a different interpretation on Qur’anic statements and Prophetic *hadith* reports so that they can be seen to be in line with the situation in our present world with all its pressures on contemporary Muslims’ was directed in particular towards a certain Muhammad ‘Abd Allah Draz, an Egyptian who was the son of an al-Azhar scholar and, unlike Qutb, himself trained both at al-Azhar and in France. Draz had argued that ‘the war legitimated by Islam is a defensive war, which consists of two types: defense of human life ... and the obligatory assistance to a Muslim population or a helpless ally’, writing that ‘wars in this Islamic viewpoint are an evil to which one turns only when forced; but even if negotiations lead to a treaty that strips away some of Muslims’ rights, at that time sparing blood is preferable to a glorious victory for truth in which human lives perish’.<sup>18</sup>

In defending the doctrine of jihad as solely defensive or humanitarian war, many modern Muslims begin by pointing to a set of Qur’anic verses that exhort believers to adopt an attitude of mutual tolerance and non-aggression with unbelievers.<sup>19</sup> In addition to verse 8:61 quoted above, one finds:

Fight in the cause of God those who fight you, but do not transgress limits, for God does not love transgressors. [2:190]

And fight them until there is no more tumult or oppression and there prevail justice and faith in God, but if they cease let there be no hostility except to those who practice oppression. [2:193]

If they withdraw from you but fight you not and (instead) send you (guarantees of) peace, then God opens no way for you (to war against them). [4:90]

Do not say to him who offers you a greeting of peace, ‘You are not a believer,’ seeking the chance goods of the present life. [4:94]

God does not forbid you, with regard to those who do not fight you for your faith nor drive you from your homes, from dealing kindly and justly with them. For God loves the just. [60:8]

The most frequent argument for a purely defensive conception of jihad is in two parts. First, it is argued that the vast *majority* of Qur’anic verses on fighting and warfare prescribe a doctrine of defensive war. This argument holds that the more

<sup>17</sup> On the question of whether the basic rule of relations between Muslims and non-Muslims is war or peace, Haykal argues that it is peace before the call to Islam (*da’wa*) has reached them, and war after it has been conveyed and rejected: Haykal, *supra* note 11, v. 1, at 826.

<sup>18</sup> M.’A.A. Draz, *Nazarat fi ’l-Islam* (1972), at 119–120.

<sup>19</sup> Parts of this section are taken from March, *supra* note 3, at 197–201.

aggressive verses from Chapter 9 of the Qur'an are best understood in the context of the hostility faced by the first generation of Muslims from the pagan Arabs rather than as a general attitude towards non-Muslims or as the higher stage of God's revelation on the ethics of war, abrogating the chronologically-previous 'peaceful verses'. Secondly, it is argued that the basic 'positive' duty underpinning jihad is not the duty to eradicate unbelief or remove non-Islamic forms of rule, but rather the duty of *da'wa*, i.e., to call non-Muslims to the universal message of Islam. Thus, should the right to proselytize be unmolested in non-Muslim lands and there be an accord of mutual non-aggression, then there are no grounds for aggression against such non-Muslim states.

The modern Islamist (revivalist) argument for a Qur'anic foundation to 'offensive' jihad, as expounded by Qutb, Mawdudi and others, rests on the theory of *marhaliyya*, that is, of successive stages to God's injunctions on war, with later verses establishing the final guidelines on war and relations with unbelievers and in the process abrogating (*naskh*) the previous, temporary verses. In contrast, Modernist scholars tend to attribute to all of the verses on a particular subject equal normative value and attempt to arrive at an interpretation based on consideration of all of them together in their textual as well as historico-revelatory context.<sup>20</sup> Following this methodology, a wide range of Islamic scholars in the modern period have been swayed by the large number of verses, such as those cited above, which enjoin restraint, reciprocity, and faithfulness to contracts, and declare that the basic principles (*al-asl*) of relations between Muslims and non-Muslims are peace and invitation to Islam. The argument is usually advanced not that there is a conflict between the verses which needs to be explained or mitigated, but rather that they (and the historical behaviour of the Prophet and his successors<sup>21</sup>) all affirm the same essential message, especially when the more 'aggressive' verses are read not in isolation but as parts of longer passages: that violence is justified only in response to aggression, oppression, or treachery, such as that faced by Muhammad and his followers from the pagan Arabs and Byzantine and Persian empires. In addition to Shaltut, notable 20th century scholars who have affirmed this basic doctrine against the neo-classical expansionary jihad doctrine include Muhammad Abu Zahra,<sup>22</sup> 'Ali 'Ali Mansur,<sup>23</sup> Uthman al-Sa'id al-Sharqawi,<sup>24</sup> Wahba al-Zuhayli,<sup>25</sup> Muhammad Sa'id al-Buti,<sup>26</sup> Muhammad Shadid,<sup>27</sup> and Yusuf al-Qaradawi.<sup>28</sup>

<sup>20</sup> See M. Shaltut, *al-Qur'an wa'l-qital* (1983), at 29–30 for this characterization of the preferred method of Qur'anic exegesis, which he refers to as '*tafsir mawdu'i*' (thematic exegesis).

<sup>21</sup> Some theorists cite the example of Yemen which did not oppose the Islamic call and to which the Prophet sent missionaries rather than armies. 'The relationship of the Abode of Islam with any society which has an opposing doctrine but opens a space for invitation to Islam, and does not obstruct its missionaries or the freedom to choose Islam, is a political stance preferred over one of aggression': 'Abd al-Qadir, *supra* note 15, at 43.

<sup>22</sup> M. Abu Zahra, *al-'Alaqa al-duwaliyya fi 'l-Islam* (1964), at 47.

<sup>23</sup> 'A. A. Mansur, *al-Shari'a al-Islamiyya wa'l-qanun al-duwali al-'amm* (1971), at 378.

<sup>24</sup> 'U. al-Sa'id al-Sharqawi, *Shari'at al-qital fi 'l-Islam* (1972), at 33.

<sup>25</sup> W. al-Zuhayli, *al-'Alaqa al-duwaliyya fi al-Islam* (1981), at 93.

<sup>26</sup> M. S. R. al-Buti, *al-Jihad fi 'l-Islam* (1997), at 93.

<sup>27</sup> M. Shadid, *al-Jihad fi 'l-Islam* (n.d.), at 119.

<sup>28</sup> Y. al-Qaradawi, *Fiqh al-jihad: dirasa muqarana li-ahkamih wa-falsafatih fi daw' al-Qur'an wa'l-Sunna* (2009), i, at 256.

In relation to the verses from Chapter 9 which are central to justifications of 'expansionary jihad', Modernist authors are quick to point out that the entire chapter clearly deals with the specific antagonism between the early Muslim community and the pagan Arabs, as the classical exegetical tradition unambiguously asserted, and in particular the pagans' violation of existing treaties with the Muslim polity.<sup>29</sup> Even in this context, Muslims are still exhorted to observe the standards of restraint and reciprocity called for in earlier chapters. Verse 9:4 declares that '[the treaties are not dissolved] with those pagans with whom you have entered into an alliance and who have not subsequently betrayed you, nor aided anyone against you. So fulfill your obligations with them until the end, for God loves the righteous.' The surrounding verses are replete with descriptions of the pagans' perfidy (9:8: '[i]f they get the better of you, they will not observe towards you any bond or treaty') and excesses (9:13: '[w]ill you not fight a people who violated its oaths, plotted to expel the Messenger, and were the first to attack you?') in such a way that both treat this as the ultimate *casus belli* rather than the pagans' mere paganism (9:12: '[i]f they break their oaths after their covenant and revile your religion, then fight the leaders of unbelief so they may desist' (emphasis added)) and also clearly give the passages a contextual and contingent character. Arguing, as the revivalists do, that this *Sura* establishes a *basic* principle of antagonism between believers and unbelievers requires not only extracting verses from their unambiguous context but, in certain cases, also citing only half or partial verses. The general principle of mutual restraint and recognition between Muslims and others is thus, according to the Modernists, the manifest implication of the entirety of revelation on the subject of fighting, including verses from Chapter 9.

What the Modernist scholars often do not address, however, is why the medieval religious scholars who constructed the classical *jihad* doctrine were also confused about the lessons to be drawn from the Qur'an and the Prophet's *sunna*. This and the bare fact of Islamic history pose a general challenge to arguing that the true intention of the Qur'an and Prophetic example *in their original context* was to authorize only defensive war. Thus, a further argument often advanced is that, while the actual Qur'anic doctrine was one that prescribed only defensive war as an ideal, in a generalized state of nature offensive war is often justified and necessary purely as self-defence. This argument was most notably advanced by Rashid Rida (d. 1935, along with his mentor Muhammad 'Abduh, the most prominent progenitor of Islamic Modernism) in response to a request for a fatwa (*istifta'*) by a Muslim who asked how, if jihad is purely defensive, the Islamic state expanded so far so fast into territories whose rulers had not attacked the Muslims. The first part of Rida's response consists of observing that in the 7th century war all states and peoples existed in a *de facto* state of war and that apparently aggressive wars were thus in the first order *pre-emptive* wars against powers that were constitutionally hostile to the Muslim polity.<sup>30</sup>

<sup>29</sup> Shaltut, *supra* note 19, at 89; Shadid, *supra* note 27, at 129; Abu Zahra, *supra* note 22, at 90; al-Sharqawi, *supra* note 24, at 43; Zuhayli, *supra* note 25, at 95–96; 'Abd al-Qadir, *supra* note 15, at 36.

<sup>30</sup> M.R. Rida, *Fatawa* (ed. S. al-Din al-Munajjid and Y.Q. Khuri, 1970–1971), iii, at 1152–1156.

This way of reconciling the norm of non-aggression with Islamic history, including the examples of the Prophet and the earliest Caliphs, has recently been adopted by Yusuf al-Qaradawi. Qaradawi acknowledges the classical consensus that an effort to wage expansionary jihad at least once a year was a collective obligation (*fard kifaya*) on the Muslim community, but claims that this consensus was based less on an unequivocal revelatory command than on a response to historical circumstances that have changed. 'When the jurists settled on this they only did so according to their lived reality that was imposed on the *umma* in those times, namely that the community was threatened continuously from its neighbors. ... People realized that the best defense is attack [and t]his is what compelled the jurists to say that attacking every year is an obligation. For we have seen Ibn Qudama [d. 1223] mention a number of excuses which remove the obligatoriness of the annual attack, including if the Imam sees a good opinion about Islam on the part of his opponents, and a desire to approach it more and more, until their hearts are induced to enter into it.'<sup>31</sup>

This argument is elaborated by Sherman Jackson (an American convert to Islam trained in both Western and Islamic modes of scholarship) in an effort to theorize a modern Islamic just war doctrine while openly acknowledging that such efforts involve significant departures from classical doctrine and the practice of the Prophet and his followers. Like the Modernist scholar cited above, Jackson treats the revelatory sources in their context, but expands that context to include not just the immediate conflict with the Meccan polytheists, but the general state of affairs in late antiquity. For Jackson (following Fred Donner<sup>32</sup>) the Qur'an observes and takes for granted (rather than prescribes as a norm) the world as existing in a 'state of war'. The idea of permanent recognition of other entities (tribes, cities, empires) simply did not exist at the time of revelation and the early growth of the Muslim community. Thus the Qur'anic treatment of war first of all simply 'reflected the social, historical and political realities of 7th century Arabia'.<sup>33</sup> The Qur'an's exhortations to fight and its emphasis on the absolute loyalty due to the Islamic community reflect the need to 'break the early Muslims' emotional, psychological and even material dependency on the "old order" by forcing them to affirm their commitment to Islam by way of a willingness to fight – in accordance with the existing norm – for the life and integrity of the new religion'.<sup>34</sup> Thus, like the Modernists, Jackson sees the Qur'anic exhortations in the context of the war for survival with the Meccan enemies.

However, Jackson also sees a clear application of these lessons to the later juridical tradition, which is where one finds the concepts of *dar al-harb* and *jihad al-talab* (expansive, missionary jihad), because the 'state of war' characteristic of pre-modern Arabia 'characterized the pre-modern world in general. ... Muslim juristic writings continued to reflect the logic of the "state of war" and the assumption that only Muslims would

<sup>31</sup> Qaradawi, *supra* note 28, at 82.

<sup>32</sup> In Donner, 'The Sources of Islamic Conceptions of War', in J. Kelsay and J.T. Johnson (eds), *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions* (1991), at 31–70.

<sup>33</sup> Jackson, 'Jihad and the Modern World', 7 *J Islamic L and Culture* (2002) 11.

<sup>34</sup> *Ibid.*, at 13–14.

permit Muslims to remain Muslims. They continued to see jihad not only as a means of guaranteeing the security and freedom of the Muslims but as virtually the *only* means of doing so.<sup>35</sup> In other words, the failure of the pre-modern juridical tradition to assert a doctrine of mutual recognition with non-Muslim polities need not imply that what is central to the Islamic political imagination is the utopian commitment to a world governed by Islam, but rather that doctrines of mutual recognition were simply not part of the medieval 'imaginary' at all. Where were the corresponding *doctrines* of recognition from non-Muslim quarters? Given that the underlying circumstances that gave rise to the classical doctrine have changed, that is, that doctrines of mutual recognition are now available, there is every reason for the Islamic doctrines to change.

Jackson invokes classical methods of jurisprudence (*usul al-fiqh*) to buttress this claim. Against the misconceptions of both some Muslims and non-Muslims, Jackson shows that legal dynamism (within the confines of the texts) is the normal assumption of Islamic law. He quotes 13th-century Maliki jurist Shihab al-Din al-Qarafi's view that '[h]olding to rulings that have been deduced on the basis of custom even after this custom has changed is a violation of Unanimous Consensus [*ijma'*, the fourth source of Islamic law] and an open display of ignorance of religion'.<sup>36</sup> If it is true, then, that the Qur'anic prescriptions and juristic interpretations on war were both based on an interaction with temporally determined circumstances ('custom'), then with the change of those customs it is in fact a *requirement* of the rules of classical jurisprudence that Islamic rules be revised.

Crucially, Jackson sees this kind of reasoning as potentially compelling even to Revivalist thinkers like Sayyid Qutb, who also endorse a 'dynamic' reading of the Qur'an which requires an engagement with changing circumstances. He focuses in particular on Qutb's interpretation of verse 9:29 ('[f]ight those who do not believe in God and the Last Day and do not forbid that which God and His Messenger have forbidden and do not practice proper religion, among those who were given the Book until they pay the poll-tax and they are subdued'), which relies not on an immutable Divine command but rather on the observation of Jewish and Christian hostility as '*an historical fact*'. Because it is 'clear that it is Qutb's belief that Jews and Christians (which one senses he uses as a catch-all for the West) are inherently hostile towards Muslims that informs his reading of 9:29' to the exclusion of other possible interpretations.

Qutb's understanding of the Qur'anic doctrine on Muslim–non-Muslim relations is as informed by his own reading *into* the text as it is by his attempt to extract meaning *from* the text. For the Qur'an clearly establishes a range of possible attitudes and behaviors on the part of Jews and Christians towards Muslims. Moreover, at least as many if not more exegetes, classical and modern, hold chapter five (which speaks of Christian love for Muslims) to be the last-revealed chapter as hold chapter nine to be so. As such, on purely formal grounds, one could just as rightly argue that chapter five reflects the final teaching on Muslim–non-Muslim relations. What brings Qutb to privilege 9:29 and to construe it in the manner he does seems to be his *historical assessment*, based in part on his own experience, of the attitude of Jews and Christians

<sup>35</sup> *Ibid.*, at 17.

<sup>36</sup> *Ibid.*, at 9. He also cites a contemporary Saudi scholar and the Islamic Law Academy of the Organization of the Islamic Conference.

towards Muslims. On this assessment, one would have to admit that whether we employ his 'dynamic' method or the classical jurisprudence exemplified by al-Qarafi, Qutb is certainly correct in the conclusion he draws. But, it is equally true, on both approaches, that this conclusion could be overturned, assuming a different *historical assessment*. In other words, assuming that Jews and Christians are no longer active enemies of Muslims, or that there are political mechanisms in place that prevent them from acting on this hostility, even Qutb (or his followers), *on his own methodology*, could be convinced to modify his interpretation of 9:29. In sum, assuming an overall 'state of peace,' even Qutb might be forced to concede that there is no obligation to wage jihad against Jews and Christians.<sup>37</sup>

Jackson is doubtlessly being optimistic when he reduces the classical and Revivalist expansive jihad doctrine to an empirical assessment that non-Muslims will always be dangerous to Muslims. As we saw in the extended quotation at the end of the previous section (extracted from Qutb's commentary on verse 8:61), the threat posed by non-Muslims is just *one* rationale for expansive jihad. Equally important seems to be the belief that in Islam there is a *categorical* Divine command to not passively tolerate systems of unbelief when capacities permit. Nonetheless, there is thus some reason to believe that even though doctrines of mutual recognition are a substantive revision of a broad pre-modern juridical consensus, they may have the capacity to persuade Muslims committed to the idea of an orthodox interpretation of Islam, which itself, as Jackson shows, need not involve a commitment to the letter of existing juridical positions.

### 3 A Third Concept of Just War: Protecting Proselytism

However, the Modernist doctrine of just war is not quite as simple as a bare doctrine of mutual non-aggression.<sup>38</sup> While it is understandable that many Muslims have been eager to conclude that the proper understanding of jihad in Islam is that it authorizes only defensive or humanitarian war, virtually indistinguishable from modern international norms,<sup>39</sup> the reality of modern Islamic just war thinking is somewhat more interesting than this. For the Qur'an-based arguments for restraint are often embedded within a broader argument about the universal nature of the Islamic mission and the duty of Muslims to proselytize. Whereas for the proponents of classical expansionary jihad inviting unbelievers to Islam was a precondition for declaring war, and the unbelievers' rejection of that invitation a justification for waging it, for the vast majority of modern Islamic just war theorists the unbelievers' willingness to allow peaceful proselytizing ensures a permanent state of peace and mutual recognition. Calling to Islam (*da'wa*) is at the centre of both doctrines, but it figures in precisely inverse ways.

These theorists' emphasis on the importance of *da'wa* exempts them from any charge of passivity, defeatism, or insularity. For not only do they match the 'Revivalists' in their insistence on bringing the message of Islam to unbelievers in all places and at all times, but 'protecting the right to call to Islam' figures as a legitimate *casus belli*

<sup>37</sup> *Ibid.*, at 24.

<sup>38</sup> Parts of this section are taken from March, *supra* note 3, at 201–205.

<sup>39</sup> See, e.g., the article by Shah, *supra* note 2.

for some of these writers. Relating the ethics of war to the duty to proselytize enables Modernist theorists to argue, not for a purely defensive conception of jihad, but for an intermediate category of legitimate warfare between self-defence and expansion. We believe it is reasonable to assert that this, rather than either the neo-classical expansionary jihad doctrine or the jihad-as-self-defence doctrine, is the dominant Islamic account of *jus ad bellum* in the modern world. All of the scholars introduced above as arguing against the classical doctrine permitting war for the territorial expansion of Islam – Shaltut, Abu Zahra, Mansur, Sharqawi, Zuhayli, Buti, Shadid, 'Abd al-Qadir, and Qaradawi – argue that protecting or achieving the right of Muslims to proselytize in a given land is a permissible ground for the use of force, as do many others who have written on Islamic law and war since the 20th century.<sup>40</sup>

The argument advanced is that *da'wa*, rather than some categorical duty to overturn man-made laws or systems of rule, is the value ultimately behind the offensive jihad doctrine from which Modernist theorists are eager to distance themselves. Once this is asserted, then it is further argued that the crucial variable in determining the stance toward a non-Muslim polity is its policy towards Islamic missionaries. Protection of the freedom to preach the Islamic message guarantees it absolute immunity from hostility:

Islam, after the spread of its call around the world and the reaching of its message to all mankind, does not forbid in reality the establishment of nations and states with a variety of legal systems, if they preserve a posture of neutrality towards the Islamic call, or make treaties of friendship and peace with Muslims, and of non-aggression with Muslim states. These states enjoy absolute freedom and the right to exist with whichever legal systems they want: because the Qur'an recognizes the existence of multiple communities [*'alamin*] ('Blessed is he who revealed the Proof/Discernment [*al-furqan*: the Qur'an] to his servant that he may be a Warner for all people.' [25: 1]) and forbids Muslims to take oaths through deception in order to violate contracts, and to fall into injustice, indecency, wickedness and sin through fearing the proliferation of nations or forbidding that one nation should become more numerous than another.<sup>41</sup>

This popular 20th century doctrine<sup>42</sup> is endorsed in a long-awaited two-volume treatise on the Islamic laws of war by the most influential living Sunni scholar, the Egyptian Qatari Yusuf al-Qaradawi. In this work, Qaradawi speaks of two groups, 'attackists' and 'defensivists', between which he intends to chart a middle path

<sup>40</sup> See also al-Banna (the founder of the Muslim Brotherhood and, thus, mentor of sorts to Sayyid Qutb), 'Risalat al-jihad', in *Majmu' rasa'il* (n.d.), at 297; 'A. al-Wahhab Khallaf, *al-Siyasah al-shar'iyah, aw Nizam al-dawla al-Islamiyya fi 'l-shu'un al-dusturiyya wa 'l-kharijiyya wa 'l-maliyya* (1977), at 76–77; M.S. Khattab, *al-Rasul al-Qa'id* (1964), at 22; H.I. Hasan, *al-Nuzum al-Islamiyya* (1939), at 78; A. Sabiq, *Fiqh al-sunna* (1969–1971), ii, at 613; A. Shalabi, *al-Jihad wa 'l-nuzum al-'askariyya fi 'l-tafkir al-islami* (1974), at 58–60; H. al-Hajj Hasan, *al-Nuzum al-islamiyya* (1987), at 476; 'A. al-Hamid Bakhit, *Zuhur al-islam wa siyadat mabadi' ihi* (1977), at 287; 'U.A. al-Farjani, *Usul al-'alaqat al-duwaliyya fi 'l-islam* (1984), at 87–88; 'U.J. Dumayriyya, *Manhaj al-islam fi 'l-harb wa 'l-silm* (1982), at 128–130.

<sup>41</sup> Zuhayli, *supra* note 25, at 18 (emphasis added).

<sup>42</sup> E.g., 'Abd al-Wahhab Khallaf provides the following account of a non-Muslim state that would be immune from violence: '[a] non-Muslim nation that does not initiate hostilities against Muslims, does not obstruct Muslim missionaries and leaves them free to present their religion and its proofs to whomever wishes, does not oppose the caller nor interfere with the called, or to which missionaries have not been sent may not be fought': Khallaf, *supra* note 40, at 74–75.

(‘*wasatiyya*’ – middle-ness – being his preferred name for his own ideology and methodology of Islamic jurisprudence, in reference to the general idea of Islam as a ‘median religion’<sup>43</sup>).

The points of doctrine of the ‘attackist’ school from which Qaradawi seeks to distance himself<sup>44</sup> include the principled and near-categorical (1) rejection of the UN Charter, (2) criminalization of a Muslim state joining the UN, (3) opposition to the Agreement on Abolishing Slavery, (4) opposition to the Geneva Convention on Prisoners of War (because that convention prohibits executing or enslaving prisoners), and (5) endorsement of the legitimacy of spreading Islam through war. However, he dissents from a pure ‘defensivist’ position in arguing that there are four purposes for which all agree that a war in which Muslims attack non-Muslims in the latter’s own lands (*jihad al-talab*) is permissible: (1) to secure the freedom to call to Islam (*da’wa*) and prevent ‘religious discord’ (*al-fitna fi l-din*, a catch-all category covering all threats to the integrity of Islam and the Muslim religious community, with deep historical and religious resonances), (2) to guarantee the security of the Islamic state and its borders, (3) to rescue oppressed Muslim prisoners or minorities, and (4) to purify the Arabian peninsula of idolatry and enmity.

If the second and third justifications for war outside one’s own land can be categorized as pre-emptive and humanitarian wars respectively, the first is obviously of most interest here, including the fact that it is the first of Qaradawi’s justified foreign wars. (The fourth category reflects both a point of doctrine that idolatry or polytheism may not be tolerated in the land of Islam’s birth and holiest sites, but also a way of treating the historical fact of the Prophet’s own early wars as something other than a normative precedent for pure expansionary war.) It is quite clear that protecting the Islamic mission is indeed a fully distinct rationale for war, and a euphemism neither for protecting the religious freedom of Muslim minorities nor for the kind of expansionary, ‘regime-change’ jihads of universal human liberation theorized by Mawdudi, Qutb, and Haykal. Qaradawi writes that the default rule of relations with non-Muslims is peace rather than war, and thus ‘Islam has only justified fighting those who fight them, aggress against their honor, seek to disrupt and divide them in religion, expel them from their homes, or *block the path of the Islamic mission and violate their right to spread Islam through proof, argument and clarification, or kill their missionaries*’.<sup>45</sup>

The doctrine of war to protect the Islamic mission strikes at the nerve centre of Islamic ethics and Islam’s self-understanding as a universal faith, and is beset with some paradoxical implications. On the one hand, this doctrine is clearly an attempt to read out of the mainstream legal tradition the doctrine of military expansion for the sake of subjugating unbelievers and imposing Islamic rule over all mankind. In a section responding directly to the views of Sayyid Qutb, namely that the expansionary jihad doctrine follows both from revelatory instructions and Islam’s universalism,

<sup>43</sup> Qaradawi, *supra* note 28, i, at 237–242.

<sup>44</sup> He cites for these views ‘A. ibn Nafi’ al-‘Alyani, *Ahammiyat al-jihad fi nashr al-da’wa al-Islamiyya wa l-radd ‘ala al-tawa’if al-dalla fih* (1995).

<sup>45</sup> Qaradawi, *supra* note 28, i, at 256.

Qaradawi states that Islam is indeed a universal, emancipatory message, but that today Islam's universalism is fulfilled through missionary activities (*da'wa*). War is justified to defend peaceful propagation of the faith, but not to establish political control.

More importantly, it is an article of faith for Modernist theorists that *da'wa* is by its very nature and essence a strictly non-coercive enterprise.<sup>46</sup> These theorists further argue, therefore, that if the ultimate value and goal is the spreading of the Islamic message, then all political acts and state policies must be judged in terms of their impact on that project. It is thus frequently pointed out that not only is coercion strictly antithetical to the nature of religious conversion, but proselytizing flourishes best in an atmosphere of peace and charity, and that a posture of hostility towards non-Muslim communities can only harm the long-term interests of *da'wa* if it serves to alienate non-Muslims from the essentially just and peaceful Islamic message.<sup>47</sup> Reciprocating recognition is thus both a categorical duty based on divine command and in the enlightened self-interest of Islamic communal aims.

It has been argued that a category of just war that permits wars not of conquest and subjugation but of defending the right of Muslims to proclaim Islam 'blurs the lines between "defense" and "offense" to the point where there is no real distinction between the terms and reduces the question to a semantic game'.<sup>48</sup> The question is essentially whether there is a genuine distinction between the notion of *da'wa* as non-coercive employed by the Modernists and that employed by Revivalists such as Sayyid Qutb, for whom 'defending the Islamic mission' and 'protecting freedom of religion' serve as euphemisms for overturning secular political systems.<sup>49</sup> Yet, as noted above in reference to Qaradawi, it is quite clear that most of these authors are not, in fact, developing an esoteric doctrine that uses 'defending the Islamic mission' as a euphemism for establishing an Islamic social order. Most of them are, in fact, anxious to compare the 'true' jihad doctrine to international law.<sup>50</sup> Zuhayli in particular seems

<sup>46</sup> Zuhayli, *supra* note 25, at 94.

<sup>47</sup> 'Abd al-Qadir, *supra* note 15, at 37–44.

<sup>48</sup> D. Cook, *Understanding Jihad* (2005), at 96.

<sup>49</sup> Qutb, e.g., writes that 'Islam never seeks converts through compulsion or threats or pressure of any kind. It deploys facts, reasoning, explanation and persuasion'. Yet he maintains this view only by not considering the imposition of an Islamic legal-political order to be a form of coercion, but rather the liberation of man from the tyranny of man-made laws: '[m]odern man has been deprived of the right to choose and live other than according to what is dictated by the state, using the full force of its colossal machinery, laws and powers. People are today given the choice only to adhere to the secular state system, which does not allow for a belief in God as the Creator and Master of the world, or to face annihilation.' Further on: 'Islam also advocates *jihad* to guarantee the right and freedom of expression and propagation of the faith. In order for individual human beings to make the choice of whether they believe in Islam or not, nothing should stand between them and God's Message or in any way prevent them from having full and free access to it. Of the many obstacles that stand between Islam and people, foremost are the tyrannical political regimes that oppress and persecute religious believers. An objective of *jihad* is to establish the Islamic social order and defend it. It is an order that frees man from the tyranny of other men, in all its forms, by urging the submission of all to the one supreme Master.' Qutb, *In the Shade of the Qur'an*, *supra* note 13, v. I, at 325, 329.

<sup>50</sup> All three of these circumstances which are demanded in order to protect the Islamic mission do not depart in practice from the rights of states recognized in modern international law, including the right to exist, the right to legitimate self-defense, the right to equality, the right to freedom, and the right to mutual respect': Zuhayli, *supra* note 25, at 32–33.

anxious to avoid any ambiguity in his just war doctrine and how it differs from classical ones:

As for a non-Muslim nation which did not initiate hostilities, did not obstruct Islamic missionaries, and left them free to present their religion to whomever wishes: it is not permissible to fight it nor to sever peaceful relations with it. The guarantee of security [*aman*] between it and Muslims is firm [*thabit*], not based on a payment of money or a specific treaty, but because the basic principle [of relations with non-Muslims; *al-asl*] is peace. The basic principles of international relations in Islam do not allow for war to be considered as a foundation of these relations, for this is not consistent with the sublimity of the Islamic mission and its universal inclination, which is not realized except through peace.<sup>51</sup>

Whether individual thinkers see defensive jihad as analogous to modern international standards, however, is not really the point. Let us assume that the thinkers in question are advancing a doctrine whereby a state that protects the freedom of Muslims to call non-Muslims to Islam is immune from hostility. Nonetheless, these doctrines would seem in theory to justify wars which respond to a non-Muslim state's actions against the Islamic mission which fall short of both aggression against another state and serious oppression of a domestic population. Such wars would thus not be wars of self-defence, wars of humanitarian intervention, or even wars of Islamic revolution, but some imaginary fourth kind that seeks to create a space for the freedom to practise and proselytize Islam.

'Abd al-Qadir, for example, uses a variety of expressions to describe actions or policies which nullify the state of mutual non-aggression, some of which are vague: 'seduction away from religion' (*al-fitna 'an al-din*<sup>52</sup>), 'barring missionary activities' (*al-sadd 'an al-da'wa*), 'hostility towards religion or the Islamic state' (*al-i'tida' 'ala'l-din aw 'ala'l-dawla al-islamiyya*), or 'violating treaties' (*al-naqd li'l-'uhud*). War can legitimately be waged for the purposes of 'aiding the oppressed' (*nusrat al-mustad'afin*) or 'removing those who do evil' (*izalat al-tawaghit*). Thus, for 'Abd al-Qadir, while 'it is the duty of the state to provide [missionaries] with everything which work in the field of proselytizing demands, including the preservation of peaceful relations between Muslims and others', if 'the country in question calls for war either by attempting to tempt these missionaries away from their religion or to block their missionary activities, then it is necessary to fight them for temptation away from religion is an assault on the holiest thing in human life'.<sup>53</sup> A literal reading of this passage would seem to render a wide range of societies, such as the former Communist countries, vulnerable to hostility for reasons which international law would not regard as sufficient for hostile action. Furthermore, while military aggression is treated as a matter of reciprocal

<sup>51</sup> Zuhayli, *supra* note 25, at 102. Further on (at 107) he makes explicit that this recognition is not based on the payment of some form of tribute, like the classical *kharaj* or *jizya*, which on my reading serves to ground his doctrine of recognition as a doctrine of *equal* recognition.

<sup>52</sup> 'Fitna' is a notoriously difficult concept to translate. It can mean trial or temptation, but also tumult, turmoil, or sedition. In referring to Muslims living in non-Muslim states, it most likely invokes interference in the practice of Islam by non-Muslim authorities or majorities with the aim of seducing Muslims away from Islam or preventing them from practising it in peace and security.

<sup>53</sup> 'Abd al-Qadir, *supra* note 15, at 44.

obligations between nations, protecting the right to proselytize is resolutely not a matter of a universal standard for determining the justness of initiating hostilities. This is a right pertaining to the necessity of removing barriers to the acceptance of Islam, not to religious freedom as such.

The deeper tension here, however, lies not in the failure to achieve a purer form of universalism more compatible with modern international law. Islamic legal thinkers obviously do not set for themselves the task of arriving at norms that do not privilege or advantage Islam. Rather, the perplexity lies in the matching of means to ends. For, if the replacement of jihad with proselytism as the ultimate expression of Islam's universalism is predicated on the promise that Muslims can spread Islam through 'good-willed exhortation' [verse 16:125] to new communities, the use of force to compel those communities to allow the freedom to proselytize seems singularly ill-matched.

This paradox does not go unnoticed by Islamic scholars in other contexts. In theorizing the place of Muslim minorities in non-Muslim societies, the concept of 'calling to Islam' (*da'wa*) figures just as centrally for theologizing thicker forms of moral concern and obligation to non-Muslims as it does in modern just war theorizing. But in this civil, political context, the incompatibility of *da'wa* and war is proclaimed much more directly, for *da'wa* is posited not as a potential *casus belli*, but as a thorough-going replacement of the entire logic of war and enmity.

The recently-deceased Lebanese Sunni scholar Faysal Mawlawi, a close associate of Qaradawi in many international scholarly institutions, summarized the modernist position on whether the basic principle of relations between Muslims and non-Muslims ought to be a state of peace or of war by challenging, 'Can you call someone [to Islam] while harboring feelings of hatred towards him?! Or making plans to fight him? Under such conditions can you call him with wisdom and good-willed exhortation [*al-maw'iza al-hasana*]?' [verse 16:125]. However, he derives from the duty to invite non-Muslims to Islam in a spirit of 'good-willed warning' much more than a position of mutual non-aggression. He speaks, importantly, of '*atifa* for non-Muslims, which has a literal meaning of attachment, sympathy, affection, liking, etc., but when transferred to a social, inter-communal context can be understood as analogous to a conception of civic solidarity, or at least as providing a foundation for accepting it. He asks, 'How can a Muslim be a caller of humanity to Islam when he is reluctant even to initiate a greeting, or speak to him a kind word, to the point that non-Muslims suspect that in the Muslim's heart there is no affection [*atifa*] for them. ... If there does not exist a form of affection or respect or good will between you and non-Muslims, then you will never succeed in calling to Islam.'<sup>54</sup> This concern of his with whether a Muslim may feel 'love' or 'affection' for non-Muslims as a precondition for calling them to Islam throws into stark relief the inherent mismatch of protecting or opening the way to *da'wa* as a legitimate war aim in modernist Islamic legal theory.

For the preceding reasons, we think that the prevailing attitude within Islamic legal discourses on just war does indeed reflect a certain ambivalent universalism.

<sup>54</sup> Mawlawi, 'al-Mafahim al-asasiyya li'l-da'wa al-islamiyya fi bilad al-gharbi', in A. Shamala (ed.), *Risalat al-muslimin fi bilad al-gharbi* (1999), at 211–212.

Neo-classical doctrines that reaffirm the right and obligation of a unified Muslim empire to emancipate all non-Muslim lands and populations from self-subjugation or political and spiritual alienation display very little ambivalence in their own form of universalism. Similarly, apologetic doctrines that reduce the use of force in Islamic law to either self-defence or humanitarian intervention are unambiguous in their preference for post-1945 international standards of just war.<sup>55</sup>

What we have described as the dominant jihad doctrine in modern times, however, is an attempt to reconcile the possibly irreconcilable tensions between Islamic universalism and global public norms that are not themselves manifestly repugnant to wider Muslim commitments and sensibilities. The firm stance on the protection and advancement of the Islamic call seeks to validate both Islamic particularism and a presumption of peace as the default condition of international relations. Universal international norms are not rejected out of hand, and still less viewed as integral to Western attempts to subvert Islam. And yet religiously neutral universal just war standards appear to be precisely what the theorists of the dominant doctrine are trying to avoid. It is less any material disadvantage than a symbolic sacrifice to Islamic universalism that is unacceptable in the simpler doctrine of jihad-as-self-defence. After all, the dominant doctrine does not propose the protection of religious freedom, including strong rights of proselytism, as a *general casus belli* for adoption by the international community. It is only Islamic proselytism that may be protected through the use of force. However, in our view, this doctrine itself is more a legal fiction of sorts than an actual proposal for a kind of war to be waged in practice. A war waged only to force a country to allow Islam to be preached, at which point Muslim forces are not to occupy and transform the regime but to withdraw, has the feel of a resolution of a *doctrinal* problem – namely, how to navigate the divide between two competing universalisms with claims on the Muslim conscience.

#### 4 Reflections on Reflecting on Islamic Law and the Use of Force

What are we asking Islamic law to do when we talk about ‘Islamic law and war’? What kind of conversation are we imagining and what is our purpose for exploring the inner debates of a legal system that has no formal place in international law? If all Muslim-majority states, even those that claim to apply *only* Islamic law as their domestic legal systems, recognize the universality and bindingness of international law, then why are we thinking about Islamic law at all? If no contemporary Muslim-majority nation-state has declared war against another nation-state on the basis of Islamic law, and if Islamic law (as Shah claims in this volume) in no way permits non-state actors to access its language as a legitimate basis for the use of armed force, then should not that be the end of the discussion?

<sup>55</sup> See, e.g., Shah, *supra* note 2.

Perhaps. But before we reach such a conclusion it may be useful to explore what *might* be the reasons we are interested in Islamic law and war, and what we want Islamic law (and our greater understanding of its approach to use of force and conduct of warfare) to do for us. It seems obvious that part of our interest stems from a sense that there are groups that we cannot reach through international law alone – no matter how universal. And, increasingly, we acknowledge that we live in a world in which non-state armed groups are able to use force within and across borders with ever more ease, organization, and access to resources. We are not worried about Saudi Arabia when we talk about the Islamic laws of war. We are worried about the Taliban, Hamas, al-Qa'ida, Hezbollah, al Shabaab, Lashkar-e Taiba, the variety of regional al-Qa'idās that may or may not be centrally controlled (AQAP, AQIM), and a host of other smaller non-state armed groups.<sup>56</sup> And when we think about whether or not Islamic law is a vocabulary or reasoning that would make sense for proponents of international law or Western policy-makers to adopt, we are not thinking primarily of convincing Saudi Arabia to ratify the Geneva Conventions (again: it already has). We are thinking, instead, of how Islamic law might play a role in speaking particular values to the 'Arab street', one that is, at the time of this writing, in great upheaval.

With that in mind, below is a list of the kinds of things we may really be looking for when we look to Islamic law on the use of force and the law of war. There are certainly many more objectives that could be added to this list, but it serves to sharpen our reflections on what kinds of purposes inform our desire for particular kinds of scholarship and encourage particular (and often simplistic) approaches to a notoriously complex and somewhat insular field.

- We might be interested in the actual substantive compatibility between Islamic law and international law
  - This might involve all sorts of projects, like archival research on a broad range of mainstream and dissenting interpretations of Islamic law, or exploration of the contextual circumstances in which particular norms were developed and interpreted. Or it might involve cherry-picking particular language or interpretations simply because they are consonant with international law.
  - If it is substantive rule- or principle-compatibility that we are interested in, we must also consider our approach to identifying incompatibility. There seems to be a sense underlying much contemporary scholarship that any acknowledgement of incompatibility immediately signifies a failure on the part of Islam, and that deviant elements must be rationalized as representing historical circumstances prevailing at the time of the Prophet or the leading jurists.

<sup>56</sup> It should be noted that these groups are, of course, not all similar, nor do they share a perspective on Islamic law or an equally vigorous rejection of international law. Hamas and Hezbollah both acknowledge international law and claim to apply it in their ranks. However, they are all non-state armed groups that justify the use of armed force, and rely to varying degrees on Islam-based reasoning in explaining their behaviour.

- We might be interested in looking to Islamic law to act as a genuine source of substantive law for those states or non-state actors that reject international law altogether as an illegitimate source of norms.<sup>57</sup>
  - Such an approach might be very different from that discussed above. Here, we might concede that a group such as the Taliban which, at the time of writing, may well (re-)ascend to some sort of governance position in a near-future Afghanistan, simply will not participate in the international legal system on religious grounds. They view international law as a man-made construct, and therefore no degree of substantive overlap or similarity to Islamic law will make international law more appealing to them. Given the impossibility of convincing them to accept not only the language of international law, but also its principles, we might be interested in turning to Islamic law as a generative source of binding norms.
- We might be interested in Islamic law acting as a 'localizing' filter for efforts to restrain force or convince Muslim populations not to object to particular external interventions.
  - Here, we may not be interested at all in what Islamic law has to say in its own right about questions of *jus ad bellum* or *jus in bello*. Instead, we may see Islamic law as a filter through which we may translate and transmit international legal norms or modes of argumentation regarding armed conflict. In this sense, Islamic law may function to provide us with useful approximations of international legal provisions or standards, but in terms that are acceptable to Muslim populations.
- We might see Islamic law as an excellent vehicle for launching a critique of international law and the international legal system.
  - Here, again, we may not be very interested in what Islamic law has to say or why, but rather in utilizing the very outsider status of Islamic law (both as outside the language of international law as such, and also as the most readily plausible alternative legal framework to 'western' international law or western interpretations of and control over international law) to marshal its resources as critique.
- We might see knowledge as a tool in our arsenal.
  - Knowledge of what makes the enemy tick has always been part of both conventional warfare and more recent innovations in counter-insurgency and counter-terrorism planning. To the extent that we believe that Islamic law is

<sup>57</sup> A fascinating example of this can be found in an al-Qa'ida propaganda video featuring Adam Gadahn or 'Azzam al-Amriki,' the Californian who joined al-Qa'ida and long acted as its liaison to the English speaking world through widely-distributed videos. Against a backdrop of the scrolling text of a *fatwa* ruling that, despite the strong prohibition on attacks against embassies in Islamic law, al-Qa'ida fighters are permitted to attack embassies in Muslim countries in retaliation for violations of sovereignty and the laws of war by Western states, as well as against images of former Secretary of State Colin Powell presenting the (later disavowed) 'evidence' of Iraq's illegal possession of nuclear weapons prior to the US invasion of that country, Gadahn states, 'We respect your international laws as much as you respect our Islamic Shari'a' (video on file with the authors).

central to the way in which non-state armed groups frame and justify their behaviour, we may be interested in Islamic law on the use of force and conduct of hostilities insofar as it bolsters our ability to undermine extremist or violent groups.

These objectives may be laudable or at least understandable as a matter of policy goals and demands on scholarship. However, insofar as they remain unstated in the way that we approach questions about Islamic law, the constant presence of policy or political uses of scholarship focusing on Islamic law and the use of force limits the range of what we are able to understand about a rich, historically layered, multi-vocal field of law and legal analysis. And it tends to narrow the window of our scholarly thinking to merely those texts, jurisprudence, and debates that support a particular policy approach.

Ultimately, if we are interested in thinking about Islamic law and what it in turn has to say about complex questions of use of force, we must imagine the sorts of conversations that we wish to have once we know more about Islamic law. Islamic law will not act as a Rosetta Stone for translating the universal principles of lawful use of force or regulations applicable to the conduct of hostilities. Armed with Qur'anic verses or the pronouncements of centuries-old greybeards, we will not suddenly be able to crack the code of how to convince al-Qa'ida to lay down its arms, or bring about capitulation in negotiations with the Taliban.<sup>58</sup> If we find (and surely it is not difficult to do so) revealed texts or authoritative interpretations that seem to identically match provisions or principles of international law, we will not be able to 'trick' otherwise sceptical Muslim populations into thinking that external armed interventions are to their benefit. The Qur'an is not a codebook. Nor is Islamic law particularly concerned with its adherence (or not) to international law. Rather, like other exercises of engaging with languages and frameworks foreign to international law, we suggest that thinking about and asking questions of Islamic law and war must take place in a space in which scholars do not feel compelled to consistently defend Islam or Islamic law from simplistic and prejudiced attacks. If there is a role for comparative scholarship – as opposed to policy advising or instrumental mining of Islamic legal sources – it must begin with a reflection on our approach to Islamic law and our desire for particular conclusions regarding its coexistence with international law.

<sup>58</sup> A well-meaning journalist on his way to Waziristan once asked one of the authors for several Quranic verses that would effectuate his release should he be kidnapped in the course of his travels. Alas, at least thus far, Islamic legal texts do not function as a 'cryptex' that will activate certain outcomes in the Muslim world. 'Cryptex' is a neologism created by the author Dan Brown in his novel, *The Da Vinci Code*, blending the words 'codex' and 'cryptology': see Wikipedia, *Cryptex*, available at: <http://en.wikipedia.org/wiki/Cryptex> (last visited 4 July 2012).