

Islamic International Law: an emerging branch of law which answers the contentious question of ‘authority to use force’ in Islamic law and politics.

‘Authority to use force’ has been a subject of contentious debate, not least among the academics, politicians and lawyers, since the oft-occurrence of use of armed forces by non-state actors and terrorist groups in modern world. Since 9/11 terrorist attacks, most use of force by non-state actors and terrorist groups, which occurred primarily in Muslim majority states, have been categorised as acts of terrorism. This categorisation has been made without any rational or sound scrutiny of such use of force and accordingly resulted in controversies. This article is a historical, legal and political account of Islamic international law on the use of force. It defines and interprets the fundamental principles of use of force in Islamic international law, such as *jihad*, and analyses the significance of those principles in scrutinising legal and political authority to use force at the state level and inter-state level.

Keywords: law; politics; authority; force; jihad.

Introduction

‘Authority to use force’ has been a subject of contentious debate, not least amongst the academics, politicians and lawyers, since the oft-occurrence of use of armed force by non-state actors in modern world. Since 9/11 terrorist attacks, most use of force by state and non-state actors, which occurred primarily in Muslim majority states, have been categorised as acts of terrorism.¹ This categorisation has been made without any scrutiny, rational or sound, of such use of force.² This is because categorisation of use

¹ Tony Blair, ‘A Battle for the Global Values’, *Foreign Affairs* 79 (2007): 82; Lisa Wedeen, ‘Beyond the Crusades: Why Huntington and Bin Laden are Wrong’, *Middle Eastern Policy* X (2003): 56.

² John L. Esposito and Dalia Mogahed, *Who Speaks for Islam?: What a Billion Muslims Really Think, Based on Gallup’s Poll – The Largest Study of its Kind* (New York: Gallup Press, 2007),

of force is often made to deliver rapid responses to particular incidents rather than to contextualise such use of force. Whereas it is true that not all use of force by non-state actors are necessarily acts of terrorism, it is also true that all such use of force cannot possibly be legal.³ As a result, it is necessary to understand the distinguishing features of legal and illegal use of force in terms of Islamic international law. Understanding this distinction would make potential contribution to settle the debate on the ‘authority to use force’ by Muslim majority states and non-state actors based on those states.

This article begins with a historical, legal and political account of the development of Islamic international law as an emerging branch of law. It defines and interprets the fundamental principles of use of force in Islamic international law, such as *jihad*, and analyses the significance of those principles in scrutinising legal and political authority to use force by Muslim majority states. This article also examines the nature and extent of use of force in the practices and ideologies of non-state armed actors in Muslim majority states. Finally, this article evaluates the use of force provisions in Islamic international law followed by a critical analysis of the legal and political position of these provisions in the core values of Islamic international law, such as the *Qur’an* and the *Hadith* (the actions and sayings of the Prophet Muhammad), the practices of the four rightly guided Caliphs, and the juristic opinions of the different schools of thought (*Madhhab, pl. Madhahib*).

136; David Ryan, ‘Framing September 11: Rhetorical Device and Photographic Opinion’, *European Journal of American Culture* (2004): 19; Abdeen Jabara, ‘September 11: Doesn’t it Have a Political and Historical Context?’ *Guild Practitioner* 58 (2001): 136.

³ *ibid.*

Technical definitions of essential terms

This section defines some basic concepts that are commonly used in this article. The aim of this section is to familiarise the readers with the technical definitions of essential terms that will assist them to follow the discussion of their historical evolution.

In this article, the Arabic word ‘*siyar*’ refers to ‘Islamic international law’. The *Qur’an* refers to the primary scripture of Islam that has been accepted by Muslims as a revelation from the God (Allah). Few words have been used in the *Qur’anic* context of use of force such as *qital* (fighting, murder, killing, infanticide), *jihad* (struggle, striving) and *harb* (war). *Hadith* (also known as ‘*sunna*’) denotes to the recorded words and actions of the Prophet Muhammad. *Shari’a* consists of two core sources of Islamic international law, which are the *Qur’an* and the *Sunna*. There are circumstances where the *Shari’a* have not provided any specific guidelines. In such circumstances *Shari’a* permits application of juristic interpretation (*Fiqh*).⁴ In addition, Muslim scholars have adopted the method of *Ijtihad* (exertion in intellectual efforts) in order to interpret the principles of *Shari’a* and also to provide Islamic solution to new issues and circumstances. The Arabic word ‘*ummah*’ refers to a community of Muslims. This may also include a community of Muslim majority states.

In this article, use of the term ‘Muslim majority states’ does not suggest that those states are governed by either Islamic law or *Shari’a* but only denotes that majority of the population of such countries are Muslims. The same principle applies to the terms ‘non-Islamic or non-Muslim countries’. Whereas ‘polytheists’ are those who believe in

⁴ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (The Islamic Texts Society, 1991), 12; see also Majid Khadduri, *Al-Shafi’s Risala: Treatise on the Foundations of Islamic Jurisprudence* (2nd edn, the Islamic Texts Society, 1961), 21.

more than one God, 'People of the book' are believers of all the monotheists religion except Islam such as Jews, Christians, Sabaeans, and Zoroastrians. *Madhhab* (pl. *Madhahib*) denotes to different schools of thought within Islam. '*Dar al-Islam*' designates to 'abode of Islam' and '*Dar al-harb*' designates to 'abode of war'. *Jizyah* means poll tax that non-Muslims who resided in Muslim states paid for their protection in classical time. *Shi'a* and *Sunni* Muslims represent the main Muslim sects that splintered in the 8th Century CE when the Muslim community was divided into these two sects. *Da'wah* indicates call to the faith, and *Ulama* means religious authority in Islam. *Qurayesh* was a tribe in Mecca where Prophet Muhammad was borne. *Ma'sum* designates 'the inerrant Imam' of the *Shi'a* sect.

Background of Islamic international law on the use of force

Islamic international law has been introduced under the Arabic word '*siyar*' which is the plural form of '*sirah*'.⁵ *Sirah* is a technical term in the Islamic sciences meaning the biography of the Prophet while its plural form, *siyar*, refers to legal matters.⁶ The *Qur'an* and *Hadith* (also known as '*sunna*') provided the framework of the relationship between Muslims and non-Muslims. However, they never specified for any provision as having international legal status. Therefore, Islamic international law developed through the practice of the rulers beginning from the Prophet himself up until the modern day.

⁵ Majid Khadduri, *The Islamic Law of Nations: Shaybani's Siyar* (Baltimore: John Hopkins Press, 1966), 38; Labeeb Ahmed Bsoul, *International Treaties (Mu'ahadat) in Islam: Theory and Practice in the Light of Islamic International Law (Siyar) according to Orthodox Schools* (University Press America, 2008), 1; Mohamed Badar, 'Jus in bello under Islamic International Law', *International Criminal Law Review* 3 (2013): 593.

⁶ Ibid.

The development of Islamic international law began when the Prophet migrated to Medina in 622CE and formed an Islamic community. The later conquest of Mecca followed by the astonishing conquests by the Prophet and his rightly guided Caliphs developed the major practices of Islamic international law.⁷ *Siyar* or Islamic international law was later built on the orthodox practices of the early Caliphs and other Muslim rulers, arbitral awards, treaties, pacts and other conventions, official instructions commanders, admirals, ambassadors and other state officials, the internal legislation for conduct regarding foreigners and foreign relations, custom and usages.⁸

Since the death of the Prophet Muhammad, Islamic international law has evolved over time through the work of jurists as a response to the needs created by the progress of the changing Islamic society.⁹ Therefore, Islamic international law is that part of the law and custom of the land and treaty obligations which a Muslim (*de facto* or *de jure*) state observes in its dealings with other (*de facto* or *de jure*) states.¹⁰ *Siyar* or Islamic international law is the sum total of the rules and practices of Islam's intercourse with other people.¹¹

The practices of these Muslim majority states had been the subject of in depth analysis of the jurists in the second century of Islam (8th Century CE) when juristic

⁷ 'Rightly guided Caliphs' include the first four caliphs in Islam, such as Abu-Bakr, Omar, Utham and Ali.

⁸ Muhammad Hamidullah, *Muslim Conduct of State* (4th edn, Lahore: Ashraf Press, 1961), 18.

⁹ Sobhi Mahamassani, 'The Principles of International Law in the Light of Islamic Doctrine', *Recueil des Cours* 117 (1966) 205, cited in Mohamed Badar, 'Jus in bello under Islamic International Law', *International Criminal Law Review* 3(2013): 593.

¹⁰ Muhammad Hamidullah, *Muslim Conduct of State* (4th edn, Lahore: Ashraf Press, 1961), 3.

¹¹ Majid Khadduri, *War and Peace in the Law of Islam* (The John Hopkins Press, Baltimore, 1955), 47.

development of Islamic international law took place. The exegetical works of these jurists resulted into different schools (*Madhhab*, pl. *Madhahib*) on the basis of different methods of interpretation (*Ijtihad*) adopted by these schools.¹² However, the most significant exegetical work in Islamic international law related matters came from the Sunni branch. The first and major classical work on *Siyar* came from a Hanafi jurist of the Sunni branch, Al-Shaybani, whose remarkable treatise *al-Siyar al-Kabir* (the Major *Siyar*) serves as a standard work of reference to date.¹³ In addition, ‘Abd al-Rahman al-Awza‘i, had also contributed to *Siyar* by writing a treatise on this subject but his work is publicly unavailable, and hence has failed to reach modern jurists.¹⁴ However, his doctrines were primarily based on the *Sunna* of the Prophet as well as the practice of Muslims of his time including official orders, which were preserved in the works of Abu Yusuf and Al-Shaf‘i.¹⁵

Like Roman Law, Islamic international law used to be a ‘jurist law’, in the sense that it was neither a product of legislative authority or case law, but a creation of the classical jurists, who elaborated on the sacred texts.¹⁶ Therefore, Islamic international law began its foundation surrounding the principles of *Shari‘a*. In other words, its

¹² Muhammad b. ‘Abd al-Karim Sharastani, *Muslim Sects and Divisions: The Section on Muslim Sects in Kitab al-Milal wa ‘I-Nihal* (A.K. Kazi and J.G. Flynn tr, Kegan Paul International, n.d.), 10.

¹³ Mohammad T. Al-Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (Martinus Nijhoff, The Hague, 1968), 33-35.

¹⁴ Majid Khadduri, *The Islamic Law of Nations: Shaybani’s Siyar* (Baltimore: John Hopkins Press, 1966), 24.

¹⁵ Josepha Schacht, *Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1967), 34.

¹⁶ Farooq A. Hasan, ‘The Sources of Islamic Law’, *American Society of International Law Proceedings* 76 (1982): 65.

development has depended on its compliance with *Shari'a* which is primarily based on the *Qur'an* and the *Sunna*. While the Western notion of international law rests on a post-Westphalian premise of territory based nation-states who enjoy full sovereign rights and equality of status,¹⁷ the 'Islamic Law of Nations' or *Siyar* is a legal system based on the *Shari'a* intended to apply universally to all people in every time and place.¹⁸

Use of force in Islamic international law has been formulated through the stages of fighting which the first Muslims had undertaken under the leadership of the Prophet Muhammad. The history of Islam suggests that Prophet Muhammad was not permitted to use force, even for self-defence, until all other alternatives were exhausted for saving the religion in its infancy.¹⁹ The Prophet and his companions remained in Mecca for thirteen years, advocating their faith in the face of brutal persecution and injustice.²⁰ Throughout this period, they were instructed by the God (Allah) to refrain from using force against their persecutors.²¹ Only after the Prophet's immigration to Medina at the

¹⁷ 'Equality of status' of sovereign states is meant here on theoretical sense without taking into account the sovereign inequality in the decision-making process at the Security Council.

¹⁸ Shaheen S. Ali, 'Resurrecting Siyar through Fatwas?', in *Jihad and its Challenges to International and Domestic Law*, ed. M. Cherif Bassiouni and Amna Guellali (The Hague Academic Press, The Hague, 2010), 116.

¹⁹ Syed Ameer Ali, *A Critical Examination of the Life and Teachings of Mohammed* (London: Williams and Norgate, 1983), 76.

²⁰ Adil Salahi, *Muhammad: His Character and Conduct* (UK: The Islamic Foundation, 2013), 214.

²¹ *Ibid.*

beginning of the fourteenth year of his message was permission to fight against oppression given.²² In a Qur’anic direction the God (Allah) ordained:

Permission to fight is given to those against whom war is waged, because they have been wronged. Most certainly, God has the power to grant them victory. Those are the ones who have been driven from their homelands against all right for no other reason than their saying, “Our Lord is God!” Were it not that God repels some people by means of others, monasteries, churches, synagogues and mosques – in all of which God’s name is abundantly extolled – would surely have been destroyed. God will most certainly succour him who succours God’s cause. God is certainly Most Powerful, Almighty.²³

These verses discuss and justify permission for combat because of the injustices that the Muslims faced, and because they were expelled from their homes and forced to emigrate.²⁴ These verses also emphasise the imperative of meeting force with equal force in order to prevent defeat and discourage future aggression.²⁵

The Classical exegetes differ on whether 2:190 was the first to be revealed with regard to fighting (*qital*). It may be appropriate to consider that, as 22:39 preceded 2:190 the former constitutes permission to engage in fighting that was prohibited *ab*

²² Muhammad Husayn Haykal, *The Life of Muhammad* (Crescent Publishing, Delhi 1990), 256;

Hilmi Zawati, *Is Jihad a Just War? War, Peace and Human Rights under Islamic and Public International Law* (Edwin Mellen, 2001), 29.

²³ Al-Qur’an 22:39-40, Abu Yusuf translation.

²⁴ Ahmed Al-Dowody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan, 2011), 59.

²⁵ Joel Hayward, ‘Warfare in the Qur’an’, in *War and Peace in Islam: The Uses and Abuses of Jihad*, ed. Prince Ghazi bin Muhammad, Ibrahim Kalin and Mohammad Hashim Kamali (MABDA, 2013), 46.

initio, whereas the latter clearly ordains fighting in self-defence.²⁶ However, at this stage, fighting was allowed to fend off aggression and this has been clearly exemplified in verses 2:190, 194; 4:91; 9:36; and 22:39 of the Qur'an.²⁷

After the Prophet had migrated to Medina, there were still a few Muslims who remained in Mecca although they could not practice their religion. There were also some Meccans who wished to be Muslims but would not convert out of fear of their fellow tribesmen.²⁸ In both cases these difficulties were due to the weakness of these people *vis-à-vis* the polytheistic members of their own clans who sought to oppress them with threats and even torture. Therefore, verse 4:75 was revealed to call the Muslims of Medina to use force: (1) to free their brethren who were left behind in Mecca from religious oppression, and (2) to give those Meccans who desired to convert the ability to do so without fear of reprisals from the enemies of Islam.²⁹

Defensive use of force against aggression has been permitted only in the Medinan verses of the *Qur'an*.³⁰ The emphasis of Medinan verses has added any demonstration of hostility towards Islam as an act of aggression. Reluctance to fight, in

²⁶ Elsayed M.A. Amin, *Reclaiming Jihad: A Qur'anic Critique of Terrorism* (The Islamic Foundation, UK: 2014), 88.

²⁷ Muhammad Haykal, 'al-Jihad' cited in Elsayed M.A. Amin, *Reclaiming Jihad: A Qur'anic Critique of Terrorism* (The Islamic Foundation, UK, 2014), 89.

²⁸ Ibn Kathir, *Tafsir al-Qur'an al-'Azim*, vol.1, (Riyadh: Dar al-Salam, 1998), 698.

²⁹ David Dakake, 'The Myth of Militant Islam' in *War and Peace in Islam: The Uses and Abuses of Jihad*, ed. Prince Ghazi bin Muhammad, Ibrahim Kalin and Mohammad Hashim Kamali (MABDA 2013) 128.

³⁰ Al- Qur'an 8:39, Abu Yusuf translation; for other Medinan verses see M. Cherif Bassiouni, 'Evolving Approaches to Jihad: From Self-defense to Revolutionary and Regime-Change Political Violence', *Chicago Journal of International Law* 8 (2007): 119, 127.

verses 2:190 – 91,³¹ which may be understood in terms of priority of the rule against killing, is overcome by the security needs of a persecuted and outnumbered community.³² Therefore, use of force progressed from a state of patience to use of force in self-defense followed by an obligatory *jihad* against the polytheists and People of the Book who persecuted Muslims.³³

Fundamental principles of use of force in Islamic international law

The Islamic perception of use of force may be studied from the viewpoints of both the Muslim States' practice and of Islamic jurisprudence.³⁴ Islamic international law does not prohibit use of force in general terms. It prohibits aggressive use of force but permits defensive use of force in certain circumstances. However, the Qur'an gives only three reasons for using force, namely fending off aggression, protecting call to the faith (*da'wah*) and safeguarding freedom of religion.³⁵

³¹ 'Fight in the way of Allah those who fight you, but begin no hostilities. Verily Allah loves not the aggressors' - Al- Qur'an, Abu Yusuf translation.

³² Abdulaziz A. Sachedina, 'The Development of Jihad in Islamic Revelation and History', in *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition*, ed. James Turner Johnson and John Kelsay (New York: Greenwood Press, 1990), 43.

³³ Niaz A. Shah, 'The Use of Force under Islamic Law', *European Journal of International Law* 24 (2013) 343.

³⁴ Said Mahmoudi, 'The Islamic Perception of the Use of Force in the Contemporary World' (paper presented at the International Law and the Islamic World: Towards a Multipolar International Legal System, organised by Max Planck Institute for Comparative and International Public Law, Heidelberg and the Institute for Political and International Studies, Tehran, Iran, 3-5 April 2004, page 13).

³⁵ Mahmoud Shaltut, *Jihad in Mediaeval and Modern Islam* (Rudolph Peters tr, E.J. Brill, Leiden, 1977), 55; see also Mahmoud Shaltut, 'The Qur'an and Combat' in *War and*

Use of force for fending off aggression and safeguarding freedom of religion are for defensive purposes and therefore these are permitted in Islamic international law.³⁶ However, use of force for protecting *da'wah* has been a point of controversy in terms of the extent to which use of force is permitted by Islamic international law for this purpose. Few Muslim scholars (especially the fundamentalists)³⁷ have supported use of force for calling to the religion to a very large extent. This includes aggressive use of force to expand the land under Islamic rule. On the other hand, modern scholars have only promoted and agreed peaceful calling to the religion and denied the availability of use of force for *da'wah*. Modern Muslim scholars have argued that aggressive use of force for *da'wah* is unjust and likely to bring detestation to the religion which have been forbidden by the *Qur'an*.³⁸ The *Qur'an* proscribed that - "Let not your hatred of a people cause you to be unjust. You must do justice."³⁹

Therefore, use of aggressive force for the spreading Islamic faith is not supported by Qur'anic provisions. Call to Islam (*da'wah*) is permitted by all peaceful means. Even when call to the *da'wah* are denied no use of force is permitted as this may result in unjust killing of human beings. As the Qur'an ordains that – 'Whosoever kills a human being for other than manslaughter or corruption in the earth, it shall be as if he

Peace in Islam: The Uses and Abuses of Jihad, ed. Prince Ghazi bin Muhammad, Ibrahim Kalin and Mohammad Hashim Kamali (MABDA, 2013), 18.

³⁶ Shawki Allam, *The Ideological Battle: Egypt's Dar al- Iftaa Combats Radicalization* (The Grand Mufti of Egypt, 2016), 175.

³⁷ The term 'fundamentalists' is a contested term as it is derogatorily known in the West but not in the Muslim world.

³⁸ Muhammad Al-Buti, *Jihad in Islam* (Munzer Adel Absi tr, Dar al-Fikr: Damascus, 1995), 233; Muhammad Abu Zahra, *Concept of War in Islam* (Cairo: Ministry of Waqf, 1961), 18.

³⁹ Al- Qur'an 5:8, Abu Yusuf translation.

had killed all humanity.’⁴⁰ As a result, only peaceful measures to protest against the denial of freedom of religion and call to the *da’wah* are permitted. This is recognised in Islamic jurisprudence as ‘jihad by tongue against the tyrants.’⁴¹

If, however, peaceful measures fail to secure peaceful co-existence between Muslim and non-Muslim states then use of force is permitted as a last resort, but for defensive purposes only.⁴² Mahmud Shaltut (d. 1963), the then rector of al-Azhar University, was of the opinion that only defensive wars are permissible in response to external aggression.⁴³ In support of this view, Shaltut has relied on the history of Islam on the circumstances under which the battle of Badr (624CE) was fought. For instance, shortly before the start of the battle the Prophet Muhammad sent a message to the *Qurayesh* leaders telling them they had no reason to fight him and his companions, and that, therefore, a peace arrangement should be easily agreed.⁴⁴ Although very few of the *Qurayesh* leaders accepted the logic that a battle was unnecessary and tried to persuade their people to abandon the war, the hardliners were determined to go on the warpath and were soon able to draw everyone into the battle that had been fought by the Prophet and his companions to defend themselves from aggression of the *Qurayesh*.⁴⁵ This historical example suggests that, the causes of war (*casus belli*) in Islamic international

⁴⁰ Al- Qur’an 5:32, Abu Yusuf translation.

⁴¹ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (The Islamic Texts Society, 1991), 279.

⁴² Syed Ameer Ali, *A Critical Examination of the Life and Teachings of Mohammed* (London: Williams and Norgate, 1983), 76.

⁴³ Mahmud Shaltut, ‘Koran and Fighting’ cited in Asma Afsaruddin, ‘Views of Jihad throughout History’, *Religious Campus* 1 (2007): 169.

⁴⁴ Kate Zebiri, *Mahmud Shaltut and Islamic Modernism* (Oxford: Clarendon Press, 1993), 45.

⁴⁵ *Ibid.*

law are the prevention of aggression and religious persecution, and so fighting must cease once religious freedom is secured, and the mission to preach Islam is protected.⁴⁶

This historical period, when Islamic international law was shaped into its primary stage, suggests that the fundamental principles of use of force was based on self-defense and non-aggression. The Prophet fought to defend the religion and its adherents from persecution by non-Muslims as a last resort. Islamic international law does not permit or promote use of force in order to facilitate forced conversion to the faith as the *Qur'an* itself provides that 'there is no compulsion in religion'.⁴⁷ Moreover, the Prophet would not have wanted the non-Muslims to be subjected to the same religious persecutions which the Muslims had been subjected to at the infancy of the faith and God (Allah) would not have ordained in the *Qur'an* for non-Muslims to pay poll tax (*Jizyah*) instead of converting to Islam.⁴⁸ Therefore, the fundamental principles of Islamic international law on the use of force provide for defensive use of force but only at the extinction of all other options.

Political influence in shaping Islamic international law

Islamic jurisprudence has always been the subject of an interplay between political context and theological doctrine in different historical periods.⁴⁹ Despite the *Shari'a* requirement to wage just war, use of force in Islamic international law had not been free

⁴⁶ Mahmud Shaltut, 'Al-Islam wa al-Alaqaq al-Dawliyyah' cited in Ahmed Al-Dowody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan, 2011), 68.

⁴⁷ Al- Qur'an 2:256, Abu Yusuf translation.

⁴⁸ Al- Qur'an 9:29, Abu Yusuf translation.

⁴⁹ Major T.R. Copinger-Symes, 'Is Osama bin Laden's Fatwa Urging Jihad Against Americans' dated 23 February 1998 Justified by Islamic Law?', *Defence Studies* 3 (2003): 44.

from intrusions by political leaders who had temporal reasons to support use of force. As James Turner Johnson pointed out that ‘despite the invocation of religious authority of war, the causes of the wars in question were essentially temporal; despite being termed *jihad*, they were wars of the state, not wars of religion.’⁵⁰

In the course of time, the Caliphs of Islam used defensive force against external aggression which resulted in expansion of the land ruled under Islamic law.⁵¹ In the wake of the phenomenal conquests achieved by Muslims during 7th century CE, the scholars of Islam began to apply the term ‘*jihad*’ to military action and to efforts to expand the ‘abode of Islam’ (*dar al-Islam*) through the expansion of boundaries of the Islamic polity.⁵² As a result, *jihad* became a political tool to legitimise use of force in order to achieve political goal rather than purely religious ones. Throughout the centuries, competing claimants to the *khalifa* (leadership) resorted to the doctrine of *jihad* in their struggles for power.⁵³ This doctrinal extension of *jihad* to political goals

⁵⁰ James Turner Johnson, *The Holy War Idea in Western and Islamic Traditions* (Pennsylvania State University Press, 1997), 96.

⁵¹ Shawki Allam, *The Ideological Battle: Egypt's Dar al- Iftaa Combats Radicalization* (The Grand Mufti of Egypt, 2016), 175.

⁵² Abdulaziz A. Sachedina, ‘The Development of Jihad in Islamic Revelation and History’, in *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition*, ed. James Turner Johnson and John Kelsay (New York: Greenwood Press, 1990), 37.

⁵³ M. Cherif Bassiouni, *The Sharia and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press, 2014), 202.

has increased dramatically over the past 200 years, during which time it has been used to justify political regime change and political opposition to rulers.⁵⁴

However, the conquests by Muslim rulers had not continued for long. Following the death of the last rightly guided Caliph (Ali), the Muslims were afflicted by internal and external affairs that prevented them from observing God's prescriptions and laws in the development of a sophisticated jurisprudence.⁵⁵ As a result, Islamic international law has not evolved through jurisprudence compared to other major legal systems, instead it developed mostly through the doctrinal work of theologians. This has given rise to an almost symbiotic relationship between the ruler and the theologians where the ruler found support from theologians for his rule and the theologians found wealth and power from the ruler for having provided him with religious support.⁵⁶ This convenient relationship resulted in the evolution of Islamic international law as interpreting *Shari'a* in a way which became both rigid and yet at the same time quite flexible when politics and other inducements or disincentives required it.⁵⁷

Since politics became an integral part of the development of Islamic international law on the use of force, rulers like the Ummayyad, the Abbasid, the Mongols, the Seljuks and the Turkish Ottoman Empire entertained a broader concept of

⁵⁴ M. Cherif Bassiouni, 'Evolving Approaches to Jihad: From Self-defense to Revolutionary and Regime-Change Political Violence', *Chicago Journal of International Law* 8 (2007): 119.

⁵⁵ Mahmoud Shaltut, 'The Qur'an and Combat' in *War and Peace in Islam: The Uses and Abuses of Jihad*, ed. Prince Ghazi bin Muhammad, Ibrahim Kalin and Mohammad Hashim Kamali (MABDA, 2013), 21.

⁵⁶ M. Cherif Bassiouni, *The Sharia and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press, 2014), 43.

⁵⁷ *Ibid.*

military *jihad* together with few classical jurists like al-Shaf'i and his followers.⁵⁸ The spiritual nature of *jihad* was very rarely used by the rulers and leaders in Classical time. The transformation of *jihad* from mainly spiritual to mainly military in nature resulted in the wider recognition of '*jihad*' as a 'holy war' especially by Western scholars.⁵⁹ This is due to the interpretation of the classical exegetes that *jihad* is a permanent and total war against unbelievers.⁶⁰

The use of *jihad* to legitimate armed struggle against colonial power became the political agenda of Muslim leaders and rulers in the colonial period. Despite the enormous difficulties faced by Muslim scholars, leaders, merchants, and villagers in Egypt, Africa, India and other states, the *jihad* calls against the European armies did not lead to an all-out war against local non-Muslim communities.⁶¹ Even in cases where the Muslim population had to bear the full brunt of colonialism, extreme care was taken not to label local non-Muslims as the enemy because of their religious and cultural affiliation with European colonial powers. When, for instance, the Sanusi call for 'jihad against all unbelievers' caused a sense of alarm among the Christians in Egypt, Muslim scholars responded by saying that *jihad* in Libya was directed at the Italian aggressors, not all Westerners or Christians.⁶² This scholarly response of the leaders of Sansui call

⁵⁸ Ibid, 8.

⁵⁹ Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, 1963), 6; Ruven Firestone, *Jihad: The Origin of Holy War in Islam* (Oxford University Press, 1999), 106.

⁶⁰ James Turner Johnson, *The Holy War Idea in Western and Islamic Traditions* (Pennsylvania State University Press, 1997), 25.

⁶¹ Philip K. Hitti, *History of the Arabs* (New York, St. Martin's Press, 1970), 145.

⁶² Rudolph Peters, *Islam and Colonialism: The Doctrine of Jihad in Modern History* (The Hague: Mouton Publishers, 1979), 86.

clarified that the call for *jihad* was not generally against non-Muslims but particularly against those who were involved in aggression and violence against Muslims.

After independence from colonial power, Muslims were divided in independent states and there was no prospect or necessity to form a unified Islamic Caliphate at that time. As a result, the bipolar distinction between *Dar al-Islam* (abode of Islam) and *Dar al-harb* (abode of war) had been dissolved altogether. The distinction became obsolete because they no longer accurately described contemporary historical and political reality.⁶³ However, some of these components may nevertheless be deemed relevant by traditional scholars, because Islamic jurisprudence (*fiqh*) traditionalists have not evolved their thinking to consider the passage of centuries, and only a few Muslim jurists have addressed the evolution of Islamic international law since the twelfth century CE.⁶⁴

Since the division of Muslim community (*ummah*) into independent nation-states, contemporary discussion of use of force in the context of Islamic international law is usually oriented towards the concept of *jihad*.⁶⁵ This concept has been used and abused by state as well as non-state actors in Muslim majority states in order to claim legality of recourse to force. An example is Iran's call for *jihad* to its citizens and beyond during

⁶³ Asma Afsaruddin, 'Views of Jihad throughout History' 1 Religious Campus (2007) 167.

⁶⁴ M. Cherif Bassiouni, *The Sharia and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press, 2014), 78.

⁶⁵ Said Mahmoudi, 'The Islamic Perception of the Use of Force in the Contemporary World' (paper presented at the International Law and the Islamic World: Towards a Multipolar International Legal System, organised by Max Planck Institute for Comparative and International Public Law, Heidelberg and the Institute for Political and International Studies, Tehran, Iran, 3-5 April 2004, page 2).

the war against Iraq in 1980 -1988.⁶⁶ Similarly, the then President of Iraq Saddam Hussain called for *jihad* to Iraqi people against the imminent attack of the US in 2003.⁶⁷ However, the call for *jihad* is more frequently used by the leaders of Islamic resistance or insurgent groups than by state officials.⁶⁸ Furthermore, the misconception of *jihad* has formed an integral part of Western scholarship as discussed in the previous section of this article.⁶⁹ As a result, the meaning and significance of *jihad* has been the most contentious issue in Public international law, Islamic international law and politics. The following section will deal with this most contentious issue surrounding *jihad* and use of force.

Who can authorise use of force in Islamic international law?

Questions about who is legally entitled to call for or initiate use of force as part of any *jihad*, in a world which no longer has Caliphs leading the *ummah*, are debated by Islamic scholars. A vast majority have argued that only state leaders in Islamic (or Muslim majority) lands would be legitimately able to do so if a genuine 'just cause' emerged.⁷⁰ However, the two major branches of Islam, the *Sunni* and *Shi'a*, differ

⁶⁶ Ardalan Rezamand, 'Use of Religious Doctrine and Symbolism in the Iraq-Iran War', *Journal of the Centre for Studies in Religion and Society* 9 (2010): 83.

⁶⁷ Said Mahmoudi, 'The Islamic Perception of the Use of Force in the Contemporary World' (paper presented at the International Law and the Islamic World: Towards a Multipolar International Legal System, organised by Max Planck Institute for Comparative and International Public Law, Heidelberg and the Institute for Political and International Studies, Tehran, Iran, 3-5 April 2004, page 7).

⁶⁸ Ibid.

⁶⁹ See text adjacent to n. 58 above.

⁷⁰ John Kelsay, *Arguing the Just War in Islam* (Harvard University Press, 2009), 101.

sharply for doctrinal reasons on the necessary authority to wage war in the sense of *jihad*.

The position of the *Sunni* jurists is that both offensive and defensive *jihad* could be waged by any Muslim authority against the *dar al-harb* (abode of war).⁷¹ The *Shi'a* position, on the other hand, has been that a divinely appointed person, the just Imam, who would unite political and religious sovereignty, is necessary for any *jihad* that is not defensive.⁷² The last divine Imam, the Twelfth Imam, being not available there is no legal authority to use offensive force in Islam until his return from hidden position.⁷³ Consequently, the eminent *Shi'a* and *Sunni* authorities have respectively maintained that use of force, except for self-defence, is forbidden in the absence of the *ma'sum*, that is 'the inerrant Imam',⁷⁴ or the Caliph.⁷⁵ As a result, no offensive force or war of

⁷¹ Muhammad Al-Buti, *Jihad in Islam* (Munzer Adel Absi tr, Dar al-Fikr: Damascus, 1995), 59; Mahmoud Shaltut, *Jihad in Mediaeval and Modern Islam* (Rudolph Peters tr, E.J. Brill, Leiden, 1977), 44.

⁷² Ayatullah Murtada Mutahhari, *Jihad and Shahadat* (The Institute for Research and Islamic Studies, 1986), 103; Abdulaziz A. Sachedina, 'The Development of Jihad in Islamic Revelation and History' in *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition*, ed. James Turner Johnson and John Kelsey (New York: Greenwood Press, 1990), 41.

⁷³ Muhammad b. 'Abd al-Karim Sharastani, *Muslim Sects and Divisions: The Section on Muslim Sects in Kitab al-Milal wa 'I-Nihal* (A.K. Kazi and J.G. Flynn tr, Kegan Paul International, n.d.), 140; Etan Cohlberg, *Belief and Law in Imami Shaiism* (Variorum Aldershot: Great Britain, 1991), 78; Mehdi Abedi and Gary Legenhausen, *Jihad and Shahadat* (The Institute for Research and Islamic Studies, 1986), 15.

⁷⁴ Seyyed Hossein Nasr, *The Heart of Islam: Enduring Values for Humanity* (New York: Harper Collins Publishers, 2004), 262.

⁷⁵ Muhammad Hamidullah, *Muslim Conduct of State* (4th edn, Lahore: Ashraf Press, 1961), 151.

aggression is legal in Islamic international law since the disappearance of the hidden Imam and death of the last rightly guided Caliph Ali.

These perspectives, stated above, of the *Shi'a* and *Sunni* schools of thought give a clear message that 'use of force is not legal in Islamic international law unless such use of force is necessary for self-defence of a Muslim majority state'.⁷⁶ However, these perspectives are not definitive about who has the authority to make the decision to recourse to force in self-defence and in what circumstances such force can be used. In Islamic international law, 'use of force' decision must be declared by a legitimate leader.⁷⁷ Hence, no group, party or organisation has the authority to take up arms in the name of *jihad* without authorisation from the ruler of the state in which that group, party or organisation is based.⁷⁸ In this way, Islamic international law has made provisions to control disorder and anarchy. A *hadith* (saying of the Prophet) supports this stance: 'A Muslim ruler is the shield [of his people]. A war can only be waged under him and people should seek his shelter [in war].'⁷⁹ As a result, it is the ruler who has the legal authority to declare *jihad* and make decisions on use of force. Any use of force decisions made by non-state actors and terrorist groups are illegal in Islamic international law for their lack of lawful authority to make such decision.

⁷⁶ Ibid.

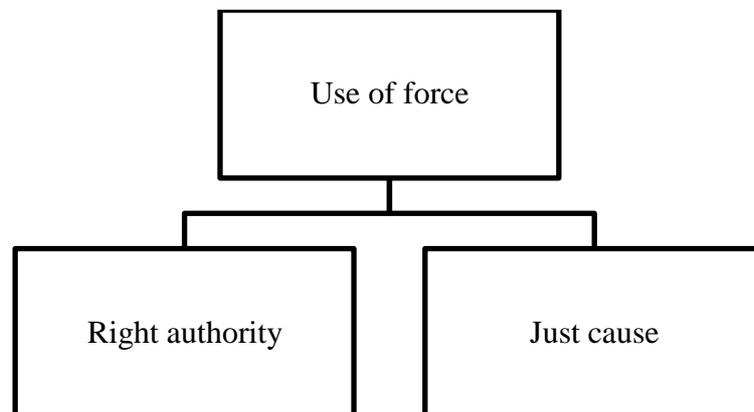
⁷⁷ Muhammad Hamidullah, *Muslim Conduct of State* (4th edn, Lahore: Ashraf Press, 1961), 151; Mohammad Hashim Kamali, 'Introduction' in *War and Peace in Islam: The Uses and Abuses of Jihad*, ed. Prince Ghazi bin Muhammad, Ibrahim Kalin and Mohammad Hashim Kamali (MABDA, 2013), XIII.

⁷⁸ Muhammad Asad, *The Principle of State and Government in Islam* (Dar al-Andalus: Gibraltar, 1985), 35.

⁷⁹ Bukhari, *Sahih al-Bukhari*, hadith no. 2957.

In addition to having lawful authority to make decisions on use of force, a ruler must be satisfied that the reason for making such decision is justified [see figure 1 below]. This is because the legal authority of the ruler must correspond to a just cause. For example, a ruler who uses defensive force in circumstances which is inconsistent with the Qur’anic proscriptions is not lawful in Islamic international law for lack of ‘just cause’ element of use of force.⁸⁰ Therefore, the legality of use of force in Islamic international law requires satisfaction of both elements of use of force, namely right authority and just cause [see figure 1 below].

Figure 1: Elements of use of force.



Another issue on the legal authority to use force arises when a ruler abstains from making decisions on use of force where necessary. For instance, if a ruler makes no call for *jihad* or use of force for self-defence even when it is necessary to do so. The majority of Muslim scholars and exegetes agree that if a head of state or government does not use necessary force and his abstention amounts to disregard of the *Shari'a* then

⁸⁰ Majid Khadduri, *Al-Shafi's Risala: Treatise on the Foundations of Islamic Jurisprudence* (2nd edn, the Islamic Texts Society, 1961), 112; Liaquat Ali Khan, 'Jurodynamics of Islamic Law', *Rutgers Law Review* 31 (2008): 231.

such omission can give the undisputed leader of a Muslim majority state the authority to declare use of defensive force to protect the Muslim community within that state.⁸¹ The best example to illuminate the legality of this position is the Russian invasion of Afghanistan in 1979. The Afghan leaders declared *jihad* against both the invaders and 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-defense or defensive *jihad*, although it was not declared by a Muslim ruler.⁸² A further example of this type of declaration is the letter written by one hundred scholars addressing al-Baghdadi (the then leader of the so called Islamic State in Iraq and Syria (ISIS)) which confirmed his lack of legal authority to use force under Islamic law as he was neither a ruler nor an undisputed leader of a Muslim majority state.⁸³

The restriction on the authority of use of force to the ruler, or in the absence of a ruler the undisputed leader of a Muslim majority state, is a very high requirement.⁸⁴ This is because the authority of a ruler, or in his absence the undisputed leader of a Muslim majority state, is always subject to dispute. As a result, it is a high requirement to establish lawful authority to use force without questioning their status as a legitimate ruler or an undisputed leader. Therefore, the leaders of any group or organisation are not eligible to declare the use force under Islamic international law.⁸⁵ These leaders of such

⁸¹ Niaz A. Shah, 'The Use of Force under Islamic Law', *European Journal of International Law* 24 (2013): 343.

⁸² Ibid.

⁸³ Shawki Allam, *The Ideological Battle: Egypt's Dar al- Iftaa Combats Radicalization* (The Grand Mufti of Egypt, 2016), 160.

⁸⁴ Mohammad Asad, *The Principle of State and Government in Islam* (Dar al-Andalus: Gibraltar 1985) 59.

⁸⁵ *ibid*, 36.

groups or organisations are not representative of the Islamic belief or behaviour and they do not have any recognised status as an authority in Islamic international law to make such decisions and declarations. For example, the recent al-Azhar position has also confirmed that the declaration of use of force by Al-Qa'ida, ISIS (Islamic State in Iraq and Syria), ISIL (Islamic State in Iraq and Levant), QSIS or Al-Qa'ida Separatists in Iraq and Syria, and other similar groups or organisations are not lawful due to lack of right authority.⁸⁶ This position has been confirmed by the scholars of Mardin declaration who attended a Peace Summit Conference (Mardin: The Abode of Peace) that was convened in the Turkish city of Mardin at the Artuklu University campus on Saturday and Sunday (27-28 March 2010).⁸⁷ Participating in the conference was a group of renowned Muslim scholars, from across the Muslim world, who brought with them diverse and relevant specializations. They gathered in order to collectively study one of the most important juridical concepts such as *jihad*. They have concluded that only leaders of states can issue a call for *jihad* and that no other individual has the right to wage war against a nation or population.⁸⁸ Taking direct aim at contemporary jihadists and their reliance on Ibn Taymiyyah's fatwa, the scholars declared that 'anyone who seeks support from this fatwa for killing Muslims or non-Muslims has erred in his interpretation and has misapplied the revealed texts.'⁸⁹ Therefore, non-state actors are

⁸⁶ Shawki Allam, *The Ideological Battle: Egypt's Dar al- Iftaa Combats Radicalization* (The Grand Mufti of Egypt, 2016), 130.

⁸⁷ 'The New Mardin Declaration' (27 April 2010) <<http://iqra.ca/2010/the-new-mardin-declaration/>> accessed 20 February 2019; for *contra* see Yahya Michot, 'Ibn Taymiyya's "New Mardin Fatwa". Is genetically modified Islam (GMI) carcinogenic?', *The Muslim World* 101 (2011): 130.

⁸⁸ Ibid.

⁸⁹ Ibid.

not allowed to recourse to force due to lack of legitimate authority under Islamic international law.

The legal-political legacy of use of force in Islamic international law

The scholarly positions of *Sunni* and *Shi'a* schools of thought, outlined above, set out the legal position of Muslim majority states and the issues surrounding legal authority to use force in Islamic international law. This is because the Muslim majority states in the world are generally belong to *Sunni* and *Shi'a* schools of thought.⁹⁰ For example, the Kingdom of Saudi Arabia and the Islamic Republic of Iran are generally adherents of the *Sunni* and *Shi'a* schools of thought respectively.

Moreover, these scholarly positions outline the political legacy of use of force in the legal discourse of Islamic international law.⁹¹ For instance, these scholarly positions also set out their understanding of the political history of Islam and the connections of the Qur'anic *jihad* with that history.⁹² In this way their understanding of *jihad* has been immensely influenced by political history of Islam. On the one hand the *Sunni* jurists have been influenced by the political reality of war, on the other hand the *Shi'a* jurists

⁹⁰ Muhammad b. 'Abd al-Karim Sharastani, *Muslim Sects and Divisions: The Section on Muslim Sects in Kitab al-Milal wa 'I-Nihal* (A.K. Kazi and J.G. Flynn tr, Kegan Paul International, n.d.) 70.

⁹¹ Peter Mandaville, *Islam and Politics* (Routledge, 2014), 36.

⁹² Al-Shaybani, *The Islamic Law of Nations: Shaybani's Siyar* (Majid Khadduri tr, Baltimore: John Hopkins Press, 1966), 16; Abdulaziz A. Sachedina, 'The Development of Jihad in Islamic Revelation and History', in *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition*, ed. James Turner Johnson and John Kelsay (New York: Greenwood Press, 1990), 41.

have focused on the political ideology of war.⁹³ This political influence has made the *Sunni* jurists' attempt to justify aggressive use of force based on historical conquests by Muslim rulers. They treated aggressive use of force (offensive *jihad*) as a divinely approved political tool for furthering the 'sphere of Islam' and keeping the 'sphere of war' in check.⁹⁴ However, the *Shi'a* jurists were able to question the legality of the conquests by aggressive use of force and thereby making a strong claim that such use of force was opposed to Qur'anic commands.⁹⁵ As a result, highly political legacies of use of force were incorporated into Islamic jurisprudence by the *Sunni* and *Shi'a* jurists which was opposed to the Classical position.⁹⁶

The political legacy of use of force in Islamic international law can also be traced in the decision making process of the ruler for recourse to force. This is a decision based on the knowledge and evidence available to the ruler and is not purely based on Islamic international law.⁹⁷ The only point that is relevant to Islamic international law is that such use of force must not be aggressive or for any other purposes than self-defense and as a measure of last resort. The ruler's permission is mandatory and only then it is permissible to use force in self-defense.⁹⁸

⁹³ Ibid.

⁹⁴ Majid Khadduri, *War and Peace in the Law of Islam* (John Hopkins Press: Baltimore, 1955), 63; Chris Waddy, *The Muslim Mind* (Grosvenor: London, 1990), 102.

⁹⁵ Muhammad Asad, *The Principle of State and Government in Islam* (Dar al-Andalus: Gibraltar, 1985), 35.

⁹⁶ For classical position see n. 73 and 74 above.

⁹⁷ Shawki Allam, *The Ideological Battle: Egypt's Dar al- Iftaa Combats Radicalization* (The Grand Mufti of Egypt, 2016), 160.

⁹⁸ Majid Khadduri, *War and Peace in the Law of Islam* (John Hopkins Press: Baltimore, 1955), 78; Shawki Allam, *The Ideological Battle: Egypt's Dar al- Iftaa Combats Radicalization* (The Grand Mufti of Egypt, 2016), 175.

A further political legacy of use of force can be found in the Qur'anic exegesis. The three words (with their derivatives) used in the Qur'anic context of use of force are: *qital* (fighting, murder, killing, infanticide), *jihad* (struggle, striving) and *harb* (war).⁹⁹ Classical Islam developed its own just war doctrine as early as the seventh and eight centuries C.E., that is before the just war tradition of the West began to coalesce into its classical form, based on the *Qur'an* and *Hadith*.¹⁰⁰ Al-Shaybani, an Islamic Jurist of the Classical period, developed a sophisticated concept of the use of force theory that governed the relationship between Muslim nation and non-Muslim nations.¹⁰¹ It is the Classical jurists who differentiated between *harb* (war) and *jihad* (struggle, effort) and the only relationship between these two concepts was overlapping. This overlap was outlined by the jurists by establishing a connection between *harb* (war) and *qital* (fighting). The connection suggests that the *Qur'an* permits use of force or fighting (*qital*) only in the path of God (*jihad*) in a state of war (*harb*). In this connection, just war develops when *jihad* and *harb* merge together and at that point *jihad* enters the mode of *qital*. Therefore, the following theory applies to just war in Islam:

$$\text{Jihad} + \text{harb} = \text{Qital}$$

Whereas *Jihad* requires religious authorisation, *harb* requires political authorisation and direction. Therefore, *qital* (fighting) is only just when both religious

⁹⁹ Ahmed Al-Dowody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan, 2011), 56.

¹⁰⁰ James Turner Johnson and John Kelsey, *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (New York: Greenwood Press, 1990), xiv.

¹⁰¹ Al-Shaybani, *The Islamic Law of Nations: Shaybani's Siyar* (Majid Khadduri tr, Baltimore: John Hopkins Press, 1966), 5.

and political authorisations have been given by the appropriate authorities.¹⁰²

Accordingly, the ‘just cause’ test is satisfied when *jihad* is approved by religious authority and use of force is approved by political authority. These authorisations do not necessarily have to emanate from the same person or institution as long as these are coming from a legitimate authority and are consistent with the *Shari‘a*. For instance, a ruler of an Islamic country can authorise defensive use of force if the population of that country is under an actual or imminent armed attack from another state or under forceful invasion or occupation by foreign power. If the political authority is responsible for the foreign invasion or occupation, then the religious authority can alone authorise use of force. For example, the 1882 British invasion of Egypt with invitation of the legitimate ruler (a political authority) Khedive Tawfiq when defensive use of force was declared by the *Ulama* (religious authority) to save the country from non-Muslim invasion.

Justification of use of force by non-state actors

Relying on the religious authority, discussed above, non-state actors like Al-Qa’ida has been trying to justify their violent actions. They claim that, they have got the religious authority to declare defensive actions against aggression by non-Muslim states which constructively resort to aggressive force for their own benefit and often collude with the ruler who abstains from exercising his political authority to declare use of force in such situation.¹⁰³ In addition, these groups also claimed legality of use of force against

¹⁰² Shawki Allam, *The Ideological Battle: Egypt's Dar al- Iftaa Combats Radicalization* (The Grand Mufti of Egypt, 2016), 20.

¹⁰³ Elsayed M.A. Amin, *Reclaiming Jihad: A Qur’anic Critique of Terrorism* (The Islamic Foundation, UK, 2014), 119.

Muslim rulers who they accuse for assisting and even supporting the non-Muslim Western powers in their influence on the Muslim countries and as a result subjecting God's command to them.¹⁰⁴ However, these justifications are not free from scrutiny for being influenced by political agenda.

Non-state actors are known to have invoked different ideologies to provide justification for their violent use of force. They have claimed individual responsibility for armed *jihad* even in modern day. They are known as the 'revivalists' who lean more strongly towards the expansionist doctrines stressing that the clear message of later *Qur'anic* revelations was to spread the word of God by use of force.¹⁰⁵ According to them the nature of fighting is such that one might consider it analogous to the historical notion of imposed war, so that the duty to fight is in some way an individual duty.¹⁰⁶ They say that the most pressing task for revivalists is the replacement of un-Islamic regimes within Muslim countries, whose hypocrisy must be overcome before the external *jihad* can be resumed.¹⁰⁷ In this respect, three examples of militant argument

¹⁰⁴ Sayyid Abul Ala Mawdudi, *Towards Understanding the Qur'an* (Zafar Ishaq Ansari tr, The Islamic Foundation, 1995), 199; S. Khatab, 'Hakimiyyah and Jahiliyyah in the Thought of Sayyid Qutb', *Middle Eastern Studies* 38 (2002): 145.

¹⁰⁵ Asma Afsaruddin, *Jihad and Martyrdom in Islamic Thought and History* (OUP: USA, 2016), 11; see also Major T.R. Copinger-Symes, 'Is Osama bin Laden's Fatwa Urging Jihad Against Americans' dated 23 February 1998 Justified by Islamic Law?', *Defence Studies* 3 (2003): 53.

¹⁰⁶ Asma Afsaruddin, *Jihad and Martyrdom in Islamic Thought and History* (OUP: USA, 2016), 10; see also John Kelsay, *Arguing the Just War in Islam* (Harvard University Press, 2009), 128.

¹⁰⁷ Major T.R. Copinger-Symes, 'Is Osama bin Laden's Fatwa Urging Jihad Against Americans' dated 23 February 1998 Justified by Islamic Law?', *Defence Studies* 3 (2003): 53.

are instructive, namely *The Neglected Duty* (1981), the Charter of Hamas (1988), and the Declaration on Armed Struggle against Jews and Crusaders (1998).

‘The Neglected duty’ is a testament of the assassination of the then President of Egypt Anwar Sadat in 1981. The writer of the testament was Muhammad abd el Salam Faraj who was himself accused of this assassination. This testament appealed for a rise of militant Islam. According to al-Faraj “a well-established rule of Islamic law that the punishment of an apostate will be heavier than the punishment of someone who is by origin an unbeliever.”¹⁰⁸ The background of the text is set upon the precedent set by classical *Ulama* and the political situation posed by Sadat’s policies. Of the latter, the most important concerns were with the recognition and establishment of formal relations between Egypt and the state of Israel.¹⁰⁹ In addition, Sadat’s policies towards Egyptian Christians and his readiness to open Egypt to foreign investments also suggested a willingness to compromise the Islamic character of Egyptian society.¹¹⁰

Muhammad abd el Salam Faraj and his followers judged President Anwar Sadat an apostate who must repent or be killed. The testament promulgated that “the Rulers of this age are in apostasy from Islam ... They carry nothing from Islam but their names.”¹¹¹ It also promulgated that “an apostate leader no longer has the qualification in a leader; to obey such a person is no longer obligatory, and the Muslims have the duty to revolt against him and depose him, to put a just leader in his place when they are able

¹⁰⁸ Muhammad abd el Salam Faraj, *al-Faridah al-Ghaibah: The Neglected Duty* (Johannes J.G. Jansen tr, New York: Macmillan, 1986), 169.

¹⁰⁹ John Kelsay, *Arguing the Just War in Islam* (Harvard University Press, 2009), 130.

¹¹⁰ *Ibid*, 131.

¹¹¹ Muhammad abd el Salam Faraj, *al-Faridah al-Ghaibah: The Neglected Duty* (Johannes J.G. Jansen tr, New York: Macmillan, 1986), 169.

to do so.”¹¹² As the title of the testament hints, the “neglect” of the duty to fight is itself a sin, at least of omission.¹¹³ This testament, therefore, focuses on the near enemy, which is the leader or ruler.

The Charter of Hamas (1988) reflects the struggles between Israelis and Palestinians where the movement established by Hamas believed that Islam is the solution of all political ills. The Charter conceives armed struggle as resistance to the taking of land entrusted to the Muslim community.¹¹⁴ The Islamic Resistance Movement believes that:

The land of Palestine is entrusted to the Muslims until the Day of Resurrection. It is not right to give it up in whole or in part. No Arab state ... no King or Leader ... no organisation, Palestinian or Arab, has such authority.¹¹⁵

The Charter also stresses heavily on the responsibility of fighting by every individual in circumstances where Muslims lands have been usurped by foreign power. According to the Charter:

There is no higher peak in nationalism, no greater depth of devotion than this: When an enemy makes incursions into Muslim territory then struggle and fighting the enemy becomes an obligation incumbent upon every individual Muslim (male) and Muslimah (female).¹¹⁶

¹¹² Ibid, 191.

¹¹³ John Kelsay, *Arguing the Just War in Islam* (Harvard University Press, 2009), 133.

¹¹⁴ Ibid, 134.

¹¹⁵ The Charter of Hamas, (M. Maqdsi tr, Dallas: Islamic Association for Palestine, 1990), sec. 22.

¹¹⁶ Ibid, sec. 12.

The World Islamic Front Declaration on Armed Struggle against Jews and Crusaders (1998) was signed by 5 different militant groups from Egypt, Afghanistan, Pakistan and Bangladesh.¹¹⁷ The message sent by this declaration was that US military presence in Arabian Peninsula following the Gulf war in 1991 is an imposed war on Muslims and it is an individual duty of every Muslim to fight this war. The declaration provided that:

Ulama throughout Islamic history have unanimously agreed that armed struggle is an individual duty if the enemy destroys the Muslim countries ... The ruling to fight the Americans and their allies, civilians and military, is an individual obligation for every Muslim who can do it in any country in which it is possible to do it ... We call on every Muslim who believes in God and wishes to be rewarded to comply with God's order to fight the Americans and plunder their money wherever and whenever they find it. We also call on Muslim 'ulama', leaders, youths, and soldiers to launch the raid on the adversary's U.S. troops and the satanically inspired supporters allying with them, and to displace those who are behind them so that they may learn a lesson.¹¹⁸

This declaration focuses on the far enemy, such as the U.S. and its allies, and accordingly claims justification for both internal and extraterritorial use of force irrespective of the enemy's presence. However, this analogy gained so much popularity among extremists to cause violence all over the world. *Shari'a* precedents cast the duty to fight in an imposed war as an individual duty but that terminology does not appear to

¹¹⁷ Said Mahmoudi, 'The Islamic Perception of the Use of Force in the Contemporary World' (The International Law and the Islamic World: Towards a Multipolar International Legal System, organised by Max Planck Institute for Comparative and International Public Law, Heidelberg and the Institute for Political and International Studies, Tehran, Iran, 3-5 April 2004, page 8).

¹¹⁸ <<http://www.fas.org/irp/world/para/docs/980223-fatwa.htm>> accessed 17 February 2019.

suggest a popular uprising.¹¹⁹ The arguments advanced and actions claimed to be justified by such scholars and authorities are subject to serious criticism on *Shari'a* grounds.¹²⁰ Authors of the testament, charter and declaration do not have the right authority to declare use of force. The cause may be just, which is defensive use of force against foreign usurpation, but the *Shari'a* requirement of 'just and legitimate authority' is lacking here.

As a result, the Shaykh al-Azhar has criticised 'the Neglected Duty' for causing widespread harm than good.¹²¹ Saudi scholars suggested the operations carried out in accordance with the declaration as without precedent in the history of Islam and the participants might best be judged as 'mere' suicide.¹²² Both Muslim scholars and Shaykh al-Azhar issued opinions against Al-Qa'ida-sponsored bombings of U.S. embassies in Kenya and Tanzania in 1998.¹²³ Their action is opposed to *Shari'a* notion of honourable combat. According to *Shari'a* precedents fighting should be the last resort even in self-defence and any claim of imposed war must be responded firstly by preaching and then diplomacy before using force.¹²⁴ The fundamental problem with the militant versions of *Shari'a* reasoning is that they confuse their own views with those of the *Qur'an* and *sunna*.¹²⁵

¹¹⁹ John Kelsay, *Arguing the Just War in Islam* (Harvard University Press, 2009), 129.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*, 133.

¹²² *Ibid.*, 140.

¹²³ *Ibid.*, 142.

¹²⁴ *Ibid.*, 147.

¹²⁵ Khaled Abou El Fadl, *And God Knows the Soldiers: The Authoritative and the Authoritarian in Islamic Discourses* (Lanham, Md.: University Press America, 2001), 37.

Following the presentation of “The Clash of Civilisation” theory by Samuel Huntington in 1993,¹²⁶ the West has related the cause of terrorist attacks including the 9/11 to Islamic religious extremism and particularly to *jihad*.¹²⁷ This claim from the West is very serious and therefore requires scholarly investigation. There have been trends among few modern exegetes who support the classical view of *jihad*. Amongst these exegetes Sayyid Qutb, Abu’l A’la Mawdudi, and Bin Laden have been very influential.

According to Mawdudi, military *jihad* as a ‘perpetual revolutionary struggle’ whose aim is to bring the whole world into conformity with the ideals of Islam.¹²⁸ Similarly, Sayyid Qutb rejected abrogation of non-violent verses of the Qur’an, which is a common denominator in the classical theory, and come up with a distinctive and revolutionary vision of *jihad* as a permanent struggle.¹²⁹ This view of Qutb is not radically different from classical theory. He inclined to support offensive *jihad* and rejected defensive *jihad* and named the proponents of the latter as ‘defeatists’ and ‘apologists’.¹³⁰

¹²⁶ Samuel Huntington, *The Clash of Civilization and the Remaking of World Order* (New York: Simon & Schuster, 1996), 81.

¹²⁷ Ahmed Al-Dowoodi, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan, 2011), 3.

¹²⁸ Abu’l A’la Mawdudi, ‘Shari’at al-Islam’ cited in Elsayed M.A. Amin, *Reclaiming Jihad: A Qur’anic Critique of Terrorism* (The Islamic Foundation, UK: 2014), 93.

¹²⁹ Elsayed M.A. Amin, *Reclaiming Jihad: A Qur’anic Critique of Terrorism* (The Islamic Foundation, UK: 2014), 99.

¹³⁰ Sayyid Qutb, ‘Zilal’ cited in Elsayed M.A. Amin, *Reclaiming Jihad: A Qur’anic Critique of Terrorism* (The Islamic Foundation, UK: 2014), 100.

On the other hand, leaders of Al-Qa'ida consider their *jihad* as purely defensive.¹³¹ Those scholars attempting to disassociate Islam from the policies of Al-Qa'ida were said to be “ostensible” Muslims, lacking in conviction, untrustworthy, or unrepresentative of the faith.¹³² However, this claim of defensive *jihad* cannot be lawfully declared by Al-Qa'ida under Islamic international law because such claim is opposed to *Shari'a*. They do not have the ‘right authority’ and ‘just cause’ to declare use of force. The Western powers did not invade any Muslim country at the time of the declaration made by Al-Qa'ida in 1998.

The term ‘*jihad*’ is very powerful in the Muslim psyche.¹³³ The classical *jihad* is still invoked by today’s extremists, such as Sayyid Qutb, Abu'l A'la Mawdudi, and Bin Laden, who insist on practising terrorism in the name of Islamic *jihad*.¹³⁴ The interpretation of the *Qur'an* as applied by some of the classical exegetes and their modern extremist followers has had its impact on the formulation of modern Western understanding of *jihad* in Islam.¹³⁵ Although few extremists and terrorist groups have invoked the ideology of classical juristic views of permanent war against non-Muslims, this does not represent contemporary Islamic international law as the *Shari'a* itself does not represent the dominant classical view in modern world. *Shari'a* is a living mechanism which evolves in the course of time but such evolution does not include

¹³¹ Elsayed M.A. Amin, *Reclaiming Jihad: A Qur'anic Critique of Terrorism* (The Islamic Foundation, UK: 2014), 119.

¹³² John Kelsay, *Arguing the Just War in Islam* (Harvard University Press, 2009), 3.

¹³³ M. Cherif Bassiouni, *The Sharia and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press, 2014), 221.

¹³⁴ Elsayed M.A. Amin, *Reclaiming Jihad: A Qur'anic Critique of Terrorism* (The Islamic Foundation, UK: 2014), 124.

¹³⁵ *Ibid.*

invocation of any legal principle that is inconsistent with its core elements, namely the *Qur'an* and *Sunna*.

Conclusion

After examining the nature and extent of use of force permissible in Islamic international law this article concludes that Islamic international law does not permit use of force beyond the necessity to defend the religion and people from persecution. In very exceptional circumstances it allows defensive use of force but never permits aggressive use of force. However, the use of defensive force requires 'right authority' and 'just cause' which are lacking in the status and ideologies of non-state actors and terrorist groups. Although very few Muslim scholars and terrorist groups have invoked the ideology of classical juristic views of permanent war against non-Muslims, this does not represent contemporary Islamic international law as the *Shari'a* itself does not represent the dominant classical view in the modern world.

The overall analysis of this article concluded on the fundamental principles which are based on the modernists' view and represented the core values of Islamic international law. The fundamental principles of Islamic international law justify use of force only for defensive purposes and as a last resort. These principles also confined the authority to decide on use of force to the ruler or undisputed leader of a Muslim majority state. As a result, Islamic international law excluded non-state actors and other terrorist groups from legal as well as political authority to use force.

Although most of the modernist scholars have portrayed '*jihad*' as a 'defensive war', they have not been successful in keeping this portrait free from terrorism. This is because, the modernists' views are given less coverage than those of terrorists and extremists, which received disproportionate amount of exposure. In these

circumstances, circulation of the modernists' views is necessary to counter the misleading ideologies of terrorist groups and to educate the world on the true position of Islamic international law as far as use of force is concerned. This would reinforce the true position of Islamic international law on the use of force and settle the contentious debate on the authority to use force to a considerably large extent.